NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 42

19 JUNE 1979

---

4 SEPTEMBER 1979

RALEIGH
1980

CITE THIS VOLUME
42 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

NAOMI E. MORRIS

Judges

FRANK M. PARKER
R. A. HEDRICK
EARL W. VAUGHN
ROBERT M. MARTIN
EDWARD B. CLARK
GERALD ARNOLD
JOHN WEBB
RICHARD C. ERWIN
HARRY C. MARTIN
HUGH A. WELLS
CECIL J. HILL*

Retired Judge

HUGH B. CAMPBELL

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN

* Appointed by Gov. James B. Hunt, Jr. and took office 14 September 1979.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	ROBERT D. ROUSE, JR.	Farmville
	DAVID E. REID	Greenville
4	HENRY L. STEVENS III	Kenansville
	JAMES R. STRICKLAND	Jacksonville
5	BRADFORD TILLERY	Wilmington
	N. B. BAREFOOT	Wilmington
6	RICHARD B. ALLSBROOK	Roanoke Rapids
7	GEORGE M. FOUNTAIN	Tarboro
	FRANKLIN R. BROWN	Tarboro
8	R. MICHAEL BRUCE	Mount Olive
	JAMES D. LLEWELLYN	Kinston

Second Division

9	ROBERT H. HOBGOOD[1]	Louisburg
10	JAMES H. POU BAILEY	Raleigh
	A. PILSTON GODWIN, JR.	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
11	HARRY E. CANADAY	Smithfield
12	E. MAURICE BRASWELL	Fayetteville
	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	JOHN C. MARTIN	Durham
15A	D. MARSH MCLELLAND	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	HENRY A. MCKINNON, JR.	Lumberton

Third Division

17	JAMES M. LONG	Yanceyville
18	CHARLES T. KIVETT	Greensboro
	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON	Greensboro
19A	THOMAS W. SEAY, JR.	Spencer
	JAMES C. DAVIS	Concord
19B	HAL HAMMER WALKER	Asheboro
20	JOHN D. MCCONNELL	Southern Pines
	F. FETZER MILLS	Wadesboro
21	WILLIAM Z. WOOD	Winston-Salem
	HARVEY A. LUPTON	Winston-Salem

DISTRICT	JUDGES	ADDRESS
22	ROBERT A. COLLIER, JR.	Statesville
	PETER W. HAIRSTON	Advance
23	JULIUS A. ROUSSEAU	North Wilkesboro
	Fourth Division	
24	RONALD W. HOWELL	Marshall
25	SAM J. ERVIN III	Morganton
	FORREST A. FERRELL	Hickory
26	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	CLIFTON E. JOHNSON	Charlotte
	ROBERT M. BURROUGHS	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

DONALD L. SMITH	Raleigh
H. L. RIDDLE, JR.	Morganton
SAMUEL E. BRITT	Lumberton
JUDSON D. DERAMUS, JR.	Winston-Salem
JOHN R. JOLLY, JR.	Rocky Mount
ARTHUR L. LANE	Fayetteville
CHARLES C. LAMM, JR.	Boone
PRESTON CORNELIUS[2]	Troutman

EMERGENCY JUDGES

ALBERT W. COWPER	Wilson
HAMILTON H. HOBGOOD[3]	Louisburg

1. Appointed 11 January 1980.
2. Appointed 19 January 1980 to succeed Robert L. Gavin who retired 18 January 1980.
3. Retired as Resident Judge Ninth Judicial District and constituted Emergency Judge 31 December 1979.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Elizabeth City
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	CHARLES H. WHEDBEE (Chief)	Greenville
	HERBERT O. PHILLIPS III	Morehead City
	ROBERT D. WHEELER	Grifton
	E. BURT AYCOCK, JR.	Greenville
	NORRIS C. REED, JR.	New Bern
4	KENNETH W. TURNER (Chief)	Rose Hill
	WALTER P. HENDERSON	Trenton
	STEPHEN W. WILLIAMSON	Kenansville
	E. ALEX ERWIN III	Jacksonville
	JAMES NELLO MARTIN	Clinton
5	GILBERT H. BURNETT (Chief)	Wilmington
	JOHN M. WALKER	Wilmington
	CHARLES E. RICE	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
	PAUL MICHAEL WRIGHT	Goldsboro
	JOSEPH E. SETZER, JR.[1]	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford
	J. LARRY SENTER	Louisburg

DISTRICT	JUDGES	ADDRESS
10	GEORGE F. BASON (Chief)	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	W. POPE LYON	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	KELLY EDWARD GREENE	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	CHARLES LEE GUY	Fayetteville
	SOL G. CHERRY	Fayetteville
	LACY S. HAIR	Fayetteville
13	FRANK T. GRADY (Chief)	Elizabethtown
	J. WILTON HUNT, SR.	Whiteville
	WILLIAM E. WOOD	Whiteville
	ROY D. TREST[2]	Shallotte
14	J. MILTON READ, JR. (Chief)	Durham
	WILLIAM G. PEARSON	Durham
	DAVID Q. LABARRE	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	THOMAS D. COOPER, JR.	Burlington
	WILLIAM S. HARRIS	Graham
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	B. CRAIG ELLIS	Laurinburg
	HERBERT LEE RICHARDSON	Lumberton
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	PETER M. MCHUGH	Reidsville
	JERRY CASH MARTIN	Mount Airy

DISTRICT	JUDGES	ADDRESS
18	ROBERT L. CECIL (Chief)	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	JAMES SAMUEL PFAFF	Greensboro
	JOHN B. HATFIELD, JR.	Greensboro
	JOHN F. YEATTES	Greensboro
	JOSEPH ANDREW WILLIAMS	Greensboro
	FRANK ALLEN CAMPBELL	Greensboro
19A	ROBERT L. WARREN (Chief)	Concord
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	L. FRANK FAGGART	Kannapolis
19B	L. T. HAMMOND, JR. (Chief)	Asheboro
	WILLIAM H. HEAFNER	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	WALTER M. LAMPLEY	Rockingham
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
21	ABNER ALEXANDER (Chief)	Winston-Salem
	GARY B. TASH	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	HUBERT E. OLIVE, JR.	Lexington
	ROBERT W. JOHNSON	Statesville
	SAMUEL ALLEN CATHEY[3]	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
	JOHN T. KILBY	Jefferson
24	J. RAY BRASWELL (Chief)	Newland
	ROBERT HOWARD LACEY	Newland
25	LIVINGSTON VERNON (Chief)	Morganton
	BILL J. MARTIN	Hickory
	SAMUEL MCD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
	EDWARD J. CROTTY	Hickory

DISTRICT	JUDGES	ADDRESS
26	CHASE BOONE SAUNDERS (Chief)	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	L. STANLEY BROWN	Charlotte
	LARRY THOMAS BLACK	Charlotte
	JAMES E. LANNING	Charlotte
	WILLIAM G. JONES	Charlotte
	WALTER H. BENNETT, JR.	Charlotte
	DAPHENE L. CANTRELL	Charlotte
27A	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
27B	ARNOLD MAX HARRIS (Chief)	Ellenboro
	GEORGE HAMRICK	Shelby
	THOMAS BOWEN[4]	Lincolnton
28	JAMES O. ISRAEL, JR. (Chief)	Candler
	WILLIAM MARION STYLES	Black Mountain
	EARL JUSTICE FOWLER, JR.	Arden
	PETER L. RODA	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	HOLLIS M. OWENS, JR.	Rutherfordton
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX[5]	Hendersonville
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES MCDARRIS	Waynesville
	JOHN J. SNOW, JR.	Murphy

1. Appointed 16 January 1980 to succeed Herbert W. Hardy who died 19 September 1979.
2. Appointed 29 September 1979.
3. Appointed 19 January 1980 to succeed Preston Cornelius who was appointed Special Superior Court Judge 19 January 1980.
4. Appointed 5 October 1979.
5. Appointed 26 October 1979.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

JAMES M. WALLACE, JR.

Special Assistant to the Attorney General

JOHN A. ELMORE

Senior Deputy Attorneys General

JAMES F. BULLOCK
ANDREW A. VANORE, JR.
ROBERT BRUCE WHITE, JR.

Deputy Attorneys General

JEAN A. BENOY
MILLARD R. RICH, JR.
WILLIAM W. MELVIN

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
EUGENE A. SMITH
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED DUNN
CHARLES J. MURRAY
ISAAC T. AVERY III
H. AL COLE, JR.

Assistant Attorneys General

CLAUDE W. HARRIS
WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
RICHARD N. LEAGUE
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
I. B. HUDSON, JR.
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
ARCHIE W. ANDERS
DAVID S. CRUMP
DANIEL C. OAKLEY
GEORGE J. OLIVER
ELIZABETH C. BUNTING
ELISHA H. BUNTING
ALAN S. HIRSCH
SANDRA M. KING
JOHN C. DANIEL, JR.
ACIE L. WARD
JOAN H. BYERS
J. MICHAEL CARPENTER
BEN G. IRONS II
AMOS C. DAWSON III
JAMES L. STUART
DONALD W. GRIMES
NONNIE F. MIDGETTE
JO ANN SANFORD
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
MARY I. MURRILL
THOMAS F. MOFFITT
RUDOLPH A. ASHTON
FRANK P. GRAHAM
GEORGE W. LENNON
MARILYN Y. RICH
DAVID BLACKWELL
NORMA S. HARRELL
THOMAS H. DAVIS, JR.
ROBERT W. NEWSOM III
JANE R. THOMPSON
DENNIS MYERS
KAYE R. WEBB

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3	ELI BLOOM	Greenville
4	WILLIAM H. ANDREWS	Jacksonville
5	WILLIAM ALLEN COBB	Wilmington
6	W. H. S. BURGWYN, JR.	Woodland
7	HOWARD S. BONEY, JR.	Tarboro
8	DONALD JACOBS	Goldsboro
9	DAVID WATERS	Oxford
10	RANDOLPH RILEY	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	LEE J. GREER	Whiteville
14	DAN K. EDWARDS, JR.	Durham
15A	HERBERT F. PIERCE	Graham
15B	WADE BARBER, JR.	Pittsboro
16	JOE FREEMAN BRITT	Lumberton
17	FRANKLIN FREEMAN, JR.	Reidsville
18	MICHAEL A. SCHLOSSER	Greensboro
19A	JAMES E. ROBERTS	Kannapolis
19B	RUSSELL G. WALKER, JR.	Asheboro
20	CARROLL R. LOWDER	Monroe
21	DONALD K. TISDALE	Clemmons
22	H. W. ZIMMERMAN, JR.	Lexington
23	MICHAEL A. ASHBURN	Wilkesboro
24	CLYDE M. ROBERTS	Marshall
25	DONALD E. GREENE	Hickory
26	PETER S. GILCHRIST	Charlotte
27A	JOSEPH G. BROWN	Gastonia
27B	W. HAMPTON CHILDS, JR.	Lincolnton
28	RONALD C. BROWN	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

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

Case	*Reported*	*Disposition in Supreme Court*
Bank v. Belk	41 N.C. App. 328	Denied, 298 N.C. 293
Bank v. Belk	41 N.C. App. 356	Denied, 298 N.C. 293
Baxter v. Poe	42 N.C. App. 404	Denied, 298 N.C. 293
Black v. Insurance Co.	42 N.C. App. 50	Denied, 298 N.C. 293
Board of Transportation v. Annas	41 N.C. App. 405	Denied, 298 N.C. 293 Appeal Dismissed
Board of Transportation v. Rand	42 N.C. App. 202	Allowed, 298 N.C. 567
Boehm v. Board of Podiatry Examiners	41 N.C. App. 567	Denied, 298 N.C. 294
Brown v. Boney	41 N.C. App. 636	Denied, 298 N.C. 294
Brown v. Bryant	41 N.C. App. 405	Denied, 298 N.C. 294
Bullard v. Johns-Manville Corp.	42 N.C. App. 370	Denied, 298 N.C. 567
Charett v. Charett	42 N.C. App. 189	Denied, 298 N.C. 294
Cole v. Sorie	41 N.C. App. 485	Denied, 298 N.C. 294
Conner v. Insurance Co.	41 N.C. App. 610	Denied, 298 N.C. 295
Daniels v. Jones	42 N.C. App. 555	Denied, 298 N.C. 567
Davidson and Jones, Inc. v. County of New Hanover	41 N.C. App. 661	Denied, 298 N.C. 295
Davis v. McRee	40 N.C. App. 238	Allow for Limited Purpose, 298 N.C. 295
Distributors, Inc. v. Department of Transportation	41 N.C. App. 548	Denied, 298 N.C. 567
Dixon v. Realty Co.	42 N.C. App. 650	Denied, 298 N.C. 567
Employment Security Comm. v. Broadcasting Corp.	42 N.C. App. 702	Denied, 298 N.C. 805
Equilease Corp. v. Hotel Corp.	42 N.C. App. 436	Denied, 298 N.C. 568
Falls Sales Co. v. Board of Transportation	42 N.C. App. 257	Denied, 298 N.C. 295
Freight Lines v. Pope, Flynn & Co.	42 N.C. App. 285	Denied, 298 N.C. 295

Case	*Reported*	*Disposition in Supreme Court*
Gooden v. Brooks, Comr. of Labor	39 N.C. App. 519	Vacated, 298 N.C. 806 Dismissed
Graham v. City of Hendersonville	42 N.C. App. 456	Denied, 298 N.C. 568
Harrell v. Construction Co.	41 N.C. App. 593	Allowed, 298 N.C. 296
Hassell v. Means	42 N.C. App. 524	Denied, 298 N.C. 568
Hedrick v. Southland Corp.	41 N.C. App. 431	Denied, 298 N.C. 296
Hester v. Miller	41 N.C. App. 509	Denied, 298 N.C. 296
High v. Parks	42 N.C. App. 707	Denied, 298 N.C. 806
Hooper v. City of Wilmington	42 N.C. App. 548	Denied, 298 N.C. 568
Housing Authority v. Truesdale	42 N.C. App. 256	Denied, 298 N.C. 296 Appeal Dismissed
Hudson v. Hudson	42 N.C. App. 647	Allowed, 298 N.C. 806
IFCO v. Bank	42 N.C. App. 499	Denied, 298 N.C. 568
Industries, Inc. v. Construction Co.	42 N.C. App. 259	Denied, 298 N.C. 296
In re Foreclosure of Deed of Trust	41 N.C. App. 563	Denied, 298 N.C. 297
In re Huntley	42 N.C. App. 1	Denied, 298 N.C. 297
In re Mental Health Center	42 N.C. App. 292	Denied, 298 N.C. 297
In re Williams	42 N.C. App. 504	Denied, 298 N.C. 569
Joyner v. Lucas	42 N.C. App. 541	Denied, 298 N.C. 297
Kirkman v. Kirkman	42 N.C. App. 173	Denied, 298 N.C. 297
Knowles v. Coach Co.	41 N.C. App. 709	Denied, 298 N.C. 298
Lynch v. Construction Co.	41 N.C. App. 127	Denied, 298 N.C. 298
Matthews, Cremins, McLean, Inc. v. Nichter	42 N.C. App. 184	Denied, 298 N.C. 569
Mazzocone v. Drummond	42 N.C. App. 493	Denied, 298 N.C. 298
Middleton v. Myers	41 N.C. App. 543	Allowed, 298 N.C. 298
Neihage v. Auto Parts, Inc.	41 N.C. App. 538	Denied, 298 N.C. 298
Oglesby v. McCoy	41 N.C. App. 735	Denied, 298 N.C. 299 Appeal Dismissed
Oglesby v. McCoy	41 N.C. App. 767	Denied, 298 N.C. 299 Apeal Dismissed
Pierce v. Gaddy	42 N.C. App. 622	Denied, 298 N.C. 569
Power & Light Co. v. Jackson	42 N.C. App. 731	Denied, 298 N.C. 807
Quis v. Griffin	42 N.C. App. 477	Denied, 298 N.C. 569
Ragland v. Moore	41 N.C. App. 588	Allowed, 298 N.C. 299

Case	*Reported*	*Disposition in Supreme Court*
Railway Co. v. Fibres, Inc.	41 N.C. App. 694	Denied, 298 N.C. 299
Realty, Inc. v. Whisnant	41 N.C. App. 702	Denied, 298 N.C. 299
Roofing Co. v. Dept. of Revenue	42 N.C. App. 248	Denied, 298 N.C. 300
Rouse v. Maxwell	40 N.C. App. 538	Vacated, 298 N.C. 570 Dismissed
Sasser v. Beck	40 N.C. App. 668	Denied 298 N.C. 300
Silverthorne v. Land Co.	42 N.C. App. 134	Denied, 298 N.C. 300
Snyder v. Freeman	40 N.C. App. 348	Allowed, 298 N.C. 300
Starmount Co. v. City of Greensboro	41 N.C. App. 591	Denied, 298 N.C. 300
State v. Anderson	42 N.C. App. 505	Denied, 298 N.C. 301
State v. Broadway	42 N.C. App. 257	Denied, 298 N.C. 301
State v. Buckner	40 N.C. App. 629	Denied, 298 N.C. 301
State v. Bumgarner	42 N.C. App. 71	Allowed, 297 N.C. 613
State v. Byrd	40 N.C. App. 172	Denied, 298 N.C. 301
State v. Carter	42 N.C. App. 325	Denied, 298 N.C. 301 Appeal Dismissed
State v. Childers	41 N.C. App. 729	Denied, 298 N.C. 302
State v. Corriher	42 N.C. App. 257	Denied, 298 N.C. 204
State v. Drakeford	42 N.C. App. 257	Denied, 298 N.C. 205
State v. Edwards	41 N.C. App. 767	Denied, 298 N.C. 302
State v. Ellison	41 N.C. App. 767	Denied, 298 N.C. 302
State v. Enslin	42 N.C. App. 565	Denied, 298 N.C. 570
State v. Guirguis	41 N.C. App. 405	Denied, 298 N.C. 570
State v. Holsclaw	42 N.C. App. 696	Denied, 298 N.C. 571 Appeal Dismissed
State v. Hoskins	42 N.C. App. 108	Denied, 298 N.C. 302
State v. Locklear	41 N.C. App. 292	Denied, 298 N.C. 571
State v. Locklear	42 N.C. App. 486	Appeal Dismissed 298 N.C. 302
State v. Maynard	42 N.C. App. 257	Denied, 298 N.C. 808
State v. Oxendine	40 N.C. App. 280	Denied, 298 N.C. 303
State v. Parks	41 N.C. App. 514	Denied, 298 N.C. 303
State v. Poe	40 N.C. App. 385	Denied, 298 N.C. 303 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
State v. Sawyer	42 N.C. App. 731	Denied, 298 N.C. 571
State v. School	42 N.C. App. 665	Allowed, 298 N.C. 303 Appeal Dismissal Denied, 298 N.C. 571
State v. Setzer	42 N.C. App. 98	Denied, 298 N.C. 571
State v. Smith	40 N.C. App. 772	Denied, 298 N.C. 572
State v. Smith	42 N.C. App. 731	Denied, 298 N.C. 809
State v. Sneed and State v. Webb	42 N.C. App. 258	Denied, 298 N.C. 303
State v. Whitehead	42 N.C. App. 506	Denied, 298 N.C. 572 Appeal Dismissed
State v. Whitley	42 N.C. App. 731	Denied, 298 N.C. 572 Appeal Dismissed
State v. Williams	42 N.C. App. 662	Allowed, 298 N.C. 572
Stone v. McClam	42 N.C. App. 393	Denied, 298 N.C. 572
Strickland v. Tant	41 N.C. App. 534	Denied, 298 N.C. 304
Trust Co. v. Grainger	42 N.C. App. 337	Denied, 298 N.C. 304
Trust Co. v. Seiver	41 N.C. App. 762	Denied, 298 N.C. 304
Wall v. City of Durham	41 N.C. App. 649	Denied, 298 N.C. 304
Whalehead Properties v. Coastland Corp.	42 N.C. App. 198	Allowed, 298 N.C. 304
Winborne v. Winborne	41 N.C. App. 756	Denied, 298 N.C. 305
Wise v. Wise	42 N.C. App. 5	Denied, 298 N.C. 305
Woodhouse v. Board of Commissioners	41 N.C. App. 473	Allowed, 298 N.C. 305

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

Case	*Reported*	*Disposition on Appeal*
Baumann v. Smith	41 N.C. App. 223	298 N.C. 778
Harris v. Latta	40 N.C. App. 421	298 N.C. 555
In re Andrews	42 N.C. App. 86	299 N.C. ---
In re Vinson	40 N.C. App. 423	298 N.C. 640
Kinlaw v. Long Mfg.	40 N.C. App. 641	298 N.C. 494
Land Co. v. Byrd	42 N.C. App. 251	Pending
Pearce v. Telegraph Co.	41 N.C. App. 62	299 N.C. ---
Power Co. v. Winebarger	42 N.C. App. 330	Pending
Starr v. Clapp	40 N.C. App. 142	298 N.C. 275
State v. Benton	42 N.C. App. 228	299 N.C. ---
State v. Dickens	41 N.C. App. 388	299 N.C. ---
State v. Jones	41 N.C. App. 465	299 N.C. ---
State v. White	42 N.C. App. 320	Pending
State v. Winfrey	40 N.C App. 274	298 N.C. 260
Thompson v. Soles	42 N.C. App. 462	Pending
Williams v. Williams	42 N.C. App. 163	Pending

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF: GENEVA D. HUNTLEY APPELLEE AND CHARLOTTE AREA FUND HEADSTART PROJECT EMPLOYER AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA APPELLANT

No. 7826SC804

(Filed 19 June 1979)

Master and Servant § 108— Project Headstart—secondary school—exclusion of teacher from unemployment compensation

The Charlotte Area Fund Project Headstart is a secondary school within the meaning of G.S. 96-13(a)(3), which excludes from unemployment benefits those who are subject to school-related seasonal employment.

APPEAL by Employment Security Commission from *David Smith, Judge.* Judgment entered 5 June 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 May 1979.

As in previous years, petitioner was given a separation notice in June 1977 when Project Headstart, where she was employed, closed for the summer. Her claim for unemployment benefits was denied by a claims deputy and an appeals deputy of the Employment Security Commission of North Carolina (Commission) and she appealed to the Commission, which found as fact:

> 1. Claimant last worked on June 7, 1977, as a teacher for The Charlotte Area Fund Headstart Project. The school ceased operations on that day for the summer months. Claimant filed a claim for unemployment insurance benefits as of June 5, 1977, and the claim was continued through June 25, 1977.

2. Claimant has worked for The Charlotte Area Fund Headstart Project for six years. The project operates on a nine-month basis. Each year the Headstart Project has been operating on a nine-month basis the program has been refunded for the following year. Claimant has been recalled to her job for each of these school years.

3. The Headstart Program involves kindergarten level instruction for the children who attend.

The Commission concluded that petitioner was unavailable for work within the meaning of G.S. 96-13(a)(3) because Project Headstart falls within the statutory definition of a secondary school and petitioner has at least an implied contract to return to work there each fall.

Petitioner appealed to Superior Court, and the court concluded that the Commission had erred in applying G.S. 96-13(a)(3), as Project Headstart is not a secondary school. The decision of the Commission was reversed, and the Commission appeals.

Donald S. Gillespie, Jr., for petitioner appellee.

Howard G. Doyle, Garland D. Crenshaw, V. Henry Gransee, Jr. and Gail C. Arneke for respondent appellant.

ARNOLD, Judge.

G.S. 96-13(a) provides in pertinent part: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that— . . . (3) He is able to work, and is available for work . . . . [A]ny employee of a secondary school system or subdivision of a secondary school system . . . shall be considered available for work during any week such individual is on vacation between successive terms . . . *only* if the individual does not have a contract . . . , written, oral, or implied . . . for . . . both such terms." (Emphasis added.) The sole issue which the parties argue before us on this appeal is whether Project Headstart is a "secondary school" within the meaning of G.S. 96-13(a)(3).

"Secondary school" is defined in G.S. 96-8(5)m: "For purposes of this Chapter, 'secondary school' means any school not an institution of higher education as defined in G.S. 96-8(5)l." "Institu-

tion of higher education" is in turn defined by G.S. 96-8(5)l as an educational institution which provides education beyond high school. Thus, if G.S. 96-13(a)(3) is to apply, Project Headstart must be found to be (1) a school, and (2) not an institution which provides education beyond high school. It clearly meets the second requirement, so we need consider only whether Project Headstart is, in fact, a school.

Petitioner's arguments that Project Headstart is not a North Carolina public school and that it is federally funded and administered through a community action agency are not dispositive. G.S. 96-8(5)m refers not to "any public school" but simply to "any school." Further, we think that the purpose behind the "secondary school provision" of G.S. 96-13(a)(3) would not be served adequately if we read the statute as limited to public schools; school workers, whether in public or private employment, share the circumstance of temporarily not working from time to time because school work ordinarily is not year-round employment, but expecting to return to work when school begins again. We believe it is this type of "temporary unemployment" which the legislature intended to except from unemployment benefits.

Project Headstart is a federal program "focused upon children who have not reached the age of compulsory school attendance which . . . will provide such comprehensive health, nutritional, education, social, and other services as the Director finds will aid the children to attain their full potential." 42 USCA § 2809(a)(1). It may be that Headstart programs across the state choose varying formats to meet these needs, so we do not decide whether all Headstart programs are schools within the statutory definition. Instead, we focus on the characteristics of the Charlotte Area Fund Headstart Project, where petitioner is employed.

Petitioner testified at the hearings before the claims and appeals deputies. Asked what type of work she did at Headstart, petitioner responded, "Teacher." She works there from 8:00 a.m. till 3:30 p.m., five days a week, September through June.

> Q. . . . Exactly what are your job duties . . . ?
>
> A. . . . [W]hen they first come in . . . we provide a snack for 'em and it's just a little, regular school.

Q. It is what, nursery, kindergarden [sic]?

A. Yes.

Q. It's pre-school then.

A. Yes.

Q. Where you — go to school.

A. Yes. Uh-huh.

* * * *

Q. . . . [O]n your job duties you say you do provide some instructions, for the children, try and help them. I believe . . . you try and help them to reach a kind of parity in first grade with other children?

A. Yes.

Black's Law Dictionary (Rev. 4th Ed. 1968) 1511 defines "school" as a "place for instruction or education." "Education," in turn, "[c]omprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical." *Id.* at 604. We believe that the purposes set out for Project Headstart in the federal statutes indicate that Headstart is to provide education in this broad sense, and that the format in which Headstart is conducted by the Charlotte Area Fund and the petitioner's testimony about the activities there show that this Project Headstart is a school within the ordinary meaning of the term. We find that petitioner's situation is one of those addressed by the "secondary school provision" of G.S. 96-13(a)(3), excluding from unemployment benefits those who are subject to school-related seasonal unemployment. The Commission correctly decided that the Charlotte Area Fund Project Headstart is a secondary school within the meaning of G.S. 96-13(a)(3). The judgment of the Superior Court is

Reversed.

Judges MARTIN (Robert M.) and ERWIN concur.

ELNA MAE KEARNS COLEMAN WISE v. JOSEPH BARTOW WISE

No. 7819DC813

(Filed 19 June 1979)

1. Witnesses § 7.1— leading question improper

In an action for alimony pendente lite and permanent alimony, the trial court did not err in sustaining defendant's objection to the question by plaintiff's attorney, "And from all that information, that evidence, and the stipulations, Judge Grant entered a permanent alimony order of support; is that correct?" since that was a leading question and it called for a conclusion of law by the plaintiff as to the meaning of certain facts.

2. Appeal and Error § 49— attorney's statement unsupported by evidence—leading question

The trial court in an alimony action did not err in sustaining defendant's objection to a statement by plaintiff's counsel with respect to a stipulation of which there was no evidence in the record and a leading question for which no basis existed in the record.

3. Attorneys at Law § 4; Appeal and Error § 49.2— testimony by attorney excluded—evidence irrelevant

In an action for alimony pendente lite and permanent alimony the trial court did not err in refusing to allow plaintiff's counsel to withdraw and to testify as a witness, since the testimony of the attorney which would have concerned the rendition of an order and judgment by the trial court at an earlier hearing would not have been relevant to a determination of whether a judgment and order for permanent alimony had been entered, as a judgment directing the payment of permanent alimony is not entered until the clerk makes a notation in his minutes, and the proposed testimony of counsel would not have tended to prove the existence of such a notation.

4. Rules of Civil Procedure § 58— no entry of judgment—judgment and order tendered by plaintiff one year later—refusal to sign proper

Where the trial court had no independent recollection of what had occurred at a hearing for alimony held more than a year earlier and no judgment had been entered at the conclusion of that hearing in accordance with the provisions of G.S. 1A-1, Rule 58, the trial court did not err in refusing to sign the judgment and order proposed and tendered by plaintiff.

5. Divorce and Alimony § 20— no alimony order entered prior to divorce decree—sufficiency of evidence

The trial court did not err in concluding as a matter of law that no final order or judgment for permanent alimony had been entered at the time that defendant was granted an absolute divorce, since there was nothing in the record from which it could be found as a matter of law that such judgment or order had been entered.

APPEAL by plaintiff from *Grant, Judge*. Judgment entered 26 April 1978 in District Court, RANDOLPH County. Heard in the Court of Appeals 23 May 1979.

The plaintiff instituted this action against the defendant on 2 October 1975 seeking alimony pendente lite and permanent alimony. A hearing was held on 30 October 1975 concerning the plaintiff's claim for alimony pendente lite. At the conclusion of that hearing, the trial court entered an order directing the defendant to pay the plaintiff $40 per week as alimony pendente lite. On 29 November 1976, a hearing was held concerning the plaintiff's claim for permanent alimony. The record does not indicate the outcome of that hearing, but it does indicate that the plaintiff's attorney was directed to prepare an order for the trial court in connection with the case.

On 14 January 1977, the defendant filed a separate action against the plaintiff seeking an absolute divorce. On 29 November 1977, a jury found that the defendant was entitled to the requested relief, and the trial court then entered a judgment granting the defendant an absolute divorce.

On 14 December 1977, the plaintiff prepared and presented to the trial court a proposed order and judgment declaring that the trial court had found, at the hearing held in this action on 29 November 1976, that the plaintiff was entitled to permanent alimony. The trial court never signed or entered the proposed order and judgment.

Eight days later, the defendant moved to dismiss the plaintiff's action for permanent alimony or, in the alternative, for summary judgment. A hearing was held concerning the defendant's motion. The trial court found facts and concluded that no order or judgment for permanent alimony had been entered in this action prior to the entry of the absolute divorce in favor of the defendant in his subsequent action against the plaintiff. The trial court then entered judgment allowing the defendant's motion and dismissing with prejudice the plaintiff's action. From the entry of that judgment by the trial court, the plaintiff appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

Ottway Burton for plaintiff appellant.

Miller, Beck and O'Briant, by Adam W. Beck, for defendant appellee.

MITCHELL, Judge.

[1] The plaintiff first assigns as error the trial court's ruling on an objection to a question put to the plaintiff on direct examination. During the direct examination of the plaintiff, her attorney asked, "And from all that information, that evidence, and the stipulations, Judge Grant entered a permanent alimony order of support; is that correct?" The trial court sustained the objection of the defendant to the question. We find the action of the trial court in this regard was correct.

The question by the plaintiff's attorney was a leading question. Generally, leading questions may not be asked on direct examination. 1 Stansbury's N.C. Evidence § 31 (Brandis rev. 1973). The question also called for a conclusion of law by the plaintiff as to the meaning of certain facts. Although a non-expert may testify concerning facts that are within her knowledge, she may not testify as to the legal effect of those facts. 1 Stansbury's N.C. Evidence § 130 (Brandis rev. 1973). The trial court properly sustained the defendant's objection and this assignment of error is overruled.

[2] The plaintiff's second assignment of error is directed to the trial court's action in sustaining objections by the defendant to the testimony of a witness for the plaintiff on direct examination. During the course of the hearing concerning the defendant's motion to dismiss or for summary judgment, the following transpired:

> Q. Well, to refresh your recollection, it's stipulated by and between counsel that an order was entered by Judge Hammond on October the 30th, 1975 ordering permanent alimony for Elna Mae Kearns Coleman Wise in Civil action entitled *Elna Mae Kearns Coleman Wise, plaintiff, vs. Joseph Bartow Wise.*
>
> MR. BECK: OBJECTION.
>
> THE COURT: SUSTAINED.

BY MR. BURTON:

Q. Do you remember that, that statement being made by—

MR. BECK: OBJECTION.

THE COURT: SUSTAINED.

The first remark by the plaintiff's counsel was a statement rather than a question and was not admissible into evidence. Additionally, nothing in the record on appeal reveals that any such stipulation ever existed. The second remark by the plaintiff's counsel was made in the form of a leading question for which no basis exists in the record. Therefore, the trial court properly sustained the defendant's objections. This assignment of error is overruled.

[3] The plaintiff next assigns as error the failure of the trial court to allow the plaintiff's counsel to withdraw as counsel and to testify as a witness. Although the plaintiff's counsel was not allowed to testify, the trial court did permit him to state what his testimony would have been if he had been allowed to testify. Having examined that proposed testimony, we have determined that the trial court's refusal to allow the plaintiff's counsel to testify did not constitute prejudicial error.

The record reveals that the testimony of the plaintiff's counsel would have concerned the rendition of an order and judgment by the trial court at the conclusion of the 29 November 1976 hearing. Evidence relating to the rendition of any such judgment would not have been relevant to a determination of whether a judgment and order for permanent alimony had been entered. A judgment directing the payment of permanent alimony is not entered until the clerk makes a notation in his minutes of the rendition of judgment by the trial court. G.S. 1A-1, Rule 58. The proposed testimony of counsel for the plaintiff would not have tended to prove the existence of a notation in the minutes of the clerk and was not relevant evidence regarding the entry of any such judgment. Therefore, exclusion of the proposed testimony of counsel for the plaintiff was not prejudicial to the plaintiff and her assignment of error is overruled.

[4] The plaintiff next assigns as error the trial court's refusal to sign the order and judgment which she tendered to the court on

14 December 1977. Those documents were presented to the trial court more than a year after the trial court had directed their preparation by counsel for the plaintiff. When the trial court was presented with the documents, it apparently was unable to recall whether they set forth its earlier decision. In an effort to accommodate the plaintiff, the trial court heard evidence concerning the earlier proceedings. At the conclusion of that evidence, however, the trial court found as a fact that the court had no independent recollection of matters relating to the hearing of 29 November 1976. As the trial court possessed no independent recollection of what had occurred at the 29 November 1976 hearing and no judgment had been entered at the conclusion of that hearing in accordance with the provisions of G.S. 1A-1, Rule 58, the trial court did not err in refusing to sign the judgment and order proposed and tendered by the plaintiff.

The plaintiff has made several assignments of error directed to the trial court's findings of fact. In support of her assignments, the plaintiff contends that the findings were not supported by the evidence. We have reviewed the findings of fact and find that each was fully supported by evidence properly before the court. Those assignments are overruled.

[5] Finally, the plaintiff assigns as error the trial court's conclusion as a matter of law that no final order or judgment for permanent alimony had been entered at the time that the defendant was granted an absolute divorce from the plaintiff. There is nothing in the record from which it could be found as a matter of law that a judgment or order for permanent alimony was entered prior to the judgment of absolute divorce. There is no notation in the minutes of the clerk to indicate that a judgment was entered, no signed judgment or order and no transcription of an oral judgment or order. We must conclude, as did the trial court, that no judgment for permanent alimony had been entered in this action at the time the judgment granting the defendant an absolute divorce was entered in the separate action brought by him against the plaintiff. This assignment is overruled.

G.S. 50-11(a) provides that, subject to certain exceptions, "[a]fter a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine." Therefore, the trial court, having concluded that a judgment of

absolute divorce had been entered in favor of the defendant, did not err in entering a judgment dismissing this action by the plaintiff for alimony in which no judgment had been entered. *See Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E. 2d 441 (1979).

Effective 1 August 1977, the General Assembly amended G.S. 50-6 to provide that "no final judgment of divorce shall be rendered under this section [on the ground of separation of one year] until the court determines that there are no claims for support or alimony between the parties or that all such claims have been fully and finally adjudicated." The new proviso to that statute does not control, however, in this action initiated by the plaintiff prior to its effective date.

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

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

MARTHA JONES v. CHARLES MORRIS AND JOSEPH JONES

No. 7819SC881

(Filed 19 June 1979)

1. **Automobiles §§ 90.2, 90.3— instructions on two allegations of negligence not conflicting**

The trial court's instruction that the failure of a driver to keep a proper lookout would constitute negligence was not inconsistent with the court's instruction later in the charge that it would not be negligence within itself for a driver to violate his duty to maintain a reasonable lookout for other vehicles when he enters an intersection on a green light, since the court's instructions did not relate to a single allegation of negligence but related to two separate allegations of negligence.

2. **Appeal and Error § 50.2— rights determined by answer to one issue—error in instructions on other issues**

Where the rights of the parties are determined by the jury's answer to one of the issues, any error relating to another issue cannot be prejudicial.

APPEAL by plaintiff from *Seay, Judge*. Judgment entered 12 May 1978 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 31 May 1979.

Plaintiff filed a complaint seeking to recover for personal injuries sustained in an automobile accident. She alleged that both defendants "negligently and carelessly operated their motor vehicles in such a way as to be the proximate cause of the said accident."

Defendant Morris filed answer denying the allegations of negligence and asserting a crossclaim for contribution against defendant Jones. Defendant Jones filed answer denying the allegations of negligence and a crossclaim against defendant Morris for contribution. He also sought property damages to his own automobile from defendant Jones. Defendant Morris later amended his crossclaim against Jones to allege an additional claim for property damage and loss of use of his vehicle while it was being repaired. Just prior to trial, and before plaintiff had put on evidence, she gave notice of voluntary dismissal with prejudice of her claim against her husband, defendant Jones.

At the conclusion of all the evidence, the trial court submitted seven issues to the jury and they were answered as indicated:

1. Was the plaintiff, Martha Jones, injured and damaged by the negligence of the defendant, Charles Morris, as alleged in the complaint?

ANSWER: No.

2. Was Joseph Jones also negligent and did such negligence concur with the negligence of Charles Morris?

ANSWER:

3. What amount, if any, is the plaintiff, Martha Jones, entitled to recover for personal injuries?

ANSWER:

4. Was Joseph Jones damaged by the negligence of the defendant, Charles Morris?

ANSWER: No.

5. What amount, if any, is Joseph Jones entitled to recover of Charles Morris for damages to his vehicle?

ANSWER:

6. Was Charles Morris damaged by the negligence of Joseph Jones?

ANSWER: Yes.

7. What amount, if any, is Charles Morris entitled to recover of Joseph Jones for damages to his motor vehicle?

ANSWER: $1,335.00

From judgment entered in accordance with the jury verdict, plaintiff appealed. In light of the limited questions pertaining to the trial court's instructions raised by this appeal, it is unnecessary to summarize what the evidence of the parties tended to show. The other few facts necessary to this decision are hereinafter noted.

Seawell, Pollock, Fullenwider, Robbins & May, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Vance Barron, Jr., for defendant Morris appellee.

CARLTON, Judge.

Plaintiff contends that the trial court erred in giving instructions to the jury with respect to the first and second issues. We do not agree.

In her complaint, plaintiff alleged that defendants were negligent in three particulars: (1) that both drivers failed to keep a proper lookout, (2) that both drivers failed to observe traffic signals properly functioning in the intersection, and (3) that both failed to operate their motor vehicles with proper care.

[1] The trial judge gave proper instructions to the jury with respect to each of the three allegations of negligence. Plaintiff contends, however, that the approved instruction with respect to improper lookout is *inconsistent with* the approved instruction with respect to the duty of a motorist entering an intersection governed by traffic signals. In the former, the approved instruc-

tion concludes with the statement: "[A] violation of this duty is negligence." In the latter, the instruction reads as follows:

> Now, further, a person who operates a motor vehicle on a public street or public highway is under a duty to obey the electric traffic control signal duly erected at an intersection. When the light is red, a motorist is required to stop. When the light is green, the motorist may proceed into the intersection, but in doing so, he must maintain a reasonable lookout for other vehicles in or approaching the intersection. A violation of any one of these duties is not negligence within itself; however, the evidence with regard to it is to be considered with all the other facts in evidence in determining whether Charles Morris is negligent.

Plaintiff apparently does not challenge the accuracy of the instructions with respect to the particular allegations. She argues simply that it is inconsistent for the court to instruct that a driver must keep a lookout as a reasonably careful and prudent person would keep under the circumstances then existing and that the violation of such duty would constitute negligence while, at a later part in the charge, instructing the jury that it would not be negligence within itself for a driver to violate his duty to maintain a reasonable lookout for other vehicles when he enters an intersection on a green light. Plaintiff relies on several criminal cases in which our Supreme Court has established the principle that a new trial is necessary where instructions are inconsistent because the jury may have acted upon an incorrect interpretation of the law. *See State v. Carelock*, 293 N.C. 577, 238 S.E. 2d 297 (1977).

It is clearly the law in this jurisdiction that conflicting instructions to the jury upon a material point, the one correct and the other incorrect, must be held for prejudicial error, requiring a new trial, since it cannot be known which instruction was followed by the jury in arriving at a verdict. This is true in civil as well as criminal cases. *See Kinney v. Goley*, 4 N.C. App. 325, 167 S.E. 2d 97 (1969); *Barber v. Heeden*, 265 N.C. 682, 144 S.E. 2d 886 (1965).

Plaintiff's reliance on the principle stated above, however, is misplaced. To fall within the protection of the principle, plaintiff must show that the conflict in the instructions was with respect

to a single allegation of negligence and not to separate allegations as here. For example, in Kinney, *supra*, the trial judge first instructed the jury that failure to give a turn signal as required by G.S. 20-154 would be negligence *per se*. Later in the charge, the trial judge read the statute to the jury in its entirety including the proviso that violation of its provisions should not be considered negligence *per se*. In that instance, the judge's instructions with respect to a particular alleged act of negligence were obviously inconsistent. One portion of the charge was correct and the other was incorrect. There was no method to determine which instruction was followed by the jury in arriving at a verdict. It is this type of conflict in instructions which led to the principle upon which plaintiff relies on this appeal.

Here, however, the trial court did not give a conflicting instruction with respect to a single alleged act of negligence. Plaintiff elected to proceed on three alleged acts of negligence including (1) improper lookout, (2) improper control, and (3) failure to observe properly functioning traffic signals in an intersection. The trial court gave proper instructions, in separate paragraphs, with respect to each of these three allegations. In the very next paragraph the court charged as follows:

> Now, finally, as to this first issue, I instruct you that if the plaintiff has proved, that is, plaintiff, Martha Jones, has proved by the greater weight of the evidence that at the time of the collision that the defendant, Charles Morris, was negligent in any one or more of the following respects, that is, that the defendant, Charles Morris, failed to keep a proper lookout, failed to keep his vehicle under proper control, or that he failed to obey the electric traffic control signal and entered the intersection on the red light.

From the above quoted language of the instructions, it is clear that the court submitted the various alleged acts of negligence of defendant Morris to the jury *alternatively*. Having previously properly instructed the jury with respect to each of the alleged acts of negligence, we hold that the instructions were not conflicting and this assignment of error is overruled.

[2] Plaintiff next contends that the trial court erred in instructing the jury under the second issue that both defendants could be jointly and severally liable to the plaintiff. First, we find the

instructions were properly stated. Moreover, if there were error it was not prejudicial because the rights of the parties with respect to any negligence having been committed against the plaintiff was determined by the jury in the first issue. The jury, in the first issue, had found that defendant Morris was not negligent and therefore not liable to the plaintiff. Plaintiff had taken a voluntary dismissal as to defendant Jones. The trial court had instructed the jury not to answer the second issue if they decided the first issue in favor of defendant Morris and the jury followed the trial court's instructions. Hence, the jury did not reach the second issue relating to contribution. Where the rights of the parties are determined by the jury's answer to one of the issues, error relating to another issue cannot be prejudicial. 1 Strong, N.C. Index 3d, Appeal and Error, § 50.2, p. 323; *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc.*, 24 N.C. App. 447, 210 S.E. 2d 900 (1975), *affirmed*, 288 N.C. 213, 217 S.E. 2d 566 (1975). This assignment of error is overruled.

Finally, we note that counsel for plaintiff ignored the requirements of Appellate Rule 10(b)(2). The Rules of Appellate Procedure are mandatory and plaintiff's appeal could have been dismissed for that reason.

In the trial below, we find

No error.

Judges VAUGHN and CLARK concur.

MARION YOUNG, JR. v. RUDOLPH GLENN

No. 7826SC726

(Filed 19 June 1979)

1. Damages § 3.1— medical expenses—connection with injury—no showing of reasonableness required

There was no merit to defendant's contention that the trial court in a personal injury action erred in allowing plaintiff and the chiropractor who treated him to testify as to the amount of plaintiff's medical bill without requiring evidence to show that the bill was reasonable, since the chiropractor testified that, in his opinion, plaintiff's injuries could have resulted from the accident in

question; the cost of treatment would be the natural and proximate result of defendant's negligence; and the chiropractor testified not only to the total amount of the bill, but also broke down that bill as to how much each item cost.

2. **Damages § 17.2— medical expenses—no instruction as to reasonableness—no error**

The trial court in a personal injury action did not err in failing to instruct the jury that recovery for only reasonable medical expenses should be allowed.

3. **Trial § 10.3— witness found to be expert—court's statement proper**

The trial court in a personal injury action did not err in stating that plaintiff's witness was found to be an expert in the field of chiropractic medicine.

4. **Evidence § 50.2— cause of plaintiff's symptoms—hypothetical question—chiropractor's answer not unresponsive**

There was no merit to defendant's contention in a personal injury action that an expert witness's answer to a hypothetical question as to whether the accident could have caused plaintiff's chiropractic symptoms was unresponsive, where the witness stated that the accident could have caused the injury plaintiff sustained.

APPEAL by defendant from *Walker (Ralph A.), Judge*. Judgment entered 11 May 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 April 1979.

Plaintiff instituted this action seeking to recover damages for personal injuries sustained on 22 March 1976 when defendant drove his car into the rear of the truck that plaintiff was driving. Plaintiff had stopped in the road to turn left when he was hit. Upon impact, he was thrown forward against the steering wheel and his head hit the windshield. Plaintiff suffered pains in his neck and back and had headaches. The next morning he went to see a chiropractor, Dr. William Carlisle, who treated him for a little over a month. His total medical bills were $251.00. Plaintiff was absent from work about a month. He suffered no permanent injuries as a result of this accident other than stiffness and soreness in the mornings.

Dr. Carlisle testified as to his training and experience. He was tendered as an expert in the field of chiropractic medicine and the court allowed him to testify as an expert. Dr. Carlisle related the symptoms experienced by the plaintiff and the tests he ran to ascertain the extent of any injury. It was Dr. Carlisle's conclusion that plaintiff had sprained his back. In response to a

hypothetical question, Dr. Carlisle stated that the accident could have caused this injury. He also testified that he charged the plaintiff $20.00 for the first examination, $50.00 for x-rays, $25.00 for a written report, and $12.00 a visit for thirteen additional visits.

Defendant presented no evidence and his motions for a directed verdict were denied. The jury found that the defendant's negligence caused plaintiff's injury and awarded damages of $3,751.00. From this verdict, defendant appealed.

Thomas T. Downer, for plaintiff appellee.

George C. Collie, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first contends that the trial court erred in allowing plaintiff and Dr. Carlisle to testify as to the amount of the medical bill without requiring evidence to show that the bill was reasonable. This argument is without merit. Dr. Carlisle testified not only to the total amount of the bill, $251.00, but also broke down that bill as to how much each item cost. Defendant's reliance on *Ward v. Wentz*, 20 N.C. App. 229, 201 S.E. 2d 194 (1973), is unfounded. In *Ward*, plaintiff sought to introduce her testimony as to medical expenses sustained over nine months after the accident and after she had moved to Florida. None of the Florida doctors testified and the only evidence linking those expenses to the injury was by plaintiff, a layman. The Court held that this evidence was properly excluded because there was no medical evidence to show that the injury required this treatment in Florida. *See also Graves v. Harrington*, 6 N.C. App. 717, 171 S.E. 2d 218 (1969).

The Supreme Court distinguished *Ward* in *Taylor v. Boger*, 289 N.C. 560, 223 S.E. 2d 350 (1976). In *Taylor*, plaintiff sought to introduce evidence of medical bills incurred when she was treated in Ohio for an injury sustained and originally treated in North Carolina. Plaintiff was referred to the Ohio doctor by her doctor in this state. The trial court excluded the evidence of the treatment and its cost because there was no proper medical foundation for that testimony. The Supreme Court held that the testimony should have been allowed because there was evidence to show

that the cost of the treatment was a natural and proximate result of the negligence. The Court went on to state that a plaintiff in a personal injury case is entitled to recover damages for the injury which include " 'indemnity for actual nursing and medical expenses.' " *Taylor v. Boger, supra,* at 569 (quoting *Kizer v. Bowman,* 256 N.C. 565, 576, 124 S.E. 2d 543 (1962)). *See also Sparks v. Holland,* 209 N.C. 705, 184 S.E. 552 (1936). Thus the Court in *Taylor* held that it was error to exclude the evidence of the treatment and the cost of that treatment. *See also Evans v. Stiles,* 30 N.C. App. 317, 226 S.E. 2d 843 (1976).

In the instant case, the trial court correctly allowed the plaintiff and Dr. Carlisle to testify as to the cost of the treatment. In Dr. Carlisle's opinion, the injuries which he treated were probably caused by the accident. Thus the cost of that treatment would be the natural and proximate result of defendant's negligence. This assignment of error is overruled.

[2] During the charge to the jury, the trial court gave the following instruction:

> "Medical expenses, members of the jury, is the actual amount which you find, by the greater weight of the evidence, had been paid or incurred by the plaintiff as a proximate result of the defendant's negligence for doctor's expenses."

Defendant claims that this instruction was erroneous because the court failed to instruct the jury that it could award such sums as it found were *reasonable* with respect to medical expenses. This argument is also without merit. In *Williams v. Stores Co., Inc.,* 209 N.C. 591, 184 S.E. 496 (1936), the Court approved the following instruction:

> " 'Damages for personal injuries . . . include actual expenses for nursing, medical services, loss of time and earning capacity, mental and physical pain and suffering.
>
> 'By actual expenses for nursing and medical expenses is meant such sum as the plaintiff has expended therefor in the past, or for which she has become indebted, and such further expenses for nursing and medical services as she will, in your best judgment, based upon the evidence in this case and by the greater weight thereof, be put to in the future, which

> flow directly and naturally from any injury she may be found by you to have sustained on account of the negligence of the defendants, complained of in this action.' " *Williams v. Stores Co., Inc., supra,* at 601.

See also, Taylor v. Boger, supra. The instruction in the present case was substantially similar and, therefore, the court did not err in failing to instruct the jury that only reasonable expenses should be allowed. This assignment of error is overruled.

[3] Defendant next contends that the trial court erred in stating, in open court, that Dr. Carlisle was found to be an expert in the field of chiropractic medicine. Defendant argues that this was tantamount to an expression of an opinion in violation of Rule 51 of the North Carolina Rules of Civil Procedure. This argument is without merit. Dr. Carlisle was tendered as an expert witness by plaintiff and the court accepted him as such. This assignment of error is overruled.

[4] During his testimony, Dr. Carlisle was asked the following hypothetical question.

> "Doctor Carlisle, assuming that the jury should find from the evidence and by its greater weight that Marion Young was involved in an automobile accident on March 22, 1976, in which he was driving a pickup truck which was smashed into the rear by another automobile and that the impact caused him to be thrown forward in his seat and into the steering wheel with his head hitting the windshield and his chest hitting the steering wheel and that he immediately felt pain in his neck and back and that he had no pain in his neck and back prior to the collision and that he went home and the next day came to see you and stated that he had a catch in his mid-low lower back area, stiffness and pain upon movement in both shoulders and neck and that you examined him and found that he did have tenderness in his neck and back, and that you x-rayed him and found that he did have tenderness with subluxation in the thoracic and lumbar spine and that you diagnosed his injuries to be a thoracic lumbar sprain and a cervical sprain and that you treated him from a period from 3-23-76 through 5-1-76 and that you released him on May 1, 1976. Now, assume that a jury should find that all of these facts are true from the greater weight of the

evidence. Do you have an opinion satisfactory to yourself based upon reasonable medical certainty as to whether or not the accident which I have just described in this question could or might have caused the chiropractic symptoms of Marion Young and the treatment necessary for Marion Young which have been described?"

Defendant contends that this hypothetical question contained facts not in issue but fails to point out which facts are contested. We find that the question was proper. Defendant also contends that Dr. Carlisle gave an unresponsive answer in stating that, in his opinion, the accident "could have caused the injury [plaintiff] sustained." Defendant argues that this answer was unresponsive because Dr. Carlisle was asked if the accident could have caused the chiropractic symptoms and he responded that the accident could have caused the injury. This argument is also without merit. We first note that no motion to strike was made to this answer. Defendant waived any exception to this answer by failing to make a timely motion to strike. *Gatlin v. Parsons*, 257 N.C. 469, 126 S.E. 2d 51 (1962). Furthermore, this argument raises only a question of semantics. This assignment of error is overruled.

Finally, defendant contends that the court erred in refusing to set aside the verdict of the jury with respect to damages. " '[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.' " *Robertson v. Stanley*, 285 N.C. 561, 563, 206 S.E. 2d 190 (1974) (quoting *Hinton v. Cline*, 238 N.C. 136, 137, 76 S.E. 2d 162 (1953)). The 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). We find no such abuse and affirm the trial court's denial of this motion.

Affirmed.

Judges CLARK and CARLTON concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. SECURITY BUILDING COMPANY, CAROLYN M. MEARES, AND CARL MEARES, JR.

No. 7815SC869

(Filed 19 June 1979)

1. Fires § 3; Evidence § 47— path and origin point of fire—exclusion of opinion testimony

In an action to recover the amount of an insurance payment for fire damage to a home, the trial court did not err in refusing to allow plaintiff's witness to testify as to his opinion concerning the path the fire had taken and its point of origin where plaintiff made no attempt to qualify the witness as an expert, and where the facts known to the witness could have been clearly related to the jury and the jury was as well qualified as the witness to draw inferences and conclusions from the facts.

2. Fires § 3— insufficient evidence of cause of fire

Plaintiff insurer's evidence was insufficient to permit the jury to find that a fire in a home built by defendants was caused by defendants' negligent construction of an ash dump in the home where it tended to show that the owner built a fire in the fireplace of the home, the next day he emptied the ashes from the fire into the ash dump, the following day a fire occurred in the area of the ash dump, defendants left an exposed wooden beam extending into the ash dump when they constructed the home, and the ash dump was constructed in such a manner as to leave four holes leading from the interior of the ash dump to a wooden support, but there was no direct evidence that the fire was caused by the presence of a hot coal or other burning material in the ash dump.

APPEAL by plaintiff from *Farmer, Judge*. Judgment entered 8 May 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 28 May 1979.

Charles James Branton and Delight Branton purchased a homeowner's insurance policy from the plaintiff, Nationwide Mutual Insurance Company. While that policy was in effect, a fire occurred in the Branton's home. Pursuant to the terms of the insurance policy, the plaintiff paid the Brantons $11,698.71 as compensation for damage to their home caused by the fire. The plaintiff instituted this action against the defendants seeking to recover the amount of that payment. The plaintiff's claim for relief was based upon allegations that the fire was proximately caused by the negligent construction of an ash dump in the Branton home by the defendants.

When the case was called for trial, the plaintiff presented evidence tending to show that the defendants had constructed the entire Branton home. The home contained a fireplace with a small door leading to an ash dump. The ash dump could be opened from a carport area in order to remove ashes created by fires in the fireplace.

The plaintiff's evidence further tended to show that between 2:00 p.m. and supper on 9 December 1974, Mr. Branton built a fire in the fireplace. Between noon and 2:00 p.m. the following day, he emptied the ashes from the previous day's fire into the ash dump. At approximately 2:10 p.m. on 11 December 1974, Mr. Branton discovered that the home was on fire. The fire was concentrated at that time in the area around the ash dump.

The plaintiff's evidence also tended to show that the defendants left an exposed wooden beam extending into the ash dump at the time they constructed the home. Additionally, the ash dump was constructed in such a manner as to leave four holes leading from the interior of the ash dump to a wooden support.

At the close of the plaintiff's evidence, the defendants moved for a directed verdict. The trial court found the plaintiff's evidence insufficient to be submitted to the jury and entered judgment granting the defendants' motion. The plaintiff appealed.

Bryant, Bryant, Drew & Crill, P.A., by Victor S. Bryant, Jr., for plaintiff appellants.

Midgette, Page and Higgins, by Keith D. Lembo and Thomas D. Higgins III, for defendant appellees.

MITCHELL, Judge.

[1] The plaintiff first assigns as error the trial court's refusal to allow one of the plaintiff's witnesses to testify as to his opinion concerning the path the fire had taken and its point of origin. Generally, the opinion of a witness is inadmissible "whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. If either of these conditions is absent, the evidence is admissible." 1 Stansbury's N.C. Evidence § 124, p. 388 (Brandis rev. 1973).

Therefore, if both those conditions existed, the trial court did not err in refusing to allow the witness to give his opinion.

The facts known to the witness could have been clearly related to the jury. The witness could have described to the jury, for example, where he found charred wood, where the charring was most severe, and the perimeter of the charring. It would have been neither impossible nor impracticable for him to describe those facts in detail. *See generally* 1 Stansbury's N.C. Evidence § 125 (Brandis rev. 1973). Additionally, no evidence was offered tending to show that the witness had any special knowledge or expertise which would have made him better qualified than the jury to draw inferences from those facts. Therefore, the witness' testimony concerning his opinion was inadmissible.

In addition, the plaintiff made no attempt to qualify the witness as an expert. Nothing in the record on appeal indicates that the defendants stipulated that the witness was an expert. The witness was not tendered to the trial court as an expert, and the court made no finding concerning whether he was an expert. In such situations, it is not error to sustain an objection to a question calling for the witness to give his opinion. *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973). This assignment of error by the plaintiff is overruled.

The plaintiff next assigns as error the trial court's refusal to allow one of the plaintiff's witnesses to testify as to his opinion concerning whether the ash dump in the Branton home complied with the North Carolina Residential Building Code. When the witness was asked whether he had an opinion, he was allowed to answer the question for the record and out of the presence of the jury. The witness answered "No." As the witness did not have an opinion, any error in excluding that answer from evidence was harmless beyond a reasonable doubt. Therefore, the assignment of error is overruled.

[2] The plaintiff finally assigns as error the action of the trial court in granting the defendants' motion for a directed verdict at the close of the plaintiff's evidence. A defendant's motion for a directed verdict should be granted when it appears as a matter of law that the plaintiff cannot recover upon any view of the facts which the evidence reasonably tends to establish. *See Manganello*

v. Permastone, Inc., 291 N.C. 666, 231 S.E. 2d 678 (1977). Although the plaintiff contends that its evidence was sufficient to support a jury verdict in its favor, we do not agree.

In order for the plaintiff to recover on its claim for relief based upon negligence, it was required to present evidence tending to show that the negligence of the defendants was the proximate cause of its injury. *McGaha v. Smoky Mountain Stages, Inc.*, 263 N.C. 769, 140 S.E. 2d 355 (1965); W. Prosser, Torts § 41 (4th ed. 1971). The plaintiff's evidence concerning the proximate cause of the fire reasonably tended to establish that Mr. Branton built a fire in the fireplace of his home on 9 December 1974. The following day, he swept the ashes from that fire into the ash dump. Mr. Branton described those ashes and his disposal of them as follows:

> When I dumped them it looked like ashes and pieces of dark coals, but it didn't appear to be hot. I saw no glowing coals and I did not see any smoke coming from the area. I opened the ash dump in the fireplace and swept the ashes into the dump. I used a broom approximately three feet long and the ashes were about three or four feet from me.
>
> At the time I swept the ashes into the ash dump, I am sure I could feel heat, but I don't know where it was coming from. I am sure the inside of the fireplace was still warm from the fire. The ashes that I swept into the dump looked like a very light gray powder, except for a few little pieces of charred wood laying around. I couldn't tell if there was any fire.

The plaintiff's evidence further tended to reasonably establish that a fire occurred in the area of the ash dump on the following day.

The plaintiff presented no direct evidence that a hot coal or other burning material was swept into the ash dump. The plaintiff's evidence would support, however, a reasonable inference to that effect. Pursuing the chain of events one step further, there was no direct evidence that the fire was caused by the presence of a hot coal or other burning material in the ash dump.

The plaintiff contends that, based upon the reasonable inference that a hot coal was placed in the ash dump, the jury

should be allowed to infer further that the hot coal came into contact with an exposed wooden beam which the defendant negligently left extending into the ash dump or that the hot coal traveled through a hole in the wall of the ash dump and became lodged against a wooden support and proximately caused the fire. While it is entirely possible that the fire was caused in one of these ways, the plaintiff's contention is without merit. An inference that a hot coal came into contact with combustible wood and started a fire cannot be based upon a mere inference that there was in fact such a hot coal. It is settled law in North Carolina that one inference of fact may not be based upon another inference. *Petree v. Power Company*, 268 N.C. 419, 150 S.E. 2d 749 (1966); *Mills, Inc. v. Foundry, Inc.*, 8 N.C. App. 521, 174 S.E. 2d 706 (1970). Since there was no evidence introduced from which the jury could be allowed to infer that the fire in the Branton home was proximately caused by the defendants' negligence, the plaintiff was precluded as a matter of law from recovering anything from the defendants. Therefore, the trial court properly granted the defendants' motion for a directed verdict and the assignment of error must be overruled.

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

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

STEPHEN HOWARD DURLAND, PETITIONER v. ELBERT L. PETERS, COMMISSIONER OF MOTOR VEHICLES, RESPONDENT

No. 7818SC865

(Filed 19 June 1979)

Automobiles §§ 2.4, 126.3— breathalyzer test—willingness to take within prescribed time

Facts found by the trial court were sufficient to support its conclusion of law that petitioner did not wilfully refuse to take a breathalyzer test where the court found that petitioner "wanted to take the test" at the conclusion of the thirty minute waiting period.

APPEAL by respondent from *Wood, Judge*. Judgment entered 1 May 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 May 1979.

The respondent appeals from the judgment of the trial court holding petitioner did not wilfully refuse to take a breathalyzer test. Evidence necessary for the opinion is hereafter set forth.

Turner, Rollins, Rollins & Clark, by Walter E. Clark, Jr., for petitioner appellee.

Attorney General Edmisten, by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin, for respondent appellant.

MARTIN (Harry C.), Judge.

This civil action was instituted by petitioner pursuant to N.C.G.S. 20-16.2(e) to review *de novo* the question of whether petitioner had wilfully refused to take a breathalyzer test after being arrested on a charge of operating a motor vehicle while under the influence of intoxicating liquors.

After hearing the testimony of the witnesses, Judge Wood found as facts the following:

> 2. On the 3rd day of December, 1977, the petitioner Steven [*sic*] Howard Durland was lawfully arrested in the City of Greensboro by G. F. Brooks, a uniform officer with the Greensboro Police Department and charged with operating a motor vehicle under the influence of intoxicating liquor in violation of N.C.G.S. 20-138. The petitioner was transported to the breathalyzer room at the Greensboro Police Department arriving there in the presence of Gary R. Ballance, a duly licensed breathalyzer operator at 4:00 A.M. at 0402 A.M. the petitioner was advised of the rights concerning the breathalyzer in accordance with the requirements of N.C.G.S. 20-16.2 § A.
>
> 3. The petitioner indicated that he desired to have present to witness the testing procedures either the supervisor of Officer Brooks or his father. A sergeant came to the breathalyzer room. The petitioner said that he meant a lieutenant or higher. At 0423 the petitioner made a telephone call to his father.

4. At 0432 A.M. Mr. Ballance informed the petitioner that the time was up. The petitioner said that he wanted to take the test and wanted a witness to be present. At 0439 A.M. the petitioner's father arrived and requested that the petitioner be permitted to take the breathalyzer test. The petitioner and his father were informed that the breathalyzer test would not be given;

Upon these findings the court concluded as a matter of law that petitioner did not wilfully refuse to take the breathalyzer test, and ordered that his driver's license not be suspended.

The respondent, although represented by counsel at the court hearing, failed to make any exceptions to the trial court's findings of fact but did except to the conclusion of law. When there are no exceptions to the findings of fact, they are deemed to be correct and supported by competent, substantial evidence, but the appeal itself raises the question of law whether the facts found support the judgment and whether error of law appears on the face of the judgment. Respondent's exception to the conclusion of law raises the same issues. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967); *Hertford v. Harris*, 263 N.C. 776, 140 S.E. 2d 420 (1965); *Aiken v. Collins*, 16 N.C. App. 504, 192 S.E. 2d 617 (1972). Absent exception, the findings of fact are conclusive upon appeal. By the failure of counsel to make the required exceptions, the findings of fact by the court are not presented to us for review.

We hold the facts found by the court do support the court's conclusion of law that petitioner did not wilfully refuse to take the breathalyzer test. The Commissioner of the Division of Motor Vehicles had the burden of proof at the hearing before the court. *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E. 2d 553, *pet. to rehear denied*, 279 N.C. 397 (1971). The Commissioner failed to carry this burden with the trier of the facts, the trial judge. There was no finding that petitioner refused to take the test when requested to do so by the officer. To the contrary, the court found as a fact that petitioner "wanted to take the test" at the conclusion of the 30-minute waiting period.

Appellant has failed to show error, and the judgment is

Affirmed.

Judges PARKER and MITCHELL concur.

IN THE MATTER OF: DOUGLAS A. VINSON CLAIMANT AND N. C. MUNICIPAL COUNCIL, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 7810SC871

(Filed 19 June 1979)

Master and Servant § 108— unemployment compensation—resignation because of criminal charges—cause not attributable to employer

Claimant left work voluntarily without good cause attributable to his employer and thus was not entitled to unemployment compensation benefits where he resigned from his employment at his supervisor's suggestion because he had been arrested on six felony charges of possession and sale of phenobarbital and had admitted to his supervisor that the charges were true.

APPEAL by Employment Security Commission from *Smith (David I.), Judge*. Judgment entered 4 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 28 May 1979.

Vinson was an employee of the North Carolina Municipal Council, Inc. for a period of five years. On 26 May 1977 he was arrested at his place of employment in the presence of his supervisor on six charges of felonious possession and sale of phenobarbital. Vinson admitted to his supervisor that he had illegally possessed and sold phenobarbital. On 27 May 1977, claimant's supervisor suggested that Vinson submit his resignation which he forthwith did. On 14 August 1977 claimant filed a claim for unemployment insurance benefits.

A claims deputy with the Employment Security Commission of North Carolina held a hearing on 30 August 1977 and rendered a decision that claimant voluntarily left his job without good cause attributable to the employer and therefore was not entitled to unemployment insurance benefits. Another hearing was held before an appeals deputy on 22 September 1977. The appeals deputy upheld the ruling of the claims deputy.

Claimant appealed the decision of the appeals deputy and a hearing was held before the Employment Security Commission of North Carolina on 21 March 1978. The ruling of the Commission further upheld the decisions of the claims deputy and the appeals deputy. From entry of the decision of the Employment Security Commission, claimant appealed to the superior court of Wake County. Upon hearing the appeal on 31 July 1978 in Wake Superior Court, Judge Smith entered judgment on 4 August 1978 reversing the decision of the Employment Security Commission. From this judgment, the Employment Security Commission appeals to this Court.

Jernigan & Edmonson, by Leonard T. Jernigan, Jr., for claimant appellee.

Howard G. Doyle, by Thomas S. Whitaker, for appellant.

MARTIN (Harry C.), Judge.

The Employment Security Commission entered findings of fact and conclusions of law denying claimant unemployment compensation because he left work voluntarily without good cause attributable to the employer. The superior court of Wake County ruled that the Employment Security Commission improperly applied the law to the facts, reversed its decision, and ordered the Commission to pay benefits to Vinson. We reverse.

The superior court concluded as a matter of law that claimant was unemployed because he left work voluntarily *with good cause attributable to his employer* (emphasis ours). The sole question for determination on this appeal is whether the findings of fact by the Employment Security Commission support this conclusion of law.

There were no exceptions to any of the findings of fact, either before the Commission or the superior court. The findings of fact are deemed to be supported by the evidence and are conclusive on appeal. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967); *Employment Security Com. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950); *Durland v. Peters, Comr. of Motor Vehicles*, 42 N.C. App. 25, 255 S.E. 2d 650 (1979); Gen. Stat. 96-15(i).

In interpreting the Employment Security statute, it must be given the meaning the legislature intended it to have. That intent is stated in the act itself and must be considered by the courts in construing sections of the statute which are not clear and explicit. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). This public policy is declared in N.C.G.S. 96-2.

> § 96-2. Declaration of State public policy.—As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons *unemployed through no fault of their own.* (Emphasis added.)

N.C.G.S. 96-14 sets out the following: "An individual shall be disqualified for benefits: (1) . . . if it is determined by the Commission that such individual is . . . unemployed because he left work voluntarily without good cause attributable to the employer." The claimant has the burden of proving that he is not so disqualified. *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544, 135 A.L.R. 929 (1941).

The court held that Vinson left work voluntarily and he made no exception to this finding. The court also held as a matter of law that Vinson left his work for good cause attributable to his

employer, the North Carolina Municipal Council, Inc. This conclusion is not supported by the findings of fact or the evidence. The findings of fact do not disclose any acts by the employer that constituted good cause for claimant to leave his work. "Attributable to the employer" as used in the statute means "produced, caused, created or as a result of actions" by the employer. The cause or reason Vinson voluntarily resigned and left his employment was that he had been arrested on six felony charges of possession and sale of phenobarbital and that he had admitted to his supervisor the charges were true. This was solely attributable to the claimant Vinson and not to his employer. Claimant is unemployed because of his own fault, and his unemployment is not within the declared public policy of the state.

Other jurisdictions considering this question have come to the same conclusion. *See Unemployment Compensation Board of Review v. Delker*, 24 Pa. Commw. Ct. 148, 354 A. 2d 59 (1976); *Matter of Mastro (Levine)*, 52 A.D. 2d 708, 382 N.Y.S. 2d 589 (1976); *Lane v. Dept. of Employment Security*, 134 Vt. 9, 347 A. 2d 454 (1975).

The conclusion of law by the court that claimant is entitled to benefits because he voluntarily left work with good cause attributable to his employer is erroneous. The judgment of the superior court is, therefore, reversed, and this matter is remanded to the superior court with direction to enter a judgment affirming the order of the Employment Security Commission.

Reversed and remanded.

Judges PARKER and MITCHELL concur.

Cox v. Funk

KENNETH D. COX AND WIFE, LINDA G. COX v. GUY FUNK AND WIFE, HARRIET B. FUNK

No. 7821SC705

(Filed 19 June 1979)

Contracts § 16— contract to purchase house—sale of buyer's house as condition precedent

Where defendants contracted to purchase plaintiffs' house, the contract provided for closing on 19 September 1977, one of the conditions of the purchase was that it be "Subject to Closing of house at 900 Hawthorne Rd. Sept. 15, 1977," this house being defendants' residence, "the subject to closing" provision was a condition precedent to the closing of the contract to purchase plaintiffs' house; therefore, summary judgment for defendants was proper in plaintiffs' action for specific performance of the contract for sale of the real property where it was clear from materials offered in support of the motion that the sale of defendants' house was not consummated prior to the closing date on plaintiffs' house.

APPEAL by plaintiffs from *McConnell, Judge*. Judgment entered 30 May 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 April 1979.

Plaintiffs appeal from the entry of summary judgment in favor of defendants. Plaintiffs instituted this action seeking specific performance of a contract for the sale of real property or, in the alternative, damages for breach of that contract. Defendants denied any breach and counterclaimed for recovery of their $500.00 deposit. Defendants then moved for summary judgment. Their affidavits in support of this motion tended to show that defendants contracted to purchase plaintiffs' house on 1 September 1977. The contract provided for closing on 19 September 1977. Plaintiffs agreed to sell and defendants agreed to purchase the home upon certain terms and conditions, one of which was "Subject to closing of house at 900 Hawthorne Rd. Sept 15, 1977," this house being defendants' residence. Prior to entering into this contract, defendants had contracted with Dr. and Mrs. Rupert Fox of Morganton to sell their home to the Foxes contingent upon the sale of the Foxes' property in Morganton. The closing date for that sale was 15 September 1977. On 15 September 1977, defendants were informed that the buyers of the Foxes' property were unable to finance their purchase. The defendants, therefore, could not close on their house as scheduled.

On 19 September 1977, defendants informed plaintiffs' broker that they were invoking the contingency clause in the contract since they were unable to close on their home on 15 September 1977. Dr. Fox's affidavit, submitted in support of defendants' motion, verified these events and stated that the contract to purchase defendants' house was terminated because the condition of closing the Morganton property on 15 September 1977 could not be fulfilled.

In opposition to defendants' motion, plaintiffs submitted the affidavit of Kenneth Cox, one of the plaintiffs, which stated that he received a call from defendants' broker on 15 September informing him that defendants' buyers were unable to arrange financing and would be unable to close that day. Defendants' broker requested a postponement of defendants' and plaintiffs' closing date until 28 September 1977. That evening, defendants visited plaintiffs, expressing their intention to fulfill the contract. On 17 September 1977, defendants again visited the plaintiffs' home and looked over the entire house once more. No problems were mentioned. On 19 September 1977, however, defendants called plaintiffs to cancel the contract because the Foxes did not have the money. Plaintiffs called defendants' broker who stated that some people were going to loan the money to the Foxes' buyers so that they could close. A written extension was prepared but defendants refused to sign. Plaintiffs were prepared to close on 28 September but were informed that the sale would not be consummated. Plaintiffs again listed their house on the market and sold it on 16 December 1977 for less than the contract price with the defendants.

Plaintiffs also offered the affidavit of the Foxes' broker. She stated that Dr. Fox requested an extension of time to close with defendants and defendants verbally agreed to postpone closing until 28 September. A written extension was drawn requesting postponement of closing until 6 October 1977. Defendants refused, for undisclosed reasons, to sign this extension and claimed that the verbal agreement was not binding. Dr. Fox was able to close during the week of 6 October but defendants refused.

Defendants supplied a supplemental affidavit of Dr. Funk wherein he stated that he had agreed to an extension of the closing date provided that he receive from Dr. Fox a guarantee that

the deal would be closed on the extended date without exception. Dr. Fox told him that he could not make this guarantee and, therefore, they agreed to cancel their contract. He refused to sign the written extension because it did not contain the requested guarantee.

The trial court, upon consideration of the pleadings, affidavits, briefs, and oral arguments, granted defendants' motion for summary judgment and ordered that their $500.00 deposit be refunded. From this judgment, plaintiffs appeal.

Robert D. Hinshaw, for plaintiff appellants.

Blackwell, Blackwell, Canady & Eller, by Jack E. Thornton, Jr., for defendant appellees.

VAUGHN, Judge.

The sole assignment of error in this case is directed to the entry of summary judgment in favor of defendants. Summary judgment is appropriate "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." Rule 56(c), North Carolina Rules of Civil Procedure. The crucial question in this case is whether the provision, "Subject to closing of house at 900 Hawthorne Rd. Sept 15, 1977" is a condition precedent to the closing of the contract to purchase the Coxes' house. If so, from the facts presented in the pleadings, affidavits, and exhibits, summary judgment was appropriately entered because it was apparent that the sale of the Funks' house would not be consummated prior to the closing date on the Coxes' home.

> "A condition precedent is a fact or event, 'occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.' " (Citations omitted.) *Parrish Tire Co. v. Morefield*, 35 N.C. App. 385, 387, 241 S.E. 2d 353 (1978).

In entering into a contract, the parties may agree to any condition precedent, the performance of which is mandatory before

they become bound by the contract. *Federal Reserve Bank v. Manufacturing Co.*, 213 N.C. 489, 196 S.E. 848 (1938). The contract "may be conditioned upon the act or will of a third person." *Federal Reserve Bank v. Manufacturing Co., supra*, at 493. Conditions precedent are not favored by the law and a provision will not be construed as such in the absence of language clearly requiring such construction. *Price v. Horn*, 30 N.C. App. 10, 226 S.E. 2d 165, *cert. den.*, 290 N.C. 663, 228 S.E. 2d 450 (1976).

We find it unquestionable that this clause was a condition precedent to the closing of the Cox house. No other reason can be given for its presence in the contract. Furthermore, it is a reasonable provision in light of the fact that the defendants would be forced to carry two mortgages if the Foxes' financing could not be arranged in time to close on the Funks' house before the closing of the contract in question.

It is apparent from the pleadings and affidavits introduced that the Funks' house could not be closed prior to the closing of the Coxes' even though there was a tentative agreement to extend the closing on the Cox house until 28 September. The written extension submitted to the defendants by the Foxes' brokers provided for closing on 6 October but this date was not guaranteed. We find that this condition precedent failed to materialize and, therefore, defendants did not breach a contractual duty.

Plaintiffs argue that time was not of the essence and that defendants were under a duty to make a good faith effort to sell their home within a reasonable time. These arguments do not affect the question at issue. Even if time were not of the essence, the condition precedent must still be fulfilled and the record indicates that it could not be fulfilled. Furthermore, there is no evidence to support a contention that the condition precedent failed due to an absence of good faith on the part of the defendants. We, therefore, affirm the trial court's order granting summary judgment in favor of defendants.

Affirmed.

Judges CLARK and CARLTON concur.

RAMIE E. HENDRIX v. J. L. GUIN, JR.

No. 7826DC886

(Filed 19 June 1979)

1. **Trespass § 7— action for forcible trespass—question of material fact**

The trial court erred in entering summary judgment for defendant landlord in plaintiff's action for forcible trespass where the evidence presented a question of fact as to whether the landlord pulled upon the screen door of plaintiff's apartment with such force so as to tear two hooks securing the door out of the door frame and then came through the screen door upon plaintiff's back porch and beat and banged upon the door to plaintiff's kitchen.

2. **Damages § 12.1; Trespass § 10— punitive damages for forcible trespass—sufficiency of complaint**

Plaintiff's allegations that defendant's conduct constituted "a willful, wanton, malicious, reckless, wrongful, rude and forcible trespass to plaintiff's rightful possession of the apartment," if supported by evidence, would permit the jury to consider an award of punitive damages.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 31 July 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 31 May 1979.

Ray Rankin, for plaintiff appellant.

James, McElroy and Diehl, by William K. Diehl, Jr., and David M. Kern, for defendant appellee.

VAUGHN, Judge.

Plaintiff filed this action against her former landlord for $2.95 actual damages, $4,950.00 punitive damages and for attorney fees. In her verified complaint, filed 29 November 1977, she alleged forcible trespass and a breach of her right to quiet enjoyment of the leased premises. More particularly, she alleged:

"5. On or about August 9, 1976, defendant telephoned plaintiff to inquire about payment of the August rent. Plaintiff informed defendant that her payment was delayed because of the refrigerator.

6. Promptly after that telephone conversation, on or about August 9, 1976, defendant came to the screen door to the back porch of plaintiff's apartment, which was hooked

with two (upper and lower) screen door hooks. Defendant beat, banged, and yanked upon said screen door with great force and violence, tore the hooks out of the door frame, came through the screened doorway into plaintiff's back porch and there beat and banged upon the glass door to plaintiff's kitchen. Defendant then went to the front door of plaintiff's apartment and beat and banged with all his might upon said front door, and he yelled 'You get the hell out of here.'

7. During the events complained of in paragraph 6 above, plaintiff was an 83 year old widow, inside said apartment and alone, and did not answer the door because of defendant's violence and hostile attitude, and because she was afraid, shocked and upset.

* * *

9. Defendant made no effort to repair the damage to the screen door, and plaintiff went to Plaza Hardware Store on Central Avenue, purchased two new screen door hooks for $0.45, and paid $2.50 labor to have those hooks installed on said screen door.

10. Defendant's actions complained of above constitute a willful, wanton, malicious, reckless, wrongful, rude and forcible trespass to plaintiff's rightful possession of the apartment, and a violation of her right to quiet enjoyment of the leased apartment."

Defendant moved for summary judgment, and his motion was supported by his affidavit. In his affidavit, defendant recited a history of almost continuous complaining by plaintiff about other tenants in the building and the condition of plaintiff's refrigerator. According to defendant, there was nothing wrong with the refrigerator but plaintiff, nevertheless, wanted a new one. As it relates to defendant's version of the alleged trespass, his affidavit is as follows:

"I had received rent checks from the other tenants but had not received a check from Mrs. Hendrix. I called her and inquired if there was some oversight on her part and she reported that because she did not have adequate refrigera-

tion she was not going to pay any more rent until I provided her with a new refrigerator and then she hung the phone up. I called her back and suggested that it was necessary to discuss this matter, whereupon she told me she did not have to talk to me and she hung up again. I continued to attempt to call her but got no answer. I then drove to the apartment building, going to the front door and ringing the front doorbell. She refused to answer. I am aware of Mrs. Hendrix being over 70 years of age and perhaps hard of hearing, so I went to her back door, knocked on the door, opened the back screen porch door and knocked on the wooden door to her kitchen, again receiving no response. I then went back to the front door to put a note on her door advising her that if the rent was not paid by the following Friday I would take the necessary action to have her evicted. However, before I could write the note and put it on the door, I heard her in the front portion of the apartment and I informed her verbally of my intentions. I then left the premises and she subsequently made her rent payment. I heard nothing more about the matter until she filed this lawsuit on November 29, 1977, approximately 15 months after mid-August 1976."

Plaintiff's responses to defendant's interrogatories were also made a part of the record. They indicated that plaintiff purchased new screen door hooks and paid to have them installed soon after the day she contends defendant tore the old hooks out of the door frame.

Plaintiff did not respond to defendant's motion by affidavit but did file a response in which she referred to the detailed factual allegations of the verified complaint. The court allowed defendant's motion for summary judgment and dismissed the action.

[1] We conclude that summary judgment was inappropriate in plaintiff's action for trespass. Summary judgment is proper only when the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(c), North Carolina Rules of Civil Procedure.

"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." Rule 56(e), North Carolina Rules of Civil Procedure. (Emphasis added.)

Here defendant's supporting affidavit is his own sworn statement disputing and explaining the sworn factual allegations of plaintiff's complaint. We conclude that factual issues were thus raised, notwithstanding that plaintiff did not respond with an affidavit (in which she would have probably repeated the factual allegations of the complaint). The court should not resolve issues of credibility on a motion for summary judgment. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). Here the affidavit is by defendant, a witness vitally interested in the result. It related to his own thoughts, motives and conduct, the knowledge of which was largely under his own control. Questions of credibility were thus raised which should not have been resolved in favor of the movant for summary judgment.

[2] A complaint stating a claim for trespass will also present a claim for the recovery of at least nominal damages. *Hutton v. Cook*, 173 N.C. 496, 92 S.E. 355 (1917). Plaintiff also alleges that the conduct of defendant constitutes "a willful, wanton, malicious, reckless, wrongful, rude and forcible trespass to plaintiff's rightful possession of the apartment." These allegations, if supported by evidence to the satisfaction of the jury, would permit the jury to consider an award of punitive damages. *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553 (1952); *Binder v. Acceptance Corp.*, 222 N.C. 512, 23 S.E. 2d 894 (1943).

> "Forceable trespass is the high-handed invasion of the actual possession of another, he being present and forbidding. When a person enters upon the actual possession of another and by his language or conduct gives the occupant cause to fear that he will inflict bodily harm if the person in possession does not yield, his entry is forceable in contemplation of law, whether he causes such fear by a demonstration of force such as to indicate his purpose to execute his pretensions, or by actual threats to do bodily harm, or by the use of

language which plainly implies a purpose to use force against any who may make resistance." *Anthony v. Protective Union*, 206 N.C. 7, 11, 173 S.E. 6 (1934).

The court has also held, however, that "[r]udeness of language, mere words, or even a slight demonstration of force against which ordinary firmness is a sufficient protection will not constitute the offense." *Anthony v. Protective Union, supra*, at 11.

The summary judgment in favor of defendant is reversed and the case is remanded so that plaintiff can present such proof as she might have to support her allegations as they relate to trespass. Plaintiff's prayer for a judgment for attorney fees is unfounded and should be dismissed.

Reversed.

Judges CLARK and CARLTON concur.

STATE OF NORTH CAROLINA v. DWAYNE ALLEN RHONEY, PATRICK JAY BRITTAIN, LARRY JAMES EVANS

No. 7925SC184

(Filed 19 June 1979)

Schools § 6; Constitutional Law § 8.1 — ordinance of county board of education — presence on school property — control by superintendent — no unconstitutional delegation

An ordinance enacted by a county board of education which made it unlawful for a person to be on school property after sundown unless that person was participating in an extracurricular activity previously approved by the superintendent was not unconstitutional as a delegation of legislative authority to the superintendent.

APPEAL by the State from *Riddle, Judge*. Judgment entered 10 October 1978 in Superior Court, BURKE County. Heard in the Court of Appeals 24 May 1979.

Pursuant to an authorizing act of the General Assembly, the Burke County Public Schools Board of Education (School Board) enacted an ordinance regulating pedestrian and vehicular traffic

on school property. Defendants were cited for violating this ordinance. The District Court ruled that the School Board ordinance was "an unconstitutional grant of legislative authority in that it purports to grant the Superintendent of Schools authority to make exceptions to the application of the ordinance," and dismissed the cases against the defendants. On appeal to Superior Court, the District Court judgments were affirmed. The State appeals.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

Byrd, Byrd, Ervin, Blanton and Whisnant, by Lawrence D. McMahon, Jr. and Robert B. Byrd, for defendant appellee Rhoney.

ARNOLD, Judge.

Ch. 533, H.B. 535 of the 1975 N.C. Session Laws authorizes the Burke County School Board to "by ordinance prohibit, regulate, divert, control, and limit pedestrian, animal, or vehicular traffic and other modes of conveyance on its campuses." The ordinance adopted by the School Board reads as follows:

> (a) It shall be unlawful for any person to go upon or remain upon any property owned, leased, rented, or otherwise in possession or control of the Burke County Public Schools Board of Education by motor vehicle (as defined by North Carolina General Statute Sec. 20-4.01) including "mini-bikes" and "go-carts", on foot, upon animals or by any other mode of conveyance, after sundown.
>
> (b) This ordinance shall not apply to employees of the Burke County Public Schools Board of Education while acting within the scope and course of their employment; nor shall this ordinance apply to any participant in an extracurricular activity upon school property, when such activity has been approved in advance by the Superintendent of Schools.

The District Court found this ordinance unconstitutional upon the single ground that it gives the Superintendent of Schools authority to make exceptions to the application of the ordinance, an apparent reference to the second phrase of paragraph (b). The State argues that the correctness of this finding is the sole issue before us on appeal, while defendants would have us consider every

possible ground of unconstitutionality of both the ordinance and the act of the General Assembly under which it was enacted.

The District Court Judge set out explicitly in his judgment the ground for his finding of unconstitutionality. At the hearing on appeal in Superior Court defendants attempted to argue other constitutional issues, but the Court, affirming the District Court, said:

COURT: Is this Judge Vernon's judgment?

MR. BYRD: Yes sir.

COURT: I'm affirming that judgment.

The court in its judgment found the ordinance to be "an unconstitutional grant of legislative authority, among other things, in that it purports and grants the Superintendent of the Schools authority to make exceptions to the application of the Ordinance." We believe it is clear that both the judgment and affirmance were grounded in the single constitutional issue of the authority of the Superintendent to make exceptions to the ordinance, and we decline to consider other constitutional issues which were not passed upon by the courts below. *See State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967).

The parties cite to us *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953), and *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969), for the proposition that while administrative powers may be delegated, legislative powers may not be. In both those cases, the challenged enactments delegated the power to determine whether a particular project was "in the public interest," and the Court held that these delegations of legislative power were invalid.

The situation in the case now before us is quite different, however. The ordinance makes presence on school property after sundown unlawful, but excepts from the operation of the ordinance "any participant in an extracurricular activity upon school property, when such activity has been approved in advance by the Superintendent of Schools." Although it is true that the Superintendent's decision as to whether a particular extracurricular activity is approved will have the effect of determining when it is unlawful to be upon school property, it defies common

sense to believe that he will approve or disapprove an activity simply for the purpose of making presence upon the school grounds illegal. Certainly considerations of benefit to the participants, appropriateness as a school function, etc. will be the deciding factors.

We find that this ordinance does not delegate either legislative or administrative power to the Superintendent, but instead defines when particular conduct will be unlawful by reference to an external standard, that is, whether a person is upon school property for an approved activity. This ordinance is not unconstitutional as a delegation of legislative authority to the Superintendent.

Reversed.

Judges MARTIN (Robert M.) and ERWIN concur.

EMMA L. JONES v. NATIONWIDE MUTUAL INSURANCE CO.

No. 784DC895

(Filed 19 June 1979)

Insurance § 68.7— automobile policy—medical payments coverage—funeral expenses—person using vehicle without permission of insured or spouse

Plaintiff was not entitled to recover under a provision of a medical payments endorsement of an automobile policy obligating the insurer to pay funeral expenses of each person accidentally killed while in the insured automobile provided it was being used "by any other person with the permission of the Policyholder or his spouse residing in the same household" where the evidence showed that the named insured allowed his son to use the automobile and told him not to let anyone else drive it, insured's son permitted plaintiff's intestate to use the automobile contrary to the insured's instruction, and plaintiff's intestate was killed while using the insured vehicle.

APPEAL by defendant from *Erwin, Judge*. Judgment entered 18 July 1978 in District Court, DUPLIN County. Heard in the Court of Appeals 1 June 1979.

The facts of this case are all either stipulated or uncontroverted by the parties: Plaintiff's intestate, her son Jerry, was

killed on 9 September 1973 when the 1967 Chevrolet in which he was riding collided with a tree. The car was owned by one Ralph Ostendorf and insured by defendant through a policy including $2000 of medical payment coverage.

Ralph Ostendorf had given his son Stephen permission to use the car, instructing him not to let anyone else drive it. Stephen allowed Jerry Jones to use the car without telling him of his father's restriction, and after the accident Stephen told plaintiff and others that Jerry had had permission to use the car. Jerry Jones' use of the car was not for Stephen's benefit in any way.

The funeral expenses for Jerry Jones were $1595. Plaintiff demanded payment of them under the medical payment coverage of the Ostendorf policy, and defendant refused to pay.

Defendant's motion for a directed verdict was denied. The trial court, sitting without a jury, found that the Chevrolet was being operated with the permission of the named insured at the time of the collision, and awarded plaintiff $1595. Defendant appeals.

Kornegay & Rice, by John P. Edwards, Jr., for plaintiff appellee.

Jeffress, Morris & Rochelle, by Thomas H. Morris, for defendant appellant.

ARNOLD, Judge.

Defendant contends that this action does not involve the financial responsibility laws of the state, but instead is a claim based upon a contract. Plaintiff's position is that G.S. 20-279.21(b)(2) controls.

G.S. 20-279.21 defines "motor vehicle liability policy." Subsection (b)(2) reads in pertinent part:

> Such owner's policy of liability insurance . . . [s]hall insure the person named therein and any other person . . . using any such motor vehicle . . . with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle. . . .

Plaintiff argues that Jerry Jones was a "person in lawful possession" and that, accordingly, the statute applies to make him an insured. However, even if Jerry Jones was in lawful possession of the Ostendorf automobile, a question we do not decide, the statute would make him an insured under the owner's policy only "against loss from the liability imposed by law for damages." The coverage at issue here is medical payments coverage, which does not protect the insured against his liability to others, but which instead pays to the insured or certain named others enumerated expenses—medical, nursing, funeral, etc.—associated with an accident. This coverage is not required by G.S. 20-279.21, and by the terms of subsection (g),

> [a]ny policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section.

Defendant is correct that this action is a claim based upon a contract, the terms of which control.

By the medical payments endorsement of the policy issued to Ralph Ostendorf, defendant is obligated to pay for the funeral services of "each person whose . . . death was accidentally sustained while in . . . the described automobile, provided it was, at the time, being used by the Policyholder, by a resident of the same household or by any other person with permission of the Policyholder or his spouse residing in the same household." The trial court found as fact that Jerry Jones was operating the Chevrolet with the permission of the named insured, and defendant argues that there is no evidence to support this finding.

Ralph Ostendorf testified by deposition that when he loaned the car to his son Stephen he "[d]efinitely told him not to loan the car out and not to let anybody else drive or use it." Ostendorf never gave Jerry Jones permission to use the automobile. Stephen testified that his father loaned him the car, and "I was not to let anybody else use it or loan it out." Stephen let Jerry

Jones use the car without telling him of his father's restriction. After the accident Stephen told several people "that Jerry had my permission to use the car. I told them that Jerry had permission to drive the car."

There is no evidence in the record that Jerry Jones had the permission "of the Policyholder or his spouse residing in the same household" to use the automobile; all the evidence is to the contrary. It may be that Jones thought he had permission, but that is not enough. The policy applies not the subjective test, but the objective test: did the person *in fact* have the permission of the policyholder or his spouse? The finding of fact that Jerry Jones was operating the automobile with the permission of the named insured is unsupported by the evidence and cannot stand.

Defendant's argument is that because the plaintiff failed to establish a right to recover, defendant was entitled to a directed verdict. As plaintiff points out, defendant's motion for a directed verdict should have been denominated a motion for involuntary dismissal under Rule 41(b), since this action was tried by the court without a jury. An involuntary dismissal under Rule 41(b) is to be granted if the plaintiff has shown no right to relief or if she has shown a right to relief but the trial court as trier of fact determines that defendant is entitled to a judgment on the merits. *Airport Knitting, Inc. v. King Kotton Yarn Co., Inc.*, 11 N.C. App. 162, 180 S.E. 2d 611 (1971). By denial of defendant's motion and entry of judgment for plaintiff the trial court here has concluded by implication that plaintiff presented sufficient evidence to show a right to relief, but this conclusion is not supported by findings of fact based on competent evidence. To establish a right to recover under the Ostendorf policy, it was necessary for plaintiff to show compliance with the terms of the policy, that is, permission of the policyholder or his spouse. As we have set out above, she has not done so. Defendant is entitled to a judgment in his favor.

Since we find for defendant, we need not consider his second assignment of error, going to the alleged failure of the trial court to set out findings of fact and conclusions of law to support its judgment. The decision of the trial court is

Reversed.

Judges MARTIN (Robert M.) and ERWIN concur.

IN THE MATTER OF THE APPEAL OF MESSRS. LINDSAY T. AND KENNETH C. WAGSTAFF FROM THE VALUATION OF CERTAIN OF THEIR PROPERTY BY THE PERSON COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1976

No. 7810SC889

(Filed 19 June 1979)

1. **Taxation § 25.4— ad valorem tax assessment—presumption of correctness**

Ad valorem tax assessments are presumed to be correct and in order to rebut this presumption the taxpayer must show that either (1) an arbitrary method of valuation was used, or (2) an illegal method of valuation was used and the resulting assessment substantially exceeded the true value in money of the property.

2. **Taxation § 25.4— ad valorem taxes—valuation of property—mass appraisal—no arbitrary method**

The method used by a county in revaluation of real property for ad valorem tax purposes was not arbitrary where the valuation was accomplished by means of a mass appraisal with land being divided into categories and subcategories by soil quality related to location, then assigning a value range to each subcategory by reference to recent sale prices of land, since G.S. 105-317(b)(1) clearly contemplates the use of a schedule for real estate valuation, and the fact that independent valuations of each tract might be more accurate than a mass appraisal does not make the county's method arbitrary; furthermore, the fact that the expert who prepared the county's valuation schedule had no personal knowledge of the county's soil classifications did not render the schedule arbitrary, since the expert obtained a soil classification map of the county from the ASCS office, the county agent helped him with land classifications, and the expert himself inspected each of petitioners' tracts of land before classifying them.

3. **Taxation § 25.4— ad valorem taxes—valuation of property—no illegal method**

Petitioners' contention that the valuation method chosen by a county to revaluate all real property for ad valorem tax purposes was illegal because it failed to take into account the ability of petitioners' property to produce income was without merit.

APPEAL by taxpayers from *David I. Smith, Judge.* Order dated 1 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 1 June 1979.

Pursuant to G.S. 105-286(a)(1), real property in Person County was reappraised for tax purposes by the Person County Board of

Equalization and Review for 1976 (County Board). Petitioners appealed the County Board's appraisals of five tracts of their land to the Property Tax Commission sitting as the State Board of Equalization and Review (State Board), which upheld the county's valuations. Pursuant to G.S. 150A-43, petitioners then appealed to Superior Court, where the State Board's decision was affirmed. From the order of the Superior Court, petitioners appeal.

Jackson & Hicks, by Alan S. Hicks, for petitioner appellants.

James W. Tolin, Jr. for respondent appellees.

ARNOLD, Judge.

[1] Ad valorem tax assessments are presumed to be correct, and in order to rebut this presumption the taxpayer must show that either (1) an arbitrary method of valuation was used, or (2) an illegal method of valuation was used *and* the resulting assessment substantially exceeded the true value in money of the property. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). Petitioners first contend that the valuation method was arbitrary.

[2] Steve Whitaker, who is stipulated to be an expert on ad valorem tax valuation of real property, testified before the State Board that he had supervised the 1976 Person County revaluation, which was done by mass appraisal. The valuation schedule required by G.S. 105-317(b)(1) was constructed by dividing the three large categories of cropland, permanent pasture, and woodland into sub-categories by soil quality (good, fair, poor) related to location (paved road, dirt road, rear), then assigning a value range to each sub-category by reference to recent sale prices of land, for example

Cropland

	Good	Fair	Poor
Paved Road	$550-600	$500-550	$450-500
Dirt Road	$500-550	$450-500	$400-450
Rear	$450-500	$400-450	$350-400

Additional values were added where appropriate for road frontage and crop allotments.

Actual appraisals were made by determining the soil quality of each particular parcel by reference to a 1974 soil classification map obtained from the ASCS office, and placing each parcel in

the appropriate sub-category. As required by G.S. 105-317(b)(2), each of petitioners' tracts was inspected by an appraiser.

Petitioners seek to show that this valuation method was arbitrary by the testimony of Jess Sweely, a realtor. Sweely inspected the tracts in a vehicle and on foot, checked for accuracy a soil map of the properties prepared in 1967 by the Soil Conservation Service, and reached an appraisal figure for the five tracts some $168,000 lower than the county's figure. Petitioners also testified that these tracts are hilly and rocky and the soil is shallow and not good for crops.

We find here no evidence of arbitrariness in the county's valuation method. G.S. 105-317(b)(1) clearly contemplates the use of a schedule for real estate valuation, and G.S. 105-283 requires only that "[a]ll property, real and personal, shall *as far as practicable* be appraised or valued at its true value in money." (Emphasis added.) Whitaker testified that mistakes will occur from time to time in a mass appraisal, but the fact that independent valuations of each tract might be more accurate than a mass appraisal does not make the county's method arbitrary. Considerations of practicality must enter into the choice of method. Nor have petitioners shown us that the county's valuation schedule was applied arbitrarily to their land.

Petitioners also argue that Person County's schedule was arbitrary because it was prepared and administered by Whitaker, who testified that he had no personal knowledge of Person County soil classifications. They rely upon *In Re Trucking Co.*, 281 N.C. 375, 189 S.E. 2d 194 (1972), in which the Court found an appraisal invalid as hearsay. That case is easily distinguishable from the one before us, however. In *Trucking Co.* the appraisers gave as the value of the property amounts given to them by third parties. Neither appraiser purported to have a basis for an opinion of his own as to the value of the property, and neither had inspected any of the property. Here, Whitaker testified that he obtained a soil classification map of the county from the ASCS office and that the County Agent helped him with land classifications because he was unfamiliar with the local types of soil. However, it was not a third party who established the values for the schedule sub-categories, and Whitaker testified that he himself inspected each of petitioners' tracts of land before it was classified. The

Court in *Trucking Co.*, holding that the appraisers could not give another's opinion as the value of the property, declined to find impropriety in using information obtained from others to assist in making appraisals. "[A]ppraisals are not required to be based upon evidence competent in a judicial proceeding." *Id.* at 389, 189 S.E. 2d at 203. We do not find the county's valuation method to be arbitrary upon this ground.

[3] Petitioners argue next that the valuation method chosen was illegal, because it failed to take into account the ability of the property to produce income. G.S. 105-317(a)(1) instructs the appraiser to consider, among other things, "adaptability for agricultural, timber-producing . . . or other uses; past income; [and] probable future income." Petitioners have not shown us how the county appraisal failed to take these factors into account. The record reveals that the county appraisers considered soil quality and whether the land was cropland, pasture, or woodland, and set varying land values on this basis. They also took into consideration that part of the land was swampland. We believe the potential uses and income of the land were adequately considered.

Finally, we find no merit in petitioners' argument that the record as a whole does not reveal competent, material and substantial evidence, as required by G.S. 150A-51(5), to support the county's valuation. The petitioners have failed to carry their burden of proof. Accordingly, the order of the Superior Court is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

GERALDINE JORDAN BLACK v. STANDARD GUARANTY INSURANCE COMPANY

No. 7826DC696

(Filed 19 June 1979)

1. Attorneys at Law § 7.5— action against insurer—attorney fees as part of costs—motion—findings

A plaintiff seeking an award of attorney fees under G.S. 6-21.1 does not have to plead for such an award as a separate claim in the complaint but may

properly move for an award of attorney fees after a verdict has been returned in its favor; nor is it required that the trial judge make separate findings and conclusions in accordance with G.S. 1A-1, Rule 52(a) to support the award of attorney fees.

2. Attorneys at Law § 7.5— finding of unwarranted refusal by insurer to pay claim—no abuse of discretion

In an action upon an automobile collision insurance policy, the trial court did not abuse its discretion in finding that defendant insurer had unwarrantedly refused to pay plaintiff's claim and in awarding attorney fees to plaintiff under G.S. 6-21.1 although defendant insurer offered evidence, had it been believed, that would have been a defense to plaintiff's claim.

3. Attorneys at Law § 7.5— attorney fee of $1,200—no abuse of discretion

The trial court's award to plaintiff of an attorney fee of $1,200 under G.S. 6-21.1 was not so low so as to constitute an abuse of discretion where the court found that plaintiff's attorney had reasonably expended 65 hours on plaintiff's case.

APPEAL by defendant from *Saunders, Judge*. Judgment entered 2 March 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals on 21 May 1979.

The plaintiff instituted this lawsuit to recover from the defendant, as insurer, for damages to her automobile allegedly caused by a hit and run driver. At trial, plaintiff introduced evidence tending to show that after her car had been damaged, she contacted her insurance agent who had the loss adjusted by an independent claims adjuster; that she then had her car repaired at a body shop, and upon completion of the repairs she was informed for the first time that her insurance policy had been cancelled prior to the accident; and that she had never received any cancellation notice from her insurance carrier. Defendant presented evidence tending to show that it had properly mailed the cancellation notice to the plaintiff; that to its knowledge the policy had been properly cancelled; and that it did not authorize anyone to act as its agent in adjusting her loss or repairing her automobile. The jury found that defendant had breached its insurance contract with the plaintiff, and awarded the plaintiff damages in the amount of $714.68.

After the verdict was returned, plaintiff made a motion for a reasonable attorney fee under G.S. § 6-21.1. On 27 February 1978, after a hearing, the court entered an Order containing the conclusion that the defendant "unwarrantedly refused to pay the claim

which constituted the basis of [plaintiff's] suit." Plaintiff's counsel was awarded a fee of $1,200.00 to be taxed as a part of the costs. Defendant appealed.

Sanders, London & Welling, by Charles M. Welling, and Samuel A. Wilson III for plaintiff appellee.

Helms, Mulliss & Johnston, by W. Donald Carroll, Jr., for defendant appellant.

HEDRICK, Judge.

This appeal concerns only the judge's award of a "reasonable attorney fee" to plaintiff's counsel under G.S. § 6-21.1, which provides:

> *Allowance of counsel fees as part of costs in certain cases.*—In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as part of the court costs.

The defendant does not contest on appeal any aspect of the trial resulting in the verdict for plaintiff. The defendant's sole contention, as stated in its brief, is that "[t]he trial court abused its discretion in awarding attorney's fees to plaintiff where the trial court's findings do not support, and where there are no facts in the record to support, a finding that Standard Guaranty Insurance Company made an unwarranted refusal to pay the plaintiff's claim." The essence of defendant's argument is that the trial court is required to make findings of fact, supported by competent evidence, to support a conclusion that there was an "unwarranted refusal" on the part of the insurance carrier to pay the claim, and that, considering the record as a whole, there are no

facts in it to support such a conclusion. Defendant also argues that plaintiff is not entitled to an award of counsel fees since she failed to allege in her complaint any basis to support such an award.

[1] The defendant has misconstrued the nature of the relief provided by G.S. § 6-21.1. Defendant would require that a plaintiff seeking attorney fees under the statute affirmatively plead for such an award as a separate claim in the complaint, and would require the trial judge to make separate findings and conclusions to support an award of attorney fees in accordance with G.S. § 1A-1, Rule 52(a). This is not required by the statute. The plaintiff may properly move for an award of attorney's fees after a verdict has been returned in its favor. *See Callicutt v. Hawkins*, 11 N.C. App. 546, 181 S.E. 2d 725 (1971). Furthermore, "[t]he allowance of counsel fees under the authority of G.S. § 6-21.1 is, by express language of that statute, in the discretion of the presiding judge." *Hubbard v. Lumbermen's Mutual Casualty Co.*, 24 N.C. App. 493, 498, 211 S.E. 2d 544, 547, *cert. denied*, 286 N.C. 723, 213 S.E. 2d 721 (1975); *Callicutt v. Hawkins*, 11 N.C. App. at 548, 181 S.E. 2d at 727. *See also Harrison v. Herbin*, 35 N.C. App. 259, 241 S.E. 2d 108, *cert. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978); *Brady v. Smith*, 18 N.C. App. 293, 196 S.E. 2d 580 (1973).

[2] In the present case, after the jury had returned a verdict in its favor, plaintiff moved for attorney fees pursuant to G.S. § 6-21.1, and the court made the finding that the defendant insurance carrier had unwarrantedly refused to pay the claim. While the defendant offered evidence that, had it been believed, would have been a defense to plaintiff's claim, the jury obviously was unpersuaded. In the face of the unchallenged verdict and judgment for plaintiff, we cannot say Judge Saunders abused his discretion in holding that there was an unwarranted refusal by the insurance company to pay plaintiff's claim and awarding a fee to plaintiff's counsel.

[3] Finally, we consider plaintiff's cross-assignment of error in which she contends that the amount of the attorney fee awarded was inadequate and constituted an abuse of discretion. The amount of the attorney fee allowed, like the award of the fee itself, is a matter largely within the discretion of the presiding judge. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168, *cert.*

denied, 288 N.C. 240, 217 S.E. 2d 664 (1975). In the Order allowing a fee of $1,200.00 to plaintiff's attorney, the judge found as a fact "that Plaintiff's counsel expended at least 65 hours in this cause; [and] that the time was a reasonable time required to properly represent the Plaintiff." We cannot say that the amount awarded is so low as to constitute an abuse of discretion, and the plaintiff's cross-assignment of error is overruled.

For the reasons stated, the judgment appealed from is affirmed.

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

PERCY H. REAMS, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER LIBERTY MUTUAL INSURANCE COMPANY, CARRIER DEFENDANTS

No. 7810IC829

(Filed 19 June 1979)

Master and Servant § 55.1— workmen's compensation—different task performed by employee—no accident

The mere fact that plaintiff was performing a task for his employer which involved a greater volume of lifting than his ordinarily assigned task could not be taken as an indication that an injury he sustained while performing the work was the result of an accident within the meaning of the Workers' Compensation Act.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 8 May 1978. Heard in the Court of Appeals 29 May 1979.

The plaintiff instituted this action to recover benefits under the Workers' Compensation Act [hereinafter "Act"] for a back injury he suffered while working for the defendant. A Deputy Commissioner of the North Carolina Industrial Commission conducted a hearing concerning the plaintiff's claim and concluded that the plaintiff was not entitled to an award under the Act. The plaintiff appealed to the full North Carolina Industrial Commission [hereinafter "Commission"]. The Commission affirmed the opinion

of the Deputy Commissioner and denied the plaintiff's claim. The plaintiff appealed.

During the hearing before the Deputy Commissioner, the plaintiff presented evidence in support of his claim which tended to show that he had been employed by the defendant for approximately 22 years. He had worked for the defendant as a "head grader" for approximately 8 years prior to his injury. The plaintiff's duties as a head grader consisted of lifting bales of cloth weighing 70 to 80 pounds, placing them on a measure graft, inspecting the cloth, and removing the bales from the measure graft. The plaintiff ordinarily inspected no more than 30 bales of cloth per day.

On 29 March 1977, one of the defendant's other employees was absent from work and the plaintiff was asked to perform the absent employee's duties. Those duties consisted of removing the bales of cloth from an inspection table, carrying them three to fifteen feet, and placing them on a pallet. The plaintiff performed those duties for approximately two hours during which time he handled approximately 100 bales of cloth. The plaintiff then informed his supervisor that he could no longer perform the job. He later discovered that he had suffered a back injury in the form of a ruptured intervertebral disc.

Dill, Exum, Fountain & Hoyle, by William S. Hoyle, for plaintiff appellant.

Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Kaylor, for defendant appellees.

MITCHELL, Judge.

In order to be compensable under the Workers' Compensation Act, G.S. 97-1 *et seq.*, an injury must have resulted from an accident. The mere fact of injury does not of itself prove that an accident occurred. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968); *Lawrence v. Mill*, 265 N.C. 329, 144 S.E. 2d 3 (1965). The terms "injury" and "accident," are not, therefore, synonymous as employed in the Act. Instead, an accident as referred to in the Act is "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 110-111 (1962).

The facts in the present case as established by the plaintiff's own testimony are that:

> There was not anything different about the bale I was lifting when I felt the pain as opposed to any other bales. They were all about the same, the length and weight. When I felt this pain, there was not anything about the way I was moving the bale as opposed to the other bales I was moving on the cloth table. Like I said, one bale did not do it. It was volume.

Based on this testimony by the plaintiff, the Commission made a "finding of fact" that the injury to the plaintiff's back "did not result from an accident as the word 'accident' is defined [in the Act], as there was no interruption of the plaintiff's work routine, and he was merely performing his usual and normal duties in the customary manner." That portion of the "finding of fact" stating that the injury did not result from an accident as defined in the Act comprised a conclusion of law and not a finding of fact. *See Beamon v. Grocery*, 27 N.C. App. 553, 219 S.E. 2d 508 (1975). The Commission apparently recognized this when it later made a conclusion of law that the plaintiff did not "sustain an injury by accident" and was not entitled to benefits under the Act. Any confusion in this regard, however, merely resulted in unnecessary surplusage being included in one of the Commission's findings and was in no way harmful to the plaintiff.

The plaintiff contends that the Commission erred in finding and concluding that his injury was not the result of an accident. He concedes that, in order to establish that type of injury produced by a "fortuitous cause" which will be found to be an accident, he must have shown that his injury occurred as a result of an interruption of his usual work routine or the introduction of some new circumstance not a part of his usual work routine. The plaintiff goes on, however, to advance a well-reasoned argument to the effect that his assignment to a task different than that he was accustomed to performing and which required him to lift an increased volume of bales of cloth amounted to an interruption of his usual work routine and the introduction of a new circumstance not a part of his usual work routine. In support of this contention, counsel for the plaintiff cites numerous cases decided by our Supreme Court all of which involved fact situations in which the

claimant was working at the same task to which he was generally assigned by his employer. The plaintiff would have us conclude that the fact that he was performing a different task which involved lifting a greater volume of bolts of cloth than required in his generally assigned task caused an interruption of his usual work routine and the introduction of a new circumstance not a part of the usual work routine.

We do not think that the mere fact that the plaintiff was performing a task for his employer which involved a greater volume of lifting than his ordinarily assigned task may be taken as an indication that an injury he sustained while performing the work was the result of an accident within the meaning of the Act. The plaintiff was still performing a job in the ordinary course of business "in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings." *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 250, 196 S.E. 2d 571, 572 (1973). All of the evidence indicates that his injury was not caused by any particular movement, exceptional weight or other circumstance which would constitute an "unlooked for and untoward event" or a "fortuitous cause." The findings and conclusions of the Commission were, in this regard, borne out by the uncontested facts as put forth in the plaintiff's testimony. Therefore, the order of the Commission concluding that the plaintiff did not sustain an injury by accident within the meaning of the Act and denying recovery by him must be

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

BERTA MAE BRANNON, PLAINTIFF-EMPLOYEE v. WESTCHESTER ACADEMY, DEFENDANT-EMPLOYER AND LUMBERMENS MUTUAL INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 7810IC837

(Filed 19 June 1979)

Master and Servant § 62— workmen's compensation—employee leaving work—fall on slippery street—no accident arising out of employment

Plaintiff's injury did not arise out of and in the course of her employment and therefore was not compensable under the Workmen's Compensation Act where the evidence tended to show that plaintiff fell on a public street made slippery by snow after she had completed her work shift and after she had left her employer's premises for the day; plaintiff was not performing any of the duties of her employment or anything else that would have benefited her employer; and the hazard presented by the slippery condition of the street could not be traced to her employment.

APPEAL by defendants from an order of the North Carolina Industrial Commission entered 19 July 1978. Heard in the Court of Appeals 29 May 1979.

The Commission's findings of fact are, in part, as follows:

"1. Defendant employer is a private institution engaged in delivery of educational services for hire. The premises is located on a hill in a residential district, access to which is by public street. Pine Tree Lane dead ends on the premises. Cascade Drive is the means of access to Pine Tree Lane. Access to one end of Cascade Drive is by way of Abbotts Creek Church Road. No part of defendant employer's premises borders on Abbotts Creek Church Road. No part of the premises borders on that portion of Cascade Drive that connects Abbotts Creek Church Road and Pine Tree Lane.

2. Claimant was cook for defendant employer on 24 January 1977. Her hours of employment were nine a.m. to two-thirty p.m.

3. Claimant's husband usually drives her to and from work via Abbotts Creek Church Road, Cascade Drive and Pine Tree Lane. He lets her out and picks her up at defendant employer's premises in the parking lot.

4. Snow fell after claimant got to work on 24 January 1977. School was let out early. The bus or buses could not reach the premises because of the snow. The bus stop was temporarily transferred from the premises to the intersection of Abbotts Creek Church Road and Cascade Drive. The children were escorted to the temporary bus stop by members of defendant employer's staff.

5. Claimant completed her duties and left work at approximately two-fifteen p.m., the usual time. Her husband had attempted but was unable to negotiate the hill between Abbotts Creek Church Road and Pine Tree Lane. He parked his car on Cascade Lane closer to Abbotts Creek Church Road than Pine Tree Lane.

6. Don Farlow, Head Master of defendant employer, escorted claimant and a co-employee from the premises along Pine Tree Lane and Cascade Drive toward claimant's husband's automobile. Claimant slipped in the snow and fell on Cascade Drive halfway between Pine Tree Lane and Abbotts Creek Church Road. The fall occurred between the premises and the temporary bus stop. The fall also occurred before claimant reached the safety of her husband's vehicle."

The Commission concluded that the fall was an accident arising out of and in the course of her employment and made an award based on the injuries plaintiff sustained in the fall.

Brinkley, Walser, McGirt, Miller & Smith, by D. Clark Smith, Jr., for plaintiff appellee.

Richard L. Vanore, for defendant appellants.

VAUGHN, Judge.

Certain of defendants' assignments of error were directed to the findings of fact and have merit. For example, finding of fact No. 3 is not only unsupported by the record but is contrary to plaintiff's own testimony. Plaintiff testified that she usually drove her car to work and parked in defendant's parking lot. On the day of the accident, however, she had her husband take her to work because snow had been predicted. Her husband returned to pick her up after work that afternoon and was walking beside her

when she fell on a public street some distance from her place of employment.

We need not, however, discuss whether all of the other findings are supported by evidence. We conclude that even the facts as found do not support the conclusion that plaintiff's accident arose out of and in the course of her employment.

The accident occurred after plaintiff had completed her work shift and after she had left her employer's premises for the day. It occurred on a public street over which her employer had no control. She was not performing any of the duties of her employment or anything else that would have benefited her employer. The hazard presented by the slippery condition of the street cannot be traced to her employment. It was certainly not created by the employer. It was not a risk connected with her services as an employee. Any member of the general public undertaking to walk down that street under the same circumstances would have been subjected to the identical hazard. The accident, therefore, neither arose out of the employment nor occurred in the course thereof. *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751 (1943); *Taylor v. Shirt Co.*, 28 N.C. App. 61, 220 S.E. 2d 144 (1975), *cert. den.*, 289 N.C. 302, 222 S.E. 2d 703 (1976).

Plaintiff strongly relies on *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957). In that case, a thirteen-year-old boy was killed while crossing the road to his home after laboring at his employer's barn. There, however, the employee lived on his employer's farm. The farm was located on both sides of a highway. The house was furnished to the employee's family rent free so that the members of the family would be available for farm labor as the need arose. At the time of the accident, he was employed to go to the barn several times a day and feed the livestock. At other times of the year, he would be employed to work in the fields. The Court said:

> "It would seem unrealistic and unduly restrictive to say that deceased would be in the course of his employment while in a particular field where he was directed to perform labor on a particular day but not while going back and forth across the farm between the area of the house and such field.

The feeding of the livestock was just as much a part of the operation of the farm as tending the crops. In respect of the particular work he was employed and directed to do when fatally injured, the circumstances impel the conclusion that the real nature of his employment was to go to the barn and feed the livestock. The feeding of the livestock being a part of the operation of the farm as a whole, the trip (across the farm) between the area of the house and the barn may reasonably be considered within the terms of his employment. So considered, the period of his employment commenced when he left the area of his house for the barn; and, in the absence of evidence of deviation, terminated upon his return from the barn to the area of the house. The fact that he was injured while in such employment and *on a mission for his employer* affords sufficient factual basis for the determination that his injury arose out of and in the course of his employment.

It is noteworthy that the public highway was neither necessary nor used as a means of access to the barn, *i.e.*, in the sense of travel *along* the highway. The fact that he had to *cross* the highway on his way to and from the barn constituted an additional hazard of his employment; for if the house and barn had not been separated by the public highway, means of access between the area of the house and the barn would have been equally available and safer." *Hardy v. Small, supra*, at 586. (Emphasis added.)

Plaintiff also relies on *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953), where the decedent, a cemetery keeper for the city, was killed as he crossed a street on the way to a funeral home. It was the employee's usual custom to walk to the funeral homes in the city each evening in order to ascertain if graves would need to be dug, funerals arranged and cemetery lots sold. On the evening in question the decedent set out on his usual round, but in crossing a street on the way to the funeral homes, he was struck by an automobile and killed. The employee was thus in performance of his duty as he crossed the street en route to a funeral home on a mission for his employer.

In the case at bar, the employee was not on a mission for her employer. She was travelling along a public street on the personal mission of returning home after her workday had ended.

The order and award are reversed.

Reversed.

Judges CLARK and CARLTON concur.

CHARLES JACKSON HARPER v. ELBERT L. PETERS, JR., COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES

No. 788SC891

(Filed 19 June 1979)

Arrest and Bail § 3.8; Automobiles § 2.4— reasonable grounds to arrest for drunk driving—refusal to take breathalyzer test—revocation of license

The trial court erred in failing to conclude that an arresting officer had reasonable grounds to believe that petitioner had operated a motor vehicle upon a public highway in this State while under the influence of intoxicating liquor where the court found that the officer first observed petitioner seated behind the wheel of a truck parked on the shoulder of the highway; petitioner admitted driving the truck when questioned by the officer; the officer detected an odor of alcohol about the person of petitioner and requested him to submit to four performance tests; and petitioner performed the tests in a wobbly manner and failed to touch his nose when performing finger to nose tests. Therefore, petitioner's driver's license was properly revoked for his refusal to submit to a breathalyzer test after his arrest.

APPEAL by respondent from *Strickland, Judge*. Judgment entered 20 July 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 1 June 1979.

Upon receipt of affidavits from the arresting officer and the breathalyzer operator that petitioner had willfully refused to submit to a chemical test on 2 October 1977, his driving privileges were revoked by respondent for a period of six months. Petitioner requested and received an administrative hearing. The results were unfavorable to him. Petitioner sought judicial review. A hearing was held, and the trial court reversed the revocation order of respondent, from which respondent appealed.

Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill, for the State appellant.

Barnes, Braswell & Haithcock, by Michael A. Ellis, for petitioner appellee.

ERWIN, Judge.

This case on appeal presents one question for our determination:

> "Did the trial court err in concluding that the arresting officer did not have reasonable grounds to believe that the petitioner had been operating a motor vehicle upon the public highways while under the influence of intoxicating liquor and that, as a result thereof, the order of the respondent complained of is not justified in fact and in law?"

We answer, "Yes," and vacate the judgment entered by the trial court.

G.S. 20-16.2(a) provides in part:

> "(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered."

Petitioner contends that the arresting officer did not have reasonable grounds to believe that he had been operating a motor vehicle upon a public highway; therefore, the judgment entered by the trial court was proper.

The trial court found the following facts:

"2. That the arresting officer, Trooper Bass, was called to the scene of a disturbance and first observed the petitioner seated behind the wheel of a parked truck. The truck was parked on the paved portion of the highway about a foot from the white right side line.

3. That the petitioner admitted driving the truck when questioned by Trooper Bass, but Trooper Bass did not stop the motor vehicle which was already on the shoulder of the road when Trooper Bass arrived.

4. That Trooper Bass detected an odor of alcohol about the person of the petitioner and requested him to submit to four performance tests which he performed in a wobbly manner and touched his top lip on finger to nose test with right finger and missed with his left finger.

5. The petitioner was forthwith taken before Trooper John D. Booth of the North Carolina State Highway Patrol. Trooper Booth was duly licensed and authorized to administer a chemical test of breath on October 2, 1977.

6. In the presence of Trooper Booth, the petitioner was requested by Trooper Bass, the arresting officer, to submit to a chemical test of breath.

7. That Trooper Booth, being duly authorized to administer a chemical test of breath, informed the petitioner verbally and in writing, furnishing a signed document setting out all the petitioner's rights under the provisions of GS 20-16.2(a).

8. The petitioner advised that he did not want to take the test and refused to submit to such test telling Trooper Booth that he had not done anything wrong."

G.S. 20-4.01(25) provides: "Operator.—A person in actual physical control of a vehicle which is in motion or which has the engine running."

In *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971), Justice Sharp (now Chief Justice), speaking for the Supreme Court, stated:

> "Probable cause and 'reasonable ground to believe' are substantially equivalent terms. 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. . . .'"

See State v. Streeter, 283 N.C. 203, 195 S.E. 2d 502 (1973).

The court's findings of fact require a different conclusion of law and order than the one entered by it. The trial court should have concluded that the arresting officer had reasonable grounds to believe that petitioner had operated the motor vehicle in question on a public highway in this State while under the influence of intoxicating liquor.

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."

The judgment entered by the trial court is vacated, and the case is remanded for the trial court to reinstate respondent's order of revocation and to vacate all restraining or stay orders issued.

Judges MARTIN (Robert M.) and ARNOLD concur.

MALLIE HINTON PRICE, JR. v. RACHEL B. PRICE

No. 7810DC799

(Filed 19 June 1979)

Divorce and Alimony § 25.1— child custody—mental illness of mother—improper ground for awarding custody to father

In a controversy between husband and wife for the custody of minor children of the marriage, it is error for the trial court to award custody to the husband as a matter of law on the sole ground that the wife has prior to that time been adjudged mentally incompetent; rather, G.S. 50-13.2(a) requires a full factual determination of all the circumstances in the case before a proper order for custody may be entered by the court.

APPEAL by defendant from *Parker, Judge*. Judgment entered in District Court, WAKE County. Heard in the Court of Appeals 25 May 1979.

Plaintiff husband filed a complaint against defendant wife and alleged that he and defendant have three minor children of their marriage; that he was separating from defendant because of his desire to provide suitable care and environment for the children consistent with their best interests and welfare; and that the court should award custody of the children to him as he is a fit and proper person to have custody.

In her answer and counterclaim, by and through her guardian, defendant's counsel admitted the marriage and the minority of the children. She alleged no present controversy and counterclaimed in the alternative for joint custody of the children, legal custody or actual custody, and in addition, child support and attorney's fees.

The trial court entered a temporary custody order awarding custody to plaintiff. Defendant appealed.

Carter G. Mackie, for plaintiff appellee.

Paul Stam, Jr., for defendant appellant.

ERWIN, Judge.

The temporary custody order entered by the trial court reads in part as follows:

"THIS CAUSE coming on to be heard and being heard before the undersigned Judge presiding in Wake County District Court upon plaintiff's motion for custody . . . the Court having examined the pleadings in this case, certain medical reports from physicians at Dorothea Dix Hospital, and Judgment entered in case entitled '*In the Matter of: Rachel B. Price, Respondent*' (76SPD1261); the Court makes the following:

* * *

3. That the defendant has been judicially declared as being 'Incompetent from want of understanding to manage her affairs by reason of mental and physical weakness on account of disease' according to Judgment entered in 76SPD1261 on January 12, 1977, a copy of which is attached hereto as Exhibit A and hereby incorporated by reference.

4. That it would be in the best interests of the minor children for them to be in the custody of the plaintiff, their father.

5. That it would be in the minor children's best interests for a Temporary Custody Order to be entered at this time.

* * *

CONCLUSIONS OF LAW

1. That, as a matter of law, the defendant herein has been judicially declared to be incompetent according to Exhibit A attached hereto.

* * *

ORDERED

1. That the plaintiff be and he is hereby awarded temporary custody of the three (3) minor children of the parties . . ."

Defendant presents one question on appeal: In a controversy between husband and wife for the custody of minor children of the marriage, is it error for the trial court to award custody to the husband, as a matter of law, on the sole ground that the wife has heretofore been adjudged incompetent from want of under-

standing to manage her affairs by reason of a physical and mental impairment on account of disease? We answer, "Yes, it is error," and reverse the trial court.

We note that plaintiff does not allege that any emergency exists that would require the court to act with great speed nor does he allege that defendant is not a fit and proper person to have custody of the children of the marriage. The judge's order provided that "the General Guardian of the defendant is hereby ordered to obtain a current medical and psychiatric evaluation of the defendant by qualified medical personnel." The medical and psychiatric evaluation requested should have been considered by the court before the temporary order was issued. We note further that the judgment relied upon by the court, "*In the Matter of: Rachel B. Price, Respondent,*" was entered on 19 January 1977, and the present action was filed on 1 March 1978, and temporary order entered 7 April 1978.

To us, mental illness of a parent in itself does not necessarily mean incompetence to rear children. *See In re Woodell*, 253 N.C. 420, 117 S.E. 2d 4 (1960), and *Spitzer v. Lewark*, 259 N.C. 50, 129 S.E. 2d 620 (1963).

G.S. 50-13.2(a) requires a full, factual determination of all the circumstances in the case before a proper order for custody may be entered by the court. A prior court order which judicially declares a parent to be incompetent is not sufficient in and of itself to establish a parent's present unfitness to have custody of a child or children.

At the rehearing of the case, each party will be allowed to present all available evidence as each elects. The court, from a full and ample hearing, must find facts from the evidence, enter conclusions of law relating thereto, and enter a proper order awarding custody. Justice and fair play require that both the plaintiff and defendant start on the same footing without the benefit of a temporary order under the circumstances of the issuance of the order before us.

The temporary order is vacated, and the case is remanded for a hearing in keeping with this opinion.

Reversed and remanded.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN ROBERT CURRY, JR.

No. 7926SC69

(Filed 19 June 1979)

Criminal Law § 75.11— in-custody interrogation—waiver of rights—no explicit waiver of counsel

Defendant voluntarily and knowingly waived his constitutional rights prior to in-custody interrogation where he was advised of his rights, was allowed to read them, signed a waiver of rights form, expressed a willingness to talk, and did not ask for an attorney, although it is questionable whether defendant explicitly waived counsel.

APPEAL by defendant from *Mills, Judge.* Judgment entered 24 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 April 1979.

Defendant was charged with (1) breaking and entering a building of Hamilton College on 18 February 1978 and (2) theft of money from a coin machine.

Defendant, age 16, and John Hemphill, both students at Myers Park High School, were taken from school, with consent of the principal, by Officer R. B. Crenshaw, to his office at the police station. A witness from Checker Cab Company identified them as the ones who had broken into a coin machine at Checker Cab. The witness knew both boys. Defendant was charged with that offense. Defendant confessed. Defendant moved to suppress the confession. After *voir dire* the motion was denied. Defendant then pled guilty as charged. A transcript of his plea was taken. From judgment imposing imprisonment of 4 to 5 years as a Committed Youthful Offender, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Sandra M. King for the State.

Public Defender Fritz Y. Mercer, Jr., by Assistant Public Defender Theo X. Nixon for defendant appellant.

CLARK, Judge.

In the *voir dire* hearing Officer Crenshaw testified that when defendant and Hemphill were brought to the principal's office they were advised that they were suspects of breaking into the vending machine at Checker Cab. They were advised of their *Miranda* rights in the presence of the principal before leaving the school on the way to the police department Law Enforcement Center. He turned defendant over to Officer D. V. Crump.

Office Crump testified that when defendant was brought to the Center he advised him of his rights. Defendant said, "I know what [my rights] are. I've seen them before." He did not ask for a lawyer. Defendant signed a Waiver of Rights form. Defendant was identified by the witness from Checker Cab. Defendant said, "I've been caught." He was asked about other crimes, and he freely began to tell Crump about breaking into other vending machines with a screwdriver, including the subject crimes.

The court found that defendant's confession was freely and voluntarily given after being advised of his constitutional rights. The motion to suppress was denied.

Defendant contends that there was no evidence that defendant specifically waived his right to counsel, and relies on *State v. Butler*, 295 N.C. 250, 244 S.E. 2d 410 (1978), which held that defendant's statement was inadmissible because he had not made an "express" or "specific" waiver of his rights.

On 24 April 1979 the United States Supreme Court, in *North Carolina v. Butler*, 47 U.S.L.W. 4454 (1979), rejected the express waiver rule of *Butler*. It was held that a defendant could waive his right to counsel without explicitly stating that he waives that right. The evidence in *Butler* on the waiver question is remarkably similar to the evidence in the case *sub judice*. Defendant, in *Butler*, had an eleventh grade education, defendant Curry a tenth grade education. Both were told of their rights, allowed to read them, and apparently understood them. Both expressed willingness to talk, and neither asked for an attorney. In the case before us, defendant signed a waiver, but defendant, in *Butler*, did not.

In the case *sub judice*, it is questionable whether the defendant explicitly waived counsel. Officer Crump testified that he

could not recall that defendant said he did not want or did not need a lawyer, but he was sure that defendant did not ask for a lawyer. Officer Crenshaw testified that defendant was told he could call a lawyer if he wanted one, and defendant said he didn't need one.

The question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019 (1937). An implicit waiver may be sufficient. We find the evidence sufficient to support the finding of the trial court that defendant knowingly and voluntarily waived the rights delineated in the *Miranda* case. The judgment is

Affirmed.

Judges VAUGHN and CARLTON concur.

STATE OF NORTH CAROLINA v. HENRY JAMES BUMGARNER

No. 7925SC187

(Filed 19 June 1979)

Criminal Law §§ 87, 99— court's belief that calling witness was unethical—witness not called—defendant prejudiced

Defendant was prejudiced when he refrained from calling a witness who he knew would plead the Fifth Amendment because of the trial court's erroneous belief that it would be unethical for defendant's attorney to do so.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 20 July 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals 23 May 1979.

The defendant was tried for second degree murder. While the defendant was offering evidence his attorney stated to the court in the absence of the jury that he would call as a witness one James Dean McGinnis, who was an eyewitness to the alleged crime. At this point, Tom Morphis, a member of the Catawba County Bar, advised the court he was representing Mr. McGinnis,

who would refuse to answer certain questions on the ground they might tend to incriminate him. The following colloquy then took place.

COURT: As I recall the rule of ethics it says a lawyer is not supposed to call a witness whom they know is going to take the 5th. Is that correct?

MR. ISENHOWER: I do not know that he is going to do that. The reason that he is being called is to establish a major point at the scene that night and that is all. We realize that we cannot limit the State on cross examination and rather than put him on the spot, even though he is essential to the defense case, we will not call him.

COURT: Now I am not trying to limit you here on what you can offer and cannot. I am just telling you.

MR. ISENHOWER: His testimony, your Honor, would be to the effect that there were no other cars there beside the car that Red Dog was in that night, not a Datsun, and that they did not go to the van prior to leaving the Klub parking lot itself.

COURT: I fail to see how that would help any in that in your opening statement you staked yourself out to a defense of self-defense but the way you try the case is your decision and I will not limit you in that. What do you say, Mr. Solicitor?

MR. CROTTY: I am not in a position to say anything, your Honor. The man has been advised of his rights under the law, and they can call him if they elect to. I don't feel that I have any standing here.

COURT: Let's get down to the nuts and bolts here. Has there been any plea bargaining for your client?

MR. MORPHIS: No sir.

COURT: Talk about any?

MR. MORPHIS: There has been none.

MR. CROTTY: I don't know if this man will be prosecuted for being an accessory or not. I don't want to go into that

now. There may or may not be enough evidence. I have not made that decision at this time. If I thought they should be tried together I would have done so but Mr. Morphis moved that they not be tried together.

COURT: Well, I will let you call him if you so desire.

MR. CROTTY: I would like for the record to show that the State does not object.

COURT: The 5th right is a personal right and can only be invoked by the person having that right.

(Counsel went up to the bench at this time.)

MR. ISENHOWER: The defendant withdraws the call of the witness Mr. McGinnis.

The defendant was convicted of second degree murder.

Attorney General Edmisten, by Assistant Attorney General Amos C. Dawson III, for the State.

Gaither and Wood, by J. Michael Gaither, for defendant appellant.

WEBB, Judge.

The appellant assigns as error the action of the judge, which he contends prevented him from calling a witness he had intended to use at the trial. As we read the Canons of Ethics of the North Carolina State Bar, it is not unethical for an attorney to call a witness who he knows will plead the Fifth Amendment. Nevertheless, the interpretation of the law by the presiding judge must be accepted during a trial. We assume the defendant's attorney knew the severe penalty to which he might be subject if he did something the presiding judge considered unethical. *See In re Palmer*, 296 N.C. 638, 252 S.E. 2d 784 (1979). On the facts of this case it appears defendant was prevented from calling as a witness an eyewitness to the alleged crime because of an erroneous interpretation of the law by the presiding judge. We hold this to be prejudicial error.

We do not discuss defendant's other assignments of error as they may not recur.

New trial.

Chief Judge MORRIS and Judge HEDRICK concur.

RICHARD STEPHEN JOHNSON v. GERALD E. WHITTINGTON

No. 7810SC888

(Filed 19 June 1979)

Malicious Prosecution § 11.2— probable cause—magistrate's issuance of warrant for wrong offense

Plaintiff's action for malicious prosecution should have been dismissed where the evidence showed as a matter of law that probable cause existed for the issuance of warrants charging either felonious larceny of plants from defendant's plant shop or felonious possession of stolen property. The fact that the magistrate erroneously issued the warrant against plaintiff for receiving stolen goods rather than for larceny or possession of stolen property was not chargeable to defendant and did not establish the absence of probable cause.

APPEAL by defendant from *Clark, Judge*. Judgment entered 16 May 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 1 June 1979.

Gary S. Lawrence, for the plaintiff.

Kimzey, Smith & McMillan, by James M. Kimzey, for the defendant.

MARTIN (Robert M.), Judge.

Plaintiff brought this civil action seeking recovery of damages allegedly suffered by him as a result of a criminal prosecution instituted against him at defendant's behest. He contends that the prosecution was malicious, in that there was no probable cause for the issuance of any warrant for his arrest.

Evidence received at trial tended to show that plaintiff was an employee at defendant's plant shop and greenhouses. Over a period of time, inventory checks at the plant shop revealed that significant numbers of plants of a broad range of varieties were missing and not accounted for. Plaintiff and one other employee of defendant were the only employees who had greenhouse facilities

of their own. Defendant conducted a surprise search of both employees' greenhouses, and discovered a substantial number of plants and pots from his shop in plaintiff's possession. On being confronted with this information, plaintiff at first argued that he had taken only discards and diseased plants from the shop. (Defendant and one of his employees gave evidence directly contrary to that assertion, however.) Plaintiff did, ultimately, admit to defendant that it was wrong for him to take the plants and that he "probable did not have the authorization" to do so. (This admission was affirmed by plaintiff on cross-examination during the trial of the instant action.) Defendant estimated the value of the plants taken as being in excess of $500.00. Plaintiff was not able to pay for the plants, and was discharged by defendant. The plants were subsequently returned to defendant's shop in a frost-bitten and highly damaged condition, so that almost none of them were useable or suitable for sale. Plaintiff demanded of defendant wages that he contended he was owed for his labor in part of the week in which he was fired. Defendant did not pay them and plaintiff filed a complaint with the Labor Board. Defendant then paid plaintiff the $45.00 he claimed was owed to him. After that, defendant went to a magistrate and swore out a warrant against plaintiff, the offense charged in the warrant being receiving stolen goods. The magistrate found probable cause and had the warrant executed. When the criminal charges came on for trial, the matter was dismissed as the prosecuting witness (defendant) did not appear. There is no evidence that any subpoena was ever served on defendant for his appearance. The plaintiff also put on evidence as to the expenses he had incurred in defending the criminal matter and damage to his reputation. The trial judge submitted the case to the jury on the following issues:

1. Was the warrant issued without probable cause?

2. If so, was the warrant issued wrongfully and maliciously?

3. What actual damages, if any, has the plaintiff sustained as a result of said prosecution?

4. Was the defendant motivated by actual malice in said prosecution?

5. If so, what punitive damages, if any, is the plaintiff entitled to recover?

The jury answered issues 1, 2 and 4 "yes," and answered issues 3 and 5 in the amounts of $3,300.00 and $1.00, respectively. Defendant made numerous motions to set aside or reduce the verdict and for a new trial. All were denied, and judgment was entered in accordance with the verdict.

We reverse the trial court and remand the cause for dismissal of the action. The evidence shows as a matter of law that probable cause existed for issuance of warrants charging either felonious larceny or felonious possession of stolen property. It is apparent that the magistrate erred in issuing the warrant charging receiving stolen goods; we do not think, however, that this error should be chargeable to defendant. Plaintiff had admitted his wrongful acts to defendant, and reaffirmed that admission in the trial of the instant case. The magistrate's finding of probable cause constituted *prima facie* evidence that reasonable grounds for the prosecution existed, *Mitchem v. National Weaving Co.*, 210 N.C. 732, 188 S.E. 329 (1936); *Stanford v. Grocery Co.*, 143 N.C. 419, 55 S.E. 815 (1906), and plaintiff's admissions, rather than rebutting the *prima facie* case, removed from contention the issue of probable cause. It was error, therefore, to submit the case to the jury at all. *Gray v. Bennett*, 250 N.C. 707, 110 S.E. 2d 324 (1959) is distinguishable in that here the question as to what offense was properly chargeable in the warrant from the evidence before the magistrate was not dependent upon a mixed state of fact and law contended for by the complaining witness and later proved to be incorrect, but rather was a determination of law to be made upon facts essentially uncontested by reason of plaintiff's admission.

Because of our disposition of this case, we need not reach the remaining assignments of error raised by appellant. The judgment of the trial court is reversed and the cause is remanded for entry of dismissal.

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. SYLVESTER LEE

No. 798SC156

(Filed 19 June 1979)

1. **Indictment and Warrant § 1— indictment unaffected by charges at preliminary hearing**

The grand jury may indict without regard to the charges presented or determined at a probable cause hearing in the district court.

2. **Assault and Battery § 15.7— self-defense on one's own premises—instruction not required**

In a prosecution for assault with intent to kill inflicting serious bodily injury, the trial court did not err in failing to instruct on self-defense when one is assaulted on his own premises, since the evidence tended to show that the victim was at all times during the altercation in question in an alley adjoining defendant's house and not on defendant's premises.

APPEAL by defendant from *Cowper, Judge*. Judgment entered 16 November 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 3 May 1979.

A warrant was issued for defendant's arrest charging him with felonious assault with a deadly weapon inflicting serious bodily injury upon Roger Rayner. Probable cause was found and defendant was bound over for trial. An indictment was returned against the defendant, however, charging him with assault with intent to kill inflicting serious bodily injury. Defendant was tried on this charge.

The State's evidence tends to show that on 2 September 1978, Roger Rayner was walking down Virginia Street to his cousin's house. In order to reach his destination, he had to pass in front of defendant's house. As he was passing, he saw defendant run into his house. Meanwhile, Rayner knocked on his cousin's door and, when there was no answer, turned to leave. As he was walking in front of defendant's house, defendant told Rayner he was going to kill him and shot him in the leg with a shotgun. Rayner was able to get home at which time he was taken to the hospital. He stayed in the hospital for six days.

Defendant's evidence tends to show that he was sitting in an alley beside his house talking to a friend when Rayner walked up. He asked defendant if his name was Sylvester Lee and told de-

fendant that he was going to mess him up. Rayner pushed defendant until defendant went into his house. Defendant came out with a gun and told Rayner to leave. When Rayner failed to leave defendant shot him. Rayner was moving towards defendant when he was shot. Although Rayner had his right hand in his pocket, there was no evidence that he had a weapon.

Defendant was convicted of assault with a deadly weapon inflicting serious bodily injury. From a judgment imposing a prison sentence, he appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

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

VAUGHN, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to strike the portion of the bill of indictment charging an intent to kill because the warrant at the probable cause hearing did not include that allegation. He argues that once the State has elected to proceed upon a specific charge and probable cause is found on that charge, the State cannot thereafter, with respect to the same facts, proceed on a bill of indictment charging a more serious offense. The argument reflects the diligence of defendant's able appointed counsel but not the present state of the law. A preliminary hearing is not essential to the finding of an indictment. The Grand Jury may indict without regard to the charges presented or determined at a probable cause hearing in the District Court.

[2] Defendant argues that the judge erred in his instructions on self-defense in that he failed to instruct on self-defense when one is assaulted on his own premises. We conclude, however, that the judge properly declared and explained the law concerning self-defense as it related to the evidence in the case then being tried. The evidence tends to show that the victim was in an alley adjoining defendant's house when the argument started. Defendant left and went into his house and got a shotgun and two shells. He pointed the loaded shotgun at Rayner while Rayner was in the alley and told him to leave. Defendant shot Rayner in the leg and,

as Rayner was attempting to run away, defendant fired into the air. The instructions on the ordinary rules of self-defense were appropriate. We concede, however, that it appears that the distinctions between the rules governing defense against "an *attack* on the house *or its inmates*," *State v. Gray*, 162 N.C. 608, 612, 77 S.E. 833 (1913) (emphasis added), and ordinary self-defense are now somewhat elusive. *See State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979).

We find no prejudicial error in defendant's trial.

No error.

Judges CLARK and CARLTON concur.

PITTS FIRE SAFETY SERVICE, INC. v. CITY OF GREENSBORO

No. 7825DC744

(Filed 19 June 1979)

Venue § 4— action against city—venue in county where city located

Proper venue in an action against a city to recover the price of equipment installed in its municipal building lies in the county in which the city is located, since the contract was performed and the failure to pay occurred in that county, G.S. 1-77, and the trial court erred in failing to grant defendant city's motion for a change of venue to such county.

APPEAL by defendant from *Vernon, Judge*. Order entered 6 June 1978 in District Court, CATAWBA County. Heard in the Court of Appeals 1 May 1979.

Plaintiff instituted this action to recover payment for services rendered to defendant pursuant to an alleged oral contract. Plaintiff's principal office and place of business are in Catawba County. Defendant, a municipal corporation, is located in Guilford County.

Plaintiff alleges that on 14 June 1976, James R. Pitts, president of Pitts Fire Safety Service, Inc., received a call from Harvey Phipps of the City of Greensboro who requested that plaintiff install certain fire detection and extinguishing equipment

in defendant's municipal building. An employee of plaintiff went to Greensboro and installed the equipment at the contract price of $734.24. Plaintiff requested payment but defendant failed to pay and, therefore, plaintiff instituted this suit to recover $734.24.

Defendant made a motion for a change of venue to Guilford County. This motion was denied and defendant appeals.

Sigmon, Clark and Mackie, by E. Fielding Clark II, for plaintiff appellee.

Dale Shepherd, for defendant appellant.

VAUGHN, Judge.

The issue we address is whether the trial court erred in denying defendant's motion for a change of venue. Venue in this action is governed by G.S. 1-77 which provides, in pertinent part, as follows:

> "Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> * * *
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer."

An action against a municipality is governed by this statute. *Lee v. Poston*, 233 N.C. 546, 64 S.E. 2d 835 (1951). The issue to be determined is where the cause of action arose because that is the factor controlling venue in this case.

In *Coats v. Hospital*, 264 N.C. 332, 141 S.E. 2d 490 (1965), plaintiffs brought suit against Sampson County Memorial Hospital to recover in *quantum meruit* for labor and material furnished to the hospital. Although plaintiffs did not contend that the cause of action arose outside of Sampson County where the hospital was located, the Court stated:

"Patently, this cause of action arose in Sampson County. Plaintiffs furnished to defendant there all the material and labor the value of which they now seek to recover in *quantum valebant* and in *quantum meruit*. The debt is the cause of action, and it arose where the debt originated. *Steele v. Commissioners*, 70 N.C. 137, 139. 'A broad, general rule applied or stated in many cases is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' Annot., Venue of actions or proceedings against public officers, 48 A.L.R. 2d 423, 432." *Coats v. Hospital, supra*, at 334.

Thus the Court held that venue was governed by G.S. 1-77 and that Sampson County was the proper place of venue.

We find this analysis applicable in the present case. Plaintiffs delivered equipment in Guilford County where the contract was to be performed. The defendant's failure to pay for this equipment was the basis of this cause of action and it occurred in Guilford County. We hold, therefore, that the lower court erred in failing to grant defendant's motion for a change of venue.

Reversed and remanded.

Judges CLARK and CARLTON concur.

STATE OF NORTH CAROLINA v. NEALY J. LESLIE

No. 7920SC211

(Filed 19 June 1979)

Homicide § 30.3 — failure to instruct on involuntary manslaughter as related to defendant's evidence

The trial court in a homicide case erroneously failed to instruct the jury on a possible verdict of involuntary manslaughter as it related to defendant's evidence where the court's instructions permitted the jury to return a verdict of involuntary manslaughter only if it found that the killing proximately resulted from defendant's commission of an unlawful act not amounting to a felony, but defendant presented evidence which, if believed, would have permitted the jury to find that the killing was caused by defendant's culpable negligence in the handling of a loaded shotgun.

State v. Leslie

APPEAL by defendant from *Mills, Judge*. Judgment entered 6 October 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 24 May 1979.

Attorney General Edmisten, by Assistant Attorney General George J. Oliver, for the State.

Van Camp, Gill and Crumpler, by James R. Van Camp, for defendant appellant.

VAUGHN, Judge.

Defendant was indicted for the murder of his wife and convicted of voluntary manslaughter. There was ample evidence to have supported a verdict of a higher degree of homicide. We must, nevertheless, order a new trial because the jury was not properly instructed on a possible verdict of involuntary manslaughter as it related to defendant's evidence.

It is the duty of the judge to declare and explain the law arising on all of the evidence including that of the defendant even though it appears to be incredible. There was evidence which, if believed, would have permitted the jury to find that the killing was caused by defendant's culpable negligence in the handling of a loaded shotgun. Under the court's instructions, however, the jury could have returned a verdict of involuntary manslaughter only if it found that the killing proximately resulted from defendant's commission of an unlawful act not amounting to a felony.

> "Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, *or some act done in an unlawful or culpably negligent manner . . .*." *State v. Williams*, 231 N.C. 214, 215-16, 56 S.E. 2d 574 (1949). (Emphasis added.)

For the reason stated, defendant is entitled to a new trial.

New trial.

Judges CLARK and CARLTON concur.

ZULEEN DANIEL PENNINGTON v. CLEM PENNINGTON, JR.

No. 7810DC861

(Filed 19 June 1979)

Divorce and Alimony § 18.17— alimony pendente lite—sexual intercourse between parties—order voided

Sexual intercourse between the parties constitutes a reconciliation which voids an order for alimony *pendente lite*.

APPEAL by defendant from *Parker, Judge*. Order entered 16 June 1978 in District Court, WAKE County. Heard in the Court of Appeals 21 May 1979.

This action was commenced by the filing of a complaint on 21 November 1977 in which the plaintiff alleged a claim for alimony without divorce. On 22 December 1977, Judge Bullock signed an order requiring the defendant to pay alimony *pendente lite*. Following the order for alimony *pendente lite*, a series of motions and orders was entered in the case, including one order on 3 April 1978 holding the defendant in contempt for failure to pay alimony *pendente lite*. The defendant purged himself of this contempt by bringing his alimony payments up to date. On 11 April 1978 the defendant filed a verified motion to dismiss the action, alleging the parties had resumed their marital relationship including sexual intercourse. On 19 May 1978 another order was served on the defendant requiring him to show cause why he should not be held in contempt for not making his alimony payments. On 8 June 1978 a hearing was held before Judge John H. Parker. At this hearing, the defendant testified he and his wife had intercourse twice in February 1978 and once around Easter. At the conclusion of this hearing the court entered an order in which it recited "the Defendant from his pleadings and testimony has not shown a resumption of the full marital relations between he [sic] and his wife." The defendant was again held in contempt. He has appealed.

Hatch, Little, Bunn, Jones, Few and Berry, by Thomas D. Bunn, for plaintiff appellee.

Vaughan S. Winborne, for defendant appellant.

WEBB, Judge.

We hold that the court committed error in its finding that "the Defendant from his pleadings and testimony has not shown a resumption of the full marital relations between he [sic] and his wife." An order for alimony *pendente lite* is rescinded by a reconciliation between the parties. *Hester v. Hester*, 239 N.C. 97, 79 S.E. 2d 248 (1953). The defendant has alleged and testified to acts of intercourse between his wife and him twice in February and once around Easter of 1978. *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978) holds that intercourse between the parties constitutes a reconciliation which voids a separation agreement. We can see no reason why it should not also constitute reconciliation which would void the order for alimony *pendente lite*. We reverse the order of the district court and remand this case for a hearing as to whether the parties have been reconciled so as to void the order for alimony *pendente lite*.

We note that *Murphy v. Murphy, supra*, on which we base the holding of this case had not been filed at the time the order was entered in district court in this case.

Reversed and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

PEYTON CLARK v. MURRAY M. CLARK, JR. AND MURRAY M. CLARK, SR.

No. 7818DC864

(Filed 19 June 1979)

Appeal and Error § 6.2— motion to strike amended complaint—appeal from denial interlocutory

Defendant's appeal from the trial court's entry of an order denying his motion to strike plaintiff's amended complaint is interlocutory and is dismissed.

APPEAL by defendant from *Alexander (Elreta M.), Judge*. Order entered 18 April 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 28 May 1979.

The plaintiff, Peyton Clark, brought this action against the defendant, Murray M. Clark, Jr., seeking a divorce from bed and board, a money judgment and a writ of possession of the marital home. After a hearing, the trial court granted the plaintiff a divorce from bed and board but retained the cause for further hearings with regard to the other issues raised. Several months later, the plaintiff filed a motion for leave to amend her complaint so as to, among other things, bring in the defendant, Murray M. Clark, Sr., as an additional party defendant. An order was entered granting the plaintiff's motion and an amended complaint was filed in accordance with that order. The defendant, Murray M. Clark, Jr., then filed a motion to strike the amended complaint on the ground that he had no notice of the hearing on the plaintiff's motion for leave to amend her complaint and no opportunity to be heard on that motion. The trial court entered an order denying the defendant's motion. From the entry of that order denying his motion to strike the plaintiff's amended complaint, the defendant, Murray M. Clark, Jr., appealed.

Younce, Wall & Chastain, P.A., by Percy L. Wall, for plaintiff appellee.

Reginald L. Yates for defendant appellant.

MITCHELL, Judge.

The effect of both G.S. 1-277 and G.S. 7A-27(d) is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E. 2d 640, *rev. denied*, 295 N.C. 264, 245 S.E. 2d 781 (1978). The order of the trial court denying the motion of the defendant, Murray M. Clark, Jr., does not determine or discontinue the action or affect a substantial right. *See Trust Co. v. Motors, Inc.*, 13 N.C. App. 632, 186 S.E. 2d 675 (1972). The assignments and contentions the defendant, Murray M. Clark, Jr., seeks to present here by interlocutory appeal will not be lost if the order from which he has appealed is not reviewed before an appeal from final judgment. The trial court has rendered no order or judgment from which an interlocutory appeal may properly be taken and we order the

Appeal dismissed.

Judges PARKER and MARTIN (Harry C.) concur.

IN THE MATTER OF: THE PURPORTED WILL OF KARL ARTHUR ANDREWS

No. 7820SC780

(Filed 3 July 1979)

Wills § 21.4— caveat proceeding—undue influence—insufficiency of evidence

Evidence in a caveat proceeding was insufficient to submit to the jury on the question of undue influence where provisions of testator's will and codicil which differed from past wills did not indicate that the later instruments were procured by undue influence; the differences apparently resulted from an intent to avoid a heavy estate tax; there was no evidence which showed that testator's wife was responsible for the procurement of the will; the beneficiaries under the will were the natural objects of testator's bounty and were the same beneficiaries who took under the prior wills; no evidence tended to show that testator was in such a physical and mental condition that he was susceptible to domination and influence by his wife; and the evidence tended to show that testator personally continued his business dealings up until his death, over a year after the codicil was executed.

Judge CARLTON dissenting.

APPEAL by propounders from *Hairston, Judge*. Judgment entered 18 April 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 3 May 1979.

Propounders appeal from a judgment entered in accordance with a jury verdict finding that the execution of the last will and testament of Karl Arthur Andrews (testator) was procured by undue influence. Propounders are the wife of testator, Mrs. Andrews, and the guardian ad litem for testator's grandchildren.

Testator died on 27 November 1976 at the age of seventy-seven. He had been in declining health for several years. A will executed in 1974 and a codicil executed in 1975 were presented to the Clerk of Superior Court of Moore County for probate. Testator's son, Karl Andrews, Jr., filed a caveat to the will and codicil, alleging that they were not the last will and testament of

the testator because they were procured by the undue influence of testator's wife.

The evidence shows that testator executed a series of wills and codicils prior to the execution of the will and codicil in question. Since the pattern of dispositions is relevant to the question of undue influence, a review of these instruments is necessary.

Testator executed a will in 1962 which devised one-half of his estate to Mrs. Andrews absolutely. The remainder he devised in trust, naming his son, Karl Andrews, Jr., as beneficiary. When his son reached the age of twenty-eight, the trust was to terminate and his son was to receive the principal. If his son died prior to the termination of the trust, the principal was to be given to his son's issue, if any, and if none to Mrs. Andrews. If she were not living then the principal was to go to testator's stepson, Michael Jad Mahaley, the son of Mrs. Andrews. Mrs. Andrews was named executrix.

In 1965, testator executed a codicil to the 1962 will which appointed Mrs. Andrews and R. F. Hoke Pollock as co-executors of the will.

In 1966, testator executed a second codicil to the 1962 will which removed Mrs. Andrews as co-executor and appointed R. F. Hoke Pollock as sole executor. The codicil further stated that if the testator's death should result from any cause other than natural causes, his wife, Mrs. Andrews, should receive nothing under the will. He also directed that an autopsy be performed to determine the cause of death.

In 1970, testator executed a will revoking all prior wills and codicils. In that will, he devised his estate to a trustee to pay one-half of the income to Mrs. Andrews for life and one-half to Karl Andrews, Jr., for life. Upon the deaths of the income beneficiaries, the principal was to be distributed to testator's grandchildren in equal shares. He appointed R. F. Hoke Pollock as executor.

In 1974, testator executed the will in question. In this will, he bequeathed all of his tangible personal property to his wife. If his wife predeceased him, the property was to go to his son, Karl Andrews, Jr., if he survived the testator, and if not, then to his son's surviving issue and his stepson, Michael Jad Mahaley, in equal

shares. All the furniture, household goods, silverware, china and ornaments were acknowledged to be the property of his wife. Testator devised one-half of his "adjusted gross estate" to his wife in such a manner as to take advantage of the maximum marital deduction. The rest of his estate testator devised in trust for the benefit of his son. The son was to receive the income for life and at his death, the principal was to be divided equally between testator's stepson, Michael Jad Mahaley, and his grandchildren. A spendthrift provision was attached to this trust whereby the income was to be paid to Mrs. Andrews and the principal beneficiaries in the event an income beneficiary tried to sell or transfer his interest in the trust. The testator appointed his wife as executrix.

A codicil to this will was executed in July, 1975, which altered the provisions of the trust to provide that upon the death of Karl Andrews, Jr., Mrs. Andrews, if she were still living, was to receive the income from the trust for her lifetime.

The first two wills and codicils were drafted by R. J. Hoke Pollock and executed by the testator in Southern Pines. Mr. Pollock had been testator's attorney for some time prior to the drafting of the 1962 will. Mrs. Andrews was never present at the execution of these instruments. The 1974 will and 1975 codicil were drafted by Paul Wyche, a Charlotte attorney. At the time these instruments were executed, Wyche was employed by Belk Stores Services, Inc., as an attorney. Wyche first learned of Mr. Andrews when he was asked by a superior to draw up a will. Wyche contacted the testator by phone and drafted the will. He sent a copy to the testator and a couple of weeks later, testator went to Charlotte and signed the will. Mrs. Andrews was with him. In response to subsequent conversations, Mr. Wyche revised the will in November, 1974. No action was taken, however, until 1 July 1975 when Wyche went to Pinehurst at testator's request, to discuss the will. Wyche spent most of the day talking with the Andrews and their accountant. As a result of this discussion, the 1975 codicil was executed in Pinehurst.

Wyche subsequently prepared deeds for the testator transferring certain land from the testator to him and his wife as tenants by the entireties. This action was taken in response to conversations about estate planning and avoiding probate. Wyche

also handled other real estate transactions for testator including the sale of some land to the Sheraton Motel. Wyche testified that almost all of his dealings and conversations were with testator although Mrs. Andrews was usually present. Wyche stated that the impetus for the new will, codicil, and transfer of some of the real estate was that testator had read a book entitled "How to Avoid Probate."

Caveator presented evidence at trial concerning the testator's declining health and relationship with his wife. Charles Martin, a barber, knew testator as a customer. He testified that between 1962 and 1973, testator had been particular about his appearance but after 1973, testator showed less concern. Testator was not as alert or as conversational as he had once been. Polly McFadyen, a nurse, also testified that when she saw testator in 1974 and 1975, he was not his normal self; he was not as alert as he used to be.

Polly Carson, a former employee of testator, stated that in 1975 she went to visit testator at his home. Testator was relaxed and outgoing at first but when Mrs. Andrews appeared, testator became very nervous, had tears in his eyes and could not speak. Carson testified that Mrs. Andrews, in an angry voice, asked of someone in the room, "Did you ever know a son-of-a-bitch who had a bastard for a son." A motion to strike was granted because the statement was not responsive to the question but a motion for a mistrial was denied.

Marty McKenzie, a realtor, negotiated the sale of some property with testator and Mrs. Andrews in late 1975 or early 1976. Most of his discussions were with Mrs. Andrews although testator was present. At one point, testator referred to a certain tract of land but was told by his wife that he had sold that property. Testator was apparently confused as to whether he owned it.

Donald Robert Calfee, the manager of the Sheraton Motor Inn in Southern Pines, testified that he negotiated the purchase of a piece of property with testator in 1975. He met with testator on one occasion and thereafter called testator six or seven times but never talked with him. On each occasion, he spoke with Mrs. Andrews who said testator was either resting or had had a bad night and could not be bothered. She told him to contact her at-

torneys in Charlotte who would handle the closing. Calfee later saw testator in 1976 at the Sheraton and testator asked him why he had never called.

John Scott testified that in April, 1974, he called testator to ask a favor and testator told him to come by the house the next day. When Scott arrived Mrs. Andrews would not let him see testator. Scott later attempted to get in touch with testator but was told he was resting or could not come to the phone.

Edward Earl Hubbard testified that on several occasions in 1975, he called testator and left a message to have him return the call. The calls were never returned. Hubbard saw testator in 1975 or 1976 and was not sure whether testator recognized him.

In rebuttal, propounders presented testimony in addition to that of Paul Wyche. Joseph Hiatt, Jr., testator's physician, testified that testator had high blood pressure and diabetes. He suffered a major heart attack in 1969. In 1972, he developed double vision, dizziness and difficulty in walking. Testator incurred a loss of hearing in his left ear. Dr. Hiatt saw testator about a week before his death and stated that testator was in better health than he had been in months. Dr. Hiatt stated that although testator was normally a happy person, he had become depressed in his later years because he couldn't work like he wanted to. On cross-examination, Dr. Hiatt testified that Mrs. Andrews gave testator his insulin shots. Dr. Hiatt was not familiar with the relationship between testator and Mrs. Andrews.

Propounders presented the testimony of several other persons tending to show that they had conducted business transactions with testator during the period between 1972 and 1976. The testator had handled the affairs himself and Mrs. Andrews was generally not involved. Testator was described as being a considerate man but prone to doing exactly what he intended to do. Testator's accountant testified that testator had discussed his estate with him within the last few years of testator's life. Based on his observations, the accountant felt that testator made his own business decisions.

Propounders' motions for a directed verdict made at the close of caveator's evidence and at the close of all of the evidence were denied. The case was submitted to the jury which found

that the executions of the 1974 will and 1975 codicil were procured by undue influence and that they were not the last will and testament of Karl Arthur Andrews. From a judgment entered in accordance with this verdict, propounders appeal.

Bryant, Hicks & Sentelle, by David B. Sentelle and Richard A. Elkins, for propounder appellants.

Van Camp, Gill & Crumpler, by James R. Van Camp and Douglas R. Gill, for caveator appellee.

VAUGHN, Judge.

The issue to be determined on this appeal is whether caveator presented sufficient evidence of undue influence exerted by Mrs. Andrews to withstand propounders' motions for a directed verdict.

> "[U]ndue influence which justifies setting aside the testator's will is an influence which controls or coerces the mind of the testator so as to induce him to make a will which he would not have made otherwise. Influence is also spoken of as being undue when it destroys the testator's free agency." 1 N. Wiggins, Wills and Administration of Estates in North Carolina § 55 at 133 (1964).

The burden of proof lies upon the propounder to prove that the instruments in question were executed with the proper formalities required by law. *In re Will of West*, 227 N.C. 204, 41 S.E. 2d 838 (1947). Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *In re Will of Simmons*, 268 N.C. 278, 150 S.E. 2d 439 (1966); *In re Will of West, supra.*

Proof of undue influence is, necessarily, circumstantial.

> " 'Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inferences from circumstances must determine it.' It is 'generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' " (Citation omitted.) *In re Mueller's Will*, 170 N.C. 28, 29, 86 S.E. 719 (1915).

Factors to be considered on the issue of undue influence include:

"1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution." *In re Mueller's Will, supra,* at 30.

If there is sufficient evidence of undue influence, the issue should be presented to the jury. *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932). The question is, therefore, did caveator present sufficient evidence to go to the jury.

We first note the pattern of distributions in the prior wills and codicils. The 1974 will and 1975 codicil do not materially differ from the 1962 will. The main distinction is that under the later devise, testator's stepson takes a vested interest in part of the estate whereas in the former his interest was contingent. Mrs. Andrews receives a greater interest because she receives the personal property and the life estate in the trust for Karl Andrews, Jr., after his death. The codicils to the 1962 will do, however, remove Mrs. Andrews as executrix. Although the 1966 codicil to the 1962 will implies that testator and his wife were at odds, the provisions in that codicil do not appear in the 1970 will.

The 1974 will and its codicil differ from the 1970 will in that Mrs. Andrews takes her interest outright rather than a life estate. She also receives the personal property and is appointed executrix. Nevertheless, we must note that Mr. Pollock, testator's local attorney, testified that the 1974 will takes advantage of the marital deduction provisions whereas the 1970 will does not. Use of this provision can result in substantial tax savings. Mr. Pollock also testified that he never knew the extent of testator's holdings. There was evidence which showed, however, that the estate was

worth over one million dollars. There was further testimony which showed that testator had read a book on avoiding probate and that this was the impetus to write the 1974 will.

We also cannot ignore the testimony of Mr. Wyche who drafted the 1974 will. He indicated that all of his important conversations were with testator alone. He discussed at length the drafting of the 1975 codicil when he went to Pinehurst in July, 1975. He stated that although Mrs. Andrews was present, she did not take part in any material discussions. The import of his testimony was that testator acted freely and knowingly in executing this will and codicil.

Based on the testimony concerning the execution of the 1974 will and the 1975 codicil, we cannot say that the provisions differing from past wills indicate that these instruments were procured by undue influence. The differences apparently resulted from an intent to avoid a heavy estate tax. There was no evidence which showed that the procurement of this will was made by Mrs. Andrews. The beneficiaries under the will were the natural objects of testator's bounty and were the same beneficiaries who took under the prior wills.

Furthermore, no evidence was presented which showed that testator was in such a physical and mental condition that he was susceptible to domination and influence by his wife. Testator had some physical problems and was prone to depression. Two people testified that testator suffered from a lapse of memory on two occasions. Some people had problems contacting testator. One witness testified that, on one occasion, testator became fearful and nervous in his wife's presence. Nevertheless, the evidence shows that he personally continued his business dealings up until his death, over a year after the codicil was executed.

We conclude that the evidence presented at trial was insufficient to submit to the jury on the question of undue influence. There is no evidence that such influence was exerted on testator as to control his mind and force him to execute a will which he otherwise would not have executed. We, therefore, reverse.

Reversed.

Judge CLARK concurs.

Judge CARLTON dissents.

Judge CARLTON dissenting.

I concur with the majority's statement of the applicable law in an action of this nature. I strongly disagree, however, with the majority's evaluation of the evidence disclosed by the record. Indeed, it seems to me that caveator's evidence was abundant to withstand propounders' motions for a directed verdict. I must, therefore, respectfully dissent.

I note below those factors which compel me to conclude that propounders' motions were properly disallowed so that the case could be submitted for decision to the twelve:

(1) The majority attaches no significance to the change in the pattern of distribution in the various wills and codicils. With this conclusion, I strongly disagree. A review of the salient portions of the various instruments illustrates a vastly superior position for Mrs. Andrews and her son in the propounded will as compared to the earlier instruments:

a. In the 1962 will, Mrs. Andrews was devised a one-half interest in the estate. The other one-half was devised in trust to Karl Andrews, Jr. His half could only go to Mrs. Andrews' son in the event that Karl Andrews, Jr., died prior to the termination of the trust *and* provided he had no surviving issue *and* provided Mrs. Andrews had predeceased him. Mrs. Andrews was named as executrix in this will.

b. The 1965 codicil simply named attorney Pollock as a co-executor with Mrs. Andrews. The reasonable inference to be drawn from this act by the testator was that he did not wish for his wife alone to be vested with the powers of an executor.

c. The 1966 codicil removed Mrs. Andrews as co-executrix and appointed attorney Pollock as sole executor. This codicil also gives rise to the inference that Mr. and Mrs. Andrews had problems of some nature. It provided that if the testator's death

should result from any causes other than natural causes, his wife would take nothing under the will. Further, he directed that an autopsy be performed to determine the cause of death.

d. The 1970 will revoked all prior wills and codicils. There, Mrs. Andrews would receive only an *income interest* to one-half of the estate *for the term of her life*. The other one-half in income was devised to Karl Andrews, Jr., for life. Under this will, upon the deaths of the income beneficiaries, the principal would have been distributed to testator's grandchildren in equal shares. I note here that Mrs. Andrews' son would have taken *nothing* under this will. Moreover, attorney Pollock is named as the executor.

The will in question was written in 1974. Both the position of Mrs. Andrews and her son are drastically improved under the contested will. Here, Mrs. Andrews was bequeathed *all* tangible personal property. All furniture, household goods, silverware, etc. were acknowledged to be the sole property of Mrs. Andrews. Mrs. Andrews would then receive one-half of the "adjusted gross estate" outright. The other half would go to Karl Andrews, Jr., in trust and at his death the principal would be divided equally between Mrs. Andrews' son and the grandchildren of the testator.

In other words, neither Mrs. Andrews nor her son would have received any fee simple interest in Mr. Andrews' estate under the 1970 will which was prepared by the testator's regularly retained attorney. From that mere income beneficiary status in 1970, Mrs. Andrews, under the 1974 will, would have received a one-half fee simple interest in his estate in addition to all of his tangible personal property and household goods. With respect to Mrs. Andrews' son, he would have received nothing under the 1970 will, yet attained equal status with the testator's grandchildren under the 1974 will.

I also disagree with the majority's conclusion that there is little difference in the interest Mrs. Andrews would receive between the 1962 will and the 1974 will. The record discloses that the testator's 1974 will included the following provision:

> The aforesaid percentage of my residuary estate [the portion devised to Mrs. Andrews] constituting my wife's share shall be ascertained from the determinations finally arrived at for

purposes of the federal estate tax, subject to such adjustment as may be necessary to carry out the provisions of this Will to the effect that *my wife's share shall not be reduced by any estate, inheritance, transfer, succession, legacy or similar taxes*. . . . (Emphasis added.)

In other words, under the 1974 will, Mrs. Andrews would receive a one-half *net* interest in fee simple undiminished by the payment of state and federal inheritance and estate taxes. Under the 1962 will, Mrs. Andrews would have received one-half of Mr. Andrews' estate after the payment of estate and inheritance taxes. The record also discloses that Mr. Andrews' estate was worth at one point between $1 million and $1.5 million. Obviously, the difference in the value of the estate ultimately received by Mrs. Andrews would be greatly increased if that value is computed by subtracting all inheritance and estate taxes from that portion of the estate devised in trust to Karl Andrews, Jr.

Moreover, Mrs. Andrews was named as the executrix in the 1974 will. While this may appear incidental at a glance, it is of particular significance in a will of this nature which utilizes the special provisions of our federal estate tax laws allowing a wife to receive one-half of a husband's estate free from federal estate taxes. The significance is this: The will vests the power in the executrix to determine which property shall go into which half of the estate. In other words, Mrs. Andrews could choose that portion of the property to be allocated to her.

I agree that the evidence gives rise to the inference that the 1974 will reflects an interest by the testator in taking advantage of inheritance and estate tax savings provided by the Internal Revenue Code. However, I do not agree that we should ignore Mrs. Andrews' improved position in the 1974 will along with the other factors noted below.

I also note that Mrs. Andrews' position was again improved by the 1975 codicil which provided for her to be the income beneficiary of the Karl Andrews, Jr., trust should he predecease her.

(2) I think also that the usage of counsel by testator throughout the years gives rise to a reasonable inference of undue influence by Mrs. Andrews. Except for the final will and

codicil, all prior instruments had been prepared by attorney Pollock in Southern Pines. Counsel preparing the propounded will and codicil, the record discloses, was an employee of Belk Stores Services, Inc., in Charlotte. There is also some indication in the record that Mrs. Andrews was previously employed either by that company or one of its employees. I also am impressed that the 1974 will was prepared by counsel in Charlotte as a result of a telephone call and that counsel had never seen Mr. Andrews until he appeared (with Mrs. Andrews) in his office in Charlotte to execute the will. In a word, there is a reasonable inference here that Mrs. Andrews influenced the testator to have a new will prepared by an attorney of her choosing, with whom the testator was not familiar, far from his home, and drafted to her and her son's obvious advantage.

(3) The majority opinion notes, and I will not repeat it here, various portions of the evidence giving rise to the reasonable inference that Mr. Andrews was not in normal health during the period when these transactions took place.

(4) The majority enumerates seven "factors to be considered on the issue of undue influence." (Quoting from *In re Mueller's Will*, 170 N.C. 28, 86 S.E. 719 (1915).) Upon reviewing those factors, I conclude that there is evidence in caveator's favor with respect to *every single one of them*. The evidence is clear with respect to his advanced age. There is some evidence of physical and mental weakness. There is evidence that he was in the home of the beneficiary and subject to her constant association and supervision. There is some evidence that others had little or no opportunity to see him. There is abundant evidence that the will is different from and revokes prior wills. It is clear that it is made in favor of one with whom he has no ties of blood. It is clear that, to some extent at least, it disinherited the natural objects of his bounty. There is a reasonable inference from the evidence that Mrs. Andrews had procured the will's execution.

In summary, I agree that there is not overwhleming evidence of undue influence on the part of Mrs. Andrews. I do believe, however, that there is more than a scintilla of evidence; indeed, the evidence is abundant that improper influence may have been exerted over Mr. Andrews by Mrs. Andrews such that the matter should be submitted to the jury for decision. Surely, on the basis

of the evidence disclosed by the cold record before us, the trial judge, who was present and observed the witnesses as they testified upon the stand, was in a superior position to determine whether the matter should be resolved as a matter of law or be submitted to the ultimate trier of facts. I believe that Judge Hairston decided properly and that the law should not disturb the verdict reached by the twelve.

STATE OF NORTH CAROLINA v. DAVID EARL SETZER

No. 7925SC293

(Filed 3 July 1979)

1. **Criminal Law § 21— delay in ruling on pretrial motions—no abuse of discretion**

The trial court did not abuse its discretion in failing to rule on defendant's twenty-six pretrial motions until the day before the trial where only three months had elapsed since the filing of the first motion, defendant showed no vindictiveness by the district attorney in not bringing the motions on for hearing earlier, and defendant showed no prejudice from the delay in ruling on the motions. G.S. 15A-952(f).

2. **Jury § 3.1— motion to pay jurors their weekly wages and provide care for dependents**

The court properly denied defendant's motion that jurors be paid their weekly wages and that funds be provided for the care of their dependents, since G.S. 7A-312 provides that a juror shall receive $8.00 per day, and jury duty is not a form of employment but is a civic responsibility.

3. **Constitutional Law § 31— refusal to provide experts at State's expense**

In this prosecution for murder and arson, the trial court did not err in the denial of defendant's motion for funds to employ a criminologist, a fire investigative expert, a psychologist, a psychiatrist, a parole and probation expert, and a lie detector expert, especially since the court ruled that defendant should be provided funds to employ a pathologist to review the autopsy reports and that the use of a fire investigative expert would be considered if more details were provided by defense counsel. G.S. 7A-454.

4. **Criminal Law § 75.9— volunteered in-custody statement**

Defendant's incriminating statement to an officer was not the result of custodial interrogation but was volunteered and admissible in evidence where the officer stopped the car in which defendant was riding, arrested defendant for public drunkenness, and locked him in the police car; the officer started walking toward the car where defendant's wife was seated; defendant told the officer he had better watch out how he talked to defendant's wife; and the officer asked, "Why?" and defendant stated, "Because my wife and brother didn't have anything to do with it. I went up there and did it by myself."

5. Criminal Law § 83— defendant's statement to wife—no violation of husband-wife privilege

An officer's testimony that he heard defendant tell his wife, "Ruby, I am in real trouble this time," did not violate the husband-wife privilege of G.S. 8-56.

6. Bills of Discovery § 6; Criminal Law § 80.1— letters—discovery order—authentication

A pretrial discovery order requiring the State to provide statements made by defendant was not violated by the State's failure to provide to defendant before trial letters written by defendant to his brother where the letters first came into the State's possession during trial and were then provided to defendant. Furthermore, the letters were sufficiently authenticated for admission in evidence where defendant's brother testified that he received the letters while he and defendant were in jail two cells apart; defendant would call out that he had a letter on the way and who would bring it and the letters came as defendant said they would; the letters were signed with defendant's initials; and he had seen defendant write receipts and bills and it was his opinion that the letters were in defendant's handwriting.

7. Homicide § 20.1— photographs of bodies of victims

In this prosecution for arson and murder, photographs of the victims' bodies found in a burned house were properly admitted for the purpose of illustrating testimony.

8. Criminal Law §§ 96, 102.5, 128.2— improper question by prosecutor—instruction to disregard—denial of mistrial

In this prosecution for arson and murder, the trial court did not abuse its discretion in refusing to declare a mistrial when the prosecutor violated an order requiring prior approval of the court for any questions relating to any previous fires that had occurred in the proximate vicinity of defendant where the court sustained defendant's objection to the prosecutor's question and instructed the jury not to consider it, and the question was never answered.

9. Homicide §§ 30.2, 30.3— instructions on voluntary and involuntary manslaughter not required

In this prosecution for first degree murder by setting fire to the victims' dwelling, the trial court properly refused to instruct the jury on voluntary manslaughter since there was no evidence that the killings were done in the heat of passion or by the misuse of self-defense. Nor did the court err in refusing to instruct on involuntary manslaughter since malice was implied from defendant's act of intentionally setting fire to a building which he knew to be occupied even if he did not intend to kill the occupants but only to frighten them.

APPEAL by defendant from *Ervin, Judge.* Judgment entered 2 November 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals 14 June 1979.

Defendant was indicted for the first degree murders of Cary Grant Huffman and Calvin Augustus Duncan, and for arson. Over defendant's objection the cases were consolidated for trial.

Defendant's brother Manuel Setzer, who had been charged with the same crimes, testified under a grant of immunity for the State. He testified that at about 9 p.m. on 4 June 1978 defendant asked him to go to Catawba with defendant and his wife. Defendant had been drinking at that time. On the way they stopped to buy more wine, and defendant had several drinks of it on the trip. When they started back from Catawba defendant did not head toward home. Manuel "asked where we were going and he told me that he was going to check on something." Defendant drove on a dirt road, and when they reached a house in a field, defendant got out of the car. "Standing in front of the house, there was a foam rubber mattress in the front yard. . . . [Defendant] tore a piece off it and went around back of the house with it." Manuel did not see him go into the house. Defendant was gone for five to seven minutes, then "he came back . . . and jumped in the car and said, let's get the hell out of here. . . . He was scared to death but I didn't know what was wrong with him." The car got stuck and it took about five minutes to get it out.

> "[T]hat is when I first saw something on fire from where the house was and where we just came from. . . . I asked David did he set the house on fire and he said yes. . . . I asked what did he do that for and he said to teach them bastards who they're ------ with. I asked then, you mean somebody is in there. David said yes. . . . [H]e said that he had seen them go out through the backyard with a flashlight. I said are you sure. He said yes. I told him that I was going to call the fire department and he said okay."

They stopped at the first house and asked the people there to call the fire department. When they got back to town, the police were pulling cars over and they were stopped.

On cross-examination Manuel testified that he had had two beers on the day of the fire and about four drinks from a bottle of wine that evening. Between 4:30 and 9 p.m. he saw defendant drink a fifth of wine; "David acted like he was not drunk, just a little drunk." After they left for Catawba defendant drank about half of another fifth of wine. By this time he was "pretty well

drunk . . . half drunk." Manuel repeated the details of the evening as he had told them on direct examination.

Officer Pruitt of the Claremont Police testified that on the night of the fire he stopped the car in which defendant and Manuel Setzer were riding as it came toward town on the road from the farmhouse. Defendant had "an odor of alcohol about him and he was staggering and his speech was slurred and his eyes were bloodshot." Officer Pruitt placed defendant under arrest for public drunkenness, advised him of his rights, and locked him in the police car. Pruitt addressed no questions to defendant, and defendant said nothing to the officer concerning his rights. As Pruitt walked back toward the vehicle where defendant's wife was seated, defendant began beating on the patrol car window. Pruitt returned to him and defendant "said that I had better watch out how I talked to his wife." Pruitt asked, "Why?" and defendant answered, "[B]ecause my wife and my brother didn't have anything to do with it. I went up there and did it by myself." Pruitt testified that at that time he did not know to what defendant was referring. Pruitt then brought defendant's wife over to the patrol car, and he heard defendant say to her, "Ruby, I am in real trouble this time."

Asked on voir dire about defendant's reputation, Officer Pruitt testified that "there had been two or three houses on fire or small blazes in the house where [defendant] lived," and that he considered defendant to be a fire bug. He felt that he had probable cause to believe defendant was involved in the fire when he saw him coming down the road from the farmhouse.

Deputy Sheriff Price testified that he found two charred bodies in the burned house. Photographs of the bodies were admitted into evidence over defendant's objection to illustrate Price's testimony. Dr. Page Hudson, who was stipulated to be an expert forensic pathologist, had examined the bodies, and he gave his opinion that the cause of death was carbon monoxide poisoning and thermal burns. The high levels of alcohol (.35 and .43 per cent) present in the bodies could have contributed to the deaths. Marvin Sawyer, an expert in fire investigation and arson detection, testified that he was unable to determine the cause of the fire.

Defendant presented witnesses, but did not testify. He was found guilty of second degree murder in the deaths of Huffman and Duncan, and guilty of unlawful burning. The court arrested judgment on the conviction of unlawful burning, and sentenced defendant to 30-40 years on each count of second degree murder. From the murder convictions defendant appeals.

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

Tate, Young & Morphis, by Thomas C. Morphis, for defendant appellant.

ARNOLD, Judge.

[1] Twenty-six pretrial motions were filed by the defendant. The court entered its order on these motions on 23 October 1978, the day before defendant's case was called for trial. Defendant's motion to dismiss for delay in hearing these motions was denied, and he assigns error to this denial, contending that the delay was intended to hinder him in the preparation of his case.

Only three months elapsed between the filing of the first of the motions and the date the court ruled upon all of them. Defendant has shown no vindictiveness on the part of the District Attorney's office in not bringing the motions on for hearing earlier. In addition, G.S. 15A-952(f) provides that "[w]hen a motion is made before trial, the court *in its discretion* may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury was impaneled, or during trial." (Emphasis added.) Defendant has shown no instances of prejudice which resulted from a lack of earlier hearing on the motions. We find no abuse of the trial court's discretion.

[2] Defendant next assigns error to the denial of three of his pretrial motions. The first of these requested that the jurors and witnesses be paid their weekly wages and that funds be provided for the care of their dependents. Defendant cites no authority for his position, but he makes the ingenious arguments that without such payment qualified jurors with financial difficulties will ask to be excused from jury service, and that those who do serve will be distracted from the trial by "instinctive concerns about their own survival." Even if we were persuaded by defendant's arguments,

we could find no error in the court's ruling on his motion, since G.S. 7A-312 plainly provides that a juror "shall receive eight dollars ($8.00) per day." Where the legislature has spoken, the court is bound. We note further that jury duty is not a form of employment, but a responsibility owed by a citizen to the State. Finally, defendant has made no attempt to show that any actual prejudice resulted from the denial of this motion.

The second motion which is the subject of an assignment of error asked that the jury be prohibited from dispersing during the trial. Defendant argues that this prohibition was necessary to remove the jurors from possible influence by outside sources. He does not allege, however, that any juror actually was influenced by any source outside the courtroom, and we find no merit in this assignment of error.

[3] Defendant also moved for funds to employ experts: a criminologist, a fire investigative expert, a psychologist and psychiatrist, a parole and probation expert, and a lie detector expert. The court ruled

> 14. That the Defendant's Motion for Funds for Expert Witnesses and Investigator is denied insofar as such relates to a criminologist, psychologist, psychiatrist, parole expert, probation expert, lie detector expert and investigator. The Court will allow the Defendant to procure the services of an area pathologist to review the autopsy reports in this case and will consider the use of a fire investigative expert, if more details of said request are made available to said Judge by the counsel for the Defendant.

Defendant apparently provided the court with no further details regarding the use of a fire investigative expert. G.S. 7A-454 leaves the approval of fees for expert witnesses for an indigent within the court's discretion. Defendant has not shown how the lack of any of the requested experts in fact prejudiced his defense. We find no abuse of discretion.

[4] Defendant assigns error to the court's ruling that an incriminating statement made by the defendant was not the result of custodial interrogation, but was a voluntary utterance and so admissible. The uncontradicted testimony of Officer Pruitt was that after stopping the car in which defendant was riding he ar-

rested defendant for public drunkenness, gave him the *Miranda* warnings, and locked him in the police car. Pruitt started walking toward the car where defendant's wife was seated and defendant began kicking and beating on the patrol car. Pruitt returned to him and defendant said Pruitt had better watch out how he talked to defendant's wife. Pruitt asked, "Why?" and defendant responded, "[B]ecause my wife and my brother didn't have anything to do with it. I went up there and did it by myself." At that time Pruitt did not know to what defendant was referring. Pruitt had thought that defendant's first statement was an allegation that Pruitt had a sexual interest in defendant's wife.

We find no merit in defendant's contention that this was a custodial interrogation. Pruitt testified that he did not question defendant after he gave him the *Miranda* warnings. The single question "Why?", in context, cannot reasonably be seen as referring to the fire. We find no error in the admission of defendant's incriminating statement into evidence. *Cf. State v. Miller*, 276 N.C. 681, 174 S.E. 2d 481 (1970), death penalty vacated 408 U.S. 937, 33 L.Ed. 2d 755, 92 S.Ct. 2863, conformed to 281 N.C. 740, 190 S.E. 2d 841 (1972).

[5] Nor do we find error in the admission of Pruitt's testimony that he heard defendant say to his wife, "Ruby, I am in real trouble this time." Defendant argues that this communication was privileged because it was between husband and wife. However, the marital privilege of G.S. 8-56 says merely that neither spouse shall be compellable to disclose any confidential communication between them during the marriage. The communication here was not confidential, since it was made within the hearing of a third party, and at any rate the privilege refers only to testimony by a *spouse* about the confidential communication. This argument is unavailing.

[6] The trial court allowed into evidence letters allegedly written by defendant to his brother Manuel. Defendant argues that the State failed to make timely disclosure of the letters to him, and that the letters were not properly authenticated and so were inadmissible. Prior to trial defendant moved for discovery of all statements made by him, and this motion was granted. The State admits that prior to trial the existence of these letters was not disclosed to defendant. However, it appears in the record that the

letters did not come into the State's possession until after the trial had begun. Manuel Setzer testified that he provided the letters to the District Attorney on Thursday, and that the District Attorney had not known about the letters before then. Defendant's counsel, arguing to suppress, indicated to the trial court that he received copies of the letters on Friday. We find no violation of the discovery order.

Further, we find that the letters were sufficiently authenticated. Manuel Setzer testified that while he and defendant were in jail two cells apart they would sometimes communicate by "hollering" and other times by writing letters. Before each of the letters came to Manuel, defendant called out and told Manuel that he had a letter on the way, and who would bring it. The letters came just as defendant said they would, and they were signed with defendant's initials. Manuel had never received letters from defendant before, but he had seen him write receipts and bills, and it was his opinion that the letters were in defendant's handwriting. After this testimony was heard on voir dire, the court found facts and concluded that the letters were sufficiently authenticated. As there is sufficient evidence to support this conclusion, defendant's argument cannot prevail.

[7] Defendant next assigns error to the admission into evidence of photographs of the bodies found in the burned house, asserting that they were prejudicially horrible and gory. The law in North Carolina on this point is well-established, however. "[I]n a prosecution for homicide, photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray." *State v. Atkinson*, 275 N.C. 288, 311, 167 S.E. 2d 241, 255 (1969), *death penalty vacated* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971), on remand 279 N.C. 386, 183 S.E. 2d 106 (1971), later appeal 281 N.C. 152, 187 S.E. 2d 702 (1972), *cert. denied* 409 U.S. 881, 34 L.Ed. 2d 136, 93 S.Ct. 172 (1972); *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979); 4 Strong's N.C. Index 3d, Criminal Law § 43.4 and cases cited therein. Here the photographs were properly authenticated and admitted only for the purpose of illustrating testimony. Defendant does not contest the admission

procedures, but argues, essentially, that we should change the law, making gruesome photographs inadmissible. This we cannot do.

Aerial photographs of the area in which the burned farmhouse was located were admitted into evidence to illustrate the testimony of Manuel Setzer. Defendant argues that these photographs were not properly authenticated, but we find it unnecessary to reach that question. Even assuming that the admission of the photographs was improper, defendant has shown no prejudice, and we find none, which could have resulted from their admission. Manuel had already testified in detail about landmarks in the area of the farmhouse—a section of badly washed-out road, a silo, and the J. C. Penney warehouse, for example—and how they were related to the sequence of events on the night of the fire. We fail to see how having these details pointed out on aerial photographs (which defendant does not argue inaccurately depicted the area) could have prejudiced defendant's position.

[8] Counsel for defendant made a pretrial motion in limine to prevent the State or its witnesses from referring in open court to any other fires that had occurred in the past in the proximate vicinity of the defendant. This motion was granted to the extent that any such questions by the District Attorney were required to be with the prior approval and consent of the court. At trial, defendant called his mother as a witness, and on cross-examination by the District Attorney the following occurred:

Q. Did you live at the O. D. Smith property?

A. Yes sir.

Q. And was that in 1976?

MR. MORPHIS: Objection.

A. Been about three years ago.

Q. And there was a couple of fires there while you lived there?

MR. MORPHIS: Objection.

COURT: Sustained.

MR. MORPHIS: May we be heard out of the hearing of the jury?

COURT: Objection is sustained. Motion to strike is allowed. Don't consider that question for any purpose, members of the jury.

At this point, out of the hearing of the jury, defendant moved for a mistrial, which was denied. However, the court continued:

[T]he court is of the opinion that it is a violation of the court order and I don't want to hear any more questions of that kind asked of anybody unless you do what I told you to do and that is to call it to the court's attention beforehand and ask the permission of the court to do so. If it does happen again, I am going to grant a mistrial on my own motion.

Defendant contends that the denial of a mistrial was prejudicial error.

We cannot say that the trial court abused its discretion in denying a mistrial. The defendant's objection was sustained and the question was never answered. The motion to strike was allowed and the jury was instructed not to consider the question for any purpose. There was other evidence to support the jury's verdict. The situation is much like that in *State v. Harris*, 22 N.C. App. 332, 206 S.E. 2d 369 (1974), where we observed that the trial court is in the best position to determine the impact of an improper question upon the trial. We uphold the trial court's ruling on the motion.

[9] Finally, defendant contends that the trial court erred in denying his request to charge the jury on voluntary and involuntary manslaughter. We find no evidence to support a charge of voluntary manslaughter, since that verdict must be supported by a showing that the killing was done in the heat of passion or by the mis-use of self-defense, *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978), neither of which is present here.

We find, further, that the evidence would not support a charge on involuntary manslaughter. From the evidence presented the jury could find that defendant, while intending to set fire to the farmhouse, did not intend to kill its inhabitants, but only to frighten them. However, the evidence is uncontradicted that defendant knew the house was inhabited. Involuntary manslaughter differs from second degree murder, of which defendant was convicted, in that malice is present in the latter but

not the former. *Id* at 578, 247 S.E. 2d at 916. And malice "'"does not necessarily mean an actual intent to take human life; it may be . . . implied . . . when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." [cite omitted.]'" *Id.*, quoting *State v. Wrenn*, 279 N.C. 676, 686-87, 185 S.E. 2d 129, 135 (1971) (Justice, now Chief Justice, Sharp, dissenting). We believe that the act of intentionally setting fire to a building known to be occupied is such an act. Thus, because malice is implied from the nature of the act, an instruction on involuntary manslaughter would have been improper.

We have considered defendant's other assignments of error and we find that they are without merit. In defendant's trial we find

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ARCHIE CHARLES HOSKINS

No. 7926SC41

(Filed 3 July 1979)

1. **Criminal Law § 34.5— evidence of another crime—competency to show identity**

In this prosecution of defendant upon two charges of kidnapping for the purpose of terrorizing the victims, testimony relating to a third incident was admissible to identify defendant as the perpetrator of the crimes charged where the similarity of *modus operandi* between the third incident and the crimes charged tended to show that the same person committed all three offenses in that (1) each incident took place in the same parking lot; (2) each incident occurred late at night; (3) each involved a woman who was alone when accosted; (4) a gun was held on each victim by the perpetrator who threatened to kill the victim if she did not cooperate; and (5) cars belonging to the victims were involved in each incident.

2. **Criminal Law § 75.10— admissibility of confession**

The trial court properly admitted defendant's in-custody statement where the court found upon supporting evidence that defendant made the statement understandingly and voluntarily after he had been fully advised of his constitutional rights and had freely, knowingly and voluntarily waived those rights.

3. Kidnapping § 1.2— purpose of terrorizing victims—sufficiency of evidence

The State's evidence was sufficient to show that defendant kidnapped his victims for the purpose of terrorizing them where it tended to show that defendant repeatedly threatened to kill each of his victims; he forced each of them at gunpoint to travel with him in a car late at night to isolated and dark localities and forced each of them to disrobe; he held a knife to the throat of one victim while she was driving; and both victims testified that they were scared.

4. Criminal Law § 114.2— instructions—evidence tending to show defendant "confessed"—no expression of opinion

In this prosecution upon two charges of kidnapping, the trial court's instruction that there was evidence tending to show that defendant confessed "that he had participated in the crimes in which he was charged" was supported by the evidence and did not constitute an expression of opinion.

5. Kidnapping § 1.3— failure to instruct on assault and false imprisonment

The trial court in a kidnapping case did not err in failing to instruct the jury on assault with a deadly weapon or assault by pointing a gun since those offenses are not lesser included offenses of the crime of kidnapping. Furthermore, even if the common law offense of false imprisonment still exists in this State and is a lesser included offense of the statutory crime of kidnapping, the trial court did not err in failing to instruct the jury on false imprisonment where the State's evidence tended to show the commission of the crime of kidnapping and there was no conflicting evidence relating to any element of that crime.

APPEAL by defendant from *Barbee, Judge.* Judgments entered 16 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 April 1979.

The defendant was tried upon his pleas of not guilty to two indictments in which he was charged with kidnapping, respectively, Vickie Johnson and Carrie Mae Bennett, persons who had attained the age of 16 years, by unlawfully restraining them and removing them from one place to another for the purpose of terrorizing them.

At trial the State's evidence tended to show: Vickie Denise Johnson, 21 years old, drove to Church's Fried Chicken Restaurant about 12:30 a.m. on 20 May 1978 to purchase chicken. As she was leaving the building, the defendant walked up to her. He held a gun to her side and said, "If you move, I'll kill you." The defendant told her to get in her car. She got in on the passenger side. The defendant drove. As they were pulling out of the parking lot, the defendant held the gun to her head saying he

was going to kill her. The defendant drove down a dark dirt road close to the outskirts of town. He told her to get out of the car and, holding the gun on her, told her that he was going to kill her if she didn't take off her clothes by the time he counted to four. She complied. After she took off her clothes, the defendant told her that he was not going to kill her and gave her the gun. She put her clothes back on and got back in the car. She had the gun with her on the right side of her seat. The defendant then drove the car out of the dirt road and eventually drove into the parking lot of a club. She grabbed the gun and jumped out of the car screaming, "Somebody help me, he is crazy." The defendant grabbed her arm and told her, "Come back. I've got a knife. I'm going to stab you." She jerked away and ran to the front door of the club. The defendant followed behind her. She pulled the gun's trigger three times, but it did not go off. The defendant took the gun from her, ran back to her car, and drove away in it.

At about 2:50 a.m. on the same night, 20 May 1978, Carrie Mae Bennett, 27 years old, drove with her sister to the same Fried Chicken Restaurant. Her sister went in, and as Bennett sat in her car waiting, the defendant jumped in, put a gun to her side, and said to "drive". He told her to drive him to Rock Hill. He said, "Woman, I will kill you if you try any tricks." After they got on Interstate 77, he put a knife to her throat and said, "Do you feel that?" In Rock Hill, the defendant again threatened her life. He told her to stop on a dark road, get out, and take off her blouse and bra. She did so. The defendant then allowed her to put her clothing on again and told her that he wasn't going to kill or rape her, "but [that] he just wanted someone to talk to." At this point she was still not sure the defendant would not kill her. They drove back to Charlotte. The defendant directed her to the place where he stayed and got out of the car about 7:30 a.m. She then drove off.

Three days later, at about 11:05 p.m. on 23 May 1978, in the parking lot of the same Fried Chicken Restaurant, the defendant got into the car in which one Barbara Moore was sitting, drew a hand gun, stuck the gun into Moore's side, and said, "Lady, if you move, I'll shoot you." Moore jumped from the car and ran screaming toward the restaurant. Police Officer Frye observed the incident and chased the defendant, who ran from the car to the rear of the parking lot. He was then chased to a nearby house where

he hid in the crawl space beneath the house until he finally came out and was arrested at 10:45 the next morning, 24 May 1978. The police found a pocket knife and a set of handcuffs in a search of the crawl space and found a hand gun in the field behind the Fried Chicken Restaurant.

Following his arrest, defendant gave a statement to the police in which he admitted his participation in the crimes for which he was charged.

The defendant did not present evidence. The jury found him guilty as charged in both cases. From judgments imposing prison sentences, the defendant appeals.

Attorney General Edmisten by Associate Attorney Kaye R. Webb for the State.

Tate K. Sterrett for the defendant appellant.

PARKER, Judge.

[1] The defendant first assigns error to the trial court's overruling his objection to the testimony of Barbara Moore. He contends that this evidence was inadmissible because it showed the commission of a criminal offense separate and distinct from the offenses for which he was being tried. We find no error.

> Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

1 Stansbury's N.C. Evidence, Brandis Revision, § 91, p. 289-90.

Here, the evidence of the Barbara Moore incident was relevant to identify the defendant as the perpetrator of the crimes charged. "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *State v. Thompson*, 290 N.C. 431, 438, 226 S.E. 2d 487, 491 (1976) quoting from *State v. McClain*, 240 N.C.

171, 175, 81 S.E. 2d 364, 367 (1954). The similarity of *modus operandi* between the Barbara Moore incident and the crimes charged tended to show that the same person committed all three offenses. These similarities are numerous and compelling: (a) each incident took place in the same parking lot; (b) each incident occurred late at night; (c) each involved a woman who was alone when accosted; (d) a gun was held on each victim by the perpetrator; (e) in each incident the perpetrator threatened to kill the victim if she did not cooperate; and (f) cars belonging to the victims were involved in each incident.

The defendant contends that the evidence was unnecessary to establish identity because defendant's counsel on voir dire offered to stipulate that the defendant "was the man in the car with Carrie Mae Bennett and Vickie Johnson on the evening of the 20th of May." There is, however, no indication in the record that this offer of stipulation was ever made known to the jury. The defendant was on trial upon pleas of not guilty to the offenses charged, and the State had the burden of proving every element of the crimes. Identification of the defendant as the perpetrator of the crimes was an essential part of the State's burden of proof. The evidence of the Barbara Moore incident was relevant to prove identity and was admissible for that purpose. This assignment of error is overruled.

[2] The defendant next assigns error to the admission into evidence of the statement he made to the police after his arrest. Prior to admitting this statement in evidence, the court conducted a voir dire hearing after which the court entered an order making full findings of fact on the basis of which the court determined that defendant made the statement understandingly and voluntarily after he had been fully advised of his constitutional rights and had freely, knowingly, and voluntarily waived those rights. There was competent evidence to support the trial court's findings. The court's findings of fact, being fully supported by competent evidence, will not be disturbed on appeal. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). This assignment of error is overruled.

[3] The defendant assigns error to the trial court's denial of his motion to dismiss, contending that there was insufficient evidence to show that defendant kidnapped his victims for the purpose of

terrorizing them. We disagree. The evidence showed that the defendant repeatedly threatened to kill each of his victims, that he forced each of them at gunpoint to travel with him in a car late at night to isolated and dark localities, that he held a knife to the throat of Carrie Mae Bennett while she was driving, and that he forced both victims to disrobe. Both victims testified that they were scared, and their terror can be readily understood. The evidence was ample to show that the victims were terrorized. The defendant's purpose to terrorize is amply shown by what he did. This assignment of error is overruled.

[4] The defendant next contends that the trial court erred by expressing an opinion on the evidence in violation of G.S. 15A-1232 during its instructions to the jury. The challenged instructions concern the statement made by defendant to the police. The trial court said:

> There is evidence which tends to show that the defendant confessed that he participated in the crimes charged in this case.
>
> * * *
>
> The State's evidence . . . tends to show that . . . the defendant made a statement to Detective M. V. Holt of the Charlotte Police Department, admitting that he had participated in the crimes in which he was charged.
>
> The defendant's statement reads as follows:
>
> . . . Saturday night sometime after 12 midnight I was at Church's Chicken on W. Trade Street. I saw a girl named "Little Mama" pull on to the lot in a Gran Prix. She walked on in to Church's. She bought some chicken and came back out toward her car. I met her at her car and pulled my gun and told her to move over and "Don't touch the latch on the door. I drove the car away down Trade Street to I-77 to West Boulevard and headed toward the airport. I pulled off West Boulevard near Little Rock Apartments on a dead end street and told her to take all her clothes off. I got out of the car. She took all her clothes off and walked around the car to where I was standing. I told her to put her clothes back on her stinking ass and she did. We got back in the car and

drove to the Pilot Service Station on West Boulevard near Old Steele Creek to call her mother. After that we went to the CAS-BAR lounge where she grabbed my gun and jumped out of the car screaming "somebody help me, he is crazy". She started to run into the Lounge and I grabbed her arm and got the gun back. I then jumped in the car and left. I drove the car back to Sumter Street near my Mothers house and parked it. I went to my Mother's house and stayed a few minutes and talked to my old lady, then I left again.

I then walked back up to Church's Chicken again. I seen a green Pinto parked on the lot next to the yellow house with a girl in it. I got in the car and pulled my gun out of my pocket and laid it down and told her to start driving down I-77 and we drove down to Rock Hill, S. C. We got lost and asked some policeman for directions and they told us. We rode around and then came to Charlotte and I got out of the car on W. Boulevard in front of Little Rock Apartments. I went to Eular Bells' apartment at 3031 Faye # 9 and went to bed, about 8:00.

In this statement, the defendant, did in fact admit or confess "that he had participated in the crimes in which he was charged," precisely as the trial court instructed. This case is distinguishable from *State v. Bray*, 37 N.C. App. 43, 245 S.E. 2d 190 (1978), upon which defendant relies. In *Bray*, the trial court's characterization of defendant's statement as a *confession* to the crime charged was a misstatement of the facts clearly resulting in prejudice to the defendant. Although the defendant in *Bray*, charged with second degree murder, had admitted to the investigating officer that he had fired the fatal shot, he had not *confessed* to *murdering or otherwise unlawfully taking the life of the decedent*, but contended throughout that he had acted lawfully. In the present case, the trial court did not misstate the facts in the challenged instructions. This assignment of error is overruled.

[5] The defendant assigns error to the trial court's refusal to instruct the jury that it might find the defendant guilty of assault with a deadly weapon, assault by pointing a gun, and false imprisonment. This assignment of error has no merit. Assault with a deadly weapon and assault by pointing a gun are not lesser included offenses of the crime of kidnapping, which was the offense

with which defendant was charged; since he was not charged with assault with a deadly weapon, or with assault by pointing a gun, and since neither of these is included within the offense with which he was charged, it would have been error for the court to have instructed the jury on them. Nor was the trial court required to instruct the jury on the offense of false imprisonment. The common law crime of false imprisonment was a distinct crime from the common law crime of kidnapping. *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1973). Under our present statute relating to kidnapping, G.S. 14-39, the statutory offense may be committed when a person "shall unlawfully confine, restrain, or remove from one place to another, any other person . . . if such confinement, restraint, or removal is for" one of the unlawful purposes enumerated in the statute. On this appeal we need not decide whether the common law offense of false imprisonment still exists in this State as a separate offense nor whether, if so, it may properly be considered as a lesser offense included within the statutory offense proscribed by present G.S. 14-39. This is so because, even if the common law crime of false imprisonment be considered as still existing in this State and as being a lesser offense included within the offense charged by the indictments in this case, the necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed. There is no such necessity if the State's evidence tends to show the commission of the crime charged and there is no conflicting evidence relating to elements of the crime charged. *See, State v. Keenan*, 289 Minn. 313, 184 N.W. 2d 410 (1971). "Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 160, 84 S.E. 2d 545, 547 (1954). Here, the State's evidence all tends to show the commission by the defendant of the crime charged and there was no conflicting evidence relating to any element of that crime. This assignment of error is overruled.

We have considered all of defendant's remaining assignments of error and find them without merit. The defendant in this case received a fair trial free from reversible error.

No error.

Judges HEDRICK and CARLTON concur.

MACK FINANCIAL CORPORATION v. HARNETT TRANSFER, INC.

No. 7826DC857

(Filed 3 July 1979)

1. Evidence § 34.2— purchase of trucks—inflated price to cover previous bill—admission—no compromise offer

In an action to recover $4000 for repairs made to a truck owned by one of defendant's drivers where defendant claimed that it was not responsible for the bill, the trial court properly allowed into evidence testimony that the president of defendant, in negotiating for the purchase of two trucks from plaintiff's assignor, suggested that, when financing for the purchase of the trucks was being arranged, the assignor raise the price of each of the trucks by $2000 and apply the extra $4000 from the sale against the outstanding repair bill, since such testimony established an admission by defendant's president that, at the time he made the statements, he considered himself liable for the debt involved in this case; furthermore, the evidence was not excludable as an offer to compromise since the amount of the repair bill was $4025.71, and it would be unrealistic to assume that an offer to pay $4000 was a compromise offer.

2. Contracts § 27.1— existence of contract—sufficiency of evidence

In an action to recover $4000 for repairs made to a truck owned by one of defendant's drivers, evidence was sufficient to show a contract between defendant and plaintiff's assignor where the evidence tended to show that defendant's president telephoned plaintiff's assignor and told him that the truck was being towed in, that his business was flourishing and he needed the truck repaired as quickly as he could get it back on the road; after the repairs had been completed, defendant's president told the manager of plaintiff's assignor that he would pay for the repairs and even instructed him as to where to send the bill; and defendant's president discussed paying for the repairs with the business manager of plaintiff's assignor fifteen to twenty times and stated that he was going to pay the bill as soon as he could.

3. Frauds, Statute of § 5— repairs to truck—no promise to pay for debt of another

In an action to recover $4000 for repairs made to a truck, there was no merit to defendant's contention that its promise to pay for the repairs was barred by G.S. 22-1 as being an unwritten promise to pay the debt of another, since the evidence disclosed that the bill defendant promised to pay belonged to defendant only and not to defendant's driver, the owner of the truck.

4. Uniform Commercial Code § 8— repair to truck—parts required—no sale of goods—statute of frauds inapplicable

In an action to recover $4000 for repairs made to a truck, there was no merit to defendant's contention that any contract for parts used in the repair of the truck was rendered unenforceable by the statute of frauds provision of G.S. 25-2-201 pertaining to the sale of goods, since the contract in the present case was for services, and the fact that various parts were also required to repair and service the truck properly was merely incidental to the repair contract.

5. Evidence §§ 33.1, 46— written notations on invoice—handwriting authenticated—no hearsay

In an action to recover for the cost of repairs to a truck, the trial court did not err in allowing plaintiff to introduce into evidence a duplicate invoice from its assignor which had some handwritten notations on it, since the writing was sufficiently authenticated by the owner of the truck which was repaired, and since the handwriting on the invoice did not render the exhibit inadmissible on the basis of hearsay, as the handwriting was not offered to prove the truth of the matter asserted therein, but was offered only for the purpose of showing that the statements had been made.

6. Trial § 36— instruction to examine exhibit carefully—no comment on evidence

The trial court's instruction to the jury to examine plaintiff's exhibit "very carefully" did not constitute an improper comment as to the probative force of the evidence.

7. Contracts § 28— quantum meruit—no instruction given—amount of damages—instruction proper

Where defendant's president telephoned plaintiff's assignor and specifically requested that a truck be repaired, asked that the bill be sent to him, and stated that he would pay the bill as soon as he could, the trial court did not err by instructing the jury only as to express contracts and not instructing or submitting an issue as to *quantum meruit*; furthermore, the court did not err in instructing the jury that they should award plaintiff damages of $4025.71 if they believed the evidence with respect to costs of labor and materials, since the evidence tended to show that defendant was billed for that amount, discussed the bill numerous times with plaintiff's assignor, and never questioned the amount of the bill.

APPEAL by defendant from *Lanning, Judge.* Judgment entered 17 April 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals on 30 May 1979.

This is a civil action wherein plaintiff seeks to recover $4,389.07 plus interest on an account assigned to it for collection by Brockway Motor Trucks, a division of Mack Financial Corporation, for repairs made by Brockway on a Kenworth truck

owned by Billy Lee. Defendant denied liability for the account by Answer filed 7 December 1976.

Plaintiff presented evidence tending to show the following:

On 20 October 1974, Billy Lee was the owner of a 1970 Kenworth truck which he operated in defendant's business pursuant to a written agreement. Under the terms of this agreement, Lee was responsible for maintaining the truck in operating condition and paying for any repairs to it. On 20 October 1974, Lee telephoned George Hodges, president of the defendant, and informed him that the truck had broken down in Knoxville, Tennessee. Hodges told Lee that he was sending a wrecker to have the truck towed in for repairs, and that it would be repaired by Brockway. Lee did not talk with anyone at Brockway about repairing the truck or paying for the repairs. Lee never received a bill from Brockway for the repairs, but he did receive a bill from the defendant. John Sumner, a branch manager for Brockway where the Kenworth was repaired, received a call from Hodges concerning the truck. Sumner testified as follows:

> When Mr. Hodges called me, he said his business was flourishing and he needed the truck repaired as quickly as he could get it back on the road to keep his freight moving and his driver going. At that time we had no discussion concerning payment for the repairs to be made on the truck. We did discuss this when the work was completed. Mr. Hodges said that as soon as the truck got back on the road he would take care of the bill within a time limit, just as quickly as he could. He said he would pay for those repairs. Mr. Hodges told me to send the invoice to Harnett Transfer, Inc., Dunn, North Carolina, and that's what I did. The invoice was mailed approximately November 6, 1974. We have never received any payment for the work done on the vehicle . . . The work we did was described on the invoice sent to Harnett Transfer, Inc., and the amount of the invoice was $4,025.71.

Hodges never told Sumner that the invoice was incorrect or that he did not owe it prior to the time this lawsuit was instituted. Subsequent to the time the repairs were made to the Kenworth, Hodges wanted to purchase two used trucks from Sumner. Hodges suggested to Sumner that the price be raised $2,000.00 on each of the trucks and the overage be applied to the repair bill

for the Kenworth. Thomas Dunn, the business manager for Brockway, talked with Hodges about the repair bill fifteen or twenty times after 21 October 1974. Hodges told Dunn "he would pay it as soon as he could, that he was going to take care of it, there was no question about it. . . . [H]e said that it was his bill and he would see that it was paid."

Defendant presented evidence tending to show the following:

George Hodges talked with John Sumner of Brockway about the repair to Lee's truck. Hodges told Sumner that payment for the repairs would be Lee's responsibility and that Harnett Transfer would not pay the bill. Hodges did tell Sumner that he would see that Brockway got paid for the repairs if Lee continued to work for Harnett Transfer. Hodges never told Sumner that Harnett Transfer would pay the repair bill.

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

1. Did the defendant enter into a contract with Brockway Motor Trucks, a division of Mack Trucks, Inc. for the repair of a 1970 Kenworth truck?

ANSWER: Yes

2. If so, did the defendant breach the contract?

ANSWER: Yes

3. Were the rights of Brockway Motor Trucks, a division of Mack Trucks, Inc. assigned to the plaintiff, Mack Financial Corporation?

ANSWER: Yes

4. What amount, if any, is plaintiff entitled to recover of defendant?

ANSWER: $4,025.71

From a judgment entered on the verdict, defendant appealed.

Craighill, Rendleman, Clarkson, Ingle & Blythe, by John R. Ingle, and Stephen D. Poe, for plaintiff appellee.

Johnson and Johnson, by W. A. Johnson, for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial court erred in allowing plaintiff's witness John Sumner to testify on direct, and the defendant's witness George Hodges to testify on cross-examination, about a negotiation for the purchase by defendant of two used trucks from Brockway. According to the testimony, Hodges suggested that when the financing for the purchase of the trucks was being arranged, that Sumner raise the price of each of the trucks by $2,000 and apply the extra $4,000 from the sale against the repair bill for the Kenworth truck. Defendant contends that this negotiation occurred subsequent to the events alleged by plaintiff to have created a contract between the parties for repairs to the Kenworth truck, and thus it was irrelevant and prejudicial. Defendant further contends that it should be excluded as an offer to compromise.

We think this evidence was relevant and was admissible as an admission of a party. "Anything that a party to the action has done, said or written, if relevant to the issues and not subject to some specific exclusionary statute or rule, is admissible against him as an admission." 2 Stansbury's N.C. Evidence § 167, at 4 (Brandis rev. 1973); *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). Such a statement is admissible if "it can reasonably be interpreted as an acknowledgment of the existence of a relevant fact." Stansbury, *supra* § 167, at 9-10. This testimony establishes an admission by Hodges that, at the time he made the statements, he considered himself liable for the debt involved in the present case. The discussion of the proposed method of payment assumed the existence of the debt, and was clearly relevant. Furthermore, the testimony was not excludable as an offer to compromise. The amount of the repair bill was $4,025.71; it would be unrealistic to assume that an offer to pay $4,000 was a compromise offer. This assignment of error has no merit.

Defendant next contends that the court erred in failing to grant his motions for a directed verdict and for a judgment notwithstanding the verdict. Defendant advances three arguments in support of this contention: (1) that there was insufficient evidence of a contract between Brockway and the defendant; (2) that, at most, the evidence might show a promise by defendant to pay the debt of Billy Lee, and such a promise is unenforceable under G.S.

§ 22-1 since it was not in writing; and (3) that, insofar as the contract related to goods sold, it was barred by G.S. § 25-2-201.

[2] Plaintiff introduced evidence tending to show that the defendant's president, George Hodges, telephoned John Sumner at Brockway, and told him that the truck was being towed in, that his business was flourishing and "he needed the truck repaired as quickly as he could get it back on the road." After the repairs had been completed, Hodges told Sumner that he would pay for the repairs, and even instructed him as to where to send the bill. Subsequent to 21 October 1974, Hodges discussed paying for the repairs with Thomas Dunn, business manager for Brockway, approximately fifteen to twenty times. Hodges told Dunn that he was going to pay the bill as soon as he could. We think that this evidence, when viewed in the light most favorable to the plaintiff, was sufficient to show the existence of a contract between the defendant and Brockway for the repair of the truck.

[3] With regard to the defendant's second argument, there was no evidence that Billy Lee ever entered into a contract with Brockway for the repair of his truck. The evidence discloses that Lee never had any discussions with Brockway concerning the repairs to the tractor, he never promised to pay for the repairs, and he was never billed for the repairs by Brockway. The evidence further discloses that the defendant contracted directly with Brockway for the repairs of the truck, and that no debt ever existed between Brockway and Lee for which defendant could be considered a guarantor of payment. Thus, the promise of defendant to pay for the repairs is not barred by G.S. § 22-1 as being an unwritten promise to pay the debt of another, since the evidence disclosed that the bill he promised to pay was the defendant's and not the debt of another.

[4] We also reject defendant's argument that any contract for the parts used in the repair of the truck is rendered unenforceable by the statute of frauds provision of G.S. § 25-2-201 pertaining to the sale of goods. By its express terms, G.S. § 25-2-201 applies only to a contract for the sale of goods. In the present case, the contract was one for services rendered in the repair of a truck. The fact that various parts are also required to properly repair and service the truck is merely incidental to the repair contract, and does not bar its enforcement, either in its entirety or to the extent of the cost of the parts included.

[5] By assignments of error numbers five and six, defendant contends that the court erred in allowing plaintiff to introduce into evidence a duplicate invoice from Brockway that had some handwritten notations on it, and that the judge's comment to the jury to examine the exhibit carefully constituted an unpermitted expression of opinion as to its weight. Defendant argues that the exhibit was inadmissible on two grounds: (1) the handwritten notations were never properly authenticated, and (2) in any event the inscriptions on the invoice were hearsay and thus incompetent.

Plaintiff's evidence tended to show that the duplicate invoice was sent to George Hodges at Harnett Transfer, and that the handwritten notations were not put on the document by anyone at Brockway. The handwritten notations on the bill are as follows:

Pd Interest on bill 7-14-75 $97.49
Ck # 9496

4025.71
Pd by ck 8934 1475.50
Bal due 2550.21 To Brockway Motor Trucks

Billy Lee testified that this invoice was sent to him in a Harnett Transfer, Inc., envelope, and that the handwriting was on the invoice when he received it. Lee further testified that he was familiar with the handwriting of Mrs. Hollis, who did all of Harnett's settlement statements, that he had seen her handwriting on a number of occasions, and that in his opinion the handwriting on the invoice was hers.

In North Carolina, a witness "who has acquired knowledge and formed an opinion as to the character of a person's handwriting . . . from having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged or upon which he has acted or been charged . . . may give such opinion in evidence." 2 Stansbury's N.C. Evidence § 197, at 121-22 (Brandis rev. 1973). We think that Lee's testimony in the present case falls squarely within the above-quoted rule, and thus the writing was sufficiently authenticated.

Furthermore, the handwriting on the invoice did not render the exhibit inadmissible on the basis of hearsay. Hearsay is an out-of-court statement, either oral or written, that is offered into

evidence for the purpose of proving the truth of the matter asserted therein. *Bullock v. Insurance Co. of North America*, 39 N.C. App. 386, 250 S.E. 2d 732 (1979). In the present case, it is clear that the handwriting was not offered to prove the truth of the matter asserted therein, *viz.*, that the amounts written had been paid. Indeed, all the evidence tended to show that Brockway had not received any payments for the repairs. The invoice was offered only for the purpose of showing that the statements had been made. A permissible inference from the notations was that defendant considered itself liable for the account; nevertheless, the admission of the invoice was proper.

[6] Defendant also contends that the trial judge made an improper comment on the evidence with regard to the invoice when he made the following statements to the jury: "Ladies and gentlemen, you have been handed plaintiff's Exhibit 2. Each of you may examine it to the extent that you feel appropriate and necessary. Examine it very carefully." Under G.S. § 1A-1, Rule 51(a), the trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to the importance or credibility of any of the evidence. *Searcy v. Justice*, 20 N.C. App. 559, 202 S.E. 2d 314 (1974). We do not think, however, that the judge's instruction to the jury to examine the exhibit "very carefully" when considered contextually, constituted an improper comment as to the probative force of the evidence.

[7] Defendant's remaining assignments of error all relate to the judge's instructions and to the issues submitted to the jury. The thrust of defendant's argument is that the evidence does not establish the existence of a contract between Brockway and the defendant or any agreement to pay a specific price for the repairs to the truck. Thus, defendant argues, the trial judge erred by (1) instructing the jury only as to express contracts and not instructing or submitting an issue on a *quantum meruit* theory of recovery, and (2) giving a "peremptory instruction" on the amount of damages rather than instructing and submitting an issue that plaintiff is entitled to recover only what the services are reasonably worth. Defendant cites *Pilot Freight Carriers, Inc. v. David G. Allen Co., Inc.*, 22 N.C. App. 442, 206 S.E. 2d 750 (1974), in support of its argument.

We think the defendant's contentions are without merit. In the *Pilot Freight Carriers* case, the evidence disclosed that the plaintiff had shipped crushed stone which was subsequently used by the defendant in the construction of a turkey plant. In upholding a summary judgment for plaintiff on the issue of liability, we said:

> [N]o express contract existed between the parties. These uncontroverted facts manifest a benefit conferred by plaintiff and an acceptance of such benefit by the defendant. Such circumstances dictate, in the absence of an express contract, that quasi-contract principles be imposed to prevent one party from being unjustly enriched to the detriment of the other.

22 N.C. App. at 444, 206 S.E. 2d at 752.

In contrast, the evidence in the present case tends to show that Hodges specifically telephoned Brockway and requested that the truck be repaired; that after the truck was repaired, Hodges instructed Brockway to send the bill to him; that he informed Sumner that he would pay for the repairs, and "that as soon as the truck got back on the road he would take care of the bill . . . just as quickly as he could." The only issue raised by this evidence is whether the parties entered into a contract for the repair of the truck. It does not raise the issue whether the plaintiff is entitled to recover on a theory of *quantum meruit.*

Defendant further challenges the following instruction to the jury with regard to the issue of damages: "Again with respect to this Issue, all the evidence indicates and tends to show that the costs of labor and materials was $4,025.71. If you believe this evidence, it would be your duty to answer this Issue in the sum of $4,025.71."

Defendant argues that the above-quoted portion of the charge amounts to a "peremptory instruction" on the issue of damages, and that there is no evidence that the defendant ever agreed to pay a specific amount. There is evidence in the record tending to show that the amount billed to defendant for the repairs was $4,025.71, and the invoice was even introduced into evidence. Thomas Dunn, who was employed by Brockway as business manager at the time the transactions giving rise to this case arose, testified as follows:

> . . . I talked to Mr. Hodges on the phone several times, and when he would come into the office, I would talk to him about his account. On these occasions I would always ask him when he was going to pay the bill, and he said he would pay it as soon as he could, that he was going to take care of it, there was no question about it. I discussed the size of the bill with him a lot of times, and he said that it was his bill and he would see that it was paid. I discussed this particular Harnett Transfer, Inc. account with him 15 or 20 times after October 21, 1974.

This evidence is sufficient to support the challenged instruction.

We hold that the evidence adduced at trial supports the judge's instructions and the issues submitted and is also sufficient to support the verdict and judgment for plaintiff.

No error.

Chief Judge MORRIS and Judge WEBB concur.

STATE OF NORTH CAROLINA v. CLIFFORD GENE SHEPPARD AND STATE OF NORTH CAROLINA v. JAMES THEODORE GARNER

No. 7918SC298

(Filed 3 July 1979)

1. **Searches and Seizures § 15— no standing to contest search of another's premises**

   Defendants had no standing to contest the search of a residence and seizure of property therefrom where they were not on the premises at the time of the search, alleged no proprietary or possessory interest in the premises or any of the items seized, and were not charged with an offense which includes as an essential element the possession of the seized evidence at the time of the search and seizure.

2. **Searches and Seizures §§ 16, 43— absence of written motion to suppress—involuntary consent by defendant's wife**

   The trial court erred in ruling that a search of one defendant's residence was illegal where no written motion to suppress was made as required by G.S. 15A-977(a). However, the court properly ruled that a second search of the residence was illegal where the court found upon supporting evidence that officers had no warrant but relied on consent given by defendant's wife, and that any consent given by her was not voluntary.

State v. Sheppard and State v. Garner

APPEAL by the State of North Carolina from *Crissman, Judge.* Order entered 9 November 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 26 June 1979.

On 5 June 1978, two true bills of indictment proper in form were returned against Clifford Gene Sheppard, the first charging him with felonious conspiracy to possess "on or about the 15th day of March 1978" stolen property belonging to Industrial Welding Supplies, Inc., and having a value of $15,611.89, and the second charging him with felonious possession "on or about the 15th day of March 1978" of the same stolen property. The property alleged to have been stolen consists of an acetelyne welding outfit, including regulators, gauges, torches, and other supplies such as welding gloves and masks which were seized in a search of defendant Sheppard's residence on 11 April 1978, and six electric welders and other welding equipment seized in a search of a house in Riverside, California, on 9 April 1978. Defendant James Theodore Garner was charged in a proper indictment with felonious conspiracy to possess "on or about the 15th day of March 1978" the allegedly stolen property recovered in the Riverside, California, search. Both defendants filed motions to suppress the use as evidence at trial the allegedly stolen property.

Prior to trial, a *voir dire* hearing was held on the defendants' motions. The State presented evidence tending to show the following:

On 7 April 1978, law enforcement officers William Edward Hunt, Charles Elwood Hatley, Paul Wade Scott, Charles L. Bulla, and other officers went to the residence of defendant Sheppard on rural unpaved road 2687 in Randolph County, North Carolina, pursuant to a warrant to search for paint chips, paint smears, scratch marks, and finger prints located on a yellow 1975 Cadillac automobile. Elaine Sheppard, the wife of defendant Clifford Eugene Sheppard, was contacted by law enforcement officers and agreed to meet them at the residence in Randolph County. The search warrant was served on Elaine Sheppard, and she informed the police that the garage was locked, that she did not have a key to it, and that the only way to enter the garage was through a window going from the inside of the residence into the garage. Mrs. Sheppard supplied the officers with a key to the residence

and an officer entered and unlocked the garage. Mrs. Sheppard also consented orally and in writing to a search of the premises. No threats or inducements were made in order to get her consent to search. Once inside the garage, the officers located a yellow Cadillac matching the description in the search warrant and affidavit, and made arrangements to have it towed away. The officers were in the garage for two to three hours waiting for a wrecker to arrive. During this time, numerous items in the garage, including a washing machine, dishwasher, riding lawnmower, and acetelyne welding outfit, were examined and photographed and then serial numbers recorded. None of the items listed in the indictments were removed from the garage on this date, however. On 9 April 1978, police arrived at a residence located at 5897 Jones Street in Riverside, California and secured a key to the house from Mr. Kermit Hare, who was a neighbor and the brother of the owner, Jewel Sheppard. Mr. Hare gave the officers permission to search the residence, and various electric welders and other welding equipment were seized. On 11 April 1978, Mrs. Elaine Sheppard was again contacted and asked for consent to search the Randolph County premises and to seize the welding equipment. She met the officers at the house and orally consented to a search and signed a consent to search form supplied by the officers at that time. When she arrived, there were five officers, four detectives, and one uniformed officer present at the house. The officers denied that they had told Mrs. Sheppard that they would break down the door if she did not consent. Mrs. Sheppard again supplied a key to the residence and the officers entered the garage and seized the welding equipment and work order forms with the name Industrial Welding Supplies, Inc., on them which were in a trash can.

Defendants presented evidence tending to show the following:

The residence in Randolph County that was searched on 7 and 11 April 1978 was owned by defendant Sheppard's mother. The defendant Clifford Eugene Sheppard and his wife, Elaine Sheppard, had lived in the house for about two years. On 7 April 1978 Detective Charles Bulla talked to Mrs. Sheppard at her place of employment and asked her to meet them at the house to let them search. She told him that she could not leave her job and he responded, "Well, if you don't get off, we'll go down there—we

got a search warrant—and we'll take the door down; we're going to have that Cadillac." As a result of the conversation, Mrs. Sheppard left work and drove to her house where there were 25 to 30 people. She was read the search warrant and she then opened the door and informed them how to get into the garage. On 11 April 1978, at about 2:00 p.m., the police again contacted Mrs. Sheppard in order to get her consent for them to return to the house and seize some of the property in the garage. Mrs. Sheppard informed them that she had to pick up her children from school at 2:30 p.m. and be at work at 3:00 p.m., and that they would have to get a search warrant to go back in her house. The police then told her that if she did not let them in the house, that they "would go get one [a search warrant] and come back and get you off the job." Mrs. Sheppard was afraid of being fired from her job if they came out to her place of employment, and she responded, "Well, please don't." The police then stated, "If you don't go, we'll take your door down and we'll get that stuff because we know what is in there. We seen [sic] it the first time." Mrs. Sheppard then agreed to meet the officers at her house and give them the key. Subsequently, Mrs. Sheppard went to the Magistrate's Office where she signed several forms, including an inventory form. She did not sign any consent to search forms at her house on either 7 April or 11 April prior to the two searches. Mrs. Sheppard testified, "I at no time on April 7th willingly and freely gave these officers permission to search my home." As to the second search on 11 April, Mrs. Sheppard testified, "I let them in because he said if I didn't, he would take my door down and go in when I wasn't there and get them. I did not willingly let them in on April 11th." With regard to the 9 April 1978 search of the Riverside, California residence of Jewel Sheppard, Mr. Kermit Hare testified that he did not have any property in the house, and that he was only there to feed a dog kept in a fenced-in portion of the backyard. Mr. Hare had a key to the house, and he gave the key to the officer who conducted the search. No one had given Hare permission or authority to allow anyone to search the house.

On 9 November 1978, Judge Crissman entered the following Order allowing defendants' motions to suppress:

> The cases 78CRS17160 and 78CRS17161, wherein Clifford Gene Sheppard is the defendant, and the case 78CRS17162, wherein James Theodore Garner is the defendant, in these

cases, as to the motions to suppress evidence obtained by alleged search and seizure, in the April 7, 1978, instance, wherein there was a search warrant issued by the Clerk of the Superior Court of Randolph County, the Court is ruling that there is not sufficient evidence as to the reliability of the informant in the issuance of this search warrant and that in the effort that the officers made in getting the consent of the wife of the defendant, Clifford Gene Sheppard, that they apparently abandoned the search warrant and its limitations and went beyond the scope of the search warrant, and that for those reasons the Court is compelled to allow the motion to suppress.

In the April 11, 1978, instance, the Court finds that the consent or alleged consent given by the wife of Clifford Gene Sheppard was not given voluntarily; that various kinds of pressure were brought at the time, and that the officers had ample opportunity to obtain a search warrant but did not do so, and that in addition to that, in the case of *State vs. Hall*, our court has said that a wife cannot give consent. And, so, the motion as to this is allowed.

And as to the alleged search and seizure on April 9, 1978, in California, the Court rules that there was not sufficient evidence, even though this man carried a key, to show that he really had authority to give the officers consent to search these premises, and that in addition to that, the laws of the State of North Carolina were not complied with; particularly, in the failure of the officers to list the items that were confiscated and delivering a copy to the person who gave consent and to the owner, if possible, and that there actually was not sufficient evidence to show to the Court that there were stolen goods there or that they had grounds to believe that there were stolen goods there. So, the motion to suppress as to this is allowed.

From the foregoing Order, the State gave notice of appeal and certified that the appeal was not taken for the purpose of delay and that the evidence suppressed is essential to the case.

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

W. B. Byerly, Jr., for defendant appellee Clifford Gene Sheppard.

Joe D. Floyd, for defendant appellee James Theodore Garner.

HEDRICK, Judge.

[1] Appellate review is permitted by G.S. § 15A-979(c). The State first contends that the trial court erred in granting the motion to suppress as to No. 78CRS17162 since defendant Garner lacked "standing" to contest the validity of the searches. We agree.

G.S. § 15A-972 provides: "When an indictment has been returned or an information has been filed in the Superior Court, or a defendant has been bound over for trial in superior court, a defendant *who is aggrieved* may move to suppress evidence in accordance with the terms of this Article." [Emphasis added.] This is the same terminology employed by Rule 41(e) of the Federal Rules of Criminal Procedure. *See* Official Commentary to G.S. § 15A-972. In construing the language in Rule 41(e), the United States Supreme Court, in *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed. 2d 697, 702 (1960) stated:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . .
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he was the victim of an invasion of privacy.

The principle that Fourth Amendment rights are personal rights that may not be asserted vicariously has been reaffirmed by the Supreme Court. *Rakas v. Illinois*, --- U.S. ---, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed. 2d 176 (1969).

In the present case, defendant Garner was charged with felonious conspiracy to possess stolen property "on or about the 15th day of March 1978." Defendant Garner was not present at the residence in Randolph County that was searched on 7 and 11 April 1978, or at the Riverside, California residence that was searched on 9 April 1978. Garner has neither alleged nor shown any possessory or proprietary interest in either residence or any of the items seized and listed in the indictment charging him with felonious conspiracy to possess stolen property. The burden is on the defendant to show that he is "aggrieved" within the meaning of G.S. § 15A-972 and that he has standing to contest a search allegedly violating his Fourth Amendment rights. This Garner has failed to do.

Thus, this case falls squarely under the rule announced in *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed. 2d 208 (1973):

> [T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

411 U.S. at 229, 93 S.Ct. at 1569, 36 L.Ed. 2d at 214. Consequently, the trial court erred in granting defendant Garner's motion to suppress in No. 78CRS17162 since Garner had no standing to contest any of the searches.

Likewise, with regard to defendant Sheppard's motion to suppress the evidence obtained in the 9 April 1978 search of the Riverside, California residence, the trial court erred in granting the motion. The record discloses that defendant Sheppard was not on the premises at the time of the search, alleged no proprietary or possessory interest in the premises or any of the items seized, and was charged with felonious conspiracy to possess stolen property and felonious possession of stolen property "on or about the 15th day of March 1978." Thus, under the above-quoted rule from *Brown*, Sheppard had no standing to contest the 9 April 1978 search.

We need not consider the question whether Sheppard has "automatic standing" under *Jones v. United States, supra,* with regard to the possession charge. *See Rakas v. Illinois,* --- U.S. at --- n. 4, 99 S.Ct. at 426, 58 L.Ed. 2d at 396, since under the indictment charging Sheppard with possession of the stolen goods, the State must prove that he possessed the property in North Carolina on the date charged in the indictment.

Thus, we hold the trial court erred in granting the motions to suppress any evidence obtained as a result of the search of the Riverside, California residence as to both defendants, and in granting the motion to suppress as to the defendant Garner with regard to the searches of the Randolph County residence.

Finally, we consider the trial court's order as it relates to the searches on 7 and 11 April 1978 of the Randolph County residence with respect to defendant Sheppard. The State contends that the officers were acting pursuant to a valid search warrant when they saw welding equipment in plain view in the defendant Sheppard's garage, and thus the trial court erred in its ruling that the 7 April 1978 search exceeded the scope of the warrant. We need not consider this argument for the reasons which follow, and thus we express no opinion as to the validity of the warrant or the search on 7 April 1978.

[2] A motion to suppress may be made at any time prior to trial unless the State gives notice within twenty working days before trial of its intention to use as evidence at trial a statement made by a defendant, evidence obtained as a result of a warrantless search, or evidence obtained as a result of a search with a warrant when the defendant was not present for its execution. G.S. § 15A-975(b) and -976. A motion to suppress evidence in superior court must be in writing, must state the grounds upon which it is made, and must be accompanied by an affidavit containing facts supporting the motion. G.S. § 15A-977(a). In the present case, there is no written motion to suppress by defendant Sheppard with regard to the 7 April 1978 search of the Randolph County house. We also note that no items were physically removed from the premises on 7 April 1978, nor is there any notice or other indication in the record that the State intends to introduce any evidence of any nature obtained as a result of the 7 April 1978 search relating to the charges in the present case. While the trial

judge's Order clearly refers to a motion to suppress evidence obtained in the 7 April 1978 search, no such motion appears in the record that would provide a basis for the Order, and thus that portion of the Order purporting to allow such a motion is gratuitous and a nullity.

The only remaining search contested by defendant Sheppard occurred on 11 April 1978 when the law enforcement officers seized various items listed in the indictments. The officers had no warrant authorizing them to be on the premises on that date, and any authority to search the garage could only have been by consent. The defendant Sheppard was not present at the time of the search and gave no consent. The only consent was that purportedly given by the defendant's wife. The trial judge, however, found as a fact that any consent given by her was not voluntary. There is ample evidence in this record to support this finding and thus it is binding on the appellate courts. *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974); *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159 (1978).

The result is: That portion of the Order dated 9 November 1978 suppressing the evidence obtained as a result of the search of the Riverside, California residence on 9 April 1978 relating to the charges against Garner in No. 78CRS17162 and against Sheppard in No. 78CRS17160 and No. 78CRS17161 is reversed; that portion of the Order suppressing the evidence obtained in the 7 and 11 April 1978 searches of the Randolph County residence relating to the charges against Garner in No. 78CRS17162 is reversed; that portion of the Order relating to the suppression of evidence obtained as a result of a search of the Randolph County residence on 7 April 1978 as it relates to the charges against Sheppard in No. 78CRS17160 and No. 78CRS17161 is vacated; and, that portion of the Order suppressing the evidence obtained in the 11 April 1978 search in Randolph County, North Carolina is affirmed.

Reversed in part; vacated in part; affirmed in part; and remanded.

Judges VAUGHN and ARNOLD concur.

J. C. SILVERTHORNE, B. McADOO WHORTON, THEODORE R. SLADE, J. C. SILVERTHORNE, ADMINISTRATOR OF THE ESTATE OF MICHAEL W. SILVERTHORNE, AND WIFE, JO SILVERTHORNE, AND BRANDENBURG LAND COMPANY, A CORPORATION, PLAINTIFFS AND ZACHARY TAYLOR, GUARDIAN AD LITEM FOR BRIAN Z. TAYLOR AND JOHN WEBB TAYLOR, INTERVENOR PLAINTIFFS v. COASTAL LAND COMPANY, A CORPORATION, JOSEPH G. BLOW AND WIFE, ELIZABETH P. BLOW, RALPH T. MORRIS AND WIFE, ELSIE S. MORRIS, VERNON J. SILVERTHORNE AND WIFE, MILDRED C. SILVERTHORNE, MINNIE S. BARNHILL AND HUSBAND, FRANK C. BARNHILL, KATHLEEN S. SLADE, HELEN S. ADKINS AND HUSBAND, BERNARD ADKINS, ANNIE S. COOK AND HUSBAND, PHILLIP E. COOK, EFFIE S. HADDER AND HUSBAND, MINOR L. HADDER, J. G. SILVERTHORNE AND WIFE, BESSIE SILVERTHORNE, AND JOHN T. TAYLOR, JR. AND WIFE, DORA W. TAYLOR, DEFENDANTS

No. 783SC844

(Filed 3 July 1979)

1. Rules of Civil Procedure § 37— failure to comply with discovery order—justification—burden of proof on noncomplying party

If a party who fails to comply with a discovery order of the court wishes to avoid court imposed sanctions for his failure, the burden is upon him to show that there is justification for his noncompliance. Plaintiffs in this action could not excuse their failure by claiming that they were not represented by an attorney, since that situation arose by their own choice, or by claiming that the long history of the case with its many extensions of time showed that the parties were willing to accommodate each other with "extensions ad infinitum," since the situation was no longer merely between the parties after the court intervened and ordered plaintiffs to answer interrogatories.

2. Rules of Civil Procedure § 37— failure to answer interrogatories—dismissal proper

There was no merit to plaintiffs' contention that the court was not entitled to impose the sanction of a dismissal of their action with prejudice upon finding that plaintiffs' failure to comply with the court's order to answer interrogatories was without justification. G.S. 1A-1, Rule 37(b)(2).

3. Rules of Civil Procedure § 25— parties not properly substituted

The substituted plaintiffs were never properly made parties to this lawsuit since no substitution motion was made; the "substitution" was made just under three years after the death of one of the original plaintiffs; and no supplemental complaint was filed. Therefore, the substituted plaintiffs had no claim which could have been abated, and the court does not consider their argument that their claim was abated prematurely. G.S. 1A-1, Rule 25.

APPEAL by plaintiffs and intervenor plaintiffs from *Cowper, Judge*. Judgment entered 5 May 1978 in Superior Court, PAMLICO County. Heard in the Court of Appeals 30 May 1979.

The complaint in this action to try title was filed in September 1971. Answers were filed by all defendants except John T. Taylor, Jr. and Dora W. Taylor. (hereinafter the term "defendants" will refer to all defendants except these two.) Defendant Coastal Land Company also counterclaimed to be adjudged the owner of the lands.

By nine consecutive consent orders, the time for completing discovery was extended through January 1975. Interrogatories were served upon the plaintiffs Silverthorne, Whorton and Slade on 17 September 1974 and upon the plaintiff Brandenburg Land Company on 24 September 1974. In November 1975 the petition of plaintiffs' counsel to withdraw from the action was allowed.

On 21 January 1976 an order was entered substituting for the deceased plaintiff Michael Silverthorne his heirs J. C. and Jo Silverthorne individually and J. C. Silverthorne as administrator of his estate. The order also stated that it would "constitute notice to such substituted parties that this action as to them may be abated unless it is continued by them within the provisions of Rule 25(c) of said Rules of Civil Procedure."

On 19 March 1976 defendants moved for an order compelling answers to interrogatories pursuant to Rule 37. This motion was granted on 5 April 1976 by an order giving plaintiffs 60 days to file answers to the interrogatories. On 25 June 1976 defendants moved for a dismissal with prejudice of plaintiffs' action, for a default judgment finding ownership of the land in defendant Coastal Land Company, and for an order requiring the substituted plaintiffs to take affirmative action to prosecute whatever claim they might have before 21 July 1976, six months from the entry of the order substituting them as parties. Hearing on this motion was continued until 10 April 1978 on the court's own motion.

On 19 July 1976, answers to interrogatories were sent to defendants' attorney by plaintiffs Silverthorne and Whorton, but were not filed with the court.

On 15 November 1977 defendants moved for an order abating the action as to any claim of the substituted parties plaintiff because they had failed to prosecute their action within 12 months of the date of their substitution. Hearing on this motion was also continued until 10 April 1978 on the court's own motion. On 10 April 1978, plaintiff Brandenburg Land Company filed answers to interrogatories.

On 7 April 1978, Zachary Taylor as guardian ad litem of minors Brian Z. and John Webb Taylor moved to intervene in this action, alleging that title to the lands which are the subject of this action rests in the minor plaintiffs by virtue of a deed from a collateral source dated 31 March 1978. This motion was denied.

Defendants' motions to dismiss with prejudice the action of the original plaintiffs and abate the claims of the substituted plaintiffs were granted. Plaintiffs and intervenor plaintiffs appeal.

Nelson W. Taylor III for plaintiff appellants.

Henderson & Baxter, by B. Hunt Baxter, Jr., for intervenor plaintiff appellants.

A. D. Ward & Barden, Stith, McCotter and Stith, by Laurence A. Stith, for defendant appellees.

ARNOLD, Judge.

Original Plaintiffs' Appeal

[1] In his order dismissing the plaintiffs' action, the trial court concluded that the plaintiffs' failure to file answers to interrogatories within 60 days of 5 April 1976, as they had been ordered by the court to do, was "wholly without justification or excuse." Plaintiffs argue that there is no evidence to support this conclusion.

Plaintiffs' view is that defendants were required to show that plaintiffs' failure to comply with the court order was without justification, but this is not the case. G.S. 1A-1, Rule 37(b)(2) sets out possible consequences of a party's failure "without good cause" to comply with the court's order to answer interrogatories. If a noncomplying party wishes to avoid court-imposed sanctions for his failure, the burden is upon him to show that there is

justification for his noncompliance. Plaintiffs attempt to excuse their failure upon the grounds that between November 1975 and April 1978 they were not represented by an attorney, and that the long history of the case with its many extensions of time shows that the parties were willing to accommodate each other "in extensions ad infinitum." Neither of these arguments avails.

Interrogatories were served upon the plaintiffs in September 1974. Fourteen months later, plaintiffs' counsel sought to withdraw from the case, giving as one reason the fact that a number of the interrogatories could only be answered by plaintiff Brandenburg Land Company, and counsel had been unable to find through diligent effort who owned that company. Some five months later, nineteen months after the interrogatories had been served, the court entered its order giving the plaintiffs 60 days to answer the interrogatories. Thus, during 14 of the 21 months given to the plaintiffs to answer the interrogatories, plaintiffs were represented by counsel, and plaintiffs have made no attempt to show that their lack of representation through the remainder of the period was other than by choice. The withdrawal of plaintiffs' counsel because of plaintiffs' non-cooperation, and their subsequent lack of counsel by their own choice is no excuse. As for the parties' apparent willingness to accommodate each other in unlimited extensions of time, the situation was no longer merely between the parties after the court intervened and ordered plaintiffs to answer. The record amply supports the court's conclusion that plaintiffs' failure to comply was without justification.

[2] Plaintiffs then argue that even a finding that their failure to comply with the order to answer interrogatories was without justification does not entitle the court to impose the sanction of a dismissal of their action with prejudice. G.S. 1A-1, Rule 37(b)(2) provides that upon a party's failure to comply with the court's order, "the judge may make such orders in respect to the failure to answer as are just." The choice of sanctions to be imposed having been left by the rule in the court's discretion, we may not overturn the court's decision unless an abuse of that discretion is shown. Rule 37(b)(2) provides further that "[t]he relief granted may include . . . c. An order . . . dismissing the action." Dismissal of a plaintiff's action for failure to answer interrogatories was upheld in *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307, *cert. den.* 285 N.C. 233, 204 S.E. 2d 23 (1974), and this Court noted

there that, as here, "plaintiff did not serve on defendant . . . any objections to any of the interrogatories as was her right under the rule, nor did she ever ask for an extension of time." *Id.* at 626, 202 S.E. 2d at 309. Considering the facts of this case, and the fact that the sanction imposed is clearly allowed by the rule, we find no abuse of discretion. There was no error in the dismissal of the original plaintiffs' action.

Substituted Plaintiffs' Appeal

Subsequent to the death of original plaintiff Michael Silverthorne, the court substituted for him as plaintiffs his heirs J. C. and Jo Silverthorne individually and J. C. Silverthorne as administrator of his estate. The substitution order, entered on 21 January 1976, stated that it would "constitute notice to such substituted parties that this action as to them may be abated unless it is continued by them within the provisions of Rule 25(c) of said Rules of Civil Procedure." On 25 June 1976 defendants moved for an order requiring the substituted plaintiffs to take affirmative action to prosecute whatever claim they might have before 21 July 1976, six months from the date of their substitution. No such order was entered. On 15 November 1977 defendants moved for an order abating the action as to any claim of the substituted parties. They relied upon the "notice" provision in the court's substitution order, arguing that "the effect of said provision was to permit the substituted parties to prosecute the subject action within twelve months of January 21, 1976, which they have not done." By order of 8 May 1978, the court found that the substituted plaintiffs "made no effort whatsoever to prosecute the subject action within twelve (12) months of January 21, 1976, the date on which order was entered substituting them as parties, and that same was wholly without justification or excuse," and ordered that the claim of the substituted plaintiffs "is hereby abated."

These plaintiffs argue that no evidence was presented that their failure to actively prosecute this lawsuit was without excuse, but as we have held above with reference to the dismissal of the original plaintiffs' action, there is no burden upon the defendants to make such a showing. Nor is the lack of counsel, apparently by choice, an excuse. As the substituted plaintiffs have

presented no evidence to justify their non-action, we find no error in the court's conclusion.

Plaintiffs then argue that the trial court's order abating their action was premature, as he had not fixed a time after which their action would abate as required by G.S. 1A-1, Rule 25(c). That rule provides: "At any time after the death . . . of a party, the court . . . , upon notice to such person as it directs and upon motion of any party aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six months nor more than 12 months from the granting of the order." Plaintiffs argue that a prerequisite to abatement was the trial court's fixing of a time after which the action would abate. Defendants argue that an action abates in twelve months at the very latest, and that since the trial court can do nothing but shorten this period to as little as six months, it was not necessary for the court to fix a time for abatement.

[3] We find it unnecessary to decide this issue, since we conclude that the substituted plaintiffs were never properly made parties to this lawsuit. G.S. 1A-1, Rule 25(a) provides that upon a party's death an action does not abate, as it did at common law, 1 Am. Jur. 2d, Abatement, Survival and Revival § 47. The court may substitute a party to continue the action in place of the deceased. However, this substitution must be (1) *on motion within one year* of the party's death or (2) afterwards on a *supplemental complaint.* No substitution motion appears in the record, and at any rate it affirmatively appears that the substitution was made just less than three years after the death of plaintiff Michael Silverthorne. Nor does a supplemental complaint appear. Accordingly, no substitution was made under Rule 25(a). *Deutsch v. Fisher*, 32 N.C. App. 688, 233 S.E. 2d 646 (1977).

Furthermore, had the parties been properly substituted under Rule 25(a), the time limitation in Rule 25(c) would not apply. Rule 25(c) does not provide for substitution, but provides a method by which a party may place a time limitation on the right to substitution. W. Shuford, North Carolina Civil Practice and Procedure, § 25-6 at 219 (1975). There is no indication that defendants ever availed themselves of this method. Rule 25(c) provides for an order of conditional abatement "*upon motion of any party*

aggrieved," (emphasis added) and no such motion appears. Further, Rule 25(c) shows that the order it provides for is intended to be used prior to any substitution of parties, since it provides for notice to "such person as [the court] directs," which we think has been correctly viewed as requiring notice to those who "would reasonably be expected to represent most closely the interest of the deceased." W. Shuford, *supra* at 220. It is then up to the persons interested in the estate of the deceased to arrange for substitution of the appropriate party. *See id.*

Accordingly, the court's substitution order of 21 January 1976 is neither a correct substitution under Rule 25(a) nor the order of conditional abatement contemplated by Rule 25(c). Had the parties been properly substituted, the appropriate move if defendant wished to terminate their action would have been a motion to dismiss for failure to prosecute under G.S. 1A-1, Rule 41(b). Since they were not properly substituted, they have no claim that could have been "abated," and we need not consider their argument that their claim was abated prematurely. *See Deutsch v. Fisher, supra.*

Intervenor-Plaintiffs' Appeal

The intervenor-plaintiffs, the Taylors, argue that they have met all the requirements that entitle them to intervene in this action as a matter of right. However, the order denying the Taylors' motion to intervene indicates that before it was entered, the court already had allowed defendants' motion to dismiss the action of the original plaintiffs and "abate" the claims of the substituted plaintiffs. No action remained in which the Taylors could intervene. We find no error in the denial of their motion.

The orders of the trial court are

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. STANLEY RICHARDO MENDEZ

No. 793SC204

(Filed 3 July 1979)

1. **Criminal Law § 89.10— witness's prior criminal activity—cross-examination proper**

The district attorney could properly cross-examine one of defendant's witnesses concerning his prior criminal activity for the purpose of impeaching or discrediting the witness.

2. **Criminal Law § 102.4— prosecutor's intent to have witness indicted—defendant not prejudiced**

Defendant was not prejudiced by the alleged statement of the prosecutor that he intended to have one of defendant's witnesses indicted where the record on appeal indicated that defendant had completed his direct examination of the witness prior to the prosecutor's alleged statement, and the statement therefore apparently had no effect upon the witness's testimony and tended in no way to detract from defendant's right to a fair trial.

3. **Criminal Law § 99.7— court's advice to witness not to testify—impropriety—no prejudice**

Though it is not improper for a trial court on its own motion to inform a witness of his rights, it was improper for the court in this case to advise the witness not to testify, but defendant was not prejudiced since the court's advice was given after the witness had completed his testimony for defendant on direct examination.

4. **Criminal Law § 105.1— motion for nonsuit—waiver by introduction of evidence**

When the defendant offers evidence, he waives his motion for dismissal or judgment as in the case of nonsuit made, either actually or by statute, at the close of the State's evidence and only his motion made at the close of all of the evidence is considered on appeal.

5. **Narcotics § 4— sale of LSD—defendant's belief that drug was mescaline—sufficiency of evidence of possession and sale**

In a prosecution for possession with intent to sell and sale of LSD, defendant was not entitled to have the case dismissed at the close of all the evidence even if he did think that the LSD which he possessed and sold was mescaline, since, in order to sustain a conviction for a violation of G.S. 90-95, it is not required that the State offer evidence tending to show that defendant knew the scientific name or the actual chemical composition of the controlled substance, and the evidence in this case tended to show at least that defendant knew or should have known that the controlled substance with which he was dealing was a Schedule I controlled substance.

State v. Mendez

APPEAL by defendant from *Reid, Judge*. Judgment entered 1 November 1978 in Superior Court, PITT County. Heard in the Court of Appeals 23 May 1979.

The defendant was charged with possession of the controlled substance lysergic acid diethylamide with the intent to sell and deliver and with the sale and delivery of that controlled substance. Upon his pleas of not guilty the jury returned a verdict finding the defendant guilty of both charges. From judgment sentencing him to imprisonment for a term of four years with that sentence suspended for a period of three years upon certain conditions, the defendant appealed.

The State's evidence tended to show that on 27 April 1978, Irvin Lee Alcox, a special agent with the North Carolina State Bureau of Investigation, and David Smith went to Room 345 of Slay Dormitory on the campus of East Carolina University. When they arrived, they expected to find George Mitchell Duke, Jr., the person to whom the room had been assigned. Instead the only person in the room was the defendant, Stanley Richardo Mendez. Mendez told them at that time that Duke was out "turning a deal." Smith then told Mendez that he and Duke had had a conversation earlier and that Duke had agreed to sell Smith a quarter of an ounce of chocolate mescaline for $350. Mendez responded "Okay" and then walked to a small stool in the corner of the room. Underneath the stool there was a small pouch from which Mendez produced a plastic bag containing a chocolate powder. Mendez handed the bag to Smith who handed it to Alcox. After weighing the contents of the bag, Alcox asked Mendez how much the quarter of an ounce of chocolate mescaline cost. Mendez replied that the price was $350. Alcox then handed $350 in cash to Mendez. Alcox later had the chocolate substance chemically analyzed and it was found to contain lysergic acid diethylamide or LSD.

During his testimony, Alcox indicated without objection that chocolate mescaline is known by "street people" as a form of LSD. It is made by grinding up LSD tablets and mixing them with a chocolate powder. It is sold under the name chocolate mescaline because some people will not buy the drug if it is represented to them as LSD.

The defendant Mendez offered evidence tending to show that he was visiting in Duke's room when Duke received a telephone call. Duke then told Mendez that he had to leave to pick up his girl friend but that Mendez could stay in the room and listen to the stereo while he was gone. About ten minutes after Duke left, Smith and Alcox came to Duke's room. They asked Mendez where Duke was, and Mendez told them that Duke had gone out but would return in a few minutes. Smith then told Mendez that he had previously arranged to purchase some chocolate mescaline from Duke. Smith stated that he knew where Duke kept the drug and asked Mendez to get it for them because they were in a hurry. At first Mendez refused. Smith persisted, however, and Mendez looked into the place where he was told the drug would be and found a plastic bag containing the chocolate powder described by Smith and Alcox. Mendez gave Smith the bag in exchange for $350. Mendez then left the money given him by Smith in the place where he had found the plastic bag.

Additional facts pertinent to this appeal are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the action of the trial court in allowing the District Attorney to ask one of the defendant's witnesses several questions concerning that witness' prior criminal activity. During cross-examination, the District Attorney asked the defendant's witness George Mitchell Duke, Jr. questions concerning his past involvement in various drug related activities. Although the defendant contends that the District Attorney's cross-examination constituted prejudicial error, we do not agree.

It is permissible to impeach or discredit a witness on cross-examination by asking him "all sorts of disparaging questions and he may be particularly asked whether he has committed specific criminal acts or has been guilty of specified reprehensible or

degrading conduct." *State v. Waddell*, 289 N.C. 19, 26, 220 S.E. 2d 293, 298 (1975) (citations omitted), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976). The scope of such cross-examination rests largely within the trial court's discretion and the scope of the cross-examination permitted by the trial court is not ground for reversal unless the cross-examination is shown to have improperly influenced the verdict. *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974). We find that the scope of cross-examination in the present case could not have had an improper influence on the jury and the defendant's assignment of error is overruled.

[2] The defendant next assigns as error the failure of the trial court to strike the entire testimony of the witness George Mitchell Duke, Jr. During redirect examination of the defendant's witness George Mitchell Duke, Jr., the following exchange occurred:

Q. And would you state whether or not it is true that while you were talking to [your lawyer] on the phone and in my presence [the Assistant District Attorney] threatened to have you indicted and placed in jail?

A. Yes. I heard him talking to my lawyer on the telephone.

Q. He said he was going to have you locked up?

A No. He did not say that.

Q. He said he was going to have you indicted?

A. Yes.

Q. For drugs?

A. Yes.

Q. Did that scare you?

A. Yes.

At no time after the foregoing testimony was introduced or at any other time did the defendant move to strike the testimony of the witness Duke. Nonetheless, we shall review the defendant's assignment of error.

Nothing in the record on appeal indicates that the alleged stated intent of the prosecutor to have the defendant's witness

Duke indicted was in any way made dependent upon Duke's decision concerning whether he would testify or the content of his testimony. To the contrary, the record clearly indicates that the prosecutor stated his intent to have the witness indicted in any event. Therefore, the statements of the prosecutor cannot be said to have been coercive or threatening.

More importantly, the record on appeal indicates that the defendant had completed his direct examination of Duke prior to the alleged statement of the prosecutor concerning his intent to have Duke indicted. Therefore, the defendant's evidence does not tend to show that the alleged statement of the prosecutor had any effect upon the witness' testimony or tended in any way to detract from the defendant's right to a fair trial. Having chosen to call Duke as a witness in his behalf, the defendant was not entitled to have Duke's testimony stricken in its entirety when it later became apparent that his credibility had been damaged by cross-examination. This assignment of error is overruled.

[3] We additionally note that the witness Duke asserted his right against self-incrimination provided by the Fifth Amendment to the Constitution of the United States when asked certain questions by the State during cross-examination. This occurred after the trial court made the following statement to the witness:

> The Court: Let me just say this to you, and I can't advise you because I cannot practice law. But if you have told me that you recognized the fact that you have not been charged or have not pled guilty to any criminal offense growing out of the specific contraband which is the subject matter of this case, then my advice would be to interpose your objection on any question in this regard because it would tend to incriminate you. If you follow what I am saying.
>
> A. In other words, not testify?
>
> The Court: This is what I would suggest to you if I were your lawyer, which I cannot do. Do you understand what I am telling you?
>
> A. Yes.

It is, of course, not improper for a trial court on its own motion to inform a witness of his rights. We do not approve, how-

ever, the action of the trial court in going beyond that point and advising a witness with regard to whether and how he should testify. In the present case, the action of the trial court was harmless to the defendant beyond a reasonable doubt as the witness had completed his testimony for the defendant upon direct examination. Such may not always be the case, however, and trial courts in such situations should avoid conveying any opinion to a witness concerning whether or how he should testify.

The defendant also assigns as error the failure of the trial court to grant his motion to dismiss made at the close of the State's evidence. At the time he made his motion, the defendant did not indicate whether he was making the motion pursuant to G.S. 15-173 or G.S. 15A-1227. Both of those statutes allow motions to dismiss to be made at the close of the State's evidence. However, they are not identical. G.S. 15-173 provides that "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." Although no such provision is contained in G.S. 15A-1227, its enactment did not create a new type of motion to challenge the sufficiency of the evidence.

A challenge to the sufficiency of the evidence to sustain a conviction is still properly made by either a motion for dismissal or a motion for judgment as in the case of nonsuit. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Both motions were known to the law for many years prior to the enactment of G.S. 15A-1227. The motion for dismissal referred to in G.S. 15A-1227 is the same motion for dismissal referred to in G.S. 15-173. Therefore, there is but one motion for dismissal for insufficiency of the evidence to sustain a conviction, and that motion is governed by the provisions of both G.S. 15-173 and G.S. 15A-1227.

[4] When the provisions of G.S. 15-173 are applied to the defendant's motion to dismiss, it is clear that by presenting evidence he waived his right to assert the denial of his motion to dismiss at the close of the State's evidence as a ground for appeal. The provisions of G.S. 15A-1227(d) and G.S. 15A-1446(d)(5), allowing review on appeal of the sufficiency of the State's evidence in a criminal case without regard to whether the appropriate motion has been made, do not change the foregoing rule. *See State v. Paschall*, 14

N.C. App. 591, 188 S.E. 2d 521 (1972) (applying former G.S. 15-173.1). When the defendant offers evidence, he waives his motion for dismissal or judgment as in the case of nonsuit made, either actually or by statute, at the close of the State's evidence and only his motion made at the close of all of the evidence is considered on appeal. As the defendant presented evidence, he may not properly bring forward an assignment of error based upon the denial of his motion to dismiss at the close of the State's evidence. This assignment of error is dismissed.

[5] The defendant also assigns as error the trial court's failure to grant his motion to dismiss at the close of all of the evidence. The defendant contends that the motion should have been granted because, among other things, the State failed to offer evidence tending to show that the defendant knowingly possessed lysergic acid diethylamide. We do not agree.

By its terms, G.S. 90-95(a)(1) makes it unlawful to sell or deliver a controlled substance and to possess a controlled substance with intent to sell or deliver that substance. Such acts must be committed knowingly in order to be criminal. Therefore, if a person knowingly sells or delivers a controlled substance and knowingly possesses a controlled substance with the intent to sell or deliver that substance, he is guilty of those crimes.

The defendant contends that the State's evidence tends to show that the controlled substance which he possessed and sold was at all times represented as "chocolate mescaline" and that he did not know that the substance in fact contained lysergic acid diethylamide. The State offered evidence tending to show that the term "chocolate mescaline" is a term used by those familiar with controlled substances to identify lysergic acid diethylamide mixed into a chocolate powder base and that this was the type of mixture possessed and sold by the defendant in connection with the charges brought against him.

Even if we assume *arguendo* that the State's evidence tended to show that the defendant possessed and sold lysergic acid diethylamide which he thought to be mescaline, the defendant will not prevail with regard to this assignment. In order to sustain a conviction for a violation of G.S. 90-95, it is not required that the State offer evidence tending to show that the defendant knew the scientific name or the actual chemical composition of the

controlled substance. The uncontested evidence tends to show that during the transaction with regard to the controlled substance involved in the present case, it was at all times referred to as "chocolate mescaline." Mescaline is a Schedule I controlled substance. G.S. 90-89(c)(10). Therefore, the evidence tends to show at least that the defendant knew or should have known that the controlled substance with which he was dealing with a Schedule I controlled substance. He would not be exonerated by virtue of a mistaken belief on his part that he was selling mescaline when, in fact, he was selling another Schedule I controlled substance, lysergic acid diethylamide. As the evidence tends to support a reasonable inference that the defendant knowingly sold and delivered a Schedule I controlled substance and knowingly possessed a Schedule I controlled substance with the intent to sell and deliver that substance, the trial court properly overruled the defendant's motion to dismiss. *People v. Bolden*, 62 Ill. App. 3d 1009, 379 N.E. 2d 912 (1978); *People v. James*, 38 Ill. App. 3d 594, 348 N.E. 2d 295 (1976); *Herrera v. State*, 561 S.W. 2d 175 (Tex. Cr. App. 1978).

The defendant has presented additional assignments of error which we have reviewed and find to be without merit. The defendant received a fair trial free from prejudicial error, and we find

No error.

Judges PARKER and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. GARY WAYNE ZIGLER

No. 7917SC146

(Filed 3 July 1979)

1. Weapons and Firearms § 3— discharging firearm into occupied building—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for discharging a firearm into an occupied building where it tended to show that a glass door forming the entrance to a police station was shattered by a shotgun blast; at the time of the shooting, a magistrate was standing directly in front

of the door a little to the left and two other persons were present in the station; two spent shotgun shells found in the street in front of the station were fired from a shotgun taken from defendant when he was arrested a short time later; and defendant told officers he intended to kill a cop before the sun came up. G.S. 14-34.1.

2. Property § 4.2— damaging real property—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for willful and wanton damage to real property where it tended to show that defendant intentionally fired a shotgun through the glass front door of a police station. G.S. 14-127.

3. Assault and Battery § 14— communicating threats—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for communicating threats in violation of G.S. 14-277.1(a) where it tended to show that defendant made numerous threatening statements to officers who arrested him and to officers present in the police station after his arrest, that such threats would cause a reasonable person to believe they would be carried out, and that the police officers believed that the threats would be carried out.

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

The State's evidence was sufficient for the jury in a prosecution for resisting arrest where it tended to show that an officer observed defendant fire a shotgun from a moving vehicle and informed him that he was under arrest; when the officer attempted to place handcuffs on defendant, he lifted the officer up off the ground; and five or six officers finally had to pull defendant's feet out from under him and place him on the ground on his chest in order to handcuff him.

5. Jury § 6.3— improper question by prosecutor—failure to strike entire panel

The trial court did not err in failing to strike the entire jury panel after the prosecutor improperly asked four jurors who had read about the case "whether they had an opinion that the defendant was guilty" where the court sustained defendant's objection to the question and none of the jurors were permitted to respond to it. G.S. 15A-1212(6).

6. Searches and Seizures § 11— probable cause to search vehicle—effect of removal of vehicle to police station

Where an officer observed defendant fire a shotgun from the window of his moving vehicle, the officer had probable cause to search defendant's vehicle for shotgun shells at the time he arrested defendant, and the fact that the shells were seized some five to seven minutes later after the vehicle had been removed from the middle of the street to a parking lot at the police station did not make the search and seizure unreasonable.

7. Criminal Law § 57— expert in ballistics—qualification

The trial court's determination that a witness was an expert in ballistics was supported by evidence tending to show that he was a special agent in the firearms and toolmark section of the SBI; he had been employed for 25 years in the New York City Police Department in ballistics; and he had tested thousands of rifles, semi-automatic pistols and shotguns.

State v. Zigler

APPEAL by defendant from *Albright, Judge.* Judgment entered 6 October 1978 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals on 21 May 1979.

Defendant was charged with willful and wanton damage to real property, a violation of G.S. § 14-127; communicating threats, a violation of G.S. § 14-277.1; resisting arrest, a violation of G.S. § 14-223; and discharging a firearm into an occupied building, a violation of G.S. § 14-34.1. Upon defendant's plea of not guilty, the State presented evidence tending to show the following:

On 18 May 1978, Magistrate J. B. Lemons of Stoneville was on duty, and was standing in a room in the Madison Police Station. Two other persons, Tom Tesh, a police officer, and David Highfill, a dispatcher for the Madison Police Department, were present in the room with Magistrate Lemons. At approximately 12:50 a.m., the glass door to the office was shattered by three shotgun blasts. Some of the shots went into a bulletin board that was located behind Magistrate Lemons. Mr. Highfill then immediately radioed for help, and Jerry Welch, the Chief of Police, was also notified at his home of the shooting. Chief Welch immediately left his home and commenced cruising the streets of Madison in search of the person who had fired the shots into the police station. Chief Welch noticed a brown or gold colored Chrysler and began following it. When the headlights of Chief Welch's car shined on the vehicle, a shotgun was fired out of the right side of the Chrysler. The vehicle was stopped by Chief Welch, and the defendant was the only person in it. Officer Tesh was also present when the vehicle was stopped, and he observed that the defendant was armed with what appeared to be an automatic twelve gauge shotgun and that there were several shotgun shells in the vehicle. When the defendant was arrested he was cursing, abusive, disorderly, and loud. He made several threatening statements to the arresting officers. The defendant had to be subdued and handcuffed in order to be taken into custody. Two boxes of shotgun shells were found in the defendant's vehicle when it was being moved from the street where the defendant was arrested to a parking lot located behind the police station. Two discharged shotgun shells were retrieved from the street in front of the police station. Robert Sherwin, who was qualified as an expert in ballistics, testified that the two shells had been fired from the shotgun that was taken from the defend-

ant. While in the police station, the defendant, without being questioned made several statements, including the following: "There are two of you dudes that need killing . . . Someone is going to have to do you in, and I decided that it was going to be me . . . The brothers are going to do you in . . . I was going to kill a cop before the sun came up . . . I don't care if I spend fifty years in jail I will get you when I get out."

The defendant presented no evidence.

Defendant was found guilty as charged. From a judgment entered on the verdict sentencing the defendant to nine to ten years in No. 78CR6188 for the offense of discharging a firearm into an occupied building, six months in No. 78CR6184 for the offense of willful and wanton damage to real property to run at the expiration of the sentence imposed in No. 78CR6188, and six months in Nos. 78CR6185 and 78CR6186 to run at the expiration of the sentence imposed in No. 78CR6184, defendant appealed.

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

Herman L. Taylor for defendant appellant.

HEDRICK, Judge.

We first consider defendant's assignment of error number six, the denial of his motions for a directed verdict made at the close of the State's evidence.

[1] G.S. § 14-34.1 provides in pertinent part: "Any person who willfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure . . . or enclosure while it is occupied is guilty of a felony . . ." A person is guilty of the felony created by this section if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building when he knows that the building is occupied or when he has reasonable grounds to believe that it might be occupied. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973).

With regard to this offense, the State presented evidence tending to show that the entrance to the police station located in a lower level of the Town Hall is a glass door; that Magistrate Lemons, at the time of the shooting, was standing directly in

front of the door a little to the left; that at the time the glass door was shattered by a shotgun blast, two other persons were also present in the police station; and that two spent shotgun shells found in the street in front of the police station were fired from the shotgun taken from the defendant when he was arrested. This evidence, coupled with the defendant's statements to the officers after his arrest, is ample to make out every element of the offense of discharging a firearm into an occupied building to require its submission to the jury.

[2] G.S. § 14-127 provides in relevant part: "If any person shall wilfully and wantonly damage, injure or destroy any real property whatsoever . . . he shall be guilty of a misdemeanor . . ." There was ample evidence presented tending to show that the defendant wilfully and wantonly fired the shotgun and shattered the glass door of the police station, causing damage to real property. Thus, defendant's motion for nonsuit as to this offense was properly denied.

[3] G.S. § 14-277.1(a) provides:

> A person is guilty of a misdemeanor if without lawful authority:
>
> (1) He wilfully threatens to physically injure the person or damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

There was ample evidence introduced tending to show that the defendant made numerous threatening statements both to the police officers who effected his arrest and to the officers present in the station house after he had been taken into custody. There was plenary evidence from which the jury could find that such threats from the defendant would cause a reasonable person to believe that the threats would be carried out, and that the police officers believed that the threats would be carried out. Thus,

there was ample evidence presented of every element of the crime of communicating threats and the case was properly submitted to the jury as to this offense.

[4] G.S. § 14-223 provides in pertinent part: "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor . . ." In the present case, the State presented evidence tending to show that the Chief of Police, Jerry Welch, observed the defendant fire a shotgun out of the window of a moving vehicle; that the defendant's automobile was stopped, and Chief Welch approached the vehicle, took the shotgun from the defendant, and informed him that he was under arrest; that the defendant got out of the car, and Chief Welch frisked him for weapons; that when Chief Welch attempted to put handcuffs on the defendant, the defendant resisted and lifted him up off the ground; that the police finally had to pull the defendant's feet out from under him and lay him on the ground on his chest in order to handcuff him; and that it took five or six officers forty to fifty seconds to subdue the defendant. This is sufficient evidence of every element of the offense of resisting arrest to require its submission to the jury and to support a verdict of guilty. We hold that the trial judge properly denied the defendant's motions for nonsuit as to the four offenses of which the defendant was found guilty, and thus the defendant's sixth assignment of error is overruled.

[5] By assignment of error number one, the defendant contends that the trial court erred in failing to strike the entire jury panel after the prosecutor improperly questioned members of the panel. The record discloses that the prosecutor asked the jurors whether any of them had heard or read about the present case. When four of the jurors raised their hands, the assistant district attorney then asked those who had read about the case "whether they had an opinion that the defendant was guilty." The trial court sustained defendant's objection with regard to the inquiry as to which way an opinion was formed, but denied his motion to strike the entire panel.

Under G.S. § 9-14, the trial judge is charged with the duty of deciding all questions as to the competency of jurors. In North Carolina, inquiry into the fitness of jurors to serve is subject to

the trial judge's close supervision, and the "regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion." *State v. Boykin*, 291 N.C. 264, 272, 229 S.E. 2d 914, 919 (1976); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972). A juror who has formed or expressed an opinion as to the guilt or innocence of a defendant may be challenged for cause. However, "[i]t is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant." G.S. § 15A-1212(6). Thus, the assistant district attorney's question as to whether the jurors had formed an opinion that the defendant was guilty was clearly improper, and the defendant's timely objection thereto was properly sustained by the trial judge. We do not think, however, that this question prejudiced the defendant in the present case since the record discloses that none of the jurors were permitted to respond to the question. Thus, the trial judge did not err in denying defendant's motion to strike the entire jury panel.

By his second assignment of error, defendant contends that the trial court erred by allowing into evidence testimony of Jerry Welch as corroborating the testimony of David Highfill when the testimony was not corroborative. At trial, David Highfill testified that after the door to the police station had been shattered by the shotgun blast, he radioed "that shots had been fired at the police department." Jerry Welch testified that he was telephoned by David Highfill, and that the "communication I received from Mr. Highfill was that small arms had been fired through the door of the police department." Although David Highfill did not testify on direct as to the contents of his telephone conversation with Chief Welch, we think that the testimony of Chief Welch was corroborative of Highfill's testimony as to the events that had transpired that night at the police station. Accordingly, this assignment of error is overruled.

[6] Defendant next contends that the trial court erred in permitting the State to offer testimony as to the shotgun shells found in the automobile driven by the defendant, and in allowing the shells to be introduced into evidence. At trial, the defendant objected to the introduction of this evidence, and the trial court conducted a *voir dire* hearing out of the presence of the jury to determine its admissibility. At the *voir dire* hearing, Chief Welch testified that the defendant's automobile was stopped in the middle of the

street and the defendant was placed under arrest; that prior to the time the defendant was taken to the station house, Chief Welch conducted a search of the defendant's person incident to the arrest and took some shotgun shells out of his pocket; that Chief Welch returned to the vehicle five to seven minutes later for the purpose of removing it from the middle of the street to a parking lot behind the police station; that when he opened the car door, the interior light came on and he observed two boxes which contained thirty-seven loaded shells; that he later found a spent shell on the front seat of the automobile; and that he did not have a search warrant authorizing a search of the vehicle. John T. Gentry, a police corporal, testified that he remained with the defendant's vehicle while the defendant was being taken to the police station, and that he also observed the boxes of shells when Chief Welch returned to remove the car from the street.

Defendant argues that the evidence should have been excluded because there were no exigent circumstances preventing the officers from getting a search warrant prior to the search. We disagree. When there is probable cause to search defendant's automobile at the place of his arrest, and such a search would have been constitutionally permissible without a search warrant, it does not violate the Fourth Amendment rights of the defendant for police to make a warrantless search of his automobile after it has been taken to the police station so long as there is a reasonable basis for its removal. *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed. 2d 209 (1975); *Chambers v. Maroney*, 299 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *State v. Hill*, 278 N.C. 365, 180 S.E. 2d 21 (1971). In the present case, had the police conducted the search of the defendant's vehicle at the time of his arrest, the items seized would have been admissible since "automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize." *Chambers v. Maroney*, 399 U.S. at 48, 90 S.Ct. at 1979, 26 L.Ed. 2d at 426. In the present case, Chief Welch testified that after following the defendant's automobile, he observed the defendant fire the shotgun out of the window. Chief Welch thus had probable cause to search the defendant's vehicle for shotgun shells at the time of defendant's arrest. The

fact that the shells were seized some five to seven minutes later, after the vehicle had been taken to the police station, does not make the search unreasonable.

[7] Finally, defendant contends that the trial court erred in "allowing Robert Sherwin to testify as an expert in ballistics when the evidence of his expertise in that field was not sufficient." The rule in North Carolina is that a finding by the Court that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies. *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); 1 Stansbury's N.C. Evidence § 133 (Brandis rev. 1973). In the present case there was evidence tending to show that the witness was a special agent in the firearms and toolmark section of the State Bureau of Investigation, that he had been employed for twenty-five years in the New York City Police Department in ballistics, and that he had tested thousands of rifles, semi-automatic pistols, and shotguns. We hold there was ample evidence of the witness' experience to support the court's finding that he was an expert. This assignment of error is meritless.

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

No error.

Chief Judge MORRIS and Judge WEBB concur.

STATE OF NORTH CAROLINA v. WILLIAM PATRICK DEGINA

No. 7921SC278

(Filed 3 July 1979)

1. Forgery § 1— uttering forged check—inference of forgery or consent to forgery

The inference that one who utters a forged instrument and thereby endeavors to obtain money or advances upon it either forged or consented to the forging of the instrument is not violative of due process.

2. Forgery § 2— forgery and uttering forged check—no double jeopardy

There was no merit to defendant's contention that the use of the same evidence to convict him of forgery and of uttering a forged check placed him in double jeopardy, since the crime of uttering is an offense distinct from that of forgery, and conviction of each offense requires proof of an additional fact which the other does not.

3. Criminal Law § 113.7— jury instructions—acting in concert

Defendant was not prejudiced by the trial court's instruction on acting in concert, though defendant contended there was no evidence in the record indicating the existence of another's participation in the crimes charged.

4. Criminal Law § 114.2— jury instructions—recapitulation of evidence—no expression of opinion

In a prosecution for forgery and uttering a forged check, the trial court did not express an opinion in instructing the jury that the State had offered evidence which would tend to show that the check in question came back and was "labeled a forgery," or in instructing that one witness's testimony was that the check was a "forgery."

APPEAL by defendant from *Hairston, Judge*. Judgment entered 27 October 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 June 1979.

Defendant was charged with the offenses of forging and uttering a false check.

At trial, the State's evidence tended to show: Clarence Hennings, owner of Hennings Auto Sales, discovered that eighteen of his checks were missing from his checkbook subsequent to a break-in at his company. Two weeks later, defendant presented one of Mr. Hennings' checks for payment in the amount of $2,500 at the main office of Wachovia Bank in Winston-Salem. The check was payable to Clarence Hennings. Ms. Cheryl Davis, a bank teller, cashed the check for defendant, but did not see him endorse the check.

Clarence Hennings had not given defendant authority or consent to sign his name on the check, nor did he receive funds from that check.

Defendant offered evidence tending to show that he was in New York on the day the check was cashed.

The jury found defendant guilty of forgery and of uttering forged papers. The trial court sentenced defendant to a term of

not less than four years and not more than six years on the uttering charge. On the forgery charge, the court sentenced defendant to no less than two nor more than four years; this sentence to run consecutively with the sentence on the uttering charge. Defendant appealed.

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

Charles O. Peed, for defendant appellant.

ERWIN, Judge.

[1] The initial question raised by defendant is whether the presumption in our State that one who is found in the possession of a forged instrument and is endeavoring to obtain money or advances upon it either forged or consented to the forging of the instrument, violates due process of law. We hold that it does not.

The presumption, or more properly labeled the inference, questioned by defendant was thoroughly examined by our Supreme Court in *State v. Morgan*, 19 N.C. 348 (1837). In upholding the validity of a conviction based on the inference, Chief Justice Ruffin, speaking for the Court in *Morgan, supra* at 350, stated:

> "[F]ew frauds, or offences partaking in their nature of fraud, are perpetrated openly, so as to be capable of express proof. If more than one person was present at the perpetration, it is almost certain that all participated; so that each is protected from testifying. Hence, there is both a necessity, and a propriety in resorting to presumptions from circumstances. It is possible, indeed, that a wrong inference may be deduced from them; but the necessity is so pressing, that a bare possibility of mistake must not over-rule it; and while guilt is not presumed from any circumstances, unless, in the whole, they are apparently inconsistent with innocence; the danger of injustice is rather ideal than real."

In reaching its decision in *Morgan, supra*, the Court relied on the presumption-inference, arising from possession of recently stolen property, that the person in possession stole the goods. Defendant would have us invalidate the forgery presumption on the ground that it lessens the State's burden of proof. However, the very

same argument made as to the invalidity of the inference arising from possession of recently stolen property has been rejected not only by our Supreme Court, but the Supreme Court of the United States as well.

In *Barnes v. United States*, 412 U.S. 837, 37 L.Ed. 2d 380, 93 S.Ct. 2357 (1973), the Supreme Court upheld the conviction of a defendant on two counts of possessing United States Treasury checks stolen from the mails, knowing them to be stolen, two counts of forging the checks, and two counts of uttering the checks, knowing the endorsements to be forged. Defendant's convictions were upheld even though the trial court instructed the jury that ordinarily it would be justified in inferring from unexplained possession of recently stolen mail that the defendant possessed the mail with knowledge that it was stolen. The Court stated:

> "[T]he evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen. Cf. *Turner v United States*, 396 US, at 417, 24 L Ed 2d 610; *Leary v United States*, 395 US, at 46, 23 L Ed 2d 57. Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable-doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process." (Footnotes omitted.)

Id. at 845-46, 37 L.Ed. 2d at 387, 93 S.Ct. at 2362-63.

Our Supreme Court's opinion in *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976), upholding the propriety of instructing the jury on the doctrine of recent possession is in accord with *Barnes, supra.* In *State v. Fair*, 291 N.C. 171, 173, 229 S.E. 2d 189, 190 (1976), our Supreme Court explained as follows:

> "The presumption, or inference as it is more properly called, is one of fact and not of law. The inference derived

from recent possession 'is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' *State v. Baker*, 213 N.C. 524, 526, 196 S.E. 829, 830 (1938); *accord State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976); *State v. Bell, supra.* Proof of recent possession by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. *State v. Greene, supra, State v. Baker, supra.*"

Defendant would have us believe that the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), makes the continued use of the doctrine of recent possession or the inference arising from the uttering of a forged instrument unconstitutional. Only recently, we rejected this very same argument in *State v. Hales*, 32 N.C. App. 729, 233 S.E. 2d 601, *cert. denied*, 292 N.C. 732, 235 S.E. 2d 782 (1977). Judge Arnold, speaking for this Court in *State v. Hales, supra*, stated:

"[*M*]*ullaney* is inapposite to the case at bar, because the so-called recent possession doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury *to infer* that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by *Mullaney. State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975)."

Id. at 731, 233 S.E. 2d at 602.

In view of our decision in *Hales, supra*, we hold that the inference that one who utters a forged instrument and thereby endeavors to obtain money or advances upon it either forged or consented to the forging of the instrument is not violative of due process.

[2] Defendant further contends that the use of the same evidence to convict him of forgery and of uttering places him in

double jeopardy in violation of Article I, § 19, of the North Carolina Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. We do not agree.

The crime of uttering is an offense distinct from that of forgery. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1968). The three essential elements necessary to constitute the crime of forgery are: (1) a false writing of the check; (2) an intent to defraud on the part of defendant who falsely made the said check; and (3) the check as made was apparently capable of defrauding. *State v. Greenlee, supra*; *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966); 6 Strong's N.C. Index 3d, Forgery, § 1, p. 306.

To be convicted of uttering, a defendant must have offered to another the forged instrument with the knowledge of the falsity of the writing and with the intent to defraud. *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975), and *State v. Greenlee, supra.*

In the instant case, each statute requires proof of an additional fact which the other does not. An acquittal or conviction under either statute does not except the defendant from prosecution and punishment under the other. *See Barker v. State of Ohio*, 328 F. 2d 582 (6th Cir. 1964); *State v. Stevens*, 114 N.C. 873, 19 S.E. 861 (1894).

It is true that the same evidence was offered to support the convictions of forgery and uttering. However, the forgery conviction was based on an *inference* arising from the uttering and not on the evidence of uttering itself. Since the inference of forgery arising from the uttering is constitutionally permissible, defendant has not been placed in double jeopardy for the "same offense." We find no error.

[3] Defendant contends that the trial court erred in instructing the jury on "acting in concert" when there was no evidence in the record indicating the existence of another's participating in the forging or uttering. Although the trial court's instruction may have been erroneous, we do not find it to be prejudicial error.

In *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied*, 418 U.S. 905, 41 L.Ed. 2d 1153, 94 S.Ct. 3195 (1974), our Supreme Court rejected a similar argument. In *Cameron, supra*, the Court stated:

"The State's evidence, principally offered through the testimony of co-participants in the commission of the crime, tended to show that defendant was not alone. However, this compelling and direct evidence was amply sufficient to support a jury finding that defendant actually participated in each element of the charged crime. Defendant's sole defense was alibi. The jurors' decision was not clouded by questions of joint participation or common purpose to commit a crime. Thus the jury was given a clear-cut decision: whether to believe the State's evidence and return a verdict of guilty or believe the defendant's evidence of alibi and return a verdict of not guilty.

We must agree that the instruction given to the jury upon the reconvening of court did not arise upon the evidence and, therefore, could not have been properly applied to the evidence. However, in light of the clear choices afforded the jury by all the evidence, we do not believe that this one statement misled or confused the jury in reaching its verdict."

Id. at 171, 200 S.E. 2d at 191.

In view of our Supreme Court's decision in *Cameron, supra*, we find no error in the court's instruction on "acting in concert." There was ample evidence to support the jury's verdict that defendant forged and uttered the instrument in question.

In giving its instruction on "acting in concert," the trial court stated: "If two or more persons act together with a common purpose to commit forgery or uttering an instrument, a forged instrument, each of them is held responsible for the acts of the others done in the commission of forgery *and* uttering a forged instrument." (Emphasis added.)

When viewed in isolation, this part of the instruction would be erroneous. However, when the charge is viewed in its entirety, as it must be, we find no prejudicial error. *Cf. State v. Hubbard*, 19 N.C. App. 431, 199 S.E. 2d 146 (1973).

Any prejudice which could have resulted from that portion of the charge complained of was removed by the following portions of the charge and particularly the final mandate to the jury on each offense charged. The jury was instructed that in order to

convict the defendant, it must find him guilty beyond a reasonable doubt as to each of the elements of the offenses charged. We find no merit in this assignment of error.

[4] Finally, defendant contends that the court, in its charge, invaded the province of the jury when the trial court instructed the jury that the State had offered evidence which would tend to show that the check (State's Exhibit No. 3) came back and was "labeled a forgery," and at another point, the court instructed the jury that witness Hennings' testimony was that State's Exhibit No. 3 was a "forgery." This is not an expression of an opinion that the evidence established such or should be believed. *Thompson v. Davis*, 223 N.C. 792, 28 S.E. 2d 556 (1944). This assignment of error is overruled.

In the trial of defendant, we find

No error.

Judges CLARK and CARLTON concur.

LUCY BLOUNT WILLIAMS v. ALFRED WILLIAMS III

No. 7810DC823

(Filed 3 July 1979)

1. **Divorce and Alimony § 17.1— erroneous finding that wife is dependent spouse**

The trial court erred in finding that plaintiff wife is a dependent spouse and in awarding her alimony where the evidence showed that she has a net worth of $761,925 and an income of $22,000 per year; throughout her marriage to defendant she expended her entire income and $2,000-$4,000 of her savings each year to maintain the high standard of living of the parties; defendant's maximum contribution to household expenses was $800 per month plus a $200 mortgage payment and payment of some utilities; plaintiff made the major contributions to the costs of building and furnishing the family home; plaintiff's net worth increased some $8,000 in the eleven months prior to trial; and plaintiff invaded her principal assets during the year prior to trial no more than she did during the last five or six years the parties lived together.

2. **Divorce and Alimony § 27— award to wife of counsel fees and expenses of prosecuting action—wife not dependent spouse**

In an action for alimony upon divorce from bed and board, the court erred in awarding counsel fees to plaintiff where she is not a dependent spouse. Fur-

thermore, the court erred in awarding plaintiff an amount as "reasonable expenses" of prosecuting the suit since (1) she is not a dependent spouse and (2) there is no statutory authorization for an award of such "expenses."

3. Divorce and Alimony § 24.6— child support—necessity for finding needs of child

The trial court erred in ordering defendant husband to pay child support of $450 per month where there were no evidence and findings as to the actual needs of the child.

Judge ERWIN dissenting.

APPEAL by defendant from *Parker, Judge*. Judgment entered 8 May 1978 in District Court, WAKE County. Heard in the Court of Appeals 25 May 1979.

In this action for divorce from bed and board, the parties stipulated for the purpose of the hearing on alimony and child custody and support that grounds for alimony exist by virtue of defendant husband's abandonment of the plaintiff. The trial court found that plaintiff's net worth is $761,975 and her annual income from interest and dividends is $22,000; defendant's net worth is $870,165.43 and in 1977 his gross income was $116,660. The court found plaintiff's reasonable monthly expenses to be in excess of $3,500, concluded that she is the dependent and defendant the supporting spouse, and awarded her alimony of $1,000 per month plus mortgage and other payments. For the one minor child plaintiff was awarded $450 per month child support, medical expenses, and private school expenses of some $4,500 per year. Defendant was also ordered to pay $3,000 each to plaintiff's two attorneys, and to pay plaintiff $2,500 as expenses of this action. Defendant appeals.

Gulley, Barrow & Boxley, by Jack P. Gulley, for plaintiff appellee.

Hunter & Wharton, by John V. Hunter III, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that the trial court erred in awarding alimony to the plaintiff, because she is not and never has been dependent upon him for her support. Only a dependent spouse is entitled to alimony. See G.S. 50-16.2. A dependent spouse is one

"who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." G.S. 50-16.1(3). "Alimony is not awarded as a punishment for a broken marriage, but for demonstrated need." *Lemons v. Lemons*, 22 N.C. App. 303, 304, 206 S.E. 2d 327, 329 (1974).

Considering the facts of the case before us in light of these principles of law, we find that the trial court erred in awarding the plaintiff alimony. The plaintiff has a net worth of $761,975. Her income is $22,000 a year, and plaintiff's uncontradicted testimony is that throughout the marriage she has expended her entire income and $2,000-$4,000 of her savings each year to maintain the high standard of living which the parties enjoyed during their marriage. (Defendant's maximum contribution to the household expenses has been $800 per month in addition to the $200 mortgage payment and the payment of utilities other than the telephone.) Plaintiff also made the major contributions to the costs of building, furnishing and improving the family home. Plaintiff paid all the medical bills, sent the children to summer camp, and purchased all gifts for both sides of the family.

The trial court found that in the eleven months prior to trial, during the period of the parties' separation, plaintiff's net worth increased from $754,000 to $761,975. This in spite of the fact, according to plaintiff's testimony, that since the separation she has paid $7,000 cash for a new car and "traveled more than ever before"—three times to New Orleans, twice to Denver, to Atlanta and several times to Florida. Moreover, she has invaded her principal assets during the year prior to trial no more than she did each year during the last five or six years the parties lived together.

The evidence completely fails to support the trial court's finding that plaintiff is substantially dependent upon the defendant or in need of maintenance and support from him. The award of alimony to the plaintiff is reversed.

[2] Upon the same ground, the award of counsel fees to the plaintiff is error. G.S. 50-16.4 allows an award of counsel fees "[a]t any time that a *dependent* spouse would be entitled to alimony pendente lite." (Emphasis added.) Since there is no evidence that

plaintiff is a dependent spouse, the award of counsel fees cannot stand.

Further, plaintiff is not entitled to the $2,500 awarded to her by the trial court as "reasonable expenses" of prosecuting this suit, both because we have determined that she is not a dependent spouse, and because G.S. 50-16.4 provides only for the award of "reasonable counsel fees," making no mention of "expenses."

[3] Defendant does not contest the portion of the Judgment for Child Support which requires him to pay the private school expenses of his minor son. He does contend that the portion of the judgment ordering him to pay $450 per month in child support is error. He argues that there is no evidence to support the court's finding that "[t]he plaintiff needs $450 per month from the defendant to enable the plaintiff properly to provide for the comfort, welfare and needs of the minor son." Defendant is correct.

G.S. 50-13.4(c) provides that "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance." To determine the amount of support that will meet the reasonable needs of the child, the court must make specific findings as to what actual past expenditures have been. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). This the trial court has failed to do. Furthermore, it could not have made such findings from the evidence contained in the record.

Plaintiff offered no testimony that showed the actual needs of the minor son, Don, who is away from home at private school eight months a year. She estimated that she needed a total of $6,754 each month "for me and Don." In her affidavit of financial standing she listed $451 per month as "Support for children not living with affiant," but she testified that "part of that" relates to Don and part to the other children, who have reached their majority and no longer live at home. She testified, "I contribute to all the children's welfare. I cannot tell you for sure how much of the four hundred fifty-one is solely for Don." Nor was she able to testify how much she sent him for spending money at school, or spent on his transportation to school and back. In the absence of any evidence of the child's actual needs, the monthly child support award must be vacated and remanded.

Finally, defendant contends that the trial court erred in finding that plaintiff "bought and paid for essentially all of the furniture, furnishings, decoration in the marital home and they are owned by her in her own name" and concluding that "[t]he furniture, furnishings and decorations in the marital home are the lawful property of the plaintiff." He relies on plaintiff's testimony, as follows:

> I bought and paid for every piece of furniture and object of art in the house except the leather pieces which came from Alfred Williams and Company. They are still in the house. There are three pieces in the library, a small sofa and two lounge chairs. There is one in my bedroom. There is one in an upstairs bedroom, a chair each. And then the leather furniture, which is twenty-five years old, in our playroom he and I gave to each other. I paid for half of that, so that's five pieces.

The evidence as a whole supports the trial court's finding that plaintiff "bought and paid for *essentially* all of the furniture" (emphasis added), but this finding does not in turn support the conclusion that "[t]he furniture, furnishings and decorations in the marital home are the lawful property of the plaintiff." No evidence was presented to show who owns the items which "came from Alfred Williams & Company," and plaintiff's uncontradicted testimony shows that she and defendant own the playroom furniture jointly. The trial court's judgment that "[t]he furniture, furnishings and decorations now in the marital home are and shall continue to be the property of the plaintiff" is modified accordingly.

The judgment of the trial court regarding alimony and counsel fees and expenses is reversed. The portion of the judgment referring to ownership of furniture in the family home is modified to the end that it does not decide ownership of the playroom furniture or furniture from Alfred Williams and Company. The portion of the judgment ordering defendant to pay $450 per month child support is vacated and remanded.

Reversed in part.

Vacated and remanded in part.

Modified and affirmed in part.

Judge MARTIN (Robert M.) concurs.

Judge ERWIN dissents.

Judge ERWIN dissenting.

I agree with all portions of the majority's opinion EXCEPT that portion which reverses the award of alimony to the plaintiff. I vote to affirm the award of alimony on the grounds that the finding of fact by the trial judge was supported by competent evidence and that the defendant is the supporting spouse.

STATE OF NORTH CAROLINA v. JOAN LOFTON

No. 798SC237

(Filed 3 July 1979)

1. **Constitutional Law § 67— confidential informant—defendant not entitled to name**

In a prosecution of defendant for manufacturing marijuana and possession of marijuana and heroin, defendant was not entitled to the name of a confidential informant when she presented no evidence to support her contention that no confidential informant existed and that information contained in a search warrant was obtained solely as a result of an earlier search by police officers.

2. **Searches and Seizures § 43— motion to suppress evidence—denial proper**

Defendant was not entitled to have evidence seized from her apartment suppressed on the grounds: (1) that the affidavit was not truthful in that the affiant did not receive his information from a confidential informant, where the court's finding to the contrary was supported by the evidence, or (2) that there was no probable cause to search defendant's apartment when the only information received was that there was marijuana on the balcony, an area over which defendant did not have exclusive control, since the affidavit presented to the magistrate was sufficient to supply probable cause to believe that defendant had the power and intent to control the disposition of the drug.

3. **Narcotics § 4— marijuana growing on balcony—drugs and paraphernalia in apartment—sufficiency of evidence of possession**

In a prosecution for manufacturing marijuana and possession of marijuana and heroin, evidence was sufficient to be submitted to the jury where it tended to show that marijuana plants were growing on defendant's balcony; there were only two means of access to defendant's balcony, one through her apart-

ment and one through an unoccupied apartment; there was no indication that anyone other than defendant used the balcony; heroin was found on defendant's kitchen table; defendant was present in the apartment with only one other person, the codefendant; and several needles and syringes were found in defendant's dresser drawer.

APPEAL by defendant from *Cowper, Judge*. Judgments entered 10 November 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 12 June 1979.

Defendant was indicted on charges of feloniously manufacturing a controlled substance, marijuana, possession of marijuana and felonious possession of heroin. Defendant was tried and found guilty on each count. From judgments imposing prison sentences, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

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

VAUGHN, Judge.

Prior to trial, defendant made a motion to suppress the evidence seized in a search of her apartment pursuant to a search warrant. Defendant claims that the warrant was invalid because there was no confidential informant as alleged in the affidavit and that the information contained in the affidavit resulted from an illegal search of defendant's premises.

Officer Johnson testified on *voir dire* that about 7:00 p.m. on 27 June 1978, he met with a confidential informer who told him that he had been at defendant's apartment a couple of days before and had seen about thirty marijuana plants on her balcony. The informer told Johnson that he had spent time in prison for marijuana. He had previously supplied Johnson with information leading to the arrest of another person which information proved to be true. After talking with the informant, Johnson went by defendant's apartment building and saw a green planter on a balcony but he could not tell what was in it. In the affidavit supporting the search warrant, Johnson related this information. The warrant was signed by the magistrate at 2:40 p.m. on 28 June 1978 and Johnson served the search warrant at 3:30 p.m. He was accompanied by Deputies Stocks and Flowers. The search

resulted in the confiscation of marijuana plants found on defendant's balcony, heroin and several needles and syringes.

On cross-examination, Johnson testified that he had no knowledge about the defendant prior to talking to his informant. On the afternoon of 28 June, Johnson saw Deputies Stocks and Flowers at his home. He had not talked with them about this case prior to that time nor had he asked them to check out defendant's premises. Stocks and Flowers never told Johnson that they had verified the presence of marijuana. Johnson asked Stocks and Flowers to aid him in the search because he had worked with them before.

Defendant presented the testimony of Deputy Stocks who stated that on the morning of 28 June 1978, he and Deputy Flowers went to see the real estate agent for defendant's apartment building. They accompanied the agent to an unoccupied apartment next door to defendant's residence. The apartments shared a common balcony with no dividing barricade. The deputies confirmed the presence of marijuana on the balcony. They never told Officer Johnson, however, that marijuana was there. Stocks testified on cross-examination that he had received information about the defendant from the same informer who spoke with Johnson. He talked to the informer several days prior to June 27 and told him to contact Johnson. The informer told Stocks on June 27 that Johnson had not taken any action. Stocks did not talk to Johnson until 28 June when he accompanied him on the search.

The court denied defendant's motion that the State divulge the name of the informant and denied her motion to suppress the evidence seized.

[1] Defendant contends that the name of the confidential informant should have been divulged because the fact that the deputies inspected the balcony prior to the issuance of the search warrant impugns the validity of the affidavit in support of that warrant. It is apparently defendant's theory that there was no informant and that the information contained in the warrant was solely obtained as a result of the earlier search. We find no merit in this argument because there is no evidence to support it. Defendant presents no evidence to contradict the State's evidence that information was obtained from a confidential informant. The trial

court found as a fact that the information was obtained from a confidential informant and the evidence supported this finding.

[2] Defendant also contends that the trial court erred in denying her pretrial motion to suppress the evidence obtained in the search. Defendant claims that the affidavit supporting the search warrant was not truthful and that the court should have suppressed the evidence seized pursuant to that warrant. We again find no error. The evidence on *voir dire* showed that Officer Johnson received his information from a confidential informant. Although Deputies Stocks and Flowers had visited the balcony, they did not relate their information to Johnson. The court found that Johnson received his information from a confidential informer and this finding was supported by the evidence.

Defendant also argues that the evidence should be suppressed because there was no probable cause to search defendant's apartment when the only information received was that there was marijuana on the balcony, an area over which defendant did not have exclusive control. The informant's information showed that he had seen marijuana growing on defendant's balcony. We find that the affidavit presented to the magistrate was sufficient to supply probable cause to believe that defendant had the power and intent to control the disposition of the drug. *State v. Wrenn*, 12 N.C. App. 146, 182 S.E. 2d 600, *appeal dismissed*, 279 N.C. 620, 184 S.E. 2d 113 (1971), *cert. den.*, 405 U.S. 1064 (1972). This assignment of error is overruled.

[3] Defendant contends that the court erred in denying her motion to dismiss. She argues that the evidence was insufficient to establish that she had control over the planter and over the matchbox containing heroin. Taking the evidence in the light most favorable to the State, we find that the evidence was sufficient to establish defendant's control over the contraband.

The evidence tends to show that defendant read the search warrant and allowed the officers to enter her apartment. A friend, the codefendant, was sitting at the kitchen table. Officer Johnson found forty-two marijuana plants growing in a planter attached to the metal frame of the balcony. The only access to the balcony was through defendant's apartment and the vacant one next door. On the kitchen table were two mixed drinks, an ashtray containing two marijuana cigarette butts, a penny match-

box containing three tinfoil packets, a cottonball and an empty tinfoil packet. Johnson found an envelope containing marijuana in the bedroom and also discovered some needles and syringes. The plants were analyzed and found to be marijuana. The powder in the tinfoil packets contained heroin. Defendant presented no evidence.

A person is deemed to have possession of contraband if he has the power and intent to control its disposition. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). This power may be in him alone or with someone else. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974).

> "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss . . . by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" (Citations omitted.) *State v. Harvey, supra*, at 12-13; *State v. Balsom*, 17 N.C. App. 655, 195 S.E. 2d 125 (1973).

The fact that other persons also had access to contraband does not exonerate a defendant. *State v. Sutton*, 14 N.C. App. 161, 187 S.E. 2d 389, *cert. den.*, 281 N.C. 515, 189 S.E. 2d 35 (1972).

In this case, the evidence shows that there were only two means of access to the defendant's balcony, one through her apartment and one through an unoccupied apartment. There was no indication that anyone other than the defendant used the balcony. Furthermore, the heroin was found on defendant's kitchen table. Defendant was present in the apartment with only one other person, the codefendant. Several needles and syringes were found in defendant's dresser drawer. We find that this evidence was sufficient to warrant denial of defendant's motions to dismiss. *See State v. Davis*, 25 N.C. App. 181, 212 S.E. 2d 516 (1975). This assignment of error is overruled.

Defendant next assigns as error certain portions of the jury charge. She contends that the court erred in failing to apply the law to the substantive features of the case. Specifically, she

argues that the judge should have pointed out to the jury that at no time did the officers see defendant in close proximity to the heroin and that the balcony was equally accessible to the adjoining apartment. The judge had no such duty. Defendant also contends that the court erred in failing to explain the evidence as it applied to the charge of manufacturing marijuana which the court defined as the growing of marijuana with the intent to distribute to others. In this case, the evidence was simple and direct. The judge's instructions on constructive possession and manufacturing were sufficient. *See State v. Williams*, 290 N.C. 770, 228 S.E. 2d 241 (1976). We, therefore, have considered all of defendant's assignments of error and conclude that no prejudicial error has been shown.

No error.

Judges HEDRICK and ARNOLD concur.

JOHN C. KIRKMAN, JR., THOMAS L. KIRKMAN AND LINA KIRKMAN HAMILTON v. MINNIE H. KIRKMAN

No. 7814SC934

(Filed 3 July 1979)

Declaratory Judgment Act § 3— agreement for devise of property—no breach of agreement—no justiciable controversy

There was no justiciable controversy between the parties so as to give the court jurisdiction under the Declaratory Judgment Act where plaintiffs were third party donee beneficiaries of an executory contract between their father and defendant to devise real property in a particular manner; plaintiffs in essence sought a determination of their rights upon a breach of the contract by defendant; but no breach of contract could occur until defendant either voluntarily disabled herself from being able to comply with its terms or died without making a will disposing of the property in accordance with the contract.

APPEAL by plaintiffs from *McKinnon, Judge*. Judgment entered 30 June 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals on 14 June 1979.

Plaintiffs instituted this action under G.S. § 1-253 to -267, the Declaratory Judgment Act, and have alleged that "[a]n actual controversy of a justiciable nature" exists with regard to a Postnuptial Agreement entered into by their father, John C. Kirkman, Sr., who is now deceased, and the defendant. The Postnuptial Agreement recited that John C. Kirkman and Minnie H. Kirkman had purchased a house and lot at 4316 Samoa Court, Durham, North Carolina, as tenants by the entirety on 30 January 1973; that both parties had contributed an equal sum of money for the purchase of the property; and that they desired upon the death of the survivor that the property be sold and the proceeds divided between the plaintiffs and the sister of the defendant. In an attempt to effectuate their intent, the parties contracted as follows:

> The parties to this Agreement will execute separate Last Wills and Testaments which will provide that upon their death the said property in question be sold and the proceeds of the sale be divided into two equal shares. One share shall be left to Lina Kirkman Hamilton, John C. Kirkman, Jr., and Thomas L. Kirkman, per stirpes, share and share alike. The remaining share shall be bequeathed to Elsie H. Westmoreland, if she shall survive the parties to this Agreement . . .

The Postnuptial Contract was dated 19 February 1973, and the signatures of the parties were notarized.

The record also contains documents purporting to be the Last Wills of John C. Kirkman, Sr., and Minnie H. Kirkman, each dated 20 February 1973. The Will executed by John C. Kirkman, Sr., contains the following provision:

> If my beloved wife, Minnie H. Kirkman, shall not survive me, I direct my Executor to sell that property which my wife, Minnie H. Kirkman, and I purchased at 4316 Samoa Court, Durham, North Carolina, and the proceeds of the sale divided into two equal shares. I bequeath one share to my beloved children, Lina Hamilton Kirkman, John C. Kirkman, Jr., and Thomas L. Kirkman, share and share alike, with the surviving issue of any deceased child receiving per stirpes and in fee the interest of their deceased parent. The remaining share I bequeath to my sister-in-law, Elsie H. Westmoreland if she shall survive me. . . .

The Will executed by Minnie H. Kirkman contains the following provision:

> My husband, John C. Kirkman, and I have acquired a home at 4316 Samoa Court, Durham, N. C. on January 30, 1973. If my husband shall not survive me, I direct that said property be sold and the proceeds divided into two equal shares. I bequeath one share to my sister, Elsie H. Westmoreland, if she shall survive me . . .
>
> The remaining share I bequeath to the beloved Children of my husband, John C. Kirkman, Sr., Lina Kirkman Hamilton, John C. Kirkman, Jr. and Thomas L. Kirkman, share and share alike . . .

Plaintiffs' Complaint contains the following allegation:

> 5. It is alleged upon information and belief that Minnie H. Kirkman has revised her will that she executed on February 20, 1973 and eliminated the provisions of the contract in said Postnuptial Agreement and in the aforedescribed wills to defraud and defeat her obligation, or the obligation of her personal representative, to plaintiffs.

Plaintiffs prayed for "a judgment impressing a constructive trust upon one-half of the proceeds of the sale of the real property located at 4316 Samoa Court, Durham, North Carolina, or for a judgment impressing a constructive trust upon a one-half undivided interest in said property, for the benefit of plaintiffs."

Defendant answered, denying that she had revised her Will to eliminate the provisions at issue. Defendant's Answer also contains a "counterclaim" wherein defendant alleges "that the paper writing hereto attached as Exhibit 'A' and designated Postnuptial Agreement is void as a matter of law in that same is void *ab initio*, that defendant was not examined privately and said document was not acknowledged pursuant to the provisions of G.S. 52-6 . . ." Defendant prayed that the Court declare the Postnuptial Agreement "to be void and invalid." Defendant also filed a motion for judgment on the pleadings with her Answer. On 26 May 1978, defendant filed a motion for summary judgment and supporting affidavit, and on 30 June 1978, the trial court entered an Order granting defendant's motion, which contained the following:

> [T]he Court having studied the pleadings, interrogatories and answers, affidavits, and other matters of record and having considered arguments and briefs of counsel, and the Court being of the opinion and concluding as a matter of law there is no genuine issue as to any material fact, and that the defendant is entitled to judgment as a matter of law on its counterclaim for a declaratory judgment; that the agreement which is the subject of controversy in this legal action is void for its failure to have been acknowledged following a private examination under North Carolina General Statutes, § 52-6; and that North Carolina General Statutes, § 52-6 is not unconstitutional . . .

From the foregoing Order, plaintiffs appealed.

Nancy Fields Fadum for plaintiff appellants.

E. C. Harris and Randall, Yaeger & Woodson, by John C. Randall, for defendant appellee.

HEDRICK, Judge.

Although it has not been raised directly by either party, we first consider the issue of jurisdiction. "An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act." *Adams v. North Carolina Department of Natural and Economic Resources*, 295 N.C. 683, 703, 249 S.E. 2d 402, 414 (1978). When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by a Rule 12(b)(6) motion to dismiss. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Newman Machine Co. v. Newman*, 275 N.C. 189, 166 S.E. 2d 63 (1969). While the Declaratory Judgment Act is to be liberally construed, its provisions are not without limitation. In determining whether an actual controversy exists in the present case, the following principles concerning the scope of the Act are applicable:

> [The Act] does not undertake to convert judicial tribunals into counselors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical

> guidance concerning their legal affairs. This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice. [Citations omitted.]
>
> . . .
>
> While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.

Lide v. Mears, 231 N.C. 111, 117-18, 56 S.E. 2d 404, 409 (1949). *See also North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. at 446-47, 206 S.E. 2d at 187.

Application of the foregoing principles to the facts of the present case compels the conclusion that the trial court lacked jurisdiction to enter a summary judgment. The plaintiffs in the present case are third party donee beneficiaries of the executory contract between their father and the defendant to devise the real property known as 4316 Samoa Court, Durham, North Carolina, in a particular manner. Although the plaintiffs have alleged that the defendant revised her Will to eliminate the provisions relating to disposition of the residence, it is clear that no breach of the Postnuptial Agreement could occur until the defendant either voluntarily disables herself from being able to comply with its terms, as for example by conveying the real property to a third party, or dies without making a Will disposing of the property in accordance with the contract. Even if the allegation of the plaintiffs was true, there is nothing to prevent the defendant from revising her Will prior to her death to bring it into compliance with the Postnuptial Agreement. The courts do not have the authority to declare the legal rights and obligations of the plaintiffs, as third party donee beneficiaries, to an executory contract upon the mere allegation that they anticipate that the

obligor will breach the contract at some time in the future. As there has been no breach of the contract, any order entered by the court attempting to secure the obligor's performance in compliance with the terms of the contract would be unenforceable.

In essence, plaintiffs seek a determination of their rights upon a breach of the contract by the defendant. No breach has yet occurred, and there is no assurance that the contract will be breached. The facts here alleged present a wholly abstract question and any decision from this Court on such facts would be purely advisory. *See City of Raleigh v. Norfolk Southern Railway Co.*, 275 N.C. 454, 168 S.E. 2d 389 (1969).

Furthermore, plaintiffs pray for the imposition of a constructive trust on the property or on the proceeds from its sale. While proceedings under the Declaratory Judgment Act have been given wide latitude, they nevertheless do not encompass the general equity jurisdiction of the court. *See Brandis v. Trustees of Davidson College*, 227 N.C. 329, 41 S.E. 2d 833 (1947); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E. 2d 552 (1970).

We hold that plaintiffs have failed to allege sufficient facts to show the existence of an actual or justiciable controversy with regard to any interest they have in the property sufficient to invoke the jurisdiction of the court to declare their rights or to impress a constructive trust on the property for their benefit. It follows that the court lacked jurisdiction to make any declaration with respect to the constitutionality of G.S. § 52-6 as prayed for in defendant's "counterclaim."

For the reasons stated, the judgment of the Superior Court entered on 30 June 1978 is vacated, and the matter is remanded to the Superior Court of Durham County for entry of an Order dismissing the proceeding and cancelling the notice of lis pendens.

Vacated and remanded.

Judges VAUGHN and ARNOLD concur.

MILNER HOTELS, INC. v. MECKLENBURG HOTEL, INC. AND RABS, INC., A VIRGINIA CORPORATION

No. 7826SC914

(Filed 3 July 1979)

1. **Evidence § 29— authentication of writing**

A writing may be authenticated by the production of sufficient evidence from which the jury could find that the writing was either written or authorized by the person who the writing indicates was responsible for its contents.

2. **Evidence § 29.1— authentication of mailgram**

A mailgram giving notice of termination of a lease was sufficiently authenticated for admission in evidence where a person who identified himself as the secretary-treasurer of defendant told an officer and an employee of plaintiff over the telephone that he would send plaintiff a written termination of the lease; both plaintiff's officer and the employee recognized the voice on the telephone as that of defendant's secretary-treasurer; and the mailgram was thereafter received by plaintiff and was sent in the name of defendant and defendant's secretary-treasurer.

3. **Interest § 2— interest on liquidated damages for termination of lease**

Plaintiff was entitled to interest on liquidated damages for the termination of a lease from the date that the lease was terminated.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 1 May 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 June 1979.

The plaintiff, Milner Hotels, Inc., leased a hotel from Mecklenburg Hotel, Inc. Mecklenburg Hotel, Inc. sold all of its interest in that hotel to RABS, Inc. on 1 April 1974. The plaintiff surrendered possession of the hotel to RABS, Inc. on 31 May 1974. The plaintiff then initiated this action by filing a complaint against Mecklenburg Hotel, Inc. and RABS, Inc. alleging that it had been notified by RABS, Inc. that its lease was to be terminated prior to the date specified therein, that it had then surrendered possession of the hotel to RABS, Inc., that a security deposit in the amount of $7,500 which it had made at the time of entering the lease had not been returned and that it had not received $7,500 established by the terms of the lease as the amount of liquidated damages to be paid the plaintiff in the event of premature termination of the lease. RABS, Inc. denied that it had terminated the plaintiff's lease and contended that the plain-

tiff was not entitled to a refund of its security deposit or to any liquidated damages. Additionally, RABS, Inc. counterclaimed for $11,546.81 alleging that the plaintiff owed it that amount on a Virginia judgment which arose out of circumstances surrounding the termination of the lease in question. At the conclusion of a trial concerning the issues raised by the parties, the jury returned a verdict finding that RABS, Inc. had terminated the lease, that the plaintiff was entitled to recover $15,000 by reason of that termination, that the plaintiff was estopped from asserting liability against Mecklenburg Hotel, Inc. and that RABS, Inc. was entitled to recover $11,546.81 from the plaintiff by reason of the matters set forth in the counterclaim. From the entry of judgment in accordance with that verdict, the defendant RABS, Inc., appealed.

Additional facts pertinent to this appeal are hereinafter set forth.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William P. Farthing, Jr. and Gaston H. Gage, for plaintiff appellee.

Helms, Mulliss & Johnston, by Robert B. Cordle, for defendant appellant RABS, Inc.

MITCHELL, Judge.

The defendant first assigns as error the admission into evidence of a Western Union Mailgram. The mailgram was a material part of the plaintiff's case since the terms of the lease required that notice of the termination of the lease be in writing. The mailgram was the only written notice of termination that the plaintiff offered evidence of having received. In support of this assignment of error, the defendant contends that the trial court erred in admitting the mailgram because it was not properly authenticated. We do not agree.

[1] Generally, a writing must be authenticated before it is admissible into evidence. *Walton v. Cagle*, 269 N.C. 177, 152 S.E. 2d 312 (1967). A writing may be authenticated by the production of sufficient evidence from which the jury could find that the writing was either written or authorized by the person who the writing indicates was responsible for its contents. *See Lumber*

Co. v. Lumber Co., 185 N.C. 237, 117 S.E. 10 (1923); *Credit Co. v. Hall*, 34 N.C. App. 478, 238 S.E. 2d 625 (1977); 32 C.J.S., Evidence § 706 (1964). Once evidence from which the jury could find that the writing is genuine has been introduced, the writing becomes admissible. Upon the admission of the writing into evidence, it is solely for the jury to determine the credibility of the evidence both with regard to the authenticity of the writing and the credibility of the writing itself.

[2] In the present case, the plaintiff's evidence tended to show that one of the plaintiff's employees, Barbara Dromke, received a telephone call on 8 April 1974 from a person who identified himself as Mr. Stein and whose voice she recognized as being that of Al Stein, the secretary-treasurer of RABS, Inc. During their conversation, Stein asked to speak with Ronald Miller, the president of the plaintiff corporation, concerning the termination of the lease of the hotel in question. Upon being told by Dromke that Miller was not in the office at that time, Stein replied that he was going to confirm the termination in writing but wanted to discuss possible dates with Miller. Dromke then suggested that Stein might like to speak with Ralph Totton, the vice-president and secretary of the plaintiff corporation. Stein agreed and Dromke had the call transferred to Totton. Stein identified himself to Totton who recognized Stein's "very distinctive" voice. Stein told Totton that he was going to take over the operation of the hotel. Totton then replied, "Well, there's got to be something in that lease that specifies some terminology for terminating the lease, probably in writing, and we should receive the proper notification." Stein answered, "You'll be hearing from me." Stein also said, "I expect to take over June 1, and I'd like to have the inventory taken around the twentieth of May, and would you be able to be present?"

The plaintiff's evidence further tended to show that Dromke was opening the plaintiff's mail on 9 April 1974 when she discovered what a Western Union employee later identified as a Western Union Mailgram. She opened the envelope, looked inside and immediately took the mailgram to Totton. Totton examined it and found the body of the mailgram to read as follows:

NOTICE OF TERMINATION IN 60 DAYS AS PER PHONE CONVERSATION AND LEASE. TAKE OVER JUNE 1 IF POSSIBLE. SEE YOU MAY 20TH, 1974.

A L STEIN R A B S INC

We find that the plaintiff's evidence was sufficient to permit the jury to find that A. L. Stein of RABS, Inc. sent the mailgram in question to the plaintiff corporation. Therefore, the mailgram was admissible and the defendant's assignment of error is overruled.

The defendant also assigns as error the trial court's ruling on an objection and motion to strike made by the plaintiff. During the direct examination by the defendant of its witness A. L. Stein, the following exchange took place:

Q. Was there a specific reason why you came on May 31, that day?

A. Yes, sir.

Q. What was that reason, sir?

A. During the last week of May, we received a telephone call from Hemingway Trucking Company that the Mecklenburg Hotel was going to be closed down.

MR. GAGE: OBJECT and MOVE TO STRIKE, your Honor.

After hearing arguments of counsel, the trial court sustained the plaintiff's objection and granted the plaintiff's motion to strike. The trial court told counsel for the defendant that he was free to rephrase the question. Counsel for the defendant then asked the witness if he had received a telephone call from Charlotte during the week of May 31. The witness answered in the affirmative and then gave testimony essentially identical to that which had been stricken previously. Assuming *arguendo* that the trial court improperly sustained the objection and improperly granted the motion to strike, any such error was clearly harmless as the same evidence was later admitted. Therefore, the defendant's assignment of error is overruled.

The defendant further assigns as error the trial court's denial of his motion for a directed verdict and his motion for judgment notwithstanding the verdict. We have reviewed the evidence and find that it was sufficient to justify the trial court in submitting the case to the jury and supported a verdict in favor

of the plaintiff. Therefore, the trial court did not err and this assignment of error is overruled.

The defendant next assigns as error several portions of the trial court's final instructions to the jury. The defendant contends that the trial court intimated its opinion, instructed on facts not in evidence or contrary to the evidence, stressed the contentions of the plaintiff, misstated the issues, and misstated the law concerning the modification and waiver of the terms of a contract. We have reviewed the charge in its entirety and find that, when it is read in its entirety and contexually as required on appeal, it contains no reversible error. This assignment of error is overruled.

[3] The defendant finally assigns as error the trial court's action in granting the plaintiff interest on the $7,500 termination fee from 1 June 1974. The lease provided that the lessee would be entitled to $7,500 in liquidated damages if the lessor terminated the lease before 28 February 1977. Nothing to the contrary appearing in the lease, it is clear that the parties to the lease intended that in the event of such a termination, the lessee would be entitled to that amount on the date of termination of the lease. The jury having found that the lessor, RABS, Inc., terminated the lease, the plaintiff was entitled to the $7,500 in liquidated damages as of the date of termination and was entitled to interest on that amount for the period thereafter. Thus, the trial court did not err in awarding interest on the unpaid balance and the defendant's assignment of error is overruled.

The defendant has presented certain other contentions in support of the assignments of error previously referred to herein. We have reviewed those contentions and find them without merit.

The defendant having received a fair trial free from reversible error, we find

No error.

Judges MARTIN (Robert M.) and WEBB concur.

MATTHEWS, CREMINS, McLEAN, INC. v. MICHAEL NICHTER, JOHN GASKELL, AND MEDIA COMMUNICATIONS, INC.

No. 7826SC904

(Filed 3 July 1979)

Libel and Slander § 5.2— defamation of business reputation—libel per se

Letters sent by defendants to certain television stations were libelous *per se* where they tended to disparage plaintiff's integrity in its business dealings by asserting that plaintiff breaches its contracts and fails to pay its bills.

APPEAL by plaintiff from *Ervin, Judge*. Judgment entered 13 April 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 June 1979.

Plaintiff appeals from an order dismissing its action at the close of plaintiff's evidence. Plaintiff instituted this suit against the individual and corporate defendants for alleged conversion of funds, unlawful tying arrangements and defamation. Plaintiff requested both compensatory and punitive damages. Defendants denied any liability and counterclaimed for damages for breach of contract.

The evidence tends to show that plaintiff is an advertising agency located in Charlotte. In 1974, plaintiff was authorized by its client, National Automotive Parts Association (NAPA), to institute a national television advertising campaign. As plaintiff did not have a media buying capacity sufficient to handle NAPA's business, it contracted with defendants to buy radio and television time in various markets. Defendant corporation, Media Communications, Inc. (MCI), is a media buying service located in New York. The individual defendants are officers of MCI. In January, 1975, the parties agreed that MCI would buy television advertising time for about one-half of NAPA's distribution areas. The advertising year was divided into two segments: the first flight which was to run between January and June of 1975 and the second flight which was to start that fall.

During the first flight, MCI contacted various television stations to determine the availability of television advertising spots. With plaintiff's approval, MCI would buy these spots. Once the stations had broadcast the advertisements, they would bill MCI. Plaintiff would pay MCI the amount of the charges within fifteen

days of their receipt. MCI would pay the stations within fifteen days of receiving payments from plaintiff.

The relationship between plaintiff and MCI went well during the first flight. In June, 1975, therefore, plaintiff authorized MCI to proceed with the second flight. Soon thereafter, however, plaintiff learned that defendants were attempting to tie the NAPA advertising to a program, "Northwest Traveler," which MCI was trying to schedule. Defendants had sent letters to various stations indicating that acceptance of the "Northwest Traveler" was a condition of receiving the NAPA advertising. Neither plaintiff nor NAPA had approved this arrangement. Upon learning of this situation, plaintiff terminated its contract with defendants during the first week in August, 1975. There was no contract provision concerning termination. Defendants had begun work on five stations for the second flight and were authorized to continue that work.

Upon termination, plaintiff had fully paid MCI for the first flight. It discovered, however, that MCI had failed to pay some of the stations as had been the agreed procedure. Plaintiff received several letters from various stations notifying it that these bills had not been paid. Upon advice of counsel, plaintiff withheld payment from MCI for the five buys in the second flight and paid the stations directly.

MCI instituted an action in New York against plaintiff for breach of contract. On 24 October 1975, defendants wrote letters to various television stations which read as follows.

> "Time has been placed on your station for NAPA/Matthews, Cremins, McLean with Media Communications, Inc. acting solely as agent for the purchase. Our records indicate your (*sic*) have been paid for the bulk of the schedule ordered. The time currently unpaid became payable after Matthews, Cremins, McLean terminated our agency. The termination by Matthews, Cremins, McLean constituted a breach of its contractual arrangement, and as a result Media Communications, Inc. has been forced to institute legal proceedings to recover damages it incurred.
>
> In view of the fact that we acted in this transaction solely as the agent for Matthews, Cremins, McLean and Matthews,

Cremins, McLean terminated the agency we suggest that you contact Matthews, Cremins, McLean regarding payment of the outstanding balance.

Media Communications, Inc. has enjoyed its past relationship with your station. You will note that in all of our prior transactions with you either as a principal or as an agent acting for our clients your invoices have always been paid.

I think it is important at this point to note that not only in our dealing with you, but also in our dealings with the industry, a situation such as this has never happened to Media Communciations, Inc. Quite frankly we are embarrassed by it. In all our prior relationships our clients have met their obligations and such a course as this current action has not been necessary.

However the need has arisen and we have been forced to institute legal proceedings to protect our interests. We are sorry for any inconvenience you might be caused by this unfortunate chain of events. Please feel free to contact me directly if I can be of any help personally in this matter."

The letters were signed by the defendant, Michael Nichter. Plaintiff learned of these letters when copies were sent to plaintiff by the station representatives. Two stations from which plaintiff received copies were in West Virginia and South Dakota. As to those two stations, plaintiff had paid MCI for their first flight broadcasts.

At the close of plaintiff's evidence, the trial judge granted defendants' motion for an involuntary dismissal. From this judgment, plaintiff appeals.

DeLaney, Millette, DeArmon & McKnight, by Samuel M. Millette, for plaintiff appellant.

Harkey, Faggart, Coira & Fletcher, by Francis M. Fletcher, Jr., and Philip D. Lambeth; Gerald Rubin, for defendant appellees.

VAUGHN, Judge.

Plaintiff presents only one argument on appeal. It contends that the court erred in granting defendants' motion for dismissal

of the action for libel because plaintiff had presented sufficient evidence to submit the question of defamation to the jury.

Libel has been defined as a malicious publication, in writing, which tends to impeach the reputation of someone and expose him to public contempt. 50 Am. Jur. 2d *Libel and Slander* § 3 (1970).

> " 'Libels may be divided into three classes: (1) Publications which are obviously defamatory and which are termed libels *per se*; (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not, and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel *per quod*.' " *Robinson v. Insurance Co.*, 273 N.C. 391, 393-94, 159 S.E. 2d 896 (1968) (quoting *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938).

Libel *per se* is actionable without proof of actual damages because malice and injury are presumed. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971); *Badame v. Lampke*, 242 N.C. 755, 89 S.E. 2d 466 (1955). Defamatory statements about a businessman imputing conduct derogatory to his reputation are actionable *per se* if they are uttered about him in his business relationship and affect him in his particular occupation. *Badame v. Lampke, supra.*

Plaintiff introduced into evidence three allegedly defamatory letters: one sent to West Virginia, one to South Dakota, and one with the addressee obliterated. Copies of the letters were sent to television advertising representatives in New York. "Unless otherwise provided by statute, libelous matter sent through the mails is generally actionable either at the place of posting or at the place of receipt by the addressee, even in another state. . . ." *Sizemore v. Maroney*, 263 N.C. 14, 21, 138 S.E. 2d 803 (1964). The law of the state in which the tort occurs governs the case. *Kornegay v. Oxendine*, 21 N.C. App. 501, 204 S.E. 2d 885 (1974). In New York, the general rule is that

> " '[a] writing is defamatory—that is, actionable without allegation or proof of special damage—if it tends . . . to induce an evil or unsavory opinion of [a person] in the minds of

> a substantial number in the community, even though it may impute no moral turpitude to him . . . . And to that listing of the defamatory should be added a writing which tends to disparage a person in the way of his office, profession or trade.' " (Citations omitted.) *Book v. Severino*, 380 N.Y.S. 2d 692, 693-94 (1976). *See Four Star Stage Lighting, Inc. v. Merrick*, 392 N.Y.S. 2d 297 (1977).

South Dakota follows this same rule. *Williams v. Hobbs*, 81 S.D. 79, 131 N.W. 2d 85 (1964). In West Virginia, a corporation may sue for libel when a publication defames its business reputation. *Coal Land Development Co. v. Chidester*, 86 W. Va. 561, 103 S.E. 923 (1920). Thus, plaintiff would be entitled to sue in any of these jurisdictions for the libelous actions of defendants.

Taking the plaintiff's evidence in the light most favorable to plaintiff, we find that defendant Nichter admittedly sent the allegedly libelous letters to at least two television stations. One of plaintiff's employees testified that he received a copy of the letters from each station. This testimony indicates that the letters were read by third parties and, therefore, fulfills the publication element of the cause of action for libel. *Taylor v. Bakery*, 234 N.C. 660, 68 S.E. 2d 313 (1951); 50 Am. Jur. 2d *Libel and Slander* § 155 (1970). That these third parties may not be business relations of plaintiff's is inconsequential because the only requirement is that plaintiff's business reputation be defamed. We further find that the letters themselves are libelous *per se* because they tend to injure plaintiff's reputation in that they assert that plaintiff breaches its contracts and fails to pay its bills. These statements clearly tend to disparage plaintiff's integrity in its business dealings.

We, therefore, reverse the order of the trial court dismissing plaintiff's action for libel.

Reversed.

Judges HEDRICK and ARNOLD concur.

RICHARD LUCIAN CHARETT v. DONNA H. CHARETT

No. 784DC1008

(Filed 3 July 1979)

1. **Divorce and Alimony § 25.9— child custody—changed circumstances—modification not required**

Where the changes in circumstances are such as to warrant but not compel a change in a child custody award, the decision of the trial judge to modify or not to modify that award will not be disturbed on appeal.

2. **Divorce and Alimony § 25.12— child custody—motion for modification—visitation privileges—cost of transporting child**

The issue of visitation was before the court upon plaintiff's motion for modification of a child custody award on the basis of changed circumstances, and the trial court did not abuse its discretion in requiring the parties to split the expense of the child's transportation for visitation purposes.

APPEALS by plaintiff and defendant from *Henderson, Judge*. Order entered 17 August 1978 in District Court, ONSLOW County. Heard in the Court of Appeals 25 June 1979.

This is an appeal from an order denying plaintiff-father's motion for modification of a custody order on the grounds of changed circumstances but granting plaintiff extensive specific visitation rights. The parties were divorced by judgment dated 7 November 1975. The judgment of divorce awarded custody of the parties' only child, DeAnna Lynn Charett, born 24 September 1970, to the defendant-mother "subject to reasonable visitation privileges by the plaintiff so as not to interfere with the health, education and welfare of said child." Plaintiff was ordered to pay $175.00 per month for support of the child.

On 9 January 1978 plaintiff filed a motion in the cause for a modification of the custody award made in the 7 November 1975 divorce judgment on the grounds of changed circumstances. Plaintiff in his motion alleged:

> a) since the entry of the aforesaid order, the Plaintiff has remarried; that the Plaintiff's wife is not employed, and has the time and ability to assist the Plaintiff in the raising of the minor child.

b) that the Plaintiff is a First Class Petty Officer with the United States Navy and is fully capable of providing for said minor child.

c) that the Plaintiff now has the home in which said minor child would have her own room; said home is located in a nice neighborhood and located across the street from an elementary school.

d) that said minor child has expressed a desire to reside with her father, the Plaintiff herein.

Plaintiff further alleged:

a) that since the entry of the aforesaid order, the Defendant has remarried and divorced.

b) that the Defendant is in the United States Army stationed in Augusta, Georgia, and is unable to care for the child.

c) that the Plaintiff is informed and believes and therefore alleges on information and belief that the Defendant does not have the physical facilities with which to have the child with her at present.

d) that the minor child has in fact been residing with the Defendant's parents for the past several months.

e) that since the entry of the aforesaid order, the minor child has been moved back and forth between the Defendant's duty station and the grandparents home in Mobile, Alabama.

On these allegations plaintiff prayed that the 7 November 1975 custody award be modified so that he be awarded custody of the child and be relieved of the obligation to make further payments to defendant for support of the child.

At a hearing on 2 June 1978 plaintiff presented evidence to support his allegations. The court entered judgment on 17 August 1978 finding as facts and concluding:

4. That since the date of the aforesaid Order, the plaintiff has remarried and now has a three bedroom home.

5. That since the date of the aforesaid Order defendant has remarried and divorced and presently resides in Augusta, Georgia.

6. That since the date of the aforesaid Order defendant has entered the United States Army and is stationed at Fort Gordon, Georgia.

7. That since the date of the aforesaid Order plaintiff has made support payments of $175.00 per month to the defendant for the support and maintenance of said minor child and said payments are current.

8. That from July, 1977 until the present date the minor child has resided with her maternal grandparents, Mr. and Mrs. Archie Hooper, in Mobile, Alabama.

9. That counsel for the parties stipulated and agreed that the undersigned Judge could talk with the minor child alone in chambers, and the undersigned did so on March 24, 1978.

10. That pursuant to the aforesaid conversation with said minor child the undersigned found that the minor child, age 7, is an intelligent young girl, who is aware of the circumstances of this case. Said child indicated to this Court that she loves both her mother and father and expressed no preference. Said child did express a desire to have visitation with her father.

Based upon the foregoing findings of fact the Court concludes as a matter of law that the plaintiff has failed to show that there has been a substantial and material change in circumstances since the Court's Order of November 7, 1975.

The court ordered, based on its findings and conclusions, that custody of the minor child remain with defendant "as per the Court Order of November 7, 1975" and granted plaintiff the following rights of visitation:

a. The natural father, Richard Lucian Charett, shall have custody of the minor child during the summer months beginning one week after school ends and continuing until one week next preceding the beginning of school in the fall.

b. That the natural father, Richard Lucian Charett, shall have custody of the minor child for one full week during the Christmas holidays which shall begin on Christmas day beginning 1978, and the next ensuing Christmas the week which ends Christmas day, and all future Christmas week vacations shall alternate in that order.

The court also ordered that plaintiff and defendant split the cost of transporting the child for visitation purposes and that plaintiff continue to pay $175.00 per month child support except during the summer months when he is entitled to custody of the child.

From this judgment, both plaintiff and defendant appeal.

Ellis, Hooper, Warlick, Waters & Morgan by Lana Lee Starnes for the plaintiff.

Gene B. Gurganus for the defendant.

PARKER, Judge.

PLAINTIFF'S APPEAL

Plaintiff assigns error to the trial court's conclusion that "the plaintiff has failed to show that there has been a substantial and material change in circumstances since the court's order of 7 November 1975." The plaintiff contends that the facts found by the court compel a contrary conclusion. We do not agree.

[1] It is true that the specific facts found by the trial court in this case show some changes in the circumstances of the parties since entry of the prior custody award. The changes shown may even be sufficient to warrant a change in the custody order previously entered. *See In re Custody of King*, 11 N.C. App. 418, 181 S.E. 2d 221 (1971); *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E. 2d 506 (1969). In our opinion, however, the changes shown do not compel that conclusion. Where, as here, the changes in circumstances are such as to warrant but not compel a change in the custody award, the decision of the trial judge to modify or not to modify that award will not be disturbed on appeal. "The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving custody of children." *Blackley v. Blackley*, 285 N.C. 358, 362, 204

S.E. 2d 678, 681 (1974). The trial court's position in this regard is far superior to that of the appellate court which must base its decisions upon a cold record. The trial court's decision in this case, which in effect did give plaintiff custody of the child during specified periods of the year, was within the court's discretion and no abuse of that discretion has been shown. Plaintiff's assignment of error is overruled.

DEFENDANT'S APPEAL

[2] The defendant's primary contention in her appeal is that the trial court erred in modifying plaintiff's visitation rights upon a motion for change in custody. This assignment of error has no merit. Custody and visitation are two facets of the same issue. The issue of visitation was before the court upon plaintiff's motion for modification of the custody award on the basis of changed circumstances. This assignment of error is overruled.

Defendant also assigns error to the trial court's order compelling her to split the expense of the child's transportation for visitation purposes. We find that the order was within the trial court's discretion and did not constitute an abuse of discretion.

We have carefully considered all of defendant's remaining assignments of error and find no prejudicial error.

Neither party in this case is entirely satisfied with the order of the trial court. This is almost always true in a contested child custody matter. The courts, seeking always to advance the best interests of the child, can only make the best of a situation which is already sad and unpleasant for all concerned. This, the trial court has done in the present case. The order appealed from is

Affirmed.

Judges ERWIN and MARTIN (Harry C.) concur.

JAMES W. COUNCIL v. METROPOLITAN LIFE INSURANCE COMPANY

No. 7828DC906

(Filed 3 July 1979)

1. Insurance § 8— no estoppel to deny claim

Defendant insurer was not estopped from denying plaintiff's claim on a disability insurance policy because defendant originally denied the claim on the ground of plaintiff's failure to qualify for Social Security disability benefits where defendant has not asserted another theory in defense of plaintiff's claim but has merely relied on plaintiff's failure of proof.

2. Insurance § 38.2— disability insurance—failure to show total disability

The evidence and findings supported the trial court's conclusion that plaintiff is not "totally disabled so as to be wholly prevented from engaging in any and every gainful occupation for which he is reasonably fitted by education, training and experience" where the court found upon supporting evidence that plaintiff had a high school education; he had worked for nine and a half years as a route salesman for a dairy, which included driving a refrigerated truck, loading and unloading the truck, and making deliveries; plaintiff had previously worked as a dye jig operator and a service station operator; plaintiff suffered from degenerative arthritis in the lumbar region of his back which prevented him from doing work involving heavy lifting or prolonged sitting or standing and from working in cold areas; plaintiff refused to participate in vocational rehabilitation training for a light occupation not requiring lifting; and plaintiff has been working on a small farm raising tobacco and cattle with the help of his two sons.

3. Insurance § 38.2— disability insurance—evidence of recent low income from odd jobs

In an action on a disability insurance policy, the trial court did not err in excluding evidence that plaintiff's gross income for the past five years never exceeded $2,200 per year since the fact that plaintiff has performed only odd jobs during such time did not require the court to find that plaintiff can only perform such tasks, it being the nature of the work that plaintiff is able to perform, not the work he has actually performed or how much he has been paid, that is relevant to a determination of whether he is totally disabled.

APPEAL by plaintiff from *Styles, Judge*. Judgment entered 16 May 1978 in District Court, BUNCOMBE County. Heard in the Court of Appeals on 12 June 1979.

This is a civil action wherein plaintiff seeks long term disability benefits under a group insurance policy issued to him by the defendant. The plaintiff alleged that he was "totally disabled" under the insurance policy, which contained the following provision defining that term as follows:

> [U]pon receipt by the Insurance Company of notice and due proof that . . . the Employee is totally disabled so as to be wholly prevented from engaging in any and every gainful occupation for which he is reasonably fitted by education, training, or experience, the Insurance Company shall pay such Monthly Benefits to the Employee during the continuance thereafter of such total disability.

Defendant answered, denying the material allegations of the Complaint, and alleging as a further defense that plaintiff was not totally disabled within the meaning of the policy because plaintiff applied for and was denied Social Security disability insurance benefits.

The case was tried before the judge without a jury, and on 16 May 1978 after hearing the evidence, the trial judge entered a Judgment containing findings of fact which, except where quoted, are summarized as follows:

Plaintiff was born on 25 November 1935, and has a high school education. Prior to May 1974, plaintiff was employed for approximately three and one-half years as a route salesman for Borden Dairy in Asheville. His duties in that job involved, among other things, driving a van-type refrigerated truck, loading the truck at the plant, unloading it and making deliveries, and collecting money for some deliveries. For the six years prior to his work at Borden, plaintiff worked as a route salesman for other dairies, which also involved loading and unloading trucks. Prior to that, plaintiff worked as a dye jig operator, which involved the lifting of heavy bolts of cloth, and also as a service station operator. Plaintiff served in the Armed Forces for approximately two years and was assigned to duties at a post exchange as a sales clerk. From April 1973 to August 1977, plaintiff was examined and treated by Dr. McCullough, who diagnosed plaintiff as suffering from "significant degenerative arthritis in the lumbar region of his back, more than would normally be expected to appear in a man of Plaintiff's age." There was evidence that plaintiff "will probably never totally recover [from this condition] and [the condition] would probably not be improved by surgery." Plaintiff's back condition prevents him "from doing work involving heavy lifting or prolonged sitting or standing and from working in cold areas." Plaintiff was referred to Vocational Rehabilitation for

placement in work not requiring lifting, but he declined to participate in recommended training for a light occupation not requiring lifting. Since plaintiff last worked for Borden, he has worked on a small farm raising tobacco and cattle with the help of his two sons.

The Court concluded that "Plaintiff has not proved by the greater weight of the evidence that he is totally disabled so as to be wholly prevented from engaging in any and every gainful occupation for which he is reasonably fitted by education, training or experience," and entered a judgment that plaintiff recover nothing of defendant and that his action be dismissed. From the foregoing judgment, plaintiff appealed.

Long, McClure, Hunt & Trull, by Robert G. McClure, Jr. and David E. Matney III, for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by O. E. Starnes, Jr., for defendant appellee.

HEDRICK, Judge.

[1] Plaintiff first contends that the defendant is estopped from denying that the plaintiff is "totally disabled so as to be wholly prevented from engaging in any and every gainful occupation for which he is reasonably fitted by education, training, or experience" as defined in the insurance policy provision attached to the Complaint, on the grounds that the defendant initially denied benefits because of plaintiff's failure to qualify for Social Security benefits. Plaintiff relies on *Gouldin v. Inter-Ocean Insurance Company*, 248 N.C. 161, 165, 102 S.E. 2d 846, 849 (1958), in which the Court quoted the general rule "that where an insurer denies liability for a loss on one ground, at the time having knowledge of another ground of forfeiture, it cannot thereafter insist on such other ground *if the insured has acted on its asserted position and incurred prejudice* or expense by bringing suit, or otherwise." [Emphasis added.]

Plaintiff argues that because defendant sent him a letter denying his claim because of his failure to qualify for Social Security benefits it is now estopped from defending plaintiff's claim on any other theory. This is an erroneous interpretation of the rule stated in the *Gouldin* case. The defendant certainly could not defend against plaintiff's claim on a totally separate theory of

which plaintiff had no notice and after plaintiff had relied on the representations of the insurance carrier to his prejudice. Plaintiff nevertheless must still introduce sufficient evidence to support his own theory of recovery in order to be entitled to the benefits under the policy. In the present case, defendant has not asserted a separate theory in defense of plaintiff's claim, but has merely relied on plaintiff's failure of proof. This assignment of error has no merit.

[2] By assignments of error six and seven plaintiff contends that the court erred in its finding that he was not totally disabled under the terms of the policy, and in failing to make the requested findings of fact and conclusions tendered by him. Plaintiff argues that the requested findings of fact are "undisputed" and "lead to inescapable conclusions of law that the plaintiff was totally disabled."

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive if there is evidence to support them, even though the evidence would sustain findings to the contrary. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971). In the present case, the evidence is sufficient to support the findings made by the trial judge, and the findings in turn support the conclusions and judgment for the defendant. This assignment of error has no merit.

[3] Finally, plaintiff contends that the court erred in excluding testimony pertaining to his income for the past five years. Plaintiff argues that his gross income for the past five years never exceeded $2,200.00 per year and that his net income never exceeded $1,500.00 per year. Plaintiff apparently relies on the rule stated in *Bulluck v. Mutual Life Insurance Company of N. Y.*, 200 N.C. 642, 646, 158 S.E. 185, 187 (1931), that in considering whether the claimant is totally disabled, his "ability to do odd jobs of comparatively trifling nature does not preclude recovery."

The issue addressed by the trial court was whether the plaintiff was "totally disabled so as to be wholly prevented from engaging in any and every gainful occupation for which he is reasonably fitted by education, training, and experience." The trial judge determined this issue against the plaintiff and made a specific finding of fact to that effect. The fact that the plaintiff has the ability to do odd jobs, or, as in the present case, that the

plaintiff has in fact done various odd jobs, does not require the trial judge to find that the plaintiff can only perform such tasks. Furthermore, it is the nature of the work that the plaintiff is able to perform, and not what work he has actually performed or how much he has been paid, that is relevant to a determination of whether he is totally disabled. Thus, the trial court did not err in excluding evidence as to the plaintiff's income.

For the reasons stated, the judgment appealed from is affirmed.

Affirmed.

Judges VAUGHN and ARNOLD concur.

WHALEHEAD PROPERTIES, A PARTNERSHIP v. COASTLAND CORPORATION, OCEAN SANDS PROPERTY OWNERS ASSOCIATION, INC. AND OCEAN SANDS, INC.

No. 781SC933

(Filed 3 July 1979)

Appeal and Error § 6.2— partial summary judgment—premature appeal

An appeal from an order granting partial summary judgment on the issue of liability, reserving for trial the issue of damages, is interlocutory and must be dismissed.

APPEAL from *Snepp, Judge*. Judgment entered 15 June 1978 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 14 June 1979.

Plaintiff and defendants are landowners and developers of adjoining tracts of land on the outer banks of Currituck County. Access to plaintiff's property from the north is closed by the United States Government. This suit arises out of contractual agreements wherein plaintiff sought to obtain access to its property from the south, particularly wherein plaintiff acquired the right to use a right-of-way commonly referred to as the "Slick Easement."

The Slick Easement is an unpaved roadway which is not dedicated to the public. It commences at the northern end of N.C. State Road # 1200 in Currituck County and runs northwardly along the Currituck County Outer Banks toward the Virginia line. The Slick Easement commences at the southern boundary of property now or formerly belonging to Earl F. Slick and others on the Currituck County Outer Banks and runs northwardly across said Slick property to the northern boundary of the Slick property where said Slick Easement intersects a roadway known as "Ocean Trail."

Ocean Trail, a roadway dedicated to the public, traverses northwardly to defendants' property on the Currituck County Outer Banks known as the Ocean Sands Subdivision which lies to the north of the Slick property. Ocean Trail runs northwardly across defendants' property (Ocean Sands) where it enters plaintiff's property known as Whalehead Club or Beach Subdivision which lies to the north of defendants' Ocean Sands property on the Currituck County Outer Banks. Southern access to plaintiff's property depended upon its acquisition of the right to use the Slick Easement in order to reach the dedicated roadway to the north thereof.

Defendant Coastland had obtained access to its property from the south by entering into various agreements with Earl F. Slick and others. Those agreements granted Coastland a nonexclusive right to use the Slick Easement. The agreements further provided that others could be granted the right to use the Slick Easement with the joint consent of Coastland and Slick.

Through a series of three agreements with Coastland and Slick, plaintiff acquired the right to use the right-of-way known as the Slick Easement which, when linked to Ocean Trail, provided plaintiff with access to its property from the south.

Plaintiff alleged three causes of action against defendants. In the first, plaintiff alleged that, although it had complied with its agreements with Coastland, defendants were nevertheless wrongfully threatening to terminate access over the Slick Easement by trucks hauling road base materials and asphalt to plaintiff's property to the north thereof. The first cause of action was settled by consent.

Plaintiff's second cause of action again alleged compliance with its agreements with Coastland as to use of the Slick Easement. It alleged that defendants had wrongfully threatened to terminate plaintiff's right to access over the Slick Easement by writing letters so stating to plaintiff and those who had purchased property from plaintiff. Plaintiff alleged that such action by defendants breached the agreements entered into with defendant Coastland as to access over the Slick Easement and constituted a direct and lasting injury to plaintiff's sales of its property. Plaintiff sought a temporary restraining order, preliminary injunction and permanent injunction restraining defendants from terminating or threatening to terminate access.

Plaintiff's third cause of action sought a Declaratory Judgment establishing the rights of plaintiff and defendants under the agreements entered into by plaintiff and defendant Coastland with respect to the Slick Easement. Specifically, plaintiff sought an adjudication by the court that it was in compliance with said agreements thereby permitting plaintiff to commence sales from its redesigned property. Defendants had rejected said redesign as not being in compliance with the agreements.

Defendants filed Answer and Counterclaim to plaintiff's complaint. Defendants denied the allegations of the complaint and alleged that plaintiff had wrongfully failed to comply with the terms of its contracts and sought specific performance of the agreements. In the alternative, defendants sought damages for plaintiff's breach of the contracts.

Restraining orders were entered restraining defendants from terminating or threatening to terminate the right of plaintiff and others having the right through plaintiff to use the Slick Easement until trial on the merits.

The issue of damages was severed from the action and counteraction until trial on the merits of the other issues.

All parties moved for summary judgment. After considering the pleadings, affidavits and exhibits offered, the testimony of a witness and argument of counsel, Judge Snepp granted plaintiff partial summary judgment on its second cause of action set forth in the complaint to the extent that defendants were permanently enjoined from terminating or threatening to terminate the right

of plaintiff and others having the right through plaintiff to use the Slick Easement.

In all other respects, plaintiff's motion for summary judgment was denied. Defendants' motion for summary judgment on plaintiff's third cause of action was granted and plaintiff was declared to be in violation of certain of the terms and conditions of its agreements with defendant Coastland.

As to defendants' counterclaims, the judge denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment. Although the court held that plaintiff was in violation of certain of the terms and conditions of its agreements with defendant Coastland, the court denied defendants' prayer for specific performance, thereby limiting defendants to the recovery of damages, if any, on their counterclaims. The issue of damages was ordered to be tried at a later session of court.

Plaintiff appealed from the judgment of Judge Snepp denying its motion for summary judgment in its entirety and granting defendants' motion for summary judgment on plaintiff's third cause of action and defendants' counterclaims. Defendants appealed from that portion of Judge Snepp's judgment limiting them to recovery of damages on their counterclaims.

White, Hall, Mullen, Brumsey & Small, by M. H. Hood Ellis and Gerald F. White; J. Kenyon Wilson, Jr., attorneys for plaintiff appellant and plaintiff appellee.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells and Mark M. Maland; Twiford, Trimpi & Thompson, by Russell E. Twiford and Jack H. Derrick, attorneys for defendant appellants and defendant appellees.

HEDRICK, Judge.

The present case is indistinguishable from *Tridyn Industries, Inc. v. American Mutual Insurance Company*, 296 N.C. 486, 251 S.E. 2d 443 (1979), where our Supreme Court declared that an appeal from an order granting partial summary judgment on the issue of liability, reserving for trial the issue of damages, is interlocutory and must be dismissed. Justice Exum, writing for a unanimous Court, noted that Rule 56(c) of the Rules of Civil Procedure, which authorizes a summary judgment on the issue of

liability alone, specifically provides that such a judgment is "interlocutory in character." "This case should be reviewed, if at all, in its entirety and not piecemeal." *Tridyn Industries, Inc. v. American Mutual Insurance Company, supra*, at 494, 251 S.E. 2d at 449.

Dismissed.

Judges VAUGHN and ARNOLD concur.

BOARD OF TRANSPORTATION v. W. R. RAND AND WIFE, ELIZABETH P. RAND, GEORGE F. LATTIMORE, JR. AND WIFE, HELEN T. LATTIMORE

No. 7810SC830

(Filed 3 July 1979)

Eminent Domain § 7.8— highway condemnation—general and special benefits—instructions

In this highway condemnation action, testimony by plaintiff's witness that the value of defendants' land was increased by the taking because a roadway fronting the property was paved and property on the paved road "tended to bring more money per acre" was insufficient to require the court to instruct on general and special benefits to defendants' property resulting from the highway project; furthermore, the court did present plaintiff's contention of benefits to the jury when it told the jury to consider any evidence of increased value of defendants' land in arriving at their verdict.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 11 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 29 May 1979.

On 9 October 1974 plaintiff began this action against W. R. Rand and wife, Elizabeth, and George F. Lattimore, Jr. and wife, Helen, for the condemnation of a part of their property for highway purposes. The condemnation was necessary to improve secondary road 1831, Old Creedmoor Road, in Wake County. Defendants owned 155.64 acres prior to the taking on 9 October 1974, and after the condemnation of .87 acre there remained 154.77 acres. The landowners' evidence tended to show that the highest and best use of the property both before and after the taking was for residential purposes; that in addition to the .87

acre acquired in the right of way, 15 acres had become subject to flooding because of water diversion by the highway construction and was no longer usable for residential purposes. Plaintiff's evidence tended to show that the 15 acres were subject to flooding before the condemnation. This soil and gravel road was paved as a part of the project. Frank Gordon testified for plaintiff that in his opinion the property was worth more after the taking than before and that the paving of the road benefited defendants' remaining property. Plaintiff appeals from the verdict of the jury assessing defendants' damages.

Attorney General Edmisten, by Associate Attorney R. W. Newsom III, for plaintiff appellant.

Hatch, Little, Bunn, Jones, Few & Berry, by William P. Few, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff argues the trial court erred in its charge by failing to instruct the jury concerning general and special benefits to defendants' property resulting from the highway project. We find no error.

Defendants' evidence tended to show the value of their remaining property was reduced by reason of the condemnation.

Plaintiff produced the following evidence indicating benefits to defendants' remaining property: the witness Frank Gordon testified he appraised the property on 1 April 1974 before the taking; he also appraised the property after the taking; the property had road frontage of 4560 feet before the taking and about 4471 front feet thereafter; the road was soil and gravel before and paved in this project. Gordon further testified:

> I have an opinion as to the fair market value of this entire tract immediately prior to the taking on October 9, 1974. That value is $280,150.00. In arriving at that figure I considered the highest and best use for this property to be residential development. That was before the taking. That $280,000.00 represented a per acre value of $1800.00 per acre. I have an opinion satisfactory to myself as to the reasonable fair market value of the tract in question immediately after the taking, October 9, 1974, that is $386,925.00. In my opinion

> the property has been benefited as a result of the highway. The highest and best use for this property after the taking is for residential development.

On cross-examination he testified:

> The act of putting several feet of asphalt on that road increased the value of the property because it provided frontage along . . . I estimate it would be worth more afterward, after the road was paved. I estimate it would be worth a hundred and six thousand dollars more. Based on the comparable sales that were made compared with the subject, in those sales using before condition had frontages along soil-and-gravel roads, whereas in the after conditions, after S.R. 1831 had been paved, I compared it then with the sales of properties along paved roads, and they tended to bring more money per acre. The construction of the road, in my opinion, did not damage the remaining land.

We hold plaintiff's evidence is not sufficient to require a charge on benefits. In order to require a charge on benefits, the evidence must establish benefits "which arise from the particular improvement for the purpose of which the owner's land is taken or damaged." *Kirkman v. Highway Commission*, 257 N.C. 428, 433, 126 S.E. 2d 107, 111 (1962). Special benefits are those which arise from the peculiar relation of the land in question to the public improvement. General benefits are those which arise from the fulfillment of the public object which justified the taking and from the increased general prosperity resulting from the highway project. *Templeton v. Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918 (1961).

In *Kirkman, supra*, the Court held:

> "Of course, any alleged benefit to have any standing in court at all, must be genuine and capable of estimation in money value." 18 Am. Jur. Eminent Domain, Section 297. "They must be actual and appreciable and not merely conjectural and they must be the direct and proximate result of the improvement, remote benefits not being taken into consideration," 29 C.J.S., Eminent Domain, Section 183. "Whether benefits are special or general, the courts are agreed on the proposition that remote, uncertain, contingent, imaginary,

speculative, conjectural, chimerical, mythical or hypothetical benefits cannot, under any circumstances, be taken into consideration." Anno.—Eminent Domain—Deduction of Benefits, 145 A.L.R. 124. *Statesville v. Anderson*, 245 N.C. 208, 95 S.E. 2d 591.

The burden of proving the existence and the amount of benefits is on the condemner. 29 C.J.S., Eminent Domain, Section 184.

257 N.C. at 434, 126 S.E. 2d at 112.

The witness Gordon's only basis for his opinion that defendants' land value was increased by the taking was his testimony that the paving of the road provided frontage and that sales of property on paved roads "tended to bring more money per acre." Actually, the record shows that defendants' property had less road frontage after the taking.

At best, plaintiff's evidence as to benefits was conjectural, uncertain, speculative and contingent. Plaintiff, having the burden of proof, failed to produce evidence showing the existence of benefits and the amount of such benefits.

Nevertheless, the court in its charge did present plaintiff's contention of benefits to the jury. Although the court did not use the word "benefit" in its charge, it plainly told the jury to consider any evidence of increased value of defendants' land in arriving at their verdict.

The court instructed the jury:

The measure of damages when a part of the land is taken is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder immediately after the taking

. . . .

. . . .

The Department of Transportation presented evidence tending to show that the fair market value of the land immediately before the taking was $280,150 and $386,920 afterwards, . . . that the changes in elevation and the pavement of the dirt roadway existing prior to the taking have caused no

diminution in value, but, rather, have enhanced the value of the land remaining.

You should consider the opinions expressed as to value and also the reasons upon which those opinions were based, and upon a full consideration of all of the evidence together, determine what the values were before and after the taking.

. . . .

. . . If you should determine that the fair market value is greater after the taking than before the taking, the answer should be nothing or none, for the plaintiff, Department of Transportation, may not recover anything from the landowners for any increase that the land may have acquired in value by reason of the construction of the paving project.

The above quoted instructions, together with the remainder of the charge, fairly placed plaintiff's contention of benefits to the jury, although not in the precise language plaintiff now urges. If plaintiff desired more detailed or elaborate instructions as to benefits, it had the duty to so request the trial judge. Having failed to do so, the court's charge will not be held for error. *Simmons v. Highway Commission*, 238 N.C. 532, 78 S.E. 2d 308 (1953).

Appellant has failed to show any prejudicial error in the trial, and we find none.

No error.

Judges PARKER and MITCHELL concur.

SHIRLEY FIELDS v. ROBERT CHAPPELL ASSOCIATES, INC.

No. 7818SC956

(Filed 3 July 1979)

Negligence § 57.4— fall on motel steps—sufficiency of evidence of negligence

In an action to recover for injuries sustained by plaintiff when she fell down the steps of defendant's motel, evidence was sufficient to be submitted to the jury where it tended to show that plaintiff's shoe heel unexpectedly became wedged in a crevice near the front edge of one of the steps; plaintiff

was proceeding in a careful and prudent manner and the crevice was almost imperceptible to one proceeding down the steps; the wearing away of the concrete of the step and the resulting gap between the metal strip and the rest of the step did not occur suddenly; and defendant knew of the condition, should have known it was dangerous, and yet allowed it to continue to exist without doing anything to warn its guests of the danger.

APPEAL by defendant from *Albright, Judge*. Judgment entered 14 August 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 June 1979.

This action is to recover damages for injuries sustained by plaintiff when, on 21 October 1976, she fell on steps at defendant's motel in Southern Pines. The jury answered issues of negligence, contributory negligence and damages in favor of plaintiff.

Bateman, Wishart & Norris, by Robert J. Wishart, for plaintiff appellee.

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

VAUGHN, Judge.

Defendant first argues that it was entitled to judgment as a matter of law, contending that the evidence fails to show negligence by defendant and shows plaintiff's contributory negligence as a matter of law. We disagree.

In summary, the evidence tends to show the following. Plaintiff was a registered guest in defendant's motel. She left her room intending to go to the motel office. It was necessary for her to turn to her right and go down a flight of steps. She looked down the steps and saw nothing unusual, except that she saw that the left side was obstructed by the protruding metal handle of a hook that is used to clean swimming pools. She, consequently, did not hold the handrail but moved more to her right towards the wall. There was no handrail on the right side of the step. She fell forward but did not fall all the way down the flight of steps because her foot was caught. She had to pull her shoe loose from the step to get up. There was a deep gash in her leg. She yelled for assistance, and some of the other motel guests gave her first aid before she was taken to a hospital emergency room. After she had been taken to the hospital, another guest went to the stairs

where plaintiff had fallen. The stairs were concrete with a metal strip along the front edge of the step. This guest testified that the steps were bloody. She found a piece of plaintiff's shoe heel, the heel cap, wedged between the metal strip and the concrete part of the step. There was a gap between the metal strip and the concrete. Part of the concrete was missing. The witness described it as "a crumbling or an erosion as opposed to a crack." There were similar gaps on several of the steps but on the step where plaintiff's shoe heel had been lodged, the gap was somewhat larger. There was also an eroded area on the top of that step about four inches long that extended back about two inches. It was easier to observe this defect from below than when one looked down the steps from the top. The guest took plaintiff's shoe heel to the motel office and explained what had happened.

Defendant called only one witness, the motel manager. She testified that she was not present on the day the accident occurred. She further testified that the stairs were thirteen years old at the time plaintiff fell and that no repairs had been made after the accident. The motel, including the stairs, was regularly inspected every three months. She had participated in these inspections and had not observed any defects in the "steps prior to the time Mrs. Fields fell, nothing that would be noticeable enough to think you would fall, you know, you might see a crack here or there." She admitted, nevertheless, that the cracks were wide enough to receive the heel of a shoe "If you tried . . . ."

It is elementary that the evidence must be considered in the light most favorable to plaintiff. The legal principles that arise on the evidence may also be simply stated. The defendant motel operator was not an insurer of the safety of plaintiff, its invited guest. It was, however, required to exercise due care to keep the premises in a reasonably safe condition so as not to expose plaintiff unnecessarily to danger, and to warn her of any hidden perils. It is liable to plaintiff for any injury proximately caused by a breach of that duty. A directed verdict for defendant on the basis of contributory negligence would have been proper only if the evidence, taken in the light most favorable to plaintiff, established her negligence so clearly that no other reasonable conclusion could have been drawn therefrom. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

When the evidence in this case is reviewed in the light of the foregoing principles, it is clear to us that it is sufficient to permit the jury to find that defendant's negligence was a proximate cause of plaintiff's injury. The question of plaintiff's contributory negligence (assuming without deciding that there was some evidence of such) was at the most a question of fact for the jury and not of law for the court. The evidence all but compels the conclusion that plaintiff fell on defendant's stairs because the heel of her shoe unexpectedly became wedged in a crevice near the front edge of one of the stairsteps. Plaintiff was proceeding in a careful and prudent manner, and the crevice was almost imperceptible to one proceeding down the steps. The wearing away of the concrete and resulting gap between the metal strip and the rest of the step did not occur suddenly. Defendant knew of the condition, should have known that it was dangerous, and yet allowed it to continue to exist without doing anything to warn its guests of the danger. Defendant, thereby, unnecessarily and unreasonably exposed plaintiff and its other guests to a danger that resulted in injury to plaintiff.

In support of defendant's second assignment of error, it is argued that the judge erred when he instructed the jury:

> "Members of the jury, the innkeeper as part of this exercise of ordinary care is required to warn invitees of any hidden or concealed dangerous condition which the innkeeper knows about or in the exercise of ordinary care should know about. He is charged with knowledge of any conditions which reasonable inspection and supervision of the premises would reveal. He is charged with knowledge of any dangerous or concealed condition which his own conduct or that of his employees has created."

Our earlier review of the facts makes it clear that the foregoing principles of law were raised by the evidence given in the case. The instruction was proper, and the assignment of error is overruled.

In its final assignment of error, defendant argues that "the court failed to apply the evidence to the law and failed to charge the jury what facts, if found by them, would constitute negligence on the part of the defendant sufficient to warrant an affirmative answer to the first issue." Defendant argues that under the

charge "the jury was free to find the defendant guilty of negligence for any reason which might occur to them." We disagree. Contextual consideration of the charge gives us no reason to believe that the jury was misled or could have failed to understand what it must find in order to answer the issues. There is, therefore, no reason to disturb the verdict. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967).

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. SAMUEL EUGENE KING

No. 7917SC291

(Filed 3 July 1979)

1. **Searches and Seizures § 13— consent to search as condition of suspended sentence—validity of search**

Officers lawfully searched defendant's residence pursuant to the terms of a suspended sentence which required defendant to consent to a search of his residence by any law officer to determine if he had possession of any controlled substance where officers told defendant they were there to search his house pursuant to the conditions of his suspended sentence and defendant told them to go ahead with the search.

2. **Narcotics § 4.1— 70 phenobarbital tablets—insufficient evidence of intent to sell**

Evidence that defendant possessed 70 phenobarbital tablets, absent other factors supplying an intent to sell, was insufficient to withstand a motion for nonsuit on a charge of possession with intent to sell.

APPEAL by defendant from *Long, Judge*. Judgment entered 2 November 1978 in Superior Court, SURRY County. Heard in the Court of Appeals 26 June 1979.

Defendant was convicted of felonious possession of a controlled substance, phenobarbital, with intent to sell the same. Seventy tablets of phenobarbital were found in a bottle in defendant's bedroom during a police search on 5 May 1978. The bottle also contained fifteen tablets of Diuril and a prescription label for Diuril was attached to the bottle.

From a judgment imposing a prison sentence, defendant appeals.

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

Neaves, Everett, Peoples & Freeman, by Charles M. Neaves and Hugh H. Peoples, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first assignment of error is directed to the denial of his motion to suppress the evidence seized in the search of his home. The court conducted a hearing on this motion and found, in part, as follows.

> "The Court finds first that on May 4, 1978, the defendant Samuel Eugene King entered a plea of guilty to illegal possession of a controlled substance and was given a prison term of not less than three years, nor more than five years, in the State Department of Correction, which sentence was suspended upon conditions which included the following:
>
> That the defendant not have in his possession any controlled substance whatsoever unless he has a valid prescription issued by a doctor for his own use. And that he consent to a voluntary search of his personal residence and vehicle in which he may be riding or any home that he may be renting or have control to come and go from by any law enforcement officer or his probation officer to determine if he has in his possession any controlled substance.
>
> Second, the Court finds that on May 5, 1978, the defendant lived at 225 East Poplar Street in Mount Airy.
>
> Third, that on that date, May 5, 1978, the Mount Airy police officers went to 225 East Poplar Street for the purpose of searching the premises to determine whether any controlled substances were possessed therein. That as the officers were talking to the defendant's wife the defendant drove up to the house. That Officer Kinder told the defendant they were there to search his house pursuant to the conditions of his probation judgment. That the defendant told him to go ahead. That the officers searched the defendant's

house and found in the defendant's bedroom five 4-ounce bottles of Robitussin A-C and seventy Phenobarbital tablets.

Fourthly, the Court finds the officers did not have a valid search warrant but that said search was made pursuant to permission granted by the defendant Samuel Eugene King."

These findings were fully supported by uncontradicted evidence.

The thrust of defendant's argument is that there is no showing that defendant had accepted the terms of probation. We conclude that this is not the crucial issue. The judgment in that case had been entered. The police went to defendant's home under the authority of that judgment. They announced their purpose and the authority under which they were proceeding. Defendant told them to go ahead with the search. If he had refused he could have been cited for the violation of the terms of his probation. *State v. Mitchell*, 22 N.C. App. 663, 207 S.E. 2d 263 (1974). The evidence supports the court's findings that the search was with the consent of defendant and was a valid search. This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in denying his motion for nonsuit on the charge of possession of phenobarbital with intent to sell. He argues that the evidence was insufficient to submit the case to the jury. On a motion for nonsuit, the evidence will be taken in the light most favorable to the State with all discrepancies resolved in its favor and giving it the benefit of every reasonable inference to be drawn from the evidence. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973). "To withstand a motion for judgment as of nonsuit there must be substantial evidence of all material elements of the offense charged. Whether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E. 2d 578 (1975). In this case, we find that the evidence was insufficient to support the charge of possession with intent to sell.

In *State v. Mitchell*, 27 N.C. App. 313, 219 S.E. 2d 295 (1975), *cert. den.*, 289 N.C. 301, 222 S.E. 2d 701 (1976), this Court held that the requisite intent can be at least partially inferred from the quantity of controlled substance found in defendant's posses-

sion. In *Mitchell*, defendant was found with not only a large quantity of marijuana but also an assortment of paraphernalia generally associated with drug trafficking. The Court held that this evidence was sufficient to support the charge of possession with intent to sell. *See also State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974).

In *State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265, *cert. den.*, 293 N.C. 592, 241 S.E. 2d 513 (1977), defendant was found with less than one-half pound of marijuana in his possession. No weighing scales, rolling papers or other paraphernalia were found. The Court held that this small quantity of marijuana alone, without additional evidence, was insufficient to raise the inference that defendant intended to sell the substance.

Again in *State v. Cloninger*, 37 N.C. App. 22, 245 S.E. 2d 192 (1978), defendant had in his possession four pounds of marijuana, various paraphernalia for smoking marijuana and less than one gram of hashish. The Court noted that possession of less than one gram of hashish is a misdemeanor unless an intent to sell promotes the crime to a felony. The Court held that the small amount of hashish, absent other evidence from which intent to sell could be inferred, was insufficient to warrant a jury charge on possession of hashish with intent to sell.

In the instant case, no evidence of intent was presented other than the seventy tablets of phenobarbital found in defendant's cabinet. No items usually associated with drug trafficking were found which would supply an inference of an intent to sell. No showing was made that seventy tablets of phenobarbital is an unusually large amount to have in one's possession. There is no statute which establishes that possession of seventy such tablets presumes an intent to sell them. *See, e.g.*, former G.S. 90-95(f) enacted by 1971 N.C. Sess. Laws ch. 919 § 1 (revised by 1973 N.C. Sess. Laws ch. 654 § 1). We do note, however, that G.S. 90-95(d)(2) provides that possession of over 100 tablets of phenobarbital is a felony while possession of less than that amount is a misdemeanor. We find that the defendant's possession of seventy tablets of phenobarbital, absent other factors supplying an intent to sell, is insufficient to withstand a motion for nonsuit on the charge of possession with intent to sell.

The jury has found defendant guilty of the unlawful possession of phenobarbital. That part of the verdict is supported by the evidence. The quantity of the drugs he unlawfully possessed makes him guilty of a misdemeanor. There is no evidence that the possession was for the purpose of sale. The judgment on the felony is vacated, and the case is remanded for the pronouncement of sentence and entry of judgment on the misdemeanor of unlawful possession.

Vacated and remanded.

Judges HEDRICK and ARNOLD concur.

ARNOLD BRYCE GIBSON v. WILLIAM GERALD TUCKER, JOSEPH E. LEWIS, AND ROLLINS LEASING CORPORATION

No. 7815SC931

(Filed 3 July 1979)

Automobiles § 76.2— truck parked on shoulder—failure to turn to avoid striking—contributory negligence

In an action to recover for personal injuries sustained by plaintiff when his truck collided with defendants' truck, evidence established plaintiff's contributory negligence as a matter of law where it tended to show that plaintiff saw defendants' truck while he was still approximately 200 feet away from it; when he first saw it, he realized it was standing still and blocking approximately five feet of the right-hand westbound traffic lane in which he was driving; there was no obstruction in the remaining approximately nineteen feet of the westbound lanes to the left of defendants' vehicle; and plaintiff realized that this was so and yet failed to turn his vehicle to the left even to the slight degree required to allow it to pass freely by defendants' stopped truck.

APPEAL by plaintiff from *Farmer, Judge*. Judgment entered 8 May 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 13 June 1979.

This is a civil action in which plaintiff seeks to recover damages for personal injuries suffered by him when the right front of the tractor-trailer driven by plaintiff collided with the left rear end of a tractor-trailer owned by the corporate defendant and being operated by its employees, the individual defendants.

The collision occurred at 12:25 a.m. on 26 October 1971, in the westbound portion of Interstate Highway I-85, a four lane divided highway having two lanes for westbound and two lanes for eastbound traffic, each traffic lane being twelve feet wide so that the two westbound lanes had a combined width of twenty-four feet. On the right-hand (north) side of the westbound lanes there was a paved shoulder approximately twelve feet wide. The posted speed limit was sixty-five miles per hour.

Plaintiff alleged that the collision occurred when plaintiff, "driving his vehicle at approximately 60 miles per hour, shortly after he came over the crest of the hill and began proceeding down the downgrade, saw defendants' vehicle stopped in his lane when it was approximately 200 feet ahead of him," and he was unable to avoid striking it. He alleged that the collision was caused by the negligence of the individual defendants in leaving their unlighted vehicle parked or standing on the main traveled portion of the highway. Defendants answered, denying plaintiff's allegations as to their negligence and pleading plaintiff's contributory negligence as a defense.

Defendants moved for summary judgment, supporting their motion by affidavits showing that plaintiff drove his vehicle into their fully lighted tractor-trailer while it was standing off of the main traveled lanes of the highway and entirely on the shoulder of the road, where it had been temporarily stopped for the purpose of changing drivers and checking safety equipment. Defendants also supported their motion by the transcript, sworn to by the court reporter, of testimony given by the plaintiff at the trial of a wrongful death action brought by the administratrix of the estate of a fellow driver of the plaintiff who was killed in the same collision. At that trial plaintiff testified that he first saw defendants' tractor-trailer when he was approximately 200 feet from it, that he was driving between fifty and fifty-five miles per hour, that when he first saw defendants' tractor-trailer it was standing still "partially in the road," that plaintiff estimated it to be "four or five feet" into the traveled portion of the highway, that there was nothing blocking the rest of the twenty-four foot highway to the left of defendants' tractor-trailer, that plaintiff saw it was open and unobstructed to the left-hand side, and that he could have passed it "[i]f there had been time enough to have passed it."

In opposition to defendants' motion for summary judgment, plaintiff filed his own affidavit in which he stated that he was driving in a westerly direction in the right-hand lane on the north side of I-85, that approximately 200 feet ahead of him he saw defendants' tractor-trailer "stopped on said highway with four or five feet of said trailer blocking said right-hand westbound lane," and that said tractor-trailer had no lights lighted on the rear of the trailer and no other lights lighted that were visible to traffic behind it in the westbound lane.

The court granted defendants' motion for summary judgment, and plaintiff appealed.

Cooper and Williams by Robert E. Cooper and Sheila R. Benninger for plaintiff appellant.

Spears, Barnes, Baker & Hoof by J. Bruce Hoof for defendant appellees.

PARKER, Judge.

Summary judgment for defendants was properly allowed. Although the affidavits filed in support and in opposition to defendants' motion disclose that a genuine issue of fact exists between the parties as to the exact location of defendants' tractor-trailer and as to whether it was lighted or unlighted when the collision occurred, plaintiff's own affidavit and his sworn testimony given at the prior trial disclose that, even if his version of the disputed facts is accepted as true, he was guilty of contributory negligence as a matter of law. Thus, there is no genuine issue as to any *material* fact and defendants are entitled to a judgment as a matter of law.

While it may be generally conceded that summary judgment will not usually be as feasible in negligence cases, where the standard of the prudent man must be applied, as it would in other types of cases, *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), summary judgment will be proper also in negligence cases where it appears that even if the facts as claimed by the plaintiff are proved, there can be no recovery. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

In the present case, accepting plaintiff's affidavit and his sworn testimony at the prior trial as true, and viewing all of the

evidentiary materials filed in connection with the motion for summary judgment in the light most favorable to the plaintiff as the non-movant, plaintiff's own evidence discloses that he saw defendants' tractor-trailer while he was still approximately 200 feet away from it, that when he first saw it he realized it was standing still and blocking approximately five feet of the right-hand westbound traffic lane in which he was driving, that there was no obstruction in the remaining approximately nineteen feet of the westbound lanes to the left of defendants' vehicle, that plaintiff saw and realized that this was so, and yet he failed to turn his vehicle to the left even to the slight degree required to allow it to pass freely by defendants' stopped tractor-trailer. Instead, he continued to drive straight ahead until the collision occurred. These facts, all of which are shown by plaintiff's own testimony and affidavit, establish his contributory negligence as a matter of law. "What is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does or does not exist." *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E. 2d 457, 461 (1972).

The summary judgment for defendants is

Affirmed.

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

STATE OF NORTH CAROLINA v. CHARLES WINFRED QUICKSLEY

No. 7926SC218

(Filed 3 July 1979)

1. Assault and Battery § 15.6— self-defense—instructions—necessary force

The trial court in a felonious assault case properly told the jury what to consider in determining whether defendant used more force than necessary in repelling an alleged assault by the prosecuting witness where the court instructed the jury to consider (1) the circumstances that existed at the time; (2) the size, age and strength of defendant as compared to the prosecuting witness; (3) the fierceness of the assault on defendant; (4) the use, if any, of a weapon by the prosecuting witness; and (5) the reasonableness of defendant's belief that his actions were necessary to protect himself from death or great bodily harm.

2. Criminal Law § 113.2— instructions on self-defense—absence of request for further instructions

Defendant cannot complain on appeal that the court failed to give more detailed and elaborate instructions concerning excessive force in self-defense where defendant was given an opportunity to request further instructions but failed to do so.

3. Assault and Battery § 15.6— sufficiency of instructions on self-defense

The trial court in a felonious assault case properly applied the law to the evidence with respect to self-defense, and the court's instruction on self-defense in its final mandate was sufficient.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 11 October 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 May 1979.

The defendant was indicted for the felony of assault with a deadly weapon with intent to kill inflicting serious injury. Upon his plea of not guilty, the jury returned a verdict finding the defendant guilty of the lesser included felony of assault with a deadly weapon inflicting serious injury. From judgment sentencing him to imprisonment for a term of not less than six years nor more than eight years, the defendant appealed.

The State's evidence tended to show that on 24 April 1978, Gerald A. Call, Jr. went to the Independence Cue Lounge and engaged in a game of pool with the manager. After they had played one game, the manager walked to the back of the lounge. Call then noted that the defendant, who was playing pool at a nearby table, was making a lot of noise. Call walked over to the defendant and told him to "shut up." As Call began to walk back to the table where he had been playing pool, he turned and saw the defendant standing behind him. The defendant then struck Call several times with a cue stick. Call fell and the defendant kicked him in the head. He did not assault the defendant at any time and did not have anything in his hands when he spoke to the defendant or at any time thereafter. After the attack by the defendant, Call was taken to a hospital where it was discovered that he had a fractured cheek bone, a fractured nose, a five centimeter laceration of the scalp and a two centimeter laceration of the right cheek.

The defendant presented evidence tending to show that Call told people at the defendant's pool table to be quiet. A few

minutes later, Call walked up behind the defendant who was leaning over the table shooting pool. Call then swung a cue stick at the defendant. The defendant turned, blocked the blow with his arm and then struck Call in the head with a cue stick.

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

Charles V. Bell for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the following portion of the court's charge on self-defense:

> In making this determination you should consider the circumstances as you find them to have existed at the time from the evidence, including the size, age, and strength of the defendant as compared to Gerald Call; the fierceness of the assault, if any, upon the defendant; and whether or not Gerald Call had a weapon in his possession. Again, it is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.

The defendant argues that the quoted instruction fails to tell the jury what to consider in determining whether the defendant used more force than necessary in repelling the alleged assault of the prosecuting witness Call upon the defendant. The instruction properly tells the jury what to consider, i.e., (1) the circumstances that existed at the time as shown by the evidence; (2) the size, age and strength of defendant as compared to Call; (3) the fierceness of Call's assault on defendant; (4) the use, if any, of a weapon by Call in the assault on defendant; and (5) the reasonableness of defendant's belief that his actions were necessary to protect himself from death or great bodily harm.

The challenged instruction is in accord with *State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975); *State v. Koutro*, 210 N.C. 144, 185 S.E. 682 (1936). *See* N.C. Pattern Jury Instructions, Criminal 308.45, October 1978.

[2] The defendant further excepts to the failure of the court to instruct the jury in a more detailed and elaborate manner con-

cerning excessive force in self-defense, setting out a proposed instruction in the record. However, the trial court near the end of the charge inquired if the defendant's counsel had any requested instructions, and he answered, "Nothing from the defendant." In *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971), the defendant asserted error in the failure of the trial court to include a review of the defendant's evidence relating to his contention of self-defense. The defendant's counsel made no request for such instruction. The court held if defendant desired fuller instructions he should have so requested. Quicksley's failure to do so precludes him from now assigning this as error.

[3] The trial court applied the law to the evidence three times, there being three possible verdicts submitted to the jury. The first such instruction follows:

> [F]urthermore, although you are satisfied beyond a reasonable doubt that Charles Quicksley committed assault with a deadly weapon with intent to kill inflicting serious injury, or you should find from a later part of my Charge, if you should find him guilty of assault with a deadly weapon inflicting serious injury, or you should find the defendant guilty of assault with a deadly weapon, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that Charles Quicksley did not act in self-defense; that is, that Charles Quicksley did not reasonably believe that the assault was necessary to protect himself from death or serious bodily injury, or that he, Charles Quicksley, used excessive force or was the aggressor.
>
> If you do not so find, or have a reasonable doubt, then Charles Quicksley would be justified by self-defense and it would be your duty to return a verdict of not guilty.

In *State v. Dooley*, 285 N.C. 158, 166, 203 S.E. 2d 815, 820 (1974), the Supreme Court set out this proposed final mandate on self-defense:

> "If, however, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot Thomas and thereby proximately caused his death, if you are further satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did

have reasonable grounds to believe and did believe that he was about to suffer death or serious bodily harm at the hands of Thomas, and under those circumstances he used only such force as reasonably appeared necessary, you the jury being the judge of such reasonableness, and you also are satisfied that the defendant was not the aggressor, then he would be justified by reason of self-defense, and it would be your duty to return a verdict of not guilty."

Although *Dooley* was prior to *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), the substantive law as to the recommended instruction is unimpaired, *Hankerson* only affecting the burden of proof on self-defense.

The trial court properly applied the law to the evidence with respect to self-defense, the final mandate being in accord with the proposed instruction in *Dooley*. We find the trial court's charge as a whole to be free of prejudicial error. The court fully instructed the jury as to the evidence and contentions, and defined the law applicable thereto.

The defendant's assignment of error that the court intimated an opinion on the evidence by failing to include some part of the defendant's evidence in its summary of evidence in the charge, is novel, but without merit. Again, the defendant did not request further instructions although he was offered an opportunity to do so. *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971).

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

No error.

Judges PARKER and MARTIN (Harry C.) concur.

BARBARA LYNN NICKERSON MORRIS v. JESSE JOHN MORRIS

No. 781DC1053

(Filed 3 July 1979)

Divorce and Alimony § 23.3— violation of custody order—jurisdiction over nonresident

Jurisdiction over contempt proceedings related to a child custody order remains in the court which had jurisdiction over the custody proceeding, so that the N. C. court had jurisdiction over plaintiff, an Alabama resident, who allegedly refused to allow defendant his visitation rights with the parties' children pursuant to an earlier custody order of the N. C. court.

APPEAL by plaintiff from *Chaffin, Judge.* Judgment entered 30 August 1978 in District Court, PASQUOTANK County. Heard in the Court of Appeals 26 June 1979.

Plaintiff wife, a resident of Alabama, filed in 1974 in the North Carolina courts a complaint seeking from defendant, a North Carolina resident, alimony without divorce and custody of the couple's three minor children. These were given to the plaintiff by a consent judgment on 15 April 1975. On 30 April 1976, the parties were divorced in a separate action, on the ground of one year's separation.

On 6 June 1978, defendant filed a motion in the cause, alleging that plaintiff had violated the consent judgment by refusing to allow defendant his visitation rights with the children. Judge Chaffin ordered plaintiff to show cause why she should not be attached for contempt or punished as for contempt, and this order was served upon plaintiff in Alabama. Plaintiff by her attorney appeared specially and moved for dismissal of the order to show cause, on the ground that North Carolina has no jurisdiction over her, an Alabama resident. This motion was denied, and plaintiff appeals.

J. Kenyon Wilson, Jr., and M. H. Hood Ellis for plaintiff appellant.

Wilton F. Walker, Jr., for defendant appellee.

ARNOLD, Judge.

After a hearing on the motion to dismiss, the trial court concluded:

> [T]he Court is of the opinion that it does have jurisdiction to conduct a hearing upon said Order to Show Cause, the plaintiff having invoked the jurisdiction of this Court originally and having been a party to the Consent Judgment entered by this Court on the 1st day of April, 1975, wherein custody, support and visitation rights of the children with the defendant were determined by the Court, the Court further being of the opinion that the jurisdiction of this Court is a continuing jurisdiction with reference to the matters of custody, support and visitation of said children with their father, the defendant herein.

We find that the trial court is correct.

There is no question that North Carolina had *in personam* jurisdiction over the Alabama plaintiff at the time of the entry of the consent judgment awarding her custody of and support for the children. Plaintiff agrees that she had voluntarily submitted herself to North Carolina jurisdiction by filing her action for alimony and custody in this state. She argues, however, that this jurisdiction has not continued to the present matter. G. S. 50-13.5 (c)(2)b gives the courts of this state jurisdiction to enter custody orders "[w]hen the court has personal jurisdiction of the person . . . having actual care, control, and custody of the minor child," which is the case here, and G.S. 50-13.5(c)(4) provides that jurisdiction acquired in this way "shall not be divested by a change in circumstances while the action or proceeding is pending." This is merely a codification of the general rule that once jurisdiction attaches "it exists for all time until the cause is fully and completely determined." *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E. 2d 469, 476 (1958). And it is well-established that matters of custody and support are pending "until the death of one of the parties or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur." *Johnson v. Johnson*, 14 N.C. App. 378, 382, 188 S.E. 2d 711, 714 (1972). Since it does not appear that either of these events has occurred, our courts clearly have jurisdiction over this plaintiff with regard to custody matters.

Plaintiff argues, however, that this proceeding to find her in contempt is not an action to affect custody of the children, and should not be covered by these rules. We disagree. G.S. 50-13.3(a)

provides that "[t]he willful disobedience of an order providing for the custody of a minor child shall be punishable as for contempt." And our courts have held that " '[i]f both parties are in court and subject to its jurisdiction, [a custody] order may be entered . . . binding the parties and *enforceable through [the court's] coercive jurisdiction*.' [cite omitted]." *Romano v. Romano*, 266 N.C. 551, 553, 146 S.E. 2d 821, 822 (1966) (emphasis added); *Johnson v. Johnson, supra* at 379, 188 S.E. 2d at 712. Any other conclusion would make no sense, since the hands of the courts would be effectively tied if they had no jurisdiction to enforce the orders they entered.

Our view that jurisdiction over contempt proceedings related to a custody order remains in the court having jurisdiction over custody is supported by cases dealing with jurisdiction over contempt proceedings for violation of a court order while appeal of the order is pending. In *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976), defendant husband appealed from awards of alimony and child support. Plaintiff wife filed with the Supreme Court an affidavit alleging that defendant had failed to comply with the orders, and asking the court to order defendant to show cause why he should not be attached as for contempt. The court held that while the trial court was divested of jurisdiction over contempt proceedings while the appeal was pending, if the order was upheld on appeal the contempt could be inquired into on remand to the trial court. Also *Sturdivant v. Sturdivant*, 31 N.C. App. 341, 229 S.E. 2d 318 (1976). This indicates that jurisdiction over the contempt proceeding was in the trial court which decided the alimony and support questions.

The trial court correctly determined that its continuing jurisdiction over custody matters included contempt proceedings for violation of the custody order. The denial of plaintiff's motion to dismiss is

Affirmed.

Judges HEDRICK and VAUGHN concur.

GASP v. Mecklenburg County

GASP, BRENDA BLACKWELDER, LILLIAN BRUMLEY, BERTIE H. CARPENTER, R. A. CARPENTER, HAZEL B. DUTTON, HELEN S. HUNTER, MARY KNAGGS, MILDRED MCCLURE, WILLIAM T. MCCRACKEN AND LARRY M. STEARNS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. MECKLENBURG COUNTY, NORTH CAROLINA

No. 7826SC922

(Filed 3 July 1979)

1. **Counties § 10— action to prohibit smoking in county facilities—plaintiffs not "handicapped" persons**

A class of plaintiffs described in the complaint as persons with any pulmonary problem and all persons who are harmed or irritated by tobacco smoke does not constitute a class of "handicapped persons" within the meaning of G.S. 168-1 *et seq.*; therefore, plaintiffs are not entitled to relief under G.S. 168-1 *et seq.* to compel defendant county to prohibit smoking in its facilities on the ground that they are handicapped persons who are denied access to public facilities because of the presence of tobacco smoke.

2. **Constitutional Law § 18— smoking in public facilities—no constitutional violation**

Plaintiffs' First and Fourteenth Amendment rights are not infringed because a county permits smoking in its public facilities, and plaintiffs' claim under 42 U.S.C. § 1983 was properly dismissed.

APPEAL by plaintiffs from *Lee, Judge*. Judgment entered 28 June 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 June 1979.

On 1 March 1978 the plaintiffs, the Group Against Smokers Pollution, an unincorporated association, brought this action against Mecklenburg County on behalf of a class of persons who are harmed by tobacco smoke. The complaint alleged, *inter alia*, that their class is handicapped within the meaning of G.S. 168-1, *et seq.*, in that they suffer discomfort and harm such as nasal and ocular irritation, allergic reactions, and acceleration of heart disease when in the presence of tobacco smoke. G.S. 168-1 *et seq.*, provide that handicapped persons are to have full and free use of public facilities, and that since Mecklenburg County permits smoking in its public buildings and facilities, the plaintiffs are thereby denied access to the buildings and prevented from participating in activities held in public facilities. Plaintiffs sought an injunction to compel the defendant to prohibit smoking in its buildings and facilities. Defendant answered and moved to dismiss

pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs thereafter moved to amend the complaint to assert that smoking in public buildings violated their First and Fourteenth Amendment rights and sought relief under 42 U.S.C. § 1983, and to allege a violation of 29 U.S.C. § 794 which prohibits discrimination against the handicapped in programs receiving federal assistance.

On 28 June 1978, the court allowed plaintiffs' motion to amend the complaint and allowed defendant's motion for dismissal pursuant to G.S. 1A-1, Rule 12(b)(6). From this judgment, plaintiffs appeal.

Blum and Sheely by Shelley Blum for plaintiff appellants.

James O. Cobb for defendant appellee.

CLARK, Judge.

[1] Plaintiffs assign as error the dismissal of their complaint pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiffs contend that they are entitled to relief pursuant to G.S. 168-1, *et seq.*, since the members of their class are handicapped persons who are denied access to public buildings and facilities because of the presence of tobacco smoke. Since the trial court reserved ruling on the class certification, we will assume for purposes of this discussion that the class of plaintiffs was properly constituted and certified by the court.

The test on a Rule 12(b)(6) motion is whether the pleading is legally sufficient. *Alltop v. J. C. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885, *cert. denied*, 279 N.C. 348, 182 S.E. 2d 580 (1971). A complaint may be dismissed if it is clearly without merit, and this want of merit may consist in an absence of law to support a claim of the sort made, or absence of facts sufficient to make a good claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690, *cert. denied*, 277 N.C. 251 (1970).

In the case *sub judice*, the complaint alleges that the plaintiffs represent a class of persons who are: "too numerous to make it practicable to bring them all before the Court. On information and belief, at least 20% of all persons are harmed by being in the presence of tobacco smoke. These persons are, among others,

those with allergic rhinitis, those pregnant, those with heart conditions, and those with any pulmonary problem (*e.g.* emphysema)."

G.S. 168-1 provides:

> "The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment. The definition of 'handicapped persons' shall include those individuals with physical, mental and visual disabilities. . . ."

The North Carolina General Statutes do not specifically define "handicapped person"; however, 29 U.S.C. § 706 defines "handicapped person" as "any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities, . . ." This is the definition which plaintiffs set forth in their complaint.

It is manifestly clear that the legislature did not intend to include within the meaning of "handicapped persons" those people with "*any* pulmonary problem" however minor, or *all people* who are harmed or irritated by tobacco smoke. Therefore, the class of plaintiffs as defined in the complaint does not constitute a class of "handicapped persons" within the meaning of G.S. 168-1, *et seq.*, and the complaint was therefore properly dismissed. We do not attempt to determine, in this opinion, whether a class of persons with a particular pulmonary problem or disease such as emphysema, would be considered "handicapped persons" within the meaning of G.S. 168-1, *et seq.*, but only that the broad class of plaintiffs defined in this complaint (*i.e.*, persons who are harmed by tobacco smoke) are not, as a class, handicapped persons within the meaning of G.S. 168-1, *et seq.* For the same reasons set forth above, the claim for relief based upon 29 U.S.C. § 794, was properly dismissed.

[2] Plaintiffs also contend that the court erred in dismissing plaintiffs' claim for relief based upon 42 U.S.C. § 1983 which provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Plaintiffs contend that their First and Fourteenth Amendment rights have been infringed and seek redress under 42 U.S.C. § 1983. In *Gasper v. Louisiana Stadium and Exposition District*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F. 2d 897 (5th Cir. 1978), the court held that no deprivation of any constitutional right, under the First, Fifth, Ninth or Fourteenth Amendments to the Constitution of the United States occurred by reason of permitting cigarette smoking in a public facility. The court noted that "[n]o legally enforceable right to a healthful environment . . . is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution. (Citations omitted)" *Id.* at 720. *See Ely v. Velde*, 451 F. 2d 1130 (4th Cir. 1971); *F.E.N.S.R. v. United States*, 446 F. Supp. 181 (D.D.C. 1978). Therefore, the plaintiffs' third claim for relief was without merit and was properly dismissed.

Affirmed.

Judges ERWIN and CARLTON concur.

STATE OF NORTH CAROLINA v. LEROY BENTON, JR.

No. 7922SC296

(Filed 3 July 1979)

1. Homicide § 21.1 — sufficiency of evidence

There was no merit to defendant's contention in a homicide case that all the evidence showed self-defense and that his motion for nonsuit should have been granted since the State's evidence that defendant shot his victim was sufficient for the jury to conclude it was an unlawful killing and since the jury did not have to believe defendant's evidence as to who fired the first shot.

2. Homicide § 21.2 — injury inflicted by defendant — sufficiency of evidence

Evidence that defendant fired at his victim at point blank range was substantial evidence from which the jury could conclude that defendant shot the victim, and the absence of ballistics evidence did not require that defendant's motion for nonsuit be granted.

3. Homicide § 28— self-defense—burden of proof—proper jury instructions

Defendant was not prejudiced by the trial court's expression, that the third and fourth elements of self-defense "that must be proved . . . ," since the court properly placed upon the State the burden of proving beyond a reasonable doubt all elements of self-defense.

Judge MARTIN (Robert M.) dissenting.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 4 January 1979 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 14 June 1979.

The defendant was tried for first degree murder. The evidence showed that on 27 October 1974 defendant was working at "Dan's Place" on the Shoaf Road in Davidson County. Robert "Buck" Eller entered Dan's Place with some friends and proceeded to a table where he and his friends sat down. The defendant went to the table at which Mr. Eller's group was seated and engaged in conversation with Mildred Littlejohn. After words were passed between Buck Eller and defendant, both men drew pistols and began firing at each other. Buck Eller received two wounds, which were mortal. One other person in Dan's Place was killed and one was wounded during the exchange of gunfire. The witnesses for the State testified they did not see who fired first. The defendant's witnesses testified Buck Eller fired first. The court dismissed the charge as to first degree murder and the jury convicted the defendant of voluntary manslaughter. From the imposition of a prison sentence, the defendant has appealed.

Attorney General Edmisten, by Associate Attorney Richard L. Kucharski, for the State.

Hutchins, Tyndall, Bell, Davis and Pitt, by Fred S. Hutchins, Jr. and Richard D. Ramsey, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error deals with the court's overruling his motion for nonsuit. He contends there was no evidence that he fired a pistol first and all his evidence was to the effect that Buck Eller fired first. He argues from this that all the evidence shows self-defense. We do not agree. The State's evidence shows that defendant shot Buck Eller. This is evidence from which the jury could conclude it was an unlawful killing. *See*

State v. Hammonds, 290 N.C. 1, 224 S.E. 2d 595 (1976). The jury did not have to believe defendant's evidence as to who fired the first shot. *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).

[2] The defendant also argues that since no ballistic evidence was introduced that showed the fatal bullet came from his pistol, it could as reasonably be concluded that the deceased shot himself. We hold the evidence that defendant fired at Buck Eller at point blank range is substantial evidence from which the jury could conclude the defendant shot Buck Eller. This is sufficient evidence to withstand a motion for nonsuit. *See State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971).

[3] The defendant next assigns as error the charge of the court. In its charge, the court correctly defined self-defense and properly charged the jury that the burden of proving beyond a reasonable doubt the lack of self-defense was on the State. In defining the elements of self-defense, the court used the following expressions: "[t]he third element of self-defense that must be proved . . ." and "[t]he fourth element of self-defense that must be proved. . . ." The defendant contends that the use of these terms led the jury to believe that the defendant had to prove these elements of self-defense in order to be acquitted. The court did not say the defendant had to prove these elements. Reading the charge contextually and considering that the court instructed the jury that the State must prove the absence of self-defense, we do not believe the language of which defendant complains could have misled the jury. In the final mandate, the court charged the jury as follows:

> "Finally, if the State has failed to satisfy you beyond a reasonable doubt, first, that Leroy Benton, Jr. did not reasonably believe under the circumstances as they existed at the time of the killing that he was about to suffer death or serious bodily injury at the hands of Robert Henry Eller; and second, that Leroy Benton, Jr. used more force than reasonably appeared to him to be necessary; and third, that Leroy Benton, Jr. was the aggressor, then the killing of Robert Henry Eller by Leroy Benton, Jr. would be justified on the grounds of self-defense, and it would be your duty to return a verdict of not guilty."

The defendant contends this part of the final mandate was confusing to the jury. This language was taken from the North Carolina Pattern Jury Instructions, N.C.P.I.—Crim. 206.30. We hold that it is a proper charge and properly puts the burden on the State to prove beyond a reasonable doubt all elements of self-defense.

In his last assignment of error the defendant contends the court did not properly relate the law to the evidence thus violating G.S. 15A-1232. The court recounted the evidence of the State and defendant. The jury was then instructed what they would have to find from the evidence in order to find the defendant guilty or not guilty of the various charges. We hold this satisfies the requirements of G.S. 15A-1232.

No error.

Judge MITCHELL concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

I am of the opinion that defendant should have a new trial. In instructing the jury, the trial court twice stated that in order for the defendant to be excused by reason of self-defense certain elements "must be proved." This language impermissibly shifted the burden from the State to the defendant on the defense of self-defense. Although the court in other portions of the charge correctly stated that the burden of proof was on the State to prove from the evidence beyond a reasonable doubt that the killing was not done in self-defense, the instructions were contradictory and could only have engendered confusion which would naturally be prejudicial to defendant. *See Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975).

Stanley v. Miller

BETTY M. STANLEY AND JAMES RALPH MCNEILL AS ADMINISTRATORS OF THE ESTATE OF BEATRICE M. MCNEILL, DECEASED v. GLENN MILLER AND VERONA WITHERSPOON, EXECUTORS OF THE ESTATE OF BESSIE M. MILLER, DECEASED, AND THE NORTHWESTERN BANK

No. 7810SC596

(Filed 3 July 1979)

Venue § 3— action against executors

An action against defendant executors to determine rights in the balance on deposit in a joint savings account opened by testatrix and another involved the settlement of the accounts of defendant executors and was brought against defendants in their official capacity, G.S. 41-2.1(b)(4), and the action was therefore properly removed to the county where defendants' letters testamentary were issued.

APPEAL by plaintiffs from *McLelland, Judge.* Order entered 20 April 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 27 March 1979.

In 1968 Bessie M. Miller and Beatrice M. McNeill opened a joint savings account in Northwestern Bank at Jefferson, N.C., payable to either or the survivor pursuant to G.S. 41-2.1. Bessie M. Miller died in Ashe County on 23 November 1975 leaving a will which has been admitted to probate in Ashe County. Defendants Glenn Miller and Verona Witherspoon are Executors under that will and are administering the estate in Ashe County. Beatrice M. McNeill died a resident of Wake County on 16 May 1976 without a will. Plaintiffs are administrators of her estate, which is being administered in Wake County.

Plaintiffs brought this action on 26 January 1978 in the Superior Court of Wake County to obtain a declaratory judgment determining the rights of the parties in the balance on deposit in the joint savings account. In apt time defendants moved to remove the action to Ashe County on the ground that under G.S. 1-78 the proper venue of the action is Ashe County. From order allowing the motion, plaintiffs appeal.

Johnson, Gamble & Shearon by David R. Shearon for plaintiff appellants.

Vannoy & Reeves by Wade E. Vannoy, Jr., for defendant appellees.

PARKER, Judge.

This action was properly removed to Ashe County. G.S. 1-78 provides that all actions against executors and administrators in their official capacity, unless otherwise provided by statute, must be instituted in the county where the letters testamentary or letters of administration are issued. *Wiggins v. Trust Co.*, 232 N.C. 391, 61 S.E. 2d 72 (1950). Thus, the only question presented by this appeal is whether this action was brought against defendant executors in their official capacity. We hold that it was and that therefore G.S. 1-78 controls.

At the outset we recognize that "the fact that an executor or administrator is sued, and the defendant is named as such executor or administrator in the summons, caption and complaint, does not entitle such defendant to an order of removal if the complaint discloses the alleged cause of action is not against such executor or administrator *in his official capacity.*" *Davis v. Singleton*, 256 N.C. 596, 599, 124 S.E. 2d 563, 566 (1962). Here, however, the complaint discloses that the alleged cause of action *is* against the defendant executors in their official capacity.

> The action is against the representative in his official capacity if it: (a) asserts a claim against the estate; (b) involves the settlement of his accounts; or (c) involves the distribution of the estate.

1 McIntosh, N.C. Prac. and Proc., 2nd ed., § 804, p. 423.

The present case does necessarily involve the settlement of the accounts of the defendant executors. Upon the death of their testatrix, Bessie M. Miller, the balance in the joint survivorship savings account became the sole property of Beatrice M. McNeill as the surviving joint tenant, but subject to certain claims in connection with the estate of Bessie M. Miller against a portion of the unwithdrawn deposit as provided in G.S. 41-2.1(b)(3). Any part of the unwithdrawn deposit not used for the payment of such claims "shall, *upon the settlement of the estate*, be paid to the surviving joint tenant or tenants." (Emphasis added.) G.S. 41-2.1(b)(4). It is apparent, therefore, that the ultimate determination of the rights of the respective parties in the joint savings account must necessarily depend upon the proper settlement of

the accounts of the defendant executors. Plaintiffs clearly recognized this in their complaint when they alleged:

> 10. That the plaintiffs are informed and believe and so allege that the executors' commissions and other expenses and commissions paid or claimed owing by the defendant executors are not allowable and erroneous and therefore should not be a part of nor be paid by the estate of Bessie M. Miller, deceased, and that if said commissions and other unallowable expenses are disallowed from the Estate of Bessie M. Miller, the funds claimed owing by said Estate from the savings account in the joint name and with Beatrice M. McNeill will not be needed to pay estate expenditures and will rightfully be the property of the plaintiffs.

Since this action was against the defendant executors in their representative capacity, G.S. 1-78 applies to make Ashe County the proper county in which this action should have been instituted. That statute applies only to actions *against* representatives, not to actions by them, *Whitford v. Insurance Co.*, 156 N.C. 42, 72 S.E. 85 (1911), and thus the fact that plaintiffs in this case are suing in their representative capacity is not controlling.

The order appealed from is

Affirmed.

Judges ERWIN and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ROBERT FLOYD JOHNSON

No. 793SC288

(Filed 3 July 1979)

Municipal Corporations § 36; Indictment and Warrant § 9.12— violation of city ordinance—failure to allege place of violation—no crime charged

Where the citation upon which defendant was tried alleged a violation of the Morehead City Code, operating a taxicab without securing the required permit, but failed to charge that the offense occurred within the city limits, the citation was insufficient to charge a crime.

ON writ of certiorari to review judgment by *Hobgood, Judge.* Judgment entered 29 November 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals 13 June 1979.

This is a criminal proceeding in which defendant was charged with violating Sec. 18-2 of the Morehead City ordinances. He was found guilty in the District Court and received a ten day sentence suspended on condition he pay costs. Upon appeal to Superior Court, defendant moved pursuant to G.S. 15A-954 to dismiss the charge on the grounds that the Morehead City ordinance which he was alleged to have violated is unconstitutional as applied to him. The motion was denied, whereupon defendant entered a plea of guilty. Judgment was entered imposing a $1.00 fine. From this judgment, defendant gave notice of appeal.

Attorney General Edmisten by Associate Attorney Christopher P. Brewer and Nelson W. Taylor, III, for the State.

Ernest C. Richardson III and Sam L. Whitehurst, Jr., for defendant.

PARKER, Judge.

G.S. 15A-1444(e) contains the following:

> Except as provided in G.S. 15A-979 (which relates to rulings on motions to suppress evidence and which is not applicable to the present case), 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.

In order to afford defendant appellate review in this case, we treat his purported appeal as a petition for a writ of certiorari and grant the writ.

The citation on which this criminal prosecution is based was headed "District Court Division, County of Carteret," and was entitled "*State of North Carolina vs. Robert Floyd Johnson.*" It charged that

> on or about Thrus (sic) 10:05 p.m., the 27th day of July 1978, in the named county, the named defendant did unlawfully and

> wilfully operate a (motor) vehicle on a (street or highway) By picking up a passenger in a taxi cab owned by Captal (sic) Cab company without first securing from the board of commissioners a permit to drive or operate such taxicab (Violation Town Ordinance) (Chapter 18 Article I Sec. 18-2)

Sec. 18-2 of the Morehead City Code provides:

> No person shall drive any taxicab carrying passengers for hire from place to place within the corporate limits, or within a distance of five (5) miles thereof, unless such person shall have first applied to and secured from the board of commissioners a permit to drive a taxicab.

The citation upon which defendant was tried alleged a violation of the Morehead City Code "in the named county," which was Carteret County. It failed to allege that the violation occurred within the corporate limits of Morehead City or even that it occurred "within a distance of five (5) miles thereof" to which the ordinance by its language purports to apply. In the absence of a grant of power from the Legislature, "a city or town may not, by its ordinance, prohibit acts outside its territorial limits or impose criminal liability therefor." *State v. Furio*, 267 N.C. 353, 356, 148 S.E. 2d 275, 277 (1966). The only grant of power made by the Legislature which has been called to our attention is that contained in G.S. 160A-304 which provides that "[a] city may by ordinance license and regulate all vehicles operated for hire in the city."

In the present case, assuming the validity of the ordinance, still the *place* where the alleged acts were committed determines their criminality or lack of criminality. The citation failed to charge unequivocally that defendant committed the acts for which he was charged at a place where the performance of such acts would be a criminal offense. Therefore, the citation on its face fails to charge the commission of a crime. *State v. Freedle*, 268 N.C. 712, 151 S.E. 2d 611 (1966); *State v. Furio, supra; State v. Barnes*, 29 N.C. App. 502, 224 S.E. 2d 661 (1976).

The court should have allowed the motion to dismiss on the grounds that the citation failed to charge the commission of a crime. In the absence of a valid charge against the defendant, the

constitutionality of the ordinance is not at issue in this case. *State v. Freedle, supra.*

Because the citation failed to charge a crime, the judgment of the Superior Court must be and is hereby arrested. 4 Strong's N.C. Index 3rd, Criminal Law, § 127.2, p. 665.

Judgment arrested.

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

WILLIAM DARRYL EDMUND AND WIFE, LISA EDMUND v. FIREMEN'S FUND INSURANCE COMPANY

No. 7813SC980

(Filed 3 July 1979)

Insurance § 136— action on fire policy—amount recoverable

In an action to recover for the fire loss of plaintiffs' home under a homeowners policy which included a replacement cost provision, plaintiffs were entitled to recover only the actual cash value of the home at the time of the fire rather than the replacement cost of the home where they did not repair or rebuild the home but bought another home, and they were not entitled to recover anything from defendant insurer in this action where they failed to show that the actual cash value of the propery destroyed was greater than the amount they had been paid by defendant. G.S. 58-158; G.S. 58-159.

APPEAL by defendant from *Graham, Judge.* Judgment entered 12 December 1977 in Superior Court, COLUMBUS County. Rules 59 and 60 motions denied 30 August 1978. Heard in the Court of Appeals 28 June 1979.

This action arises out of a dispute over what additional money, if any, defendant owes plaintiffs under the terms of its Homeowners Policy for the loss of plaintiffs' home by fire. The face amount of the policy was dwelling coverage of $30,000.00, appurtenant structures coverage of $3,000.00, unscheduled personal property of $15,000.00 and $6,000.00 for additional living expenses.

All claims except that relating to the dwelling coverage have been paid. Defendant has paid $22,691.57 under that coverage.

All the evidence tends to show that it would have cost $28,364.46 to rebuild the dwelling. Plaintiffs did not rebuild but bought another house and lot at a cost of $24,000.00. Plaintiffs executed and submitted a proof of loss form to defendant, wherein the actual cash value of the dwelling was stated to be $22,691.57. Defendant paid plaintiffs that amount. An additional $5,672.89 was to be paid if plaintiffs replaced the dwelling as provided by the policy.

The trial judge, sitting without a jury, entered judgment for plaintiffs for $5,672.89, which, when added to the amount previously paid, would equal $28,364.46, the replacement cost. Defendant appealed.

Marvin J. Tedder, for plaintiff appellees.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for defendant appellant.

VAUGHN, Judge.

The fire policy in question, as are all that are issued in this State, was issued subject to the following section of the General Statutes.

> "§ 58-159. Limit of liability on total loss.—Subject to the provisions of G.S. 58-158, when buildings insured against loss by fire and situated within the State are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertained values, with interest at six per centum (6%) per annum from the date of issue."

The pertinent provisions of G.S. 58-158 to which the statute we have just quoted refers are as follows:

> "Provided, any fire insurance company authorized to transact business in this State may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the in-

sured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace on the premises described in the policy, or some other location within the State of North Carolina with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against."

Plaintiffs' policy included the replacement cost provision. It, however, is not relevant because plaintiffs did not elect to avail themselves of its provisions since no money has been "expended to repair, rebuild or replace on the premises described in the policy, or some other location within the State of North Carolina with new materials of like size, kind and quality, such property as has been damaged or destroyed by fire or other perils insured against."

The ultimate task at trial, therefore, should have been to determine the actual cash value of the insured property at the time of the loss or damage. In plaintiffs' sworn proof of loss, which was introduced at trial, they stated the actual cash value to be $22,691.57. At trial, plaintiffs offered no witnesses to testify as to the actual cash value. Although the male plaintiff testified, even he was not asked to state an opinion on that question. The only evidence as to actual cash value came from defendant's adjuster. He testified that, in his opinion, the actual cash value of the dwelling at the time of the fire was $22,691.57. He arrived at this opinion by first computing the cost of rebuilding with all new materials and arrived at the figure of $28,364.46. He then took into account the fact, among others, that the house was about fifty years old and that some remodeling had been done about five years before that fire. It costs more to replace an old house with new materials in the current market than the actual cash value of the old house before the fire. To arrive at the actual cash value, he applied what he considered to be a reasonable depreciation factor of twenty percent and deducted that from the replacement cost. There was no evidence to the contrary.

In summary, the case must be stated as follows. In this suit on defendant's fire policy, plaintiffs had the burden of showing that the actual cash value of the property destroyed was greater than the amount they had been paid by defendant or that they had expended a greater sum to replace the property as called for

by the terms of the policy. They offered no evidence to aid them in that task. The court's findings, therefore, are not supported by the evidence. The judgment is vacated, and the cause is remanded for the entry of judgment that plaintiffs have and recover nothing on this claim.

Vacated and remanded.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES LEONARD PRUITT

No. 7926SC273

(Filed 3 July 1979)

Criminal Law § 21.1; Constitutional Law § 28— first appearance before judge—delay—no prejudice to defendant

Defendant was not prejudiced by the denial of his first appearance rights prescribed by G.S. 15A-601, since statements given to police before his appearance before a judge were freely, intelligently, and voluntarily made without coercion and duress and after defendant on each occasion had been fully advised of his constitutional rights and had intelligently and voluntarily waived his rights to the presence of counsel.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 25 October 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 June 1979.

Defendant was convicted by a jury for armed robbery. He was sentenced to a term of not less than 25 nor more than 30 years. Prior to trial, defendant moved to suppress evidence of identification by two of the State's witnesses and to suppress statements given by the defendant to an officer of the Charlotte Police Department. The trial court conducted a lengthy *voir dire* and concluded that the in-court identification of the defendant by the State's witnesses was based upon their observations of him at the scene of the crime and that there was nothing impermissively suggestive about photographic identification procedures in which the witnesses participated. The court also concluded that two statements given by defendant were freely, intelligently and

voluntarily made without coercion and duress and that the defendant on each occasion had been fully advised of his constitutional rights and had intelligently and voluntarily waived his right to the presence of counsel. Also included in the court's order is the following:

> The court finds from the case file that there is no record that the defendant ever was accorded a first appearance before a magistrate, as required by North Carolina General Statute 15A-601. However, the court has no evidence before it that if such hearing was not held, the defendant was prejudiced in any way, having been fully advised of his rights and having understandingly, intelligently, and voluntarily waived them before making any statements to the police.

The trial court then denied the defendant's motion and the State offered evidence tending to show that the defendant entered the Steak and Egg Kitchen on 26 July 1978, and, along with two others, robbed the cash register while armed with a weapon.

Defendant appeals.

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

Ann C. Villier, for the defendant.

CARLTON, Judge.

Defendant's sole specific assignment of error is that the trial court committed error by denying his motion to dismiss after finding that he was never accorded a first appearance as required by G.S. 15A-601. That statute provides in pertinent part as follows: "Unless the defendant is released pursuant to Article 26 of this Chapter, Bail, first appearance before a district court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first."

The record discloses that defendant was arrested on 27 July 1978 at which time he was taken to the Mecklenburg County Jail. He remained incarcerated there without an appearance before a judge until 24 August 1978. On that date, he appeared in the

superior court for arraignment at which time he filed an affidavit of indigency and counsel was appointed to represent him. Defendant argues that during the 29 day period of incarceration he was questioned by police on two occasions without representation by legal counsel and that, during this time, he gave two written confessions or incriminating statements later introduced at trial over his objections.

We think this case is controlled by *State v. Burgess*, 33 N.C. App. 76, 234 S.E. 2d 40 (1977). There, this Court specifically held that G.S. 15A-601 did not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. The question, therefore, is whether defendant was prejudiced by the denial of his first appearance rights.

We hold that the defendant was not prejudiced by the denial of his first appearance rights. The trial court concluded that the statements of the defendant given to the police were freely, intelligently, and voluntarily made without coercion and duress and after the defendant on each occasion had been fully advised of his constitutional rights and had intelligently and voluntarily waived his rights to the presence of counsel. Judge Snepp was obviously sensitive to defendant's claim and required the conducting of a lengthy *voir dire*. His detailed findings and conclusions are amply supported by evidence produced at the *voir dire*. Indeed, defendant does not attack the competency or sufficiency of the evidence presented on *voir dire* on appeal. We note also the proviso in G.S. 15A-601 that, "[t]his first appearance before a district court judge is not a critical stage of the proceedings against the defendant."

While we hold that G.S. 15A-601 is not a mandatory procedure affecting the validity of a trial in the absence of a showing of prejudice, we do not approve the practice followed here. This statute was designed not only to ensure the protection of defendant's constitutional rights, but also to ensure the orderly progression of a criminal proceeding. The first appearance is a clear and specific directive of our General Statutes and the appropriate officials would be well advised to abide by the prescribed procedures. Indeed, the State runs the risk, in failing to provide the first appearance, of being forced to trial again for an obviously guilty, but prejudiced, defendant.

Counsel for defendant requested that we examine the entire record for error. We have done so and find that the defendant had a fair trial, free from prejudicial error.

In the proceedings below, we find

No error.

Judges CLARK and ERWIN concur.

NORA L. CRAVEN v. JOHN EDGAR CRAVEN

No. 7818DC938

(Filed 3 July 1979)

1. **Divorce and Alimony § 16.6— right to alimony—sufficiency of evidence**

Plaintiff's evidence was sufficient to show that she had a right to permanent alimony where it tended to show that she was married to defendant at the time of trial; she had no separate estate and her only income came from Social Security and Veterans Administration payments totaling $160.50 per month; her living expenses were $415.50 per month; defendant owned stock worth over $60,000, received dividends of $500 per quarter, received Social Security and Veterans Administration payments of $445.60 per month, and lived in the parties' home valued at $55,000; and defendant physically assaulted plaintiff on numerous occasions, drank alcoholic beverages to excess, and forced her to leave their home on numerous occasions by his physical assaults and verbal abuse.

2. **Evidence § 1.1; Trial § 58— findings that allegations of complaint were true—sufficient basis**

Since the trial court judicially knew the facts alleged in plaintiff's complaint, plaintiff's testimony under oath before the trial court that the allegations as set forth in the complaint were true was sufficient to serve as a basis for the court's finding that those allegations were true.

APPEAL by defendant from *Pfaff, Judge*. Judgment entered 10 May 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 14 June 1979.

The plaintiff, Nora L. Craven, instituted this action by filing a complaint against her husband, John Edgar Craven, seeking alimony pendente lite, permanent alimony and counsel fees. The defendant filed no answer in response to the plaintiff's complaint.

At trial, the plaintiff presented evidence tending to support her claim. The defendant chose not to present any evidence by way of defense. At the conclusion of the presentation of the evidence, the trial court made findings of fact and concluded that the plaintiff was entitled to permanent alimony and attorney's fees. The trial court then entered a judgment directing that the defendant pay the plaintiff $300 per month as alimony and that he pay the plaintiff's attorney $500 as attorney's fees. From the entry of that judgment, the defendant appealed.

Additional facts pertinent to this appeal are set forth in this opinion.

Tate and Bretzmann, by C. Richard Tate, Jr., for plaintiff appellee.

Stephen E. Lawing for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the failure of the trial court to grant his motion for dismissal. A motion for dismissal at the close of the plaintiff's evidence in an action tried by the court without a jury properly may be granted pursuant to G.S. 1A-1, Rule 41(b) when the plaintiff has failed to introduce evidence sufficient to show a right to relief. The plaintiff's evidence in the present case tended to show that she was married to the defendant at the time of trial, that she had no separate estate, that her only income came from a monthly Social Security payment of $125.30 and a monthly Veterans Administration payment of $35.20. The plaintiff's evidence further tended to show that her minimum living expenses were $415.50 per month, that her husband owned stock worth more than $60,000 and received dividends of $500 per quarter on that stock, that he received Social Security and Veterans Administration payments in excess of $445.60 per month and that he lived in a home owned by the parties and of a value of approximately $55,000. The plaintiff's evidence also showed that the defendant physically assaulted the plaintiff on numerous occasions, drank alcoholic beverages to excess and forced her to leave their home on numerous occasions by his physical assaults and verbal abuse. Such evidence, if believed, was sufficient to show that the plaintiff had a right to the relief she sought. *See* G.S. 50-16.2; *Galloway v. Galloway*, 40 N.C. App. 366, 253 S.E. 2d

41 (1979); 2 Lee, N.C. Family Law § 135 (3rd ed. Supp. 1976). Therefore, the trial court properly denied the defendant's motion and the assignment of error is overruled.

[2] The defendant next assigns as error the findings of fact of the trial court and contends that those findings were not supported by the evidence. At trial the plaintiff testified that the allegations of fact contained in her complaint were true. She also testified that certain of the monthly payments to her had been increased slightly since the filing of the complaint. The defendant argues that, as the complaint was not introduced into evidence, the plaintiff's testimony in this regard was irrelevant, without probative value and did not support the trial court's findings. We do not agree.

A trial court "judicially knows its own records in the suit being tried." *Gaskins v. Insurance Co.*, 260 N.C. 122, 124, 131 S.E. 2d 872, 874 (1963). *Accord, Harrington v. Wadesboro*, 153 N.C. 437, 69 S.E. 399 (1910); 6 Strong's N.C. Index, Evidence § 1.1. Therefore, the trial court judicially knew the facts alleged in the plaintiff's complaint, which was a part of the trial court's own records in this case. The plaintiff having testified under oath before the trial court that the allegations as set forth in the complaint and known to the court were true, the plaintiff's evidence was sufficient to serve as a basis for the trial court's finding that those allegations were true. Viewing the facts alleged in the complaint and the testimony of the plaintiff in such manner, we find that in this case tried by the court without a jury the trial court's material findings of fact were fully supported by the plaintiff's evidence. The defendant's assignment of error is overruled.

The judgment of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

JAMES A. SMITH v. DORIS C. SMITH

No. 7821DC1017

(Filed 3 July 1979)

Divorce and Alimony § 13— divorce based on year's separation—recrimination no defense

Recrimination did not constitute a bar to plaintiff's action for divorce based on one year's separation. G.S. 50-6.

APPEAL by defendant from *Harrill, Judge*. Judgment entered 6 June 1978 and amended judgment entered 17 August 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 25 June 1979.

Plaintiff filed his complaint on 4 January 1978 seeking an absolute divorce from defendant on the ground of one year's separation. Defendant did not file a pleading.

At the trial, plaintiff testified that he had lived in North Carolina for more than six months prior to filing his complaint; that he was married to defendant on 2 September 1949 in Danville, Virginia; that the parties separated on 23 March 1973; since July 1974, he had lived continuously separate and apart from his wife; and that six children were born to the marriage, and four of said children are minors.

At trial, defendant attempted to introduce evidence of plaintiff's adultery. The trial court refused to allow the evidence to be introduced as substantive evidence. The evidence tended to show that plaintiff moved out of the home on Easter Monday 1973 and did not tell his children or his wife where he was moving. Sometime later, plaintiff and Frances Rucker came out of an apartment building and got into his car. Plaintiff now lives on Sedgefield Drive in the home of Frances Rucker, who has lived at that house for quite some time. Defendant admitted that she has lived continuously separate and apart from plaintiff and has not resumed the marital relationship since July 1974.

Plaintiff was granted an absolute divorce from defendant, and she appealed.

Westmoreland & Sawyer, by Rebecca L. Connelly and Barbara C. Westmoreland, for plaintiff appellee.

Kennedy, Kennedy, Kennedy & Kennedy, by Annie Brown Kennedy, for defendant appellant.

ERWIN, Judge.

Defendant contends that the trial court committed error in granting plaintiff an absolute divorce when the plaintiff's evidence and the defendant's evidence showed that the plaintiff was living in an adulterous relationship at the time of trial and had continuously lived in adultery since the separation of the parties. We find no error and affirm the judgment entered by the trial court.

Defendant contends that the central issue presented on this appeal is whether it was proper for the trial court to exclude all evidence tending to establish an adulterous relationship on the part of the plaintiff, because the defendant failed to file answer. We do not agree. To us, the central issue is whether recrimination is a defense at all to the plaintiff's action for absolute divorce.

G.S. 50-6 provided at the time of trial:

> "*Divorce after separation of one year on application of either party.*—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. *A plea of res judicata or of recrimination with respect to any provision of G.S. 50-5 shall not be a bar to either party obtaining a divorce on this ground*: Provided that no final judgment of divorce shall be rendered under this section until the court determines that there are no claims for support or alimony between the parties or that all such claims have been fully and finally adjudicated." (Emphasis added.)

The change in the above statute became effective on 1 August 1977, a few months before the complaint was filed in this action. The statute is clear that "[a] plea of res judicata or of recrimination with respect to any provision of G.S. 50-5 shall not be a bar to either party obtaining a divorce on this ground. . . ." This sentence was rewritten by the General Assembly in 1978 to read: "A plea of res judicata or of recrimination, with respect to any provision of G.S. 50-5 or of 50-7, shall not be a bar to either party's obtaining a divorce under this section." To us, it is clear that the General Assembly has totally eliminated the defendant's bar to plaintiff's divorce action. The statute was changed to avoid the decision of our Supreme Court in *Harrington v. Harrington*, 286 N.C. 260, 262, 210 S.E. 2d 190, 191 (1974), wherein the Court held that "the affirmative defenses of abandonment and adultery can defeat an action for divorce based on separation."

We hold that recrimination does not constitute a bar to plaintiff's action for divorce. The results would be the same had the answer been filed and the evidence offered admitted on the merits.

Judgment affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

YOUNG ROOFING COMPANY, INC. v. NORTH CAROLINA DEPARTMENT OF REVENUE

No. 7810SC429

(Filed 3 July 1979)

Taxation § 31.1— sheet metal articles—sales tax on fabrication labor

Sales tax is due upon the sales price, including fabrication labor, of sheet metal articles made to order for the taxpayer's customers when there is no contract requiring installation by the taxpayer and such articles are not for resale by the customer.

APPEAL by petitioner from *Clark, Judge*. Judgment entered 10 February 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 8 February 1979.

The petitioner operates a roofing and sheet metal business which fabricates customer-order items from sheet metal. Auditors of the Department of Revenue proposed an assessment for additional sales tax plus penalty and interest against the petitioner. The petitioner denied liability. A hearing was held by the Commissioner of Revenue from which an appeal to the Tax Review Board was taken. The Tax Review Board remanded the case to the Commissioner for a further hearing. The Commissioner held a hearing which was continued twice for taking further evidence. The Commissioner made findings of fact that the petitioner had fabricated certain articles of personal property for a customer's order for which there was no contract to attach or install to realty, but which were merely delivered to the customer for use by him, and on articles which were fabricated to a customer's order and attached or installed upon the customer's personal property. The plaintiff paid the sales tax on the cost of materials, but excluded the cost of labor. The Commissioner assessed a tax for the cost of labor and the Tax Review Board affirmed. The superior court affirmed the judgment of the Tax Review Board.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for respondent appellee.

Eugene C. Brooks III, for petitioner appellant.

WEBB, Judge.

Both parties in their briefs state the question involved in this appeal is as follows:

> "Is sales tax due upon the sales price, including fabrication labor, of sheet metal articles made to order for taxpayer's customers, when there is no contract requiring installation by the taxpayer, and where such articles are not for resale by the customer?"

G.S. 105-164.4 provides:

> There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail . . . the same to be collected and the amount to be determined by the application of the following rates against gross sales . . .

> (1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State . . . .

G.S. 105-164.3 provides:

> (6) "Gross sales" means the sum total of all retail sales of tangible personal property as defined herein, whether for cash or credit without allowance for cash discount and without any deduction on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or any other expenses whatsoever . . . .
>
> * * *
>
> (13) "Retail" shall mean the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.
>
> * * *
>
> (16) "Sales price" means the total amount for which tangible personal property is sold including charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money . . . without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expenses whatsoever.

The statute imposes a tax on retail sales. It defines "retail" as sales to persons for any purpose on the part of the purchaser other than resale. It expressly provides the cost of labor shall not be deducted in the calculation of the sales price. We hold that the statute requires the question posed in both briefs to be answered in the affirmative.

Affirmed.

Judges PARKER and ARNOLD concur.

TANGLEWOOD LAND COMPANY, INC. v. C. L. BYRD AND WIFE, KATHLEEN N. BYRD

No. 7810SC958

(Filed 3 July 1979)

Vendor and Purchaser § 1— right to mortgage and prior sale retained by seller— contract not unconscionable

Provisions in a contract for the sale of land that seller could mortgage the property or make a prior sale did not render the contract unconscionable.

Judge ARNOLD dissents.

APPEAL by plaintiff from *Smith (David I.), Judge*. Judgment entered 2 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals on 26 June 1979.

Plaintiff, a Virginia corporation, instituted suit to recover $7,418.25, the balance due on an installment land contract involving the sale of a lot to the defendants. Pursuant to the contract, defendants were to pay $500.00 down and make monthly payments of $135.25 for five years. The total deferred price of the lot was $8,615.00. Defendants executed the note on 5 May 1974 and made payments totalling $1,311.50 until 6 November 1974, the date of the last payment. Defendants filed an Answer, including a Rule 12(b)(6) motion to dismiss on 21 April 1978. On 3 August 1978 the trial court allowed the motion to dismiss in an Order stating:

> [T]he complaint should be dismissed for reason that it appears upon the face of the contract upon which this suit is based, a copy of which contract is incorporated in the complaint, is unconscionable, and there is a failure of consideration to support the plaintiff's claims.

Plaintiff appealed.

Mast, Tew, Nall & Moore, by Allen R. Tew, for plaintiff appellant.

Gulley, Barrow & Boxley, by Jack P. Gulley, for defendant appellees.

HEDRICK, Judge.

Defendants contend that the contract is unconscionable and any obligations of the plaintiff illusory because of the following two provisions contained in the agreement:

> 6. Buyer agrees that in the event of prior sale of said lot(s), this agreement and note shall be cancelled and voided without further liability to either party, except for refund of all payments made hereunder to Buyer, and to accept the decision of Seller without recourse, that said prior sale of lot(s) has been made.
>
> . . .
>
> 12. Seller reserves the right to convey its interest in the above described premises and its conveyances thereof shall not be a cause for recission. Buyer expressly consents that Seller and its grantees and/or assigns may mortgage said premises and the rights of Seller and Buyer shall be subordinate to the lien of all such mortgages, whether the same shall be given hereinbefore or hereinafter.

Defendants argue that there is a failure of consideration since the vendor, under the terms of paragraph 6, has no obligations other than to refund any payments made to it by defendants. Furthermore, they argue, under the terms of paragraph 12, plaintiff can place a mortgage on the property in any amount, and thus any rights of defendants would be subject to said mortgage.

These arguments have previously been considered and rejected by this Court. We find the present case indistinguishable from *Tanglewood Land Company, Inc. v. Wood*, 40 N.C. App. 133, 252 S.E. 2d 546 (1979), where this Court, affirming a judgment for Tanglewood, declared that a contract identical to the one in the present case was not unconscionable or illusory and was supported by consideration. We also note that the trial court in that case ordered the vendor to deliver a deed conveying the property to buyers upon payment of the balance due on the notes and contracts.

We note that in holding that the promises of the vendor were not illusory and were supported by consideration, this Court stated, "The rule is well established in [Virginia] that when a ven-

dor breaches a contract to convey, the vendee is entitled to sue for specific performance or breach of contract." *Tanglewood Land Company, Inc. v. Wood*, 40 N.C. App. at 139, 252 S.E. 2d at 551. The rule is stated in *Davis v. Buery*, 134 Va. 322, 339, 114 S.E. 773, 777 (1922), as follows:

> [F]or a vendee to be entitled . . . to recover any damages, beyond the return of the purchase money actually paid, with interest, for the breach of a contract by the vendor to convey the title contracted to be conveyed at the time fixed for the completion of the contract, the vendee must prove that the vendor either acted in bad faith in originally undertaking to convey such title at such time, or that since the undertaking and on or before the time fixed for completion of the contract, he has voluntarily disabled himself from making the conveyance, or that he was able at such time to make the conveyance contracted for and willfully neglected or refused to do so.

See also Williams v. Snider, 190 Va. 226, 56 S.E. 2d 63 (1949); *Spruill v. Shirley*, 182 Va. 342, 28 S.E. 2d 705 (1944). Thus, insofar as paragraph 6 attempts to limit the liability of the vendor for breach of the contract under any circumstances to return of the payments made, it is contrary to the settled law of Virginia and inoperative.

For the reasons stated, the Order dismissing plaintiff's complaint is reversed, and the cause is remanded to the Superior Court for further proceedings.

Reversed and remanded.

Judge VAUGHN concurs.

Judge ARNOLD dissents.

STATE OF NORTH CAROLINA v. JEFF DEMENT

No. 799SC297

(Filed 3 July 1979)

1. **Constitutional Law § 44— counsel appointed two hours before hearing—time to prepare**

Defendant was not prejudiced where the trial court required his counsel to represent him in a probation revocation hearing only two hours after the appointment of counsel by the court.

2. **Criminal Law §§ 143.9, 143.10— violation of probation conditions—employment—court costs**

Evidence was sufficient to support the trial court's findings and conclusions that defendant violated the conditions of his probation by failing to pay court costs and by failing to remain gainfully employed.

APPEAL by defendant from *Smith (David I.), Judge*. Judgment entered 5 December 1978 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 14 June 1979.

The defendant entered a plea of guilty to misdemeanor larceny on 4 May 1978 and was sentenced to imprisonment for a term of two years. This sentence was suspended upon the conditions, among others, that the defendant remain gainfully employed or in full-time school status and pay court costs including $5 per day for time served in the Franklin County Jail. A violation report was filed against the defendant on 29 November 1978 and received by him on 30 November 1978. It was alleged in that report that the defendant had not made any payments toward the court costs and had been fired from his job for repeatedly failing to appear for work. The case was called for hearing, and an attorney was appointed to represent the defendant and instructed to be ready for a hearing in two hours. At the hearing, the State presented the defendant's probation officer who testified that the defendant had not remained employed and had not made any payments toward court costs. The defendant presented no evidence. The trial court found that the defendant had violated the conditions of his probation by not making the required payments and by failing to remain employed. The trial court then revoked suspension of the sentence previously imposed and sentenced the defendant to imprisonment for a term of two years. The defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Conrad B. Sturges, Jr., for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the action of the trial court in requiring his counsel to represent him in the probation revocation hearing only two hours after the appointment of counsel by the court. Neither the defendant nor his attorney requested that the court grant additional time to prepare a defense. Nothing in the record suggests that the defendant's attorney did not have ample time to prepare any defense the defendant may have had. Therefore, this assignment of error is overruled. *See State v. Woody*, 271 N.C. 544, 157 S.E. 2d 108 (1967).

[2] The defendant next assigns as error the findings of fact and conclusions of law by the trial court and contends that they were not supported by the evidence. Sufficient evidence was presented in the verified and uncontradicted violation report served upon the defendant to support the trial court's findings and conclusions. *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). Additionally, the uncontradicted testimony of the defendant's probation officer was sufficient to support the findings and conclusions. This assignment of error is overruled.

The judgment of the trial court is free from reversible error and is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

HOUSING AUTHORITY OF THE CITY OF RALEIGH v. RITA TRUESDALE

No. 7810DC564

(Filed 3 July 1979)

Ejectment § 3— failure to make rent payments on time

The trial court properly allowed plaintiff's motion for summary judgment in an action for summary ejectment for failure to make rental payments on time.

APPEAL by defendant from *Winborne, Judge*. Judgment entered 21 February 1978 in District Court, WAKE County. Heard in the Court of Appeals 8 March 1979.

This appeal was dismissed 20 March 1979 with opinion reported in 40 N.C. App. 425, 253 S.E. 2d 47 (1979). The Supreme Court 12 June 1979 ordered the appeal reinstated. Pursuant to that order, the appeal is reinstated.

This is a civil action wherein plaintiff seeks summary ejectment against defendant for failure to make rental payments on time. Defendant answered and, after discovery, moved for summary judgment. Plaintiff made cross motion for summary judgment. The trial court entered judgment for plaintiff.

Allen, Steed and Allen, by Noah H. Huffstetler III, for plaintiff appellee.

Wake County Legal Aid Society, by G. Nicholas Garin and Gregory C. Malhoit, for defendant appellant.

MARTIN (Harry C.), Judge.

We have again carefully reviewed the record on appeal. No genuine issue as to any material fact is presented on plaintiff's motion for summary judgment. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

We hold the trial court properly allowed plaintiff's motion for summary judgment.

Affirmed.

Judges VAUGHN and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JULY 1979

ALLEN v. ALLEN No. 7814DC919	Durham (78CVD659) (78DC316-PS-TS)	Vacated and Remanded
BANK v. WILSON No. 7817DC959	Surry (77CVD632)	Reversed
ETHERIDGE v. WOOLER No. 781SC528	Pasquotank (78CVS17)	Affirmed
FALLS SALES CO. v. BOARD OF TRANSPORTATION No. 7829SC822	Henderson (73CVS368)	No Error
IN RE THOMPSON No. 7810SC817	Wake (77CVS3823)	Modified and Affirmed
ROBERTS v. BANK No. 7827SC574	Gaston (77CVS10)	Affirmed
STATE v. ALEXANDER No. 7926SC327	Mecklenburg (78CRS127058)	Dismissed
STATE v. BLACKMON No. 7926SC337	Mecklenburg (78CRS120852)	No Error
STATE v. BROADWAY No. 783SC1071	Craven (77CRS12637)	No Error
STATE v. CORRIHER No. 7919SC292	Rowan (78CRS6377)	No Error
STATE v. DICKERSON No. 799SC289	Granville (78CRS1867)	No Error
STATE v. DRAKEFORD No. 7920SC309	Richmond (78CRS6543) (78CRS6547)	No Error
STATE v. GAYDOSICK No. 7912SC261	Cumberland (77CR50585)	Writ of Certiorari Dismissed
STATE v. McINTIRE No. 7926SC316	Mecklenburg (78CRS7837)	Dismissed
STATE v. MAIDEN No. 7919SC206	Randolph (78CRS5393)	No Error
STATE v. MAYNARD No. 7912SC310	Cumberland (75CRS15942)	No Error

STATE v. PRINCE No. 7921SC238	Forsyth (79SP26)	Reversed
STATE v. RENFROW No. 797SC303	Wilson (78CRS6411)	No Error
STATE v. RHODES No. 7914SC341	Durham (77CRS26884)	No Error
STATE v. SNEED and STATE v. WEBB No. 795SC277	New Hanover (78CR3886, 3887, 3889, 3890) (78CR9328, 9329, 9330, 9331)	No Error
STATE v. WELCH No. 794SC232	Onslow (78CRS11124)	Dismissed
TILLITT v. PEARSON No. 781DC400	Pasquotank (77CVD7)	Reversed
WHITE v. CATHEY No. 7826SC374	Mecklenburg (73CVS11433)	Affirmed
WIGGINS v. GREEN No. 7830SC937	Swain (75SP34)	Affirmed

SHOFFNER INDUSTRIES, INC. PLAINTIFF v. W. B. LLOYD CONSTRUCTION COMPANY DEFENDANT v. NOEL N. COLTRANE, JR. ADDITIONAL DEFENDANT

No. 7815SC875

(Filed 17 July 1979)

1. **Rules of Civil Procedure §§ 12, 56— denial of summary judgment—allowance of motion to dismiss complaint—no prejudicial error**

The trial court's inconsistent ruling denying additional defendant's motion for summary judgment but allowing his Rule 12(b)(6) motion to dismiss for failure to state a claim for relief did not constitute prejudicial error.

2. **Rules of Civil Procedure § 56— allowance of motion to dismiss complaint—mootness of summary judgment motion**

When a court decides to dismiss an action pursuant to Rule 12(b)(6) for failure to state a claim for relief, any pending motion for summary judgment against the plaintiff may be treated as moot and therefore not to be decided.

3. **Architects § 3; Contracts § 15; Negligence § 2— negligence of architect—liability to general contractor—absence of privity of contract**

A third party general contractor who may foreseeably be injured or suffer an economic loss proximately caused by the negligent performance of a contractual duty by an architect has a cause of action against the architect for negligent approval of defective materials and workmanship even though there is no privity of contract.

4. **Architects § 3; Contracts § 15— general contractor's action against architect—summary judgment properly denied**

The trial court properly denied additional defendant architect's motion for summary judgment upon a general contractor's counterclaim to recover damages allegedly resulting from the architect's negligent approval of defective materials used in the construction of a building.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 28 July 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 31 May 1979.

Plaintiff, Shoffner Industries, filed complaint alleging that defendant was indebted to it in the sum of $6,524.56 for goods and merchandise delivered by plaintiff to defendant. Defendant Lloyd filed answer denying the allegations of the complaint and counterclaiming against plaintiff and additional defendant, Coltrane. Defendant's counterclaim alleged: That Lloyd entered into contract with the Elizabeth City-Pasquotank County Board of Education to construct a facility which was to be designed by Coltrane, an architect; that construction was done under the supervi-

sion and approval of Coltrane; that construction began and certain trusses were ordered from plaintiff and delivered on site for use in the structure; that prior to erection of the trusses Coltrane, or persons acting under him, inspected and approved the trusses when he knew or should have known that they were defective as to material and workmanship; that defendant relied upon Coltrane as an expert architect and installed the trusses in a workmanlike manner; that the trusses were designed by an engineer not registered in the State of North Carolina in violation of the North Carolina Building Code; that plaintiff improperly designed and constructed the trusses from defective material; that plaintiff's negligence caused one or more of the trusses installed in the roof to collapse resulting in a "domino" effect; that Coltrane was negligent in that he gave specific approval to the trusses which later proved to be defective; that the negligence of plaintiff and Coltrane concurred with resulting damage to the defendant; that this negligence caused defendant to incur additional labor cost and materials amounting to $97,411.19.

Plaintiff filed answer to the counterclaim admitting that the trusses were inspected and approved for use in the structure but denying all other allegations of the counterclaim.

Additional defendant Coltrane filed answer alleging: That defendant's counterclaim failed to state a claim upon which relief can be granted; that he was the architect who designed the building for the Board of Education; that, on information and belief, the trusses were designed by an engineer not registered in the State of North Carolina; that Coltrane owed no legal duty to defendant Lloyd and no contractual relationship existed between them; that he performed his obligations properly and with due care and was not negligent in the performance of any legal duties. Coltrane also pled contributory negligence on the part of Lloyd. He alleged that Lloyd was cautioned by him that the proper installation of the trusses was critical to the integrity of the roof structure and that, notwithstanding this, Lloyd installed the trusses in an improper manner; that Lloyd failed to provide adequate temporary braces and dismissed his employees for a weekend before the roof had been adequately braced; that any additional expenses incurred by Lloyd as the primary contractor proximately resulted from his own negligence.

It appears from the record that defendant Lloyd instructed his superintendent to cease work on the morning of Friday, 6 May 1977 before completion of the bracing of the roof trusses and that, on the following day, the roof structure collapsed.

In addition to the allegation by additional defendant Coltrane that the counterclaim failed to state a claim upon which relief can be granted, Coltrane moved for summary judgment. Affidavits were then submitted both by Coltrane, the architect, and Lloyd, the contractor. In light of our holding to be hereinafter explained, a summary of the information disclosed by the affidavits is unnecessary.

On 28 July 1978, Judge McLelland heard the additional defendant's motion for summary judgment and, apparently, also heard the additional defendant's motion to dismiss for failure to state a claim upon which relief may be granted which was asserted in additional defendant's answer. Judge McLelland expressly denied additional defendant's motion for summary judgment but allowed his motion to dismiss for failure to state a claim upon which relief may be granted pursuant to G.S. 1A-1, Rule 12(b)(6).

Defendant Lloyd, the contractor, appealed from the granting of additional defendant's motion to dismiss for failure to state a claim upon which relief may be granted. Additional defendant, Coltrane, the architect, gave notice of conditional cross appeal as to the court's failure to grant the motion for summary judgment.

The original plaintiff, Shoffner Industries, is not involved in this appeal. The owner of the property, Elizabeth City-Pasquotank County Board of Education, is not a party to this action.

Smith, Anderson, Blount & Mitchell, by James G. Billings and Nigle B. Barrow, Jr., for defendant appellant.

Allen, Allen, Walker & Washburn, by Kent Washburn, for additional defendant appellee.

CARLTON, Judge.

[1] In light of the unusual disposition of this action by the trial court, it is first necessary that we determine the proper posture

of the case on appeal. The trial court denied the additional defendant's motion for summary judgment but allowed his motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. We agree with the additional defendant, Coltrane, that the trial court's action was inconsistent. However, we do not find that inconsistency to constitute prejudicial error. As discussed *infra*, however, the inconsistent ruling by the trial court does affect our review of the case on appeal.

In reviewing additional defendant's contention that it is prejudicial error to first deny a motion for summary judgment and then grant a 12(b)(6) motion for failure to state a claim upon which relief may be granted, we note several distinctions between the two motions. Granted, several of them are subtle. A 12(b)(6) motion for failure to state a claim upon which relief can be granted addresses the claim itself and the moving party is simply asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief. Unless the motion is converted into one for summary judgment, as permitted by the last sentence in Rule 12(b), it does not challenge the actual existence of meritorious claim. The motion only entails an examination of the sufficiency of the pleadings. By contrast, the summary judgment motion embraces more than the pleadings and the trial court may properly consider affidavits, depositions, and other information designated in the Rule. The Rule 56 motion is an assertion that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment on the merits as a matter of law on the basis of the record then existing. Obviously, the summary judgment motion may be made on the basis of the pleadings alone and, in that event, it is the same as the motion under Rule 12(b)(6). *Dyal v. Union Bag-Camp Paper Corp.*, 263 F. 2d 387 (5th Cir. 1959).

[2] The confusion between Rule 56 and Rule 12(b)(6) motions has revolved primarily around the question whether matter outside the pleadings can be presented on a Rule 12(b)(6) motion to dismiss. The confusion resulted in a 1948 amendment to Rule 12 of the Federal Rules of Civil Procedure, upon which our rule was based, providing that when outside matter is presented to and not excluded by the court on a motion under either Rule 12(b)(6) or Rule 12(c), it should be treated as one for summary judgment

under Rule 56. The result is that the party moving for dismissal for failure to state a claim may show that, even if the complaint is sufficient on its face, undisputed facts not appearing in the complaint entitle him to a summary judgment. Moreover, the Rule 12(b)(6) motion is addressed solely to the sufficiency of the complaint and does not prevent summary judgment from subsequently being granted based on material outside the complaint. *Beedy v. Washington Water Power Co.*, 238 F. 2d 123 (9th Cir. 1956). When a court decides to dismiss an action pursuant to Rule 12(b)(6), any pending motion for summary judgment against the claimant may be treated as moot and therefore not be decided. *Harber v. Kentucky Ridge Coal Co.*, 85 F. Supp. 233 (E. D. Ky. 1949), *aff'd on other grounds*, 188 F. 2d 62 (6th Cir. 1951); *see* Wright and Miller, Federal Practice and Procedure, Civil, § 2713, pp. 391-400.

Here, the trial court did not treat the summary judgment motion as moot. Indeed, it expressly denied the motion. Moreover, it is not clear from the record before us whether the trial court considered the affidavits in deciding the Rule 12(b)(6) motion. In light of the last sentence in Rule 12(b), we must assume that the court did exclude all matter outside the pleadings. That sentence provides that when outside matter is presented to and not excluded by the court on a motion under Rule 12(b)(6), it should be treated as one for summary judgment under Rule 56. Since the trial judge here denied the motion for summary judgment, and then allowed the motion under Rule 12(b)(6), and since outside matter is not ordinarily considered under a Rule 12(b)(6) motion, we must assume that the trial judge concluded that, as a matter of law, the defendant's counterclaim on its face failed to state a claim for which relief could be granted. For that reason, we do not review, for purposes of defendant's appeal, the affidavits or other documents, submitted in support of or opposition to the motion for summary judgment.

The result of the foregoing is this: The primary question raised on this appeal is whether the trial court properly allowed the motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legal-

ly sufficient. 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 12, p. 294. A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiff's claim so as to enable him to answer and prepare for the trial. *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12 (1970).

We now turn to the question of whether the counterclaim by the contractor, Lloyd, states a claim upon which relief may be granted against the architect, Coltrane. We hold that the motion to dismiss pursuant to Rule 12(b)(6) was improvidently entered.

[3] The primary substantive issue presented is whether a third party general contractor, who may foreseeably be injured or suffer an economic loss proximately caused by the negligent performance of a contractual duty by an architect, has a cause of action against the architect, notwithstanding absence of privity, for negligent approval of defective materials and workmanship.

In 65 A.L.R. 3d 249, 252, it is said:

> Although, under the traditional general rule, privity of contract was required before a cause of action could arise from the negligent breach of a duty existing by virtue of contract, this requirement has been gradually eliminated in many jurisdictions, at first with respect to actions for personal injuries or death, and later in regard to suits predicated upon harm to intangible economic interests. Thus, just as the privity doctrine has been widely repudiated in architect cases involving personal injury or death stemming from negligently prepared plans and designs and from negligent supervision, the courts of several jurisdictions have indicated that the doctrine cannot be applied to shield an ar-

> chitect from liability to a contractor who has suffered economic damage as a result of the negligence of the architect. It has been so held with respect to causes of action arising both from negligent supervision and from the negligent preparation of plans and specifications.

We think that the evolution of related cases brings North Carolina in accord with the rules stated above. It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of its negligent performance. *Jones v. Otis Elevator Company*, 234 N.C. 512, 67 S.E. 2d 492 (1951).

> The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty. (Citation omitted.) The contract merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort. *Toone v. Adams*, 262 N.C. 403, 407, 137 S.E. 2d 132, 135 (1964).

The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care so as to protect others from harm. A violation of that duty is negligence. It is immaterial whether the person acts in his own behalf or under contract with another. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951). An act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another. *Toone v. Adams, supra.*

The additional defendant contends primarily that the liability for negligence of an architect, as a professional, extends only to those with whom he is in privity of contract. He implicitly concedes that he would be liable to his client, the school board, for negligently prepared plans and specifications. Since he was under no contractual duty with the contractor, he argues, he should not be liable to him. We think, however, that the expansion of liability to third parties now establishes the proposition that a contrac-

tor hired by the client to construct a building, although not in privity with the architect, may recover from the architect any extra costs resulting from the architect's negligence. To hold otherwise would require that we ignore the modern concepts of tort liability first established by *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). We cannot ignore the half century of development in negligence law originating in *MacPherson* and are impelled to conclude that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner. As was recognized in *United States v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S. D. Cal. 1958):

> Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.

Rogers is a case analogous to the case at bar. There, in an action brought in the name of the United States by suppliers of labor and materials for a school construction project, the defendant contractor counterclaimed against the project architect, who had allegedly negligently interpreted certain concrete tests and had thereby approved the installation of inadequate concrete structural forms. The result was that the contractor suffered damages in compensating for the defective forms and in the consequent delay in completing the work. The court held that the negligent breach by an architect of his contract with the owner gave rise to an actionable claim, sounding in tort, in favor of a stranger to the contract, including a contractor who allegedly had been damaged by the breach. The court held that various factors must be balanced, including the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that he suffered injury, the closeness of the connection between the defendant's conduct and the injury, the moral blame attached to such conduct, and the policy of preventing future harm.

In *A. R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), the Supreme Court of Florida held that a general contractor may maintain a direct tort action against an architect for damages proximately caused by negligence in the preparation of plans and specifications, for negligence causing delay in the preparation of corrected plans, for negligently preparing and supervising corrected plans, for negligently failing to award a certificate of completion, and for negligent supervision and control.

We adhere to the language of the Florida court:

> From the foregoing, we are satisfied that the principle is established that a third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity. *Id.* at 402.

The additional defendant (architect) here attempts to distinguish the cases cited by noting that they involve *supervising* architects. He argues that, in the instant case, the contractor, not the architect, had responsibility for supervision of construction, and that the owner had the life and death power to stop the work of the contractor. However, the contractor's counterclaim here alleged that "said construction under the contract was done under the supervision and approval of the said Noel N. Coltrane." As stated above, the allegations of the complaint in a Rule 12(b)(6) motion must be treated as truth. The reviewing courts must, therefore, in the instant case, assume that the architect here was a supervising architect.

Additional defendant also relies upon the decision of our Supreme Court in *Ports Authority v. L. A. Fry Roof Company*, 294 N.C. 73, 240 S.E. 2d 345 (1978). There, the plaintiff, the North Carolina State Ports Authority, brought action against its general contractor, Dickerson, and also Dickerson's subcontractor, E. L. Scott Roofing Company. No privity of contract existed between the plaintiff and Scott. In its claim for relief against Scott, plaintiff set forth allegations of negligence, contending that Scott was negligent in the construction of certain roofing materials. In its answer, Scott moved to dismiss, contending that allegations of the complaint failed to state a claim upon which relief could be

granted. Scott's motion to dismiss was allowed, the Court stating as follows:

> There was also no error in dismissing the action against Scott. Scott asserted in its answer the defense that the complaint fails to state a claim upon which relief may be granted against it. In this, Scott was correct. Although the complaint states that the plaintiff seeks recovery against Scott "in tort for the negligent installation of the roofs on these two buildings," it alleges that the defendant Scott was the roofing subcontractor of Dickerson, the general contractor, and that Scott failed properly to apply the roofing material, in consequence of which failure the roofs leaked. This is simply an allegation that Scott did not properly perform its contract with Dickerson and, for the reasons above set forth, does not allege a cause of action in tort in favor of the plaintiff against Scott. *Id.* at 294 N.C. 87, 240 S.E. 2d 353.

We think that *Ports Authority* is clearly distinguishable from the case at bar and from the cases cited above. There, the plaintiff attempted to sue the subcontractor for breach of its contract with the contractor. The Supreme Court held that the pleadings did not allege a cause of action in tort in favor of plaintiff against the subcontractor. The Court stated, however, the rule that a promisor may be liable in a tort action for personal injury or damage to property proximately caused by his negligent, or willful, act or omission in the course of the performance of his contract when the injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promissee. The Court reiterated the principles enunciated by *Council v. Dickerson, supra*, and other cases cited above. We reject additional defendant's contention that *Ports Authority* overrules the well settled North Carolina rule that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in tort if he has been injured as a result of its negligent performance. Moreover, the following is well established in North Carolina:

> One who engages in a business, occupation or profession represents to those who deal with him in that capacity that he possesses the knowledge, skill, and ability, with reference

to matters relating to such calling which others engaged therein ordinarily possess. He also represents that he will exercise reasonable care in the use of his skill and in the application of his knowledge and will exercise his best judgment in the performance of work for which his services are engaged, within the limits of such calling. *Insurance Company v. Sprinkle Company*, 266 N.C. 134, 140, 146 S.E. 2d 53, 59 (1966).

We are not inadvertent to the holding of this Court in *Drilling Co. v. Nello L. Teer, Co.*, 38 N.C. App. 472, 248 S.E. 2d 444 (1978). There, we held that an engineering subcontractor could not be held liable for negligence to a drilling subcontractor in the absence of privity of contract. We hold, however, that the decision in *Drilling Co., supra*, despite its broad language, was not intended to encompass the factual situation disclosed by the case *sub judice*. The result reached here is based on our interpretation of prevailing and evolving principles of law as applied to the particular facts disclosed by the record before us. We note these salient differences which distinguish the instant case from *Drilling Co.*:

1. In *Drilling Co.*, it was stated specifically that the result reached was based on the authority of *Durham v. Engineering Co.*, 255 N.C. 98, 120 S.E. 2d 564 (1961). In *Durham, supra*, supervising engineers for a construction project were held not liable to the contractor and his surety for negligent performance of their contract with the City of Durham. Our Supreme Court determined that there was no mandatory provision in the contract to the effect that the engineer had the duty to supervise the work of the contractor and inspect the materials used and to see that the work and materials conformed to the plans and specifications. In other words, it was determined that the role of the supervising engineers was that of serving as *arbitrators* to resolve disputes between the parties. In the instant case, it is alleged that the function of the architects encompassed considerably more supervisory control. It is alleged that the architect had the right to authorize or withhold payments, administer the contract, reject nonconforming work, and approve specifications and designs.

2. In both *Drilling Co.* and *Durham*, the parties against whom liability was sought to be imposed were consulting engi-

neers. In the instant case, we are concerned with an architect with alleged general supervisory power. While the responsibilities of consulting engineers and architects can, in many instances, be virtually the same and while most authorities apply the principles we enunciate here to both professions, we believe the distinction important here particularly in light of this statement in *Drilling Co.*, 38 N.C. App. at 475, 248 S.E. 2d at 446: "[T]his defendant [engineer] did not have final authority to determine compliance with the contract. Such authority lay ultimately in the architect in this case."

3. In *Drilling Co.*, the action was for tortious interference with the performance of a contract and the allegation against the consulting engineer was that he had *exceeded* the plan specifications. The allegation was that the engineer "went above and beyond the call of duty." That allegation prompted this Court to state that the defendant engineer "should not be unnecessarily burdened with fear of liability for requiring work *exceeding* plan specifications." 38 N.C. App. at 478, 248 S.E. 2d at 448. This reasoning would not apply in the instant case in that the allegation against the architect is for negligently approving improperly designed and constructed roof trusses.

We also note that another panel of this Court has independently reached a decision similar to ours in an opinion filed 19 June 1979, *Davidson and Jones, Inc. v. New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580 (1979). In *Davidson*, Judge Erwin also notes distinctions between *Durham* and *Drilling Co.* with a factual situation similar to the instant case.

Moreover, we believe it would be inconsistent for us to fail to extend the abolition of the privity requirement to the factual situation here presented. It was stated in *Drilling Co.* that North Carolina cases finding liability for negligent performance of a contractual duty in the absence of privity of contract have been limited to actions for personal injury or property damages. *See, e.g., Council v. Dickerson's Inc., supra* (automobile damaged because of negligent highway paving); *Jones v. Otis Elevator Co., supra* (personal injury from fall in elevator shaft); *MacIntyre v. Monarch Elevator and Machine Co.*, 230 N.C. 539, 54 S.E. 2d 45 (1949) (personal injury from fall in elevator shaft). Judge Morris (now Chief Judge) stated: "We have been cited to no North

Carolina decisions and have found none allowing recovery for loss of profits to a third party injured from the negligent breach of contract." 38 N.C. App. at 476, 248 S.E. 2d at 447. Here, however, we do not believe the action is one for mere "loss of profits." Assuming, *arguendo*, that there is validity to that subtle distinction, the cause of action here is for an economic loss as a result of alleged *property damages*. North Carolina has long held that a contracting party to a third person with whom the contracting party has made no contract may be liable in damages for negligence to the third person. As stated by Professor Prosser:

> [B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person. Prosser, Torts 4th Ed., § 93, p. 622.

In *Potter v. Carolina Water Co.*, 253 N.C. 112, 116 S.E. 2d 374 (1960), the plaintiff brought action to recover from defendant the value of their stock of merchandise and fixtures destroyed by a fire. Plaintiff's building and contents were destroyed by fire allegedly as a result of the fire department being without water pressure due to defendant's negligence after it responded to the fire alarm. Our Supreme Court, following a long line of cases, held that a cause of action existed on behalf of plaintiff who had no contract with defendant for defendant's negligently failing to reasonably comply with its contract with the muncipality. *See also, Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 328, 32 S.E. 2d 720 (1899); *Fisher v. Greensboro Water Supply Co.*, 128 N.C. 375, 38 S.E. 912 (1901); *Jones v. Durham Water Co.*, 135 N.C. 553, 47 S.E. 615 (1904); *Morton v. Washington Light and Water Co.*, 168 N.C. 582, 84 S.E. 1019 (1915); *Powell v. Wake Water Co.*, 171 N.C. 290, 88 S.E. 426 (1916). We see little distinction between the type of economic loss suffered by the plaintiffs in the cited cases and that of the defendant contractor in the case at bar. The additional defendant (architect) here entered upon performance of an undertaking and, by doing so, entered into a relation with the contractor and others giving rise to a duty to those who must

reasonably rely upon his professional performance. The arrangement presented here of an architect having general supervisory responsibility over the contractor and other subcontractors on a construction project of this nature is a normal one in this commercial age. Each of the various participants must, to some degree, rely upon the professional performance of the other and each therefore has the responsibility of performing his task with due care. Clearly, the incidental fact of the existence of the contract between the architect and the property owner should not negative the responsibility of the architect when he enters upon a course of affirmative conduct which may be expected to affect the interest of third parties.

For the reasons stated above, we hold that the trial court erred in granting additional defendant's motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

[4] We now turn to the question of additional defendant's conditional cross appeal in which he contends that the trial court erred in denying his motion for summary judgment. We have indicated above, that in light of the trial court's allowance of the Rule 12(b)(6) motion, the motion for summary judgment became moot. For reasons not apparent to us, the trial court elected to deny the motion while granting the Rule 12(b)(6) motion. Since the trial court elected to rule on the summary judgment motion, it is necessary for us to review its propriety. We hold that the ruling was proper, albeit unnecessary.

Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken, but the moving party is free to preserve his exception for consideration on appeal from the final judgment. To allow an appeal from a denial of a motion for summary judgment would open the flood gate of fragmentary appeals and cause a delay in administering justice. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970). Additional defendant's conditional cross appeal could be dismissed for that purpose. However, to avoid any confusion about the posture of the case on remand, we have reviewed the pleadings and supporting affidavits in support of and in opposition to the motion for summary judgment. Suffice it to say that they obviously give rise to genuine issues of material fact

and granting of summary judgment would be patently erroneous. For the limited reasons stated, we affirm the trial court's allowance of the motion for summary judgment.

With respect to the defendant's appeal from the judgment dismissing the counterclaim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), we hold that the judgment of the trial court was in error. The judgment is therefore

Reversed and remanded.

With respect to additional defendant's conditional cross appeal, the judgment of the trial court in denying the motion for summary judgment is

Affirmed.

Judges VAUGHN and CLARK concur.

GRACE WILLIE JOHNSON AND HUSBAND, HOYT JOHNSON, OF RANDOLPH COUNTY, PETITIONERS v. WILLIAM KELLY BURROW AND WIFE, JANE J. BURROW; JUDY B. ISAACSON AND HUSBAND, PAUL ISAACSON; JACK THOMAS UPTON AND WIFE, LOLA COMER UPTON, ALL OF RANDOLPH COUNTY, NORTH CAROLINA; WILLIAM W. BURROW BY HIS GUARDIAN AD LITEM, SOLONIA FRANCES BURROW, AND HIS WIFE, SOLONIA FRANCES BURROW, OF RANDOLPH COUNTY, NORTH CAROLINA; DON THOMAS UPTON AND WIFE, JEANNIE UPTON; CAROLYN URRP (EARP) AND HUSBAND, LARRY URRP (EARP); AND LULA C. UPTON, ALL OF MECKLENBURG COUNTY, NORTH CAROLINA, RESPONDENTS

No. 7819SC418

(Filed 17 July 1979)

1. Deeds § 11— repugnant clauses—granting clause controlling

In the event of any repugnancy between the granting clause of a deed and preceding or succeeding recitals, the granting clause will prevail, and this rule is subject only to the limitations which may be placed by the habendum upon the estate granted if such a limitation clearly appears to be the intent of the grantor.

2. Deeds § 11— husband's and wife's names in deeds—husband's name in granting clauses—no estate by entirety

Three deeds did not create estates by the entirety in a husband and wife, but conveyed to the husband a fee simple estate individually where all three deeds included the husband and wife in the recital of the parties; this was the only place the wife's name appeared in one of the deeds; in two of the deeds the wife's name also appeared in the habendum and warranty clauses along with the husband's name; two of the deeds stated that the consideration named was paid by the husband; in the third deed the named consideration was paid by "the party of the second part"; and in all three deeds the granting clause conveyed the property to the husband and his heirs.

3. Husband and Wife § 4.2— deed from wife to husband—insufficient findings after private examination—deed validated by statute

Where a 1922 deed from a wife to a husband was in all respects proper except that the officer who conducted the private examination of the wife made no finding that the deed was not unreasonable or injurious to her, G.S. 39-13.1(b) applied to validate the deed.

APPEAL by Respondent Lula C. Upton from *Walker (Hal H.), Judge*. Judgment entered 15 December 1977, Superior Court, RANDOLPH County. Heard in Court of Appeals 26 February 1979.

Petitioner Grace Willie Johnson, alleging that she and respondents are tenants in common of the lands described in the petition, seeks to have the lands sold for partition. Respondent Lula C. Upton denies the allegations of tenancy in common and, as affirmative defenses avers: (1) sole seisin in herself (2) acquisition of title by her husband, John T. Upton, under whom she claims, by adverse possession under color of title, should her claim of sole seisin by record chain of title be denied (3) that petitioner joined in a deed to John T. Upton conveying the lands described in the petition and is, therefore, estopped to deny the conveyance of her interest, or waived her interest, or is equitably estopped to deny that her joining in the deed was for the purpose of relinquishing her interest in the property, if she had any interest therein.

Decision of this matter requires consideration of certain deeds which were introduced into evidence by plaintiff:

(1) Deed dated 22 September 1908 and of record in Book 150 at page 205, Randolph County Registry. By this deed "A Upton Margerite Upton his wife", conveyed to "J. K. Upton and A. B. Upton" in the premises of the deed. The granting clause was to

"J. K. Upton and his Body heirs". The habendum ran to "John K. Upton and A. B. Upton and their Body heirs". The conveyance was for 80 acres of land in Randolph County.

(2) Deed dated 1 March 1916 and of record in Book 170 at page 148, Randolph County Registry. The premise indicated Alvis Upton and Maggie Upton his wife as grantors and J. K. Upton and Addie Upton his wife as grantees. The granting clause was to "the said J. K. Upton and his heirs". The habendum clause was to "J. K. Upton and Addie Upton his wife". The conveyance was for 70 acres of land in Randolph County.

(3) Deed dated 23 September 1908, and of record in Book 170 at page 146, Randolph County Registry. The premise clause indicated grantors as "Alvis Upton and Maggie Upton his wife" and grantees as "John K. Upton and wife, A. B. Upton". The granting clause was to "said John K. Upton and his heirs". The habendum was to "John K. Upton and his heirs and assigns". The conveyance was for 15 acres.

(4) Deed dated 30 November 1922, of record in Book 206, at page 494, Randolph County Registry from Addie Upton to John K. Upton conveying the 80 acres conveyed by Deed (1) above and retaining a life estate in grantor. This deed contained the certificate of the Clerk of Court with respect to his having privately examined the grantor and his finding that she voluntarily executed the deed without fear or compulsion of her husband. The certificate did not, however, contain a finding as to whether the conveyance was "unreasonable or injurious" to her, as required by G.S. 52-6 (now repealed).

Petitioner rested and Respondent Lula C. Upton introduced into evidence the following documents:

(a) Deed dated 2 June 1919 from John K. Upton to Addie Upton conveying the same 80-acre tract. The deed was signed by John K. Upton, A. Upton, and Maggie Upton and the acknowledgment before a Justice of the Peace was by "John K. Upton and A. Upton and Maggie Upton his wife." Private examination of Maggie Upton was conducted.

(b) Deed of "Mrs. Addie B. Upton (widow of J. K. Upton) to John T. Upton conveying the three tracts described in the petition. The deed was dated 4 June 1955 and is of record in Book 575

at page 338, Randolph County Registry. The deed shows execution by Addie B. Upton and Grace Willie Johnson, but only Mrs. Addie B. Upton acknowledged her signature before a notary public.

(c) Copy of the will of A. Upton, certified by the Deputy Clerk of Court to be a true copy. After specific bequests testator devised and bequeathed the remainder of the estate to "John K. Upton and A. B. Upton, his wife."

(d) Cancelled checks payable to Randolph County Tax Department signed by Mrs. J. T. Upton on the account of "Mr. or Mrs. J. T. Upton, 1337 Auten Road, Charlotte, N. C." for 1968, 1969, 1970, 1971, 1972, 1974 and 1975.

(e) Tax receipts to John T. Upton from Randolph County Tax Department for 1969, 1971, 1972, 1974.

(f) A series of checks identified as payment for insurance and supplies, and repairs incident to the property.

(g) Copy of will of John T. Upton dated 12 May 1975, and admitted to probate in Mecklenburg County, on or about 27 October 1976.

After the parties had introduced their documentary evidence, the court ruled that Lula C. Upton was not solely seized of the property. After hearing testimony and receiving additional documentary evidence, the court entered its judgment finding facts and making conclusions of law. Findings of fact and conclusions pertinent to this appeal are:

> "14. That Alvis Upton and wife, Maggie Upton, conveyed by deeds the tracts of land located in Richland Township, Randolph County, that are described as of record in the office of the Register of Deeds of Randolph County, North Carolina at (i) Deed Book 150, page 205, (ii) Deed Book 170, page 148 and (iii) Deed Book 170, page 146.
>
> 15. That the name of John K. Upton is the only name that appeared in the granting clause of the deeds aforementioned.
>
> 16. That drawing from the four (4) corners of the instrument, and according to established rules of construction, the Court finds as a fact that it was the intention of the grantors of the

deeds recited in Paragraph 14 of these findings, to create a fee simple state in said tracts in John K. Upton, individually.

17. That John K. Upton made a deed to his wife, Addie B. Upton, for the eighty (80) acre tract described in Deed Book 150, page 205, which deed is recorded at Book 183, page 270, Randolph County Registry. This Court further finds that John K. Upton was the only party who signed this deed.

18. That subsequently, Addie B. Upton made a deed to her husband, John K. Upton, for the tract described in Deed Book 150, page 205, which deed is recorded at Book 206, page 494, Randolph County Registry.

19. That the deed aforementioned in Paragraph 18 recites that Addie B. Upton was privately examined, separate and apart from her husband, and recites that she stated that she signed the same freely and voluntarily, without fear or compulsion of her said husband, or any other person. That there is no certification by the examining official that the deed was not unreasonable or injurious to the said Addie B. Upton, the deed being in all other respects regular.

20. That Addie B. Upton made a deed dated June 4, 1955 and recorded in Book 575, page 338, Randolph County Registry, purporting to convey fee simple title in all the aforementioned tracts of land.

21. That Addie B. Upton acknowledged her signature on the deed aforementioned in Paragraph 20 above, before a duly authorized notary public.

22. That a writing purporting to be the signature of Grace Willie Johnson appears on said deed.

23. That the writing purporting to be the signature of Grace Willie Johnson was never acknowledged as required by law nor in any manner whatsoever.

24. That Grace Willie Johnson denied signing the deed aforementioned in Paragraph 20 above, and stated under oath that it was not her signature.

25. That the name of Grace Willie Johnson does not appear anywhere in the premises, granting, habendum, or warranty clauses of the deed aforementioned in Paragraph 20 above.

26. That the Court finds as a fact that the name of Grace Willie Johnson appearing on the deed aforementioned in Paragraph 20 above was not her signature, and that she never did sign the said deed."

CONCLUSIONS OF LAW

"1. The deeds made by Alvis Upton and wife, Maggie Upton, created a fee simple estate in John K. Upton, individually, in all the lands in paragraph 1 of the petition.

2. That the deed aforementioned from John K. Upton to Addie B. Upton created a fee simple estate in Addie B. Upton for the eighty (80) acre tract only, said tract being described at Book 183 page 270, Randolph County Registry.

3. That the deed aforementioned from Addie B. Upton to John K. Upton created a fee simple estate in John K. Upton, individually, subject to a life estate in Addie B. Upton, in the tract described at Book 206, page 494.

4. That North Carolina General Statute No. 39-13.1 cures the defect in the private examination certification of the deed from Addie B. Upton to John K. Upton of the eighty (80) acre tract, the deed and acknowledgment thereof being in all other respects regular.

5. That John K. Upton died seized in fee simple of all the lands which are the subject of this action, said lands being described paragraph 1 of the petition.

6. That upon the death of John K. Upton, his heirs-at-law became vested in fee simple of all the lands which are the subject of this action subject to the dower interest of Addie B. Upton, and subject to her life estate in the eighty (80) acre tract aforementioned. These lands are described in paragraph 1 of the petition."

From the judgment entered, respondent, Lula Upton, appeals.

Richard H. Robertson for respondent appellant, Lula C. Upton.

Coltrane, Gavin and Pugh, by Alan V. Pugh, for petitioner appellees, Grace Willie Johnson and her husband, Hoyt Johnson.

Ottway Burton for respondent appellees, William Kelly Burrow and his wife, Jane J. Burrow; Judy B. Isaacson and her husband, Paul Isaacson; Jack Thomas Upton and his wife, Lola Comer Upton; William W. Burrow by his Guardian ad litem, Solonia Frances Burrow, and his wife, Solonia Frances Burrow.

MORRIS, Chief Judge.

The first question which must be answered on this appeal is whether the Alvis Upton deeds conveyed the land in question to John K. Upton and his wife, Addie B. Upton as tenants by the entirety. The court concluded that the deeds did not create an estate by the entirety. We are constrained to agree.

In all three deeds the names of J. K. Upton or John K. Upton and his wife, A. B. or Addie Upton, appear in the recital of the parties. In one deed, this is the only place the wife's name appears. In two of the deeds the wife's name also appears in the habendum and warranty along with J. K. or John or John K. Upton. Two of the deeds state that the consideration named was paid by J. K. or John K. Upton. In one deed the named consideration was paid by "the party of the second part". In all three deeds the granting clause conveys the property to "J. K. Upton and his Body heirs," or "John K. Upton and his heirs" or "said J. K. Upton and his heirs."

G.S. 39-1.1 provides:

> "(a) In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.
>
> (b) The provisions of subsection (a) of this section shall not prevent the application of the rule in Shelley's case."

In *Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976), the Court said:

"By the passage of G.S. 39-1.1, it would appear that '[I]t is the legislative will that the intention of the grantor and not the technical words of the common law shall govern.' *Triplett v. Williams, supra,* at 398, 63 S.E. at 80. *See also* Comment, 4 Wake Forest Intra. L. Rev. 132 (1968). Thus, we are of the opinion that so long as it does not prevent the application of the rule in Shelley's case, conveyances executed after 1 January 1968 in which there are inconsistent clauses shall be construed in accordance with G.S. 39-1.1 so as to effectuate the intent of the parties as it appears from all the provisions in the instrument. However, we hold that G.S. 39-1.1 does not apply to conveyances executed prior to 1 January 1968 and that such conveyances will be construed in accordance with the principles enunciated in *Artis v. Artis, supra,* and *Oxendine v. Lewis, supra.*" 291 N.C. at 133, 229 S.E. 2d at 187.

In *Artis v. Artis*, 228 N.C. 754, 47 S.E. 2d 228 (1948), the granting clause conveyed a fee simple estate. The habendum was in accord and made no attempt to restrict or enlarge the estate. The clause which was repugnant to both the granting clause and the habendum appeared in the description and attempted to limit or divest the fee simple title which had been conveyed by the granting clause. The Court held that the granting clause would prevail and the repugnant clause would be rejected. The rule was stated to be:

"Hence it may be stated as a rule of law that where the entire estate in fee simple, in unmistakable terms, is given the grantee in a deed, both in the granting clause and *habendum*, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected." 228 N.C. at 761, 47 S.E. 2d at 232.

Also in *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706 (1960), the granting clause conveyed a fee simple, the habendum was in accord, and the clause which attempted to limit the estate granted to a life estate with remainder to grantor appeared at the end of the description. The Court held that the words which tended to limit the fee simple estate granted were not in the granting clause or the habendum and, under a long line of cases cited, would be deemed surplusage and of no force and effect.

In *Whetsell*, the repugnant clause also appeared in the description and the granting clause conveyed a fee simple, and the habendum contained no limitation of the fee granted by the granting clause. Nevertheless, we have found nothing to require limiting the rule of *Artis*, *Oxendine*, and *Whetsell* to those situations where the repugnant clause appears only in the description. *See Gamble v. Williams*, 39 N.C. App. 630, 251 S.E. 2d 625 (1979). Indeed we think the principles enunciated and applied are in accord with the settled rules of construction generally applied prior to the effective date of G.S. 39-1.1.

In *Wilkins v. Norman*, 139 N.C. 40, 51 S.E. 797 (1905), a fee simple estate was conveyed by the granting clause, the habendum was in accord, but the clause attempting to limit the estate to a life estate appeared after the warranty clause. The Court held the repugnant clause ineffective. Justice Connor, writing for the Court, quoted with approval what was said by Justice Ashe in *Rowland v. Rowland*, 93 N.C. 214 (1885):

> " 'Blackstone, in his Commentaries, vol. 2, p. 298, has said that the office of the *habendum* is to lessen, enlarge, explain or qualify the premises, but not to contradict or be repugnant to the estate granted in the premises. And to illustrate what is meant by the repugnancy which will render the *habendum* nugatory, he puts the case where, in the premises the estate is given to one and his heirs, *habendum* to him for life, for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away and divested by it.' The deed in that case upon which the decision is based is essentially different from ours. We have considered the case upon the assumption that the clause under which plaintiffs claim contains apt words to convey an estate in remainder. This, however, is by no means clear. While we are advertent to the general rule that the Court will by an examination of the entire deed, seek, and, if found, effectuate the intention of the grantor, we must keep in view the other rule that when rules of construction have been settled, it is the duty of the Court to enforce them, otherwise titles are rendered uncertain and insecure." 139 N.C. at 42-43, 51 S.E. at 798.

In *Triplett v. Williams*, 149 N.C. 394, 63 S.E. 79 (1908), the granting clause conveyed a fee simple estate and the habendum

limited the estate to a life estate. The Court discussed the intent of the grantor and held:

> "Taking into consideration the whole of the deed under discussion, it is clear beyond doubt that it was the intention of the grantor that the *habendum* should operate as a proviso or limitation to the granting clause in the premises, and control it so as to limit the estate conveyed to his daughter Margaret to a life estate with remainder over to her children." 149 N.C. at 398-99, 63 S.E. at 80-81.

Appellants rely on *Triplett* as a departure by the Court from the common law rule that certain technical portions of the deed controlled the estate granted and the adoption of a rule that the intentions of the parties, gathered from the entire instrument, must be determinative. We think the reliance is misplaced. The *Triplett* Court was following the principle enunciated by the same Court only a month earlier in *Condor v. Secrest*, 149 N.C. 201, 62 S.E. 921 (1908), although it did not cite the case. In *Condor*, the Court following *Blair v. Osborne*, 84 N.C. 417 (1881), held that a deed should be construed in accordance with the intent of the parties if the rules of law would permit that construction. Both *Blair* and *Condor* held that one not named in the granting clause of the deed may, nevertheless, take an estate in remainder by limitation in the habendum, because although the habendum cannot even introduce in the deed as grantee one who is a stranger to the granting clause, he may take by way of remainder by the habendum.

Both *Blair* and *Condor* were quoted with approval in *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157 (1942). The facts there are strikingly similar to the facts in the case before us for decision. The recitals of the deed designated the grantee as John W. Smith, the payment of the consideration by John W. Smith was acknowledged, and the granting clause was to John W. Smith and his heirs. In the habendum clause appeared the words: "to the said John W. Smith and wife, Amanda C. Smith, and their heirs". Amanda C. Smith survived John W. Smith, and plaintiff, her executor, instituted the action claiming that she had acquired title to the land in question by virtue of her having survived her husband. The Court did not agree that the deed conveyed an estate by the entirety and held that John W. Smith alone took an estate in fee simple under the deed. In so doing the Court reaffirmed the

settled rules that "the granting clause is the very essence of the contract", *Bryant v. Shields*, 220 N.C. at 632, 18 S.E. 2d at 160; the granting clause designates the grantee and the thing granted; the office of the habendum is "to lessen, enlarge, explain, or qualify the estate granted . . . but not to contradict or be repugnant to the estate granted . . ." 220 N.C. at 632, 18 S.E. 2d at 159. The Court also noted that all parts of the deed should be considered in ascertaining the intent of the grantor, but in so doing the Court may not disregard recognized canons of construction and settled rules of law.

[1] The rule is stated succinctly in *Ingram v. Easley*, 227 N.C. 442, 444, 42 S.E. 2d 624, 626 (1947). "In the event of any repugnancy between the granting clause and preceding or succeeding recitals, the granting clause will prevail." *See also Gamble v. Williams, supra.* The rule is subject only to the limitations which may be placed by the habendum upon the estate granted if such a limitation clearly appears to be the intent of the grantor.

[2] From an examination of the deeds before us, and applying the rules of construction which we must, we come to the conclusion that the deeds did not create an estate by the entirety in John K. Upton and his wife, but conveyed to John K. Upton a fee simple estate individually. Nor do we think this result does violence to an attempt to ascertain the intent of the grantor. In these deeds, the one clear unambiguous indicia of intent is the fact that all deeds acknowledged the payment of consideration by John K. Upton and in all deeds the granting clause was to John K. Upton.

[3] We must now determine the validity of the deed [listed as (4) above] dated 30 November 1922, of record in Book 206 at page 494, Randolph County Registry, which purports to convey to John K. Upton the 80-acre tract described as 1.(1) in the petition. By deed dated 2 June 1919, John K. Upton had conveyed the tract to Addie Upton, his wife. The validity of that deed is not questioned if John K. was seized in fee of the land, as we have held that he was. The deed from Addie to John contains the certificate of the Clerk of the Superior Court that the grantor, Addie Upton, was by him "privately examined, separate and apart from her said husband, touching her voluntary execution of the same", and that she "doth state that she signed the same freely and voluntarily,

without fear or compulsion of her said husband, or of any other person, and that she doth still voluntarily assent thereto." The Clerk did not certify that the conveyance was not unreasonable or injurious to Addie, obviously because this finding was not incorporated in the form deed used. The deed was, in all other respects, regular. Former G.S. 52-6 required contracts between husband and wife during coverture to be in writing and acknowledged before a certifying officer who was required to make a private examination of the wife touching upon her voluntary execution of the contract. Further, subsection (b) thereof required in part that "[t]he certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not (sic) said contract is unreasonable or injurious to the wife." It is this certificate which is lacking in the deed from Addie to John. The court took the position that G.S. 39-13.1(b) validated the deed. The statute provides:

> "(b) Any deed, contract, conveyance, lease or other instrument executed prior to February 7, 1945, which is in all other respects regular except for the failure to take the private examination of a married woman who is a party to such deed, contract, conveyance, lease or other instrument is hereby validated and confirmed to the same extent as if such private examination had been taken, provided that this section shall not apply to any instruments now involved in any pending litigation."

Appellants contend that the statute has no application, relying on *Mansour v. Rabil*, 277 N.C. 364, 177 S.E. 2d 849 (1970), and *Boone v. Brown*, 11 N.C. App. 355, 181 S.E. 2d 157 (1971), which followed *Mansour*. Appellants' reliance is misplaced. Both cases are distinguishable. In neither case had there been any attempt to comply with sections (a), (b), or (c) of G.S. 52-6. The Court, therefore, held that the document before the Court, in *Mansour* a joint will and in *Boone* a deed, was not "in all other respects regular." Here, however, the certifying officer was the proper officer, the Clerk of Superior Court, and he did conduct a private examination touching her voluntary execution of the deed. The only omission was the certificate that the deed was not unreasonable or injurious to her. The deed was in all other respects regular. There is no contention that there is any defect

in the premises, the granting clause, the description, the habendum, or the warranties or that there is anything about the deed which is not regular except the lack of the certificate of the certifying officer as to injury or unreasonableness. We think this is certainly one of the situations to which G.S. 39-13.1(b) was intended to apply. Otherwise, the curative statute would be stripped of all meaning.

Appellant presents no argument with respect to the position that she has acquired title to the property by adverse possession. While neither that question nor the question of equitable estoppel as to Grace Willie Johnson is before us, we do not think it inappropriate to say that we agree with the trial court's findings that the evidence does not support either theory.

Affirmed.

Judges CLARK and ARNOLD concur.

BRADLEY FREIGHT LINES, INC., A CORPORATION v. POPE, FLYNN & COMPANY, INC., A CORPORATION

No. 7828SC941

(Filed 17 July 1979)

1. **Rules of Civil Procedure § 41— voluntary dismissal—reference to rule unnecessary**

There was no merit to defendant's contention that to gain the benefit of the "saving" provision of G.S. 1A-1, Rule 41(a), there must be a specific reference to Rule 41 in plaintiff's voluntary dismissal.

2. **Insurance § 2.2— negligent advice of agent—cause of action proper—sufficiency of evidence**

Plaintiff could properly bring a cause of action based on negligent advice against an insurance agent, and plaintiff's evidence was sufficient to withstand defendant's motions for directed verdict where it tended to show a breach of duty by defendant in negligently conveying false assurances to the plaintiff concerning the extent of insurance coverage on substituted vehicles that were not specifically endorsed.

3. **Evidence § 29.1— letter—authenticity**

A letter received in due course which purports to be in response to a letter previously sent by the receiver is prima facie genuine and is admissible in evidence without other proof of its authenticity.

APPEAL by defendant from *Lewis, Judge*. Judgment entered 16 May 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 June 1979.

This lawsuit is a result of a motor vehicle accident which occurred in the State of Iowa on 9 September 1970. Plaintiff, a Tennessee trucking corporation doing business in North Carolina, one of whose trucks was involved in the accident, was the defendant in an Iowa lawsuit brought as a result of the accident. Plaintiff's insurer, Carolina Casualty Insurance Co., Inc., refused to defend the plaintiff in the Iowa lawsuit, claiming that its insurance coverage under a policy between the plaintiff and Carolina Casualty Insurance Co. did not extend to substituted vehicles that had not received a special endorsement from the insurance agency, the defendant in this case. The plaintiff's damaged vehicle in the accident was a substituted vehicle which had not received a special endorsement in accordance with the insurance policy.

In the Iowa lawsuit, judgment was rendered against this plaintiff and damages were assessed at $35,232.73. Carolina Casualty refused to pay said judgment. The plaintiff subsequently entered into a compromise settlement of the Iowa judgment, whereby the plaintiffs in the Iowa lawsuit were paid $15,000 in settlement of the case with an assignment of all claims. Carolina Casualty, pursuant to Interstate Commerce Commission requirements, paid to the plaintiff in the Iowa case the sum of $10,000.

Carolina Casualty then instituted a lawsuit against the plaintiff in the District Court of Buncombe County which resulted in a consent judgment, whereby the plaintiff paid Carolina Casualty $3,000 in settlement of the monies paid by Carolina Casualty to the Iowa plaintiff.

Plaintiff later instituted an action against Carolina Casualty, American Underwriters, Inc., and Pope, Flynn & Company, the defendant in the present action. In that case, it was adjudged and decreed that the truck involved in the Iowa accident was not covered under the terms of the insurance policy and that Carolina Casualty was not liable. The court allowed a voluntary dismissal without prejudice as to Pope, Flynn & Company and Carolina Casualty on 7 December 1976.

On 13 July 1977, plaintiff filed complaint in the present action alleging that the defendant, by and through its president, John S. Flynn, negligently advised the plaintiff that substitution of vehicles not listed on any insurance policy for vehicles covered by an insurance policy which were at the time nonoperative was authorized and that no special endorsement on the policy was required.

At the trial, evidence for the plaintiff tended to show that defendant had acted as plaintiff's insurance agent for several years and that plaintiff depended on the defendant for insurance advice. On 20 August 1970, Mr. Flynn, president of defendant insurance agency, delivered an insurance policy to Mr. J. C. Cope, president of the plaintiff corporation. Mr. Cope had previously inquired of Mr. Flynn as to whether a policy could be purchased by the plaintiff which would eliminate the necessity of reporting to the agency whenever substitutions of owned vehicles not listed in the policy were made. At the time of the delivery of this policy, Mr. Flynn told Mr. Cope "that we [the plaintiff] didn't have to report in to him [the defendant] each time we wanted to substitute." On 9 September 1970 a substituted truck, whose substitution went unreported to the agency, was involved in the Iowa accident. A letter from Carolina Casualty to the plaintiff denying liability was introduced.

On 21 September 1972, Mr. Cope discussed the Iowa lawsuit with Mr. Flynn. Mr. Cope asked for a confirmation letter from Mr. Flynn concerning the assurances that had been given as to substituted vehicles. Mr. Flynn provided such a letter as follows:

> "The question was asked in regards to the operation of a tractor and trailer used for substitute when another trailer is broken down and in the garage for repairs. He informed me that it is perfectly in order to substitute a unit when one of the units properly covered is under repair. There was no restriction attached as to the unit being hired or owned unit. It is our understanding that the Policyholder could substitute and was so advised. Very truly your [sic], Pope, Flynn & Company, Inc., John S. Flynn," signed, "John S. Flynn, President." Copy to Bill Fairey.

At the close of plaintiff's argument, defendant moved for a directed verdict. The motion was denied, at which time the de-

fendant renewed his motion which was again denied. The defendant presented no evidence.

The jury answered three issues submitted to it as follows:

1. Did the plaintiff, Bradley Freight Lines, Inc. incur loss or losses as a result of the defendant's negligent advice, as alleged in the Complaint, that a substituted vehicle was covered under the Carolina Casualty Company Policy # 144833?

ANSWER: Yes

2. Did the plaintiff, Bradley Freight Lines, Inc., by its own negligence contribute to its loss or losses?

ANSWER: No.

3. What amount, if any, is the plaintiff, Bradley Freight Lines, Inc., entitled to recover of the defendant, Pope, Flynn & Company, Inc.?

ANSWER: $24,868.28.

Defendant appeals.

Morris, Golding, Blue & Phillips, by William C. Morris, Jr., for defendant appellant.

Reynolds, Nesbitt, Crawford & Mayer, by Joseph C. Reynolds and William M. Patton, for plaintiff appellee.

CARLTON, Judge.

Defendant first assigns as error the failure of the trial court to grant defendant's motions for directed verdict made at the close of the plaintiff's evidence and at the close of all the evidence.

[1] Procedurally, defendant contends that the statute of limitations bars plaintiff's claim, as the voluntary dismissal taken by the plaintiff in the earlier action did not specifically refer to G.S. 1A-1, Rule 41(a) and thus the present claim is not "saved" by that statute. Defendant's position is that the voluntary dismissal without prejudice must refer to Rule 41(a) in order to gain the rule's benefit of a one year extension within which to file the same lawsuit.

Rule 41(a)(1) provides as follows:

(a) *Voluntary dismissal; effect thereof.*—

(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 with 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. (Emphasis added.)

Neither our nor the appellant's research discloses any authority for the defendant's contention that to gain the benefit of Rule 41(a)'s "saving" provision, there must be a specific reference to Rule 41 in the dismissal. The fact that plaintiff's notice of dismissal in this case did not refer to the specific rule of its origin would appear to have no legal significance. As Rule 41 is the only procedural rule which addresses voluntary dismissals, no confusion as to the effect of the dismissal could possibly have resulted from this omission. In analogous situations, other courts have emphasized that the *content* of a notice of dismissal controls, not a wrong label. *See* 5 Moore's Federal Practice, ¶ 41.02[2], p. 41-21; *Williams v. Ezell*, 531 F. 2d 1261 (5th Cir. 1976); *Neifeld v. Steinberg*, 438 F. 2d 423 (3d Cir. 1971). We think this reasoning should be extended to encompass situations such as the case at bar where a label *omission* is the alleged error. The voluntary dismissal without prejudice entitled the plaintiff to reinstate his claim within one year from the date of the notice, that being 7 December 1976. Plaintiff filed his complaint in the present action on 13 July 1977, well within the one-year limitation extension

period. The present action is therefore not barred by the statute of limitations and defendant's argument is without merit.

The defendant appellant also contends that the present action is not the "same claim" as the earlier action within the meaning of Rule 41(a)(1), and therefore a directed verdict for defendant would have been proper. Defendant argues that the earlier action was an action for breach of contract and the present action is one which makes no reference to breach of contract, but is solely bottomed on the theory of negligent advice. However, the record discloses that recovery based on negligent advice was advanced as a theory in plaintiff's complaint in the earlier action. This assignment of error is therefore overruled.

[2] Substantively, defendant argues that a cause of action based on negligent advice against an insurance agent has never been recognized in this State and should not now be recognized. While we agree with defendant that no North Carolina case basing recovery expressly on the theory of negligent advice of an insurance agent can be found, we do not agree that plaintiff's claim falls short of a valid cause of action.

As a general rule, an insurance agent who, with a view to compensation, undertakes to procure insurance for another owes the duty to his principal to exercise good faith and reasonable diligence, and any negligence or other breach of duty on his part which operates to defeat the insurance coverage procured or causes the principal to be underinsured will render the agent liable for the resulting loss. *Anno*: 72 A.L.R. 3d 747; *Johnson v. George Tenuta and Co.*, 13 N.C. App. 375, 185 S.E. 2d 732 (1972); *Elam v. Smithdeal Realty Ins. Co.*, 182 N.C. 599, 109 S.E. 632 (1921). In *Wiles v. Mullinax*, 267 N.C. 392, 395, 148 S.E. 2d 229, 232 (1966), Justice Sharp, now Chief Justice, writing for our Supreme Court stated: "Where an insurance broker becomes liable to his customer for failure to provide him with the promised insurance, the latter, at his election, may sue for breach of contract *or for negligent default in the performance of a duty imposed by contract*." (Emphasis added.)

Proceeding in tort against the insurer is therefore clearly actionable in North Carolina. In *Johnson v. Tenuta and Co., supra*, Judge Parker emphasized that insured's remedies are not limited

to breach of contract, but can be based on actionable negligence as well.

Cases from other jurisdictions characterize a cause of action for negligent advice as one for negligent misrepresentation. In *Greenfield v. Insurance, Inc.*, 19 Cal. App. 3d 803, 97 Cal. Rptr. 164 (1971), the defendant insurance brokerage firm was held to have negligently misrepresented to the plaintiff insured the extent of policy coverage. The plaintiff scrap iron dealer specifically requested business interruption insurance covering mechanical breakdown of an automobile shredder from the defendant insurance brokerage firm which had handled the plaintiff's insurance needs for 10 years. The brokerage firm informed the plaintiff, after contacting an insurance company, that it had obtained the type of coverage requested. The policy, however, specifically excluded loss caused by mechanical breakdown. The California court found that the defendant had violated its duty to exercise reasonable care in seeking coverage and that the plaintiff had justifiably relied on the firm's representation of coverage.

In the case *sub judice*, we hold that plaintiff alleged a valid cause of action in negligence against the defendant. Plaintiff's evidence tended to show the relationshp between the parties and a resulting duty on the part of the defendant. The evidence tended to show a breach of that duty by the defendant in negligently conveying false assurances to the plaintiff concerning the extent of insurance coverage on substituted vehicles that were not specifically endorsed. Plaintiff's evidence, taken in the light most favorable to the plaintiff and given the benefit of every reasonable inference which can be drawn therefrom, was sufficient to withstand defendant's motions for directed verdict. *See*, 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 50, p. 326; *Younts v. State Farm Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972).

Defendant next assigns as error the trial court's admission of a letter into evidence which had not been properly authenticated. The letter, dated 7 April 1971, was a reply from Carolina Casualty in response to a report sent by the plaintiff, wherein Carolina Casualty denied liability to the plaintiff on the insurance policy.

[3] A letter, received in due course which purports to be in response to a letter previously sent by the receiver, is *prima facie*

genuine and is admissible in evidence without other proof of its authenticity. 2 Stansbury, N.C. Evidence § 236, p. 216 (Brandis rev. ed. 1973); *Echerd v. Viele*, 164 N.C. 122, 80 S.E. 408 (1913). This assignment of error is overruled.

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 CLARK and ERWIN concur.

IN RE: ALBEMARLE MENTAL HEALTH CENTER

No. 781SC996

(Filed 17 July 1979)

1. **Criminal Law § 82.2— privileged communications to psychologist—alleged homicide—hearing on whether to compel disclosure—jurisdiction of superior court**

The superior court was not without jurisdiction of a special proceeding instituted by the district attorney for the court to conduct an *in camera* examination to determine whether professional employees of a mental health center obtained privileged information about an alleged homicide and whether disclosure of such information to law officers was necessary to a proper administration of justice because the proceeding was not commenced pursuant to statutory requirements for initiating a civil action as provided by G.S. 1-394; rather, the superior court obtained jurisdiction where the district attorney, acting pursuant to G.S. 8-53.3, filed a motion for an *in camera* hearing, the court promptly issued an order requiring the director and other professional employees of the mental health center to appear in court, and this notice was personally served by the sheriff.

2. **Criminal Law § 82.2— privileged communications—physician or psychologist—compelling disclosure prior to filing of charges**

When construed together, G.S. 8-53 and G.S. 8-53.3 permit the trial court to compel disclosure of privileged information obtained by a physician or a psychologist prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice.

In re Mental Health Center

APPEAL by petitioner, State of North Carolina, from *Small, Judge.* Judgment entered 20 September 1978 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 29 June 1979.

The District Attorney for the First Prosecutorial District, Thomas Watts, filed a motion in the Superior Court of Pasquotank County alleging that he had been advised by a telephone call from Charles Franklin, director of the Albemarle Mental Health Center, that professional employees of the Center had acquired knowledge and information concerning an alleged homicide. The information had been obtained by the employees from an undisclosed patient or client of the Center. The director advised Mr. Watts that he was not at liberty to disclose to him or any law enforcement agency any specific details of the information concerning the alleged homicide on the advice of counsel for the Center. Counsel had advised that such information constituted privileged communications between physician and patient pursuant to G.S. 8-53 or between a psychologist and client pursuant to G.S. 8-53.3. Mr. Watts thereafter requested in writing that Mr. Franklin provide the necessary information to him or to an assigned agent of the State Buireau of Investigation and Mr. Franklin refused in writing. District Attorney watts further alleged that:

> [I]t is in the best interest of society and necessary to a proper administration of justice to quickly and thoroughly investigate all alleged acts of homicide to the end of apprehending any and all persons responsible for such acts and bringing such persons to public trial in order to determine their guilt or innocence. . . .

The District Attorney prayed that the court conduct a confidential *in camera* examination of Mr. Franklin and other employees of the Center in order for the court to determine: (1) whether any information obtained by them constituted privileged information between either physician and patient or psychologist and client; (2) whether such information was relevant to an alleged homicide or conspiracy to commit homicide, and; (3) whether disclosure of such information to law enforcement officers was necessary to a proper administration of justice. He further prayed that the court issue an order to the Center compelling disclosure of the informa-

tion if the court determined that the information was relevant to criminal acts and that its disclosure was necessary to provide for the proper administration of justice.

The trial court thereafter entered an order requiring Mr. Franklin and other employees of the Center having personal and direct knowledge of such information to appear before it for an inquiry to be conducted *in camera* and outside the presence of the District Attorney or any other law enforcement official. The order provided that counsel for the Center could be present. The order directed the Sheriff of Pasquotank County to serve a copy of the order upon Mr. Franklin and upon Mr. Lennie Hughes, attorney for the Center. The record discloses that the Sheriff served copies of the order upon Mr. Franklin and Mr. Hughes.

On 31 July 1978, Mr. Franklin, Mr. Hughes and other employees of the Center appeared before the trial court in chambers and Mr. Hughes presented a "memorandum of law." The court recessed the hearing without conducting the *in camera* inquiry requested by the State.

On 20 September 1978, the parties appeared before Judge Small to present arguments of law concerning the District Attorney's motion. The trial court had before it the District Attorney's motion and the memorandum of law filed by counsel for the Center which the court considered as a response to the State's motion. No evidence was offered other than the verified motion and copies of letters between Mr. Watts and Mr. Hughes. At the conclusion of the hearing, the trial court dismissed the action. The trial court's order contained, *inter alia*, the following (enumeration ours):

> (1) No criminal proceeding has been instituted alleging that any person has committed a violation of the homicide laws of the State of North Carolina which would grant this Court jurisdiction over the subject matter.
>
> (2) It appears to the Court that the State does not have the name of the alleged perpetrator of the crime, nor the name of an alleged victim of the crime, and does not know the date on which the alleged crime occurred, nor does it have information indicating the place where the alleged crime was committed so that venue may be established.

(3) No subpoena or other lawful process of the Court has been issued in any judicial proceeding giving the Court jurisdiction over the Albemarle Mental Health Center, its agents and employees, which enables the Court to have authority to compel disclosure of information possessed by the Albemarle Mental Health Center, and the Court is without authority in this proceeding to require the disclosure of privileged or nonprivileged information.

(4) Although the Court takes judicial notice that the State and society have a necessary interest in the investigation of all alleged homicides to the end that the person responsible may be apprehended and their guilt or innocence be judicially determined, upon the foregoing Findings of Fact the Court concludes as a matter of law that it is without jurisdiction to proceed and to determine the merits, rights and duties of the parties.

From entry of the order dismissing the proceeding, the petitioner, State of North Carolina, appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Donald W. Stephens, for the petitioner appellant.

Lennie L. Hughes for the respondent appellee.

MITCHELL, Judge.

The sole question on appeal is whether the trial court properly concluded that it was "without jurisdiction to proceed and to determine the merits, rights and duties of the parties."

[1] The State argues, and we agree, that this cause is in the nature of a special proceeding. G.S. 1-2 provides that "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." G.S. 1-3 provides that "Every other remedy is a special proceeding." Moreover, G.S. 1-394 provides in part that "Special proceedings against adverse parties shall be commenced as is prescribed for civil actions." Respondent argues that the trial court here was without jurisdiction because the proceeding was not commenced pursuant to G.S. 1A-1, Rule 3 which provides that a civil action may be commenced only by the

filing of a complaint or by the issuance of a summons with permission of the court to file complaint within twenty days. Clearly, this proceeding was not commenced pursuant to our statutory requirements for initiating a civil action. We do not agree, however, with the respondent's view that our law is so inflexible as to preclude the superior court's jurisdiction in a matter of such moment as presented by the facts before us.

The superior court is the proper trial division for an extraordinary proceeding of this nature. *See* G.S. 7A-246. The judicial power of the superior court is that which is granted by the Constitution and laws of the State. *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954). Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly. We believe that this is one of those extraordinary proceedings and that our rules of procedure should not be construed so literally as to frustrate the administration of justice.

Our legislature plainly intended that the implementation of the provisos in G.S. 8-53 and G.S. 8-53.3 be a function of the judiciary. By virtue of the failure of our legislature to provide precise statutory directions for fulfilling this responsibility, it becomes incumbent upon the courts to proceed in a manner consistent with law. The general rule is that:

> All powers, even though not judicial in their nature, which are incident to the discharge by the courts of their judicial functions, are inherent in the courts, and . . . [they have] such power as is necessary to the exercise of the judicial department as a coordinate branch of the government.

16 C.J.S. Constitutional Law § 144, p. 694 (1956). It has, for example, been held that it is an inherent power of courts to compel the attendance and testimony of witnesses. 97 C.J.S. Witnesses § 4, p. 351 (1957). Our own Supreme Court has indicated that the

absence of discovery as a matter of right does not necessarily preclude the trial judge from ordering discovery in his discretion. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). Federal courts have also recognized the judiciary's inherent power to compel pretrial discovery *where not specifically prohibited by statute. See United States v. Cannone*, 528 F. 2d 296 (2d Cir. 1975); *United States v. Jackson*, 508 F. 2d 1001 (7th Cir. 1975); *United States v. Richter*, 488 F. 2d 170 (9th Cir. 1973). In *Richter*, it was said that:

> "A federal court has the responsibility to supervise the administration of criminal justice in order to ensure (sic) fundamental fairness." (Citations omitted) It would be ill-advised to limit improvidently this inherent power for fear of misuse. The firing point of the legal system is with the trial judge who is best situated to administer the law and protect the rights of all. *Id.* at 173-74.

[2] The pertinent portion of G.S. 8-53 reads as follows: "[P]rovided, 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." We think that the legislature intended to employ the phrase "may compel such disclosure" in such manner as to authorize the court to require disclosure in all situations governed by G.S. 8-53 without exception, when disclosure "is necessary to a proper administration of justice."

While the proviso contained in G.S. 8-53.3 does not contain the precise language of the proviso to G.S. 8-53 specifically providing that the required disclosure may be prior to trial, we believe that such was the legislative intent. The pertinent portion of G.S. 8-53.3 reads as follows: "Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." It would be wholly inconsistent to allow disclosure in the case of a physician-patient relationship while, in a statute extending the rule to the psychologist-client relationship, precluding the required disclosure until the time of trial. We do not assume any such inconsistency on the part of our legislature. Further, we find nothing inherent in the wording of either statute that would *prohibit* the court in the proper administration of justice from requir-

ing disclosure prior to the initiation of criminal charges or the commencement of a civil action.

The heart of a statute is the intention of the law-making body. In performing our judicial tasks, "we must avoid a construction which will operate to defeat or impair the object of the statute, if we can reasonably do so without violence to the legislative language." *Ballard v. City of Charlotte*, 235 N.C. 484, 487, 70 S.E. 2d 575, 577 (1952). In construing a statute, we must view it as giving effect to the obvious intention of the legislature as manifested in the entire act and other acts in *pari materia*. 82 C.J.S. Statutes § 381b(1), p. 885 (1953). When so construed, we find the language of both G.S. 8-53 and G.S. 8-53.3 sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice.

[1] In the case at bar, the District Attorney, acting pursuant to G.S. 8-53.3, filed a motion in the superior court requesting that the court conduct an *in camera* hearing to determine whether the information in the possession of the director of the Mental Health Center and other employees was "necessary to a proper administration of justice." The court promptly issued an order requiring the director and other employees to appear in court and this notice was personally served by the Sheriff of Pasquotank County. We can think of no more effective or practical way to effectuate the intent of the proviso in question than through the employed procedure. To interpret our rules of procedure with the rigidity argued for by the respondent would do nothing more than require that we frustrate the ends of justice by an unwarranted insistence on compliance with rules which were not designed to embrace specifically the facts of a situation such as this. We think our legislature intended for the privileges provided by these statutes to be subservient to the greater cause of the proper administration of justice. Unfortunately, the legislature failed to specify the procedural steps for implementation. In such instances it becomes the responsibility of the judiciary, *in the absence of some express prohibition*, to effectuate the intent of our law by the exercise of its inherent or implied powers. The District Attorney diligently employed a practicable and workable procedure to bring the matter before the trial court. For the reasons

previously stated, the trial court improvidently dismissed the action for want of jurisdiction.

It is unnecessary to this decision for us to discuss the question of whether the information in the possession of the director of the Mental Health Center and the other employees is "necessary to a proper administration of justice" such that the shield provided by G.S. 8-53.3 should be withdrawn. Indeed, it will be the trial court's function on remand to conduct the requested *in camera* hearing and make this determination. Suffice it for us to say that we can think of no more pointed situation giving rise to implementation of the proviso in question than one in which a physician or psychologist or other affiliated personnel has information concerning an alleged homicide.

[2] We are advertent to the decisions of our Supreme Court in *Gustafson v. Gustafson*, 272 N.C. 452, 158 S.E. 2d 619 (1968); *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67 (1964); and *Yow v. Pittman*, 241 N.C. 69, 84 S.E. 2d 297 (1954). Those cases held that a superior court judge, prior to trial in a civil action, had no authority to compel a physician to submit to examination by opposing counsel through deposition or to submit to any pretrial examination regarding confidential communications between such physician and patient. In *Lockwood*, the Court also held that the judge referred to in the statute was the judge presiding at a trial on the merits. When these decisions were rendered, the proviso in G.S. 8-53 provided that "the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." However, following the decision in *Gustafson*, our legislature, in 1969, amended G.S. 8-53 and reworded the proviso so as to indicate the clear intent of the legislature that disclosure could be compelled prior to the time of trial. 1969 N.C. Sess. Laws Ch. 914. The proviso to G.S. 8-53 was again reworded by the legislature in 1977 and again indicated that clear intent of the legislature that disclosure could be compelled prior to the time of trial. 1977 N.C. Sess. Laws Ch. 1118. While the legislature on both occasions failed to reword the proviso in G.S. 8-53.3, which was enacted in 1967, the reworded proviso in G.S. 8-53 applies to G.S. 8-53.3 as well. Although each succeeding amendment to G.S. 8-53 has left that statute more inartfully drafted than before, the intent of the legislature remains clear. The two statutes, G.S. 8-53

and G.S. 8-53.3, are to be read in *pari materia.* When so read, they extend the physician-patient privilege to the psychologist-client situation and withdraw the privilege *in all situations* where "necessary to a proper administration of justice." The reasons for the exceptions to the privileges granted by the two statutes are the same and it would be discordant for us to fail to extend the latter amendment of one to the other.

Finally, we commend the parties to this action for their professional approach in seeking a resolution to the questions presented. Obviously, Mr. Franklin was concerned that the information he and his colleagues received should be brought to the attention of appropriate authority. Sensitive to his professional responsibilities, however, he consulted with counsel. Mr. Hughes, on the basis of case and statutory law, issued his opinion that employees of the Health Center were not at liberty to disclose the requested information. The District Attorney, sensitive to his responsibility to enforce the criminal law in his district, filed his motion before the trial court. The trial court, with little guidance from the General Statutes and, we suspect, from an abundance of caution, dismissed the action and the matter reaches us for decision.

For the reasons stated, the decision of the trial court must be reversed and remanded. On remand, the trial court is directed to conduct the requested *in camera* hearing and make its determination as to whether the employees of the Albemarle Mental Health Center should disclose information to either the District Attorney or appropriate law enforcement authorities.

Reversed and remanded.

Judges PARKER and ERWIN concur.

JAMES HARRELL EDWARDS v. TRELBY BUMGARNER EDWARDS

No. 782DC1021

(Filed 17 July 1979)

1. **Divorce and Alimony § 2.1— action for absolute divorce—no compulsory claim in prior action**

Plaintiff's action for absolute divorce on the ground of one year's separation was not such a claim as he was compelled by G.S. 1A-1, Rule 13(a) to file in his prior pending action for divorce from bed and board, since the earlier action, based on allegations that defendant had offered such indignities as to render plaintiff's condition intolerable and his life burdensome, was filed one day after the parties separated, and it was thus apparent that at the time plaintiff instituted the prior action and at the time he was called upon to plead in response to his wife's counterclaim for alimony therein, the grounds upon which he based his subsequent action for absolute divorce did not exist.

2. **Divorce and Alimony § 20.1— absolute divorce—effect on claim for alimony**

A stay of plaintiff's action for absolute divorce was not required pending resolution of defendant's counterclaim for alimony in plaintiff's earlier action for divorce from bed and board, since defendant's claim for alimony would not be affected by the granting of an absolute divorce to plaintiff. G.S. 50-6.

3. **Divorce and Alimony § 20.1; Constitutional Law § 20— right to alimony preserved by statute—no denial of equal protection**

There was no merit to defendant's contention that G.S. 50-6 violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status, since the equal protection clauses of the State and Federal Constitutions prohibit the denial of the equal protection of the laws to persons, not to rights.

4. **Rules of Civil Procedure § 56— absolute divorce action—summary judgment inappropriate**

A summary judgment may not be entered granting an absolute divorce in this State, since G.S. 50-10 creates a genuine issue as to the material facts whether or not the parties raise such an issue and even where they attempt to admit or stipulate the facts.

5. **Divorce and Alimony § 2.4— absolute divorce action—jury trial demanded—denial improper**

The trial court in an action for absolute divorce erred in finding the facts itself without a jury where defendant timely demanded a jury trial in her answer and continued to insist on a jury trial at the hearing before the judge.

APPEAL by defendant from *Noble, Judge*. Judgment entered 13 September 1978 in District Court, CALDWELL County. Heard in the Court of Appeals 25 June 1979.

Plaintiff and defendant were married 30 June 1967. They had no children. On 26 December 1976 they separated and since that date they have lived continuously separate and apart.

On 19 June 1978 plaintiff husband instituted this action pursuant to G.S. 50-6 to obtain an absolute divorce on the grounds of one year's separation. On 6 July 1978 defendant wife filed answer in which she admitted the allegations in the complaint concerning the residence of the parties, their marriage, their separation, and their living continuously separate and apart since 26 December 1976. As defenses, she pled that plaintiff had abandoned her without just cause and that there was a prior divorce action pending between the parties brought by plaintiff in which defendant had filed a counterclaim seeking permanent alimony, which action had not been finally determined and thus defendant's claim for alimony had not been fully and finally adjudicated. In her answer, defendant demanded a jury trial.

On 7 August 1978 defendant amended her answer to add allegations that G.S. 50-6 as amended effective 16 June 1978 is unconstitutional in that it deprives defendant of property without due process of law and violates the equal protection clause in that alimony rights of a dependent spouse are protected but property rights are not. As a further defense defendant pled adultery on the part of the plaintiff as a bar to his action for divorce.

Plaintiff moved for summary judgment granting him a divorce. When the motion came on for hearing, defendant moved to dismiss plaintiff's action on the grounds that the claim for divorce should be filed as a compulsory claim in the prior existing action between the parties. The court denied defendant's motion. The plaintiff then testified on direct and cross-examination and presented the testimony of a corroborating witness to prove the facts alleged in the complaint. At the conclusion of the hearing the court announced it would allow plaintiff's motion for summary judgment for an absolute divorce, overruling defendant's various objections, including the claim that G.S. 50-6 as amended is unconstitutional. The court then signed judgment containing the following:

> After hearing the evidence, argument of counsel and upon reviewing the record and pleadings herein, the Court makes the further findings of fact and conclusions of law:

A. No material questions of fact are raised by the evidence or pleadings in this cause;

B. The Court finds the facts to be as alleged in Plaintiff's Complaint, to wit: Plaintiff has been a citizen and resident of North Carolina for six months next preceding the institution of this action; the parties were lawfully married on June 30, 1967 and lived together as man and wife until they separated on December 26, 1976; that the parties have lived separate and apart since December 26, 1976 continuously and have in no wise resumed their marital relationship.

Based upon the foregoing findings of fact, the Court concludes as a matter of law that:

I. North Carolina General Statute section 50-6, as amended, is constitutional insofar as it permits Plaintiff to obtain an absolute divorce and as applied to the parties herein.

II. That the Plaintiff is entitled to judgment for absolute divorce.

III. That the entry of a judgment for absolute divorce in this cause does not affect such property rights as the Defendant may have or may acquire by reason of any litigation pending between the parties prior to the institution of this action.

IT IS NOW, on motion of West and Groome, Attorneys for the Plaintiff, ORDERED, ADJUDGED, and DECREED that the Plaintiff, James Harrell Edwards, be and he is hereby granted an absolute divorce from the Defendant, Trelby Bumgarner Edwards, and the bonds of matrimony heretofore existing between the Plaintiff and the Defendant be and they are hereby dissolved.

From this judgment, defendant appeals.

West and Groome by Ted G. West, H. Houston Groome, Jr., and Edward H. Blair, Jr., for plaintiff appellee.

James, McElroy & Diehl by William K. Diehl, Jr., Dale S. Morrison, and David M. Kern for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the trial court's action in denying her motion to dismiss plaintiff's action on the grounds that it must be brought as an additional claim in the existing suit between the parties. We find no error in this regard.

Gardner v. Gardner, 294 N.C. 172, 240 S.E. 2d 399 (1978), relied on by defendant, is distinguishable. In *Gardner*, the wife on 12 May 1976 filed an action for alimony without divorce on the ground, among others, that her husband had abandoned her on 28 May 1975. While this action was pending and before filing answer therein, the husband on 1 June 1976 filed an action for absolute divorce on the ground of one year's separation beginning 28 May 1975. The wife moved that the husband's action be dismissed on the ground of her prior action pending or, in the alternative, that the husband's action be stayed until her action could be determined. Her motion was denied. To review this ruling the wife petitioned this Court for a writ of certiorari, which petition was denied. The Supreme Court then granted her petition for discretionary review, finding error in the trial court's denial of the wife's motion, holding that the husband's claim for absolute divorce may be denominated a compulsory counterclaim under G.S. 1A-1, Rule 13(a) in the wife's prior action for alimony without divorce and that the husband's action must be dismissed with leave to file it as a counterclaim in the wife's action or stayed pending entry of final judgment in the wife's action.

In reaching this conclusion, Justice Exum, speaking for our Supreme Court, reasoned:

> We are satisfied the husband's claim for divorce may be denominated a compulsory counterclaim. It arises out of the same transaction or occurrence that forms the basis for the wife's abandonment claim. The wife contends the husband abandoned her 28 May 1975. The husband contends his leaving was a separation entitling him to a divorce. Although when this case was argued the husband had not filed an answer, his claim had accrued in time for him to have filed it with his answer when the answer became due.

294 N.C. at 176, 240 S.E. 2d at 403.

In the present case the husband's action for absolute divorce did not arise out of the same transaction or occurrence that forms the basis of any claim asserted by either party in the prior action. The prior action was instituted by the husband on 10 December 1976. By an amended complaint filed and served on 27 December 1976 he alleged that defendant wife had offered such indignities as to render his condition intolerable and his life burdensome, and on these allegations he prayed for a divorce from bed and board. On 24 March 1977 defendant wife filed answer and counterclaim, alleging indignities and adultery on the part of the husband and seeking an award of alimony. It is thus apparent that at the time the plaintiff husband instituted the prior action and at the time he was called upon to plead in response to his wife's counterclaim for alimony therein, the grounds upon which he bases his present action for an absolute divorce did not exist. Under these circumstances we hold that plaintiff's present action for an absolute divorce was not such a claim as he was compelled by G.S. 1A-1, Rule 13(a) to file in the prior pending action.

[2] Nor, since the effective date of the amendment to G.S. 50-6 made by Ch. 1190, sec. 1 of the 1977 Session Laws, does any reason remain for requiring a stay of the present action pending resolution of the defendant-wife's counterclaim for alimony in the prior action. That amendement, which became effective 16 June 1978, three days prior to institution of the present action, added the following to G.S. 50-6:

> 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. Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section obtained by a supporting spouse shall not affect the rights of the dependent spouse with respect to alimony which have been asserted in the action or any other pending action.

Defendant-wife's claim for alimony, having been asserted in the prior action, will not be affected by an absolute divorce obtained by plaintiff-husband in the present action.

[3] We find no merit in defendant's contention that G.S. 50-6 as amended is unconstitutional because it violates the equal protection clauses contained in the Fourteenth Amendment to the

Federal Constitution and in Art. 1, Sec. 19 of our State Constitution. The gist of defendant's argument in this connection seems to be that the amended G.S. 50-6 violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status. This argument is beside the mark. The equal protection clauses of our State and Federal Constitutions prohibit the denial of the equal protection of the laws to *persons*, not to rights.

[4] Defendant assigns error "[t]o the Court entering a summary judgment granting Plaintiff a divorce in the face of Defendant's demand for a jury trial, regardless of the uncontested nature of the facts alleged in Plaintiff's complaint." In discussing this assignment of error, we note at the outset that a summary judgment may not be entered granting an absolute divorce in this State. This is so because G.S. 50-10 contains the following express provisions:

> The material facts in every complaint asking for a divorce or for an annulment shall be deemed denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint *until such facts have been found by a judge or jury*. The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39. (Emphasis added.)

A summary judgment, provided for in our practice by G.S. 1A-1, Rule 56, should be entered only where it is shown that "there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." By virtue of G.S. 50-10 the material facts in a divorce action are "deemed denied by the defendant, whether the same shall actually be denied by pleading or not." Thus, in a divorce action the statute creates a genuine issue as to the material facts whether or not the parties raise such an issue and even where they attempt to admit or stipulate the facts. If it is necessary for the court or the jury to find the material facts, as G.S. 50-10 makes mandatory in a divorce action, summary judgment may not be entered. Therefore, a divorce decree may not be granted by way of a summary judgment, and if

such a decree had been entered in this case, it would have been error. Examination of the record reveals, however, that although plaintiff moved for a summary judgment and the court at one point seemed to indicate that it was allowing the motion, what actually occurred was that the court heard the testimony of witnesses, who were subject to cross-examination by defendant's counsel, and after hearing this evidence and on the basis thereof, the court found the facts as required by G.S. 50-10. Thus, the judgment entered in this case was not a summary judgment but was one rendered by the court after making appropriate findings of fact.

[5] The question remains whether the court, in the face of defendant's timely demand for a jury trial made in her answer, and in the face of defendant's continued insistence on a jury trial made at the hearing, committed error by finding the facts itself without a jury. We find error in this regard. G.S. 50-10 expressly provides that "[t]he determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39." As already noted, G.S. 50-10 itself raises issues in a divorce action as to all material facts, regardless of whether the parties by their pleadings have raised any issue and even where, as here, all material facts are admitted. Thus, G.S. 50-10 has the effect of prohibiting entry of a divorce decree by consent, stipulation, or admissions of the parties, and requires instead that all material facts be found, either by a jury where the right to a jury trial has been preserved as provided in G.S. 1A-1, Rules 38 and 39, or by the court in case a jury trial has been waived. In the present case, the defendant in apt time and manner demanded a jury trial and did not thereafter waive but continued to assert her right to a jury trial. It may seem futile for defendant to insist upon a trial by jury when, but for G.S. 50-10, no real issue exists. That statute, however, gives her the right to do so, and the trial court erred in denying her right to have the facts found in a trial by jury.

For failure to accord defendant a jury trial, the judgment appealed from is vacated and this cause is remanded for a

New trial.

Judges ERWIN and MARTIN (Harry C.) concur.

GOTZ GRUNDEY v. CLARK TRANSFER COMPANY, INC.

No. 7821SC936

(Filed 17 July 1979)

1. **Uniform Commercial Code § 37; Warehousemen § 1— issuance of warehouse receipt—delivery not necessary**

A warehouse receipt need not be delivered in order to be issued, but must be sent forth.

2. **Uniform Commercial Code § 37; Warehousemen § 1— proper issuance of warehouse receipt—material question of fact**

The proper issuance of a warehouse receipt required not only a mailing of the receipt to the owner of the stored goods but a mailing to the proper address. An issue of material fact existed as to whether a warehouse receipt was properly issued where defendant warehouseman alleged the current address it had for plaintiff owner was in Boone, N. C., and plaintiff alleged he notified defendant by telephone that his address had been changed to Stuart, Fla.

3. **Uniform Commercial Code § 37; Warehousemen § 1— sale of goods to satisfy warehouseman's lien—compliance with U.C.C.**

In this action to recover the value of goods sold to satisfy a warehouseman's lien, the trial court erred in striking defendant warehouseman's defense that it had complied with the requirements of G.S. Ch. 25 in the issuance of a warehouse receipt and sale of the goods.

4. **Uniform Commercial Code § 37; Warehousemen § 1— sale of goods to satisfy warehouseman's lien—effect of insufficient description**

A newspaper advertisement description of goods to be sold to satisfy a warehouseman's lien as the "household goods" of a named person was insufficient to satisfy the requirements of G.S. 25-7-210(2)(f); however, the insufficient description did not invalidate the sale but entitled the owner of the goods to whatever damages he could prove resulted from noncompliance with the statute.

APPEAL by defendant from *Rousseau, Judge*. Order filed 17 July 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 June 1979.

Plaintiff by his complaint alleges the following:

Defendant is in the business of moving and storing furniture and other personal property. In August 1975 plaintiff contracted with defendant for the transportation of plaintiff's furniture and other personal property from Benson, North Carolina to Statesville, North Carolina. The property, worth at least $8,000, was picked up by defendant's agents. Subsequently, plaintiff changed

his plans, and instructed Jim Rhoney, defendant's agent, not to deliver his property to Statesville. The parties agreed that defendant would store plaintiff's property until plaintiff's destination was finally determined, in exchange for a storage fee to be paid in addition to the original transportation fee.

During the next two months, plaintiff telephoned defendant on several occasions to keep defendant apprised of his whereabouts. Defendant made no demand for payment of plaintiff's bills and did not object to continuing to store the property. In September 1975 plaintiff contacted Rhoney and advised him that plaintiff's employer had agreed to pay his moving expenses. Plaintiff requested a bill for his employer, and received a bill of $654.31. He passed this bill on to his employer and assumed that it had been paid.

In November 1975 plaintiff called defendant and left with an employee his address and phone number in Stuart, Florida. No mention was made of the bill not having been paid, and plaintiff was never contacted in Stuart. In December or January plaintiff moved to Jupiter, Florida and in May to Hilton Head, South Carolina, leaving a forwarding address in Stuart. Plaintiff never heard from defendant.

On 27 July 1976 plaintiff telephoned defendant to have his property delivered to an address in Hilton Head. He was advised by an employee of defendant that all of his furniture and personal property had been sold at public auction.

Plaintiff contends in the alternative: that defendant failed to comply with the statutory procedures for enforcement of possessory liens on personal property; that defendant as bailee is liable to plaintiff for its inability to return plaintiff's property; that defendant breached the contract between the parties; and that defendant is liable for the conversion of plaintiff's property.

Defendant moved to dismiss for failure to state a claim upon which relief can be granted, and for summary judgment. These motions were denied by Judge Lupton. The parties filed and answered interrogatories and defendant filed its answer and counterclaim, alleging that it had complied with the applicable statutes and seeking to recover from plaintiff the $85.12 of plaintiff's bill not covered by the proceeds from the sale of his property.

Plaintiff moved to strike defendant's Sixth Defense and in the alternative for summary judgment on that defense, which alleged that Chapter 25 and not Chapter 44A of the General Statutes applied to the transaction between the parties. Defendant moved for summary judgment or partial summary judgment on the same matter. Judge Rousseau concluded that as a matter of law Chapter 44A does not apply to the transaction, that defendant had failed to comply with the requirements of Chapter 25, and that any defense based on Chapter 25 should be stricken. Accordingly, plaintiff's motions were granted and defendant's motion for partial summary judgment was granted in part. Defendant appeals.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for plaintiff appellee.

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

ARNOLD, Judge.

Defendant contends that plaintiff's motion for summary judgment was improperly granted. For this to be so, there must exist a genuine issue of material fact, or it must be *defendant* who was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c).

Defendant's Sixth Defense, which was the subject of the motion, alleges that it is Chapter 25 and not Chapter 44A of the General Statutes which applies to the transaction between the parties. The trial court found that Chapter 25 is the applicable statute, but found further that defendant had failed to comply with the requirements of Chapter 25.

Plaintiff does not contest on appeal the trial court's ruling that Chapter 25 of the General Statutes controls the transaction between the parties, so the initial question for our determination is whether any genuine issue of material fact exists with regard to the defendant's compliance with Chapter 25.

Chapter 25 of the General Statutes is the Uniform Commercial Code. Defendant, agreed by the parties to be a "warehouseman" within the meaning of G.S. 25-7-102(1)(h), has a lien under Chapter 25 against the plaintiff as bailor if the goods are "covered by a warehouse receipt." G.S. 25-7-209(1). A warehouse receipt is "a receipt issued by a person engaged in the business of

storing goods for hire." G.S. 25-1-201(45). Plaintiff argues that no lien attached because a warehouse receipt was never properly issued by defendant.

Defendant's Exhibit A is a "Non-Negotiable Warehouse Receipt" made out in pertinent part as follows:

NON-NEGOTIABLE WAREHOUSE RECEIPT — CLARK TRANSFER CO., INC.

RECEIVED FOR THE ACCOUNT OF Mr. G. Grundey
WHOSE LATEST KNOWN ADDRESS IS Ramada Inn
Route 105, Boone, N. C.
GOODS ENUMERATED AND DESCRIBED ON INVENTORY,
IN CONDITION DESCRIBED THEREIN TO BE STORED
AT WAREHOUSE LOCATED AT 322 S. LIBERTY ST.
UPON TERMS AND CONDITIONS LISTED BELOW:

RATE OF STORAGE PER MONTH 50.56
WAREHOUSE HANDLING —0—
RATE OF INSURANCE PER MONTH _____
WEIGHT 6320

A written order bearing same signature as owner's signature below must be presented before withdrawing any goods, and or surrender of this receipt.

ALL CHARGES MUST BE PAID BEFORE DELIVERY OF GOODS.
UNDER TERMS OF CONTRACT, ACCOUNTS ARE PAYABLE
MONTHLY IN ADVANCE.

WAREHOUSEMAN'S LIABILITY SHALL NOT EXCEED
THE STATUTORY LEGAL LIABILITY OF CLARK
TRANSFER CO., INC.

S / (illegible)
SIGNATURE OF WAREHOUSEMAN

_____
SIGNATURE OF OWNER

Defendant, by answer to interrogatories, indicates that this receipt was made out on 10 December 1975, at the time when the tariff laws changed the status of plaintiff's property from "in transit" to "permanent storage," and mailed to plaintiff. Plaintiff

contends that the receipt was not properly issued because he never received it, and did not sign it.

[1] We consider first whether delivery to the bailor is an essential element of the issuance of a warehouse receipt. The term "issue" is not defined in either G.S. 25-1-201, the general definitions section of Chapter 25, or G.S. 25-7-102, which provides definitions for Article 7. Plaintiff would have us apply the definition of "issue" given in G.S. 25-3-102(1)(a), but that definition by its terms applies only to Article 3, and Article 3 expressly does not cover documents of title, G.S. 25-3-103(1), of which warehouse receipts are a part. G.S. 25-1-201(15). The parties have cited to us no cases, and we have found none, which have dealt with the definition of "issue" in the context of G.S. 25-1-201(45). Accordingly, we must look outside the statute. Black's Law Dictionary 964 (Rev. 4th ed. 1968) defines "issue" as "[t]o send forth; to emit." This accords with the numerous definitions found in Webster's Third New International Dictionary 1201 (1968) and is the ordinary sense of the word. We note also that had the legislature meant to require delivery, it could have said so. We hold, therefore, that a warehouse receipt need not be *delivered* in order to be issued, but must be *sent forth.*

[2] Defendant's uncontradicted testimony is that the receipt was mailed to plaintiff, but this does not end the inquiry. Issuance in this context requires not only mailing, but mailing to the proper address. Plaintiff alleges that as a result of a telephone call he made to defendant in November 1975, defendant was aware that his current address was in Stuart, Florida. Defendant denies receiving this telephone call, and alleges that the current address it held for plaintiff was in Boone, North Carolina. The record does not show to which address the receipt was mailed. Assuming that it was mailed to the Boone, North Carolina, address, the question remains whether defendant was or should have been in fact aware that plaintiff previously had changed his address to Stuart, Florida. The question of whether defendant mailed the receipt to the proper address is disputed by the parties, and must be determined by the trier of fact. Since there is an issue as to this material fact, summary judgment for either party is not proper.

[3] Defendant argues further that plaintiff's motion to strike its Sixth Defense was improperly allowed. Defendant is correct. G.S.

1A-1, Rule 12(f) provides that "the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." Defendant's Sixth Defense alleges, in essence, its compliance with Chapter 25. Plaintiff moved to strike on the ground that Chapter 25 did not apply to the transaction between the parties. As the trial court has determined that Chapter 25 does apply, Defendant's Sixth Defense is neither irrelevant nor immaterial. Nor is the defense redundant, impertinent nor scandalous. Far from being an insufficient defense, this defense, if proved, will avoid liability on defendant's part. We hold that plaintiff's motion to strike defendant's Sixth Defense should have been denied.

If defendant proves at trial that it properly issued the warehouse receipt and a lien accordingly attached, there will remain the question of whether defendant complied with the statutory procedures for enforcement of that lien. In the interest of efficiency we set out here our conclusion that in at least one respect defendant failed to comply.

[4] G.S. 25-7-210(2) provides the sole procedure for enforcement of a warehouseman's lien. Subsection (f) requires that after the owner of the goods is notified of a pending sale, "an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include *a description of the goods* . . . ." (Emphasis added.) The advertisement inserted by defendant in the Winston-Salem Journal read as follows:

> We will on the 29nd day of May, 1976, expose for sale at public auction at 322 Liberty St., S.W., Winston-Salem, N.C. at 2 o'clock p.m. the following lot of household goods, to wit: The property of G. Grundey, for the purpose of satisfying our lien against the aforesaid household goods on account of storage and other charges.

We find that this advertisement does not include a description of the goods sufficient to comply with subsection (f). We believe that the purpose of the requirement is to insure that those who might be interested in buying the items will be present at the sale. This purpose is not adequately served by the use of the general term "household goods," where, as here, the goods to be sold include such varied items as a stereo, color TV, lawn

mower, aquarium, and washing machine. Defendant's noncompliance with subsection (f) does not invalidate the sale, but it does entitle plaintiff to whatever damages he can prove resulted from the noncompliance.

To summarize: Since there exists a genuine issue as to whether defendant followed the necessary procedures for attachment of a warehouseman's lien, neither party is entitled to summary judgment. Defendant is entitled to pursue its Sixth Defense. Plaintiff is entitled to any damages he can prove resulted from defendant's noncompliance with G.S. 25-7-210(2)(f). The order of the trial court denying summary judgment to defendant is affirmed. The order granting plaintiff's motions to strike and for summary judgment is reversed, and the case is remanded for trial.

Affirmed in part and reversed in part, and remanded.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, APPELLEE v. RAIL COMMON CARRIERS—FILING PROPOSING INCREASED RATES, SCHEDULED TO BECOME EFFECTIVE MARCH 24, 1978, APPELLANTS

No. 7810UC990

(Filed 17 July 1979)

1. **Utilities Commission § 4— rate regulation—nature of case presented to Commission—evidence to support determination**

The Utilities Commission's determination with regard to the nature of the case presented must be supported by competent, material and substantial evidence in view of the entire record as submitted. G.S. 62-94(b)(5).

2. **Utilities Commission § 10— rail carriers—rate regulation—determination as to general rate case unsupported by evidence**

The Utilities Commission had insufficient evidence before it to support its determination that a proposed rate increase by appellant rail carriers was a general rate increase where the only information before the Commission at the time it entered its first order was the filing made by the carriers which contained little more than notice that the carriers proposed an increase of 10% in line-haul rates and charges on unmanufactured tobacco, applicable to intrastate shipments within N. C.; at the time the Commission entered its second order the only additional information before it was a table showing that the in-

trastate transportation of unmanufactured tobacco generated 458 carloads or approximately 0.65% of the carloads and approximately 1.02% of the revenues derived annually by the Southern Railway System from the intrastate transportation of commodities in N. C.; and the information before the Commission was insufficient to establish that the proposed rate increase involved anything other than the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which did not require a determination of the entire rate structure and overall rate of return. G.S. 62-137.

Judge MARTIN (Robert M.) concurs in the result.

APPEAL by applicants from orders of the North Carolina Utilities Commission entered 14 March 1978 and 10 August 1978. Heard in the Court of Appeals 28 June 1979.

During February of 1978, Mr. Montague C. Steele, Tariff Publishing Officer, Southern Freight Tariff Bureau, Southern Freight Association, filed a tariff schedule with the North Carolina Utilities Commission [hereinafter "Commission"] for and on behalf of certain rail common carriers operating in North Carolina. That tariff schedule contained a proposal to increase the carriers' rates and charges on all intrastate line-haul shipments of unmanufactured tobacco within North Carolina by 10 percent effective 24 March 1978. The Commission responded on 14 March 1978 by entering an order stating in part that:

> Upon consideration of the tariff filing and the matter as a whole, the Commission is of the opinion, finds and concludes, that the proposed increase involved herein is a matter affecting the public interest and that this filing constitutes a general increase as provided in GS 62-137. The Commission further concludes that under the circumstances and conditions hereinbefore enumerated, the tariff filing should be rejected by the Commission for failure to comply with Rule R1-17, and GS 62-300(3); provided, however, that this rejection should be without prejudice to the carriers' right to refile.

The Commission rejected the tariff schedule as filed and ordered the carriers to make an appropriate publication showing that the proposed tariff, which previously had been published, had been rejected and canceled with regard to transportation of traffic in intrastate commerce within North Carolina. Commissioner Ed-

ward B. Hipp filed a dissenting opinion. From the entry of that order by the Commission, the carriers gave notice of appeal.

In addition, the carriers filed a motion for a rehearing which the Commission granted. Attached to that motion was a table purporting to show the number of railroad cars used in hauling particular commodities in the Southern Railway System during 1976 and the revenue derived therefrom. According to that table, carloads of unmanufactured tobacco accounted for approximately 0.65 percent of the carloads of commodities transported intrastate and generated approximately 1.02 percent of the revenues that the Southern Railway System derived from the intrastate transportation of commodities.

A hearing was conducted on 27 June 1978 and oral arguments were presented to the Commission. The Commission entered an order on 10 August 1978 stating, in part, that:

> After further hearings on exceptions before the full Commission, and upon review of the entire record in this docket, including oral argument on exceptions, the Commission concludes that the Exceptions filed on April 11, 1978 should be overruled, and that the Commission should affirm and adopt the filings (sic) and conclusions contained in its Order of March 14, 1978. The Commission finds and concludes that the tariff filing involved a general rate case under GS 62-137 and that the Applicants failed to comply with GS 62-300 and N.C.U.C. Rule R1-17.

Commissioner Hipp, joined by Commission Chairman Robert K. Koger, dissented from the order of 10 August 1978. From the Commission's order of 10 August 1978 and its order of 14 March 1978, the carriers appealed to this Court.

Other facts pertinent to this appeal are hereinafter set forth.

Joyner & Howison, by W. T. Joyner, Jr. and Odes L. Stroupe, Jr.; and Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander; for applicants appellants.

North Carolina Utilities Commission Public Staff, by Hugh A. Wells, Executive Director, Jerry B. Fruitt, Chief Counsel and Theodore C. Brown, Jr., Staff Attorney, for the using and consuming public.

MITCHELL, Judge.

The sole assignment of error presented on appeal by the appellant carriers is that the Commission erred in its determination that the proposed rate increase by the carriers is a general rate increase, which finding would require the carriers to furnish information and fees in compliance with the requirements of G.S. 62-133 and G.S. 62-300 governing general rate cases and would require the Commission to hold its hearings in compliance with G.S. 62-133. In support of this assignment, the carriers contend that the Commission exceeded its authority under G.S. 62-137 to determine whether a case is a general rate case in order to set the scope of a hearing relative to a proposed increase in rates. They further contend the proposed increase in rates is confined to the reasonableness of a specific single rate which is a small part of the rate structure and, therefore, does not constitute a general rate case. In response to the assignment and contentions of the carriers, the Commission contends that G.S. 62-137 makes it the province of the Commission to determine whether a given case will be a general rate case under G.S. 62-133, and that such determination by the Commission is not reviewable. The Commission alternatively contends that, even if its determination is reviewable, the determination is correct.

The Commission is vested with powers to exercise some functions judicial in nature and some functions legislative in nature. It does not possess the full powers of either branch, however, but only that portion of each conferred upon it in G.S. Chapter 62. *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). It is specifically provided in G.S. 62-60 that:

> For the purpose of conducting hearings, making decisions and issuing orders, . . . the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.

When the Commission exercises its powers to make decisions and issue final orders, those decisions and orders must contain "Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record. . . ." G.S. 62-79(a)(1). The Commission is required to "ren-

der its decisions upon questions of law and of fact in the same manner as a court of record." G.S. 62-60. Therefore, the Commission's findings must be, as a matter of law, supported by competent evidence. *See Utilities Commission v. Towing Corp.*, 251 N.C. 105, 110 S.E. 2d 886 (1959). All relevant questions of law may be reviewed by this Court on appeal. Thus, it is proper for us to decide, among other questions of law, whether the findings of fact made by the Commission and contained in its orders are supported by competent, material and substantial evidence. G.S. 62-94(b)(5).

[1] The correctness *vel non* of the Commission's declaration with regard to the nature of a case involving rates is determined by deciding:

> whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return.

G.S. 62-137. The question of whether the case "is to be a general rate case" under the terms of G.S. 62-137 is a mixed question of law and fact. As to such questions, courts should be hesitant to disturb the Commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the Commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." G.S. 62-94(b)(5).

[2] At the time the Commission entered its order of 14 March 1978, it had before it only the February filing made on behalf of the carriers. That filing contained little more than notice that the carriers proposed an increase of 10 percent in line-haul rates and charges on unmanufactured tobacco, applicable to intrastate shipments within North Carolina. This did not constitute sufficient evidence in the record to support either the Commission's determination that the case was to be a general rate case or the action of the Commission. This is particularly true in light of the

fact that here the Commission, rather than merely setting the scope of the case pursuant to G.S. 62-137, proceeded to reject the filing altogether.

When the Commission entered its order of 10 August 1978, the only information before it in addition to that contained in the carriers' February filing was a table which was attached to the carriers' motion for rehearing and is a part of the record on appeal. When the information contained in that table is reviewed in the light most favorable to the Commission, it shows that the intrastate transportation of unmanufactured tobacco generated 458 carloads or approximately 0.65 percent of the carloads and approximately 1.02 percent of the revenues derived annually by the Southern Railway System from the intrastate transportation of commodities in North Carolina. Assuming *arguendo* that the Commission had authority to enter further orders after the carriers gave notice of appeal from the order of 14 March 1978 such information, standing alone was not sufficient to support, as a matter of law, findings of fact and conclusions of law determining that the proposed rate increase was a general rate increase. The information before the Commission remained insufficient to establish in and of itself that the proposed increase involved anything other than "the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return." G.S. 62-137. Nothing contained in the filings of the carriers, for example, indicated whether the figures for long haul intrastate shipment of tobacco involved one or more than one shipper. The information similarly fails to reveal the number of separate contracts for shipment relating to the 458 carloads of tobacco hauled intrastate or whether they were all hauled pursuant to one contract or agreement.

As the Commission based its orders rejecting the carriers' filing upon a determination of the nature of the case before it which was itself not based upon findings supported by competent, material and substantial evidence in view of the entire record, the orders of the Commission were erroneously entered. The orders of the Commission which are the subject of this appeal must be vacated and the case remanded to the Commission for further action in accordance with applicable law.

In their brief and during oral arguments before us in this case, the carriers have urged us to render a comprehensive opinion defining and distinguishing general rate cases controlled by G.S. 62-133, tariff filings seeking changes in rates controlled by G.S. 62-134 and cases involving complaints. We decline to take advantage of this opportunity, however, as such determinations are best left, at least in the first instance, to the legislature or to the Commission in its expert exercise of the legislative powers conferred upon it by G.S. 62-31 to make and enforce rules and regulations for public utilities. The record before us clearly indicates that the Commission has under consideration proposed new rules which would answer the very questions the carriers seek to have us address. Thus, we are confident the parties will present us with ample future opportunities to reach these issues, and we decline to reach them here.

The orders entered by the Commission on 14 March 1978 and 10 August 1978 are hereby vacated and the case remanded to the Commission.

Vacated and remanded.

Judge WEBB concurs.

Judge MARTIN (Robert M.) concurs in the result.

STATE OF NORTH CAROLINA v. DAVID RAY WHITE

No. 794SC210

(Filed 17 July 1979)

Parent and Child § 1.1— child born during marriage—access by husband and another—presumption that husband is child's father

In a prosecution for abandonment and nonsupport of a child born during defendant's marriage to the child's mother, defendant was conclusively presumed to be the father of the child where the evidence showed that defendant had access to the child's mother up to 265 days before birth of the child, which is within the normal period of gestation of 7 to 10 months; the mother lived in adultery with another for a period of several months beginning 262 days before the birth of the child; and defendant offered no evidence that he could not be the father of the child.

Judge CARLTON dissenting.

State v. White

APPEAL by defendant from *Strickland, Judge.* Judgment entered 5 December 1978 in Superior Court, JONES County. Heard in the Court of Appeals 24 May 1979.

Defendant was convicted as charged of abandonment and nonsupport of his child born of his marriage with Dawn White.

At trial the wife, Dawn White, for the State, testified that she married defendant in January 1976; that she separated from him on 12 August 1977 and went to the home of a friend for three days; that on 15 August she went to Asheville to live with Carl Pinnley and they had sexual relations.

The child was born on 4 May 1978, 265 days after her separation from defendant.

Defendant offered evidence tending to show that Carl Pinnley had written love letters to Dawn White after she was married; that he had sexual relations with her beginning in August 1977, when she stayed with him in Asheville; and that he visited her several times after she returned to New Bern.

Defendant appeals from the judgment imposing a prison term of 6 months suspended upon support payments of $25 per week and court costs.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick for the State.

Ward and Smith by Thomas E. Harris for defendant appellant.

CLARK, Judge.

If the husband has access to his wife up to 265 days before birth of the child and the wife thereafter lives in adultery for a period of several months beginning 262 days before birth, is the husband conclusively presumed to be the father of the child?

The trial court answered this question in the affirmative by charging in pertinent part that the "normal period of gestation . . . . [m]ay be anywhere from seven, eight, nine, nine and a half or ten months from the date of birth of the child, and the only way the assumption of legitimacy may be rebutted is by evidence

tending to show the husband could not have had access to the wife during the period of time referred to."

Did the court err in so instructing the jury? We have found the law in North Carolina somewhat confusing, both on the question of the period of gestation and the presumption of legitimacy.

Judicial notice that the normal period of gestation is between seven to ten months was first recognized in *State v. Key*, 248 N.C. 246, 102 S.E. 2d 844 (1958), and followed in *State v. Hickman*, 8 N.C. App. 583, 174 S.E. 2d 609, *cert. denied*, 277 N.C. 115 (1970); and *State v. Snyder*, 3 N.C. App. 114, 164 S.E. 2d 42 (1968). Other cases support the presumption that the child was conceived 280 days, or ten lunar months, prior to the date of birth. *Mackie v. Mackie*, 230 N.C. 152, 52 S.E. 2d 352 (1949); *State v. Bryant*, 228 N.C. 641, 46 S.E. 2d 847 (1948); *State v. Forte*, 222 N.C. 537, 23 S.E. 2d 842 (1943). In *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968), the court commented that protracted pregnancies of more than 280 days, while uncommon, are not considered extraordinary. In *Searcy v. Justice*, 20 N.C. App. 559, 562, 202 S.E. 2d 314, 316, *cert. denied*, 285 N.C. 235, 204 S.E. 2d 25 (1974), quoting 3 Lee, N.C. Family Law, § 250 at 191-92 (1963), the court stated: " 'There is neither medical nor legal agreement as to the period of gestation in human beings.' "

The presumption that the child was lawfully begotten in wedlock is conclusive if there were access. *Eubanks v. Eubanks, supra*; *Ray v. Ray*, 219 N.C. 217, 13 S.E. 2d 224 (1941). *See Bailey v. Matthews*, 36 N.C. App. 316, 244 S.E. 2d 191 (1978). In *State v. Greene*, 210 N.C. 162, 163, 185 S.E. 670, 671 (1936), the court stated: "The ancient rule of the common law that if the husband was within the four seas no proof of nonaccess was admissible . . . has been modified in this State only to the extent that the presumption of legitimacy may be rebutted by evidence tending to show the husband could not have had access or was impotent. (Citations omitted)."

The modern doctrine is stated in *State v. Hickman*, 8 N.C. App. 583, 584, 174 S.E. 2d 609, 610, *cert. denied*, 277 N.C. 115 (1970), as follows:

> "It is presumed that a child born in wedlock is the legitimate child of that marriage unless it is shown that the

husband could not have had access to the spouse at a time when the child could have been conceived or that the husband was impotent or that other circumstances would prevent the husband from being the father of the child." *See* 10 C.J.S. *Bastards* § 3b. (1938).

It is unclear whether this modern doctrine has been accepted, *in toto*, by the North Carolina Supreme Court. In *Eubanks v. Eubanks, supra*, decided in 1968, the court stated that the presumption of legitimacy was *conclusive* if there were access by the husband. But in light of *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), such conclusive presumption may place an unconstitutional burden on a defendant in a criminal case where paternity is an issue.

In the case before us the uncontradicted evidence established that defendant-husband had access to the spouse (prosecuting witness) at a time when the child could have been conceived, and there was no evidence that defendant-husband was impotent or that there were other circumstances which prevented him from being the father of the child. Though the State's evidence also established that the mother lived in open adultery for several months with Carl Pinnley beginning 262 days before birth of the child, if we rely on *State v. Key, supra*, and take judicial notice that the normal period of gestation is 7 to 10 months, then both defendant and Carl Pinnley had access to the mother when the child could have been conceived, and either could have been the father; but the defendant is conclusively presumed to be the father of the child since he failed to offer evidence that he could not be the father.

In view of the failure of the defendant to offer evidence that he could not be the father of the child, we do not find the instructions of the trial court erroneous. If in the case *sub judice*, the defendant offered evidence of impotency or a blood test which revealed that he could not be the father of the child (G.S. 8-50.1 and G.S. 49-7), then the instructions to the jury would have been erroneous. Though the original firm and conclusive presumption has been modified by the so-called modern rule, apparently accepted in this State, the presumption is still a strong one. Perhaps the modern rules should be further modified in light of

technological advances in genetics and blood-typing and because the presumption places a heavy, perhaps unreasonable, burden on the defendant-husband in a criminal case.

No error.

Judge VAUGHN concurs.

Judge CARLTON dissents.

Judge CARLTON dissenting.

I agree with the majority's enunciation of current North Carolina law with respect to the crime of abandonment and non-support. Prevailing decisions in this jurisdiction require the defendant to show that he did not have access to the spouse at a time when the child could have been conceived, or that he was impotent, or that other circumstances would prevent him from being the father of the child, in order to rebut the presumption of legitimacy. It seems to me, however, that these rules contravene the principles established in *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). I think that an application of the principles established by those cases to the case at bar would require a holding here that the North Carolina rule does not comport with the requirement of the Due Process Clause of the Fourteenth Amendment that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

I also agree with the majority that some confusion exists from the decisions in this jurisdiction, both on the question of the period of gestation and the presumption of legitimacy. I suspect that this results in large part from our courts' application of rules established in civil cases to criminal proceedings. The question of parenthood is clearly a ripe area for this kind of confusion. This is an obvious and serious danger. There are vast differences between the consequences to defendants in civil actions and those in criminal actions.

For these reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. BOBBY FELTON CARTER

No. 7921SC173

(Filed 17 July 1979)

1. **Constitutional Law § 31— extradition proceeding—free transcript properly denied**

The trial court did not err in denying defendant's motion for an order directing that he be furnished a free transcript of his N. Y. extradition hearing, since an extradition proceeding is intended to be a summary and mandatory executive proceeding so that a transcript would be of minimal value to defendant; defendant had an alternative device which would serve the same function as the transcript; and defendant waited until approximately one week before trial to enter his motion requesting the transcript.

2. **Criminal Law § 114.1— jury instructions—summation of evidence—more time given to State's evidence**

The trial court clearly and accurately gave a summation of the most important testimony offered by defendant and the State, and the fact that the court consumed more time in stating the evidence for the State was of no consequence, as the State presented considerably more evidence than did defendant.

3. **Assault and Battery § 15.5— self-defense—jury instructions**

There was no merit to defendant's contention that the trial court should have included a distinct mandate on self-defense in its charge as to each lesser included offense.

APPEAL by defendant from *Hairston, Judge*. Judgment entered 27 October 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 May 1979.

Defendant was charged in two bills of indictment with: (1) assault upon Calvin Hillian with a deadly weapon with intent to kill resulting in serious bodily injury; and (2) assault upon Cedric Brown with a deadly weapon with intent to kill resulting in serious bodily injury.

At trial, the State's evidence tended to show the following:

On 1 July 1976, defendant was at the Parkland Lounge in Winston-Salem, as were Calvin Hillian and Cedric Brown. When the lounge closed at approximately 1:30 a.m., Hillian and Brown walked outside to the parking lot where they observed John Davis and another person arguing. Hillian told the group to "stop arguing, talking all that junk, because they were friends and

weren't going to fight, anyway." Hillian and Brown observed defendant at his car getting something out of the glove compartment. Hillian and Brown got into Hillian's car to leave, but were approached by the defendant who was carrying a pistol. Defendant slapped Hillian several times and shot him in the right side. Hillian fell to the ground, and the defendant shot him three or four more times. Brown ran toward the lounge to get help, but was shot from behind by the defendant and jumped into a swimming pool. The defendant approached the pool area, pointed and clicked his gun at Brown, and then returned to the spot where Hillian was lying. Defendant's companion pulled Hillian's hair and asked if Hillian planned to testify against the defendant to which Hillian gave a negative response. Defendant then kicked Hillian in the face and shot him again.

Paula Ziglar was at the Parkland Lounge on the evening in question. The defendant asked her to leave with him, but she declined and sat with Hillian until they left at approximately 1:30 a.m. Upon hearing the arguing outside in the parking lot, she ran to her apartment where she shortly thereafter heard five or six gun shots. She returned to find Hillian lying on the ground bleeding.

Mr. and Mrs. Thomas Kinney, in-laws of the defendant, saw the defendant at their home on 1 July 1976. Defendant said that he shot "two niggers." The defendant was last seen in Myrtle Beach, South Carolina but placed several calls to the Kinneys from England from 1976-1978.

In June 1976, the defendant shot his gun "five or six times" in the backyard of the Kinney home. These shell casings were compared to those found after the Parkland Lounge shooting and it was determined that the shells were fired from the same gun.

The defendant offered evidence tending to show the following:

On the night of 1 July 1976, defendant and John Davis had been to several bars drinking. They went to the Parkland Lounge at approximately 1:30 a.m. An argument ensued in the parking lot between defendant, Hillian, and Brown. Hillian pulled a gun and pointed it at defendant's face which prompted the defendant to pull his gun. Defendant started shooting and Hillian fell. Brown

grabbed the defendant's arm and the defendant shot Brown. The witness stated on cross-examination that he had never told this version of what happened prior to trial because he had been threatened with prosecution.

The jury returned verdicts of guilty of assault with a deadly weapon inflicting serious injury. From judgments imposing consecutive sentences of eight to ten years' imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney T. Michael Todd, for the State.

Glenn, Crumpler and Habegger, by Larry F. Habegger, for defendant appellant.

CARLTON, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion for an order directing that he be furnished a free transcript of his New York extradition hearing.

Defendant relies primarily on *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). There, the United States Supreme Court held that a state statute affording defendants the right to appeal criminal convictions, but conditioning appellate review on the filing of a trial transcript, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution if indigent defendants were not provided a transcript of the trial at state expense. While the holding of *Griffin* dealt solely with the availability of transcripts for direct appellate purposes, the rationale of *Griffin* has been extended to broader usage. *Griffin* has been applied to transcripts of preliminary hearings, mistrials, and hearings for petition for writ of habeas corpus. *See Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed. 2d 400 (1971); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed. 2d 601 (1969); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed. 2d 41 (1967).

Despite *Griffin's* broad application, neither our nor the appellant's research discloses the extension of *Griffin* to transcripts of extradition hearings. The reasons why such an extension should not occur are obvious by virtue of the nature of the extradition proceeding.

An extradition proceeding is intended to be a summary and mandatory executive proceeding. *See*, U.S. Constitution, Art. IV, § 2, cl. 2; G.S., Chap. 15A, Art. 37 (Uniform Criminal Extradition Act). In an extradition proceeding, once the governor of the asylum state has granted extradition and the defendant has challenged it by way of habeas corpus, the forum court is confined to the consideration of specific questions. These questions include: (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive. *Michigan v. Doran*, --- U.S. ---, 99 S.Ct. 530, 58 L.Ed. 2d 521 (1978).

Extradition is clearly a function of the executive branch of government; its very nature is extrajudicial. It is not a step in the judicial process leading to an adjudication of the accused's guilt or innocence. It is a mechanical device designed to prevent an accused from avoiding the judicial process by the simple expedient of crossing state lines.

Moreover, in light of the narrow scope of the extradition proceeding, we believe the value of the State's furnishing an extradition hearing transcript to the defendant is minimal. Unlike transcripts of preliminary hearings, mistrials, etc., an extradition hearing transcript would provide little, if any, benefit in terms of trial preparation for defendant. We also note here that the defendant had an alternative device which would serve the same function as the transcript. *See Britt v. North Carolina, supra.* An affidavit of Hillian, containing his version of the events of 1 July 1976, was available to defendant well before the time of his trial. Finally, we note that defendant waited until approximately one week before trial to enter his motion requesting the transcript.

This assignment of error is overruled.

[2] The defendant next contends that the trial court committed prejudicial error by weighted summation of the State's evidence in the charge to the jury. This assignment is without merit.

The requirement that the judge state the evidence is met by presentation of the principle features of the evidence relied on by the prosecution and the defense. *State v. Guffey*, 265 N.C. 331,

144 S.E. 2d 14 (1965); *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444 (1957). In the case *sub judice*, the trial judge clearly and accurately gave a summation of the most important testimony offered by each side. The fact that the court consumed more time in stating the evidence for the State is of no consequence as the State presented considerably more evidence than the defendant. *See State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976); *State v. Jessup*, 219 N.C. 620, 14 S.E. 2d 668 (1941).

[3] The defendant next argues that the trial court should have included a distinct mandate on self-defense in its charge as to each lesser included offense. Defendant contends that the holding of *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974) necessitates such multiple mandates. We do not agree.

State v. Dooley, supra, held that where defendant presents evidence of self-defense, the trial judge errs in not including in his final mandate to the jury that not guilty by reason of self-defense is a possible verdict.

In this case, the trial judge in the final portion of his charge to the jury stated:

> Now, the Court charges you that if the defendant acted in self defense, his actions are excused and he is not guilty. The State has the burden of proving from the evidence and beyond a reasonable doubt that the defendant did not act in self defense. If you find from the evidence beyond a reasonable doubt, as I have defined reasonable doubt to you heretofore, that the defendant, Bobby Felton Carter, assaulted with intent to kill with a deadly weapon inflicting serious bodily harm on Calvin Hillian or if you find that he assaulted Calvin Hillian with a deadly weapon inflicting bodily harm or if you find that he assaulted Calvin Hillian with a deadly weapon, that assault would be excused as being in self defense only if the circumstances at the time he acted were such as would create in the mind of a person or (sic) ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm and the circumstances did, in fact, create such a belief in the defendant's mind.

In the conclusion of the final mandate, the trial judge stated:

> So I charge you that if you find from the evidence and beyond a reasonable doubt that on or about the seventh day of July—the first day of July, excuse me, not the seventh day of July, the first day of July, 1976, Bobby Felton Carter, the defendant, intentionally assaulted by pointing a gun at or by shooting Calvin Hillian with a deadly weapon, namely a handgun, and that he did these things not acting in self-defense as I have described that defense to you, that you—it would be your duty to find a verdict of guilty of assault with a deadly weapon.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Taken contextually, we think the trial court's instructions adequately explained to the jury that they could find the defendant not guilty by reason of self-defense.

We have examined 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.

DUKE POWER COMPANY v. WORTH WINEBARGER AND WIFE, REBECCA WINEBARGER

No. 7823SC731

(Filed 17 July 1979)

1. Eminent Domain § 6.9— value witness—cross-examination—sales prices of other property

In this action to condemn a right of way for an electric transmission line, the trial court erred in permitting petitioner's counsel to ask respondents' expert witness on cross-examination whether he did not know that certain individuals had sold property for stated sums per acre where there was no proof

of the actual sales price other than the implication in counsel's questions. However, respondents waived objection to such questions by failing to object to the same questions later in the trial.

2. **Eminent Domain § 6.9— value witness—price paid for adjoining property—objection on wrong ground**

The trial court in a condemnation proceeding did not commit prejudicial error in failing to instruct the jury to disregard all of a value witness's testimony on cross-examination concerning the price the witness had paid for adjoining land where objection to the testimony was based upon grounds that would not render the testimony irrelevant for the purpose of testing the witness's knowledge of transactions in nearby real estate.

3. **Eminent Domain § 6.2— evidence of value—consideration of sales of similar property**

A witness could properly testify that his method of appraising the property in question included a consideration of sales of similar property.

4. **Eminent Domain § 5.10— condemnation proceeding—entitlement to interest**

In this proceeding to condemn a right of way for an electric transmission line, the trial court did not err in instructing the jury that it should not add interest to its verdict of just compensation but that the court would do so, or in entering a judgment for the amount of the jury verdict plus 6 percent interest from the date of the judgment, since the date the condemnor acquired the right to possession determined the date from which interest was to be paid, and the condemnor was not entitled to possession until the judgment was entered.

Judge HEDRICK dissents.

APPEAL by respondents from *Albright, Judge.* Judgment entered 4 May 1978 in Superior Court, WILKES County. Heard in the Court of Appeals 30 April 1979.

This appeal is from an action filed by Duke Power Company for condemnation of a right of way and easement for an electric transmitting line between Duke's Lenoir substation and its Wilkes Tie Station. A consent order was entered into between Duke and the respondents establishing Duke's right to appropriate certain rights over the 390-acre tract belonging to respondents and reserving for trial a determination of just compensation for appropriation of the right of way. The cause was set for jury trial in Wilkes County Superior Court. A duly impaneled jury returned a verdict awarding the respondents $16,000 damages for the right of way and easement. The respondents appeal assigning error to rulings and instructions by the trial judge.

William I. Ward, Jr., and McElwee, Hall & McElwee, by William H. McElwee III and William C. Warden, Jr., for petitioner appellee.

Franklin Smith and Larry S. Moore for respondent appellants.

MORRIS, Chief Judge.

[1] Respondents first assign error to the admission, over objection, of questions propounded on cross-examination of respondents' expert witness. The following appears in the record:

"Q. Let me ask you this, do you know anything of a 225.4 acre sale made by Johnson J. Hayes, Jr., to John and Joy Payne in November 1976?

A. No. As I stated I did not base any appraisal on any comparable.

Q. You don't know that property sold for $148.00 an acre, do you?

A. No, sir.

Mr. Smith objects. Overruled.

EXCEPTION NO. 4

Q. You don't know that sold for $148.00 an acre?

A. No, I do not.

Q. How about the Douglas Ferguson sale of property from Coyd Kilby?

Mr. Moore objects.

Q. You don't know that it sold for $114.00 an acre?

Mr. Smith objects."

The question presented by this assignment of error, apparently because of the difficulty in application of the applicable rule, several times has been brought to the appellate courts of this State. The issue concerns the extent to which the sales prices of other property within the area, not shown to be substantially similar to the property in question, may be used for the limited

purpose of impeachment to test the credibility and expertise of a witness who has been offered to testify to the value of the property directly in issue. In *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964), where the primary issue was the negligence of a real estate salesman in failing to obtain an adequate price for land in a sale to Carolina Power and Light Company, the value of the land sold was before the court. The real estate agent was asked during cross-examination, without foundation and over objection, the following: "Do you know he (Moody) sold two acres to Carolina Power and Light Company for $1,375.00 an acre?" In reviewing the propriety of the question, Justice Sharp acknowledged the so-called "utmost freedom of cross-examination" rule announced in *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959). That decision permitted the cross-examination of an expert witness with respect to the sales prices of nearby property (not just substantially similar property) to test his knowledge of values and for the limited purpose of impeachment, not as substantive evidence establishing value. Justice Sharp, nevertheless, carefully delineated the limits on the rule in order to prevent a party from improperly using such cross-examination as a technique to place before the jury the value of dissimilar property. Her explanation of the limits of the rule, uniquely appropriate to this appeal, is worthy of quotation:

> "The 'utmost freedom of cross-examination' to test a witness' knowledge of values, mentioned in *Barnes v. Highway Commission, supra*, does not mean that counsel may ask the witness if he doesn't know that a certain individual sold his property for a stated sum with no proof of the actual sales price other than the implication in his question. *Bennett v. R.R.*, 170 N.C. 389, 87 S.E. 133, 16D L.R.A. 1074. Where such information is material it is easy enough to establish by the witness himself, whether a certain property has been sold to his knowledge and, if so, whether he knows the price. If he says he does not know, his lack of knowledge is thus established by his own testimony and doubt is cast on the value of his opinion. *Highway Commission v. Privett*, 246 N.C. 501, 506, 99 S.E. 2d 61. If he asserts his knowledge of the sale and, in response to the cross-examiner's question, states a totally erroneous sales price, is the adverse party bound by the answer or may he call witnesses to establish

the true purchase price? Unless per chance the purchase price of the particular property was competent as substantive evidence of the value of the property involved in the action, it would seem that the party asking the question should be bound by the answer. To hold otherwise would open a Pandora's box of collateral issues." 262 N.C. at 356-57, 137 S.E. 2d at 148.

Although we conclude that the above testimony was incompetent and the questions improperly phrased under *Carver v. Lykes*, supra, we, nevertheless, conclude, as did that Court, that the respondents waived their objection by failing to object to the same questions later in the trial. *See also Highway Comm. v. McDonald*, 8 N.C. App. 56, 173 S.E. 2d 572 (1970); *Redevelopment Comm. v. Stewart*, 3 N.C. App. 271, 164 S.E. 2d 495 (1968), *cert. denied*, 275 N.C. 138 (1969).

[2] Respondent presents a similar issue by his assignment of error directed to the failure of the trial court promptly to rule on objections interposed during the cross-examination of the respondent's witness Paul Osborne. Whether the failure promptly to rule on objections is prejudicial error must ultimately depend upon whether it was error to admit the evidence, and whether that error has been preserved on appeal. The witness is a real estate salesman and for 35 years previously had been involved in the sale and exchange of real estate. He appraised respondents' land at $600 per acre. On cross-examination, the witness was questioned concerning the value of the property adjoining respondents' property which, seven or eight years prior to trial, the witness had acquired in a property exchange. Without foundation and over objection, petitioner's counsel repeatedly was permitted to ask the witness if he had not paid sixty dollars per acre for that land. After numerous objections upon which the trial judge did not rule, the court excused the jury and heard testimony and arguments of counsel before he determined that the evidence was inadmissible. The objection was thereafter sustained in the absence of the jury, and, at the end of cross-examination, the trial court instructed the jury not to consider the witness' testimony for the purpose of fixing value with respect to the subject property, but to consider it only as it might bear upon the witness' knowledge of property values.

A trial judge, especially when presiding over a jury trial, has a duty promptly to rule on timely objections. *See State v. Norman*, 19 N.C. App. 299, 198 S.E. 2d 480 (1973), *cert. denied*, 284 N.C. 257, 200 S.E. 2d 657 (1973). *See generally* 1 Stansbury's N.C. Evidence § 28 (Brandis rev. 1973); 1 Wigmore on Evidence § 19 (3d ed. 1940). The trial judge failed promptly to rule on the objections, but later instructed the jury after ultimately sustaining the objection, that "you may not consider this testimony as substantive evidence for the purpose of fixing value of the subject property in this case. You may consider this testimony insofar as it bears upon the witness' knowledge of values . . . or only insofar as it impeached the testimony of this witness. . . ." The instruction was insufficient because it failed to instruct the jury that evidence of the price for which the witness purchased the adjoining land, under the circumstances of this case, was incompetent for any purpose. In our opinion, petitioner's questions again were phrased improperly and included incompetent matter. According to *Carver v. Lykes, supra*, unless there is a foundation sufficient to render the price of the adjoining property competent as substantive evidence or unless the price properly was elicited previously during cross-examination, a witness on cross-examination may not be asked if property was not purchased for a particular specified price. Nevertheless, under the particular facts of this case we are of the opinion that it was not prejudicial error to fail to instruct the jury to disregard all of the evidence concerning the price the witness paid for the adjoining land. We note that although respondents argue in their brief the rule in *Carver v. Lykes, supra*, in support of their exception and assignment of error, it appears that they argued to the trial court a different basis for the objection. The specific basis of the objection in the trial court was the fact that the purchase by the witness was not a sale, but an exchange of land plus "boot". The fact that the transaction encompassed an exchange in kind plus "boot" alone would not render evidence of the exchange irrelevant for the purpose of testing a witness' knowledge of transactions in nearby real estate. Therefore, we find that the evidence was not erroneously admitted over an appropriate objection. The specific objection is effective only to the extent of the grounds enunciated. *See generally* 1 Stansbury's N.C. Evidence § 27 (Brandis rev. 1973). Therefore, failure to instruct the jury to disregard *in toto* the testimony in question was not error. This assignment of error is overruled.

[3] Respondents next contend that the trial court erred in permitting the petitioner's witness Sturdivant's testimony with respect to his method of appraising the property in question. They assert that the testimony was necessarily based upon inadmissible hearsay evidence of the sales of similar property. Respondents' objection is unfounded. It is established in this State that a witness generally may give his opinion on the value of property even though based upon evidence some of the elements of which would independently be inadmissible. *Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965). This witness did not state the sales prices of the similar property. This he is prohibited from doing unless he has first-hand knowledge of the sale. However, the witness "may testify as to the basis of his opinion because it is not offered to show the truth or falsity of such matters, but how the witnesses arrived at a value. It is therefore not hearsay evidence." 263 N.C. at 400, 139 S.E. 2d at 558.

[4] Finally, respondents contend that the trial court erred in instructing the jury that they should not add interest to their verdict, and that the court would do so. The jury returned a verdict of $16,000 as damage for the taking of the property. Judgment was entered for $16,000 plus 6 per cent interest from the date of the judgment. We find no error in the charge or the judgment. It is true that a party is entitled to 6 per cent interest from the date of the taking. This interest is a necessary element of just compensation and represents the loss from delay in payment for the taking. *DeBruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958). The date the condemnor acquires the right to possession determines the date from which interest should be paid. *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E. 2d 231 (1973); *Light Co. v. Briggs*, 268 N.C. 158, 150 S.E. 2d 16 (1968) (*per curiam*); *Winston-Salem v. Wells*, 249 N.C. 148, 105 S.E. 2d 435 (1958). Title vested in the petitioner upon the entry of judgment decreeing "that there is hereby condemned and granted from the Respondents, Worth Winebarger and wife, Rebecca Winebarger, their successors and assigns a right-of-way and easement over, across and through Respondents' land. . . ." Because petitioner was not entitled to possession until the entry of judgment 5 May 1978, the court's instructions with respect to interest awarded were correct.

Finally, we find no merit to respondents' contention that the instructions defining a quotient verdict, which were intended to caution the jury with respect to the invalidity of such a verdict, had the effect of inducing a quotient verdict.

No error.

Judge WEBB concurs.

Judge HEDRICK dissents.

JOHNSON COUNTY NATIONAL BANK AND TRUST COMPANY v. LARRY GRAINGER AND JACQUELINE W. GRAINGER

No. 7810SC626

(Filed 17 July 1979)

Constitutional Law § 74— refusal to answer questions on oral deposition—no possible self-incrimination shown

The trial court's order requiring defendant to answer questions asked him on oral deposition did not infringe upon defendant's privilege against self-incrimination where 182 questions were asked; defendant answered only preliminary questions about his background; none of the questions disclosed on their face any reason why an answer might be incriminating; and defendant failed to reveal to the court any rational grounds for believing that a real danger of self-incrimination might exist if he should be required to answer.

APPEAL by defendant, Larry Grainger, from *McLelland, Judge*. Order entered 2 June 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 29 March 1979.

This is an appeal from an order directing the defendant, Larry Grainger, to answer questions asked him on oral deposition which he had refused to answer on the grounds that he might incriminate himself.

Plaintiff instituted this civil action to recover the balance which plaintiff alleged is owed on a promissory note in the original amount of $69,954.00 executed 24 July 1976 by defendants payable to Gordon Aviation Sales, Inc., of St. Ann, Missouri, and subsequently assigned to the plaintiff bank. Plaintiff alleged

that defendants executed the note and as security therefor also executed a Security Agreement covering a 1965 Cessna airplane, which plane plaintiff alleged on information and belief was destroyed as result of a crash. Plaintiff alleged that all requests by plaintiff to defendants that they provide information concerning the present locale of the airplane, as well as information concerning its possible destruction, had been unanswered.

Defendants filed answer in which they denied all allegations of the complaint except the allegations that plaintiff is a banking institution organized and existing under the laws of Kansas and that defendants are citizens and residents of Wake County, N.C. In a further answer defendants alleged that their purported signatures on the note and security agreement are forgeries.

Under G.S. 1A-1, Rules 26 and 30, plaintiff gave notice of the taking of defendants' depositions upon oral examination. At the examination, defendant Larry Grainger answered initial questions put to him by the attorneys for the plaintiff, but refused to answer all further questions on the grounds that his answers might tend to incriminate him. Plaintiff then applied pursuant to G.S. 1A-1, Rule 37(a) for an order of the court requiring the defendant Larry Grainger to answer the questions which he had refused to answer. The court granted plaintiff's motion and ordered defendant Larry Grainger to answer the questions. He appeals from this order.

Hatch, Little, Bunn, Jones, Few & Berry by William P. Few for plaintiff appellee.

Purser & Barrett by George R. Barrett for Larry Grainger, defendant appellant.

PARKER, Judge.

Appellant contends that the order appealed from infringes upon his privilege against self-incrimination provided by Article I, Sec. 23 of the Constitution of North Carolina and by the Fifth Amendment to the Constitution of the United States, which, since the decision of *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964), is applicable to the States by operation of the Fourteenth Amendment. On this record we find no infringement of the constitutional privilege invoked has been shown. Accordingly, we affirm the trial court's order.

That this is a civil rather than a criminal proceeding is without significance in the determination of the question before us, for the constitutional privilege against self-incrimination "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein*, 266 U.S. 34, 40, 69 L.Ed. 158, 161, 45 S.Ct. 16, 17 (1924); *Accord, Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). Moreover, the protection afforded by the privilege against self-incrimination "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Maness v. Meyers*, 419 U.S. 449, 461, 42 L.Ed. 2d 574, 585, 95 S.Ct. 584, 592 (1975); *accord Smith v. Smith*, 116 N.C. 386, 21 S.E. 196 (1895). However, "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities," *Zicarelli v. Investigation Commission*, 406 U.S. 472, 478, 32 L.Ed. 2d 234, 240, 92 S.Ct. 1670, 1675 (1972), and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists.

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers v. United States*, 340 U.S. 367, 95 L.Ed. 344, 71 S.Ct. 438, 19 A.L.R. 2d 378 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple v. Commonwealth*, 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as

much by his personal perception of the peculiarities of the case as by the facts actually in evidence." See Taft, J. in Ex parte Irvine, 74 F. 954, 960 (CCSD Ohio 1896).

Hoffman v. United States, 341 U.S. 479, 486-87, 95 L.Ed. 1118, 1124, 71 S.Ct. 814, 818 (1951); *See* Annot., 95 L.Ed. 1126 (1951); See also 8 Wigmore, Evidence (McNaughton rev. 1961) § 2271; 1 Stansbury's N.C. Evidence (Brandis Revision) § 57; 81 Am. Jur. 2d, Witnesses, § 52.

The difficulties inherent in attempting to reconcile the potential conflict between the principle that every citizen, when properly called as a witness, owes the duty to testify truthfully to all relevant matters which are the subject of a judicial inquiry and the principle that no one may be compelled to testify to anything which might tend to incriminate him, were long ago recognized by Chief Justice Marshall at the trial of Aaron Burr, 25 F. Cas. 38, 39-41 (C.C.D.Va. 1807) and by Chief Justice Smith of our own Supreme Court in *LaFontaine v. Southern Underwriters*, 83 N.C. 132 (1880). Granted that the constitutional privilege against self-incrimination must take precedence and that the privilege must be sustained whenever it is clear from the nature of the question or from the context in which it is asked that a truthful answer might tend to incriminate the witness, the problem remains as to how the court, which cannot know all that the witness knows about the matter, is to determine whether the witness is entitled to privilege in those cases where it is not clear, either from the question itself or from the context in which it is asked, that a truthful answer might tend to incriminate the witness. No one has stated the problem better than Judge Learned Hand in *United States v. Weisman*, 111 F. 2d 260 (2nd Cir. 1940) when he said (p. 262):

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

The proper course for the court to follow when confronted with this problem has been stated as follows:

> When the claim (of the privilege) is made, if it is immediately clear that an answer might tend to incriminate him, the claim should be sustained. Otherwise, the judge may, in the absence of the jury, inquire into the matter to the minimum extent necessary to determine that a truthful answer *might* tend to incriminate, and should deny the claim only if there is no such possibility.

N.C. Evidence (Brandis Revision), § 57, pp. 179-80.

Applying these principles in the present case, we find that a total of 182 questions was asked of the appellant, some of which he answered but most of which he refused to answer on the grounds that his answers might tend to incriminate him. (It is not clear from the record exactly which questions appellant answered; his brief states that "[a]fter answering preliminary questions about his employment and background, Defendant refused to answer all other questions propounded to him on the grounds that anything he said may tend to incriminate him.") We have carefully reviewed all of the questions asked, and, while some of them are of doubtful relevancy to any issue raised in this case, we find none which on its face discloses any reason why an answer might be incriminating. It would be possible, we suppose, by exercise of a rich enough imagination to conjure up a scenario by which the answer to any question, however apparently innocent, might tend to incriminate. The constitutional privilege invoked, however, protects against real, not against imaginary dangers. *Zicarelli v. Investigation Commission, supra*; *Mason v. United States*, 244 U.S. 362, 61 L.Ed. 1198, 37 S.Ct. 621 (1917). Nothing in the record in this case suggests any reason why the apparently innocuous questions asked might tend to probe into incriminatory matters. True, defendants pled that their purported signatures on the note and security agreement were forgeries, but if so the crime of forgery must have been committed by someone else and the privilege against self-incrimination does not apply to testimony which incriminates another. So far as the present record discloses, no criminal proceeding or investigation has ever been instituted because of the use or disappearance of the airplane which was subject to the security agreement, and it requires the exercise of

a free-ranging imagination unsupported by even any suggestion of fact to speculate that it might have been connected with criminal activity. In short, the appealing defendant, asserting the privilege to refuse to answer questions which on their face and in the context in which asked were innocuous, has failed to assist the court by pushing the door even a tiny bit ajar so as disclose some rational grounds for believing that a real danger of self-incrimination might exist if he should be required to answer. Under these circumstances we find no basis for reversing the trial court's ruling.

So deciding, we find it unnecessary to discuss the question, argued in the brief of the parties, as to whether defendants may in any event have waived their privilege in this case by having previously answered interrogatories propounded to them in an earlier suit brought on this same claim in the United States District Court in Kansas.

The order appealed from is

Affirmed.

Judges HEDRICK and CARLTON concur.

STATE OF NORTH CAROLINA v. KEITH EDWARD MILLER

No. 7924SC353

(Filed 17 July 1979)

1. **Criminal Law § 91— failure of district attorney to file calendar week before session began**

Defendant was not prejudiced by the fact that the district attorney filed the calendar of cases to be tried six days before the beginning of the session of court rather than a full week before the session began as required by G.S. 7A-49.3(a), especially where defendant was not tried until a week after the calendar was filed.

2. **Criminal Law § 91.5— motion for continuance—indictment seven days before trial**

The trial court properly denied defendant's motion for continuance made on the ground that the indictment had been returned only seven days prior to the trial where a warrant for defendant's arrest was issued on 23 July 1978;

counsel was appointed to represent defendant on 14 November 1978; the State announced on 5 December 1978 that it would not proceed with a probable cause hearing but would seek a bill of indictment on 11 December 1978; the indictment was returned on 11 December; and defendant showed no prejudice in the denial of his motion.

3. Indictment and Warrant § 5— notice of return of indictment

Defendant was not entitled to notice of the return of a true bill of indictment pursuant to G.S. 15A-630 where he was then represented by counsel.

4. Larceny § 4— indictment—felonious intent

A larceny indictment alleging that defendant "unlawfully and willfully did feloniously steal, take, and carry away one ladies purse containing approximately $300 in money" was sufficient without alleging a felonious intent to appropriate the goods taken to defendant's own use; moreover, the word "steal" as used in the indictment encompassed and was synonymous with "felonious intent."

5. Criminal Law § 46.1— discovery of defendant in another state

An officer's testimony concerning his efforts to find defendant and the subsequent discovery of defendant in Florida was competent in this larceny case.

6. Larceny § 7— sufficient evidence of larceny

The State's evidence was sufficient for the jury in a prosecution for felonious larceny where it tended to show that the prosecutrix and her husband experienced car trouble; defendant offered to help them repair their car; the prosecutrix's purse containing over $300 was on the front seat of the car; while defendant was working on the engine of the car, the prosecutrix and her husband left to obtain parts for the car; and when they returned the defendant, the purse and the money were gone.

APPEAL by defendant from *Howell, Judge*. Judgment entered 21 December 1978 in Superior Court, WATAUGA County. Heard in the Court of Appeals 29 June 1979.

The defendant was indicted and tried for felonious larceny. Upon his plea of not guilty, the jury returned a verdict of guilty of felonious larceny. From judgment sentencing him to imprisonment for ten years, the defendant appealed.

In pretrial motions, the defendant's attorney moved for a continuance and moved to quash the indictment, both of which motions were denied.

The State's evidence tended to show that on 22 July 1978, Alma and James Scott, while on a vacation trip, experienced car trouble near Boone and pulled into a service station. The defend-

ant volunteered to assist them in determining the problem with their automobile. The defendant told the Scotts that new automobile parts were needed and Mr. Scott went across the street to an auto parts store to buy a new set of points. The money to buy the points was taken by Mr. Scott from Mrs. Scott's purse, in the presence of the defendant.

Upon Mr. Scott's return with the new points, the defendant told the Scotts that a larger set of points was needed and Mrs. Scott went back to the automobile parts store to exchange the smaller set of points. Mrs. Scott left her purse on the front seat of the car. The purse contained over $300, a J. C. Penney's credit card, and other personal belongings.

After a considerable delay, Mr. Scott went to the parts store to determine why his wife had not returned. Upon the Scotts' arrival back to the car several minutes later, they discovered that the defendant was gone and had left his tools at the car. Furthermore, the doors of the automobile were open and Mrs. Scott's purse was gone.

Mr. Scott remembered that the defendant wore a belt upon which the name "Keith" was inscribed. Mr. Scott asked people at the service station after the defendant had left what the defendant's full name was.

Officer Bill Baker testified over objection that he located the defendant in Florida on 13 November 1978.

The defendant offered evidence tending to show that on 22 July 1978 he stopped at a service station to get milk for his infant child. He helped the Scotts with their automobile, told them to go across the street to buy a new set of points and to get a screwdriver, and later told them to exchange the smaller set of points for a larger set. He denied, however, seeing Mrs. Scott's purse or stealing it. He grew tired of waiting for the Scotts to return from the automobile parts store and left, leaving only an old "piece of pliers." The defendant was told by his sister in early August that his name was in the Boone paper for stealing Mrs. Scott's purse, but the defendant did not call the authorities to straighten the matter out.

Other relevant facts are hereinafter set forth.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Robert H. West for the defendant appellant.

MITCHELL, Judge.

The defendant first assigns as error the trial court's denial of his motion for a continuance. The defendant argues that the return of the indictment only seven days prior to trial did not leave him sufficient time to prepare his defense or to file a motion for discovery. Defendant argues that G.S. 7A-49.3(a) and G.S. 15A-630 were violated by the denial of his motion to continue.

G.S. 7A-49.3(a) provides in pertinent part: "At least one week before the beginning of any session of the superior court for the trial of criminal cases, the solicitor shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session."

In this case, the indictment was returned on 11 December 1978 and the case set for trial during the 18 December criminal session of superior court. The case was heard on 19 December. The calendar for the session was filed on 12 December with the Clerk of Superior Court of Watauga County.

The defendant first argues that the 18 December session of court was a continuation of the 11 December session. Therefore, the calendar should have been prepared seven days prior to 11 December. It is clear from the record, however, that the 18 December session was a special session by order of the Chief Justice and this argument is rejected.

[1] The defendant next argues that the calendar should have been filed "at least one week before the beginning of the session," that is, by 11 December. We do not believe that the one day delay constituted prejudicial error to the defendant. He was not tried until 19 December, a full week after the calendar had been filed. The defendant had ample notice of his trial date.

[2] A warrant for the defendant's arrest was issued on 23 July 1978. On 14 November 1978, counsel was appointed to represent the defendant. The case was calendared in district court for a probable cause hearing on 5 December 1978, at which time the

State announced that it would not proceed with the hearing. The State further announced at that time that it was the State's intention to seek a bill of indictment on 11 December 1978.

For a defendant to be entitled to a new trial because his motion to continue was denied, he must show both that there was error in the denial and that he was prejudiced thereby. *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973); 4 Strong's N.C. Index 3d, Criminal Law § 91.1, p. 443. The defendant in this case has neither alleged nor shown any prejudice in the denial of his motion.

[3] The defendant further contends that the provisions of G.S. 15A-630, requiring notice to the defendant upon the return of a true bill of indictment, were violated. A reading of the statute, however, reveals that its provisions are applicable to defendants "*unless* [they are] then represented by counsel of record." (Emphasis added) Counsel was appointed for the defendant in this case on 14 November 1978 and the bill of indictment was returned on 11 December 1978. Clearly, defendant was not entitled to the benefits of the notice requirement of G.S. 15A-630, and this argument is therefore without merit.

[4] The defendant next assigns as error the trial court's denial of his motion to quash the indictment. Defendant argues that the indictment is fatally defective because it fails to state a felonious intent to appropriate the goods taken to the defendant's own use.

In the indictment in the present case, it is alleged that the defendant "unlawfully and willfully did feloniously steal, take, and carry away one ladies purse containing approximately $300 in money." This Court held in *State v. Wesson*, 16 N.C. App. 683, 193 S.E. 2d 425 (1972), *cert. denied*, 282 N.C. 675, 194 S.E. 2d 155 (1973), that it is not necessary in a larceny warrant to allege that the defendant intended to convert the property to his own use. Moreover, the word "steal" as used in the warrant encompassed and was synonymous with "felonious intent." The language of the indictment in the present case is nearly identical to the language of the warrant in *Wesson*. This assignment of error is overruled.

[5] The defendant next argues that the trial court erred in allowing into evidence the testimony of Officer Baker. The defendant contends that Officer Baker's description of his efforts to find the

defendant in Florida inflamed the jury, led the jury to believe the defendant was guilty, and was irrelevant.

Officer Baker was clearly competent to testify about those facts within his personal knowledge. The probative value of the testimony was a question for the jury. 1 Stansbury's N.C. Evidence § 8, p. 17 (Brandis rev. 1973). *See also State v. McLeod*, 17 N.C. App. 577, 194 S.E. 2d 861 (1973). Evidence of the officer's investigation and the defendant's subsequent discovery in Florida was certainly relevant. 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's N.C. Evidence § 80, p. 242 (Brandis rev. 1973). *See State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091, 97 S.Ct. 2971 (1977). This assignment of error is overruled.

The defendant also assigns as error the trial court's denial of his motion for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence to sustain a conviction and as such, it should be treated as a motion to dismiss or a motion for judgment as in case of nonsuit. *State v. Livingston*, 35 N.C. App. 163, 241 S.E. 2d 136 (1978). In ruling on those motions, the trial court must determine whether a reasonable inference of the defendant's guilt may be drawn from the evidence. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). If there is substantial evidence which would support a reasonable inference of the defendant's guilt, then the trial court must deny such a motion. *Id.*

[6] In the present case, the evidence tends to show that the defendant was working on the engine of the Scotts' automobile. Mrs. Scott's purse was on the front seat of that automobile. Mr. and Mrs. Scott left the automobile for a short time and when they returned, both Mrs. Scott's purse and the defendant were gone. That evidence is sufficient to show that the defendant committed the crime charged and the defendant's assignment of error is therefore overruled.

In the trial below, we find

No error.

Judges CLARK and ERWIN concur.

WAYNE WILSON AND MINNIE JANE WILSON v. BRENDA ABSHER W. WILLIAMS

No. 7823DC1064

(Filed 17 July 1979)

Infants § 6.3— custody awarded to grandparents—father killed by mother's subsequent husband

Though the trial court did not find defendant mother to be unfit to have custody of her child, the court nevertheless could properly award custody of the child to plaintiff paternal grandparents where the court found that the child would be adversely affected by being placed with his mother since she was still married to and still maintained a relationship with the man who killed the child's father.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 20 July 1978 in District Court, WILKES County. Heard in the Court of Appeals 28 June 1979.

The plaintiffs seek custody of Richard Allen Wilson, their 12-year-old grandchild. It appears from their complaint that their son Jimmy was married to defendant in 1965 and separated from her in 1969; that between 1969 and Jimmy's remarriage in 1973, Richard remained almost continually with the plaintiffs; and that between Jimmy's remarriage in 1973 and his death in 1976, Richard lived with his father and his father's new wife next door to the plaintiffs. Pursuant to an agreement between Jimmy and the defendant, Richard spent summers with defendant. At the end of the summer of 1976 the defendant refused to return Richard, and when Jimmy went to defendant's home to pick up the child he was shot and killed by defendant's present husband. On 15 December 1976 the court placed Richard in the plaintiffs' custody pending the disposition of the murder charges against defendant's husband.

On 8 June 1978 defendant filed a motion in the cause, stating that the murder charges against her husband have been disposed of and that he is now in prison, and seeking a hearing on custody. The following evidence was presented at the hearing: Defendant is a medical secretary, with a take-home income of approximately $200 per week. She lives in a three-bedroom trailer in Chapel Hill with the four-year-old child of her second marriage. She visits her husband in prison about every other weekend. Since Richard

went to live with the plaintiffs, her relationship with him has become very poor. He no longer calls her mother, but calls her by her first name. When she goes to visit him at the plaintiffs' house she is not allowed to take him outside the house, or to be alone with him, though she feels that sometimes he would like to be alone with her. Defendant presented witnesses who testified that she is a fit person to have custody of the child.

Plaintiffs presented evidence that when Richard came to live with them he was on medication for seizures that made him hard to keep awake. Since his medication has been reduced, he has become his normal self again. He has friends and cousins in the plaintiffs' area that he plays with often. Plaintiff grandfather never interferes with Richard's communication with defendant. Richard has said to his grandfather that he cannot live with his mother after what happened to his daddy.

Plaintiff grandmother testified that she spends all of her time with Richard except when he is in school. They ride bicycles and play ball, go hiking and fishing. Richard makes good grades and is well-behaved. In March 1978 he got a letter and a call from his mother after which he was very upset and cried and started vomiting. He thought she was blaming him for his father's death. Richard has expressed his desire to continue living with his grandparents. Asked "Has either of you encouraged him to refer to her as mother?" plaintiff replied, "No, sir, I told him she's his mother and to call her whatever is in his heart. I asked him not to stay with her by hisself [sic] when she comes up there. He has asked me to stay in the room with them when she came up."

On rebuttal, defendant testified that Richard had not been withdrawn or disturbed when he went to live with plaintiffs, but she felt that now he had been brainwashed against her.

The court talked with Richard in private. The substance of their conversation does not appear. However, the court found as fact that "said minor has a strong desire to reside in the home of his grandparents and that he does not wish to either live with his mother or to visit with the mother in her home at the present time. . . . Said minor indicated that he would be willing to visit with his mother in the [plaintiffs'] area if she should desire to visit with him." The court found further that "[s]aid minor child has strong emotional feelings concerning the shooting death of his

father by Mr. Williams, and the Court is of the opinion that inasmuch as the mother still maintains a relationship with Mr. Williams that this would be extremely upsetting to said minor should he reside in the home of the mother." The court awarded custody of Richard to the plaintiffs, with the proviso that defendant be allowed an opportunity to establish a better relationship with her son. The court further ordered that a new hearing might be held in the future if Richard expressed a desire to live with his mother. Defendant appeals.

E. James Moore for plaintiff appellees.

John E. Hall and William C. Warden, Jr. for defendant appellant.

ARNOLD, Judge.

Defendant argues that, as she has not been found to be unfit to have custody of Richard, it was error for the trial court to award custody to the grandparents.

The court made no finding as to defendant's fitness to have custody of her son. However, defendant is correct in her assertion that there is no evidence in the record that she is unfit. And it is the general rule that where one parent is dead, the surviving parent has a right to custody of their minor children, a right which should be denied only for "the most substantial" reasons. *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E. 2d 759, 761 (1955). The trial court in the present case apparently found that defendant's continuing relationship with the man who killed Richard's father was such a substantial reason, and it is this decision we must review.

The parties cite to us a number of cases, none of which is on point. Defendant relies upon *In re Jones*, 14 N.C. App. 334, 188 S.E. 2d 580 (1972), but in that case there appeared no circumstance which would justify withholding the child from the mother's custody. Plaintiffs' reliance is placed upon a number of cases in which the natural parent was found to be unfit, *e.g. In re Craigo*, 266 N.C. 92, 145 S.E. 2d 376 (1965); *Holmes v. Sanders*, 246 N.C. 200, 97 S.E. 2d 683 (1957); *In re Edwards*, 25 N.C. App. 608, 214 S.E. 2d 215 (1975); *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971); *In re Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971), which is not the case here.

In custody determinations, the best interest of the child is the overriding factor. *See* G.S. 50-13.2(a). And while it is presumed that it is in the child's best interest to be placed with a natural parent, this presumption may be rebutted by a circumstance which would substantially affect the child. *In re Jones, supra.* Wide discretion is vested in the trial court in these matters, since he has the opportunity to see the parties and hear the witnesses, *Sheppard v. Sheppard,* 38 N.C. App. 712, 248 S.E. 2d 871 (1978), and his decision will not be disturbed in the absence of an abuse of discretion.

We can find no abuse of discretion here. Both parties are apparently quite fit to have custody of the child. If this were the case without more, defendant would be entitled to custody. However, the court has found, not without reason, that Richard would be adversely affected by being placed with his mother at this time, since she is still involved with the man who killed his father. We cannot say that this is not a circumstance sufficient to "substantially affect the child's welfare." *In re Jones, supra* at 339, 188 S.E. 2d at 583. We uphold the court's decision, and we commend his efforts to insure that defendant has every reasonable opportunity to improve her relationship with her son.

The trial court's conclusions are adequately supported by the facts, and his order is

Affirmed.

Judges HEDRICK and VAUGHN concur.

BRYANT-DURHAM ELECTRIC COMPANY, INC. v. DURHAM COUNTY HOSPITAL CORPORATION AND DURHAM COUNTY BOARD OF COUNTY COMMISSIONERS

No. 7814SC534

(Filed 17 July 1979)

1. Arbitration and Award § 1.1— contract provision for arbitration—invalidity in 1972

A provision for arbitration in a 1972 construction contract was not binding since a controversy had to exist between the parties in order for them to make a binding contract for arbitration in 1972.

2. Arbitration and Award § 1.1— arbitration agreement—controversies in existence

Correspondence between the parties in 1975 created a contract between them for arbitration; however, under G.S. 1-567.2 the agreement to arbitrate bound them to arbitrate only controversies existing at the time of the agreement.

3. Arbitration and Award § 1— motion to compel arbitration—controversies not existing at time of agreement

The trial court properly denied a motion to compel arbitration pursuant to an arbitration agreement where the movant made a demand for arbitration of controversies which were not in existence at the time the parties agreed to arbitrate.

4. Arbitration and Award § 1— inapplicability of Federal Arbitration Act

In order for the Federal Arbitration Act, 9 U.S.C. § 2, to apply, the transaction which is the subject of a contract must be a transaction in interstate commerce, and the Act does not apply because some of the materials used to perform a contract were shipped in interstate commerce. Therefore, the Federal Arbitration Act did not apply to the construction of the Durham County General Hospital.

APPEAL by movant from *Martin (John C.), Judge*. Judgment entered 7 March 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 March 1979.

This is an appeal by the movant from an order denying its motion to compel the respondents to enter into binding arbitration. On 2 June 1972 the parties entered into a contract for the construction of the Durham County General Hospital. The movant was to serve as the electrical contractor and to complete its work by 15 March 1975. The contract provided for the arbitration of all disputes arising in connection with the contract. During the construction a dispute arose and on 22 August 1975, movant sent a letter to the architects on the project in which it stated that it had not been able to complete the project due to delays caused by the general contractor. In the letter the movant also stated the site availability and plans and specifications had not been followed. The movant then stated:

> "We are therefore compelled and have no alternative but to seek recourse for the extensive and severe damages and losses we have suffered, are continuing to suffer, and doubtless will suffer until project completion.
>
> Therefore, in accordance with the terms and conditions of General Condition 7 (Arbitration) of our contract with the

Owner, we herewith give the required notice and serve and signify our Demand for Arbitration as to the nature and extent of the responsibility of the Owner for our delay damages.

We have and are continuing to keep strict account of our costs, losses and damages, and will quantify same at the conclusion of our performance.

* * *

. . . We signify, however, our willingness . . . to abate the empaneling of an Arbitration board and the commencement of arbitration hearings . . . until such time as project completion has been reached."

On 19 September 1975 the respondent Hospital Corporation replied to the plaintiff's letter as follows:

Mr. Robert Shackleford
Executive Vice President
Bryant-Durham Electric Company, Inc.
5102 Neal Road
Durham, North Carolina 27705

Dear Mr. Shackleford:

Your letter of August 22, 1975, addressed to Mr. L. Louis Cochran of Middleton, Wilkerson, McMillan, Architects which provides notification of your demand for arbitration has been acknowledged by the Architects' office. We concur in your demand for arbitration.

Our attention has been directed to a possible modification of the arbitration procedure which you may wish to consider. If mutually acceptable, we may wish to be governed by the "Construction Industry Arbitration Rules" dated March 1, 1974, published and administered by the American Arbitration Association, 140 West 51st Street, New York, New York 10020, rather than the procedure outlined in Section 7 of the General Conditions which may be outdated.

With your concurrence, it could be desirable for your Counsel and ours to examine the advisability of following the

procedure set forth in the "Construction Industry Arbitration Rules".

I shall be pleased to receive your response to this suggestion.

Very truly yours,

DURHAM COUNTY HOSPITAL CORPORATION

s / Thomas R. Howerton
Executive Director

On 18 May 1977 the architect assessed the movant with liquidated damages for delay in completing the contract. On 6 December 1977 the movant filed a motion to compel arbitration. It moved for arbitration on the alleged delay caused by the respondents and also for additional compensation as the result of a change order allegedly made on 20 February 1976.

The superior court on 7 March 1978 denied the motion for compulsory arbitration.

Smith, Currie and Hancock, by John D. Sours and Robert O. Fleming, Jr., and Nye, Mitchell and Bugg, by John E. Bugg, for plaintiff appellant.

Bryant, Bryant, Drew and Crill, by Victor S. Bryant, Jr., and Lester W. Owen, for respondent appellees.

WEBB, Judge.

[1] In 1972 when the parties entered into the construction contract, arbitration was governed by Chapter 1, Article 45 of the General Statutes. This article provided that a controversy had to exist between the parties in order for them to make a binding contract for arbitration. *Skinner v. Gaither Corporation*, 234 N.C. 385, 67 S.E. 2d 267 (1951). The controversy in this case did not arise until after 2 June 1972. The provision for arbitration in the contract of that date is not binding.

[2] The movant contends that the parties entered into an agreement for arbitration by correspondence between them in 1975. We hold that the letter from movant dated 22 August 1975 with the respondents' reply of 19 September 1975 created a contract

between the parties for arbitration. As we read the letter of 22 August 1975 it was a demand by movant for arbitration for the damages caused to it by delay in the performance of the contract. The reply of respondents was an unconditional acceptance. The language in this letter which suggested a possible alternative method of arbitration did not make the respondents' acceptance of the offer conditional. *Carver v. Britt*, 241 N.C. 538, 85 S.E. 2d 888 (1955). At the time this contract was made, Article 45A of Chapter 1 of the General Statutes governed arbitration agreements. In that article, G.S. 1-567.2 provides:

> (a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

Under this section the agreement to arbitrate made between the parties in 1975 would not bind them to arbitrate controversies not existing at the time of the agreement. It was not a provision of a contract for settling controversies in regard to the contract or controversies in regard to failure to perform under the contract. It was a contract to arbitrate controversies existing at the time of the agreement and binding to that extent under G.S. 1-567.2(a).

[3] Although we hold that the agreement to arbitrate made between the parties in 1975 is binding on them as to controversies existing at that time we also hold the court properly denied the motion for arbitration. In its motion for arbitration the movant asked for arbitration of matters not in controversy at the time the agreement was made. The movant asked for arbitration as to a change order which movant alleged was made on 20 February 1976. The motion made no distinction between delays caused by respondents before 22 August 1975 and those caused after that date. It made no distinction in the penalty assessed by the architect for delays attributable to the respondent before and after 22 August 1975. Since the movant made a demand for arbitration

for controversies which were not in existence at the time the parties agreed to arbitrate, we hold the court properly denied the motion to compel arbitration.

[4] The appellant also contends that the parties are bound by the Federal Arbitration Act.

9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 1 says:

> "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations . . . .

The movant contends that 9 U.S.C. § 2 should be given a broad interpretation so that it requires arbitration since some of the materials used by movant to perform the contract were shipped in interstate commerce. We note that if this is the proper interpretation of the Federal Arbitration Act there would be little need for the State to have adopted an arbitration act. Most contracts would be governed by the Federal Act. 9 U.S.C. § 2 provides that in order for it to govern there must be a contract "evidencing a transaction involving commerce . . . ." As we interpret this section the transaction which is the subject of the contract must be a transaction in interstate commerce. The construction of the Durham County General Hospital was not an act in interstate commerce and we hold the Federal Arbitration Act does not apply. *See Varley v. Tarrytown Associates, Inc.*, 477 F. 2d 208 (2d Cir. 1973).

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. THOMAS FRANKLIN POTTS

No. 7926SC11

(Filed 17 July 1979)

1. **Criminal Law § 29.1— hearing on mental capacity to stand trial**

The trial judge sufficiently complied with the requirement of G.S. 15A-1002 for a hearing on defendant's capacity to proceed where the jury was being selected when the motion was made to have defendant declared incompetent; defendant's attorney stated he did not have any medical testimony; defendant's attorney stated that defendant had cooperated with him and in his opinion defendant understood the nature of the circumstances surrounding the charge against him; and the court, on the basis of these statements, denied the motion. Furthermore, any error was cured when the court later in the trial allowed defendant to put on evidence in support of the motion.

2. **Constitutional Law § 66— absence from portion of trial—waiver of right to be present**

Defendant waived his right to be present at his trial for uttering a forged check when he failed to appear after an evening recess, and the court properly ordered that the trial continue in his absence.

3. **Constitutional Law § 46— refusal to permit appointed counsel to withdraw**

The trial court did not err in refusing to permit defendant's court-appointed counsel to withdraw during the course of the trial where there was no showing that other counsel could have represented defendant at the time his attorney requested that he be allowed to withdraw.

4. **Criminal Law § 5— opinion as to defendant's knowledge of difference between right and wrong generally—exclusion**

The trial court did not err in refusing to permit defendant's mother to state her opinion as to whether her son "knows the difference between right and wrong" since the matter under inquiry was defendant's capacity to distinguish between right and wrong at the time and in respect to the matter under investigation, not whether defendant knew right from wrong generally.

5. **Criminal Law § 126.1— manner of polling jury**

The record shows that each juror assented to the verdict during the jury poll where the jury was polled by asking the foreman if the verdict of guilty as charged was his verdict and by asking the other jurors, "Your foreman has reported your verdict is guilty as charged. Is this your verdict?" and the foreman and each juror answered in the affirmative.

APPEAL by defendant from *Hasty, Judge*. Judgment entered 11 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1979.

The defendant was indicted for uttering a forged check. When the case was called for trial and after jury selection had begun, the defendant made a motion that he be declared not mentally competent to stand trial. His counsel made the following statement in support of the motion:

> "He has indicated to me that during the jury selection that he could not concentrate and hear what they had to say; number two, he has indicated to me that he is hearing voices; number three, he has indicated to me that he is suffering from paranoia. He has indicated to me that he is suffering from schizophrenia. And he has indicated to me that the stress of the trial has put him in a very emotional state and he cannot proceed. And in addition, he has informed me that he [is] receiving disability, mental disability Social Security. I ask the Court to inquire into the basis of this motion."

Defense counsel further stated that he had not had time to obtain medical testimony; that prior to the trial the defendant had directed him not to prepare a motion to have the defendant committed for evaluation; that the defendant had cooperated with his attorney, and in the attorney's opinion understood the nature of the circumstances surrounding the charge. The court denied the defendant's motion to declare him incompetent to stand trial.

After the State had rested, the court allowed the defendant to put on evidence out of the jury's presence in regard to his motion that he be declared incompetent to stand trial. His mother testified as to her son's mental condition. She testified that he is mentally sick and has been in mental institutions several times. Willie Bryant, an instructor at Central Piedmont Community College, testified that he taught the defendant a course in internal combustion engines and the defendant has passed all tests given in the course. At the conclusion of the *voir dire* hearing, the court concluded based on proper findings of fact that the defendant was competent to stand trial.

The defendant was convicted and sentenced to prison.

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

Laura A. Kratt, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error deals with what he contends is the court's failure to hold a hearing on his motion that he be held incompetent to stand trial. G.S. 15A-1002 provides:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.
>
> (b) When the capacity of the defendant to proceed is questioned, the court:
>
> * * *
>
> (3) Must hold a hearing to determine the defendant's capacity to proceed.

There have been cases prior to the effective date of G.S. 15A-1002 which hold that it is in the discretion of the judge to determine whether the circumstances brought to his attention are sufficient to call for a formal inquiry to determine whether a defendant has sufficient mental capacity to plead to an indictment. *See State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968) and *State v. Thompson*, 285 N.C. 181, 203 S.E. 2d 781, *cert. denied*, 419 U.S. 867 (1974). The adoption of this section makes such hearing mandatory. The question posed by this appeal is whether the action of Judge Hasty complies with the requirement that there be a hearing. We hold that it does so comply. At the time the motion was made to have the defendant declared incompetent, the jury was being selected. The defendant's attorney stated he did not have any medical testimony. The attorney stated the defendant had cooperated with him and in his opinion the defendant understood the "nature of the circumstances surrounding the charge." The court on the basis of these statements denied the motion. We hold that the hearing as held by Judge Hasty complied with G.S. 15A-1002(b)(3). Any error there may have been was cured when the court at a later time in the trial allowed the defendant to put on evidence in support of the motion and the State also put on evidence. The evidence at this hearing coupled with the earlier evidence heard by the court is sufficient evidence to support find-

ings of fact supporting a conclusion the defendant was competent to stand trial.

[2] The defendant next contends that the court committed error by not declaring a mistrial during a portion of the trial when defendant was absent from the courtroom. On the morning of 9 August 1978 the defendant was not present when the trial resumed after the evening recess. The defendant appeared in the courtroom later in the day. The court found that the defendant by so absenting himself from the courtroom had waived his right to be present for the remainder of the trial and ordered that the trial continue. This ruling of Judge Hasty is in accord with *State v. Montgomery*, 33 N.C. App. 693, 236 S.E. 2d 390, *appeal dismissed*, 293 N.C. 256 (1977). This assignment of error is overruled.

[3] The defendant next assigns as error the refusal of the court to let his attorney withdraw during the course of the trial. The defendant contends it was obvious he and his attorney could not communicate and he should not have been forced to continue the trial with an attorney in whom he had lost confidence. Defendant was an indigent represented by court-appointed counsel. There was no showing that other counsel could have represented defendant at the time the defendant's attorney requested he be allowed to withdraw. It would have been difficult for defendant to represent himself. The court did not abuse its discretion in denying the defendant's attorney's motion that he be allowed to withdraw.

[4] During the trial the defendant's mother was asked the following question:

> "Q. Now, based upon that observation, do you have an opinion satisfactory to yourself as to whether or not your son knows the difference between right and wrong?
>
> MR. ROYSTER: OBJECTION.
>
> COURT: SUSTAINED."

The defendant contends it was error to sustain this objection. This objection was properly sustained. The matter under inquiry was the defendant's capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. The question was not whether the defendant knew right

from wrong generally. *See State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).

[5] The defendant next assigns error in the polling of the jury. After the verdict was in the jury was polled by asking the foreman if the verdict of guilty as charged was his verdict and asking the other jurors the following question: "Your foreman has reported your verdict is guilty as charged. Is this your verdict?" The foreman and each juror answered in the affirmative. When requested in apt time a party is entitled to have a jury polled. When so polled the record must show that each juror assented to the verdict entered. *State v. Dow*, 246 N.C. 644, 99 S.E. 2d 860 (1957). We hold that the record in this case shows each juror assented to the verdict entered.

The defendant's last assignment of error is to the overruling of the defendant's motion for a new trial. The defendant contends he should have a new trial because the court erred in finding that defendant was able to conduct his defense in a rational manner and that he was able to cooperate with his counsel to the end that any available defense might have been interposed. For reasons stated earlier in this opinion, this assignment of error is overruled.

No error.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. JAMES ERVIN CAMPBELL

No. 7912SC166

(Filed 17 July 1979)

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

Evidence was sufficient for the jury in a second degree murder case where it tended to show that the armed defendant chased down the car in which the deceased was riding and ordered the deceased and others out at gunpoint; defendant then accused deceased of stealing his money and, while pointing the gun in the general direction of deceased, engaged him in a loud argument; and after deceased was felled, defendant attempted to reload his weapon and ran from the scene of the crime when a policeman appeared.

2. Homicide § 30.3— second degree murder charged—no instruction on involuntary manslaughter required

In a second degree murder prosecution testimony by a witness that defendant "could have pulled the trigger and it could have accidentally went off" did not amount to evidence of an accident and an unintentional killing, and the trial court therefore did not err in failing to instruct the jury with regard to involuntary manslaughter.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 8 November 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 22 May 1979.

The defendant was tried upon an indictment for second degree murder and convicted by a jury. From judgment entered on the verdict sentencing him to a term of imprisonment of forty years, the defendant appealed.

The State's evidence tended to show that the defendant, James Ervin Campbell, got into a car driven by a friend, James K. Morrison, on 30 May 1978. The defendant then informed Morrison that he had been robbed by a group of men including Joel Baldwin. The defendant directed Morrison to follow a car driven by Derrick A. McNair and in which Baldwin was a passenger. The car carrying the defendant overtook the McNair car and McNair saw what he believed to be a rifle pointing out the window at him. McNair then stopped his car upon being commanded by the defendant to stop. The defendant got out of the other car with a single-barrel shotgun, which McNair mistook for a rifle, in his hand. The defendant then ordered the occupants of the McNair car to get out and accused Baldwin of taking his money. Baldwin got out of the McNair car and denied this allegation. The defendant and Baldwin were then standing two or three feet away from each other. The two men argued briefly and Baldwin moved or took a step forward. At that time the shotgun in the defendant's hands was fired and the shot entered Baldwin's chest striking his aorta and killing him. Baldwin was never observed to have a weapon of any type.

After Baldwin fell, the defendant began to reload and cock the shotgun. By that time a policeman was coming around a nearby corner and the defendant "took off" through a nearby yard with the firearm still in his possession. An unfired shotgun shell was later found in the yard.

The defendant offered evidence tending to show that he and Baldwin were arguing in the street. They were standing approximately an arm's length from each other and the defendant had a shotgun in his hand. Baldwin made a motion "like he was moving forward" and the shotgun in the defendant's hand went off when the defendant "pulled it up."

Other facts pertinent to this appeal are hereinafter set forth.

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

James R. Parish, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

MITCHELL, Judge.

[1] The defendant assigns as error the trial court's denial of his motion to dismiss at the close of all of the evidence. In support of this assignment, the defendant contends that the State failed to introduce sufficient evidence, either of malice or that the killing was voluntary, to justify submitting the case to the jury on the charge of second degree murder. We do not agree.

The evidence introduced by the State tended to show that the armed defendant chased down the car in which the deceased was riding and ordered the deceased and others out at gunpoint. He then accused the deceased of stealing his money and, while pointing the gun in the general direction of the deceased, engaged the deceased in a loud argument. After the deceased was felled, the defendant attempted to reload his weapon and to engage in flight from the scene. We find the foregoing to constitute substantial evidence of an intentional, unlawful and malicious killing with a firearm by the defendant.

Once substantial evidence of a criminal offense has been introduced, the issue of whether that offense has been proven beyond a reasonable doubt is solely for the jury's determination. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Having determined that the defendant intentionally killed the deceased, the jury may but is not compelled to infer that the killing was unlawful and with malice. *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979); *State v. Harris*, 297 N.C. 24, 252 S.E. 2d 781 (1979). The State having offered substantial evidence tending to

show an intentional, unlawful and malicious killing, the trial court did not err in submitting the case to the jury on the charge of second degree murder.

[2] The defendant next assigns as error the trial court's failure to instruct the jury with regard to involuntary manslaughter. In support of this assignment, the defendant contends that his evidence tends to show that his negligence caused him to accidentally and unintentionally kill the deceased and, therefore, entitled him to an instruction on involuntary manslaughter. The defendant bases this contention upon the testimony of his only witness Pauline Williams who testified in pertinent part that:

> The shotgun came up, I don't know if he pulled it up or what. I know it went off in his hand. He could have pulled the trigger and it could have accidentally went off, but it did go off when he pulled it up. Mr. Campbell was holding the shotgun.

We do not find the testimony of the witness Pauline Williams that the defendant "could have pulled the trigger and it could have accidentally went off" to be any evidence of an accident and an unintentional killing. Instead, such testimony merely indicates a total lack of knowledge on the part of the witness as to whether the killing was intentional or unintentional.

The trial court must instruct the jury as to a lesser included offense of the crime charged if there is evidence from which the jury could find that the defendant committed the lesser offense. However, when there is no evidence of the defendant's guilt of a lesser included offense, the trial court correctly refuses to charge on the unsupported lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). "The *presence of such evidence* is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954).

The defendant has referred us to numerous cases, all of which he contends support the proposition that the trial court should have instructed the jury with regard to a possible verdict of involuntary manslaughter. We note, however, that each of those cases involves fact situations in which direct testimony of an accidental and unintentional killing was admitted into evidence. *See, e.g., State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). In the present case no such direct testimony was offered

and all of the probative evidence introduced tended to support a finding that the defendant intentionally shot the deceased. The trial court correctly permitted the jury to consider possible verdicts of second degree murder and voluntary manslaughter and did not err in failing to allow the jury to consider a verdict of involuntary manslaughter.

We further note that the trial court instructed the jury with regard to the law of self-defense. In this portion of the charge, the trial court correctly stated the law. No exception having been taken or assignment of error having been brought forward with regard to this point, we need not consider it further.

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

No error.

Judges PARKER and MARTIN (Harry C.) concur.

WILLIAM E. INGLE v. SARAH PASCOE INGLE

No. 7826DC785

(Filed 17 July 1979)

1. **Divorce and Alimony § 18.9— alimony pendente lite—stipulation of right to receive**

The facts necessary for an award of alimony pendente lite were established by stipulations of the parties, and the only question before the trial court was the amount of such alimony.

2. **Divorce and Alimony § 18.10— alimony pendente lite—findings—evidence**

Findings of fact are not required to support the trial court's determination of the amount of alimony pendente lite, but the court must consider the income, assets and respective needs of the parties.

3. **Divorce and Alimony § 18.13— amount of alimony pendente lite**

Plaintiff failed to show any abuse of discretion by the trial court in awarding defendant alimony pendente lite of $750 per month.

4. **Divorce and Alimony § 18.8— alimony pendente lite—inconsistencies between testimony and affidavit—admissibility of affidavit**

The presence of inconsistencies between defendant's testimony and her financial affidavit went only to the credibility of certain items in the affidavit

and did not render the entire affidavit incompetent on the question of alimony pendente lite.

5. **Divorce and Alimony § 18.8— alimony pendente lite—savings for vehicle replacement**

In a hearing on a motion for alimony pendente lite, the trial court did not err in refusing to strike defendant's testimony that she needed to save for a replacement vehicle where such expense was included in defendant's affidavit of financial standing which had been stipulated into evidence.

APPEAL by plaintiff from *Jones (William G.), Judge*. Judgment entered 27 April 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 11 June 1979.

Plaintiff husband initiated this action for absolute divorce. Defendant wife answered, admitting all allegations and further pleading that plaintiff abandoned her. Defendant also counterclaimed for alimony pendente lite, permanent alimony, sequestration of the residence of the parties and reasonable counsel fees. Plaintiff replied to defendant's counterclaim and pleaded as an affirmative defense various acts on the part of defendant that constituted a constructive abandonment of him by her and that she offered such indignities to his person as to render his condition in the marriage intolerable and his life burdensome, which alleged acts were committed by the defendant without any fault, aggravation, or provocation on the part of plaintiff.

Defendant submitted a sworn financial statement declaring her individual needs and fixed expenses to be $1,254.05 per month. Plaintiff submitted a sworn financial statement with expenses of $1,577.00 per month. The expenses listed on plaintiff's financial statement included the educational expenses of the daughter who is attending Meredith College and the son who is attending Charlotte Country Day School. Plaintiff was not ordered to pay for the education of these children as they are more than eighteen years old.

Plaintiff is employed as a physical therapist by a corporation in which he owns fifty percent of the stock and earned an adjusted gross income of $43,000 in 1975 and $32,235, plus other corporate benefits, in 1976, the year the parties separated.

The trial judge made findings of fact, reached conclusions of law and entered an order awarding defendant alimony pendente

lite in the sum of $750 per month. From the entry of this order for alimony pendente lite, plaintiff appeals.

Cole and Chesson, by James L. Cole, for plaintiff appellant.

Bryant, Hicks and Sentelle, by David B. Sentelle and Richard A. Elkins, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] An award of alimony pendente lite requires proof that the claiming party is a dependent spouse and that the other party is the supporting spouse, as well as the proof of grounds entitling claimant to alimony pendente lite. Before the hearing on alimony pendente lite, plaintiff and defendant entered into stipulations, *inter alia*, that defendant is a dependent spouse entitled to alimony pendente lite and that plaintiff is a supporting spouse for the purposes of an alimony pendente lite award. The parties further stipulated that grounds existed for the entry of an order awarding defendant alimony pendente lite. Stipulations are deemed to be established facts, are binding upon the parties, and relieve the party with the burden of proof of the necessity of producing evidence to establish the matters stipulated. *Blair v. Fairchild*, 25 N.C. App. 416, 213 S.E. 2d 428, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 622 (1975). By the stipulations of the parties, the facts necessary to recover alimony pendente lite were established and the only question before the trial court was the amount.

[2, 3] The amount of alimony pendente lite is to be determined in the same manner as alimony. N.C. Gen. Stat. 50-16.3(b); *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970). "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." N.C. Gen. Stat. 50-16.5. The ultimate amount is to be determined in the discretion of the trial court. *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968). Although this amount is not absolute and unreviewable, it will not be disturbed absent a clear abuse of discretion. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). Findings of fact are not required to support the trial court's determination of the *amount* of alimony pendente lite. *Id.* However, in determining the amount of alimony, the trial court must consider the income, assets and respective needs of the par-

ties. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). *See* N.C. Trial Judges' Bench Book, Alimony, IV.2D.5 (1979). We hold the trial court complied with *Beall* and the applicable statutes. Plaintiff has failed to show any abuse of discretion by the court in determining the amount of alimony pendente lite.

[4] Plaintiff contends the financial statement of expenses submitted by defendant was not reliable because it was not supported by credible and competent testimony. In effect, plaintiff contends defendant's testimony impeached the entries on her financial statement. The impeachment of a witness's testimony and evidence goes to the credibility of the witness. It is the function of the trial judge, in trials without a jury, to weigh and determine the credibility of a witness. The presence of inconsistencies in defendant's testimony and her financial affidavit goes only to the credibility of those certain items and does not impeach the entire affidavit as plaintiff contends. It is clear that the court did not include every item listed and requested in defendant's financial affidavit in its award of alimony. Defendant declared fixed needs and expenses of $1,254.05 per month. The court awarded her $750 per month. The court did not designate the evidence upon which the award was based, nor was it required to do so. *Eudy v. Eudy, supra.* The trial judge found defendant's testimony and evidence credible despite inconsistencies; therefore we will not hold to the contrary.

[5] Plaintiff contends the trial court erred in denying his motion to strike defendant's testimony that she needed to save or plan for a replacement of her automobile. This expense was listed in defendant's affidavit of financial standing (although not clearly labeled as such). Plaintiff and defendant stipulated that the affidavits of financial standing of both parties were in evidence. Plaintiff did not enter a general objection nor a specific objection to any of the items listed in defendant's affidavit of financial standing. If evidence theretofore has been admitted without objection, a subsequent objection to admission of evidence of the same import is waived. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301 (1976). Further assuming *arguendo* the evidence was erroneously admitted, the error was not prejudicial. It is not ordinarily prejudicial if evidence is erroneously admitted in a trial before a court without a jury since it is presumed that the court did not consider the in-

competent evidence. *Reverie Lingerie, Inc. v. McCain*, 258 N.C. 353, 128 S.E. 2d 835 (1963).

Plaintiff assigns as error the trial court's denial of his motion to dismiss. He maintains that the evidence was insufficient to permit defendant a recovery. As discussed above, the question of whether defendant was entitled to an award of alimony pendente lite was resolved by the stipulations of the parties and the only question before the court was the amount of the award. We hold there was sufficient evidence before the trial court for deciding the question before it. Again plaintiff's attack goes to the credibility of defendant's testimony. As discussed above, the weight and credibility to be given defendant's testimony was for the judge, sitting without a jury. The trial judge had the opportunity to hear the evidence, observe the demeanor of the witnesses and assess their credibility. We find no error in the trial court's denial of plaintiff's motion to dismiss.

We have carefully reviewed plaintiff's remaining assignments of error and find in them no error.

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

Bullard v. Johns-Manville Corp.

ALICE S. BULLARD (LOCKLEAR), WIDOW; ALICE S. BULLARD (LOCKLEAR), GUARDIAN AD LITEM FOR JENNINGS WADNEY BULLARD, MINOR SON, AND JULIETTE BULLARD, MINOR DAUGHTER OF JENNINGS BULLARD, DECEASED, EMPLOYEE PLAINTIFFS v. JOHNS-MANVILLE CORPORATION EMPLOYER AND THE TRAVELERS INSURANCE COMPANY CARRIER DEFENDANTS

No. 7810IC910

(Filed 17 July 1979)

Master and Servant § 67.2— workmen's compensation—exposure to asbestos—subsequent death from cancer—no causal relation shown

Evidence was insufficient to support the conclusion of a deputy commissioner of the Industrial Commission that deceased employee's death resulted from cancer caused by asbestos which the employee encountered while working for defendant, though there was ample evidence in the record that as a general matter exposure to asbestos increases the risk of developing cancer, since none of the evidence specifically related to decedent indicated that his cancer was caused by exposure to asbestos; no asbestos bodies were found in his lungs; there was no scarring of his lungs; and no expert gave an opinion that decedent's cancer was caused by asbestos.

APPEAL by defendants from the Industrial Commission. Opinion and award filed 31 May 1978. Heard in the Court of Appeals 12 June 1979.

Jennings Bullard, the husband and father of the plaintiffs, died in April 1974 of cancer. The parties stipulate that they are bound by the North Carolina Workmen's Compensation Act, and that the issue for determination by the Industrial Commission is whether there was a causal relationship between Bullard's death and the environment in which he was employed, an environment in which asbestos was used as part of the manufacturing process.

Deputy Commissioner Roney heard evidence and found as fact that "[t]he carcinogenic agent that caused the [cancer] was asbestos," and that "[d]ecedent encountered the carcinogenic agent that caused the [cancer] while working for defendant employer." He awarded the plaintiffs compensation of $20,000 at $56 per week, and medical and burial expenses. Defendants appealed to the full commission, which affirmed the deputy commissioner's order. Defendants appeal.

Moses, Diehl & Pate, by Warren L. Pate, for plaintiff appellees.

Gene Collinson Smith for defendant appellants.

ARNOLD, Judge.

Defendants argue that there is insufficient evidence in the record to support the finding that the cancer which caused Bullard's death resulted from his work environment. We agree.

Evidence was presented that the decedent worked in the Johns-Manville plant from 1966 through October 1971. The decedent was exposed there to asbestos fibers in the air (*e.g.*, one fiber per cubic centimeter in 1970 according to a survey made by an industrial hygenist). Dr. Philip Pratt, an anatomic pathologist, testified that "exposure to asbestos is associated with a substantial increase and risk of having primary carcinoma in the lung." However, Dr. Pratt examined autopsy slides of the interior surface of decedent's lung and found "no particles of asbestos bodies" there. There is a more effective way to find asbestos bodies in the lungs, but it was not used. Dr. Pratt also testified that "a contraction of lung cancer by a forty-two year old male is a rare occurrence in the absence of cigarette smoking and exposure to asbestos." It is stipulated by the parties that plaintiff would testify that the decedent smoked ten or less cigarettes a day on the average. According to Dr. Pratt, "the amount of smoking is related to the risk of cancer and . . . ten cigarettes a day is in the range that would show an increased incidence." He testified that "it is probable that the asbestos exposure contributed to the risk" of developing cancer, but that he could not say what was the cause of decedent's cancer; smoking and the inborn susceptibilities of a particular person also contribute to the development of such a tumor. Decedent's tumor was not a mesothelioma, which is always associated with exposure to asbestos, but a broncogenic carcinoma, the risk of which is increased by exposure to asbestos.

Dr. Marvin Kushner, a professor of pathology, also examined autopsy slides and found "no visible evidence of inhalation of asbestos bodies nor . . . evidence of the kind of scarring that might be produced by such inhalation." No evidence of asbestos bodies in the lungs appeared in the autopsy report. He was "unable to tell . . . what the origin of that cancer was. It was his

. . . opinion that the decedent's death was not caused by or related to his occupational exposure to asbestos." It was also Dr. Kushner's opinion that a person would not develop a tumor like decedent's without sufficient exposure to asbestos to cause scarring of the lung, and no such scarring was present.

Dr. Jacob Churg, a professor of pathology, testified that "there have been considerable medical opinions that scarring is necessary before cancer can occur as a result of asbestos exposure," but that "there is a fair amount of evidence that it does occur without significant scarring." Asked in a hypothetical question whether there was a causal connection between the decedent's exposure to asbestos and his development of cancer, Dr. Churg testified, "I would say that there may be a possible connection, based on the fact that there was asbestos present in the air, the individual worked in and undoubtedly inhaled such air, that individuals exposed to asbestos do have a higher incidence of carcinoma of the lung." Either the smoking or the exposure to asbestos "was a possible contributing cause."

There is ample evidence in the record that as a general matter exposure to asbestos increases the risk of developing cancer. However, none of the evidence specifically related to the decedent indicates that his cancer was caused by exposure to asbestos. No asbestos bodies were found in his lungs, and there was no scarring. No expert gave an opinion that decedent's cancer was caused by asbestos; Dr. Pratt said he did not know the cause, Dr. Kushner said that he did not think asbestos was the cause, and Dr. Churg said only that either smoking or asbestos could have been a "possible contributing cause."

We hold that this evidence is insufficient to support the commissioner's finding. The order of the Industrial Commission is

Reversed.

Judges HEDRICK and VAUGHN concur.

HELEN YORK VOSS COBB v. WILLIAM V. COBB

No. 7819DC982

(Filed 17 July 1979)

Divorce and Alimony § 13— divorce judgment—absence of finding that no children born of marriage

A divorce judgment was not void because it did not include a finding of fact that no children were born of the marriage.

APPEAL by defendant from *Warren, Judge*. Judgment entered 17 August 1978 in District Court, RANDOLPH County. Heard in the Court of Appeals 28 June 1979.

On the ground of one year's separation, plaintiff was granted an absolute divorce from defendant. Defendant appeals.

Hugh R. Anderson for plaintiff appellee.

Donald K. Speckhard for defendant appellant.

ARNOLD, Judge.

Defendant makes the novel argument that because the court did not include in its judgment a finding of fact that no children were born of the marriage, the court was without jurisdiction and the judgment of divorce is void. We find this argument to be without merit.

To support his position, defendant relies upon certain language in *Eudy v. Eudy*, 288 N.C. 71, 74-75, 215 S.E. 2d 782, 785 (1975): "[T]he allegations required by G.S. § 50-8 are indispensable, constituent elements of a divorce action and must be established either by the verdict of a jury or by a judge. . . . [A]ll averments required by the statute must be both alleged in the complaint and found by the finder of fact to be true before a divorce judgment may be entered." We believe defendant has read this language too broadly, attempting to apply it to the second paragraph of G.S. 50-8 when it is intended to apply only to the first.

Paragraph one of G.S. 50-8 requires that the complaint in a divorce action based on one year's separation be verified, and that it allege that one of the parties has been a resident of North Carolina for at least six months. Paragraph two requires that the

complaint set forth the names and ages of any minor children of the marriage, or the fact that there are no such children. This paragraph was added to the statute in 1971 by Ch. 415, 1971 Session Laws of North Carolina; prior to that time, G.S. 50-8 required only allegations of the plaintiff's belief that the facts alleged were true, of residency, and, except where the ground was a period of separation, of the plaintiff's prior knowledge of the grounds for divorce. Ch. 590, 1951 Session Laws of North Carolina.

The language in *Eudy v. Eudy, supra*, upon which the defendant relies, refers to cases which were decided under the prior statute, and therefore have no reference to the present paragraph two. *Eudy v. Eudy* was itself a question of jurisdiction where the plaintiff failed to allege that either party had been a resident of North Carolina for the requisite period. There is no reason to believe that the Supreme Court intended to include the totally unrelated requirement of an allegation regarding minor children in its references to findings of fact necessary for jurisdiction. As we noted in *Jones v. Jones*, 20 N.C. App. 607, 609, 202 S.E. 2d 279, 281 (1974), "[t]he obvious reason for this requirement [or a pleading relating to minor children] is to bring to the attention of the court any minor children that might be affected by the divorce, to the end that the court will protect the interests of those children," and not to establish jurisdiction.

Defendant also relies upon G.S. 50-10, which specifies that "[t]he material facts in every complaint asking for a divorce . . . shall be deemed to be denied by the defendant, . . . and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury," and upon *Pruett v. Pruett*, 247 N.C. 13, 100 S.E. 2d 296 (1957). As we have pointed out above with reference to *Eudy*, the language in *Pruett* referring to the necessity of having every allegation required by G.S. 50-8 found to be true before a divorce judgment can be entered does not include the allegation relating to minor children, since *Pruett* was decided some 14 years before the portion of the statute relating to minor children was enacted. Further, without determining whether the existence of minor children can ever be a "material fact" under G.S. 50-10 which must be found before a divorce judgment is entered, we hold that in this case it is not. The object of G.S. 50-10 is to prevent judgment in a divorce action from being taken by default, or by collusion. *Campbell v.*

Campbell, 179 N.C. 413, 102 S.E. 737 (1920). A finding of fact as to the existence of children would in no way serve that purpose. And since it is uncontradicted that no children were born of this marriage, there are no children whose interests might be better protected by requiring the trial court to acknowledge by a finding of fact that he is aware of their existence.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and VAUGHN concur.

ROBERT S. COCHRANE, JR. AND WIFE, POLLY C. COCHRANE v. SEA GATE INCORPORATED

No. 7810SC979

(Filed 17 July 1979)

Appeal and Error § 14— notice of appeal not given within 10 days—appeal not timely

Where entry of judgment was noted by the clerk on the court minutes for 13 March 1978 and written judgment was filed on 15 May 1978, plaintiffs' notice of appeal filed on 25 May 1978 was not timely, as it was not filed within ten days of entry of judgment.

APPEAL by plaintiffs from *Brewer, Judge*. Judgment entered 13 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 27 June 1979.

Plaintiffs brought this civil action in Wake County to rescind a contract under which plaintiffs purchased from defendant a lot fronting on the Intracoastal Waterway in Carteret County. Plaintiffs alleged in their complaint that they had been induced to enter into the contract by the fraudulent representations of defendant's agents that the lot was suitable for the construction of a dwelling thereon, which representations were false in that an easement in favor of the United States covered the greater portion of the lot. Defendant filed answer denying that any false representations were made and alleging that plaintiffs purchased

the lot with knowledge, after full disclosure, that the same was subject to a duly recorded easement in favor of the United States.

After taking the deposition of the plaintiff, Robert S. Cochrane, Jr., defendant moved for summary judgment on the ground that there was no genuine issue as to any material fact relating to the liability of defendant to the plaintiffs and that movant was entitled to judgment as a matter of law. A hearing on the motion was held on 3 February 1978, before Judge Brewer during a term of Superior Court in Wake County. Subsequently, on 13 March 1978, attorneys for both parties appeared before Judge Brewer, at which time the Judge, in open court and in the presence of counsel for both parties and in the presence of the court clerk, rendered judgment for the defendant on its motion for summary judgment. Entry of the judgment was noted by the clerk on the court minutes for 13 March 1978.

Subsequently, Judge Brewer signed a written judgment dated 12 May 1978, which was filed on 15 May 1978, granting defendant's motion for summary judgment and dismissing plaintiffs' action. On 25 May 1978 plaintiffs filed notice of appeal.

John R. Hughes & Associates, by David Ford for plaintiffs appellants.

Staton, Betts, Perkinson & West by William W. Staton, Stanley W. West, and James S. Staton, for defendant appellee.

PARKER, Judge.

Appeal from a judgment or order in a civil case, if not taken by giving oral notice as provided in Rule 3(a)(1) of the N.C. Rules of Appellate Procedure and in G.S. 1-279(a)(1), "must be taken within 10 days after its entry." Rule 3(c) of the N.C. Rules of Appellate Procedure; G.S. 1-279(c). [The running of this time may be tolled by a timely motion filed as provided in Rule 3(c), but no such motion was filed in the present case.] G.S. 1A-1, Rule 58 provides, among other matters, that "[u]pon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation *shall constitute the entry of judgment for the purposes of these rules.*" (Emphasis added.)

In the present case, entry of judgment was made on 13 March 1978 when the trial judge, in open court and in the presence of counsel for both parties, rendered summary judgment for defendant, and the clerk, in the absence of any contrary direction by the judge, made a notation of such decision in the court minutes. No notice of appeal from the judgment was given until 25 May 1978, more than two months after its entry. Where the appeal is taken more than ten days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in Rule 3 of the N.C. Rules of Appellate Procedure and in G.S. 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. *See Teague v. Teague*, 266 N.C. 320, 146 S.E. 2d 87 (1966); *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E. 2d 46 (1976); *Brooks v. Matthews*, 29 N.C. App. 614, 225 S.E. 2d 159 (1976); *Clark v. Wallace*, 27 N.C. App. 589, 219 S.E. 2d 501 (1975).

In fairness to plaintiffs' present counsel, it should be noted that other counsel and not plaintiffs' present counsel represented plaintiff at the time the summary judgment for defendant was entered and when the notice of appeal was given.

Appeal dismissed.

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

WILBUR P. GRAHAM, MASON R. COULTER, GROVER D. COULTER, HAROLD H. SHUFORD, CHARLES A. COULTER v. RUFUS N. LOCKHART AND JOHN H. MILES

No. 7825DC940

(Filed 17 July 1979)

Religious Societies and Corporations § 2— congregational church—dismissal of pastor

The trial court properly granted summary judgment for plaintiffs in their action to have defendant enjoined from acting as pastor or member of the church to which they belonged where the record showed that the church was congregational in form and that on two occasions it voted unanimously to remove defendant as pastor.

APPEAL by defendant from *Tate, Judge*. Judgment entered 17 May 1978 in District Court, CATAWBA County. Heard in the Court of Appeals 14 June 1979.

Defendant appeals from a judgment permanently enjoining him from acting as pastor or member of the Maiden Chapel Baptist Church in Maiden, North Carolina. Maiden Chapel Baptist Church is congregational in form without a written constitution or by-laws. Sometime in 1977, friction developed within the church. A church meeting was had at which the defendants contend certain members of the church including some of the plaintiffs were removed from offices they held in the church and were "silenced." On 30 July 1977 at a meeting of the congregation, the defendant Lockhart was removed as pastor by a vote of 49 to 0. This action was commenced on 8 August 1977. On 25 March 1978 at another meeting of the church congregation, the defendant Lockhart was removed as pastor and member by a vote of 51 to 0. On 17 May 1978 the court entered summary judgment in favor of the plaintiffs.

Smith and Smith, by Young M. Smith, Jr., for plaintiff appellees.

J. Bryan Elliott, for defendant appellants.

WEBB, Judge.

We note at the outset that matters of church doctrine are not involved in this case. The only issue is whether the defendant Lockhart has been properly dismissed as pastor and member by a church which is congregational in form. The defendants advance several reasons as to why summary judgment should not have been entered. They contend first that their affidavits show that it was the custom in the church that the meetings be called by the pastor. The meetings at which the defendant Lockhart was dismissed were not called by the pastor. The defendants contend there was a genuine issue of a material fact as to whether the meetings were properly called. The defendants also contend that the court in effect chose between meetings of the church, that is, it accepted the meetings of 30 July 1977 and 25 March 1978 as representing the action of the congregation and rejected the meeting at which some of the plaintiffs were "silenced." The defendants contend there was a genuine issue of material fact as

to which of these two meetings was the proper meeting of the church congregation. The difficulty with the defendants' arguments is that the Maiden Chapel Baptist Church is congregational in form. The congregation has the right to control the church. *See Atkins v. Walker*, 284 N.C. 306, 200 S.E. 2d 641 (1973). Assuming the custom of the church was that the pastor call church meetings, the congregation had the power to change this rule which it did by calling this meeting. Assuming some of the plaintiffs had been previously "silenced," and the record is not clear that this had happened, the congregation had the power to remove this restriction, which it did by allowing them to vote. We are limited to determining that the majority voted to remove the defendant Lockhart and the record shows that the majority of the congregation so voted.

The defendants contend for the first time in this Court that there is a question of whether the persons who voted at the meetings of 30 July 1977 and 25 March 1978 were proper voting members of the church. They rely on an allegation in the complaint which says the register of the church membership is not on a current basis. No question of persons who were not members of the congregation being allowed to vote was raised at the hearing in district court. The affidavits filed by the plaintiffs showed that the meetings were properly called and properly conducted. The affidavits of defendants did not contradict this assertion except to allege it was the tradition of the church for the pastor to call meetings. On the record before it, the district court properly entered summary judgment for the plaintiffs.

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

LEON OLIVE v. PAUL J. WILLIAMS

No. 7826SC736

(Filed 31 July 1979)

1. **Contracts § 12.1— unambiguous agreement—construction**

The agreement between the parties establishing an association for the practice of law was clear and unambiguous, and the court therefore gave effect to its terms and did not, under the guise of construction, insert what the parties elected to omit.

2. **Attorneys at Law § 7— contract between attorneys for division of fees—no ambiguity**

In an action by plaintiff attorney seeking an accounting by defendant, his former associate, of all fees allegedly due plaintiff pursuant to articles of association entered into by the parties, there was no merit to defendant's contentions that the parties' contract was ambiguous and failed to provide for a division of fees after a termination of the association, and that defendant's promise to work for the fee schedule provided in the agreement was dependent upon plaintiff's promise to pay defendant's overhead as provided in paragraph one of their contract, since the agreement clearly provided that, upon termination of the association, defendant could retain clients originally attracted to the partnership upon the condition that the regular fee division schedule would continue; the agreement was silent with respect to expenses incurred by defendant or avoided by plaintiff after termination; and defendant's promise to work was not dependent upon plaintiff's promise to pay overhead.

3. **Attorneys at Law § 7— contract between attorneys for division of fees—applicability to fees actually collected**

In an action for an accounting of fees derived by defendant from clients which he took with him after terminating his association with plaintiff's law firm, plaintiff was entitled to only a percentage of those fees actually collected by defendant.

4. **Attorneys at Law § 7— termination of association for practice of law—division of fees**

In an action for an accounting of fees derived by defendant from clients which he took with him after terminating his association with plaintiff's law firm, plaintiff was not entitled to any portion of fees derived from a client who retained defendant after the date of defendant's termination of the association but before defendant actually left plaintiff's premises.

5. **Rules of Civil Procedure § 15.1— amendment of answer—motion denied—no abuse of discretion**

The trial court did not abuse its discretion in denying defendant's motion to amend his answer to "elaborate on his expenses as a setoff to any amount that may be due Plaintiff," since the court, at the same time it denied the motion to amend, granted summary judgment rejecting defendant's setoff theory

which was raised, perhaps improperly but nevertheless considered by the trial court, in his affidavits, answers to interrogatories, and prayer for relief in his answer to the complaint.

6. Attorneys at Law § 7.1— contingency fee contracts—validity

There was no merit to defendant's contention that contingency fee contracts entered into between defendant and clients of plaintiff's law firm, and upon which plaintiff relied for his share of the fees were void as contrary to public policy, since the contracts specifically provided that offers in compromise would be submitted to the clients for approval or rejection, and the provision entitling the attorney to a fee of 30% of the recovery when settlement was reached prior to litigation and 35% upon recovery after litigation was initiated did not smack of champerty and maintenance, as the slight difference in fees would seldom fully compensate the attorney for the additional effort necessary in pursuing the matter through litigation.

APPEAL by defendant from *Ferrell, Judge*. Order entered 5 May 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 April 1978.

Defendant is a former associate in the law firm of Olive, Howard, Downer and Williams in Charlotte, of which firm plaintiff was senior member. Defendant, after giving proper notice, terminated his association with the firm effective 1 January 1976. He actually left the premises 15 January 1976, at which time he opened his own office for the practice of law. The articles of association (see Appendix) refer to Olive as the "principal" and Williams as an "associate" in the firm.

This action was filed on 22 April 1976, seeking an accounting by defendant of all gross fees which are allegedly due to the plaintiff pursuant to the articles of association which were entered into between plaintiff and defendant approximately 45 days after defendant became an associate in the firm. The full text of the articles of association appears in the Appendix to this opinion. Plaintiff alleges that upon defendant's termination of his association, defendant took with him certain files and pending cases which he had been handling prior to his termination. He demands an accounting of the gross fees generated by those cases and an award of the sum to which he is entitled in accordance with the agreement of the parties as embodied in the articles of association. Plaintiff alleges that he has performed according to the provisions of the agreement and that defendant has refused to comply with his demand for payment.

Defendant answered the complaint averring as a third defense that the written agreement was not the full agreement between the parties. He alleges that he was induced to leave his position with the Mecklenburg County District Attorney and to enter into an association with plaintiff by oral promises that defendant would handle all of the firm's criminal work, and that the civil work would be divided equitably among all the associates of the firm. He avers that contrary to the oral agreement, plaintiff did not equitably distribute the business; that he was not assigned all of the criminal cases; and that, contrary to paragraph nine of the written agreement, other members of the firm were allowed to retain a higher percentage of their gross fees than was he. In response to plaintiff's interrogatories, defendant asserted that although the cases were supposed to be distributed in such a manner that all associates of the law firm would earn substantially the same income, in fact, the work was so distributed that the two other associates earned approximately $80,000 each whereas defendant earned approximately $16,000. Defendant prayed that the action be dismissed for plaintiff's failure to perform according to the contract between the parties. In the alternative, defendant prayed that the court allow defendant a setoff against sums allegedly due under the agreement for the expenses incurred in bringing to a final determination those cases pending on 1 January 1976.

Extensive discovery was utilized by each party. The relevant information revealed through discovery which is pertinent to this decision will be summarized in the opinion below.

On 20 October 1977, plaintiff filed a motion for summary judgment with respect to the issue of liability, pending further discovery on the issue of damages. On 21 February 1978, the motion was renewed, and plaintiff also sought a ruling with respect to the issue of damages. Defendant had, in the intervening period, filed on 15 December 1977, a motion to abandon and strike his original "Third Defense" and to amend his third defense to substitute in its place more specific averments with respect to his alleged right to a setoff for expenses incurred in handling the cases originating during his association with plaintiff which were brought to a conclusion after 1 January 1976.

Summary judgment was entered in favor of the plaintiff on 5 May 1978, in the amount of $27,550 with interest at the annual rate of six per cent from 1 February 1978, and for $2,305.57 plus six per cent interest from 1 August 1977. From the entry of judgment, which also included a denial of defendant's motion to amend, defendant appeals.

James, McElroy & Diehl, by William K. Diehl, Jr., and David M. Kern, for plaintiff appellee.

Curtis & Millsaps, by Cecil M. Curtis, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant's primary contention on appeal is that summary judgment was improvidently granted in the face of unresolved issues of fact with respect to both liability and damages. Defendant first contends that the articles of association were so ambiguous as to require that the intent of the parties be determined by a jury upon competent evidence as to the real agreement. *See generally Lumber Co. v. Construction Co.*, 249 N.C. 680, 107 S.E. 2d 538 (1959). However, when a written contract such as this one is plain and unambiguous on its face, the court does not resort to construction but determines the legal effect of the agreement. *Briggs v. Mills, Inc.*, 251 N.C. 642, 111 S.E. 2d 841 (1960). Clear and express language of the contract controls its meaning, and neither party may contend for an interpretation at variance with the language on the ground that the writing did not fully express his intent. *Kohler v. Construction Co.*, 20 N.C. App. 486, 201 S.E. 2d 728 (1974), *cert. denied*, 285 N.C. 85, 203 S.E. 2d 58 (1974). Even though ambiguities in a written contract are to be resolved against the party who drafted the writing, the plaintiff in this case, such a construction is only available when there does, in fact, exist an ambiguity. The language of the contract before us is clear and unambiguous. We must, therefore, give effect to its terms, and we will not, under the guise of construction, insert what the parties elected to omit. *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962).

[2] Defendant contends that the contract is ambiguous and fails to provide for a division of fees after a termination of the associa-

tion under paragraph eleven of the agreement. (See Appendix.) Paragraph eleven provides for the automatic renewal of the agreement each December for the next 12-month period unless written notice of an intention to terminate at the end of the year is given 30 days in advance. In support of his argument that paragraph eleven of the contract is ambiguous, defendant refers to paragraph twelve, the "for cause" termination provision, which specifically incorporates the division of fees arrangement specified in paragraphs five and six. Paragraph six establishes that, in the event of the termination of the association (it does not differentiate between "automatic termination" or termination "for cause"), the client in a pending case shall have the option to retain the associate or to have the matter transferred to Olive, and that the division of fees shall continue according to paragraph five. Under paragraph five, 40% of the associate's gross fees earned in all cases generating fees greater than $200 and 50% of those in all cases generating $200 or less are to be paid to Williams by Olive. Defendant contends that the failure of paragraph eleven to make specific references to paragraphs five and six indicates that the parties did not agree to a method for dividing fees in case of a termination of the agreement under paragraph eleven. In further support of his position, defendant argues that it would be unreasonable to assume that the parties agreed to a division of fees upon an "automatic termination" that failed to take into account the alleged savings plaintiff would enjoy by no longer having to pay the office expenses of defendant after termination of the agreement and pending resolution of the cases taken by defendant.

We are compelled by the plain language of the agreement to conclude that paragraphs five and six govern terminations under both paragraph eleven and paragraph twelve. Although we agree that the agreement is absolutely silent with respect to expenses incurred by defendant or avoided by plaintiff after termination, we cannot agree that this fact compels a conclusion that the written agreement was not complete and that the parties actually expected that defendant would be entitled to credit for such expenses. We do not assume, as does defendant, that the plaintiff saved expenses when defendant terminated his association. Even if this was in fact true, we are not free to change the agreement of the parties. It is apparent that the agreement contemplated

that, upon termination of the association, defendant could retain clients originally attracted to the "partnership" upon the condition that the regular fee division schedule would continue. Although defendant would undoubtedly incur his own office expense after terminating the association, he was taking with him clients of the partnership and thus benefiting from his association with the plaintiff.

Defendant also contends that the defendant's promise to work for the fee schedule provided in the agreement was dependent upon plaintiff's promise to pay defendant's overhead as provided in paragraph one of the contract. He suggests that appropriate rule of construction of the agreement is that "[w]here mutual promises go to the whole consideration on both sides, they are, in the absence of any clear manifestation of a contrary intention, mutual conditions, the one precedent to and dependent upon the other." 17 Am. Jur. 2d, Contracts § 322 at 754. Accepting *arguendo* this rule of construction, it is apparent from the nature of a law partnership or associaiton that there are other elements of consideration flowing between the parties. Under such circumstances, whether covenants are dependent or independent depends entirely upon the intention of the parties construed in light of the nature of the contract, the relation of the parties thereto, and other competent evidence. *Wade v. Lutterloh*, 196 N.C. 116, 144 S.E. 694 (1928); *Flour Mills v. Distributing Co.*, 171 N.C. 708, 88 S.E. 771 (1916); *Dwiggins v. Shaw*, 28 N.C. 46 (1845). In this case, the intention is clear that the promises are not dependent. Paragraph six specifically provides that the method of division of the fees continue after termination. Although defendant contends that his agreement to accept the fee schedule upon termination was contingent upon plaintiff's agreeing to continue to pay expenses in those cases defendant took with him, it is abundantly clear that plaintiff made no such agreement. The contract is completely silent with respect thereto, and no covenant exists upon which defendant's covenant could be said to depend.

[3] Defendant further contends that genuine issues of material fact were presented by the pleadings, interrogatories, requests for admission, and depositions with respect to the issue of damages. Defendant's contention is that the trial court improperly resolved an issue of fact when it ruled that plaintiff was entitled

to $2,305.57 as his share of the fee generated by the Harrington file despite defendant's evidence that he received a fee of only $2,152.55. Plaintiff contends, on the other hand, that plaintiff was entitled to 60% of the fee to which defendant was entitled by the contingency fee contract. His calculations were that defendant was entitled to $4,200 (35% of $12,000) and that plaintiff, therefore, was entitled to $2,520 (60% of $4,200) plus interest of $75.60 and costs paid by plaintiff of $139.98, totalling $2,735.58. Plaintiff contends that defendant's acceptance of less than that to which he was entitled did not affect plaintiff's right to his share of the full contractual fee. The trial court awarded plaintiff $2,305.57 plus interest at 6% per annum from 1 August 1977 as his share of the Harrington fee.

According to the record, the following facts with respect to the Bruce Harrington matter are uncontested by the defendant: Defendant received checks totalling $3,842.61 for fees and expenses incurred. He incurred $1,690 in expenses of the trial, $139.98 of which was paid by plaintiff prior to 1 January 1976, and which amount was placed into defendant's savings account for the benefit of plaintiff. Defendant paid $252.55 to an attorney associated to assist in the case. He placed $1,000 of the fee into savings for the benefit of plaintiff. The defendant represented Harrington under a contingency fee providing for 30% of the settlement prior to litigation, and 35% after litigation is initiated. Harrington actually recovered $12,000 in the lawsuit minus certain costs incurred after offer of judgment was rejected. *See* G.S. 1A-1, Rule 68.

We find no genuine issue of material fact with respect to the Bruce Harrington matter. Resolution of this controversy presents a question of interpretation of the articles of association, not a question of fact. Paragraphs four and five (see Appendix) of the agreement govern the division of fees. Under those provisions, Olive is entitled to a certain percentage of "[a]ll fees *derived* from the performance of professional services". Derivative, the adjective form of the verb to derive, has been defined as "[a]nything obtained or deduced from another". Black's Law Dictionary (4th ed. 1951). The choice of the contractual language is less than artful. Nevertheless, the verb "to derive", when used where a somewhat similar connotation is intented as in this contract, is defined as "to acquire, get or draw". Webster's Third, Una-

bridged (1968). In giving to the language of the contract its ordinary and usual meaning, as we must unless there is competent evidence to show that another meaning was intended, we are of the opinion that plaintiff is entitled to only a percentage of those fees actually collected by the defendant. We find support for our interpretation of the contract in defendant's affidavit, which must be accepted as true in considering plaintiff's motion for summary judgment. *See Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E. 2d 734 (1974). Defendant's answers to requests for admissions asserted that it was the custom in plaintiff's law firm to adjust fees whenever a trial or settlement resulted in a low recovery so as to charge the injured party a fair fee commensurate with the recovery. Nevertheless, it appears that the trial court accepted defendant's interpretation of the contract. The amount of the judgment with respect to the Harrington case was apparently determined as a percentage of the gross payments defendant received for his services.[1] However, it appears that in calculating the percentage, the court improperly included as part of the gross fee reimbursement for expenses of the litigation. For this reason, the matter must be remanded for a correction of the judgment in accordance with this opinion.

[4] Defendant next contends that plaintiff's evidence in support of his motion for summary judgment failed to establish that he was entitled to a share of the fees in those cases upon which the trial court based its order. The trial court's award is apparently based in part upon the calculations contained in plaintiff's second request for admissions which contains an asserted calculation of plaintiff's share of fees in 48 cases. Defendant admitted in response to plaintiff's first request for admissions that each of these cases was initiated while he was with plaintiff's firm and were taken by him when he opened his own office. With only minor exceptions, defendant has admitted the accuracy of plaintiff's calculations and information with respect to the fees in those 48 cases. We find no genuine issues of material fact with respect to which cases plaintiff was entitled to a share of the fee. Nevertheless, there does exist a question of law with respect to whether plaintiff is entitled to a share of the fees generated by the Viola Ardrey case. The question arises because defendant was

1. 60% of $3,842.61, the total payment received for fees *and expenses*, is $2,305.57.

retained by Ardrey after 1 January 1976, but before 15 January 1976, the date defendant actually left the premises. Plaintiff permitted defendant to remain in plaintiff's office until 15 January 1976 while awaiting preparation of defendant's new office. We find no evidence in the record of the parties' agreement with respect to work retained during defendant's holdover period. Insofar as the judgment includes any fee due plaintiff as a result of the Ardrey matter, the case must be remanded for further proceedings to resolve this issue.

[5] Defendant's second assignment of error is directed to the trial court's denial of his motion to amend his answer and third defense to "elaborate on his expenses as a setoff to any amount that may be due Plaintiff". A motion to amend a pleading, made more than 30 days after the original pleading is served, shall be freely granted when justice so requires. G.S. 1A-1, Rule 15(a); *see Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). However, the motion is addressed to the discretion of the trial court. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119 (1978), *cert. denied* and *appeal dismissed*, 294 N.C. 736, 244 S.E. 2d 154 (1978). We find no abuse of discretion. At the same time the court denied the motion to amend, it granted summary judgment rejecting defendant's setoff theory which was raised, perhaps improperly but nevertheless considered by the trial court, in his affidavits, answers to interrogatories, and prayer for relief in his answer to the complaint. Amendment of the complaint at that time would have been futile.

[6] Finally, defendant raises for the first time on appeal the issue of whether the contingency fee contracts entered into between defendant and clients of plaintiff's law firm, and upon which plaintiff relies for his share of the fees, are void as contrary to public policy. Defendant argues that the plaintiff's action should be dismissed, and the parties left as they stand, because the contingency fee contract language quoted below smacks of champerty and maintenance. The contract language in question appears as follows: "I [the client] agree that in the event you recommend litigation as necessary or expedient in the settlement of the case, I will not unreasonably withhold my consent thereto." Defendant contends that if the contingency fee contracts are void

because they contain such language the courts should not interfere, but should leave the parties as they stood prior to the lawsuit.

Contracts for contingent fees are closely scrutinized by the courts where there is any question as to their reasonableness. *Randolph v. Schuyler*, 284 N.C. 496, 201 S.E. 2d 833 (1974). Such contracts are valid when the contract is entered into in good faith, without suppression or reserve of fact or of apprehended difficulties, without undue influence, and for reasonable compensation. *Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921). However, the defendant is correct that contingency fee contracts providing against compromise or settlement of a case without the attorney's consent often have been declared as void against public policy for inhibiting compromise or settlement. *See generally* 7 Am. Jur. 2d, Attorneys at Law § 227; Annot., 121 A.L.R. 1122 (1939). Nevertheless, we find this contract to be reasonable and not contrary to public policy. The contract specifically provides that offers in compromise will be submitted to the client for approval or rejection. It by no means reserves to the attorney the authority to approve or reject the offer of settlement. Moreover, the contract specifically entitles the attorney to a fee of 30% of the recovery when settlement is reached prior to litigation, 35% upon recovery after litigation is initiated. It appears to this Court that the fee schedule is in fact more beneficial to the attorney where settlement is effectuated prior to litigation than when it becomes necessary to proceed with litigation in order to recover. The slight difference in fees would seldom fully compensate the attorney for the additional effort necessary in pursuing the matter through litigation. This assignment of error is overruled.

For the foregoing reasons, the order of the trial court is affirmed in part and remanded in part for further proceedings and entry of judgment in accordance with this opinion.

Affirmed in part and remanded for further proceedings.

Judges HEDRICK and WEBB concur.

APPENDIX

ARTICLES OF ASSOCIATION

THIS INDENTURE made and entered into by and between LEON OLIVE (hereinafter referred to as Olive) and PAUL J. WILLIAMS, (hereinafter referred to as Associate)

WITNESSETH:

The parties hereto are duly licensed and practicing attorneys at law associated under the firm name, OLIVE, HOWARD, DOWNER & WILLIAMS, at Suite 1200, The Johnston Building, Charlotte, North Carolina. The parties hereto are not partners in the true legal sense; their relationship is that of principal and associate, Olive being the principal. The relationship between the parties has heretofore been governed by an informal oral understanding. The purpose of this instrument is to formalize the relationship between them.

For and in consideration of the mutual covenants herein contained, it is agreed:

1. Olive agrees to maintain suitable office space for the firm and to provide a private office for the associate. Olive also agrees to defray all operating expenses for the firm, including providing adequate secretarial and investigation services, telephones, office equipment, supplies, letterheads, postage, bookkeeping and all other expenses necessarily incident to the practice of law by the firm. All property purchased by Olive shall remain his sole and separate property. All property purchased by the associate and used by him in connection with the firm's practice shall remain the sole and separate property of the associate.

2. A secretary shall be assigned to do the work of the associate and to the extent necessary she shall work under the supervision of the associate, but in the event disciplinary action or dismissal shall become necessary or desirable, such action shall be taken by Olive or by the associate with Olive's express authorization.

3. Olive shall have the sole responsibility for the employment of all personnel of the firm.

4. All fees derived from the performance of professional services by the associate shall be paid into the firm through a trust account maintained by Olive either in his own name or in the name of the firm, and all records pertaining to the receipt of fees shall be maintained by an employee of Olive.

5. Olive shall pay to the associate as promptly as practicable after the receipt of all fees attributable to the professional services of the associate, 40% of the gross fees in all cases wherein the fee is greater than $200.00. In all such cases wherein the fee is $200.00 or less, Olive shall pay to the associate 50% of the gross amount of such fees. No fees for professional services rendered solely by Olive shall be divisible hereunder.

6. In the event of termination of this agreement, with respect to all cases being handled by the associate, the client shall have the option to have the associate to continue to handle the case or to have Olive assume the responsibility for its handling. In either event, the fee arrangement hereinabove outlined in Paragraph 5. shall be applicable and a division of fees in accordance with Paragraph 5. hereof shall be made within ten days after receipt thereof.

7. Olive agrees to maintain at his own expense and for his benefit and that of the associate, professional liability insurance applicable to the work of the associate, having limits of not less than $150,000.00.

8. A log shall be maintained by Olive (and he shall furnish a copy thereof to the associate) of all cases being handled for the firm by the associate.

9. It is expressly understood and agreed that, contemporaneously with the execution of this indenture, Olive is also entering into identical agreements with the other associates of the firm. Olive reserves the right at any time in the future to enter into similar Articles of Association with additional associates and in his discretion, to appropriately change the firm name to reflect the addition of such associates.

10. It is expressly understood and agreed that, because of the use of a firm name which implies to the general public that the firm is a partnership and that each member of the firm is individually responsible for the actions of the firm, neither party

hereto shall conduct his professional practice in such a manner as to conflict with the canons of ethics of the Bar or so as to reflect discredit upon the firm or the other party hereto. In the event of any such action or conduct on the part of either party hereto which shall render the other liable therefor, the party practicing such conduct shall hold the other harmless and indemnify him from the claims of all persons whomsoever arising out of or any matter related to any such action or conduct.

11. Unless sooner terminated as hereinafter provided, the term of this Agreement shall be one year commencing January 1, 1972, and ending December 31, 1972, provided however that this Agreement shall be automatically renewed for additional successive periods of one year unless one of the parties shall, at least thirty (30) days prior to the end of the initial term or any renewal term hereof give to the other written notice of intention to terminate at the end of the then current term. Upon the giving of such notice, this Agreement shall automatically terminate at the end of the then current term.

12. Notwithstanding the provisions of Paragraph 11 above, either party hereto may for cause, terminate this Agreement and the relationship between the parties hereto upon giving the other thirty days notice of intention to terminate. In the event of such termination, the provisions of Paragraphs 5. and 6. above shall apply with respect to all pending cases then being handled by the associate.

IN WITNESS WHEREOF the parties hereto have hereunto respectively set their hands and seals this 6 day of January, 1972.

s / LEON OLIVE (Seal)

s / PAUL J. WILLIAMS (Seal)

Stone v. McClam

D. LINWOOD STONE AND J. A. STONE v. MARVIN McCLAM, C. E. SMITH, NORMAN SANDERS, WILLIAM R. HOCUTT, AND FCX, INC.

No. 7810SC590

(Filed 31 July 1979)

Fraud § 7; Fiduciaries § 2; Corporations § 13— transfer of stock—no fiduciary relationship

In an action to recover damages for fraud by defendants FCX and officers and employees of FCX in inducing plaintiffs to transfer their stock in a turkey raising and processing business to FCX in return for FCX's release of plaintiffs from personal liability on account of their guaranties of payment of the indebtedness of the turkey business to FCX, the evidence was insufficient to support a jury finding that any fiduciary relationship existed between the parties such as to cast on defendants the burden of proving that they acted in good faith in the stock transfer transaction where: (1) the debtor-creditor relationship between plaintiffs and FCX did not in itself create any fiduciary relationship between the parties, and (2) although the individual defendants, all of whom were acting in behalf of FCX, had also become the officers and directors of the turkey business, plaintiffs actively managed the turkey business until a short time prior to the stock transfer and had equal or better access than defendants to all information pertinent to determining the fair value of their stock, and there was no evidence of special circumstances which would place defendants in a fiduciary relationship toward plaintiffs in connection with the transfer of their stock.

APPEALS by plaintiffs and defendants from *Clark, Judge.* Judgment entered 3 February 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 27 March 1979.

This is a civil action in which plaintiffs seek to recover damages from defendants based on allegations that defendants, by actual fraud and by constructive fraud in breaching a fiduciary relationship which plaintiffs allege existed between plaintiffs and defendants, wrongfully induced plaintiffs to execute on 5 March 1975 a certain Agreement and Release by which plaintiffs quitclaimed to the defendant, FCX, Inc. (hereinafter referred to as "FCX"), all of plaintiffs' stock in Stone Bros., Inc. (hereinafter referred to as "Stone Bros."). The individual defendants are officers or employees of FCX. In their complaint plaintiffs alleged that the fair market value of their stock obtained by defendants through fraud was at least $3,712,000.00, and they prayed for recovery of actual damages in that amount plus interest from 5 March 1975, treble damages pursuant to G.S. Ch. 75, and punitive

damages. Defendants answered and denied the allegations of fraud and wrongdoing on their part, and by way of counterclaim FCX sought recovery from plaintiff D. Linwood Stone of $12,892.56 and from plaintiff J. A. Stone $25,011.52 which defendants allege was owed by these parties respectively to Stone Bros. and which indebtednesses had been transferred to FCX.

Allegations and admissions in the pleadings, stipulations of the parties, and evidence offered at the trial show the following: On and prior to 5 March 1975 plaintiffs were the owners in equal shares of all of the stock of Stone Bros., a North Carolina corporation which for some twenty years had been engaged in an integrated turkey raising and processing business. In connection with this business, Stone Bros. owned assets consisting of land, buildings, equipment, supplies, and other tangible property, and in addition owned 25% of the common stock in Raeford Turkey Farms, Inc. (hereinafter referred to as "Raeford"), a North Carolina corporation engaged in processing and selling turkeys. Raeford had been started in 1962, and Stone Bros. acquired its 25% stock interest in Raeford at that time for an investment of $30,000.00. During the years prior to 1974 the businesses of both Stone Bros. and Raeford prospered and grew.

The defendant, FCX, is engaged in the business, among other matters, of selling feed and farm supplies to poultry producers. Over the years it furnished to Stone Bros. large amounts of feed, nutrients, and other supplies necessary for its turkey raising business, taking as security for the account so created mortgages, deeds of trust, and other security agreements creating liens on virtually all of the assets of Stone Bros. In addition, on 4 March 1969 the individual plaintiffs guaranteed payment by Stone Bros. to FCX of a certain demand note in the sum of $320,353.63 and a bond in the sum of $400,000.00, both of which were executed by Stone Bros. to FCX on that date, and secured their guaranties by executing a Stock Pledge Agreement dated 4 March 1969 by which they transferred all of their stock in Stone Bros. to William H. McCullough as Trustee, granting to the Trustee the power in event of default by Stone Bros. in payment of the promissory note to FCX to sell the pledged stock at public or private sale and to apply the proceeds to pay the unpaid principal and interest of the debt secured. By the Stock Pledge Agreement the plaintiffs also appointed the Trustee their attorney-in-fact for the period of

ten years to vote the pledged shares at all meetings of stockholders of Stone Bros.

By a letter agreement dated 8 April 1969, FCX agreed, among other matters, to furnish Stone Bros. money for its payroll and other current operating expenses, and as part of this agreement as FCX auditor, the defendant William R. Hocutt, went to work in the office of Stone Bros. with responsibility to supervise and check all accounting records and procedures on a daily basis. FCX charged Stone Bros. for Mr. Hocutt's services. During ensuing years FCX continued to furnish Stone Bros. feed, supplies, and operating capital. On 3 February 1972 Stone Bros., the individual plaintiffs, and FCX signed a Financing Extension Agreement in which it was recited that as of 31 January 1972 Stone Bros. was indebted to FCX in the aggregate sum of $1,346,133.57 and by which FCX agreed, subject to certain conditions, to continue to furnish supplies and operating capital to Stone Bros. until the end of its fiscal year ending 30 November 1972. By subsequent letter agreement dated 29 September 1972, this Financing Extension Agreement was extended to 30 November 1973. For its fiscal year ending 30 November 1973 Stone Bros. operated at a profit, and by letter agreement dated 29 November 1973 the Financing Extension Agreement was further extended to 30 November 1974.

In 1974 the price of turkeys dropped sharply. At the same time, the price of corn, soybeans, and other supplies needed for growing turkeys skyrocketed. As a result of these factors, Stone Bros. suffered severe losses in 1974, its Statement of Operations for the eleven months period ending 31 October 1974 showing a net operating loss of $942,591.68. During this period the indebtedness owed by Stone Bros. to FCX increased sharply so that by 31 October 1974 Stone Bros. owed FCX in excess of $3,100,000.00. On 13 November 1974 the defendant C. E. Smith, Vice-President and Treasurer of FCX, notified the plaintiff, D. Linwood Stone, President of Stone Bros., that FCX was going to have to close out the account and would not extend any financing after 30 November 1974 on any additional flocks of turkeys.

On 20 November 1974 C. E. Smith, accompanied by Norman Sanders, a divisional manager of the poultry production division of FCX, and William R. Hocutt, all representing FCX, met in

Lumberton, N.C., with the plaintiffs, D. Linwood Stone, President of Stone Bros., and his brother, J. A. Stone, who was a director and officer of Stone Bros. Also present at that meeting was William McCullough, attorney for FCX and the trustee named in the 4 March 1969 Stock Pledge Agreement. C. E. Smith, on behalf of FCX, demanded payment of the debt owed by Stone Bros. to FCX. Plaintiffs responded that they were without funds to pay the indebtedness, whereupon Smith called on McCullough to exercise the powers conferred on him by the 4 March 1969 Stock Pledge Agreement to vote all of plaintiffs' stock in Stone Bros. McCullough did so at a special meeting of stockholders of Stone Bros. which resulted in removing plaintiffs as directors and electing the defendants Smith, Sanders, and Hocutt as the new Board of Directors of Stone Bros. At a meeting of the new Board, new officers for Stone Bros. were elected, Sanders being elected President, Hocutt Vice-President and Treasurer, and Smith Secretary and Chairman of the Board. The new officers took charge of Stone Bros. and set about liquidating its assets and winding up its affairs. The plaintiff J. A. Stone was discharged as an employee and after November 1974 had no further connection with Stone Bros. except as a stockholder. The plaintiff D. Linwood Stone was asked to remain as an employee to assist in managing the turkey flocks until liquidation of Stone Bros. could be accomplished, and he did continue to serve as an employee until March 1975. Both plaintiffs remained stockholders of Stone Bros. until 5 March 1975, when the transaction which gave rise to this litigation occurred.

During the period after 20 November 1974 and continuing through February 1975 the plaintiff, D. Linwood Stone, actively undertook to obtain a loan from the Farm Home Administration for the purpose of settling in cash the account of Stone Bros. with FCX. During this period he also participated in discussions between a Mr. Hervey Evans, who was acting for Raeford, and Smith, who was acting for FCX, concerning a possible acquisition by Raeford of the assets of Stone Bros. or of FCX's interests in Stone Bros. During these discussions the officials of FCX stated that there would be a substantial loss to FCX on the Stone Bros. account, and they indicated that FCX would be willing to accept a settlement of the account for substantially less than its full

amount. All negotiations for a loan or sale of Stone Bros. on a basis which would permit it to continue in business failed.

Although plaintiffs had been removed as directors of Stone Bros. on 20 November 1974, they remained as members of the Board of Directors of Raeford, and on 25 February 1975 the plaintiff D. Linwood Stone attended a meeting of that Board. He also attended a meeting held immediately prior to the official meeting of the Board of Directors of Raeford at which there were present Mr. David B. Brooker, a Vice-President of the Columbia Bank for Cooperatives, and the defendant Smith, who was representing FCX. At that meeting a general discussion was held concerning the possibility of converting Raeford into a cooperative, and Brooker explained some of the mechanics of effecting such a conversion and the basis on which the Columbia Bank might be willing to extend loans should a cooperative be formed to take over the assets and business of Raeford. During this discussion a figure of six or seven million dollars was mentioned as the possible basis on which the assets of Raeford could be transferred to a cooperative.

On 5 March 1975 the defendants Smith, Sanders, and Hocutt met in the office of Stone Bros. in Lumberton, N. C. with the plaintiff, D. Linwood Stone, and presented to him a written Agreement and Release, dated and executed by FCX on 4 March 1975, in which it was recited that it appeared likely that Stone Bros.'s indebtedness to FCX would far exceed the value of Stone Bros.'s assets and that a substantial deficiency would exist, and by which FCX released the plaintiffs from all personal liability on account of their guaranties of 4 March 1969 and any other guaranty made by them of payment of Stone Bros.'s indebtedness to FCX, and by which the plaintiffs in turn released and quitclaimed to FCX all rights in their stock in Stone Bros. Smith told D. Linwood Stone to take this document to an attorney and let him look at it to see if it didn't release the plaintiffs. Stone took the document to the office of attorney Ellis Page, who examined it and advised Stone that the document did release the plaintiffs. After receiving this advice, both plaintiffs signed the document and returned an executed copy to Smith for FCX. After this transaction, the plaintiffs had no further interest as stockholders in Stone Bros. Shortly after 5 March 1975 the plaintiffs resigned as directors of Raeford.

Following the 5 March 1975 transaction by which plaintiffs released and quitclaimed to FCX all of their stock in Stone Bros., the individual defendants continued their efforts to liquidate the assets of Stone Bros. Included among these assets was the 25% stock interest in the capital stock of Raeford, which was still carried on the books of Stone Bros. at its acquisition cost of $30,000.00. In attempting to liquidate the 25% stock interest in Raeford, the defendants worked with the other stockholders in Raeford to accomplish a transfer of all of Raeford's business and assets to a newly formed cooperative, which was at first called Five TP Cooperative, Incorporated, but later named the House of Raeford Farms, Incorporated (hereinafter referred to as "House of Raeford"). Such a cooperative would have access to financing by the Columbia Bank for Cooperatives. These efforts were ultimately successful, the date of the agreement of sale being 31 May 1975 and the sale being actually closed on 1 August 1975. The sales price was slightly in excess of $8,600,000.00, Stone Bros.'s 25% interest in the sales proceeds being $2,159,919.00. Of this amount, however, Stone Bros. received only $250,000.00 in cash, the balance being represented by a note of House of Raeford for $1,522,419.00 and a revolving fund certificate for $387,500.00. After the closing of the sale of Stone Bros.'s 25% interest in Raeford to the House of Raeford cooperative, a balance sheet of Stone Bros. prepared as of 31 August 1975 showed a net worth of $394,312.00.

Other evidence will be referred to in the opinion.

Issues were submitted to and answered by the jury as follows:

1. Did the defendants procure the execution of the Agreement and Release of March 5, 1975 by means of false and fraudulent representations?

ANSWER: No

2. Did a fiduciary relationship between plaintiffs and defendants exist with respect to the transaction between them of March 5, 1975?

ANSWER: Yes

3. If so, did the defendants exercise good faith and refrain from obtaining any advantage to themselves at the expense of the plaintiffs in connection with said transaction?

ANSWER: No

4. What amount of actual damages are plaintiffs entitled to recover of defendants, if any?

ANSWER: $394,312.00

5. What amount of punitive damages, if any, are plaintiffs entitled to recover of:

(a) Defendant, FCX, Inc.?

ANSWER: $368,312.00

(b) Defendant, C. E. Smith?

ANSWER: $0

(c) Defendant Marvin McClam?

ANSWER: $0

(d) Defendant William R. Hocutt?

ANSWER: $0

(e) Defendant Norman Sanders?

ANSWER: $0

6. What amount, if any, are the Plaintiffs indebted to the defendant, FCX, on its counterclaim?

(a) Linwood Stone

ANSWER: $0

(b) J. A. Stone

ANSWER: $0

From judgment that plaintiffs recover $394,312.00 from all of the defendants and that it recover from the defendant FCX the additional sum of $368,312.00, both plaintiffs and defendants appeal.

Boyce, Mitchell, Burns & Smith by Eugene Boyce, Robert E. Smith, Lacy M. Presnell III, and James M. Day for plaintiffs, appellants and appellees.

Sanford, Cannon, Adams and McCullough by J. Allen Adams, William H. McCullough, Charles C. Meeker and Nancy Bentson Essex for defendants, appellants and appellees.

PARKER, Judge.

DEFENDANTS' APPEAL

By its answer to the first issue, the jury has established that defendants did not procure the execution of the 5 March 1975 Agreement and Release by any fraudulent representation. Thus, no issue as to actual fraud remains in this case, and the essential question presented by defendants' appeal is whether the evidence was sufficient to warrant submission of the second issue to the jury. We find the evidence insufficient to support a jury finding that any fiduciary relationship existed between the parties with respect to the 5 March 1975 transaction such as to cast the burden on defendants of proving that they acted in good faith therein. Accordingly, we sustain defendants' assignments of error directed to the denial of their motions for a directed verdict on the second issue, and we reverse the judgment granting plaintiffs recovery of actual and punitive damages.

It is, of course, true that "[w]here a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud." *Link v. Link*, 278 N.C. 181, 192, 179 S.E. 2d 697, 704 (1971). In such a case the burden is on the transferee to show that he acted fairly and in good faith. *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943); *Smith v. Moore*, 149 N.C. 185, 62 S.E. 892 (1908). Before that burden may properly be placed upon the transferee, however, there must first be a finding, supported by adequate evidence, that a confidential or fiduciary relationship existed between the parties with respect to the transaction which is brought into question. It is for failure of the evidence on this issue that we reverse the judgment for plaintiffs in the present case.

At one time our Supreme Court was careful to limit the constructive fraud doctrine, with its shift to the defendant of the burden of proving fairness and good faith, to "only 'the known and definite fiduciary relations,' by which one person is put in the power of another." *Lee v. Pearce*, 68 N.C. 76, 87 (1873). By way of illustration, but being careful to point out that there may be other instances, the court in that case listed the following: (1) Trustee and cestui que trust dealing in reference to the trust fund; (2) Attorney and client, in respect to the matter wherein the relationship exists; (3) Guardian and ward, just after the ward arrives at age; and (4) A general agent and his principal where the agent has the entire management of the principal's affairs. In a much more recent case our court stated that "[t]he relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one resposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Even when we apply this much broader concept, we find the evidence in the present case insufficient to support a finding that a fiduciary relationship existed between the defendants and the plaintiffs with respect to the 5 March 1975 transaction.

Examining the evidence as it relates to the relationship which existed between the parties on 5 March 1975, the first and most obvious aspect of the relationship shown is that plaintiffs were on that date, contingently at least, indebted to FCX on their guaranties of the obligations of Stone Bros. and that plaintiffs' contingent liability was secured by a pledge of their stock in Stone Bros. to McCullough as trustee under the 4 March 1969 Stock Pledge Agreement. It is settled, however, that "[t]here is no fiduciary relation between a creditor and his debtor, by which it can be said that the latter is in the power of the former. . . . Nor does the fact that the debtor has conveyed property to a third person to secure his creditor establish any fiduciary relation between him and such creditor." *Simpson v. Fry*, 194 N.C. 623, 627, 140 S.E. 295, 297 (1927); *accord, Curry v. Andrews*, 230 N.C. 531, 53 S.E. 2d 542 (1949). Thus, the debtor-creditor relationship between plaintiffs and FCX did not in itself create any fiduciary relationship between plaintiffs and defendants in this action.

The other obvious aspect of the relationship which existed between the parties on 5 March 1975 is that the defendants Smith, Sanders, and Hocutt (all of whom were admittedly acting on behalf of FCX) were the officers and directors of Stone Bros. in which plaintiffs were the stockholders. There can be no question that officers and directors of a corporation stand in a fiduciary relation to the corporation and its shareholders with respect to the management of the business and assets of the corporation. G.S. 55-35. It should be noted, however, that in this case no contention is made, nor was the slightest shred of evidence introduced which suggests, that any of the defendants did anything wrong in connection with the management of the business of Stone Bros. or in connection with the disposition of its assets. Indeed, it is precisely because the defendants may ultimately have succeeded in making a favorable disposition of a portion of those assets, being Stone Bros.'s 25% stock interest in Raeford, that this litigation came into being. The question presented by this appeal thus becomes narrowed to whether, under the circumstances of this case, the defendants Smith, Sanders, and Hocutt, as officers and directors of Stone Bros., occupied a fiduciary relationship toward plaintiffs with respect to the acquisition from plaintiffs of their stock in Stone Bros. in the 5 March 1975 transaction.

This Court, in *Lazenby v. Godwin*, 40 N.C. App. 487, 253 S.E. 2d 489 (1979), has recently had occasion to examine the principles of law applicable to determining whether a director of a corporation stands in a fiduciary relationship to a shareholder with respect to the acquisition of the shareholder's stock. In a scholarly opinion by Clark, Judge, in which the pertinent authorities are discussed and analyzed, this Court adopted the view that, under special circumstances, a director of a corporation may stand in a fiduciary relation to a shareholder in the acquisition of the shareholder's stock. In that case the Court found sufficient evidence of such special circumstances, in this connection stressing the evidence showing that the defendant in that case had managed the corporation since its inception in 1950, that although plaintiffs were technically codirectors there had been no regular directors meetings, that plaintiffs did not take part in the management of the corporation but placed their trust in the business skill and judgment of the defendant, and that plaintiffs did not have equal access with the defendant to the information

needed to make a fair appraisal of the value of their shares. No such evidence has been presented in the present case. On the contrary, all of the evidence in the present case shows that plaintiffs had actively managed the corporation since its inception, that they continued in such active management in the capacity as officers and directors until less than four months prior to 5 March 1975, and that on that date the plaintiff D. Linwood Stone was still actively engaged on a daily basis as an employee. Thus, plaintiffs were intimately familiar with all of the assets and business of their corporation. As to the particular asset which it appears may ultimately have the most value, the 25% stock interest in Raeford, plaintiffs were in an especially favorable position to have full access to all information relevant to its value. Not only had they been connected with Raeford since its founding, but they were still on its board of directors on 5 March 1975, and the plaintiff D. Linwood Stone had attended the most recent meeting of that board held on 25 February 1975 when the possibility of selling all assets of Raeford to a cooperative was discussed. Plaintiffs here, unlike the plaintiffs in *Lazenby*, had equal or better access than did defendants to all information pertinent to determining the fair value of their shares. In this case we find no evidence of such special circumstances which would give rise to placing defendants in a fiduciary relationship toward plaintiffs in connection with the transfer of their stock in Stone Bros. on 5 March 1975.

In passing, we note that defendant FCX may not actually realize any profit, but may ultimately experience a loss, as result of its dealings with plaintiffs and with their corporation. While on paper the sale of the 25% interest in Raeford would appear most favorable, the biggest part of the purchase price was not paid in cash but by a note subordinated to other obligations and by a revolving fund certificate. Neither of these can be paid in cash unless the purchaser, House of Raeford, has many years of profitable operations. The evidence in this case shows that at the time of trial this had not occurred.

In defendants' appeal, they also assign error to the court's refusal to grant FCX's motion for a directed verdict on its counterclaims against the plaintiffs. As to this, suffice it to say that on the issues raised by the counterclaims, as to which FCX bore the burden of proof, we find no such admissions by the plaintiffs of all essential facts as would warrant directing verdict

against them. We find no error in the court's ruling in this regard.

PLAINTIFFS' APPEAL

In their appeal plaintiffs contend that the court erred in failing to enter judgment for treble the amount of damages awarded by the jury, for attorney fees, and for payment of interest from 5 March 1975 on the amount of actual damages awarded by the jury. Since all questions thus sought to be raised are based on the assumption that the jury's award of actual damages was correct, an assumption which in view of our holding on defendants' appeal is not well founded, we find it unnecessary to discuss the questions presented by plaintiffs' appeal.

The judgment appealed from is

Reversed.

Judges HEDRICK and CARLTON concur.

F. LEONA BAXTER v. WILLIAM E. POE, INDIVIDUALLY AND AS CHAIRMAN OF THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, THOMAS B. HARRIS, PHILLIP O. BERRY, C. D. SPANGLER, JR., MARILYN HUFF, JOHN B. McLAUGHLIN, INDIVIDUALLY AND AS MEMBERS OF THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, A PUBLIC BODY CORPORATE, DR. ROLLAND W. JONES, SUPERINTENDENT OF SCHOOLS FOR CHARLOTTE-MECKLENBURG, JOHN J. DOYLE, JR., AND KATHLEEN R. CROSBY

No. 7826SC204

(Filed 31 July 1979)

1. Schools § 13.2— dismissal of teacher—no denial of due process

A school teacher who was dismissed for inadequate performance, insubordination, neglect of duty, and failure to comply with requirements of the board of education was not denied due process where (1) the board of education scrupulously followed the elaborate dismissal procedures mandated by G.S. 115-142; (2) the board admitted and gave probative effect to evidence "of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs"; (3) the board properly heard hearsay evidence in order to complete its investigation; (4) the board heard but did not base its decision on evidence of events occurring more than three years before the superintendent's letter

recommending the teacher's dismissal; and (5) a board member's knowledge of the situation involving the teacher prior to the hearing did not indicate a lack of impartiality on the part of the board member.

2. Schools § 13.2— teacher's dismissal—corporal punishment—insubordination—substantial evidence

The trial court properly concluded the board of education's finding of insubordination by a teacher was based on substantial evidence where the evidence, including testimony by the teacher herself, the principal, classroom aides and a student's mother, tended to show that the teacher repeatedly used corporal punishment on her handicapped students in violation of her principal's orders, and a finding that the evidence of any one of the grounds listed under G.S. 115-142(e)(1) was substantial justified dismissal where the teacher was notified that dismissal was based on that ground.

APPEAL by petitioner from *Griffin, Judge*. Order dated 27 September 1977 entered in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 December 1978.

F. Leona Baxter (hereinafter "petitioner") was employed during the 1973-74 school year by the Charlotte-Mecklenburg Board of Education (hereinafter "the Board") as a teacher of orthopedically handicapped children in the Ortho II class of the Billingsville Elementary School. She had attained status as a career teacher as defined by G.S. 115-142(a)(3). The Ortho II class contained children, most of whom were between the ages of nine and eleven, who would otherwise have been in the third and fourth grades. The handicaps from which they suffered were physically disabling ones and included cerebral palsy, muscular dystrophy, fragile bones, and malformed limbs. Some children were able to walk with the aid of crutches and braces; others were completely confined to wheel chairs. The psychologically tested mental abilities of the children spanned all levels up from educable mentally retarded.

On 30 April 1974 Superintendent Rolland W. Jones sent a letter to petitioner by certified mail in which he said:

> I am writing to advise you pursuant to North Carolina General Statute 115-142(h)(2) that I intend to recommend to the Board of Education that you be dismissed effective at the close of the 1973-74 school year. The grounds for my recommendation include, but are not limited to, inadequate performance, insubordination, neglect of duty, and failure to comply with requirements of the board.

Petitioner notified Jones on 21 May 1974 that she requested a review of his recommendation by a panel of the Professional Review Committee, pursuant to G.S. 115-142(h)(3)(i). On 9 August 1974 the Board voted to suspend petitioner without pay pending final determination of the proceeding, and Jones notified petitioner of this decision by letter dated 14 August 1974.

The five-member panel of the Professional Review Committee, after conducting a hearing at which both petitioner and Superintendent Jones were represented by counsel, issued a report dated 26 August 1974. The majority report recommended that petitioner be reinstated with back pay and retention of tenure and that petitioner be transferred to another school and allowed to teach normal children. A minority report, issued by one of the two professional members of the panel, stated that petitioner "is guilty of inadequate performance, 'gross' insubordination, neglect of duty, and failure to comply with Board requirements."

On 9 September 1974 Jones submitted, pursuant to G.S. 115-142(i)(5), his written recommendation to the Board that petitioner be dismissed "for reasons set forth in a letter from me to her dated April 30, 1974."

William E. Poe, Chairman of the Board, informed petitioner pursuant to G.S. 115-142(i)(6) that the Superintendent's recommendation had been received, that she was entitled to a hearing, and that the hearing if requested would be held on 1 October 1974.

Petitioner's attorney requested the hearing, and the hearing was held on 1, 2, and 7 October 1974. On 14 October 1974 the Board voted unanimously to terminate petitioner's employment and to dismiss her on the grounds of inadequate performance, insubordination, neglect of duty, and failure to comply with Board guidelines and policy. The Board entered this order after making findings of fact and concluding that "all four (4) grounds for dismissal upon which the Superintendent has based his recommendation of dismissal are true and substantiated upon the basis of competent evidence adduced at these hearings."

A copy of the Board's findings of fact and order were sent to petitioner by Chairman Poe under cover of letter dated 14 October 1974.

By complaint filed 14 November 1974 petitioner appealed from the decision of the Board to the Superior Court of Mecklenburg County pursuant to G.S. 115-142(n). She alleged that the board had violated both the provisions of G.S. 115-142 and petitioner's constitutional due process rights and that the Board's findings of fact and order were unsupported by any competent evidence.

By answer filed 18 December 1974 defendants denied petitioner's allegations. Upon defendants' motion Judge Snepp on 15 December 1976 filed an order that petitioner's appeal be presented to the Superior Court in accordance with G.S. Ch. 143, Art. 33.

The hearing was held during the 15 August 1977 Civil Non-Jury Session of Mecklenburg Superior Court. By order filed 28 September 1977 the trial court made detailed findings of fact concerning all prior proceedings in this matter and made the following conclusions:

1. The procedures adopted by the Board and rulings made with reference to the admission of evidence were fair and without error.

* * *

2. Each of the findings of fact by the Board is supported by substantial, competent evidence.

* * *

3. The findings of fact by the Board support and justify the Board's conclusion that the grounds upon which Superintendent Jones recommended petitioner's dismissal were true and substantiated.

On these findings and conclusions, the court affirmed the Board's order. Petitioner appeals.

James, McElroy & Diehl, by William K. Diehl, Jr., and Gary S. Hemric for the appellant.

John G. Golding and Harvey L. Cosper, Jr., for the appellees.

PARKER, Judge.

The scope of the Superior Court's review of the Board's decision in this case and the power of that court in disposing of the case were governed by former G.S. 143-315 (now G.S. 150A-51), which was in effect at the time of the Board hearings in this matter. That statute provided:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

DUE PROCESS

[1] The petitioner's first group of contentions concerns due process. In addressing these contentions, we rely in large measure on the opinion of this Court by Judge (now Chief Judge) Morris in *Thompson v. Board of Education*, 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The Supreme Court reversed only that part of the decision of this Court in Thompson which held that the evidence of neglect of duty on the part of the teacher-petitioner in that case was substantial, and the Supreme Court's opinion left standing that portion of Judge Morris's opinion in which she dealt with the due process issues raised in *Thompson*.

Petitioner in the present case, as did the petitioner in *Thompson*, contends that she has been denied due process. We do not agree. The Charlotte-Mecklenburg Board of Education scrupulously followed the elaborate dismissal procedures man-

dated by G.S. 115-142. After giving petitioner the required notice, the Board held hearings which extended over three evenings in which the petitioner was represented by counsel, was given the opportunity to cross-examine the Superintendent's witnesses, and was permitted to present her own evidence.

Petitioner's contentions regarding due process are largely based on a fundamental misconception of the procedures involved in a case of this nature. The procedures prescribed by G.S. 115-142 for the dismissal of a career teacher are essentially administrative rather than judicial. As was pointed out in this Court's opinion in *Thompson, supra*, the Board is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court. Nor are the Rules of Civil Procedure applicable. G.S. 1A-1. While a Board of Education conducting a hearing under G.S. 115-142 must provide all essential elements of due process, it is permitted to operate under a more relaxed set of rules than is a court of law. Boards of Education, normally composed in large part of non-lawyers, are vested with "general control and supervision of all matters pertaining to the public schools in their respective administrative units," G.S. 115-35(b), a responsibility differing greatly from that of a court. The carrying out of such a responsibility requires a wider latitude in procedure and in the reception of evidence than is allowed a court.

The Charlotte-Mecklenburg Board of Education employed at petitioner's hearing the same rule of evidence promulgated by the State Board of Education and used by the Wake County Board of Education in *Thompson*. The rule permits boards of education to admit and give probative effect to "evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs." Petitioner contends that this rule is constitutionally invalid both *per se* and as applied at the hearing in this case in that it violated her due process rights. We do not agree. This rule of evidence was approved in *Thompson*. It is not constitutionally invalid *per se*. It allows the boards of education to consider a wide range of evidence, as they properly should, in reaching their decisions. Petitioner's protection lies in the provision in G.S. 143-315(5) which gives to the Superior Court power to reverse or modify the Board's decision if petitioner's substantial rights have been prejudiced because the administrative decision

was "[u]nsupported by competent, material, and substantial evidence in view of the entire record."

Petitioner points to the admission at the hearing of hearsay evidence and contends erroneously that this was reversible error. The Board very properly heard such evidence in this case in order to complete its investigation. Evidence of the sort complained of can, and in this case did, provide the necessary background for understanding the matter into which the Board was inquiring.

Petitioner objects to the admission of evidence of events which occurred more than three years before 30 April 1974 and bases her objection on G.S. 115-142(e)(4). We need here only point out that G.S. 115-142(e)(4) prohibits a Board of Education from *basing* dismissal "on conduct or actions which occurred more than three years before the written notice of the superintendent's intention to recommend dismissal is mailed to the teacher." There is no prohibition against the Board *hearing* evidence of this nature. Petitioner has made no showing that the Board based her dismissal on conduct of petitioner beyond the three year limit. It was proper for the Board to hear this type of evidence in order to learn of the background of the case before it.

Petitioner further argues, under the rubric of due process, that the Board did not have the requisite degree of impartiality and that this lack of impartiality is shown by the manner in which the hearing was conducted. We have examined the transcript of the hearing in detail and find no evidence of actual bias on the part of any Board member. Petitioner lays stress, in arguing that the Board lacked impartiality, on the following admission made by one of the Board members, Marilyn Huff, at the hearing before Judge Griffin in the Superior Court:

> "As to whether I understood there was some question of physical abuse of children before the hearing began, I knew, I think most people in the community knew the reasons for Mrs. Baxter's, the recommendation by the Superintendent that she be terminated."

As above noted, the Board of Education is vested by G.S. 115-35(b) with general supervisory authority over the schools within its administrative unit. In the exercise of this authority

Board members have a duty to keep themselves apprised of situations such as the one the evidence presented at the hearing in this case discloses. As Judge Morris pointed out in this Court's opinion in *Thompson v. Board of Education, supra*, "mere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decisionmaker." 31 N.C. App. at 412, 230 S.E. 2d at 170.

After a thorough examination of the transcript of the hearing before the Board we affirm the finding of the Superior Court that "the procedures adopted by the board and rulings made with reference to the admission of evidence were fair and without error."

SUBSTANTIAL EVIDENCE IN VIEW OF THE ENTIRE RECORD

[2] The petitioner's second and final major contention is that the Superior Court erred in its finding that "[e]ach of the findings of fact by the Board is supported by substantial, competent evidence." The required standard of review is defined by G.S. 143-315(5), *supra*. It was described by Justice Copeland in the Supreme Court's opinion in *Thompson v. Board of Education, supra*, as follows:

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 668-74 (1971); Hanft, Administrative Law, 45 N.C.L. Rev. 816, 816-819 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. *Universal Camera Corp., supra.* On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision to take into account whatever in the record

> fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court, may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera Corp., supra.*

292 N.C. at 410, 233 S.E. 2d at 541.

The grounds on which the Board based its order that petitioner be dismissed are set forth in G.S. 115-142(e):

> (1) No career teacher shall be dismissed or demoted or employed on a part-time basis except for:
>
> a. Inadequate performance;
>
> * * *
>
> c. Insubordination;
>
> d. Neglect of duty;
>
> * * *
>
> j. Failure to comply with such reasonable requirements as the board may prescribe;

Our task on this appeal is, by application of the "whole record" test to the record of the hearings before the Charlotte-Mecklenburg Board of Education held on 1, 2 and 7 October 1974, to determine whether there is substantial evidence, looking at the record as a whole, of any one of the four grounds which formed the basis of the Board's 14 October 1974 dismissal order.

Each finding of fact was made with regard to petitioner's employment during the 1971-72, 1972-73, and 1973-74 school years. The second finding of fact was that the petitioner was guilty of insubordination. The Board found that petitioner's insubordination consisted of her continued administration of corporal punishment to her handicapped students after being specifically instructed by her principal, Mrs. Crosby, not to do so without the principal's prior approval and the presence of an adult witness. This finding is amply supported by substantial evidence in the record.

Mrs. Crosby, the principal of Billingsville Elementary School, testified that during the 1971-72 school year she received a complaint from the parents of Susan Chapman that petitioner "had been hitting Susan in the head." Petitioner admitted at the time of the incident and also at the hearing that she had "tapped" Susan Chapman. Petitioner's classroom aide, Virginia Wallace, testified at the hearing that she had seen petitioner whip Susan Chapman "several times." Mrs. Crosby called in petitioner and the other three orthopedic teachers at this time and asked them:

> [P]lease, do not strike these children anywhere. I asked them specifically not to even punish them at all. "If there's a child in your class"—I didn't tell the total staff this, but I told those three teachers. "Do not whip any of these children. If you feel you have to whip them, I would like to know who they are and I would like to witness it. I would like for you to tell me why and I would like not to have them whipped at all. I would like for you not to thump them." I had gotten messages that she had thumped, hit, and all these kind of things. I said, "don't hit them at all."

Billingsville orthopedic teachers Catherine Erlandson and Ann Boiter both confirmed that Crosby had forbidden corporal punishment of orthopedically handicapped children, and petitioner admitted at the hearing that such an order had been given by the principal.

In October 1972, Principal Crosby received a complaint from the mother of Michael Sinclair that petitioner had hit her son on the head, producing a "big knot," and that the boy had gone home and cried all night. The complaint was made by Mrs. Sinclair both orally and in a letter introduced into evidence. Personnel in the principal's office managed to persuade the mother not to carry out her threat of beating petitioner, but the mother remained at school all day "body-guarding" the boy. At the time, petitioner admitted striking the boy, but said, "I just tapped him."

Petitioner at the hearing admitted:

> Michael was another chair victim and a dystrophy victim. . . . I did do, this, (Witness indicates with hands), and asked him to get to his work. . . . He cried some.

Subsequent to the Michael Sinclair incident, Principal Crosby wrote a letter dated 31 October 1972 to petitioner in which she detailed the incident, as well as other incidents which had been brought to her attention by parental complaints, and asked petitioner once again "to refrain from this sort of practice."

In the spring of 1973, petitioner came up for consideration for tenure. Principal Crosby expressed to petitioner orally and in person her reservations about giving petitioner tenure because, "Leona, you have a tendency to hit children." Crosby stated that she agreed to give petitioner tenure upon her word that she would not strike the children any more, and petitioner told Crosby two or three times, "I'm not going to hit anybody else no more, no more."

In the April 1973 evaluation of petitioner, Crosby wrote:

> Miss Baxter was experiencing difficulty in classroom management and was employing the use of physical punishment in an improper manner. She has made improvement in this area. It is understood, by her, that this type punishment is not acceptable.

Petitioner's receipt of this evaluation was acknowledged in writing.

Crosby testified at the hearing concerning the above-quoted remarks on the evaluation sheet:

> I just hated to write down, if you do this again, this is it. But, I told her in very plain English; I said, "Leona, if you whip another child in an improper manner, I'm not going to recommend your reemployment." And, she understood this.

Principal Crosby explained that by "improper manner" she meant that she expected petitioner to bring the child to the principal's office and whip it there, if petitioner had to whip it, so that at least the whipping would be in the principal's presence. Crosby testified that petitioner never brought a child to her office for paddling.

During the 1973-74 school year, Crosby received a complaint from the mother of Cheryl Springs that petitioner had whipped the girl for not doing her homework, making her afraid to come to school. Crosby called Cheryl Springs into her office and asked her

about the incident. According to Crosby's account, the girl, a victim of cerebral palsy, said that when she arrived at school without her homework after her mother had said she had accidentally thrown the homework away,

> "Mrs. Baxter said, 'Cheryl', and she shoved me" and she said, "she knocked me out of the chair, when she said, 'Cheryl, where is your homework.' And I was trying to tell her that (sic) my mama said and then she whipped me." And I said, "well, how did she whip you." She said, "she took this big stick and just hit me, whop, whop, whop."

Cheryl Springs' mother, Dorothy Butler, testified about this incident and said Cheryl told her that "she hit her while she was down." Irene Walker, a teacher's aide, testified that she had found Cheryl Springs crying in the bathroom. When asked, the child told her that petitioner had whipped her for not bringing homework to school.

Petitioner testified "I took a ruler and gave her a few spanks across the buttocks." Petitioner denied knocking Cheryl Springs out of her chair and said that she had punished the girl because, "I couldn't get any work out of her in any way, shape or form. Neither calls to the home, notes to the home, talking with her or anything like that hadn't (sic) done any good."

Following the Cheryl Springs incident, Crosby called in petitioner's classroom aide, Virginia Wallace, and asked if she had seen petitioner hit any one that year. Crosby testified that Wallace said she had seen petitioner hitting children in the head or shaking them. Virginia Wallace testified that she saw petitioner whip Bobby Baker "several times" in the period of time up through the year before the hearing and that she saw petitioner during several years "rap" children in the classroom.

Irene Walker testified that during the 1973-74 school year, Annette Rush told her in the bathroom that petitioner had whipped her for not bringing homework. Frieda Maxwell, Catherine Erlandson's aide, testified that during the 1973-74 school year Annette Rush complained to her on the bus that her head hurt where petitioner hit her with a pencil.

In summary, by petitioner's own admission she struck Michael Sinclair and Cheryl Springs in violation of her principal's

orders. Petitioner's classroom aide testified that petitioner whipped Bobby Baker in violation of her principal's orders. Hearsay evidence from two independent sources, which was not impeached, indicates that Annette Rush was also subjected to corporal punishment in violation of Principal Crosby's orders. We find that the Superior Court was correct in concluding that the Board's finding of insubordination was based on substantial evidence. We need not pass on the question whether the evidence of the other three grounds was substantial. A finding that the evidence of any of the grounds listed under G.S. 115-142(e)(1) was substantial justifies dismissal where, as here, the teacher was notified that dismissal was based on that ground. We note, however, that there is substantial evidence in the record to support the Board's findings that, in addition to insubordination, petitioner was guilty of inadequate performance, neglect of duty, and failure to comply with requirements of the Board.

The Superior Court's 27 September 1977 order affirming the order of the Charlotte-Mecklenburg Board of Education's 14 October 1974 order terminating petitioner's employment is

Affirmed.

Judges HEDRICK and ERWIN concur.

CHERYL L. NEWSOME v. WILLIAM SHUFORD NEWSOME

No. 788DC795

(Filed 31 July 1979)

1. Divorce and Alimony § 25.7; Husband and Wife § 11; Infants § 6.2— separation agreement awarding child custody—incorporation into divorce decree—no judicial determination of circumstances—no finding of changed circumstances necessary for modification of custody

Where a separation agreement granting custody of a minor child to its mother was incorporated by reference in a divorce decree, but the question of custody was not litigated and decided by the court after hearing evidence tending to show the circumstances as they then existed relating to the best interest of the child, it was not necessary for the court to find a substantial change of circumstances in order to modify custody of the child, and the court could enter such order as to custody which in its opinion best promoted the interest and welfare of the child.

2. Divorce and Alimony § 25.11; Infants § 6.3— change of child custody from mother to father

There was an abundance of evidence to support the trial court's finding that the environment in which plaintiff mother had placed her minor child was not in the child's best interest, and the court did not abuse its discretion in awarding custody of the child to its father.

Judge CLARK dissenting.

APPEAL by plaintiff from *Jones, Judge.* Judgment entered 10 April 1978 in District Court, WAYNE County. Heard in the Court of Appeals 22 May 1979.

Plaintiff appeals from an order awarding custody of plaintiff's and defendant's minor child, Amy, to defendant. Defendant filed a motion in the cause seeking custody on 6 March 1978.

Plaintiff and defendant were separated in September, 1976, and divorced in October, 1977. A separation agreement granting custody of Amy to plaintiff was incorporated by reference in the divorce decree. Neither the separation agreement nor the divorce decree was included in the record on this appeal.

A hearing on defendant's motion was held on 28 March 1978. Defendant's evidence tends to show that he is presently living with his parents in a three-bedroom home near Wayne Memorial Hospital in Goldsboro. If he is granted custody of Amy, she will live with him and his parents. Defendant and plaintiff were living in a three-bedroom house on Salem Church Road prior to their separation. Plaintiff's mother, Mrs. Langly, lived with them. When defendant left, another woman, Virginia Gooding, who was then employed by the Wayne County Department of Social Services, moved in with plaintiff. Mrs. Langly occupied one bedroom, Amy another, and plaintiff and Virginia Gooding slept together in a double bed in the third bedroom.

At the time of the divorce, plaintiff, Amy and Gooding moved to a two-bedroom apartment on Mulberry Street. Defendant would go there to pick up Amy for her visits. He testified that the drapes were always drawn, the apartment was dark and there were notices on the door which read, "by appointment only."

About mid-November, defendant discovered that plaintiff had moved from the Mulberry Street residence. He tried to phone and went by the apartment but found no one. He called plaintiff's

place of employment, the Community Development School in Goldsboro, and was told that she was no longer employed. He called Gooding's employer and was told that she also was no longer employed. He paid a support payment which was due to the clerk of court because he was unable to locate his wife or his child.

Plaintiff called defendant a week later to tell him that she had moved to Winston-Salem. He received a letter from her which stated that Amy was in a day care center and gave their address. Defendant went to that home in December to visit Amy a week after her birthday. He described it as a small house located on the end of the street. Plaintiff and Virginia Gooding were living together in that house. Defendant's opportunity to visit with his child became more difficult after plaintiff moved.

Defendant testified that it was after his divorce that he received information to support the allegations in his motion for change of custody. His motion was, in part, as follows:

> "9. Shortly after the entry of [the divorce decree], the plaintiff and the said Virginia Gooding simultaneously terminated their employment in Goldsboro, North Carolina, and surreptitiously moved their residence to Winston-Salem, North Carolina, without notice to the defendant or his family. For a period of time the plaintiff refused to divulge any details concerning the whereabouts of the minor child, her own whereabouts, her own employment, her place of residence, or any other details of vital concern to the defendant concerning the minor child.
>
> 10. The defendant is informed and believes, and upon such information and belief alleges, that the plaintiff has engaged in an illicit homosexual relationship with the said Virginia Gooding; and has conducted said homosexual relationship in the presence and on the premises occupied by the minor child. The defendant further alleges on information and belief that the homosexual activities of the plaintiff are detrimental to the health, safety, welfare and general well-being of the minor child; and that it would be in the best interest of said minor child that she be removed from the presence of, or association with such activities, and placed in the custody of the defendant."

Mrs. Langly, plaintiff's mother, testified that she was living with plaintiff and defendant on Salem Church Road at the time of their separation. The house had originally belonged to Mrs. Langly. Virginia Gooding moved into the bedroom with plaintiff soon after defendant moved out. The pair shared a double bed. Mrs. Langly had keys to all of the locks but plaintiff changed the locks on the entryway to the room she shared with Gooding and the baby's bedroom so that Mrs. Langly was unable to enter. Mrs. Langly also testified, in part, as follows:

> "Virginia gradually took over the bathing of the minor child.
>
> I had a chance to observe Virginia Gooding aiding with the bath of the minor child Amy on several occasions. She would lay the child, she would towel dry the child in front of the fireplace. She would get the bottle of vaseline and say we are going to use your night creme. She would use her forefinger. She would rub her genital area back and forth when there was no apparent diaper rash on this child.
>
> * * *
>
> I saw Ms. Gooding perform this act that I described. I don't know if she called it indecent liberties, sexual seduction. I don't know what it was; it disturbed me greatly. I mentioned it to my daughter and she acted as if she'd nothing to do. It was just a normal thing for her.
>
> * * *
>
> I reported what I have seen with my daughter. I tried to have a conversation about it with her. Also Virginia Gooding had a lot of bronchial trouble this winter and she would embrace the child and kiss her in the mouth when she was taking antibiotics, out of work because of her bronchial infection.
>
> During the time that my daughter and Virginia Gooding were using the same bedroom, I tried to discuss that with Cheryl, but she wouldn't discuss anything. There were a lot of magazines, M.S. magazines. . . .
>
> * * *
>
> I tried to discuss it with her but was not able to. I couldn't get anywhere with her.

* * *

My daughter had a phlebitis condition. She was out of work for a while. Ms. Gooding would rub her legs.

In November of 1976, my daughter and Ms. Gooding took a trip. They told me they went to New York City during Thanksgiving Holidays. They were gone around six days. . . . [T]hey were both wearing wedding rings.

* * *

They were both wearing gold bands on their right hands, that would be the third finger of the right hand not counting the thumb. I saw both of these pieces of jewelry. They both looked alike to me. I asked my daughter about the rings several times but there was never any concrete answer."

Mrs. Langly moved out but continued to try to communicate with her daughter. Finally, she wrote her a letter in which she pointed out, among other things, how plaintiff just a year earlier had described Virginia Gooding as being a gross person with hairy armpits and unshaven legs, who disturbed plaintiff and her husband with long and unwelcome visits. She tried to point out the harassment and ridicule the child, Amy, would have to endure because of plaintiff's lifestyle. Plaintiff was unresponsive.

Mrs. Elizabeth Richards, plaintiff's former co-worker, testified that she had a conversation with plaintiff in August or September of 1977 concerning plaintiff's homosexuality. Virginia Gooding had called Mrs. Richards and asked that she not tell the school officials about plaintiff's homosexuality. Mrs. Richards told plaintiff that she would not tell because plaintiff was a good teacher and her homosexuality did not affect her work. Mrs. Richards and plaintiff discussed the problems homosexuals have in dealing with relatives and society. Plaintiff unequivocally admitted that she was a homosexual. Plaintiff also talked with Mrs. Richards on another occasion about the problems she was encountering as a homosexual.

Mrs. Richards and her husband helped plaintiff move in mid-November. Plaintiff stated that her lawyer had told her not to tell defendant that she was moving. Mrs. Richards testified that plaintiff was a good mother to Amy and she had a good relationship with her. Amy was well cared for.

Defendant's father testified that defendant lived with him and often brought Amy to visit during the visitation periods. Defendant would only have her for an hour or two between the time he got off work and the time she went to bed. He was not allowed to keep her overnight. Amy adores her father. If defendant gets custody of Amy, Mr. and Mrs. Newsome would not object to having Amy in their home. They would raise her as they had their own children. They would not object to allowing plaintiff and Mrs. Langly visitation rights. The Newsomes attend church in Goldsboro.

Mr. Newsome testified that plaintiff is a good mother for Amy and has a good relationship with her. Defendant spent as much time with Amy prior to his separation as any father would. Defendant's mother, Mrs. Newsome, testified that Amy and her father have a great relationship. If defendant was granted custody, the Newsomes would allow plaintiff and Mrs. Langley visitation privileges. Mrs. Newsome thinks plaintiff is overpossessive but otherwise is a good mother. She knows nothing about the relationship between plaintiff and Gooding.

Defendant was recalled and testified that if Amy came to live with him, he would welcome plaintiff and Mrs. Langly to visit. He loves Amy and would be willing to include Amy in his hobbies and give up some of his interests. Defendant has tried to extend his visitation privileges but it has been an uphill battle. In general, he could provide a good home for Amy.

Plaintiff's evidence tends to show that Amy was born on 12 December 1974. She is presently living in Winston-Salem with Amy in a house which has a large fenced-in backyard. Amy has her own room. Virginia Gooding lives with them but is unemployed. Plaintiff is working for Horizons Residential Care Center. Gooding quit her job in Wayne County and moved to Winston-Salem with plaintiff and Amy. Amy is presently in a private day care situation because the prior day care group had too many children. She has a good relationship with Amy.

Plaintiff denied being a homosexual. She testified that defendant had told her that he had heard a rumor to the effect that she was a homosexual. Plaintiff believes that Mrs. Langly started this rumor. Plaintiff talked with Mrs. Richards about this rumor and about Mrs. Langly's letter. Plaintiff and Mrs. Richards dis-

cussed homosexuality in general but never talked about plaintiff. The only information Mrs. Richards could have given the school was that there was a rumor that plaintiff was a homosexual. Plaintiff did not know that Gooding had called Mrs. Richards and asked that she not report plaintiff's homosexuality to the school.

Plaintiff stated that she has not dated since her separation because she wants to be with Amy. She admitted that she and Ms. Gooding purchased rings in New York but denied that they were wedding rings. She admitted that she and Gooding "cohabited and spent the nights in the same double bed" but claimed that she had no other beds and insisted that Amy have her own room. She refused to sleep in her mother's old room on Salem Church Road after Mrs. Langly left because it would be traumatic. There was also no bed because Mrs. Langly had taken the furniture. Plaintiff saw a psychologist because she was going through a difficult period with her separation and that of her parents. Her mother was accusing her father of potential sexual molestation of Amy. Gooding moved in with them because plaintiff needed help with the bills. She was very supportive of plaintiff during this difficult period.

When plaintiff learned of her job in Winston-Salem, she gave her Goldsboro employer twenty-seven days' notice. Plaintiff did not write defendant about her new job and did not call him because he told her not to call him at his parents' home. On the day plaintiff moved to Winston-Salem, she tried to call defendant at his office several times. He was either out or not taking any calls. She finally contacted him and told him that she and Amy were in Winston-Salem but that she did not know her telephone number or address. Defendant indicated that there were no problems other than that his parents were upset that she had moved. She later wrote him as to her address. She also called to give him the exact location. She gave him her telephone number but asked that it remain private because she had been receiving a lot of harassing calls. Prior to plaintiff's moving to Winston-Salem, defendant saw Amy every Friday for about two hours. She denied unreasonable limitation of his visitation privileges.

Several of plaintiff's friends testified that plaintiff had a good relationship with the child and that she was a good mother. None of them admitted to any knowledge of a homosexual relationship

between plaintiff and Virginia Gooding. Plaintiff did not present Gooding's testimony for consideration by the court.

The judge made evidentiary findings of fact substantially in accordance with defendant's evidence except that he did not label plaintiff's relationship with Virginia Gooding as homosexual. His findings of ultimate facts included the following:

> "23. The evidence presented by both the plaintiff and the defendant tends to show that the plaintiff has in fact been a good mother to the minor child, Amy Franklin Newsome, in that she has provided very sufficiently for the physical needs and requirements for said minor child.
>
> 24. The Court further finds that the environment in which the minor child is now being raised is not conducive or beneficial to the raising of a minor child of such tender years; and further finds that the defendant did not discover the existence of such environment until February of 1978.
>
> 25. The Court further finds that the plaintiff, Cheryl L. Newsome, is a loving mother who cares for and is interested in the well-being of the said minor child.
>
> 26. The Court further finds that the home of Mr. and Mrs. George R. Newsome, the parents of the defendant, is a fit and proper environment for the raising of the minor child.
>
> 27. The defendant, William S. Newsome, is desirous of obtaining the care, custody and control of the above named minor child, and the said Mr. and Mrs. George R. Newsome are willing to assist the defendant to the best of their ability in providing for the care, custody and control of the minor child."

The court concluded as a matter of law that there has been a substantial change of circumstances since the entry of the October, 1977, divorce decree. He ruled that defendant was a fit and proper person to have the care, custody and control of Amy and that plaitniff was a fit and proper person to have visitation privileges but expressly provided that the child should be kept out of the presence of Virginia Gooding. He, therefore, awarded custody of Amy to defendant and visitation privileges to plaintiff. From this judgment plaintiff appeals.

Pfefferkorn & Cooley, by William G. Pfefferkorn, Jim D. Cooley, J. Wilson Parker and Robert M. Elliot, for plaintiff appellant.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr., for defendant appellee.

VAUGHN, Judge.

[1] Much of the argument in the briefs is directed to whether there was evidence of a substantial change of circumstances so as to warrant a modification of the earlier "decree of custody." Neither the separation agreement nor the divorce decree was made a part of the record on appeal. We are advised only that "the divorce decree incorporated the separation agreement by reference." There is no indication, however, that the question of custody was litigated and decided by the judge after hearing evidence tending to show the circumstances as they then existed relating to the best interest of this child. It appears, therefore, that the court merely approved the contract made between the parties. It is clear, however, that "Parties may never withdraw children from the protective supervision of the court." *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E. 2d 240 (1964).

> "No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment . . . but they cannot thus withdraw children of the marriage from the protective custody of the court. . . . The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty toward its wards—the children of the State whose personal or property interests require protection. . . . In such case the welfare of the child is the paramount consideration to which even parental love must yield, and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties." *Story v. Story*, 221 N.C. 114, 116, 19 S.E. 2d 136 (1942) (citations omitted).

We need not tarry long then on the question of whether there has been a "change of circumstances" or whether the same

circumstances existed at the time of the divorce. The duty of the trial judge was to enter such order respecting the child as he felt would best promote the interest and welfare of the child, a question that had not previously been decided by a court on the basis of evidence tending to show the environment in which the child was being kept. The reason behind the often stated requirement that there must be a change of circumstances before a custody decree can be modified is to prevent *relitigation* of conduct and circumstances that antedate the prior custody order. It assumes, therefore, that such conduct has been litigated and that a court has entered a judgment based on that conduct. The rule prevents the dissatisfied party from presenting those circumstances to another court in the hopes that different conclusions will be drawn. For instance, the rule was applied in *Stanback v. Stanback*, 266 N.C. 72, 145 S.E. 2d 332 (1965), where one Superior Court judge entered an order placing the children with their father. Sixteen days later, the mother sought a different result before a different judge. A hearing was held where essentially the same conduct was litigated. That judge reached a different conclusion. The Supreme Court reversed, noting that there could be no appeal from one Superior Court judge to another and that the dissatisfied parent should have either appealed the first order or awaited a more favorable factual background. The rule is designed to prevent constant relitigation of the same questions with the resulting turmoil and insecurity. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968).

When, however, as in the present case, facts pertinent to the custody issue were not disclosed to the court at the time the original custody decree was rendered, courts have held that a prior decree is not res judicata as to those facts not before the court. Thus, in *Stewart v. Stewart*, 86 Idaho 108, 383 P. 2d 617 (1963), the Court stated that where facts affecting a child's welfare existed at the time of the entry of a custody decree but were not disclosed to the court, especially in default cases, these facts may be considered in a subsequent custody determination. *Accord, Boone v. Boone*, 150 F. 2d 153 (1945); *Perez v. Hester*, 272 Ala. 564, 133 So. 2d 199 (1961); *Henkell v. Henkell*, 224 Ark. 366, 273 S.W. 2d 402 (1954); *Weatherall v. Weatherall*, 450 P. 2d 497 (Okla. 1969). *See generally*, Annot. 9 A.L.R. 2d 623 (1950).

Suppose, for instance, it should appear that, unknown to the first judge, the child had been regularly confined to a closet for long periods of time or otherwise abused, but these facts are made known to the second judge. Surely it could not be said that the second judge is powerless to act merely because the circumstances are the same in that the abuse is no greater or the environment no worse than before. Moreover, evidence of the abusive environment that existed prior to the first hearing (but unknown to the judge who conducted that hearing) could properly be considered by the judge conducting the second hearing in deciding what disposition of the case would be in the best interest of the child.

[2] The statute requires that the judge shall award "the custody of such child to such person, agency, organization or institution as will, *in the opinion of the judge,* best promote the interest and welfare of the child." G.S. 50-13.2(a) (emphasis added). The judge obviously entered the order that in his judgment or *his opinion* was in the best interest of the child. The question is, therefore, whether we in the appellate division must reverse that judgment and hold that, as a matter of law, the trial judge was obliged to have reached a different opinion. Decisions in custody cases are never easy. The trial judge has the opportunity to see the parties in person and to hear the witnesses. He can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. His decision should not be reversed in the absence of a clear showing of abuse of discretion. *In re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d 524 (1968):

> "When the court finds that both parties are fit and proper persons to have custody of the children involved, as it did here, and thus finds that it is to the best interest of the children for the father to have custody of said children, such holding will be upheld when it is supported by competent evidence." *Hinkle v. Hinkle,* 266 N.C. 189, 196, 146 S.E. 2d 73 (1966).

In summary, the majority of this panel of judges concludes that, although there was evidence to support the judge's finding that there had been a material change of circumstances, the finding was unnecessary in this case for the reasons we have stated. The statute requires the judge to enter such order which *in his*

opinion best promotes the interest and welfare of the child. Surely no one could contend that Judge Jones did otherwise in this case. Finally, the order should be reversed only if an abuse of discretion has been found and the majority of this panel finds none. There is certainly an abundance of evidence to support the critical finding that the environment in which plaintiff has placed the child is not in the child's best interest. The evidence would have supported much stronger findings. It may well be that the judge struggled to spare the child as much future embarrassment as possible.

Affirmed.

Judge CARLTON concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

On 9 October 1978 defendant filed a verified motion for dismissal of the appeal alleging that plaintiff had on 1 September 1978 taken the child for a weekend visitation and had not returned the child as provided by the court order, and that plaintiff had informed defendant that she had taken and would not return the child. Plaintiff's counsel responded that the allegations in the motion were unsubstantiated hearsay. The motion was denied on 30 October 1978. If the allegations are true plaintiff has violated G.S. 14-320.1, a felony. I vote to stay appellate proceedings and remove to the trial court for findings of fact and for determination of custodial matters in light of the facts found. *See Jones v. Cotten*, 108 N.C. 457, 13 S.E. 161 (1891).

Further, I do not agree with the majority opinion because it is based on assumptions relative to the provisions of the divorce and custody decree though the decree was not in the record on appeal, and because it ignores the established law of this State relative to modification of a custody decree, and to the standards for findings of fact and conclusions of law which should support an adjudication of custody. *See* G.S. 50-13.7(a); *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968); *Steele v. Steele*, 36

N.C. App. 601, 244 S.E. 2d 466 (1978); *Owen v. Owen*, 31 N.C. App. 230, 229 S.E. 2d 49 (1976); *Paschall v. Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974); *Register v. Register*, 18 N.C. App. 333, 196 S.E. 2d 550 (1973).

HI-FORT, INC., A CORPORATION, PETITIONER v. MRS. EDDIS BURNETTE, WIDOW; STELLA BURNETTE; JESSIE BURNETTE; RUTH BURNETTE; JANE BURNETTE, DAUGHTER OF EDDIS BURNETTE, DECEASED; JOYCE BURNETTE; LESTER DAVIS; BILL BARNES; RALPH LAWS; DILLARD BARNES; CHARLIE SUMMERS; MRS. VERLIN BURNETTE; MARY BURNETTE, WIDOW; VERLIN BURNETTE; AMERICA BURNETTE, WIDOW; GRADE BURNETTE; DON BURNETTE; FRED B. BURNETTE; ED BURNETTE; LIZZIE DAVIS; RUTH BARNES; GLADYS LAWS; BAINER BARNES; LEXIE SUMMERS, ON BEHALF OF THEMSELVES AND ALL OTHER PARTIES IN INTEREST IN THE SUBJECT MATTER; RESPONDENTS, JACK BURNETTE AND WIFE, JOYCE BURNETTE; JOYCE B. HAIRE AND HUSBAND, JESSE HAIRE; TED BURNETTE AND WIFE, RUTH BURNETTE; ANN B. MOSS AND HUSBAND, MELVIN MOSS; CHERRY BEARD AND HUSBAND, DANIEL BEARD; MARTHA BURNETTE; EDNA BELCHER AND HUSBAND, MAYWOOD BELCHER; KANSAS ELSIE AMMONS; VIOLET SCHOOLFIELD AND HUSBAND, JACK SCHOOLFIELD; ELIZABETH BADEN AND HUSBAND, WILLIAM BADEN; WILLIAM BADEN, EXECUTOR OF THE ESTATE OF MAE AMMONS; CLYDE BURNETTE; MARY JOHNSON AND HUSBAND, N. O. JOHNSON; JAY BURNETTE AND WIFE, RUTH BURNETTE; AND CLINT BURNETTE AND WIFE, EMMA BURNETTE, ADDITIONAL RESPONDENTS

No. 7830SC716

(Filed 31 July 1979)

1. **Deeds § 6.1; Registration § 5— improperly acknowledged deed—admissibility against party claiming by descent**

An improperly acknowledged and registered deed was not inadmissible in a partition proceeding against a party claiming an interest in the land by descent, since an heir is not a purchaser for value entitled to the protection of the recording act. G.S. 47-18.

2. **Partition § 1— location of property on ground not necessary**

Location of the property in question on the ground was not necessary in this partition proceeding since petitioner did not seek to show superior title to respondent but only to establish its status as a tenant in common by showing a chain of title into itself, and petitioner did not challenge respondent's status as cotenant.

3. Adverse Possession §§ 7, 9— tenant in common—widow with dower interest—presumption of ouster of cotenant or heirs

A tenant in common or a widow with a dower interest will not be presumed to have ousted a cotenant or deceased's heirs by sole possession of the property for 20 years where the tenant or widow in possession has recognized the cotenancy or the rights of deceased's heirs.

PETITIONER appeals from *Martin (Harry C.), Judge.* Judgment entered 22 March 1978 in Superior Court, SWAIN County. Heard in the Court of Appeals 25 April 1979.

Hi-Fort, Inc., instituted this action 12 November 1969 in the form of a petition to partition certain land situated in Swain County and commonly known as the "Burnette Property". Petitioner Hi-Fort, Inc., claimed to be entitled to the partition as a tenant in common of the land through mesne conveyances from certain heirs of J. E. "Babe" Burnette. Petitioner claims a 169/264 undivided interest in the approximately 300-acre tract. The respondents answered averring that Jay Burnette, through whom Hi-Fort, Inc., had received its interest in the property, had obtained quitclaim deeds from Elsie Ammons, Jack and Violet Schoolfield, Mae A. Ammons, Mr. and Mrs. V. R. Burnette, and Mrs. N. O. Johnson by false and fraudulent representations that the land was in danger of being sold for unpaid taxes with the intent to defraud the grantors and obtain their interest in the land for nothing. Respondents further allege that Jay Burnette and petitioner conspired to convey to the petitioner his interest with the purpose of cutting off respondent's defenses by allowing petitioner to claim to be an innocent purchaser for value without notice.

Mary Burnette and other originally named respondents filed an amended answer praying that the remaining heirs of J. E. "Babe" Burnette be made additional respondents to this action. Mary Burnette is the widow of Fred Burnette, one of eight children of J. E. "Babe" Burnette, and is the mother of 11 Burnette children. Mary Burnette claims by adverse possession sole seisin in the land in question. She alleges that the deeds purportedly conveying certain undivided interests in the property constitute a cloud on her title, and she prays that the cloud be removed. The action was transferred to the civil issue docket of the superior court. Thereafter, default judgments were entered

against all original and additional respondents, except for those who joined in the prayer for relief with Mary Burnette, leaving only the claim of Hi-Fort, Inc., standing adverse to the claim of Mary Burnette as sole owner of the property in question.

Upon trial without a jury, the court dismissed petitioner's action at the conclusion of its evidence and dismissed respondent's counterclaim at the conclusion of all the evidence. From the entry of judgment in conformity with these rulings, the petitioner appeals. Respondent, Mary Burnette, cross-appeals.

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

McKeever, Edwards, Davis & Hays, by George P. Davis, Jr. and Fred H. Moody, Jr., for petitioner appellant.

Herbert L. Hyde and G. Edison Hill for respondent appellee.

MORRIS, Chief Judge.

Petitioner's Appeal

Petitioner offered evidence intended to prove, by a superior chain of title, its alleged 169/264 undivided interest as tenant in common in the Burnette property. Petitioner's first assignment of error is directed to the trial court's exclusion of Petitioner's Exhibits Nos. 4 and 5. Exhibit No. 4, the ultimate link in the chain of title to petitioner, is the deed from Jay Burnette et ux, Ruth Burnette to Hi-Fort, Inc., recorded in Book 90, at page 373, Swain County Registry. Exhibit No. 5 is an option given by Jay Burnette and wife to Hi-Fort, Inc., to purchase all of their right, title, and interest in the Burnette property. Geneva T. Welch notarized the deed. Maggie Warren, Register of Deeds of Swain County, ordered the deed registered. The option was witnessed by Johnnie Fortner, notarized by Geneva T. Welch, and ordered registered by Maggie M. Warren. Each of these individuals is named in the articles of incorporation as incorporators of Hi-Fort, Inc.

The respondent presented evidence with respect to the admissibility of Exhibits Nos. 4 and 5. Jay Burnette was called by respondents and testified on direct examination by the respondent that neither he nor his wife acknowledged their signatures

on the deed before a notary public. He said on cross-examination that the deed was signed at the law office of Stedman Hines. He testified that he does not remember that Mr. Hines' secretary was present, although he admits she could have been, and that she could have been a notary public. Jay Burnette was questioned with respect to an affidavit purportedly acknowledged by him which stated that he signed the deed with no notary public present while at Johnnie Fortner's house. Jay Burnette denied making that statement. The trial court thereafter excluded from evidence Exhibits Nos. 4 and 5. The record does not indicate the basis for respondent's objection or the trial court's ruling. Nevertheless, because the documents were excluded after respondent elicited testimony from the grantor that he had not signed the deed in the presence of a notary public, the basis for the ruling appears to be the improper acknowledgment and probate of the deed.

[1] It is well settled in this State that the "registration of an improperly acknowledged or defectively probated deed imports no constructive notice, and the deed will be treated as if unregistered." *Supply Co. v. Nations*, 259 N.C. 681, 131 S.E. 2d 425 (1963). There is sufficient evidence in the record to indicate that the deed was not properly acknowledged in that the grantors did not actually appear before the notary public as recited on the face of the deed. An acknowledgment before an appropriate officer is a prerequisite to the valid registration of a deed or any other instrument presented for recordation. G.S. 47-17. Furthermore, in *Allen v. Burch*, 142 N.C. 525, 55 S.E. 354 (1906), it was held that the registration of an improperly acknowledged deed was invalid and the deed, therefore, not admissible in evidence to prove an essential link in the record chain.

The petitioner is praying for partition in kind of the real estate pursuant to G.S. 46-3. The introduction of the documents to establish its record chain of title was to establish its status as a tenant in common, a foundation upon which the right to partition is based, *Smith v. Smith*, 248 N.C. 194, 102 S.E. 2d 868 (1958); *Thomas v. Garvan*, 15 N.C. 223 (1833), and to rebut, in anticipation, Mary Burnette's claim of sole seisin in the Burnette property. Petitioner was not claiming title adversely to that of a lien creditor or purchaser for valuable consideration and, therefore, as between it and Mary Burnette, proper registration of the deed

is not required. North Carolina's recording act, G.S. 47-18, protects only creditors of the grantor, bargainor, or lessor, and purchasers for value, against an unregistered conveyance of land. *See Durham v. Pollard,* 219 N.C. 750, 14 S.E. 2d 818 (1941). The same reasoning which prevents a party from introducing into evidence against a lien creditor or purchaser for value a deed invalidly registered (*see McClure v. Crow,* 196 N.C. 657, 146 S.E. 713 (1929); *Allen v. Burch, supra*) does not apply to exclude an invalidly registered deed introduced against a party claiming interest to the land by descent. An heir is not a purchaser for value entitled to the protection of the recording act. *Bowden v. Bowden,* 264 N.C. 296, 141 S.E. 2d 621 (1965); *see generally* 8 Thompson on Real Property § 4312 (1963 Replacement).

Respondent, nevertheless, argues a further basis for excluding the documents. She contends that there was no authentication of either document shown in the record, because there was no certificate and official seal of the Register of Deeds appearing on the document as required by G.S. 1A-1, Rule 44(a) and G.S. 8-18. To the contrary, however, the certification of the Register of Deeds of Swain County clearly appears upon the face of the documents.

The parties also argue in their briefs with respect to the effect upon the validity of the deed from Jay Burnette and wife to Hi-Fort, Inc., of the fact that it was notarized and thereafter registered by persons who were connected in some capacity with Hi-Fort, Inc. *See* G.S. 47-14 and G.S. 10-5. However, because there is no evidence of their capacity on the date in question, we do not consider the arguments of counsel on this point.

Petitioner also assigns error to the exclusion of Exhibits Nos. 26, 27, 28, and 29. Exhibit No. 26 is the original option to purchase given by Jay Burnette and wife, to Hi-Fort, Inc. Exhibit No. 27 is the original deed from Jay Burnette and wife to Hi-Fort, Inc., including a re-acknowledgment and re-registration of that deed dated 7 March 1978. Exhibit No. 28 is a quitclaim deed from Jay Burnette and wife to Hi-Fort, Inc. and dated 6 March 1978 executed only by Jay Burnette. Exhibit No. 29 is a "deed of confirmation" likewise executed only by Jay Burnette. They were properly certified by the Register of Deeds and offered into evidence. Again, we see no valid basis for the exclusion of these documents. We decline to consider the effect of their admission, if

any, on the default judgment entered in this action against certain heirs of J. E. Burnette, because the date and scope of that judgment do not appear of record.

[2] Petitioner has assigned error to the trial court's finding that petitioner failed to locate on the ground the property in question. Insofar as this finding suggests that such proof was necessary, we must sustain the assignment of error. The location of the property and its boundaries are not in issue in this case. Both petitioner and respondent claim an undivided interest in the same described realty.[1] Although respondent, by her counterclaim, seeks to remove an alleged cloud on her title, petitioner does not seek to show superior title to respondents but only to establish its status as tenant in common by showing a chain of title into itself. Petitioner does not challenge respondent's status as cotenant. *Faucette v. Griffin*, 35 N.C. App. 7, 239 S.E. 2d 712 (1978), *cert. denied*, 294 N.C. 736, 244 S.E. 2d 154 (1978), cited by respondent, is not applicable. Petitioner is not seeking to quiet title to his property as against respondent or the whole world. *See also Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889).

Because we find that the errors discussed above will require a new trial for petitioner, we do not discuss petitioner's remaining assignments of error. Those errors, if errors at all, are not likely to recur upon retrial of petitioner's action.

Respondent's Appeal

[3] Respondent excepts to the ruling and conclusion of the trial court that she had failed as a matter of law to establish in herself, as against the petitioner, adverse possession in the property in question. She contends that the trial court's findings that "she did openly, notoriously and exclusively possess the lands described in her counterclaim" and that "she took the rents and profits from the lands described in her counterclaim from 1929 to 1969 and that she made no accounting to any person for the same" were sufficient to raise a presumption of ouster, ouster being necessary to establish adverse possession as between cotenants. The doc-

1. Although there is no reference to any deed in the petition itself, it is apparent from petitioner's proof that the description in the petition was intended to describe the same 300-acre tract conveyed to J. E. Burnette by deed of record in Book 20, at page 348, Swain County Registry, to which deed respondent referred in her counterclaim. We note that the description in the petition, apparently due to a clerical error in transposing the description onto the petition, does not contain a portion of the description contained in the deed which petitioner introduced into evidence. The portion omitted included two calls. Should the ends of justice so require, petitioner might desire to seek to amend the petition prior to any further proceedings in this matter. *See* G.S. 1A-1, Rule 15.

trine of presumptive ouster or constructive ouster was first explained in *Thomas v. Garvan*, 15 N.C. 223 (1833):

> "The sole enjoyment of the property by one of the tenants is not of itself an ouster, for his possession will be understood to be in conformity with right, and the possession of one tenant in common, as such, is in law the possession of all the tenants in common. But the sole enjoyment of property for a greater number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such sole enjoyment; and this not because it clearly proves the acquisition of such a right, but because from the antiquity of the transaction, clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had. Where the law prescribed no specific bar from length of time, twenty years have been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor." *Id.* at 225. *See also, Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906); *Collier v. Welker*, 19 N.C. App. 617, 199 S.E. 2d 691 (1973).

However, in order for the presumption to arise, it appears further that the sole possession for 20 years must have continued without any acknowledgment on the possessor's part of title in his cotenant. *Covington v. Stewart*, 77 N.C. 148 (1877). The presumption of ouster, therefore, is distinguishable from "actual ouster", requiring acts distinctly hostile and intended to exclude cotenants. It has been suggested that some later cases fail to maintain the distinction between presumptive ouster and actual ouster by requiring that "possession must be exclusive and under a claim of right with no recognition of [the cotenant's] rights continuing for twenty years," in order to raise the presumption of ouster. *See Annot.*, 82 A.L.R. 2d 5, 141 (1962); *Woodlief v. Woodlief*, 136 N.C. 133, 48 S.E. 583 (1904). It is, nevertheless, unnecessary to resolve this supposed conflict. Petitioner argues that the presumption cannot arise because the respondent herself specifically testified: "I never intended to claim this land to the exclusion of my children", and that, "I never intended to claim this land to the exclusion of Babe Burnette's heirs." Although petitioner cites no authority, his contention is correct. The presumption of ouster

will not arise where the cotenancy has been recognized by the party claiming adversely to the cotenant. *See generally* 82 A.L.R. 2d at 144. The rule was specifically recognized in *Mott v. Land Co.*, 146 N.C. 525, 60 S.E. 423 (1908), where the party claiming adversely was found to have recognized the cotenancy by, in previous years, having bought four shares of the property from the heirs of the party through whom all were claiming title.

We note that prior to the entry of default judgment against certain named heirs of J. E. Burnette, including certain heirs through whom petitioner claims title, and during the period of the alleged ouster, Mary Burnette's interest in the real property in question apparently consisted of a dower interest in her deceased husband's intestate share of the J. E. Burnette property. The implications of Mary Burnette's status as possessor of a dower interest has not been addressed by the parties with respect to her ability to possess adversely to the heirs of J. E. Burnette, and more specifically, her ability to hold adversely to the heirs of her deceased husband, through one of whom petitioner claims its interest. Nevertheless, the principles with respect to a dowress' necessity of showing ouster are substantially similar to those applying to tenants in common. *See Graves v. Causey*, 170 N.C. 175, 86 S.E. 1030 (1915). Therefore, we see no necessity for disturbing the ruling of the trial court on these grounds.

We conclude that the respondent's evidence failed to produce facts sufficient to establish adverse possession. Therefore, the trial court properly dismissed respondent's counterclaim.

Affirmed in part, reversed in part.

Judges HEDRICK and WEBB concur.

EQUILEASE CORPORATION v. BELK HOTEL CORPORATION AND HENDERSON BELK

No. 7826SC765

(Filed 31 July 1979)

1. **Usury § 1— application of usury laws—loan on property in this State**

A loan transaction secured by real estate or personalty in N. C. is governed by the usury laws of this State.

2. **Usury § 1.3— interest in excess of legal maximum—transaction usurious as matter of law**

Where the authenticity of the documents embodying the parties' agreement and the accuracy of the figures in the document were not in dispute, and the simple interest rate per annum as called for in the documents was 12.1226%, the transaction was usurious as a matter of law.

3. **Usury § 6— usurious interest paid—insufficient evidence of amount**

Where a usurious note called for level monthly payments and provided that each payment was to be applied to principal and interest, defendant was entitled to recover twice the amount of interest paid; however, because there was no evidence with respect to how the interest and principal payments actually were allocated, the matter must be determined on retrial upon evidence concerning the intent of the parties.

APPEAL by defendants from *Grist, Judge.* Judgment entered 23 March 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 May 1979.

Plaintiff, a New York corporation, initiated this action to recover sums due on a note made by Belk Hotel Corporation in the principal amount of $86,421.51 payable in equal monthly installments of $1,440.36 and on a personal guaranty executed by Henderson Belk to plaintiff. The loan was obtained to pay for the previous renovation of two Otis elevators, and was secured by a security interest in those elevators. Plaintiff alleges that defendants have defaulted in their obligation by failing to make their installment payments when due. Plaintiff declared the entire balance to be due and payable and demands the payment of the $45,025.72 balance due, plus six per cent interest from 1 March 1975, together with attorney's fees and costs.

Defendants' answer denied the primary allegations of the complaint, and contained a counterclaim averring that the interest rate provided in the note violated the usury laws of the

State of North Carolina. Defendants aver that the effective interest rate is 11.63% per annum in violation of G.S. 24-1.1(3). Their evidence indicated a rate of 12.1226 per cent interest. Defendants further allege that the promissory note and guaranty were executed and performed in North Carolina, secured by real property in North Carolina, and should be governed by the laws of North Carolina. They aver, in the alternative, that if the loan documents were in fact intended and structured to be governed by the laws of New York, then plaintiff structured the loan with an intent to evade the usury laws of North Carolina. Defendants pray that all interest be forfeited and that they recover double the amount of interest paid to plaintiff, plus costs of the action.

Plaintiff replied to defendants' counterclaim denying the principal allegations and moving to dismiss the counterclaim alleging usury. The matter was set for trial before a judge without a jury. At the conclusion of the evidence, plaintiff's motion pursuant to G.S. 1A-1, Rule 41(c) for dismissal of the counterclaim was denied. Nevertheless, after taking the decision under advisement, the trial court entered judgment dismissing the counterclaim and adjuding defendants jointly and severally liable in the sum of $41,409.68, along with $6,211.43 in counsel fees, plus 6% interest from the entry of judgment. The trial court concluded that the transaction was governed by the laws of New York, and that, according to New York law, the loan was not usurious.

Defendants appeal.

Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt, by Fenton T. Erwin, Jr., for plaintiff appellee.

Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, by Richard A. Bigger, Jr., for defendant appellant.

MORRIS, Chief Judge.

On appeal, defendants rest primarily on their contention that the trial court erred in determining that the loan and security agreement were governed by New York law rather than North Carolina law, therefore concluding that the loan transaction was not usurious. Defendants rely upon three theories which they contend support a conclusion that North Carolina law governs the transaction, despite the fact that the language of the documents specifically recites that New York law governs. It is uncontroverted by defendants that, in the absence of an intent to evade

North Carolina usury laws by plaintiff, the transaction in question is not usurious if it is governed by the usury laws of New York.

It has been stated without qualification that in North Carolina a loan secured by real estate located in North Carolina is subject to the laws of this State with respect to interest and usury. *South, Inc. v. Mortgage Corp.*, 11 N.C. App. 651, 182 S.E. 2d 15 (1971), *cert. denied*, 279 N.C. 396, 183 S.E. 2d 244 (1971). The authority for this apparently long-accepted rule is *Meroney v. B. and L. Assn.*, 116 N.C. 882, 21 S.E. 924 (1895). That case has been cited and relied upon as authority for the principal stated above by numerous decisions of our Supreme Court, although reference to the rule sometimes has amounted to *dictum. See e.g., Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931); *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902); *Faison v. Grandy*, 128 N.C. 438, 38 S.E. 897 (1901). *See also*, Note, 47 N.C.L. Rev. 761 at 789-90 (1969). *Meroney* involved an action to enjoin the foreclosure of a deed of trust on land in North Carolina by a Georgia building and loan association which maintained a branch office in North Carolina. The note and mortgage apparently provided, as in the case *sub judice*, that the contract would be governed under the laws of the State in which the lending institution maintained its headquarters. The Court concluded, in a meticulous and forceful opinion, that should the foreign lender be allowed to recover the usurious rate "then surely will it have come to pass that it is no longer true that there is no 'cover or device', by which the wholesome restraints put upon the money lenders by our statutes may be escaped." 116 N.C. at 888, 21 S.E. at 926. In stating the policy basis of its decision, the Court observed as follows:

> "The rules of comity require us to allow foreign corporations a standing in our courts to enforce the valid contracts they may have made with our citizens, and all such liens upon property situated within this State as they have lawfully acquired. But that comity does not require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our laws, and, being thus in conflict, the enforcement thereof would work against our own citizens, and give to the foreigner an advantage which the resident has not." 116 N.C. at 889, 21 S.E. at 926-27.

In *Bundy v. Commercial Credit Co., supra*, the Court recognized the general rule of law that the validity and legality of

a contract is to be determined by the law of the State in which it is made. Nevertheless, the Court noted an exception to this rule when a loan is made in a foreign jurisdiction and secured by a lien upon real estate in North Carolina. In support of the general rule, the Court expressed its understanding of the State's interest in enforcing usurious loans. "The mere fact that a loan was made to a citizen of this State by a citizen of a foreign State and a rate of interest in excess of [the legal rate] was reserved or charged, does not necessarily offend the public policy of this State." 200 N.C. at 518, 157 S.E. at 863.

[1] The conflict of laws rule with respect to foreign contracts secured by North Carolina realty appears to be contrary to the prevailing authority in the nation. The prevailing rule with respect to loans involving a security interest in real or personal property is that the law to be applied is that intended by the parties, and in the absence of an express intent, the parties will be presumed to have intended the law of the place of performance of the contract to apply. *McIlwaine v. Ellington*, 111 F. 578 (4th Cir. 1901) (applying North Carolina law); *see generally Annot.*, 125 A.L.R. 482 (1940); 45 Am. Jur. 2d, Interest and Usury §§ 30-31. The prevailing view, which does take into account the situs of the security when the parties have not specifically agreed upon the local law to be applied, does not penalize a foreign lender for seeking security for the loan in North Carolina property. According to the accepted rule in this State, if the plaintiff had not sought security for its loan, it appears that plaintiff in this action would have been entitled to interest at the contract rate. *See Bundy v. Commercial Credit Co., supra.* The record indicates that the note was executed for defendant in North Carolina through a broker, accepted and executed by plaintiff in New York, and payments were payable in New York. Moreover, the documents specified that New York law would govern. It appears that the Court in the seminal case of *Meroney v. B. & L. Assn., supra*, need not have relied upon the situs of the security as a basis for its ruling. It appears from the report of that case that the contract was made and to be performed in North Carolina. The Court concluded that it was evident that the borrower was expected to make payments to the local branch of the building and loan association. Although *Meroney* expressed disapproval of the notion that the transaction could be split by applying local law to

the effect of the security agreement and the law of the State of the contract for interpretation of the validity of the underlying obligation, to hold otherwise would, nevertheless, preserve this State's primary interest in applying its own property laws. It is a firmly established principle that the law of the situs of the real property or personal property governs the validity and effect of the security instrument. *See generally* Restatement (Second) of Conflict of Laws § 228 (1971); G.S. 25-9-102(1). Otherwise, according to the expressions of public policy in *Bundy v. Commercial Credit Co.*, supra, this State does not have a compelling interest in preventing the enforcement of foreign contracts charging interest at a rate greater than permitted in North Carolina. See the discussion in *McIlwaine v. Ellington, supra.* Nevertheless, we find ourselves bound by the accepted rule of law in this State that a loan transaction secured by real estate in North Carolina is governed by the usury laws of this State. We decline to accept plaintiff's proposition that we are not bound by *Meroney* unless the lender seeks foreclosure under the security instrument. To accept this position would essentially permit the method of enforcement of the obligation to determine the legality of the interest rate. This is not the reasoning applied in *McIlwaine v. Ellington, supra,* as plaintiffs contend.

We are not disposed to attempt to resolve the issue raised by the parties concerning the character of the security. We have been presented with no authority or reasoning to compel us to reach the conclusion that the choice of the applicable usury law must depend upon whether the two Otis elevators securing plaintiff's loan are characterized as realty or personalty. If indeed North Carolina's policy is to subject foreign lenders to our usury laws in exchange for their use of North Carolina property as security, as it apparently is, then the *Meroney* Rule must apply with equal force to loans secured by North Carolina realty and personalty. Indeed, according to the Uniform Commercial Code, G.S. 25-9-102(1), North Carolina law governs the effect of a security instrument in personal property and fixtures just as it governs the effect of deeds of trust on interests in real property.

[2] Our conclusion that North Carolina usury laws apply to this transaction necessarily presents the question whether plaintiff has violated our law. It is uncontroverted that, whether G.S. 24-1.1(2) or G.S. 24-1.2(2) applies, plaintiff has charged a greater

rate of interest than permitted by statute. Nevertheless, plaintiff contends that under the circumstances of this case we should not find that it possessed the requisite corrupt intent to subject it to the penalties provided in G.S. 24-2. Plaintiff argues that the excess interest charged was not exorbitant under either statute, and that fact, combined with the facts that the defendants in this action were sophisticated business persons, and that the parties agreed that New York law would govern, should prevent any inference of "corrupt intent" on the part of plaintiff. It is provided by our statute that "charging a greater rate of interest than permitted by [Chapter 24] or other applicable law . . . , when *knowingly* done . . ." violates the statute. G.S. 24-2. In the often cited *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), Justice Moore explained:

> "The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. (Citations omitted.) Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. (Citations omitted.) And where there is no dispute as to the facts, the court may declare a transaction usurious as a matter of law." 278 N.C. at 530, 180 S.E. 2d at 827-28.

Here there is no dispute as to the authenticity of the documents nor the accuracy of the figures on the documents. The expert testified at trial without contradiction that the effective simple interest rate per annum as called for in the documents was 12.1226 per cent. Therefore, the transaction was usurious as a matter of law. *Kessing v. Mortgage Corp., supra.*

[3] Plaintiff contends that even if the rate of interest was usurious, defendant has not proven that usurious interest actually was *paid,* and therefore is not entitled to recover twice the interest paid. *See* G.S. 24-2. By statute, where a greater rate of interest has been paid, a party may recover twice the amount of interest paid, and a forfeiture of the remaining interest occurs. If the greater rate is only *charged,* but not paid, there shall be a forfeiture of the entire interest. G.S. 24-2. In the present action, level monthly payments were called for by the note. The note

itself provided that each payment was to be applied to principal *and* interest. Defendants' expert witness assumed, as is the general rule, that interest on the outstanding balance is paid as part of each installment and that the balance of the level payments is applied to principal. According to the amortization schedule constructed from the documents, interest in the amount of $15,104.01 was paid out of the 30 installment payments made at $1,440.36 per payment. Nevertheless, as plaintiff noted, there is no evidence with respect to how interest and principal payments actually were allocated. This is a matter which must be determined by the fact finders upon evidence concerning the intent of the parties. In the absence of an agreement by the parties, we note that the so-called "United States Rule" applied by defendants' expert witness generally determines the allocation. *See generally* 47 C.J.S., Interest § 66; 45 Am. Jur. 2d, Interest and Usury § 99.

We find it unnecessary to consider defendants' assignments of error applying to rulings on the admission of evidence. These issues are not likely to arise upon retrial of this matter.

Defendants are entitled to have North Carolina usury laws applied when this matter is returned to the trial court for a

New trial.

Judges HEDRICK and WEBB concur.

WILLIE MAE HILL v. ALLIED SUPERMARKETS, INC.

No. 7826SC739

(Filed 31 July 1979)

1. Negligence §§ 53, 53.4— duty of store proprietor to invitee—res ipsa inapplicable

A store proprietor owes to his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they will use during business hours and to give warning of hidden perils or unsafe conditions of which he knows or of which in the exercise of reasonable inspection and supervision he should have knowledge. However, no inference of negligence on the part of the store proprietor arises from the mere fact of the customer's fall on the floor of his store during business hours, the doctrine of *res ipsa loquitur* not being applicable.

2. Negligence § 57.7— fall on water on store floor—insufficient evidence of negligence

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant store proprietor's negligence where it tended to show only that plaintiff fell because of water on the store floor near a vegetable bin but there was no evidence from which the jury could find either what was the source of the water in which plaintiff fell or how long the water had been there.

APPEAL by defendant from *Gavin, Judge.* Judgment dated 6 May 1978 filed in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 May 1979.

This is a civil action in which plaintiff seeks to recover damages for injuries suffered when she slipped and fell in defendant's supermarket. Plaintiff alleged that her fall was a result of the defendant's negligence in maintaining the floor of the aisle where plaintiff fell with water or some other slippery substance thereon and in failing to remedy the condition or to warn customers of it. Defendant filed answer denying negligence on its part and alleging that the plaintiff was contributorily negligent.

The parties stipulated that the supermarket was under the control of the defendant and that the plaintiff fell while she was a business invitee therein.

At trial the plaintiff presented evidence to show:

She is about 57 years old. On 31 August 1974, accompanied by her daughter and niece, she entered defendant's store to shop. They walked past the cash register, and turned left down an aisle on the far right between the meat counter on the right and a bin on the left containing frozen foods. Plaintiff was near the frozen food bin and had taken three or four steps down the aisle when she slipped and fell in a puddle of water approximately 1½ feet wide and 2½ to 3 feet long. The puddle was big enough to wet the back parts of the plaintiff's clothing when she fell. The floor was vinyl tile, light in color, "something like an off-white." The plaintiff was wearing low-heeled shoes. The day outside was fair and warm. There was no water fountain where plaintiff fell.

Concerning the puddle and its source plaintiff testified on direct examination:

I didn't have occasion to observe how close I was to the vegetable bin while I was laying on the floor but after they helped me up, I did. When I got up I was all wet and the water, I guess, run from there. I was close enough to it, like I say, to put my hand on it.

MR. MARTIN: OBJECTION to the conclusion.

MOVE TO STRIKE as to where the water must have run from.

THE COURT: Do you know where the water ran from? huh?

A. From the vegetable bin.

THE COURT: OBJECTION OVERRULED.

MOTION DENIED.

The water was standing right near the vegetable bin and had run out; it was kind of a big place and starting to kinda run down. I did not see the water until I got up and I got up and I had mopped up a lot by falling, but it had run down just a little place where I didn't mop up. I could tell it had began to kinda run down. I didn't see how much it was before I fell in it. My bottom and back, and, I guess, my arm got wet; I don't know about my arm, but I remember my bottom and back.

When I got up I could tell it (the puddle of water) was pretty big from what was left, but I couldn't tell exactly how big. I know I got some of the water up, but it was a pretty big place and it had begun to kind of run down. The stream that was beginning to run down was about a foot long and the water was just standing there and then it began to run down. The reason I know it was standing there was how I got wet, but I didn't see it before I fell in it. After I got up I could tell the space; and what was left they mopped it up.

* * *

. . . There were frozen vegetables, food, ice cream and so forth in the vegetable bin. I didn't get to look in there that day to see what was in there but that's mostly what frozen vegetable bins carry.

On cross-examination, plaintiff testified:

> [B]efore I fell, I didn't see the water, and I mean I got the water up with my body. I mean like I fell in it. So, therefore, I couldn't describe it. The place was wet. You could tell that, kinda like that, and a stream had begun to run down where I didn't get it mopped up. I saw that, and I was standing there.

The plaintiff's niece, Julia Douglas, testified on direct examination:

> I saw the water that she fell in. I would say it was water. The floor covering was a light tile. The puddle of water was big enough for her to get wet the back parts of her clothing. The water was along in the area of the frozen foods. I would say it wasn't just in one place. It like maybe ran. It just wasn't water in the floor, just spill or something. I would say it maybe ran. I would say maybe it ran from under the frozen tray the unit to hold the frozen vegetables, out from under the trays, the container, whatever you call it. Because, okay, we was like at the vegetable tray, and like the water, it was just, you know, like it maybe dripped or ran into a puddle of water. It just you know, just like seeped, dripped.
>
> Q. All right. Was there evidence of any stream of water from the vegetable bin to the puddle that you have described?
>
> A. I would say yes.
>
> MR. MARTIN: I OBJECT to the leading. MOVE TO STRIKE.
>
> THE COURT: All right, do not lead her, sir. I'll let the answer stand, but, now, let me tell you this. This jury was not there. I was not there.
>
> A. I know.
>
> * * *
>
> Regarding the appearance of the water there at the point Mrs. Hill fell, all I can say, you know, it was a good bit of water. It was enough for after she fell, she wet her clothes in the back. It was approximately 1½ feet wide and 2½ to 3 feet long. I would say that part of the water she fell in was touching the base of the vegetable bin.

On cross-examination Julia Douglas testified:

> I didn't see the substance on the floor before Mrs. Hill fell. I saw her after she fell. I saw this liquid on the floor near the vegetable bin because she wet her dress. I couldn't say for sure it was water. I didn't test it. It was like maybe something dissolved and it just run and it just accumulate, it just piles up. That's what I'm saying. I keep confusing people, but I don't mean to. When something is defrosting, the more it defrosts or runs, the more water. That's all I'm trying to say. I'm not saying the water was moving or running at the time I saw it, like a stream or something. I said it could be running from under beneath.
>
> Q. But you didn't see it actually coming out of this. It was there close to it, but you didn't see it coming out?
>
> A. Yes.

At the close of the plaintiff's evidence, the trial court allowed defendant's motion for a directed verdict made on the grounds that there was insufficient evidence to show negligence on the part of the defendant. From this ruling the plaintiff appeals.

Chambers, Stein, Ferguson & Becton, by Melvin L. Watt, for the plaintiff appellant.

Walker, Palmer & Miller, by Douglas M. Martin, for the defendant appellee.

PARKER, Judge.

[1] That a store proprietor is not an insurer of the safety of customers on his premises and that liability for injury suffered by a customer in his store attaches only for such injuries as result from actionable negligence on his part "is a principle of the law of negligence so familiar and so firmly established as almost to obviate the necessity of citing supporting authority." *Long v. Food Stores*, 262 N.C. 57, 59, 136 S.E. 2d 275, 277 (1964); *see* Annot., 62 A.L.R. 2d 6 (1958). The proprietor does owe to his customers the duty to exercise ordinary care to maintain in a reasonably safe condition those portions of his premises which he may expect they will use during business hours and to give warning of hidden perils or unsafe conditions of which he knows or of which in exer-

cise of reasonable inspection and supervision he should have knowledge. *Dawson v. Light Co.*, 265 N.C. 691, 144 S.E. 2d 831 (1965); *Gaskill v. A. and P. Tea Co.*, 6 N.C. App. 690, 171 S.E. 2d 95 (1969). No inference of negligence on the part of the store proprietor arises from the mere fact of a customer's fall on the floor of his store during business hours, the doctrine of *res ipsa loquitur* not being applicable. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967).

> When claim is made on account of injuries caused by some substance on the floor along and upon which customers will be expected to walk, in order to justify recovery, it must be made to appear that the proprietor either placed or permitted the harmful substance to be there, or that he knew, or by the exercise of due care should have known, of its presence in time to have removed the danger or given proper warning of its presence. Thus, before plaintiff can be permitted to recover she must first offer evidence tending to show (1) negligent construction or maintenance resulting in a condition which would cause a person of ordinary care to foresee that some injury was likely to result therefrom; and (2) express or implied notice of such condition.

Pratt v. Tea Co., 218 N.C. 732, 733, 12 S.E. 2d 242, 243 (1940).

[2] Applying these well established principles to the evidence in the present case, it is apparent that, even when the evidence is viewed in the light most favorable to the plaintiff, it is insufficient to take the case to the jury on an issue as to defendant's negligence. We hold, therefore, that defendant's motion for directed verdict was properly allowed.

There was no evidence from which the jury could find either what was the source of the water in which plaintiff fell or how long the water had been there. Although plaintiff testified that "the water, I guess, run from there" (referring to the vegetable bin), and that "[t]he water was standing right near the vegetable bin and had run out," it is clear from her total testimony that her statements identifying the bin as the course of the water were no more than conjectures on her part arrived at solely because of the proximity of the water to the bin. The only other witness to testify to plaintiff's fall, her niece, similarly testified that she "would say maybe it (referring to the water) ran from under the

frozen tray the unit to hold the frozen vegetables, out from under the trays, . . ." and that she "would say yes" to a leading question asked by plaintiff's counsel as to whether there was "evidence of any stream of water from the vegetable bin to the puddle." Here again, however, it is apparent that these were conclusory conjectures of the witness based solely on the proximity of the water to the bin. Moreover, even if the speculations of the plaintiff and her witness identifying the bin as the source of the water should turn out to be correct, there is no evidence as to how long the water had been there nor was there any evidence to show that the defendant knew or in the exercise of reasonable inspection should have known of its presence in time to have removed it before plaintiff stepped into it and fell. There was no evidence that the freezing components of the vegetable bin were malfunctioning in any way or that, if they were, defendant knew or in the exercise of reasonable inspection should have known that this was the case. The testimony of plaintiff's niece that the water "maybe dripped" and that "[w]hen something is defrosting, the more it defrosts or runs the more water," obviously represents no more than speculation on her part. Such conjectures as to possibilities furnish no adequate basis for a jury finding that water in fact did drip from the vegetable bin as result of defrosting and that the dripping water did accumulate on the floor over a long period of time to give defendant notice of its presence. Upon all of the evidence, the jury could do no more than speculate about the water's source and about the length of time it had been on the floor.

> In passing upon the sufficiency of the evidence the ultimate inquiry is whether it is such as might reasonably satisfy an impartial mind of the truth of the proposition sought to be proved. . . . [T]he evidence must do more than raise a suspicion, conjecture, guess, possibility or chance.

2 N.C. Evidence (Brandis rev.) § 210, pp. 152-53.

The evidence in this case is insufficient to "reasonably satisfy an impartial mind" either as to the source of the water or as to whether it had been on the floor long enough for defendant to be charged with notice of its presence.

The judgment appealed from is

Affirmed.

Judges MITCHELL and MARTIN (Harry C.) concur.

DAVID ROSENTHAL AND WIFE, YONINA ROSENTHAL v. DOROTHY PERKINS, FINLEY GALLERY OF HOMES, INC., RICHARD GOLDBERG AND WIFE, JEAN GOLDBERG

No. 7810SC816

(Filed 31 July 1979)

1. **Fraud § 1— elements**

The essential elements of actionable fraud are: (1) material misrepresentation of a past or existing fact; (2) representation which is definite, specific and made with knowledge of its falsity or in culpable ignorance of its truth; (3) the misrepresentation is made with the intention that it should be acted upon; and (4) the misrepresentation is acted upon by the recipient to his damage.

2. **Fraud § 9— pleadings—rule of liberal construction inapplicable in fraud case**

The G.S. 1A-1, Rule 8 provision that pleadings are to be liberally construed under the notice theory of pleading does not apply to fraud cases.

3. **Fraud § 9— *flooding in house—insufficiency of complaint to allege fraud***

Plaintiffs' complaint failed to state a claim for relief based on fraud where plaintiffs alleged that they purchased property from defendants who concealed the material fact that a drainage and flooding condition caused flooding of the house from time to time but plaintiffs did not allege that the concealment was made with the intent to induce plaintiffs to purchase the property, that plaintiffs reasonably relied upon the concealment and acted upon it, or that plaintiffs were denied the opportunity to investigate the premises or that they could not have discovered the flooding by the exercise of reasonable diligence.

4. **Rules of Civil Procedure § 12— contradictory pleadings—action properly dismissed**

Where plaintiffs' complaint effectively alleged a cause of action against defendants for breach of contract, plaintiffs' cause of action should not have been dismissed for failure to state a claim under G.S. 1A-1, Rule 12(b)(6); however, since plaintiffs, in their reply to the counterclaim of the corporate defendant, denied such contract, or in the alternative, rescinded it if it existed, such error was not prejudicial because the complaint was so modified by the contradictory allegation in the reply that there was a legal bar to the cause of action for breach of contract, and judgment on the pleadings under Rule 12(c) should have been granted.

5. **Unfair Competition § 1— Unfair Trade Practices Act—individual defendants not violators**

The trial court properly dismissed plaintiffs' cause of action under the Unfair Trade Practices Act brought against the individual defendants, since the violators of that Act can only be those engaged in a business, a commercial or industrial establishment or enterprise. G.S. 75-1.1.

6. **Unfair Competition § 1— Unfair Trade Practices Act—defendant realtor engaged in trade—fraud not necessary element in violation of Act**

The trial court erred in dismissing plaintiffs' cause of action under the Unfair Trade Practices Act against the corporate defendants since defendants were engaged in the buying and selling of real estate and were thus engaged in trade or commerce within the meaning of G.S. 75-1.1; furthermore, the fact that plaintiffs failed to state a claim in their first cause of action based on fraud did not affect their cause of action under the Unfair Trade Practices Act, since fraud is not a necessary element in the violation of the Act.

APPEAL by plaintiffs from *Godwin, Judge.* Order entered 10 July 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 24 May 1979.

Plaintiffs in their complaint allege three causes of action as follows:

First Cause: Prior to 1 August 1973, defendants Goldberg listed for sale their home at 1913 Manuel Drive, Raleigh, with defendant Finley, a realty corporation, who advertised the property for sale and its agent, defendant Perkins, showed the property to plaintiffs. A drainage and flooding condition caused flooding of the house from time to time, and this condition was known to all defendants but they concealed this material fact from plaintiffs, who had no knowledge of the condition, and they purchased the property for $44,000. Soon thereafter plaintiffs became aware of the flooding condition and were unable to move into the house for 14 months while defendant Finley made repairs to the house. Plaintiffs prayed for compensatory damages of $9,250, and for punitive damages of $20,000.

Second Cause: When plaintiffs discovered the flooding condition they sought to rescind the purchase, but defendant Finley agreed to make repairs to the house, driveway and yard to alleviate damage from flooding. Plaintiffs could not move into the house for 14 months. Defendant Finley failed to make the repairs as contracted. Plaintiffs sought compensatory damages of $2,500.

Third Cause: Plaintiffs allege violation of the Unfair Trade Practices Act, G.S. 75-1.1, and seek treble damages under G.S. 75-16, and attorneys' fees under G.S. 75-16.1.

All defendants answered and alleged failure to state a claim: The motions of all defendants to dismiss all three causes of action under G.S. 1A-1, Rule 12(b)(6) were allowed by the trial court. During the hearing the plaintiffs in open court moved to amend their complaint to allege fraud *in haec verba.* The motion was denied. Plaintiffs appealed from the order dismissing all causes and denying motion to amend their complaint.

Everett, Everett, Creech & Craven by Robinson O. Everett and William A. Creech for plaintiff appellants.

Smith, Anderson, Blount & Mitchell by Samuel G. Thompson for defendant appellees Dorothy Perkins and Finley Gallery of Homes, Inc.

Maupin, Taylor & Ellis by Richard C. Titus and Richard M. Lewis for defendant appellees Richard Goldberg and wife, Jean Goldberg.

CLARK, Judge.

The plaintiffs in their complaint filed 31 October 1975, alleged three causes of action. The defendants Goldberg in their answer made eight defenses and two cross-claims. Defendants Perkins and Finley, Inc., in their answer made six defenses and a counterclaim. Plaintiffs filed a reply to the counterclaim. All parties agreed on a Proposed Order on Final Pretrial Conference in July 1978, but this Order was not submitted to the trial court because the motions of the defendants to dismiss all causes of action under Rule 12(b)(6) were heard and allowed on 10 July 1978.

FIRST CAUSE OF ACTION

[1] Plaintiffs' first cause of action is based on fraud. The essential elements of actionable fraud are as follows: (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5)

that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that there resulted in damage to the injured party. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953); *Harding v. Southern Loan & Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940).

[2] The Rule 8 provision that pleadings are to be liberally construed under the notice theory of pleadings does not apply to fraud cases. Prior to the adoption of the Rules of Civil Procedure it was well-established that in a fraud cause the plaintiff must allege all material facts and circumstances constituting the fraud with particularity. *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972); Shuford, N.C. Civil Practice and Procedure, § 9-5. This established law was incorporated in 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. . . ."

[3] Plaintiffs allege that the misrepresentation consisted of the concealment of a material fact, *i.e.*, "a drainage and flooding condition which caused flooding of the house from time to time." In some circumstances concealment or nondisclosure may be considered as a positive misrepresentation and serve as a basis for actionable fraud. *Setzer v. Old Republic Life Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962); *Brantley v. Dunstan*, 17 N.C. App. 19, 193 S.E. 2d 423 (1972).

Assuming that the material fact concealed is alleged with sufficient specificity, we find no allegation that the concealment was done with the intent to induce plaintiffs to purchase the property. Nor do we find an allegation that plaintiffs reasonably relied upon the concealment and acted upon it. Plaintiffs have not alleged that they were denied the opportunity to investigate the premises or that they could not have discovered the flooding by the exercise of reasonable diligence. *See Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957); *Harding v. Southern Loan & Insurance Co., supra.*

We conclude that plaintiffs' complaint fails to state a claim for relief based upon fraud and that the trial court did not err in dismissing the first cause of action.

SECOND CAUSE OF ACTION

For their second cause of action plaintiffs allege that after purchasing the premises and discovering the flooding and drainage conditions they entered into a contract with all defendants whereby defendant Finley, Inc., agreed to make certain repairs to the house, driveway and garage, and the defendants Goldberg agreed to forego any payments on the purchase-money mortgage until the repairs were complete and plaintiffs could occupy the premises.

Defendants Goldberg in this answer deny such contract but admit they agreed to delay payments solely as an accommodation to the plaintiffs.

Defendants Perkins and Finley, Inc., in their answer admitted that Finley, Inc., undertook to make certain improvements and that defendants Goldberg agreed to forego payments on the purchase money mortgage pending completion of the improvements. Defendant Finley, Inc., then counterclaimed against plaintiffs, alleging that pursuant to the settlement agreement it made improvements costing $1,101.46, that plaintiffs breached the agreement, and it prayed for recovery of that sum, or, in the alternative to have that amount applied as a set-off.

Plaintiff replied to the counterclaim of defendant Finley, Inc., and alleged that said defendant "failed to perform any offer of settlement" and that "no valid settlement agreement . . . was ever reached, and in the alternative, if any compromise agreement did at any time result from discussions between plaintiffs and the corporate defendant or its agents, the terms of any such compromise agreement were never complied with by the corporate defendant and by reason of the breach thereof, any such compromise was rescinded and thereafter had no further effect."

[4] Plaintiffs' complaint effectively alleges a cause of action against all defendants for breach of contract. Thus the plaintiffs' second cause of action should not be dismissed for failure to state a claim under Rule 12(b)(6). But the plaintiffs in their reply to the counterclaim of defendant Finley, Inc., denied such contract, or in the alternative, if the contract existed it was rescinded. In view of these contradictory allegations, the plaintiffs could not recover for breach of contract. The complaint was so modified by the con-

tradictory allegation in the reply that there was a legal bar to the cause of action for breach of contract, and judgment on the pleadings under Rule 12(c) should have been granted. *See Van Every v. Van Every*, 265 N.C. 506, 144 S.E. 2d 603 (1965); 10 Strong's N.C. Index 3d *Pleadings* § 38.2 (1977). That the ruling of the trial court was improperly labeled a dismissal under Rule 12(b)(6) rather than judgment on the pleadings under Rule 12(c) we find has no legal significance.

THIRD CAUSE OF ACTION

Plaintiffs in their third cause of action seek to recover under the Unfair Trade Practices Act. G.S. 75-1.1 makes it unlawful to engage in ". . . unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." The purpose of the Act is stated in G.S. 75-1.1(b) as follows:

> "(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings *between persons engaged in business and between persons engaged in business and the consuming public* within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State." (Emphasis supplied) (G.S. 75-1.1(b) was amended in 1977.)

[5] The defendants Goldberg were not engaged in trade or commerce. They did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise. *See State ex rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977); *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

[6] The defendant Finley, Inc. and its agent Perkins were engaged in the business of buying and selling real estate and acting as a real estate broker or agent. Clearly, it was engaged in "trade or commerce" within the meaning of G.S. 75-1.1. Said defendants argue that if plaintiffs failed to state a claim in their first cause of action based on fraud, then it also failed to state a claim in their

third cause of action. We find no merit in this argument that fraud is a necessary element in the violation of the Unfair Trade Practices Act. In *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975), the court stated that while "[p]roof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true." The declared purpose of the Act "to maintain ethical standards of dealings" does not imply that the failure to maintain such standards must rise to the level of fraud, or that unethical and unfair trade practices must constitute fraudulent trade practices.

We conclude that the trial court erred in allowing the Rule 12(b)(6) motion to dismiss the plaintiffs' third cause of action against defendant Finley, Inc., and its agent Perkins.

The plaintiffs also challenge the denial of their oral motion made at the hearing to amend their complaint in order to allege elements of fraud *in haec verba*. Such motion is addressed to the discretion of the trial court and denial of the motion cannot be reversed absent an abuse of discretion. *Consolidated Vending Co. v. Turner*, 267 N.C. 576, 148 S.E. 2d 531 (1966); *Johnson v. Austin*, 29 N.C. App. 415, 224 S.E. 2d 293, *cert. denied*, 290 N.C. 308, 225 S.E. 2d 829 (1976). Rule 15(a) requires that the leave to amend by the trial court "shall be freely given when justice so requires." Factors such as contradictory pleading and the futility of amendment are possible justification for denial of the amendment, and we find no abuse of discretion.

The judgment is affirmed except for the dismissal of the third cause of action against the defendant Finley, Inc., and its agent Perkins.

Affirmed in part and reversed in part.

Judges VAUGHN and CARLTON concur.

JAMES H. GRAHAM (EMPLOYEE) v. CITY OF HENDERSONVILLE, OAKDALE CEMETERY (EMPLOYER) AND BITUMINOUS CASUALTY CORPORATION (CARRIER)

No. 7810IC971

(Filed 31 July 1979)

1. **Master and Servant § 69.3— workmen's compensation—authority to set aside compromise agreement**

The Industrial Commission has the authority to set aside compromise settlement agreements if the settlement was obtained by fraud, misrepresentation, undue influence, duress or mutual mistake. G.S. 97-17.

2. **Master and Servant § 69.3— workmen's compensation—fraud in procuring compromise agreement**

In an action to set aside a compromise settlement agreement on the ground that it had been procured by fraud, the evidence supported a finding by a deputy commissioner of the Industrial Commission that defendant insurer's agent represented to plaintiff that there was a serious question as to causation with knowledge that such representation was false or in reckless disregard of the veracity of such representation.

APPEAL by defendants from an Opinion and Award of the North Carolina Industrial Commission entered 12 June 1978. Heard in the Court of Appeals 27 June 1979.

On 3 April 1974, the parties entered into a compromise settlement agreement, which compensated plaintiff for loss of 50% of his big toe. On 27 June 1974, Chief Deputy Commissioner Shuford entered an order approving the settlement agreement. Thereafter, plaintiff sought to have the agreement and the order approving it set aside pursuant to G.S. 97-17 on the basis that the settlement agreement was obtained by fraud, duress, undue influence and misrepresentation, and sought to have additional benefits awarded.

PLAINTIFF'S EVIDENCE

At hearing on 27 May 1977, the plaintiff presented evidence tending to show that in 1972, he had been employed by the City of Hendersonville as a garbage collector, and as a grass cutter in Oakdale Cemetery. On 13 December 1972, he was mowing grass in the cemetery and stubbed his right great toe on a grave marker. The toe became swollen, so he cut off the top portion of his shoe. He continued working until the end of December when he con-

sulted Dr. William Lampley about the pain in his toe. Dr. Lampley's examination revealed evidence of frostbite and gangrene. On 8 January 1973, Dr. Lampley removed a necrotic area on plaintiff's great toe. In April 1973, the parties entered into an agreement for compensation for disability on the Commission's Form 21. The agreement stipulated that the plaintiff sustained an injury to his right foot by accident arising out of and in the course of his employment on 13 December 1972. The defendants agreed to pay $55.20 per week commencing on 3 January 1973. In October 1973, the parties entered into a Supplemental Memorandum of Agreement providing for 50% permanent partial disability of the right great toe commencing on 16 January 1973.

On 5 November 1973, Dr. Lampley amputated the rest of plaintiff's right great toe and also amputated his right fifth toe. On 6 February 1974 he removed the remaining toes on plaintiff's foot. Dr. Lampley completed Industrial Commission Form 25 which indicated that it would be necessary to remove the other toes. Defendant, Bituminous Casualty Corporation, received this report on 7 February 1974.

On 28 March 1974, Edward H. Tomblin, an adjuster for the Bituminous Casualty Corporation, went to plaintiff's home to discuss a compromise settlement. He returned on 3 April 1974, and plaintiff signed a Compromise Settlement Agreement which provided for payment of $966.00 plus medical payments for 50% permanent loss of plaintiff's great toe. Chief Deputy Commissioner Shuford approved the agreement in July 1974.

Plaintiff testifed that he did not remember signing the release and did not remember discussing the settlement. He was taking medicine at that time for the pain in his foot. He also testified that his glasses were broken, and he could not see through them. He had a sixth or seventh grade education and could read a little, but not without his glasses.

Plaintiff's daughter testified that plaintiff was disoriented and confused during April 1974. He would often fall asleep. Plaintiff's grandson testified that plaintiff signed the papers without his glasses on and that he acted "liked he didn't know where he was." Dr. Lampley testified that he informed plaintiff before 3 April 1974 that he may have to have his leg amputated below the knee. During the period between February and June 1974, he saw

plaintiff about 21 times. During that time plaintiff was under sedation and was, at times, disoriented, erratic and incoherent. On 11 November 1974, Dr. Lampley amputated the plaintiff's right leg above the knee.

DEFENDANT'S EVIDENCE

Edward H. Tomblin, for defendants, testified that on 3 April 1974, he read over the agreement with plaintiff; that they discussed it for about 45 minutes and that plaintiff's physical and mental condition appeared normal. On 3 April 1974, he was not aware that plaintiff's other toes had been amputated, because his file did not contain those reports. The file contained a medical report dated 23 March 1973, and a report dated 4 February 1974, indicating that the right great toe had been amputated. He informed plaintiff that "the frostbite situation was an involvement which created a dispute. I represented to him that there was a question as to whether he was entitled to receive compensation in the area of frostbite."

On 27 July 1977, Deputy Commissioner Denson filed an Opinion and Award which found as a fact and concluded as a matter of law that there was an error in the Industrial Commission's approval of the Compromise Settlement Agreement due to fraud, misrepresentation and undue influence. Deputy Commissioner Denson set aside the order of Chief Deputy Commissioner Shuford which approved the agreement, and set aside the agreement itself. The Commissioner found that plaintiff suffered permanent disability of his right leg for which defendants owed $55.20 per week for 200 weeks.

Defendants appealed to the Full Commission, which, on 12 June 1978 affirmed the Opinion and Award of Deputy Commissioner Denson.

Prince, Youngblood, Massagee & Creekman by James E. Creekman for plaintiff appellee.

Uzzell and DuMont by Harry DuMont for defendant appellants.

CLARK, Judge.

[1] Defendants first contend that the Industrial Commission had no jurisdiction, authority, or power to hold a hearing and to set

aside an order of a Commissioner approving a compromise agreement.

G.S. 97-17 provides, in pertinent part that:

> ". . . Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, *unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such an agreement.*" (Emphasis added).

This statutory provision clearly grants the Industrial Commission the authority to rehear and set aside prior orders approving settlements on any one of the stated grounds.

In *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E. 2d 355 (1976), the Supreme Court set forth additional guidelines for setting aside prior orders of the Commission. In *Pruitt*, the Supreme Court stated that in order for the plaintiff to attack a settlement agreement which had been approved by the Commission, he must "make application . . . for a further hearing for that purpose. In such event, the Industrial Commission shall hear the evidence offered by the parties, find the facts with respect thereto, and upon such findings determine whether the agreement was erroneously executed due to fraud, misrepresentation, undue influence or mutual mistake. If such error is found, the Commission may set aside the agreement, G.S. 97-17, and determine whether a further award is justified and, if so, the amount thereof." 289 N.C. at 260, 221 S.E. 2d at 359. It is abundantly clear that the Industrial Commission has the authority to set aside settlement agreements if the settlement was obtained by fraud, misrepresentation, undue influence, duress or mututal mistake. Defendants' first assignment of error is overruled.

[2] Defendants also contend that there was insufficient evidence to support the Deputy Commissioner Denson's Finding of Fact No. 27. The Deputy Commissioner found that:

> "Defendants through Tomblin represented to the plaintiff that there was a controversy on the causal connection of

his amputation and his work-related injury. That representation was false as clearly indicated by medical reports sent defendants by Dr. Lampley. Tomblin made that representation either knowing it to be false or making it recklessly without due inquiry into its validity. Tomblin intended that the plaintiff rely on the representation and plaintiff did, in fact, rely on it to his detriment."

Upon review of an order of the Industrial Commission, this Court does not weigh the evidence, but determines only whether there is evidence in the record to support the finding made by the Commissioner. If there is any evidence of substance which directly or by reasonable inference tends to support the findings, the court is bound by such finding, even though there is evidence that would have supported the finding to the contrary. *Russell v. Pharr Yarns, Inc.*, 18 N.C. App. 249, 196 S.E. 2d 571 (1973).

Defendants contend, first, that the plaintiff presented insufficient evidence to support the finding that the representation that there was a serious question as to causation of plaintiff's injuries was false. We cannot agree. On 27 December 1973, Dr. Lampley conducted his initial examination of plaintiff. The plaintiff's toes had a dusky, bluish discoloration, and his foot was red and swollen. Dr. Lampley diagnosed plaintiff's injuries as frostbite. By 8 January, the plaintiff's toe had become gangrenous, and Dr. Lampley demarcated a part of the right great toe. Prior to 12 April 1973, defendants entered into an agreement for compensation in which the parties stipulated:

"2. That said employee sustained an injury by accident arising out of and in the course of said employment on the following date: (Date of Accident) December 13, 1972.

3. That the accident resulted in the following injuries: (Description of Injury) Injured right foot."

Dr. Lampley testified that the ultimate condition of plaintiff's leg was a progressive change dating back to the injury. Mr. Tomblin testified that a medical report in plaintiff's file, dated 23 March 1973, indicated that plaintiff was suffering from frostbite. On 19 October 1973, the parties filed a Supplemental Memorandum of Agreement with the Industrial Commission which compensated plaintiff for 50% partial permanent disability of his right great

toe, which had been amputated on 8 January 1973 due to frostbite and gangrene. This evidence tends to show that, at the time Tomblin represented to plaintiff that there was a serious question as to causation, the defendants had already stipulated that the injury to plaintiff's right foot, diagnosed as frostbite and gangrene, arose out of and in the course of plaintiff's employment at Oakdale Cemetery. There was, therefore, sufficient evidence to support the finding of fact by Deputy Commissioner Denson that Tomblin's statement to plaintiff was false.

Defendants, however, contend that Tomblin was not aware that the other toes had been amputated and that he believed that there was a serious dispute as to the causation of plaintiff's injuries.

The evidence for the plaintiff tends to show that Tomblin knew of the involvement of frostbite from the medical records in plaintiff's file and that he knew, or was reckless in failing to know, of the stipulation as to causation in the Settlement Agreement entered by the parties in 1973. Dr. Lampley's report, dated 4 February 1974, and received by defendant Bituminous Casualty Corporation on 7 February 1974, indicated that, due to gangrene, the plaintiff's second, third and fourth toes were scheduled for amputation. The evidence is sufficient to support Deputy Commissioner Denson's finding that Tomblin represented to plaintiff that there was a serious question as to causation knowing that it was false or in reckless disregard of its veracity.

We have carefully examined and considered defendants' other assignments of error and find them to be without merit.

Affirmed.

Chief Judge MORRIS and Judge ERWIN concur.

GLADYS SOLES THOMPSON, MILDRED SOLES PARKER, MARY LUCILLE SOLES COOK AND BERTHA PAULINE SOLES v. RICHARD VERNON SOLES

No. 7813SC836

(Filed 31 July 1979)

1. **Estoppel §§ 4.7, 6— recital in deed—equitable estoppel—sufficiency of complaint and evidence**

In an action by plaintiffs seeking an adjudication that they were owners in fee of three tracts of land, plaintiffs' complaint was sufficient to set forth a claim for relief based on equitable estoppel and plaintiffs presented sufficient evidence of equitable estoppel to reach the jury where plaintiffs alleged and offered evidence tending to show that the parties' father devised all of his real property (consisting of the three tracts of land in question) to his wife for life and then to his children; plaintiffs' mother conveyed to defendant, their brother, a fourth tract of land; the deed to defendant contained a recital that the conveyance was accepted as an advancement of defendant's entire interest in the real property of his parents; defendant accepted the deed and had it recorded; and defendant refused to execute a quitclaim deed to the three tracts of land in favor of plaintiffs.

2. **Estoppel § 7— parol evidence—admissibility**

Parol evidence is ordinarily admissible to establish an estoppel unless it contravenes the evidentiary rules of competency and relevancy.

Judge VAUGHN dissents.

APPEAL by plaintiffs from *Herring, Judge.* Judgment dismissing plaintiffs' claim pursuant to Rule 50 entered 11 April 1978 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 29 May 1979.

On 6 June 1975, plaintiffs brought this action against the defendant, their brother, seeking either an adjudication that the plaintiffs are owners in fee of three tracts of land, which were devised to the parties by their father S. C. Soles, or to have defendant's interest in the three tracts of land held in constructive trust for plaintiffs. The complaint alleged, *inter alia*, that prior to his death, their father, S. C. Soles, owned four tracts of land. In 1928, S. C. Soles sold the fourth tract of land and secured the balance due by a purchase money mortgage. In 1929 S. C. Soles died testate, and his will devised all of his real property (consisting of three tracts of land) to his wife, Nettie Soles, for life, and the remainder to his children. Plaintiffs and defendant were

S. C. Soles' only children at the time of his death. After the death of S. C. Soles the purchase money mortgage was foreclosed and the fourth tract of land was sold at public auction. Some years thereafter Nettie Soles became the owner of the fourth tract of land.

In 1946, Nettie Soles conveyed the fourth tract of land to defendant, reserving a life estate. The deed was executed on 20 December 1946 and was duly recorded. The deed contained a recital that the conveyance was accepted as defendant's entire interest in the estates of S. C. Soles and Nettie Soles, now deceased. Defendant took immediate possession of the fourth tract of land. Defendant has refused to execute a quitclaim deed to the three tracts of land in favor of plaintiffs.

Defendant generally denied plaintiffs' contentions and raised as a defense the Statute of Frauds, the Statute of Limitations and laches.

At trial, plaintiffs attempted to testify as to various matters, but most of their testimony was excluded. At the close of plaintiffs' evidence, the court directed a verdict dismissing their claim for relief in favor of defendant.

Lee and Lee by J. B. Lee for plaintiff appellants.

Sankey W. Robinson for defendant appellee.

CLARK, Judge.

[1] Plaintiffs first assign as error the granting of a directed verdict pursuant to G.S. 1A-1, Rule 50, in favor of defendant. The trial court indicated that the basis of its ruling was that plaintiffs presented insufficient evidence to establish that a trust had been created in their favor. Plaintiffs, however, contend that the complaint set forth a claim for relief based on equitable estoppel; that plaintiffs presented sufficient evidence of equitable estoppel to reach the jury; and, therefore, the directed verdict was improperly granted.

It is contended by defendant that the estoppel is not pleaded in the complaint. This contention is without merit. Construing the complaint liberally with a view to substantial justice between the parties, the facts which are necessary to constitute the estoppel

are alleged in the complaint. The plaintiffs alleged in their complaint the recital in the deed to defendant and prayed for equitable and legal title in the three tracts of land. Everything does appear in the complaint which is necessary to plead an estoppel except simply naming it as an estoppel in terms. *See Faircloth v. Ohio Farmers Insurance Co.*, 253 N.C. 522, 117 S.E. 2d 404 (1960); *Allston v. Connell*, 140 N.C. 485, 53 S.E. 292 (1906).

Plaintiffs contend that the deed of the fourth tract of land to defendant contained a recital which estops defendant from asserting an interest in the three tracts of land. The deed provided in pertinent part that:

> "It is understood and agreed that this conveyance is accepted as an advancement to Richard V. Soles of his entire interest in the real property of the estate of the grantor [Nettie Soles] and of his father, S. C. Soles, deceased."

"Where, however, a fact recited in a deed is of the essence of the contract and the intention of the parties to place such fact beyond question or to make it the basis of the contract is clear, the recital is effectual and operates as an estoppel against both parties and their privies . . . ." 6 Thompson on Real Property, § 3110, 843 (Repl. 1962). *Fort v. Allen*, 110 N.C. 183, 14 S.E. 685 (1892). It is true that all recitals are not binding. Recitals in a deed are binding, however, "when they are of the essence of the contract, that is, where unless the facts recited exist, the contract, it is presumed, would not have been made." *Brinegar v. Chaffin*, 14 N.C. 108, 109 (1831). The rule is based upon the premise that it would offend every principle of equity and good morals to permit a party to enjoy the benefits of a contract or deed and at the same time deny its terms or qualifications. *Fort v. Allen, supra; see Shuford v. Asheville Oil Co.*, 243 N.C. 636, 91 S.E. 2d 903 (1956); *Pure Oil Co. v. Baars*, 224 N.C. 612, 31 S.E. 2d 854 (1944); *Joint Stock Land Bank v. Moss*, 215 N.C. 445, 2 S.E. 2d 378 (1939); *Perry v. Southern Surety Co.*, 190 N.C. 284, 129 S.E. 721 (1925). This rule is technically a form of equitable estoppel. It is not based upon the formalities of a deed, but rather, it is based upon the principle that one cannot accept the benefits of a transaction and deny the accompanying burdens. Therefore, it is similar to the theory of estoppel by acceptance of benefits under a contract or instrument. *See* 28 Am. Jur. 2d Estoppel and

Waiver § 59 (1966). It is also similar to the equitable doctrine of election which provides that a person designated as a beneficiary under a will cannot take under the instrument and at the same time assert a title or claim in conflict with the same writing. *See Rouse v. Rouse*, 238 N.C. 568, 78 S.E. 2d 451 (1953). An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own which is to be disposed of in favor of a third party by the same paper. *Wells v. Dickens*, 274 N.C. 203, 162 S.E. 2d 552 (1968). 13 Strong's N.C. Index *Wills* § 64 (1978).

In *Allen v. Allen*, 213 N.C. 264, 195 S.E. 801 (1938), Mrs. Allen, deceased, had conveyed a tract of land to two of her children, with the intention that this land would constitute their full share in the lands of both her and her husband. After the death of both parents, one of the grantees and grandchildren of the other grantee sought to invalidate certain deeds delivered by T. W. Allen to other children, and sought to be declared the owners of the land. The North Carolina Supreme Court denied the relief on the grounds that the grantees had accepted the deed to the tracts of land

> ". . . as representing their full share of the lands belonging to their mother and father, and . . . they accepted the deed with full knowledge that it was so tendered and after first debating whether to accept it or not. They have received the full benefits of the deed. It would be contrary to all the principles of equity to permit them now to disavow the conditions upon which the deed was given to them and to successfully assert a further interest in the real estate of their parents.
>
> . . . .
>
> . . . The plaintiffs elected to accept the advancement to them of the lands belonging to their mother in full of all claim they should have against the estates of both of their parents. They had their election and have made it. . . ." 213 N.C. at 271, 195 S.E. at 805-806.

Whichever theory of estoppel that plaintiffs rely upon, either estoppel by recital in a deed, estoppel by acceptance of benefits or the equitable doctrine of election, the applicable principle is

the same: that "it would offend every principle of equity and good morals to permit [a party to a transaction] to enjoy its benefits and at the same time deny its terms and qualifications." *Fort v. Allen*, 110 N.C. at 192, 14 S.E. at 686.

The test, on a motion for a directed verdict, is whether the evidence, considered in the light most favorable to the party against whom it is made, is sufficient for submission to the jury. *Sink v. Sink*, 11 N.C. App. 549, 181 S.E. 2d 721 (1971). Upon a motion for directed verdict, all evidence which supports the plaintiffs' claim must be taken as true, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom and with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. *Ingold v. Carolina Power and Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971).

In the case *sub judice*, the evidence tended to show that the deed to defendant from Nettie Soles contained a recital that it was understood and agreed that the deed was given as defendant's full share in the estates of Nettie Soles and her husband, S.C. Soles. The deed was accepted by defendant and was recorded on 6 January 1947. Although defendant did not sign the deed, the recordation of the deed indicates that defendant accepted the deed, and is therefore bound by the recital. *Webb v. British American Oil Producing Co.*, 281 S.W. 2d 726 (Tex. Civ. App. 1955). This is sufficient evidence to reach the jury on the issue of equitable estoppel, and therefore the court erred in entering a directed verdict in favor of defendant.

[2] The trial court excluded most of the evidence offered by plaintiffs, including testimony of a plaintiff that defendant stated to his mother that the deed to him for the fourth tract was his part of the S. C. Soles estate, that defendant did not claim ownership in the three tracts which constituted the S. C. Soles estate until two years after the death of their mother and paid to plaintiffs the same rental which he had paid to his mother, and that Nettie Soles in her will devised all of her property to plaintiffs for the stated reason that defendant had been provided for previously. Apparently the exclusion of this evidence was based on the conclusion that it was not admissible to show the creation of a trust. There must be a retrial for determination of the estoppel issue, but we do not deem it necesssary to discuss each eviden-

tiary question raised by plaintiffs' assignments of error. We do note that parol evidence is ordinarily admissible to establish an estoppel unless it contravenes the evidentiary rules of competency and relevancy. 31 C.J.S. Estoppel § 161 (1964). Thus it appears that much of the evidence offered by plaintiffs of the acts, conduct, and admissions of the defendant relative to the use, possession and control of both the three tracts in the S. C. Soles estate and the tract deeded to him by his mother Nettie Soles would meet the test of relevancy on the estoppel issue upon retrial.

The judgment is reversed and we order a

New trial.

Judge CARLTON concurs.

Judge VAUGHN dissents

CHARLES A. JONES v. MARY WINIFRED JONES

No. 7818DC876

(Filed 31 July 1979)

1. **Divorce and Alimony § 16.5; Husband and Wife § 11— consent judgment—order to pay alimony—modification**

When the trial court in a consent judgment adopts the agreement of the parties as its own determination of the rights of the parties and orders the husband to pay alimony, the consent judgment is a decree of the court and is modifiable and enforceable by contempt.

2. **Divorce and Alimony § 19.5— consent judgment—support and division of property—separability—modification of support provision**

Even though denominated as "alimony," periodic support payments may not be alimony within the meaning of G.S. 50-16.9(a) and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other.

3. **Divorce and Alimony § 19.5— consent judgment—support and division of property—reciprocal consideration—support provision not modifiable**

Provisions in a consent judgment for support payments to defendant and for transfer of realty to plaintiff constituted reciprocal consideration, and the support provision was thus not subject to modification by the court where: the court did not find that defendant was a dependent spouse or that grounds for

alimony existed; the $250.00 monthly payments were limited to 32 months and were contingent upon defendant's conveyance of the marital residence and upon her quitting of the premises; defendant agreed to convey her interest in a mountain lot without any consideration for such transfer being specified; and the consent judgment provided that no claim for alimony would be asserted by defendant in any divorce action.

APPEAL by defendant from *Cecil, Judge.* Order entered 13 July 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 31 May 1979.

On 1 June 1976, plaintiff-husband filed a complaint against defendant-wife for a judgment of divorce from bed and board and custody of their minor daughter. The complaint alleged, *inter alia,* that defendant has committed adultery with at least five men and that defendant has physically assaulted plaintiff; that during the last three years defendant has carried on an illicit relationship with Robert R. Johnson and the conduct was without justification or excuse; that defendant is a registered nurse and earns $8,500 per year, and is not a dependent spouse, and that defendant's sexual attitudes are detrimental to their minor daughter. Plaintiff sought custody of the child and possession of the marital home place.

On 28 June 1976, defendant was granted an extension of time to file an answer. In July 1976, the parties settled the controversy by stipulating that the District Court enter a judgment and make findings of fact without requiring the presentation of evidence. In the judgment, entered 11 August 1976, the court found that the parties owned a residence as tenants by the entireties valued at $66,000, and the parties owed $24,000 on the mortgage for said property. The court ordered plaintiff to pay defendant $250 per month for 32 months as support and alimony, provided that such payments be terminated upon remarriage or death of the defendant, and further provided that the payments were not to commence until the defendant had moved from the residence and conveyed her interest in the residence to plaintiff. In paragraph (8), the court ordered the plaintiff to pay $21,000 for defendant's interest in the marital residence. In paragraph 14, the court ordered defendant to convey her interest in and to a lot located on Beech Mountain. In paragraph 18 the court provided that:

"At the end of one year following the date of this judgment, either party shall be entitled to institute an action for absolute divorce upon the ground of one year's separation. In such event neither party shall contest the action of the party instituting such action, and no claim for alimony, separate maintenance, or the like shall be asserted by the defendant in any such action. Alimony payments shall not be barred by a procurement of absolute divorce by either of the parties hereto, these shall continue for 32 months as above specified, or until such time as the wife's remarriage or until her death, whichever event occurs first."

On 14 March 1978, defendant filed a motion in the cause pursuant to G.S. § 50-16 to modify the alimony provisions in the Judgment and Order to allow alimony in the amount of $800 per month due to a material change of circumstances. Plaintiff moved to dismiss the motion in the cause on the grounds that the consent order could not be modified pursuant to G.S. 50-16.9, and as a second defense plaintiff alleged that defendant was barred by reason of her conduct from recovering any alimony, and incorporated the allegations in his original complaint. On 29 March 1978, defendant moved to strike plaintiff's second defense on the grounds that *res judicata* barred a relitigation of the issue of defendant's adultery.

In April 1978, the court entered an order finding that the Consent Judgment contained no findings of fact upon which an award of alimony could be based and that it provided for the payment of $250 per month for a period of 32 months only. The court concluded as a matter of law that the Consent Judgment was a complete settlement of all rights of the parties, that the provisions in the Consent Judgment for payment of $250 a month for 32 months was not *per se* alimony, in that it was contingent upon the conveyance of real property, the payments were limited in time, the defendant would not lose the payments if she filed for divorce and that a study of the entire agreement shows that the provision for the $250 per month payments was a provision for the payment of $8,000 in installments.

The court then dismissed the defendant's motion for modification of the Consent Judgment.

Graham, Cooke & Tisdale by E. Norman Graham for plaintiff appellee.

Robert S. Hodgman for defendant appellant.

CLARK, Judge.

Defendant first contends that the trial court erred in concluding as a matter of law that the Consent Judgment was a complete settlement of all rights between the parties and that the provision for payment of $250 per month for 32 months was an inseparable part of the entire agreement and therefore could not be modified.

[1] As a general rule, a consent judgment cannot be modified or set aside except by agreement of the parties, *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956), since the consent judgment is merely a contract between the parties which has been approved by the court. *Davis v. Davis*, 213 N.C. 537, 196 S.E. 819 (1938). However, where a court adopts the agreement of the parties as its own determination of the rights of the parties and orders the husband to pay alimony, the consent judgment is a decree of the court and is modifiable and enforceable by contempt. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). G.S. 50-16.9(a) provides that:

> "An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. . . ."

For a court to have power to modify a consent judgment, the judgment must be an order of the court, and the order must be one to pay alimony. The first requirement is clearly met in this case since the court made findings of fact, conclusions of law and "ordered, adjudged and decreed" *inter alia*, that plaintiff pay $250 per month for 32 months as alimony to defendant.

[2] We must therefore determine whether the periodic support payments were alimony within the meaning of G.S. 50-16.9(a) and therefore were subject to modification. Even though denominated as "alimony," periodic support payments to a dependent spouse

may not be alimony within the meaning of the statute if the provisions for the property divisions between the parties constitute reciprocal consideration for each other. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979).

"[A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case (citations omitted). However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties." *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964). Plaintiff contends that the provisions for support payments to plaintiff and the provisions for transfer of real property to plaintiff are, as a matter of law, reciprocal agreements, and are inseparable; and, therefore, the consent judgment is not subject to modification. The question presented then, is whether the provisions for support and the provisions for property settlement are separable.

[3] In the case *sub judice*, we note at the outset that the court made no findings of fact upon which alimony could be based. The court did not find that defendant was a dependent spouse nor were there any findings of fact as to any grounds for alimony. See, G.S. 50-16.1(3) and G.S. 50-16.2. Second, the consent judgment provided that the payment of the $250 monthly payments was contingent upon the defendant's conveyance of the marital residence to plaintiff and contingent upon her quitting the premises. Third, the payments were limited to 32 months. Fourth, defendant agreed to convey her interest in a lot at Beech Mountain, North Carolina, without any consideration for that transfer specified.

Paragraph 17 of the Consent Judgment provided that:

> "Except as provided in this judgment, each party hereby waives and relinquishes any and all claims against the person or property of the other party and agrees well and truly to abide by this agreement."

Paragraph 18 provided, in pertinent part, that in the event of divorce "no claim for alimony, separate maintenance or the like shall be asserted by the defendant in any such action."

In addition, in determining the intent of the parties to a contract or consent judgment, it is appropriate to consider their respective circumstances at the time they consented to the judgment. Although there was no hearing in the District Court, we note that the plaintiff alleged in his complaint that defendant had committed adultery. The defendant did not answer the complaint and then agreed to the Consent Judgment.

We hold that the provision for periodic support payments was an inseparable part of the Consent Judgment and therefore the periodic payments were not subject to modification. The district court properly dismissed the defendant's motion for a modification of the Consent Judgment.

Affirmed.

Judges VAUGHN and CARLTON concur.

HANOVER COMPANY v. JOHN M. TWISDALE, TWISDALE MFG. CO., INC., M. C. BROWN, TRUSTEE, AND NORTH CAROLINA NATIONAL BANK

No. 7813SC970

(Filed 31 July 1979)

1. Evidence § 11— conversations with person who subsequently died—admissibility

In an action to recover for labor and materials for work done on property owned by the individual defendant, testimony concerning conversations with an agent of defendants who died before trial was not admitted in violation of G.S. 8-51, since the testimony was not against the representative of the deceased person, and since G.S. 8-51 does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent.

2. Principal and Agent § 4.2— conversations with agent—proof of agency

The trial court did not err in admitting testimony of witnesses about conversations with an alleged agent of defendants where such agency was admitted by the individual defendant, and the agent's apparent authority was indicated by the testimony of several witnesses.

3. Contracts § 26.1— evidence outside contract—modifications—admissibility

There was no merit to defendants' contention that the trial court erred in allowing plaintiff to present evidence *aliunde* the written contract, since the challenged testimony dealt with alleged modifications or additions made subsequent to the execution of the written contract.

4. Appeal and Error § 53— error relating to one issue—cure by verdict

Where the rights of the parties are determined by the jury's answer to one of the issues, error relating to another issue cannot be prejudicial.

APPEAL by defendants John M. Twisdale and Twisdale Mfg. Co., Inc. from *Herring, Judge.* Judgment entered 3 March 1978 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 27 June 1979.

Plaintiff instituted this civil action alleging that defendants John M. Twisdale and Twisdale Mfg. Co., Inc. (the only defendants involved in this appeal) contracted with plaintiff for plaintiff to provide labor and materials for work done on property owned by defendant John M. Twisdale. Defendants filed answer denying the material allegations of the complaint. They also counterclaimed for damages on the ground that plaintiff failed to perform work required under the contract.

At trial, evidence for plaintiff tended to show that it entered into a contract to perform certain clearing and filling jobs on heavily wooded property belonging to the individual defendant. The transactions leading to the contract were conducted between employees of plaintiff and Mr. U. J. LeBlanc, an agent of defendants. Defendants objected to testimony from plaintiff's witnesses about negotiations with LeBlanc on grounds of the dead man statute and the parol evidence rule. The objections were overruled. Plaintiff's evidence tended to show that LeBlanc had approved all of the work done and that the invoices submitted to Twisdale Mfg. Co. amounted to $43,562.20. Defendants had paid only $27,445.90 of this amount, leaving a difference of $16,116.30 still owing.

Defendants offered the expert testimony of a civil engineer tending to show that the amount of fill claimed by plaintiff to have been put on defendants' property was less than that provided in the contract. The individual defendant gave testimony indicating that the delay of the plaintiff in working on the project caused additional expenses not attributable to defendants. The witness gave other testimony indicating that plaintiff had not

complied with the terms of the contract in other particulars. A land surveyor also testified for defendants that the amount of fill used by the plaintiff was less than called for in the contract.

On rebuttal, plaintiff presented the expert testimony of a civil engineer who tended to substantiate plaintiff's claims as to the amount of fill and excavation work done on the property in question.

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

1. Did the Plaintiff, Hanover Company, enter into additional oral contracts for furnishing additional labor, materials and equipment with the defendants? Yes

2. If so, did the Plaintiff, Hanover Company, perform its obligations according to the contracts? Yes

3. Did the defendants breach their contracts with the Plaintiff as alleged? Yes

4. Did the Plaintiff breach its contracts with the Defendants as alleged? No

5. What sum, if any, is the Plaintiff, Hanover Company, entitled to recover from the Defendants for breach of contracts for the furnishing of labor, equipment and materials? $14,000

6. What sum, if any, are the Defendants entitled to recover from the Plaintiff for breach of the contracts? Nothing

From entry of judgment in accordance with the jury verdict, defendants appealed.

Murchison, Fox & Newton, by Frank B. Gibson, Jr. and William R. Shell, for defendants appellant.

Stevens, McGhee, Morgan & Lennon, by Karl W. McGhee and Henry V. Ward, Jr., for plaintiff appellee.

MORRIS, Chief Judge.

[1] Defendants first contend that the trial court erred in allowing witnesses for the plaintiff to testify about conversations with

U. J. LeBlanc, an agent of defendants. The witnesses testified that negotiations leading to the contract were conducted between them and LeBlanc and that LeBlanc was present on the job site as defendants' agent. The witnesses testified generally that LeBlanc directed the project and authorized frequent changes from the written contract. For example, the superintendent for plaintiff testified: "Additional equipment other than that which was contemplated was used on this project. Mr. LeBlanc authorized this equipment. It was necessary for extra work that had to be done over and above the contract." Defendants contend that this and similar testimony violates G.S. 8-51 since LeBlanc was dead at the time of the trial. We disagree.

The challenged testimony was not admitted in violation of G.S. 8-51. That statute prohibits testimony from witnesses in certain circumstances "against the executor, administrator or survivor of a deceased person. . . ." A witness is not regarded as testifying "against" the representative unless such representative is a party to the litigation. 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 71, p. 217. Here, the challenged testimony was obviously not against the representative of the deceased person. Moreover, our Supreme Court has held that G.S. 8-51 does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent. *Bailey v. Westmoreland,* 251 N.C. 843, 112 S.E. 2d 517 (1960).

[2] Defendants also contend that the testimony of the witnesses about conversations with LeBlanc should have been excluded on the basis of this statement of our Supreme Court in *Commercial Solvents v. Johnson,* 235 N.C. 237, 241, 69 S.E. 2d 716, 719 (1952):

> "While proof of agency, as well as its nature and extent, may be made by the direct testimony of the alleged agent . . . nevertheless it is well established that, as against the principal, evidence of declarations or statements of an alleged agent made out of Court is not admissible to prove the fact of agency or its nature and extent. . . ."

However, the stated rule is subject to several exceptions, one of which is clearly applicable to the facts disclosed by this record:

> And in applying this rule, ordinarily the extrajudicial statement or declaration of the alleged agent may not be

given in evidence, unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent or, (3) as to persons dealing with the agent, within the apparent authority of the agent. *Commercial Solvents v. Johnson, supra*, 235 N.C. 237 at 241, 69 S.E. 2d 716 at 719.

Here, in his pleadings and testimony, the individual defendant admitted LeBlanc's agency. Moreover, LeBlanc's apparent authority was indicated by the testimony of several witnesses.

[3] Defendants next contend that the trial court committed error in allowing plaintiff to present evidence *aliunde* the written contract. The defendants cite the general rule in North Carolina prohibiting parol or extrinsic evidence to contradict the terms of a written contract which has been introduced into evidence. Defendants cite various parts of the testimony in support of their contention that the trial judge allowed testimony on contravention of the parol evidence rule. Suffice it to say that we have reviewed the testimony carefully and conclude that the challenged testimony dealt with alleged modifications or additions made subsequent to the execution of the written contract. "That the [parol evidence] rule has no application to subsequent agreements of any character, whether oral or written, is settled in a long line of cases." 2 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 258, p. 256 and cases cited therein.

[4] Defendants next maintain that the trial court committed error in excluding testimony of the individual defendant regarding the storage of steel at another site since the testimony was relevant as to the measure of damages suffered by the defendants as a result of the fact that the plaintiff allegedly failed to complete the contract as specified on time. Since the jury answered the fourth issue finding that plaintiff did not breach its contract with defendant, the assigned error would not be prejudicial to defendants. Where the rights of the parties are determined by the jury's answer to one of the issues, error relating to another issue cannot be prejudicial. *Superior Foods, Inc. v. Harris-Teeter*, 24 N.C. App. 447, 210 S.E. 2d 900 (1975). Moreover, the record does not show what the answer would have been. "Where the record shows exceptions to unanswered questions, without more, the ex-

ceptions will not be considered on appeal. We cannot assume that the answers would have been favorable to the [appellant]." *In re Will of Wilder,* 205 N.C. 431-432, 171 S.E. 611 (1933).

We have examined the defendants' remaining assignments of error and hold that they, too, are without merit.

In the trial below, we find

No error.

Judges CLARK and ERWIN concur.

FRANCIS R. QUIS v. HOWARD GRIFFIN AND WIFE, WILMA J. GRIFFIN

No. 7823DC973

(Filed 31 July 1979)

1. **Rules of Civil Procedure § 55.1— refusal to allow belated answer and counterclaim after default entry**

The trial court did not abuse its discretion in refusing to permit defendants to file an answer and counterclaim after an entry of default had been entered where defendants did not show any cause for setting aside the entry of default. G.S. 1A-1, Rule 55(d).

2. **Trespass § 6— action for trespass—competency of deed**

In a hearing to determine damages for trespass to plaintiff's property, the trial court did not err in admitting plaintiff's deed to the property in question.

3. **Jury § 1.3— waiver of jury trial—failure to assert right**

Defendants waived a jury trial where their only request for a jury trial was contained in an answer and counterclaim which the court refused to permit them to file belatedly, and defendants did not call the court's attention to their demand for a jury trial.

4. **Trespass § 6— action for trespass—missing and damaged property**

In an action to recover damages for trespass to plaintiff's property, plaintiff was properly allowed to testify as to items missing from the property and damages to the items.

APPEAL by defendants from *Davis, Judge.* Judgment entered 22 June 1978 in District Court, WILKES County. Heard in the Court of Appeals 27 June 1979.

Plaintiff filed his complaint on 21 February 1978 (along with interrogatories attached thereto), alleging that he had suffered damages due to the acts of defendants in trespassing upon and cutting timber from his property. On 30 March 1978, an affidavit was filed showing that defendants had failed to file an answer to plaintiff's complaint in the time provided by law. On the basis of this affidavit, the Clerk of Superior Court made an entry of default. On the same day, a motion for default judgment was filed by plaintiff pursuant to Rule 55 of the Rules of Civil Procedure.

On 10 April 1978, defendants filed a motion requesting an extension of time until 15 May 1978 to file an answer. At the 8 June 1978 civil non-jury session of the District Court, a hearing was held. At the beginning of this proceeding, attorney for plaintiff stated that this case was before the court on the question of damages since an entry of default had been entered. Counsel for defendants objected, requesting that their motion for delay in allowing them to file an answer and counterclaim be granted. The court overruled defendants' motion.

Plaintiff testified to facts tending to support the allegations in his complaint. A deed, made to plaintiff on 29 November 1968 showing ownership of the land in question, was introduced into evidence. The court entered judgment in favor of plaintiff as to the ownership of the land but granted only nominal damages of $25.00. Defendants appealed.

Max F. Ferree, by William C. Gray, Jr. and George G. Cunningham, for plaintiff appellee.

Franklin Smith, for defendant appellants.

ERWIN, Judge.

Defendants made twelve assignments of error in their record on appeal and present them in four arguments in their brief. We find no error in the trial and affirm the judgment entered by the trial jduge.

[1] Question No. I. Did the trial court commit error in conducting the trial without allowing defendants to file answer and counterclaim after the time within which the defendant may answer or otherwise plead had expired and entry of default had been entered by the clerk? We answer, "No."

At the outset, we note that defendants did not move to set aside the entry of default or file any pleading relating thereto. We also note that defendants were served with summons on 27 February 1978, and that 42 days later, attorney for defendants filed a motion seeking an extension of time until 15 May 1978 in which to file answer or otherwise plead and to answer interrogatories which had been filed by plaintiff. We note that defendant did not file answer by 15 May 1978.

The record shows the following:

"MR. SMITH: Your Honor, we'd like to OBJECT for the record and move for the record that the Court in its discretion allow the defendant time in which to file his answer and counterclaim in this cause and that is done, the motion is made, Your Honor, without—for the purpose of asserting the meritorious defense in this case. It's not made for purpose of delaying the matter and we ask the Court and address it to the Court's discretion that the Court allow the defendant to file his answer and counterclaim. As we see it, that would not delay the proceedings, Your Honor.

COURT: Motion is OVERRULED. Go ahead.

EXCEPTION NO. 1"

When an entry of default has been made by the Clerk of Superior Court, a motion to set aside and vacate the entry is governed pursuant to Rule 55(d) of the Rules of Civil Procedure which provides: "*Setting aside default.*—For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)."

We hold that the trial judge did not abuse his discretion on the record before us. Defendants did not show any cause for setting the judgment aside. *Hubbard v. Lumley*, 17 N.C. App. 649, 195 S.E. 2d 330 (1973), and *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970).

[2] Question No. II. Did the trial court commit error in admitting plaintiff's deed to the property in question into evidence at the trial? We find no error.

In *Jones v. Cohen*, 82 N.C. 75, 80-81 (1880), our Supreme Court held, with Chief Justice Smith speaking for the Court: "In ejectment, any deed produced as a link in the chain of title may be attacked and invalidated by showing incapacity in the maker; and this, without any record specification of the nature of the obligation."

In *McDaris v. "T" Corporation*, 265 N.C. 298, 300, 144 S.E. 2d 59, 61 (1965), our Supreme Court held:

> "A deed offered as color of title is such only for the land designated and described in it. *Norman v. Williams*, 241 N.C. 732, 86 S.E. 2d 593; *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E. 2d 673; *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677. 'A deed cannot be color of title to land in general, but must attach to some particular tract.' *Barker v. Railway*, 125 N.C. 596, 34 S.E. 701. To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. *Carrow v. Davis*, 248 N.C. 740, 105 S.E. 2d 60; *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759. 'Parol evidence is admissible to fit the description to the land. G.S. 8-39. "Such evidence cannot, however, be used to enlarge the scope of the descriptive words."' *Baldwin v. Hinton*, 243 N.C. 113, 90 S.E. 2d 316. The purpose of parol evidence is to fit the description to the property, not to create a description. *Thompson v. Umberger*, 221 N.C. 178, 19 S.E. 2d 484. Plaintiffs are required to locate the land by fitting the description to the earth's surface. *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786."

Defendants had an opportunity to attack the deed in question on cross-examination. The court found, as a fact, that plaintiff purchased the property as described in the deed in question; and after purchase, she went into possession of the property and the house thereon, said house being located on the land in issue in this action; and that the property was surveyed with the property line marked. We hold that the evidence presented by plaintiff was competent and supports the finding of fact by the trial judge. Where jury trial is waived, as here, findings of fact supported by competent evidence are conclusive on appeal. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974), and *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). This assignment of error is without merit.

[3] Question No. III. Was it error for the trial court to refuse to impanel a jury as requested in defendants' purported answer and counterclaim? We find no merit in this assignment of error. The record does not reveal that attorney for defendants called the court's attention to their demand for jury trial. Plaintiff did not request a jury trial.

To us, a jury trial was waived by the parties. Defendants had the duty to state to the court, "We demand a jury trial." The trial court would have ruled on defendants' request. The burden is on defendants to show that they requested a jury trial as provided for by the rules, and that the trial court failed to follow the rules. The record does not bear out the contentions of defendants. The assignment of error is overruled.

[4] Question No. IV. Was it error for the court to allow plaintiff to testify as to the items missing from the property and to the damages of the items? This question is purported to be based upon Exceptions Nos. 2, 3, 4, 5, 10, and 11. Our study of the record does not show these exceptions relate to the question posed by defendants. Suffice it to say that a witness may testify to information of which he or she may have personal knowledge. We find no error in this last assignment of error.

Judgment affirmed.

Chief Judge MORRIS and Judge CLARK concur.

JOHN HEIDLER v. BONNIE HEIDLER

No. 7821DC1038

(Filed 31 July 1979)

Rules of Civil Procedure §§ 38, 39— jury trial demanded—failure to appear not withdrawal of demand

Taken together, G.S. 1A-1, Rules 38(d) and 39(a), provide that once any party to an action makes a timely demand for a jury trial, the trial of all issues so demanded shall be by jury unless all parties who have pleaded or otherwise appeared in the action, or their attorneys of record, affirmatively consent by oral or written stipulation to trial by the court without a jury or the court finds that no jury trial right exists as to some or all of the issues, and these

rules do not provide that failure to appear at the trial constitutes consent to a withdrawal of a valid jury trial demand.

APPEAL by plaintiff from *Harrill, Judge.* Judgment dated 11 August 1978 entered in District Court, FORSYTH County. Heard in the Court of Appeals 25 June 1979.

This is an appeal from judgment awarding defendant-wife alimony and a judgment for money loaned upon her counterclaim against the plaintiff-husband in his action for absolute divorce. Plaintiff instituted the action on 14 March 1977 by filing a verified complaint seeking absolute divorce alleging that plaintiff was a resident of Forsyth County, North Carolina and the defendant was a resident of Frankfort, Illinois; that plaintiff had been a resident of North Carolina for more than six months; that plaintiff and defendant were married 12 March 1970, and thereafter lived together as man and wife until they separated on 31 August 1974; that since 31 August 1974 they had lived separate and apart; and that no children were born of the marriage.

By answer filed 12 May 1977, defendant admitted plaintiff's allegations except that she denied that the separation occurred by mutual agreement, alleging that she had been forced to separate herself from the parties' home by the conduct of the plaintiff. Defendant counterclaimed for alimony on the grounds of indignities to her person committed by plaintiff rendering her condition intolerable and life burdensome, constructive abandonment, and adultery. Defendant alleged that she was the dependent spouse and that the plaintiff was the supporting spouse. In a Second Counterclaim defendant alleged she had made loans to plaintiff totalling approximately $50,000 which he had failed to repay. She prayed that plaintiff be required to repay this money. At the end of her answer defendant stated "Defendant demands Trial by Jury." On 13 June 1977 plaintiff filed a verified reply denying the allegations of defendant's counterclaims.

On 19 February 1978 plaintiff's attorney in the action filed a Motion to Continue and Motion to Withdraw requesting that he be allowed to withdraw as attorney of record for the plaintiff and that plaintiff be given a continuance "until such time as he can retain counsel to defend this matter on his behalf." The plaintiff's attorney based the motions on the following allegations:

1. He is attorney of record in the above-entitled action in that he has filed on behalf of the plaintiff a Complaint for an absolute divorce based on one year's separation, a Reply to Motion for Alimony Pendente Lite and Counsel Fees and a Reply to Answer and Counterclaim.

2. On November 20, 1977, this attorney was informed by the plaintiff that he was in Paris, France, and had been there for three months at that time. No indication was given as to when the plaintiff would return to the United States.

3. The letter from plaintiff informing the petitioner of plaintiff's whereabouts was in response to a letter written November 1, 1977, wherein the attorney asked the plaintiff to sign a stipulation to allow this attorney to withdraw from this action.

4. On December 27, 1977, the petitioner-attorney wrote a letter to the plaintiff, mailing it to the address shown on the plaintiff's letter of November 20, 1977, and bringing to the attention of the plaintiff again the differences which had arisen in this matter between the plaintiff and this attorney as to the manner in which the case should be prosecuted and defended.

5. To this date, this attorney has heard nothing one way or the other from the plaintiff concerning when he will be in the United States or whether he will voluntarily allow the attorney to withdraw from this action.

6. The differences which have arisen between the plaintiff and this attorney in regard to prosecution of this action are substantial in that it is in the best interests of all parties concerned that the plaintiff be allowed a continuance of this matter until such time as he is back in the United States and can retain counsel who will handle this matter along the lines he dictates.

7. A copy of this Petition has been mailed to the defendant at his last known address by certified mail.

By order dated 6 March 1978 the trial court allowed plaintiff's attorney's motion to withdraw.

The matter was called for trial on 2 June 1978. Defendant appeared with counsel. Plaintiff did not appear. Defendant in open court waived trial by a jury. The defendant testified under oath.

The trial court entered a written judgment dated 11 August 1978. The court made findings of fact and concluded:

1. This Court has jurisdiction of the parties and of the subject matter.

2. The defendant, Bonnie Heidler, is a dependent spouse, and the plaintiff, John Heidler, is the supporting spouse.

3. The plaintiff abandoned the defendant on or about August 31, 1974.

4. The plaintiff has perpetrated cruelties and indignities upon the defendant without just cause or provocation emanating from the defendant.

5. The defendant, Bonnie Heidler, is entitled to alimony in the amount of $300.00 per month.

6. The defendant is entitled to counsel fees in the amount of $500.00.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that:

1. The defendant is hereby awarded permanent alimony in the amount of $300.00 per month payable by the plaintiff to the defendant commencing June 5, 1978. Said $300.00 monthly permanent alimony shall be paid into the Clerk of Court of Forsyth County, North Carolina, commencing June 5, 1978, and continuing on the 5th day of each month thereafter and disbursed to the defendant at 420-D Manor Court, New Lennox, Illinois.

2. The plaintiff, John Heidler, shall pay to David A. Wallace, attorney for defendant Bonnie Heidler, $500.00 on or before July 1, 1978, as attorney's fees for the prosecution of the defendant's cause.

3. Judgment be entered for the defendant, Bonnie Heidler, in the sum of $16,504.02.

From the judgment plaintiff gave timely notice of appeal.

Randolph and Randolph by Clyde C. Randolph, Jr., for the plaintiff appellant.

Pfefferkorn & Cooley by David A. Wallace and J. Wilson Parker for the defendant appellee.

PARKER, Judge.

The plaintiff assigns error to the trial court's failure to submit issues of fact to a jury. The plaintiff contends that this failure constituted reversible error because plaintiff had not given his consent to the withdrawal of defendant's jury trial demand as required by G.S. 1A-1, Rule 38(d). We agree and reverse.

Rule 38(d) provides:

> *Waiver.*—Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. *A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.* (Emphasis added.)

Rule 39(a) provides:

> (a) *By jury.* When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless
>
> (1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or
>
> (2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

Taken together, G.S. 1A-1, Rules 38(d) and 39(a) provide that once any party to an action makes a timely demand for a jury trial, the trial of all issues so demanded shall be by jury unless all parties who have pleaded or otherwise appeared in the action, or their attorneys of record, affirmatively consent by oral or written

stipulation to trial by the court without a jury or the court finds that no jury trial right exists as to some or all of the issues. These rules do not provide that failure to appear at the trial constitutes consent to a withdrawal of a valid jury trial demand, and in this case the timely demand made in defendant's answer operated as a demand by the plaintiff also. *See, Bass v. Hoagland,* 172 F. 2d 205 (5th Cir., 1949).

New trial.

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

STATE OF NORTH CAROLINA v. LACY LOCKLEAR, DEFENDANT AND JOHN LEE, SURETY

No. 7818SC903

(Filed 31 July 1979)

1. **Arrest and Bail § 11.4— remission of portion of forfeited appearance bond—extraordinary cause**

The trial court did not err in finding that the surety on a forfeited appearance bond in a felonious assault case had shown "extraordinary cause" for remission of a portion of the amount forfeited where efforts of the surety after defendant's arrest for driving under the influence led to denial of any further bond for defendant and resulted in defendant's detention on the assault charge for which the bond had secured defendant's appearance. G.S. 15A-544(h).

2. **Arrest and Bail § 11.4— constitutionality of statute permitting remission of forfeited bond**

The statute permitting the remission of amounts adjudged forfeited on criminal appearance bonds, G.S. 15A-544(h), does not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used for public schools, N. C. Constitution, Article IX, § 7.

APPEAL by Guilford County Board of Education from *Kivett, Judge.* Order dated 10 August 1978 entered in the Superior Court, GUILFORD County. Heard in the Court of Appeals 11 June 1979.

This is an appeal from a judgment entered pursuant to G.S. 15A-544(h) directing remission to the surety of a portion of the amount which had been adjudged forfeited on a criminal ap-

pearance bond. On 2 September 1977, the surety, John Lee, signed a $2000.00 appearance bond for one Lacy Locklear, who was charged with a felonious assault. The defendant Locklear failed to appear for his trial on 3 October 1977, and an order for his arrest and forfeiture of the bond was issued on that date. On 21 March 1978, the Superior Court entered final judgment of forfeiture on the bond. On 6 July 1978, the surety paid the judgment and costs, and thereafter the Clerk of Superior Court paid the amount of the forfeiture to the County Treasurer for the County School Fund.

The present proceeding was commenced on 2 August 1978, when the surety filed a motion for remission of the forfeiture, alleging that he had made diligent search and inquiry into the whereabouts of the defendant and that on or about 27 July 1978, when defendant was arrested for driving under the influence, the surety's personal efforts led to denial of any further bond for the defendant. As required by G.S. 15A-544(h), a copy of the motion was served on the attorney for the county school board, who filed answer opposing the motion on the ground that the "extraordinary cause" required by G.S. 15A-544(h) for allowance of such a motion had not been shown.

At the hearing on the motion, the surety testified:

> I took the following steps to bring the defendant into court after I was notified that the defendant failed to appear: Contacted a bondsman in Winston-Salem who was originally on the defendant's bond in this case to get the defendant's address; the address was in Pembroke, so I called the Sheriff down there to check it out and found that the defendant had left; I checked with the father-in-law in Kernersville on several different occasions and he hadn't seen him and didn't know where he was; one night about two weeks ago, on a Friday night, I got a call that the police had picked up the defendant on a drunk driving charge; I checked with the sheriff's office, they didn't have anything on him, so I checked then with the Clerk's office and found that the papers had been returned unserved and were filed there, and then I got a Deputy Sheriff to serve them on the defendant (the bondsman, Mr. Lee, was apparently talking here about the forfeiture papers).

> The amount of the forfeiture bond was $2,000.00. I incurred expenses in trying to apprehend the defendant by taking two trips to Kernersville, made several calls to Pembroke; and two or three trips to Winston-Salem, from Greensboro, trying to find the defendant. I spent a good deal of time on it.

On cross-examination by the attorney for the school board, the surety testified:

> Yes, the defendant is here because he was arrested for drunk driving. No, I didn't arrest the defendant but if I hadn't provided the information, the defendant would have been bonded on that particular charge or let out by a District Court Judge. My efforts were instrumental in preventing that from happening and, therefore, preventing the defendant from making a new bond and being available for trial.

At the conclusion of the hearing, the court entered an order finding that due to the efforts of the surety, the defendant Locklear had been detained and was available to stand trial on the assault charge. The court concluded that the surety's efforts amounted to "extraordinary cause shown" under G.S. 15A-544(h) and "that the ends of justice would be served by the court's remission of $1,500.00 of the $2,000.00 bond amount that Mr. Lee has heretofore paid into the Office of the Clerk of Superior Court." From the court's order in accord with these conclusions, the Guilford County Board of Education appeals.

Douglas, Ravenel, Hardy, Crihfield & Bullock by John W. Hardy for the Guilford County Board of Education, appellant.

William C. Ray and James Lee Knight for the surety, appellee.

PARKER, Judge.

[1] The appellant first assigns error to the trial court's conclusion that the surety showed extraordinary cause for remission of the judgment. G.S. 15A-544(h) provides that "[f]or extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate." The trial court concluded upon

uncontroverted evidence that "the efforts made by Mr. John Lee amount to extraordinary cause shown under the provisions of Chapter 15A, Section 544 of the General Statutes of the State of North Carolina." We cannot say that the court was in error in so concluding. The efforts of the bondsman, while not dramatic, did result in the principal's detention on the charge for which the bond had secured the principal's appearance. The goal of the bonding system is the production of the defendant, not increased revenues for the county school fund, *see* Watts, The Pretrial Criminal Procedure Act: The Subchapter on Custody, 10 W.F.L. Rev. 417, 461-62 (1974), and in this case the surety's efforts led directly to achieving that goal. Appellant's first assignment of error is overruled.

[2] The appellant contends in its second assignment of error that the remission provision in G.S. 15A-544(h) is unconstitutional in that it violates the North Carolina Constitution, Article IX, Section 7 which reads:

> County and school fund. All moneys, stocks, bonds, and other property belonging to the county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

The record does not indicate that this constitutional contention was raised or passed upon in the trial court, and as a general rule appellate court will not pass upon a constitutional question which was not raised and considered in the court from which appeal was taken. *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971); *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911 (1975). Moreover, we find appellant's argument unpersuasive. G.S. 15A-544(h) is not in violation of the above quoted constitutional provision. The statute does not permit a *diversion* of funds as was proscribed in *Shore v. Edmisten, Atty. General*, 290 N.C. 628, 227 S.E. 2d 553 (1976). G.S. 15A-544(h) provides for remission of forfeitures as opposed to diversion to other purposes. The statute merely dictates the manner in which the amounts constituting

"the clear proceeds of forfeitures" are to be determined. This assignment of error is overruled. The judgment appealed from is

Affirmed.

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

IN THE MATTER OF: NOAH GEORGE, POST OFFICE BOX 15, FAISON, NORTH CAROLINA 28341, S. S. NO. 238-16-6752, DOCKET NO. 4977 AND DUBOSE STEEL, INC., POST OFFICE BOX 1098, ROSEBORO, NORTH CAROLINA 28382 AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611

No. 784SC584

(Filed 31 July 1979)

1. **Master and Servant § 108.2— unemployment compensation—ability to work**

A claimant for unemployment compensation who was unable to work as a long-distance truck driver because of diabetes was "able to work" within the meaning of G.S. 96-13(a)(3) where the Employment Security Commission found that there are at least six employers in the area who, from time to time, hire local truck drivers; claimant has a reasonable chance of obtaining employment from one of them; and claimant is physically able to perform work not in excess of ten hours per day which does not require heavy lifting or being away from home overnight.

2. **Master and Servant § 108.2— unemployment compensation—insufficient findings for award**

The Employment Security Commission erred in awarding unemployment compensation benefits without making the findings required by G.S. 96-13(a)(1) and (2) that claimant has registered for work and has continued to report to an employment office and that he has made a claim for benefits in accordance with G.S. 96-15(a), the Commission's finding that three separate claim series were started for the claimant being insufficient to meet the statutory requirements.

APPEAL by Dubose Steel, Inc. from *Reid, Judge.* Judgment entered 24 February 1978 in Superior Court, SAMPSON County. Heard in the Court of Appeals 9 March 1979.

Noah George made application for unemployment benefits. Several hearings were held before a claims deputy and an appeals deputy and the case was appealed to the Employment Security

Commission, all of whom ruled that Noah George was entitled to unemployment benefits. The following evidence is not in dispute. In 1974 Noah George was a 64-year-old man who had worked for more than ten years as a long-distance truck driver for the appellant Dubose Steel, Inc. In December 1974 he became ill and was diagnosed as being diabetic. He was unable to work for Dubose as a long-distance truck driver or as a local driver because of the long hours of work involved. Nor was he able to work as a laborer for Dubose because he could not lift heavy objects. He was not qualified by experience or education for any other position with the company. He voluntarily left the employ of Dubose Steel.

Among the findings of fact of the Commission are the following:

> "5. In the immediate area in which the claimant lives, there are at least six (6) employers who, from time to time, hire local truck drivers and the claimant has a reasonable chance of obtaining such employment should a vacancy occur.
>
> 6. While claiming benefits, the claimant has been physically able to perform work not in excess of ten hours per day which does not require heavy lifting or being away from home over night [sic]. During each such benefit week, the claimant has applied for work with prospective employers."

The Commission concluded that George was able to work and was available for work. The superior court affirmed the award of the Commission.

Howard G. Doyle, Chief Counsel, Thomas S. Whitaker, V. Henry Gransee, Jr., Gail C. Arneke, by V. Henry Gransee, Jr., for appellee Employment Security Commission of North Carolina.

Kimzey, Smith and McMillan, by Stephen T. Smith, for appellant Dubose Steel, Inc.

No counsel for appellee Noah George.

WEBB, Judge.

[1] The appellant contends the evidence did not support the Commission's finding that Noah George was "able to work." G.S. 96-13 provides:

(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—

(1) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;

(2) He has made a claim for benefits in accordance with the provisions of G.S. 96-15(a);

(3) He is able to work, and is available for work . . . .

Appellant argues that George's health was such that he could not accept any of the jobs offered to him by Dubose Steel and for that reason he was not able to work within the meaning of the statute. This argument overlooks the findings of fact by the Commission, which are unchallenged by appellant, that there are at least six employers in the area who, from time to time, hire local truck drivers; that claimant has a reasonable chance of obtaining employment from one of them, and that George is physically able to perform work not in excess of ten hours per day which does not require heavy lifting or being away from home overnight. We hold that if a person is able to accept some substantial employment that is available within the area he is able to work within the meaning of the statute. *See In re Beatty,* 286 N.C. 226, 210 S.E. 2d 193 (1974). The findings of fact of the Commission support the conclusion that claimant is able to work.

[2] The appellant next contends that the Commission erred in awarding benefits because no findings were made as required by G.S. 96-13(a)(1) and (2). These two subsections require that no benefits shall be awarded unless the Commission finds the claimant has registered for work and continued to report to an employment office and that he has made a claim for benefits in accordance with G.S. 96-15(a). The Commission found that three separate claim series were started for Noah George. It contends in its brief that this is a phrase that is used by the Commission to show a claimant has been found to have complied with the provisions of G.S. 96-13(a)(1) and (2) unless the Commission finds otherwise. We hold that this finding by the Commission does not support an award of benefits. Whatever the meaning may be

within the Commission, we believe the statute requires more explicit findings of fact which can be understood as meaning what the statute requires. There does seem to be evidence in the record which would support proper findings under these two subsections. We reverse the order of the superior court and remand this case to the end that it be remanded to the Employment Security Commission for proper findings of fact or to take further evidence if the Commission deems it advisable.

Reversed and remanded.

Judges MARTIN (Robert M.) and MITCHELL concur.

CARL M. MAZZOCONE, ANCILLARY PERSONAL REPRESENTATIVE C. T. A. OF THE ESTATE OF LOIS BONOTAUX DRUMMOND, DECEASED v. ROBERT WATCHORN DRUMMOND

No. 7820SC948

(Filed 31 July 1979)

1. **Abatement § 13 — action to collect judgment — death of plaintiff — no abatement**

There was no merit to defendant's contention that the action abated because he had not been served with process at the time of the death of plaintiff, since the plaintiff's cause of action was simply an action to collect a debt, that debt being a Pennsylvania judgment, and a cause of action based upon the collection of a debt survives the death of a plaintiff.

2. **Rules of Civil Procedure § 12.1 — pendency of prior action — defense improperly raised — waiver**

Defendant waived his defense of pendency of a prior action between the parties involving the same cause of action, since defendant did not present his defense in a properly filed answer.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 10 May 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 15 June 1979.

On 3 June 1960, Lois Bonotaux Drummond instituted an action in the Court of Common Pleas of Montgomery County, Pennsylvania against her husband, the defendant, for permanent alimony. After a hearing on the matter during which the defendant made a general appearance, that court issued an order direct-

ing the defendant to pay his wife a certain sum for her maintenance and support. On 9 July 1976, Mrs. Drummond filed a petition for attachment and entry of judgment against the defendant on the grounds that the defendant was delinquent in his alimony payments. On 29 July 1976, after a hearing in open court, the trial judge for the Court of Common Pleas of Montgomery County, Pennsylvania entered a judgment against the defendant in the amount of $47,000. On 24 August 1977, Mrs. Drummond filed her complaint in Superior Court, Moore County, by which she sought to have that court give full faith and credit to the Pennsylvania judgment. A summons was issued on that same date, but it was not served on defendant until 17 September 1977 at approximately 4:00 p.m. However, around eleven hours earlier that same day, Mrs. Drummond had died of terminal cancer. On 4 November 1977, the defendant filed an answer in which he alleged, among other things, that the matter was already pending in District Court of Moore County. On 3 February 1978, Carl M. Mazzocone, the personal representative of the estate of Mrs. Drummond, moved that he be substituted as the plaintiff in the Moore County action. On that same date, Mazzocone also filed a motion for summary judgment. In support of his motion for summary judgment, Mazzocone filed an affidavit attesting to the fact that a judgment in the amount of $47,000 had been entered by the Pennsylvania court against the defendant and that no payments had been made on that judgment. On 28 March 1978, the defendant filed a motion to stay the proceedings on the ground that he had filed an action in Pennsylvania to set aside the judgment of the Pennsylvania court. On 3 April 1978, the trial court denied the defendant's motion to stay and allowed Mazzocone's motion to be substituted as plaintiff. One month later, on 3 May 1978, the defendant filed a motion for leave to file an answer or in the alternative for leave to amend his answer. On 5 May 1978, the defendant filed a motion to have the matter transferred to District Court. The defendant also filed an affidavit in which he indicated that the same subject matter of the action was then pending in the District Court of Moore County. On 11 May 1978, the trial court denied the defendant's motion to stay the proceedings and then entered summary judgment in favor of the plaintiff. After summary judgment had been entered, the defendant filed a proposed answer and counterclaim. From the entry of summary judgment in favor of the plaintiff, the defendant appealed.

Additional facts pertinent to this appeal are hereinafter set out.

Nichols, Caffrey, Hill, Evans & Murrelle, by William W. Jordan and R. Thompson Wright; Sabiston & Thompson, by William D. Sabiston, Jr., for plaintiff appellee.

J. Gates Harris and Seawell, Pollock, Fullenwider, Robbins & May, by P. Wayne Robbins, for defendant appellant.

ERWIN, Judge.

[1] The defendant first contends that this action abated, because he had not been served with process at the time of the death of Mrs. Drummond. Mrs. Drummond filed her complaint on 24 August 1977. By doing so, she commenced this civil action as of that date. G.S. 1A-1, Rule 3. At all times thereafter, this action was a viable pending action. Although Mrs. Drummond died while this action was pending, her death did not abate the action. "No action abates by reason of the death of a party if the cause of action survives." G.S. 1A-1, Rule 25(a). The plaintiff's cause of action in the present case is simply an action to collect a debt, that debt being a Pennsylvania judgment. *See Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964). A cause of action based upon the collection of a debt survives the death of a plaintiff. *See* G.S. 28A-18-1. Therefore, this action did not abate upon the death of Mrs. Drummond.

We note that the defendant was required to file an answer admitting or denying the averments of the plaintiff's complaint within 30 days after he was served with the summons and complaint. G.S. 1A-1, Rule 8(b), 12(a)(1). The defendant failed to comply with that requirement. "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." G.S. 1A-1, Rule 8(d). Therefore, all averments in the plaintiff's complaint with the exception of the amount of the Pennsylvania judgment are deemed admitted by the defendant, and they are not in issue.

[2] The defendant next contends that the plaintiff's action should have been abated for the reason set forth in the defendant's plea in abatement. All pleas have been abolished by

the Rules of Civil Procedure. G.S. 1A-1, Rule 7(c). However, the pendency of a prior action between the same parties for the same cause of action is a legal defense to a claim for relief in the same nature as a plea in abatement. *Lehrer v. Manufacturing Co.*, 13 N.C. App. 412, 185 S.E. 2d 727 (1972). All legal defenses to a claim for relief, with certain exceptions not applicable to this case, must be asserted in the responsive pleading. G.S. 1A-1, Rule 12(b). If they are not, they are waived. Since the defendant did not present his defense in a properly filed answer, his defense was waived. The defendant's proffered answer was not timely filed and was, for that reason, insufficient to either raise a defense for the first time or revive a defense that had already been waived. Therefore, the defendant's contention is without merit.

The defendant next contends that the trial court erred in granting summary judgment, because the Pennsylvania court order providing for the payment of alimony to Mrs. Drummond could have been modified retroactively. Assuming *arguendo* that the Pennsylvania court order could be modified retroactively, that fact does not affect the outcome of this case. The plaintiff's claim was not based upon that order; the plaintiff's claim was based upon a judgment. In other words, the plaintiff was not seeking to collect alimony payments that were in arrears; instead, she was attempting to have the courts of this State enforce a judgment that was entered in her favor by the courts of Pennsylvania. The defendant has not shown, nor do we find, that the judgment was anything other than a final judgment. Therefore, the judgment must be accorded full faith and credit.

The defendant has presented additional assignments of error which we have reviewed and find to be without merit.

Affirmed.

Judges CLARK and CARLTON concur.

Pappas v. Dept. of Motor Vehicles

CHRIS JOHN PAPPAS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, RESPONDENT

No. 7826SC665

(Filed 31 July 1979)

Automobiles § 126.3— breathalyzer test—time of administration

G.S. 20-16.2 does not require that a breathalyzer test be administered within thirty minutes of the time a person's rights are read to him.

APPEAL by respondent from *Griffin, Judge.* Judgment entered 16 May 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 April 1979.

This is an action for judicial review of the revocation of petitioner's driver's license. At a hearing on the petition, J. D. Klutz, a member of the North Carolina Highway Patrol, testified that on 23 December 1977 at about 7:45 p.m. he investigated an accident on I-77 in Mecklenburg County. The petitioner told him he had been driving the automobile involved in the accident. Mr. Klutz testified further that petitioner had a strong odor of alcohol on his breath, was very unsteady on his feet, and talked with a thick tongue. Mr. Klutz formed an opinion that petitioner was under the influence of alcohol and placed the petitioner under arrest for operating a vehicle on a public highway under the influence of an intoxicating beverage. Mr. Klutz carried petitioner to the Mecklenburg County Jail, introduced him to John Smith, a licensed breathalyzer operator and requested that petitioner take the breathalyzer test. John Smith testified that he advised petitioner of his rights in regard to the breathalyzer test and that petitioner told him he wanted to make a telephone call. Petitioner called his attorney and Mr. Smith waited thirty-five minutes and then offered the breathalyzer test to petitioner. Petitioner refused to take the test stating that his attorney was on the way to the Mecklenburg County Jail. Mr. Smith testified he told the petitioner he was "marking it as a refusal" to take the test.

The petitioner testified that he never told Mr. Smith he was waiting for an attorney and he did not refuse to take the test; that he first learned he had refused to take the test when he was at the front desk, and he then told Mr. Smith that his time had not expired and he wanted to take the breathalyzer test. At the

conclusion of the evidence, the court asked the court reporter to read back the last question asked of Mr. Smith. The following colloquy then took place:

"Q. 'So do I understand you to say that you did not offer him the test until after his time had expired?

A. I offered him the test after it expired.'

COURT: Well, it's a technicality, but draw your order, Mr. Whitley."

The court entered an order in which it found as a fact that Deputy Sheriff John W. Smith testified he did not offer the breathalyzer test to petitioner until after the time had expired for administering the test and that Mr. Smith further testified the petitioner refused to submit to the breathalyzer test. The court ordered the Department of Motor Vehicles not to revoke petitioner's license.

Attorney General Edmisten, by Deputy Attorney General Jean A. Benoy, for respondent appellant North Carolina Department of Motor Vehicles.

No counsel for petitioner appellee.

WEBB, Judge.

We reverse the superior court for the reason we believe the court was governed by a misapprehension of the law. We infer from the statement of the court that it believed that a breathalyzer test has to be administered within thirty minutes of the time a person is advised of his rights in regard to taking the test. The court found as a fact that petitioner was not offered the test until after the time for administering it had expired. G.S. 20-16.2 provides in part:

(a) . . . The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing . . .

* * *

(4) That he has the right to call an attorney and select a witness to view for him the testing procedures; but

that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.

This statute was interpreted in *Price v. North Carolina Department of Motor Vehicles*, 36 N.C. App. 698, 245 S.E. 2d 518, *appeal dismissed*, 295 N.C. 551 (1978) to mean that a person offered a breathalyzer test has thirty minutes to select a witness to the test and a reasonable time to call an attorney and communicate with him. The statute does not require that the breathalyzer test be administered within thirty minutes of the time a person's rights are read to him. *Creech v. Alexander*, 32 N.C. App. 139, 231 S.E. 2d 36, *cert. denied*, 293 N.C. 589 (1977). From the statement by the court and the finding of fact, we conclude this was its understanding of the law. Since the court decided the case under a misapprehension of the law, it must be reversed. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

Since other errors assigned may not recur, we do not discuss them.

Reversed and remanded.

Judges MARTIN (Robert M.) and MITCHELL concur.

IFCO OF SOUTH CAROLINA, INC., PLAINTIFF v. SOUTHERN NATIONAL BANK OF NORTH CAROLINA, DEFENDANT v. GUARANTY BANK AND TRUST COMPANY OF FLORENCE, SOUTH CAROLINA, INTERVENOR DEFENDANT

No. 7812SC576

(Filed 31 July 1979)

Banks and Banking § 11— check examined by maker before payment—action against bank because of payment

The maker of a check who examines the check when presented at the bank and instructs the bank to pay it may not then collect from the bank for paying the check.

APPEAL by plaintiff from *Battle, Judge*. Judgment entered 9 March 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 March 1979.

The plaintiff instituted this action to recover from Southern National Bank $45,097.56 which Southern National Bank had paid from plaintiff's account. The following facts were established by the pleadings and depositions and are not in dispute. Plaintiff is in the business of financing insurance premiums. It had an agreement with Bobby Clamp under which it would deliver pre-signed checks to Clamp, and Clamp would fill in the name of an insurance company as payee. In 1974 plaintiff delivered a series of pre-signed checks to Clamp drawn on the Fayetteville Branch of Southern National Bank of North Carolina. Clamp filled in the name of American States Insurance Company, endorsed the checks in the name of the payee and deposited them in his own account with the Guaranty Bank and Trust Company of Florence, South Carolina. American States Insurance Company did not issue policies for these checks and Clamp did not have authority from American States to endorse the checks. Plaintiff had an agreement with Southern National Bank that the bank would not honor the checks when presented for payment until an agent of the plaintiff had inspected, approved and accepted the checks. None of the checks were paid until this was done. The plaintiff filed this action against Southern National Bank. Southern National Bank gave Guaranty Bank and Trust Company notice of the litigation pursuant to G.S. 25-3-803 and Guaranty intervened as party defendant. The superior court entered summary judgment for both defendants.

MacRae, MacRae, Perry and Pechmann, by Daniel T. Perry III, for plaintiff appellant.

Butler, High and Baer, by Ervin I. Baer, for defendant appellee Southern National Bank of North Carolina.

Anderson, Broadfoot and Anderson, by Lee B. Johnson, for defendant appellee Guaranty Bank and Trust Company of Florence, South Carolina.

WEBB, Judge.

If defendants were entitled to judgment as a matter of law on the undisputed facts, the superior court properly entered summary judgment in their favor. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

We affirm the judgment of the superior court. The principal question posed by this appeal is whether the maker of a check who examines the check when presented at the bank and instructs the bank to pay it may then collect from the bank for paying the check. We hold that the maker cannot do so. We have not been able to find a case on all fours. *Modern Homes Construction Co. v. Tryon Bank and Trust Co.*, 266 N.C. 648, 657, 147 S.E. 2d 37, *dissent at* 147 S.E. 2d 386 (1966) says by way of dictum: "it is clear that drawer's conduct in advising and requesting the Bank to make payment . . . would have estopped drawer in any subsequent suit against the Bank." An argument can be made that when plaintiff's agent examined the checks and instructed Southern National to pay them it had as much right as Southern National to rely on Guaranty's guarantee of the endorsements and by instructing Southern National to pay the checks it did not waive this right. The difficulty with this argument is that plaintiff sued Southern National. Southern National had the right to rely on the instructions of plaintiff as well as Guaranty's guarantee.

Since any liability of Guaranty in this action is predicated on a liability on the part of Southern National, the superior court was correct in allowing summary judgment in favor of both defendants.

Affirmed.

Judges MARTIN (Robert M.) and MITCHELL concur.

STATE OF NORTH CAROLINA v. SANFORD WILLIAM HIGGS

No. 799SC34

(Filed 31 July 1979)

Homicide § 30.2— second degree murder—failure to instruct on manslaughter

The trial court in a second degree murder case erred in failing to submit to the jury the charge of voluntary manslaughter where evidence of defendant's statement that he shot deceased would permit an inference that he intentionally shot deceased, but the jury would not have to infer that the killing was done with malice.

State v. Higgs

APPEAL by defendant from *Walker (Ralph), Judge.* Judgment entered 18 October 1978 in Superior Court, PERSON County. Heard in the Court of Appeals 4 April 1979.

The defendant was tried for second degree murder. The State's evidence showed that defendant who is paralyzed from the waist down lived in a house with his stepfather Jack Cates. On 21 May 1978 Jack Cates was shot to death with a shotgun. Pete Slaughter, a deputy sheriff of Person County, went to the house in which defendant and Jack Cates lived and in which the body was found and started to advise defendant of his constitutional rights. Before he could complete advising defendant of his rights, the defendant said "I shot him. I ain't going to tell you any damn thing else until you search the house." Frederick Mark Hurst, Jr., a special agent with the State Bureau of Investigation, testified: "the deceased had been shot from a range of not less than four feet nor more than ten feet." Defendant testified that Jack Cates was accidentally shot while they were struggling for possession of the shotgun.

The court submitted to the jury charges of second degree murder and involuntary manslaughter. Defendant was convicted of second degree murder.

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

Burke and King, by Ronnie P. King, for defendant appellant.

WEBB, Judge.

We reverse the superior court for failing to submit to the jury the charge of voluntary manslaughter. A defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such crime of lesser degree was committed. The presence of such evidence is the determinative factor. *See State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235 (1971), and 4 Strong, N.C. Index 3d, Criminal Law, § 115, p. 610 and cases cited therein. In this case the State's evidence was in part

circumstantial. There was evidence that defendant said he had shot deceased. From this the jury could infer that he had intentionally shot deceased with malice. The jury did not have to make this inference however. *State v. Hodges*, 296 N.C. 66, 249 S.E. 2d 371 (1978). The jury could infer that defendant intentionally shot Jack Cates which proximately caused his death, but they would not have to infer it was done with malice. This would be voluntary manslaughter. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971). There being evidence from which the jury could have found the defendant guilty of voluntary manslaughter, it was error not to submit this charge to the jury.

New trial.

Judges MARTIN (Robert M.) and MITCHELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 JULY 1979

AIR FILTER CO. v. FABRICATORS & ROOFING, INC. No. 7828SC981	Buncombe (77CVS1161)	Affirmed
GARRIS v. GARRIS No. 788DC703	Lenoir (72CVD1982)	Affirmed in Part and Vacated in Part
IN RE BURWELL No. 799DC354	Granville & Warren (78SP88)	No Error
IN RE WILLIAMS No. 7814SC961	Durham (78CVS513)	Affirmed in part; Reversed & Remanded in Part
JORDAN v. SAUNDERS No. 781SC963	Gates (74CVS229)	No Error
LOVE v. WOODY No. 7824SC926	Avery (76SP90) (76SP91) (76SP92)	No Error
REECE v. REECE No. 7830DC760	Haywood (76CVD49)	Reversed
STATE v. BOWMAN No. 7921SC350	Forsyth (78CR6457) (78CR6458)	No Error
STATE v. DUNLAP No. 7918SC157	Guilford (77CRS35937)	No Error
STATE v. GOINS No. 7919SC322	Randolph (78CRS1297)	No Error
STATE v. ROBINSON No. 7920SC321	Richmond (78CRS6884)	No Error
STATE v. SPRUILL No. 7911SC226	Lee (78CRS88)	No Error
TAPP v. OLIN CORP. No. 7826SC983	Mecklenburg (76CVS10527)	Affirmed

FILED 31 JULY 1979

CAVENAUGH v. CAVENAUGH No. 7810DC1061	Wake (78CVD1353)	Affirmed

FUQUAY v. FUQUAY No. 781DC1024	Chowan (78CVD21)	Affirmed
HEDRICK v. HEDRICK No. 7822DC1058	Davidson (75CVD215)	Affirmed
IN RE ROGERS No. 799DC268	Granville (78SP175)	Affirmed
PETTIT v. PETTIT No. 7829DC884	Transylvania (77CVD0272)	Reversed & Remanded
STATE v. ANDERSON No. 793SC342	Craven (78CRS10261) (78CRS10262)	Affirmed
STATE v. WELCH No. 794SC281	Onslow (78CRS12511)	Dismissed

STATE OF NORTH CAROLINA v. BARRY LEE WHITEHEAD

No. 791SC274

(Filed 7 August 1979)

1. Arrest and Bail § 3.5; Searches and Seizures § 8— arrest as result of radio bulletin—knowledge of facts for probable cause by officer directing arrest

Probable cause existed for the arrest of defendant by a Tyrrell County deputy sheriff where a Manteo police officer observed a car leave the gas pumps of a service station at a high rate of speed at 2:30 a.m.; the officer pursued the car but was unable to intercept it; the officer then discovered that the currency operated self-service apparatus on a gas pump at the service station had been broken open; the officer had a radio message sent to Tyrrell County officers to be on the lookout for a described vehicle and to stop it for questioning; and the Tyrrell County deputy sheriff stopped a car fitting such description while it was being driven by defendant between 3:20 and 3:40 a.m., since the officer who actually made the arrest need not have knowledge of all the facts necessary to constitute probable cause, but it is sufficient if the officer who issued the directions for the detention or arrest has probable cause for the detention or arrest. Therefore, statements made by defendant and evidence obtained by a search after defendant's arrest were not the products of an illegal arrest.

2. Criminal Law § 113— instructions to consider charges separately

The trial court's instructions, when considered as a whole, could not have misled the jury into believing that defendant could be found guilty of all three charges of forcibly breaking into a currency-operated machine if it found that he aided and abetted in the forcible breaking into only one of the machines where the record shows that the jury acquitted defendant of one of the charges; the court charged the jury that defendant was charged with three separate criminal acts; and the court submitted three separate issues to the jury on the three charges and instructed in the final mandate that the jury should "consider each of the questions separately as they pertain to three separate and distinct criminal acts charged in this court . . . ."

3. Burglary and Unlawful Breakings § 2— breaking into currency-operated machine—requirement for warning decal not element of crime

The requirement of G.S. 14-56.1 that a decal be posted on coin- or currency-operated machines stating that it is a crime to break into vending machines and that a second offense is a felony does not constitute an element of the offense of feloniously breaking into a coin- or currency-operated machine in violation of G.S. 14-56.1, since such requirement was not specifically intended to appear under G.S. 14-56.1, but was placed under that statute as the result of an editorial decision when the session law creating it was codified into the General Statutes.

State v. Whitehead

APPEAL by defendant from *Browning, Judge*. Judgment entered 17 January 1979 in Superior Court, DARE County. Heard in the Court of Appeals 25 June 1979.

Defendant was indicted on three separate counts of forcibly breaking into a currency operated machine after previously having been convicted of a violation of G.S. 14-56.1. By statute, a subsequent conviction of the crime raises the grade of the crime from misdemeanor to felony. Upon a trial, defendant was found guilty of two of the three charges. He was found guilty of breaking into currency operated gasoline pumps at a station operated by Daniels Oil Company in Nags Head and at the Kill Devil Hills Amoco owned by Bayside Oil Company of Kill Devil Hills. Defendant appeals from the judgment entered on the verdicts of the jury.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Aldridge, Seawell & Khoury, by Christopher L. Seawell, for defendant appellant.

MORRIS, Chief Judge.

[1] The primary question presented by defendant's appeal concerns whether evidence and inculpatory statements obtained from the defendant after his arrest should have been suppressed. Defendant contends that his detention by the Tyrrell County deputy for nearly an hour constituted an arrest, that the deputy did not have probable cause to believe a crime had been committed and that defendant had committed that crime, and that, therefore, his statements and the evidence obtained as a result of a search of his automobile after his arrest were products of the illegal arrest and thus inadmissible against him at trial. *See generally Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). Moreover, defendant argues that the *Miranda* warnings given to him prior to questioning did not "purge the primary taint" of the unlawful arrest. *See Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975). The State argues that there was sufficient probable cause when the actual arrest was effectuated and, in the alter-

native, argues that the search was consensual and the inculpatory statements were voluntarily given.

Following is a summary of the evidence, elicited on the voir dire held in connection with defendant's motion to suppress, with respect to the circumstances surrounding defendant's detention, the search of his car, and his statements to law enforcement officers. Manteo Police Officer Robert D. Mauldin was on patrol in the early morning hours of 30 November 1978. As he approached Tillett Motor Company on U.S. Highway 64-264 in Manteo at about 2:30 a.m., he observed a vehicle (which he later learned was a bluish-green Gremlin) leaving at a high rate of speed the general vicinity of the self-service gas pumps. He pursued the vehicle west for approximately eight miles as far as Mann's Harbor, but he was unable to intercept it or to get a license number. He returned to the gas station and discovered that the currency operated self-service apparatus connected with the unleaded gas pump had been broken open. He then radioed the Dare County dispatcher requesting that a message be relayed to Tyrrell County, which lies west of Dare County, "to be on the lookout for a blue Pacer, with a dark blue stripe, and to stop it and hold it for questioning." Officer Mauldin testified: "I did not indicate at that time in the broadcast any suspicions to Tyrrell County of what the car was being stopped for. I did not have any warrants for anybody's arrest at that particular time." Tyrrell County officials were notified at approximately 3:00 a.m. to stop the car. Mauldin stated that he did not know when the Tyrrell County deputy was informed of the specific reason for which defendant was detained when he testified, "The first time Tyrrell County was informed of the reason for stopping this car was when the Sheriff's Department dispatcher advised him, but I could not tell you what time it was, as I was not in the office at that time."

Sometime between 3:20 a.m. and 3:40 a.m. defendant's car was stopped by a Tyrrell County deputy sheriff in Tyrrell County. Officer Mauldin received a call from the Tyrrell County Sheriff's Department identifying defendant and another passenger as the occupants of the car. Mauldin then obtained arrest warrants from a Dare County magistrate and proceeded to Tyrrell County to have the warrants served. The warrants were served, and, Mauldin testified, defendant gave him permission to search the car. He found one tire tool located between the front

bucket seats and one .38 caliber Derringer under the passenger's seat. No money was found.

Officer Mauldin testified that he first talked with defendant about the crime after he returned him to Manteo around 6:00 a.m. Between 6:30 a.m. and 7:30 a.m. Deputy Billy Brown of the Dare County Sheriff's Department advised defendant of his rights, obtained his signature on a waiver of rights form, and proceeded to interrogate him. Defendant's verbal statement implicated him in each of the break-ins.

Defendant was also questioned by Lieutenant David Griggs of the Kill Devil Hills Police Department at approximately 12:00 noon on 30 November 1978. Officer Griggs went to Manteo after he heard that two subjects were being held there for forcibly breaking into currency operated machines. Early that morning he had been called to investigate a similar crime reported at the Kill Devil Hills Amoco station. He went to Manteo "for the purpose of questioning them about the particular break-in in [Kill Devil Hills]." Griggs testified that he advised defendant of his rights, and, after defendant signed his waiver of rights form, defendant made a verbal statement allegedly implicating himself in each of the break-ins. Defendant thereafter made a written statement which according to the State's evidence contained only part of what defendant stated orally.

Defendant testified on voir dire that he was stopped by a Tyrrell County deputy sheriff who told him and his companion to get out of the car, and to go under a shelter approximately 25 feet from the car. He testified they were held there a little over an hour while the deputy called "every now and then . . . to see what he had stopped [defendant] for. . . ." Defendant testified that the deputy, in response to an inquiry concerning why defendant had been stopped, replied that he didn't know, but that "he had had a report on the radio to stop a blue Pacer." After approximately an hour defendant and his companion walked over to the Town of Columbia police station under the deputy's guard.

Defendant testified that he never gave any consent to have his car searched because he was never asked. He testified that he was questioned by Officer Mauldin between 6:00 a.m. and 7:00 a.m. on 30 November 1978 and that he was approximately three or four hours later questioned by Officer Griggs. He admitted

that he was advised of his rights each time he was questioned. Defendant denied making certain statements which Officer Griggs contended he had made orally, but which were not included in the written statement.

In our opinion, the detention of defendant was valid, and the fruits of the arrest and subsequent search of the vehicle properly admitted into evidence. First, it is not necessary to decide when as a matter of law an arrest took place. Assuming, *arguendo*, that the defendant's detention for nearly an hour at gunpoint amounted to an arrest, *compare State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973), there was probable cause for the detention or arrest. *See also* G.S. 15A-401(b) and (c)(1); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). Defendant does not argue that Officer Mauldin of the Manteo Police did not have probable cause to arrest, but he argues that the Tyrrell County deputy sheriff did not at the time the vehicle was stopped have probable cause to arrest defendant. The Supreme Court has articulated the test which determines the validity of a warrantless arrest as follows:

> "Whether [the] arrest was constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed. 2d 142, 145 (1964).

Defendant would have this Court read the mandate of *Beck v. Ohio*, *id.*, and other decisions articulating the test for probable cause as requiring that in every instance the officer actually effectuating the arrest have at the time of the arrest knowledge of all facts necessary to constitute probable cause. We do not believe such a holding is compelled by *Beck*. To so hold would be inconsistent with the notions of practicality which must prevail in the application of the concept of probable cause. *See Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879, 1891 (1949). Support for our conclusion is found in the decision of *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 91

S.Ct. 1031, 28 L.Ed. 2d 306 (1971), and cases interpreting that decision.

In *Whiteley*, the Court faced the question whether a warrant issued for the arrest of defendant was based upon probable cause. The sheriff, acting on a tip, obtained a warrant for defendant's arrest for breaking and entering. He thereafter issued a bulletin over the police radio network to arrest defendant. After the Court determined that the complaint filed by the sheriff was insufficient to support the arrest warrant, it addressed the State's argument that, nevertheless, the officer who actually made the arrest based upon the radio bulletin could reasonably assume that whoever authorized the bulletin had probable cause to direct defendant's arrest. The Court responded as follows:

> "We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." 401 U.S. at 568, 91 S.Ct. 1031, 28 L.Ed. 2d at 313.

In the case under consideration, no arrest warrant had been issued at the time of the bulletin. Although we recognize that an arrest warrant issued by an independent judicial official is entitled to more deference than an individual law enforcement officer's assessment of the grounds for probable cause, we do not believe that the *Whiteley* rationale applies only when arrest warrants have been issued. The rationale of *Whiteley* recognizes the need of law enforcement officers in many situations to seek the aid of other officers in effectuating an arrest. To require that the officer who actually makes the arrest have, at that time, knowledge of all of the facts necessary to establish probable cause would unduly burden law enforcement officials without providing any significant additional safeguards for the rights of individuals. The true focus of the inquiry into the existence of probable cause for the arrest of an individual should be upon the

knowledge of the officer issuing the directions for the detention or arrest of a suspect.

The Eighth Circuit Court of Appeals reached a similar conclusion after considering *Whiteley*. In *United States v. Stratton*, 453 F. 2d 36, 37 (8th Cir. 1972), *cert. denied*, 405 U.S. 1069, 92 S.Ct. 1515, 31 L.Ed. 2d 800 (1972), the Court concluded:

> "We think the knowledge of one officer is the knowledge of all and that in the operation of an investigative or police agency the collective knowledge and the available objective facts are the criteria to be used in assessing probable cause. The arresting officer himself need not possess all of the available information."

Similar reasoning has been applied in federal decisions rendered after *Whiteley* and *Stratton*. *See e.g., United States v. Neuman*, 585 F. 2d 355 (8th Cir. 1978); *United States v. See*, 505 F. 2d 845, n. 16 at 854 (9th Cir. 1974); *United States v. Smith*, 503 F. 2d 1037, 1040 (9th Cir. 1974) (search); *Government of the Virgin Islands v. Gereau*, 502 F. 2d 914, n. 9 at 928 (3d Cir. 1974), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed. 2d 323 (1976).

We are not inadvertent to our Supreme Court's opinion in *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). In that case, the Court was presented with a similar situation in which a vehicle was stopped and the defendant arrested after the arresting officer was notified by radio to stop a maroon Cadillac bearing New Jersey license plates. The Court resolved the challenge to the arrest on the traditional "reliable informant" analysis. *See Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 854, 21 L.Ed 2d 637 (1969). However, the above-cited cases support our opinion that just such an analysis is unnecessary.

Because of our conclusion that the detention of defendant was based upon probable cause, we need not discuss defendant's contention that his subsequent self-incriminating statements were the fruits of an unlawful arrest. *See Brown v. Illinois, supra.* Likewise, we need not address the challenge to the consensual search of defendant's automobile after the arrest. Defendant's sole challenge to the admissibility of the fruits of that search is in reliance upon the asserted invalidity of the arrest.

[2] Defendant next assigns error to the manner in which the trial court consolidated its discussion of the law with respect to all three criminal charges. He contends that the instructions are subject to the interpretation that defendant could be found guilty of all three charges even if they found that he aided and abetted in the forcible breaking into of only one of the machines. First, we note that in fact the jury must not have been misled by the challenged instructions. The record indicates that defendant was acquitted of the charge of breaking into the coin operated machines at Tillett Motor Company in Manteo. Second, the trial court specifically instructed the jury concerning his consolidation of the instructions on each charge as follows:

> "Now, by way of summary or introduction, I would like to tell you that I am going to hand you a piece of paper on which you will return your verdict or verdicts in this case. Now this piece of paper has three separate questions, and while I will talk about the law as it pertains to breaking and entering a currency-operated machine only one time; I won't do it as to each of the three separate cases because the law is the same as it pertains to each one. I would like for you to keep in mind, however, that we are trying three separate cases, and no matter what your answer to any one or two of these questions is, you have to answer all three questions because they deal with the three separate cases."

Furthermore, at the beginning of the charge the court informed the jury that defendant was "accused of three separate criminal acts". Similarly, in his final mandate to the jury, the court submitted three separate issues to the jury on the three charges and instructed the jury: "[Y]ou are to consider each of the three questions separately as they pertain to the three separate and distinct criminal acts charged in this Court to which Mr. Whitehead has pled not guilty." Although the isolated passages of the charge to which defendant excepts, when read out of context, fail to present the three charges as separate and distinct criminal acts, when we consider the charge as a whole, as we must, in our opinion the jury could not have been misled. *State v. Schultz*, 294 N.C. 281, 240 S.E. 2d 451 (1978).

[3] Defendant's final argument is in support of his assignments of error directed to the trial court's denial of his motions for non-

suit. Relying on the second paragraph of G.S. 14-56.1, defendant contends that a necessary element of the State's case in proving the felony charges against defendant is to prove that the machine into which defendant allegedly entered displayed a decal warning defendant that it is a crime to break into vending machines, and that a second offense is a felony. The full text of the statute as it appears in the General Statutes follows:

> "Any person who forcibly breaks into, or by the unauthorized use of a key or other instrument opens, any coin- or currency-operated machine with intent to steal any property or moneys therein shall be guilty of a misdemeanor punishable by fine or imprisonment or both in the discretion of the court, but if such person has previously been convicted of violating this section, such person shall be guilty of a felony. The term 'coin- or currency-operated machine' shall mean any coin- or currency-operated vending machine, pay telephone, telephone coin or currency receptacle, or other coin- or currency-activated machine or device.
>
> There shall be posted on the machines referred to in G.S. 14-56.1 a decal stating that it is a crime to break into vending machines, and that a second offense is a felony."

In our opinion, proof of the presence of the warning decal is not an element of either the misdemeanor or felony offense. Our review of the amended statute as it appears in the 1977 Session Laws, Chapter 723, indicates that Section 3 (now the second paragraph of G.S. 14-56.1) was not specifically intended to appear under the Section 56.1 of Chapter 14 of the General Statutes. This reinforces our opinion that the display of the decal is not an element of the crime of which defendant is charged. Section 3 of the 1977 Session Laws, Chapter 723, apparently was placed under G.S. 14-56.1 as the result of an editorial decision when that chapter was codified into the General Statutes. We decline to hold that this editorial decision adds an additional element of the crime as fully defined in 1977 Session Laws, Chapter 723, Section 1. We view the statutory language in question as no more than a directive to place warnings on the machines specified in the first paragraph of G.S. 14-56.1 so as to deter the frequent vandalism of these highly vulnerable machines.

For the foregoing reasons, we find in defendant's trial

No error.

Judges PARKER and MARTIN (Harry C.) concur.

MANPOWER OF GUILFORD COUNTY, INC. v. CLAUDE H. HEDGECOCK AND TEMPCO, INC.

No. 7818SC858

(Filed 7 August 1979)

1. **Master and Servant § 11.1 — covenant not to compete — employer's signature not required**

A covenant not to compete in a contract signed by defendant was valid since G.S. 75-4 establishes that contracts or agreements limiting the rights of persons to do business in this State may be enforceable if put in writing "duly signed by the party who agrees not to enter into any such business within such territory," and it is not necessary that the persons seeking enforcement of the terms required to be in writing also sign the writing.

2. **Master and Servant § 11.1 — covenant not to compete — territorial restriction unreasonable**

An agreement by defendant employee not to compete with plaintiff employer for a one year period after termination of employment within a twenty-five mile radius of any city where there was a Manpower office was reasonable as to the time limitation but was not reasonable with respect to the territorial restriction, since defendant's employer, Manpower of Guilford County, Inc., had offices only in Greensboro, High Point, and Winston-Salem, and therefore had no legitimate interest in preventing defendant from competing with other Manpower franchises in other cities or states.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 3 May 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 May 1979.

This is an action by Manpower of Guilford County, Inc., either as direct beneficiary or third party beneficiary, for breach of a covenant not to compete ancillary to an employment contract. Plaintiff seeks to enjoin, preliminarily and permanently, defendant, Claude H. Hedgecock, from engaging directly or indirectly in competition with plaintiff within a 25-mile radius of plaintiff's Greensboro and High Point offices for a period of one year immediately following 19 August 1977. Plaintiff also seeks an injunction to prevent defendant, Tempco, Inc., from employing

Hedgecock and from soliciting or accepting business from any of plaintiff's customers. Plaintiff finally seeks an accounting of the earnings and profits accruing to defendants as a consequence of their alleged wrongful and unlawful conduct.

Defendant Hedgecock answered the complaint and petition for temporary injunction averring three grounds in defense of the action. First, he avers that the employment contract was not enforceable by this plaintiff because it was captioned and signed "Manpower, Inc." which is a Charlotte-based corporation separate and distinct from this plaintiff. Second, defendant avers that the provisions of the contract limiting competition with plaintiff are "illegal and void, and contrary to public policy". Finally, defendant avers that during his employment by plaintiff, he was not privy to confidential information which was not otherwise generally available to the public at large. The corporate defendant which employs Hedgecock responded that it had no legal obligation to this plaintiff and that the motion is in direct harassment of defendant with no reasonable grounds therefor and constitutes an unfair trade practice and method of competition. In response to plaintiff's alternative assertion that it was the third party beneficiary of the contract between Manpower, Inc. and Hedgecock, both defendants aver that the covenant was void as a general restraint on trade, that there was no conspiracy between defendants to violate the covenants, and that the third party beneficiary doctrine is inapplicable in the absence of a valid and enforceable contract between Manpower, Inc. and Hedgecock.

Defendant, Tempco, Inc., filed a motion for summary judgment on 21 March 1978, which was denied 19 April 1978. A subsequent motion for summary judgment was filed by Tempco, Inc., 21 April 1978. Defendant Hedgecock filed a similar motion that same day. A hearing on the pending motions for a preliminary injunction and summary judgment was held at the 24 April 1978 civil session of Superior Court in Guilford County.

The evidence presented at the hearing for the preliminary injunction tended to show that Hedgecock was hired by plaintiff, first as a part-time employee, in January of 1967. He worked as an "industrial dispatcher". On 8 January 1968, Hedgecock went to work for plaintiff as the full-time manager of plaintiff's High Point office. On that date Hedgecock signed a printed contract

form which plaintiff characterizes as its standard employment agreement. The document was entitled "Employment Agreement" and was captioned, in handwritten form, *Claude H. Hedgecock*, Employee, *Manpower, Inc.*, Company. Paragraph 10 of the printed contract form provided as follows:

> "10. You acknowledge and recognize that the lists of customers of the company are a valuable, special and unique asset of the company's business, and were acquired at considerable expense to the company; and that said lists are confidential and are a valuable trade and business secret belonging to the company. Therefore, you agree that you will not at any time during your employment with the company or within one (1) year after leaving its service, for yourself or any other person or company, divulge the names or addresses of any information concerning any customer of the company. You further agree during said period not to disclose any information obtained while in the employ of the company, without the consent of the company, said restriction to include the company's method of conducting business."

The agreement was signed "Claude H. Hedgecock" in the blank provided for the employee's signature and was signed "Manpower, Inc." in the blank provided for the company's signature. Both signatures were witnessed by W. L. Trull. Beneath these signatures on the page is a printed paragraph which reads:

> "Employee recognizes and acknowledges that through his association with Manpower, Inc. and/or its affiliates and/or licensees he will have access to Manpower's valuable and highly confidential information, including, for example, specialized business techniques, advertising materials and campaigns, national account lists, and procedural manuals. Employee further recognizes and acknowledges that such confidential information will be made available to him only if he agrees not to utilize it in competition with other Manpower offices. Therefore employee specifically agrees, during the continuation of employment under this agreement and for a one (1) year period after termination thereof, (such period not to include any period(s) of violation or period(s) of time required for litigation to enforce the covenants herein),

whether directly or indirectly, on his own account or as agent, stockholder, owner, employer, employee or otherwise, not to engage in a business similar or competitive to that of Manpower, Inc. and/or its affiliates and/or licensees, within a 25 mile radius of any city where there is a Manpower office or Manpower licensed business, and further agrees that if employee violates this agreement, Manpower, Inc., and/or its local affiliate and/or local licensee in the city where such violation occurs, shall be entitled, in addition to other legal or equitable damages or remedies available, to an injunction restraining such violation."

Following this paragraph appears the signature of Claude H. Hedgecock. This signature again was witnessed by W. L. Trull.

Hedgecock worked under this agreement with plaintiff for ten years as a full-time employee and manager of the High Point office. Hedgecock submitted his letter of resignation in July of 1977. Hedgecock's letter stated that he intended to go to work for his son as an associate in the real estate business. Hedgecock denied that he was going to compete with plaintiff in the temporary help business. Nevertheless, according to W. L. Trull, President of Manpower of Guilford County, Inc., Tempco, Inc., the company by whom Hedgecock was employed, has taken several of his major clients who used his temporary employment services including Jiffy Manufacturing Company, The Thomas Company, and Stroupe Mirror Company. Trull also testified that three to five former Manpower employees now work for Tempco, Inc.

At the hearing, Trull was questioned by the court concerning the signatures on the agreement. The court concluded that the agreement was not properly signed by Trull in his capacity as officer of the company and that his signature only appeared in his capacity as a witness. The trial court concluded that the contract was not enforceable in the absence of a signature by an officer of the corporation in his corporate capacity. The motion for a preliminary injunction was denied orally. The trial court then ruled on the pending motions for summary judgment in favor of both defendants. Judgment was entered concluding that "the covenant sued upon herein was never properly signed or authorized by the Plaintiff Corporation." Plaintiff appeals.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Clinton Eudy, Jr., and Bruce H. Connors, for plaintiff appellant.

Stephen E. Lawing for defendant appellee.

MORRIS, Chief Judge.

Plaintiff has assigned error to the denial of its motion for a preliminary injunction and to the entry of summary judgment in behalf of both defendants. It is clear from the record that the basis of the trial court's ruling was its conclusion that the corporate employer's signature on the agreement not to compete was insufficient, and that, therefore, plaintiff could not enforce the covenants against competition.

Plaintiff asserts that the issue of the signature is the only question for review because of the trial court's opinion, expressed at the hearing, that the agreement was otherwise valid and enforceable. Plaintiff's argument on appeal is addressed primarily to the sufficiency of the signatures. Although we agree with plaintiff, as pointed out below, that the employment contract and its ancillary covenants against competition are not infirm because of the requisite signatures, the sufficiency of the signatures is not the only question before us. We must consider each challenge to the enforceability of the agreement. A correct ruling by a trial court will not be set aside merely because the court gives a wrong or insufficient reason for its ruling. *See e.g., In re Will of Pendergrass*, 251 N.C. 737, 112 S.E. 2d 562 (1960); *Temple v. Temple*, 246 N.C. 334, 98 S.E. 2d 314 (1957); *Reese v. Carson*, 3 N.C. App. 99, 164 S.E. 2d 99 (1968). The ruling must be upheld if it is correct upon any theory of law.

[1] Plaintiff is correct in its contention that plaintiff's signature is not necessary to render enforceable the covenant not to compete. The sufficiency of the writing is controlled by G.S. 75-4. Its language is clear and unambiguous. Subject to the general restrictions as to reasonableness of ancillary restraints on competition, G.S. 75-4 establishes that contracts or agreements limiting the rights of persons to do business in this State may be enforeceable if put in writing "duly signed by the party who agrees not to enter into any such business within such territory". G.S. 75-4 is consistent with the other "statute of frauds" provisions in our law which require only that the writing be "signed by the party

charged therewith", G.S. 22-1 (29 Charles II (1676), ch. 3, sec. 4), or require that the writing be signed by "the party against whom enforcement is sought", G.S. 25-2-201(1) (Uniform Commercial Code). Our holding is consistent with the general view with respect to the necessary signatures to satisfy the Statute of Frauds. *See generally* 72 Am. Jur. 2d, Statute of Frauds § 364. It is not necessary that the person seeking enforcement of the terms required to be in writing also sign the writing. *Lumber Co. v. Corey*, 140 N.C. 462, 53 S.E. 300 (1906). The reasoning for this rule was stated in the early case of *Mizell v. Burnett*, 49 N.C. 249 (1857).

> "Common justice, and the general principles of law, require that there shall be a mutuality in contracts; that is, if one party is bound the other ought to be. But there may be exceptions. Although it is a maxim that a contract is never binding unless there be consideration, yet, there is a distinction between a consideration and the mutuality of contracts in reference to the obligation thereof, and the fact that by some other principle of law, or the provisions of a statute, one party has it in his power to avoid the obligation, although it suggests a very forcible reason for not entering into a one-sided contract, does not necessarily have the effect of making such contract void as to both parties." *Id.* at 253.

Indeed, in this situation there is no concern over the absence of mutuality. Nor do we find validity to the argument that the employment contract is not a valid contract because not properly signed by a corporate officer. A contract of employment generally need not be in writing in North Carolina to be enforceable. Because of our conclusion that the covenant not to compete satisfies the requirements of G.S. 75-4, we now direct our inquiry to determine whether the covenants are otherwise valid and enforceable as against each defendant.

Defendants contend that the covenant not to compete is unenforceable by plaintiff for three reasons. First, they argue, the agreement sued upon is, on its face, between Hedgecock and Manpower, Inc., a legal entity separate from Manpower of Guilford County, Inc., and therefore is not enforceable by this plaintiff. However, the evidence at the hearing was uncontradicted that "Manpower, Inc." was used by plaintiff as being synonymous with

"Manpower of Guilford County, Inc." and also that "Manpower, Inc." was the name used by plaintiff under the terms of its licensing agreement. The trial court concluded, and we so hold, that for purposes of enforcing this contract Manpower, Inc. and Manpower of Guilford County, Inc. are one and the same. Hedgecock had been employed by plaintiff for some time prior to entering into the employment agreement and no doubt knew that his contract was with Manpower of Guilford County, Inc. Defendants' second argument challenging the validity of the covenant not to compete, which addresses the sufficiency of the signatures to the agreement, has, of course, been resolved against defendants. Finally, however, we must consider the validity of the time and territory restrictions on competition imposed by the agreement.

When the nature of employment such as in the instant case is such that the employee has personal contact with the patrons and customers of an employer, or where the employee acquires valuable information as to the nature and character of the business and the names of patrons or customers, thereby enabling him to take advantage of such knowledge and to compete unfairly with a former employer, equity may be interposed to prevent the breach of a covenant not to compete which is reasonable as to time and territory. *Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E. 2d 304 (1965); *Exterminating Co. v. Griffin and Exterminating Co. v. Jones*, 258 N.C. 179, 128 S.E. 2d 139 (1962). The restrictions, however, must be no wider in scope than is necessary to protect the business of the employer. *Comfort Spring Corp. v. Burroughs*, 217 N.C. 658, 9 S.E. 2d 473 (1940). *See generally Annot.*, 41 A.L.R. 2d 15 (1955); *Annot.*, 43 A.L.R. 2d 94 (1955).

A major consideration in determining the reasonableness of restrictions as to time and territory relates to the type of position occupied by the employee, and the skills and/or knowledge obtained by the employee while under employment. The individual defendant in this case occupied a managerial position which necessitated constant contact with customers of the plaintiff. Our courts have attached significance to the fact of an employee's managerial position. The employee's opportunity to acquire intimate knowledge of the business and to develop personal association with customers is an important consideration. *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154 (1930). *See also Sonotone Corp. v. Baldwin*, 227 N.C. 387, 42 S.E. 2d 352 (1947); *Exter-*

minating Co. v. Wilson, 227 N.C. 96, 40 S.E. 2d 696 (1946). One of the single most important assets of a business is its clientele, and protection of established customers is a valid interest of the employer. *See generally* 43 A.L.R. 2d at 162; 41 A.L.R. 2d at 71. Thus, a time limitation contained in a covenant not to compete should remain valid and enforceable if its duration can be justified on the ground that it is reasonably necessary to prevent a loss of customers to the employee or a subsequent employer. *See generally* 41 A.L.R. 2d at 71. Furthermore, in determining the reasonableness of territorial restrictions, when the primary concern is the employee's knowledge of customers, the territory should only be limited to areas in which the employee made contacts during the period of his employment. *See Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E. 2d 602 (1976), *cert. denied*, 290 N.C. 659, 228 S.E. 2d 451 (1976).

[2] In our opinion, Hedgecock's agreement not to compete with plaintiff "for a one (1) year period after termination [of employment] (such period not to include any period(s) of violation or period(s) of time required for litigation to enforce the covenants . . .)" is reasonable. Essentially, the restriction is for a period of one year unless Hedgecock is determined to have violated the covenant. In that case, construing the restriction strictly against its draftsman, as we must do with contracts of this nature, the practical result is that the restriction continues for a maximum of one year after a breach of the covenant ceases. The time required for litigation to enforce the covenants necessarily terminates upon enforcement of a decree prohibiting a continued violation of the covenant. The result is that plaintiff is entitled to one continuous year without competition from plaintiff. This is not unreasonable. Indeed, periods far exceeding one year have been recognized as reasonable in cases where the employee has had extensive customer contact. *See Machinery Co. v. Milholen*, 27 N.C. App. 678, 220 S.E. 2d 190 (1975); *Sales & Service v. Williams*, 22 N.C. App. 410, 206 S.E. 2d 745 (1974). *See also Greene Co. v. Arnold, supra* (4 years); *Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961) (5 years); *Exterminating Co. v. Wilson, supra* (2 years); *Moskin Bros. v. Swartzberg, supra* (2 years).

Despite our conclusion that the covenant against competition is valid with respect to the time limitation, we are compelled to find that the restriction exceeds reasonable territorial limitations.

The covenant provided that Hedgecock was "not to engage in a business similar or competitive to that of Manpower, Inc. and/or its affiliates and/or licensees, within a 25 mile radius of *any city* where there is a Manpower office or Manpower licensed business." (Emphasis added.) A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining his customers. This restriction potentially covers a 25-mile radius of any city in the country. Hedgecock's employer, Manpower of Guilford County, Inc., however, only has offices in Greensboro, High Point, and Winston-Salem. Manpower of Guilford County, Inc., has no legitimate interest in preventing Hedgecock from competing with other Manpower franchisees in other cities or states. Although Manpower, Inc., the franchisor, may have a legitimate right to prohibit its franchisees from competing with it or its affiliates throughout the country, *see generally Annot.*, 50 A.L.R. 2d 746 (1973), it is not a party to this lawsuit seeking to enforce the territorial restrictions. We express no opinion concerning whether the covenant restrictions concerning territory would be reasonable if the franchisor, Manpower, Inc., were seeking to enforce the covenant in its capacity as perhaps a third party beneficiary of the contract. We reserve our consideration of this question until it properly is brought before this Court. Thus, we conclude that the territorial restriction imposed by plaintiff was more extensive than necessary to secure his business or goodwill. *Compare Paper Co. v. McAllister*, 253 N.C. 529, 117 S.E. 2d 431 (1960); *Comfort Spring Corp. v. Burroughs, supra.* Although the restrictions might withstand scrutiny were they limited to the region in which plaintiff seeks to enjoin defendants (25 miles of Greensboro and High Point), this Court cannot in the absence of clearly severable territorial divisions, enforce the restrictions only insofar as they are reasonable. *Welcome Wagon, Inc. v. Pender, supra*; *Noe v. McDevitt*, 228 N.C. 242, 45 S.E. 2d 121 (1947).

In light of our conclusion that the trial court properly entered summary judgment for defendants thus resolving against plaintiff the action for a permanent injunction and damages, we find it unnecessary to consider the assignment of error directed to the denial of the plaintiff's motion for a temporary injunction.

Affirmed.

Judges HEDRICK and WEBB concur.

CHARLES R. HASSELL, JR. v. LORRAINE H. MEANS

No. 7910DC182

(Filed 7 August 1979)

1. **Divorce and Alimony § 23.8; Husband and Wife § 11.2— child custody—sufficiency of separation agreement**

A separation agreement was sufficient to establish permanent custody of the children with defendant wife, especially where a divorce decree and the conduct of the parties over a period of six years confirmed that custody was in fact vested in defendant.

2. **Divorce and Alimony § 25.10; Infants § 6.2— change in child custody—insufficient showing of changed circumstances**

There was no sufficient change of circumstances to warrant a change in the custody of minor children from their mother to their father where the court found only that the children had obtained more maturity, the distance between the parties had been increased so that the father's ability to visit them had been greatly changed, and each party had remarried.

Judge MITCHELL concurring.

APPEAL by defendant from *Parker, Judge*. Judgment entered 4 October 1978 in District Court, WAKE County. Heard in the Court of Appeals 29 June 1979.

This action was instituted by plaintiff in August 1978. Plaintiff sought an award of custody of two children born to him and defendant, his former wife. Plaintiff alleged: that he and defendant entered into a separation agreement in June 1975 providing that the children would reside with defendant subject to liberal visitation with plaintiff and that plaintiff would pay child support to defendant; that plaintiff and defendnat were divorced in July 1975; that in December 1976, defendant and her new husband moved from Chapel Hill to Georgia; that plaintiff and defendant have always contemplated that the wishes of the children would be honored when they became old enough to express a desire as to their living arrangements; that there has been a substantial

change of circumstances since execution of the separation agreement; and that it would be in the children's best interest to award custody to plaintiff.

Defendant answered, denying that the best interest of the children would be served by awarding custody to plaintiff, and alleged that the terms of the separation agreement, which was incorporated into the divorce decree, are binding on the parties.

Prior to trial, the judge conferred separately with plaintiff, defendant, and the two children. At trial (non-jury), plaintiff's evidence tended to show: that he and defendant separated in 1972; that defendant moved to Chapel Hill and went to law school where she remained in November 1975; that plaintiff paid child support and visited his children every other weekend during this time; that in June 1975, plaintiff and defendant entered into a separation agreement which provides for custody and child support.

Plaintiff's evidence tended to show further that plaintiff and defendant were divorced in July 1975; the divorce decree providing the following:

> "VI. The parties have entered into a Separation Agreement, thereby providing for the division of their real and personal property and further providing for adjustment of their obligations each to the other, and for custody and support of the minor children born of the marriage.
>
> NOW THEREFORE, IT IS HEREBY ORDERED, DECREED AND ADJUDGED:
>
> . . .
>
> 2. The terms and conditions contained in that certain Separation Agreement existant [sic] between plaintiff and defendant dated June 20, 1975 are incorporated herein by reference as fully as if set out."

Plaintiff's evidence tended to show further: that in April 1976, plaintiff's and defendant's son, then seven years old, wrote to plaintiff that he would like at sometime in the future to live with him, and the son advised defendant; that in December 1976 after learning of defendant's intention to move to Georgia, plaintiff wrote defendant that he would like for them to agree in

writing that the children would visit him for Christmas and during the summers and that should the children choose to reverse the situation, their wishes would be respected; that defendant responded that the written separation agreement was sufficient and binding, but that when the children reached an age of greater maturity and reasonableness, she would not engage in legal attempts to force them to reside primarily with her should they desire to do otherwise; that defendant and her new husband moved to Cairo, Georgia in December 1976 where they practiced law together; that the children spent Christmas 1976, summer 1977, February 1978, and summer 1978 with plaintiff in Raleigh; that plaintiff remarried in July 1978; that his new wife is one of his law partners and had been living with him for approximately a year before their marriage; that plaintiff resides in a large house on Midway Plantation in Wake County, which he rents; that should plaintiff be granted custody, the children will ride the bus to a nearby school; that Mr. Silver, who is disabled and retired, is available to baby-sit in the afternoons after school until either plaintiff or his wife returns home; that plaintiff and his wife intend to adjust their schedules so that one of them will usually be home in the afternoons; that plaintiff has spent considerable time with his children in various activities, and the children have many friends in Raleigh whom they visit; that plaintiff has not taken the children to church, but would do so if they expressed a desire to go; that plaintiff and his new wife have a loving, open relationship with the children and have discussed all aspects of this case with them; that plaintiff believes in communicating openly with the children about the situation; that plaintiff did not instigate the change of the custody decision made by the children, but supports it since that is what makes them happy; that when informed by his children of their decision in July 1978, plaintiff told them to think about it and to call defendant and tell her if they were sure; that the children did call defendant and wrote her several letters; and the children became upset and confused when defendant refused to respect their wishes.

Defendant and her husband testified that: they were shocked when their children indicated a desire to live in Raleigh, because before going to Raleigh for the summer, the children had made extensive plans for the school year in Georgia; the children made

the decision only fifteen days after their arrival in Raleigh and wrote several ugly letters to defendant; the children had never acted this way toward defendant before; defendant was quite upset, but agreed to respect the children's wishes if they would return to Georgia for a visit first; plaintiff refused, and filed this action instead; on two occasions, plaintiff has used the children to demand concessions from defendant by refusing to return them to Georgia unless defendant agreed to a reduction in child support to $250 per month and promised not to seek a custody decree in Georgia; defendant agreed to the child support reduction and never intended to seek a custody decree in Georgia, because she did not want to involve the children in a legal action; she never discussed the custody situation with the children, because she did not want to involve them in adult problems; she believes the children are too young to be allowed to make this kind of decision; she and her husband have always had a loving relationship with the children; they reside in a large, two-story house in a good neighborhood next door to the children's school; defendant and her husband practice law together in a new office building, which they built very close to their home and the school; defendant's husband became a Boy Scout leader so that defendant's son would have a troop to join; defendant's daughter takes ballet lessons; defendant and her husband are active in church and take the children regularly; the children are required to clean their rooms and to take out the trash as chores; and the children are doing well in school.

Defendant's church pastor testified; and various neighbors of defendant's and the children's teachers presented affidavits attesting to the loving relationship between defendant and her husband and the children, to the high quality of the children's home and surroundings, and to the children's good progress and adjustment in school and with other children.

Defendant's sister testified that on the one occasion when she visited the children at plaintiff's home, she found the house dark and dismal and found Mr. Silver to be intoxicated.

The trial court, in its order, made extensive findings of fact and conclusions of law and entered its order, which provides in part:

"2. That both parties hereto are fit and proper persons to have custody of the minor children, Kathryn Bonner Hassell and Charles Roberson Hassell, III.

3. That the plaintiff shall have primary custody of the children and the defendant shall have liberal visitation rights.

DEFENDANT'S EXCEPTION NO. 55

4. The defendant shall be entitled to have the minor children visit with her in Georgia eight to ten weeks in the summer, during Thanksgiving, Christmas 1979, and alternating Christmases thereafter, and spring school breaks, provided however that in even-numbered years, defendant has the right to visit in North Carolina with the children from Christmas Day at 3:00 p.m. until December 29th at 3:00 p.m."

Defendant appealed.

Gulley, Barrow & Boxley, by Jack P. Gulley, for plaintiff appellee.

W. Brian Howell and Michael D. Levine, for defendant appellant.

ERWIN, Judge.

[1] The defendant contends that:

"The court committed error, in concluding, as a matter of law, that custody of the children was not determined by the Separation Agreement of June 20, 1975, between the parties, because the Separation Agreement, the Judgment of Divorce, and the conduct by and between the parties over a period exceeding six years confirms that custody was in fact vested in the defendant-appellant."

We agree with defendant.

That portion of the separation agreement relating to custody of the minor children of the parties is not artfully drafted; however, we hold that the agreement is sufficient to establish permanent custody of the children with defendant. That part of the separation agreement provides:

"(Custody)

7. The parties hereto having agreed upon the custody and support of the minor children born of the marriage, hereby covenant and stipulate, each with the other as follows:

a. It is stipulated and agreed that both party of the first part and party of the second part are fit and proper persons to have custody of the minor children born of the marriage of the parties. It is agreed that the said minor children born of the marriage of the parties presently reside with the party of the second part, (Lorraine H. Hassell Means) subject to reasonable visitation privileges. It is further provided that in the event the residences should change such that they are separated by a distance of more than 150 miles, the parties agree to arrange specific periods of visitation, including the summer months and Thanksgiving, Easter and Christmas."

In addition, the following was provided with reference to child support:

"[A]t such time as party of the second part completes her legal education and is admitted to the practice of law, or alternatively remarries, the monies paid for the support and maintenance of the minor children born of the marriage shall be reduced and the sum paid by party of the first part to party of the second part for support and maintenance of the said minor children shall be THREE HUNDRED FIFTY DOLLARS ($350.00) per month. Said payment shall continue until such time as the said children attain majority or are otherwise emancipated. Provided, however, that upon the attainment of majority or emancipation of either of the children born of the marriage of the parties, the child support payment provided herein shall be prorataly reduced and shall thereafter continue at the lower rate until the attainment of majority or emancipation of the other child born of the marriage of the parties."

The whole tenor of these portions of the agreement suggests a long period of time including "that in the event the residences

should change such that they are separated by a distance of more than 150 miles, the parties agree to arrange specific periods of visitation, including the summer months and Thanksgiving, Easter and Christmas." There is not any language suggesting that the children would not live with defendant. To us, the provisions for support are also permanent: "Said payment shall continue until such time as the said children attain majority or are otherwise emancipated." The agreement does not provide for any change of living conditions other than visitation.

The terms worked out by the parties were incorporated in the divorce decree as set out above. To us, this implies that the court approved the terms, although the court did not enter an order that they be performed. This adds further to defendant's contentions that the agreement relating to custody is permanent in nature.

We note that this agreement has been followed by the parties since June 1975. For the trial court to treat this agreement in the manner it did at this late date will discourage parties from entering into custody agreements. Parents are in a better position on most occasions to provide custody arrangements for their children as here. We hold this assignment of error has merit.

[2] Defendant contends that plaintiff, the moving party, has the burden of showing that there has been a substantial change of circumstances affecting the welfare of his children, and he has failed to meet such burden. Plaintiff contends that the court was correct when it concluded that there had been a substantial change in the circumstances since the entry of the separation agreement.

In *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974), our Supreme Court held as follows:

> "The entry of an Order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the Court may modify prior custody decrees. G.S. 50-13.7; *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649; *In re Herring*, 268 N.C. 434, 150 S.E. 2d 775; *Stanback v. Stanback, supra*; *Thomas v. Thomas, supra*; *In re Means*, 176 N.C. 307, 97 S.E. 39. However, the modification of a custody decree

must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357; *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77; and *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227. These rules of law must be applied in conjunction with the well-established principle that the trial judge's findings of fact in custody Orders are binding on the appellate courts *if supported by competent evidence. Teague v. Teague, supra*; *Thomas v. Thomas, supra*; see also, G.S. 1A-1, Rule 52(c)."

The trial court concluded as a matter of law (in part) as follows:

"That although the separation agreement did not give either party custody, there have been substantial changes in circumstances since the execution of said agreement in that the children have obtained more maturity, the distance between the parties has been increased to such an extent that the ability of the children to see the plaintiff has been greatly changed and each party has remarried."

Two of the changes of circumstances are mutual. Each party has remarried. Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order. *See King v. Allen*, 25 N.C. App. 90, 212 S.E. 2d 396, *cert. denied*, 287 N.C. 259, 214 S.E. 2d 431 (1975). The distance between the parties has been increased to such an extent that the ability of the children to see the plaintiff has been greatly changed. However, the distance would be the same for either party who has visitation rights to see the children. *See Searl v. Searl*, 34 N.C. App. 583, 239 S.E. 2d 305 (1977). To us, it is obvious that growing children will "obtain more maturity." As used in G.S. 50-13.7, "changed circumstances" means such a change as affects the welfare of the child. *In re Harrell*, 11 N.C. App. 351, 181 S.E. 2d 188 (1971). We fail to find a sufficient change of circumstances within the meaning of G.S. 50-13.7 to warrant or justify a change in the custody of the children in this case.

"A child's preference as to who shall have his custody is not controlling; however, the trial judge should consider the wishes of

a ten-year-old child in making his determination." *In re Custody of Stancil*, 10 N.C. App. 545, 548, 179 S.E. 2d 844, 846 (1971).

Judgment reversed.

Judge PARKER concurs.

Judge MITCHELL concurring.

During oral arguments before us in this case, we were informed by counsel for both parties that the defendant and her husband changed their circumstances by moving to North Carolina and entering the practice of law here after the entry of the judgment of the trial court before us on appeal. This change in the circumstances of the parties could not, of course, have been made known to or considered by the trial court and is not reflected in the record before us. Although I concur in the opinion in this case, I would additionally point out that nothing in the opinion should be construed as limiting the right of either party to return to the trial court in an effort to show changed circumstances arising after the entry of the trial court's order of 4 October 1978 and affecting the welfare of the minor children of the parties. *See Thomas v. Thomas*, 259 N.C. 461, 130 S.E. 2d 871 (1963); *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E. 2d 857 (1962); *Owen v. Owen*, 31 N.C. App. 230, 229 S.E. 2d 49 (1976).

WILLIAM WOODROW OWENS v. HARNETT TRANSFER, INC.

No. 7811DC828

(Filed 7 August 1979)

1. Contracts §§ 18, 27.2— modification of contract by action—jury question—no breach shown as matter of law

In an action to recover for breach of a contract for the sale of a tractor, the trial court did not err in denying defendant's motions for directed verdict and judgment n.o.v. where defendant claimed that plaintiff breached the contract by ceasing to drive the tractor after a certain date and by allowing payments on the tractor to become two months in arrears, since there was evidence from which the jury could find that the contract was so modified by the parties' actions—defendant's acquiescence in allowing plaintiff's son to drive the tractor in his place, and defendant's failure after five consecutive

months to withhold the monthly payment for the tractor from what was owed plaintiff for freight charges—that plaintiff's performance did not constitute a breach of the contract.

2. **Rules of Civil Procedure § 51.1; Trial § 33— jury instructions—failure to apply law to specific facts**

The trial court's instructions were inadequate where they failed to give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issues. G.S. 1A-1, Rule 51.

APPEAL by defendant from *Pridgen, Judge*. Judgment entered 10 April 1978 in District Court, HARNETT County. Heard in the Court of Appeals 29 May 1979.

This is an appeal by defendant from a judgment awarding plaintiff $5,204.44 entered after a jury trial upon plaintiff's claim for breach of contract of sale of a tractor. Plaintiff filed his complaint on 14 February 1977 and filed an amended complaint on 14 June 1977 alleging that plaintiff and defendant on 5 July 1976 entered into a contract in which the defendant agreed to deliver to the plaintiff a 1967 Ford tractor upon payment by plaintiff of $600.00 a month for nine consecutive months beginning in July 1976 for a total of $5,400.00.

In the contract, attached to plaintiff's complaint as Exhibit "A", plaintiff agreed to operate the tractor in conjunction with defendant's business for 70% of the freight, as collected, less brokerage. Plaintiff agreed that 8% of his share might be retained by defendant as a repair fund and also agreed to maintain the tractor "in its present condition, ordinary wear and tear excepted." The defendant agreed to advance necessary trip expenses and to furnish, maintain, and pay fuel costs for the operation of a trailer with an attached refrigeration unit. The contract further provided:

> 11. The Operator acknowledges receipt of the above referred to tractor and agrees to work under the terms of this agreement until any indebtedness to the Corporation is fully paid and/or for a period of one (1) year, whichever is longer.
>
> 12. The Operator agrees that should he fail or refuse to comply with any of the terms of this agreement, any pay-

> ments made to the Corporation will be considered and applied as liquidated damages for such failure and/or refusal. Any sums owed by Harnett Transfer, Inc. to the Operator at the time of said failure or refusal to comply with the terms of this agreement shall be forfeited as liquidated damages. In addition, upon such failure or refusal, the Corporation shall have the right to immediate possession of all equipment covered by the terms of this agreement.

Plaintiff alleged that defendant breached the contract of 5 July 1976 by orally prohibiting plaintiff from occupying and operating the tractor on 6 February 1977 and by withholding $3,567.35 from the funds to which plaintiff was entitled. Plaintiff alleged that he performed all of the terms and conditions of the contract and had made total contract payments on the tractor of $3,000.00. Plaintiff in his amended complaint sought (1) $5,400.00 representing the value of the tractor, (2) $1,167.35 representing sums allegedly owed by defendant to plaintiff, and (3) $2,000.00 representing the reasonable value of loss of use.

In its answer filed 21 November 1977, defendant admitted the contract but denied plaintiff's allegations of breach by defendant. The defendant further counterclaimed for $11,500.00 alleging that the plaintiff had failed to operate the vehicle in accordance with the terms of the contract with result that defendant suffered severe losses of business revenues and defendant's vehicle insurance was made much more difficult and expensive to obtain.

At trial the plaintiff presented evidence to show: He started driving a truck for the defendant in February 1976 and took possession of the 1967 Ford tractor as a result of the 5 July 1976 contract. The defendant did not give plaintiff title to the tractor. Plaintiff drove the tractor about 75,000 miles and pulled defendant's trailers anywhere from Florida to Boston, hauling mostly eggs, frozen bread, and office furniture. The plaintiff kept the tractor in good running condition and made numerous repairs to it.

The defendant deducted a $600 payment each month from plaintiff's 70% share of the freight charges in July, August, September, October, and November of 1976. The defendant did not deduct a payment in either December 1976 or January 1977.

Although the contract did not require that the payments be deducted, the parties had an understanding at the time the contract was made that this would be done. The defendant withheld $1,367.30 from plaintiff's share for the repair fund, but the fund was never used to repair the tractor. The plaintiff paid for repairs out of his advances, and the defendant took the amount so spent out of plaintiff's settlement at the end of the month.

Plaintiff stopped working for defendant on 18 October 1976. Plaintiff told defendant's president George Hodges that plaintiff's son John Owens was going to "take it over." Defendant's president did not say too much at first, but after a while he said, "OK", that he would let the son try it and see how he did. John Owens then drove the tractor from 19 October 1976 through 6 February 1977. During this period defendant's president advanced John Owens money to buy gas and told him where to go and what to haul.

On 6 February 1977 the defendant's president, over plaintiff's protests, had the tires removed from the tractor and told plaintiff he was fired.

The defendant presented evidence to show: Mr. Hodges did not consent "100 percent" to John Owens driving the vehicle in place of his father. On 18 October 1976 the truck was loaded with eggs and the defendant did not have another driver available. The only alternative available was to allow John Owens to drive it. Thereafter, Mr. Hodges repeatedly talked with the plaintiff about returning to drive the vehicle. Finally, in January 1977, Hodges told the plaintiff that the vehicle had to have him on it, or they were going to have to quit running it. The insurance company specifically told defendant not to let John Owens drive the tractor anymore. The plaintiff did not return.

The December 1976 and January 1977 payments were never made. On one occasion after the December 1976 payment became due, the plaintiff asked Hodges to take the payment out of the money coming from driving the tractor. Hodges told the plaintiff that there was no money to take it out of. The defendant took the tractor back after no payments had been made for two months.

Defendant sold the tractor in February 1977. It was not worth fixing and trying to get someone to operate it. Defendant

did not return to plaintiff the repair fund or the $3,000 plaintiff had paid on the truck. "He did not have any coming back."

The trial court submitted issues to the jury which answered them as follows:

1. Did the defendant, Harnett Transfer, Inc., knowingly prevent or hinder William W. Owens' performance of his contract?

ANSWER: Yes

2. If the defendant, Harnett Transfer, Inc., did prevent or hinder the plaintiff's performance of the contract, was the defendant's, Harnett Transfer, Inc., conduct justified?

ANSWER: No

3. Did the defendant, Harnett Transfer, Inc., breach the contract dated July 5, 1976 by a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract?

ANSWER: Yes

4. Did the plaintiff, William Woodrow Owens, breach the contract dated July 5, 1976 by a violation or nonfulfillment of the obligation, agreements or duties imposed by the contract?

ANSWER: No

5. What amount of damages has the plaintiff, William Woodrow Owens, sustained?

ANSWER: $5,204.44

From judgment entered upon the jury verdict defendant appeals.

Bryan, Jones, Johnson & Greene by K. Edward Greene for the plaintiff appellee.

Johnson & Johnson by Sandra L. Johnson for the defendant appellant.

PARKER, Judge.

[1] The defendant first assigns error to the trial court's denial of its motion for a directed verdict and judgment notwithstanding

the verdict. Defendant contends that the evidence shows as a matter of law that plaintiff breached the contract by ceasing to drive the tractor after 18 October 1976 and by allowing the payments on the tractor to become two months in arrears, thus establishing defendant's right to repossess the vehicle on 6 February 1977 pursuant to the terms of the contract. We do not agree.

First we note that the transaction that is the subject of this action was a sale of goods within the purview of G.S. Chap. 25, Article 2. G.S. 25-2-102. In essence, the transaction was a sale of the tractor in consideration of payments of money and delivery of haulage services by the plaintiff.

From the evidence presented the jury could find that for approximately three and one half months the defendant acquiesced in the substitution of plaintiff's son for plaintiff as driver of the vehicle after plaintiff announced to defendant's president his intention to go out and get another job. This acquiescence by defendant, if found by the jury, constitutes waiver of the agreement in the contract which provided that the plaintiff would operate the tractor in conjunction with defendant's business. G.S. 25-2-208(3).

> A waiver is sometimes defined to be an intentional relinquishment of a known right. The act must be voluntary and must indicate an intention or election to dispense with something of value or to forego some advantage which the party waiving it might at his option have insisted upon. The waiver of an agreement or of a stipulation or condition in a contract may be expressed or may arise from the acts and conduct of the party which would naturally and properly give rise to an inference that the party intended to waive the agreement. Where a person with full knowledge of all the essential facts dispenses with the performance of something which he has the right to exact, he therefore waives his rights to later insist upon a performance. A person may expressly dispense with the right by a declaration to that effect, or he may do so with the same result by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.

Guerry v. Trust Co., 234 N.C. 644, 648, 68 S.E. 2d 272, 275 (1951).

Should the jury find that defendant accepted the substitution of plaintiff's son for plaintiff as driver, the defendant could not now successfully assert that the substitution constituted a breach of the contract. This is so even though this was a personal contract. "Parties can be substituted in a personal contract when (1) the parties do not object, and (2) fully acquiesce in accepting the services performed by the substituted party." *Rape v. Lyerly*, 23 N.C. App. 241, 249, 208 S.E. 2d 712, 716-17 (1974), *aff'd*, 287 N.C. 601, 215 S.E. 2d 737 (1975).

Nor does the evidence establish conclusively that the plaintiff breached the contract by failing to make a $600.00 payment in either December 1976 or January 1977. The evidence shows that by mutual understanding of the parties from the contract's inception in July 1976 the defendant obtained each monthly $600.00 payment by taking out the payments from plaintiff's 70% share of the freight charges when settlement was made at month's end. This was done by defendant, the evidence shows, even though plaintiff's account always was in deficit. In December, 1976 and January, 1977 the defendant stopped withholding payments even though it continued in these months to make settlements with plaintiff. There is no evidence to show that defendant ever notified plaintiff that it was demanding a change in the method of payment.

It is true that the contract does not expressly require the defendant to obtain payment by wihholding a portion of plaintiff's share. However, after the defendant had obtained payment in this way for five consecutive months, the plaintiff thereafter had a right to rely on the construction defendant had placed upon the contract and assume that the manner of payment had been established. G.S. 25-2-208(1) provides:

> (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

In summary, on the directed verdict issue there was evidence from which the jury could find that the contract was so modified by the parties' actions that plaintiff's performance did not con-

stitute a breach of the contract. If plaintiff did not breach the contract, then defendant's repossession of the tractor on 6 February 1977 was a breach of the contract. Defendant's motion for a directed verdict was correctly denied.

[2] The defendant next assigns error to the trial court's charge to the jury on issue number four. We find error and reverse.

The challenged instruction reads:

> Issue No 4 reads: Did the Plaintiff, William Woodrow Owens, breach the contract dated July 5, 1976 by a violation or nonfulfillment of the obligations, agreements, or duties imposed by the contract? Again, the Court instructs you on the burden of proof, and on this Issue, the burden of Proof, on this Defendant, Harnett Transfer, Inc., to satisfy you, by the greater weight of the evidence, that the contract was breached by the Plaintiff, William W. Owens. A breach of contract, as previously instructed, is the unjustified failure to perform any promise, expressed or implied, that is a part of the contract. A breach occurs when a party, without legal excuse, fails to perform any promise which is all or part of the contract. As to this Issue, you are instructed to recall the summary of evidence by the Court on the previously instructed on Issues. As to this Issue, I finally instruct you that if you find, by the greater weight of the evidence, that the Plaintiff, William W. Owens, without legal excuse, failed to perform any promise, which is all or part of the contract, then you will answer this Issue "yes". On the other hand, if you fail to so find, by the greater weight of the evidence, then you will answer the Issue "no."
>
> I will instruct you as to the law concerning breach of contract by the Plaintiff and the Defendant as follows: When there is a breach of contract or some provision thereof, which does not go to the substance of the whole contract, and indicate an intention to repudiate it, the breach may be waived by the innocent party who may elect to treat the contract as still subsisting and continue performance on his part. While a party to a contract may excuse or waive nonperformance of a condition by the other party, waiver is a question of intent and does not obtain unless intended by the one party and so understood by the other. Further, the provisions of a written

> contract may be modified, waived or abandoned by a subsequent parol agreement. Such modification or waiver may be by subsequent parol agreement or by conduct which naturally and justly leads the other party to believe that the provisions had been modified or waived. The burden of proving modification or waiver is on the party asserting it, and conduct which will operate as a modification or abandonment must be positive, unequivocal and inconsistent with the terms of the contract.

This instruction is inadequate. In no part of the charge did the court give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issue either in the affirmative or in the negative. As our Supreme Court has said, Justice Moore speaking for the Court:

> G.S. § 1-180, as now incorporated in G.S. § 1A-1, Rule 51, required the judge to explain and apply the law to the specific facts pertinent to the issue involved. A mere declaration of the law in general terms was not sufficient to meet the requirements of the statute. *Saunders v. Warren*, 267 N.C. 735, 149 S.E. 2d 19 (1966). It is the duty of the court, without a request for special instructions, to explain the law and to apply it to the evidence on all substantial features of the case. *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396 (1962). A failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial. *Correll v. Gaskins*, 263 N.C. 212, 139 S.E. 2d 202 (1964).

Investment Properties v. Norburn, 281 N.C. 191, 197, 188 S.E. 2d 342, 346 (1972).

The plaintiff-appellee contends that the court's error was in any event nonprejudicial because the answers given by the jury to issues number one and two provide the answer to issue number four also, making that issue and the instruction on it mere surplusage. We disagree. First, we note that an examination of the instructions on the first two issues reveals that they suffer from the same infirmity as the instruction on the fourth issue. Second, and more directly in answer to plaintiff-appellee's argument here, in the final analysis the first two issues do not provide

a satisfactory frame for posing to the jury the questions which the finder of fact in this action is called upon to determine.

This points up a question upon which we will comment, looking ahead toward the new trial of this action. The five issues submitted by the trial court do not as a whole satisfactorily frame the issues in this action. The evidence is uncontroverted that plaintiff failed to comply with some terms of the 5 July 1976 agreement and that defendant repossessed the tractor on 6 February 1977. The only issue for determination by the finder of fact is whether the contract was so modified by the actions of the parties that plaintiff's action in substituting his son as driver and his inaction in failing to tender the $600.00 payment in December 1976 and January 1977 did constitute a breach of the contract. The jury's repeated requests for re-instruction on the issue of waiver and modification shows that the jury was confused by the manner in which the issues were framed. In the new trial of the action, the trial court should simplify the issues in order that the question to be answered may be posed more directly to the jury in a fashion that it will be able to understand.

New trial.

Judges MITCHELL and MARTIN (Harry C.), concur.

MARY JENICE JOYNER v. JOHN HARDING LUCAS, JR.

No. 7814DC851

(Filed 7 August 1979)

Bastards § 10— action to establish paternity—time limitation—procedural limitation—tolling of statute—equitable estoppel

The time limitation in G.S. 49-14 for bringing a civil action to establish paternity is not a substantive limitation on the right of action but is only a procedural limitation; therefore, the time limitation may be tolled under G.S. 1-21 by defendant's absence from the State, and a party may be equitably estopped from asserting it.

APPEAL by plaintiff from *Gantt, Judge*. Order entered 21 March 1978 in District Court, DURHAM County. Heard in the Court of Appeals 21 May 1979.

Plaintiff initiated this action 27 May 1977 seeking a judicial determination of the paternity of her infant child, Mario Denard Joyner, born 9 November 1973. This action was filed pursuant to G.S. 49-14 through 16 and seeks medical expenses incident to the plaintiff's pregnancy and the birth of the child, payments for the past and future support of the child, reasonable attorney's fees, and custody. Plaintiff alleges that defendant has been a nonresident of North Carolina since September of 1972; that he and plaintiff for several years prior to the birth of the child had cohabited and planned to be married; that 14 February 1973 plaintiff and defendant had sexual intercourse in the Holiday Inn in Chapel Hill; that defendant has admitted being the father of the child and has expressed a desire to support the child; and that defendant, nevertheless, repeatedly has refused to support the child.

Defendant has not answered the complaint. Nevertheless, on 10 November 1977, he moved to dismiss the action alleging that it was not properly commenced within the time allowed by G.S. 49-14. Furthermore, defendant contends that plaintiff's civil action is barred because a previous criminal action against defendant based upon these same facts and allegations was dismissed for failure to initiate the proceeding within the time limits called for in G.S. 49-4. Two affidavits filed by John Harding Lucas, Sr., recite facts which tend to show that, although defendant attended college at the University of Maryland and plays professional basketball for the Houston Rockets of the National Basketball Association, he has remained a resident of North Carolina during that period. The affidavits allege that defendant attended public school in Durham; that since entering college he has been home at almost every opportunity; that during the summers from 1973 until 1977 he spent considerable time in North Carolina; that he is a registered voter in Durham; a local church member; that his automobile is registered and licensed in North Carolina; that he continued to receive his important mail in Durham at the home of his parents; and that he maintains a local bank account. Defendant denies that he was a resident of Texas in 1975 through 1977. Defendant, however, admits that he has not paid income taxes in North Carolina from 1975 through 1977.

Affidavits of witnesses for plaintiff were submitted alleging that defendant had admitted he was the father of the child, Mario

Denard Joyner. An affidavit of Donna J. Hicks, a Child Support Investigator for the Durham County Department of Social Services, was submitted stating that defendant and an attorney met with her to discuss the matter. Defendant at that time admitted having sexual intercourse with plaintiff in Chapel Hill in February of 1973. Defendant admitted that he and his father had offered in December of 1973 to support the child if it was his.

Plaintiff submitted an affidavit wherein she alleges that she had sexual intercourse with defendant at the Holiday Inn in Chapel Hill on 14 February 1973; that the child was the child of John Harding Lucas, Jr.; that on 26 December 1973, defendant admitted being the father of the child Mario Denard Joyner; that on several meetings in 1975 after the birth of the child, defendant led plaintiff to believe that he was going to support the child; and that since 1976 defendant has made no further representations concerning his responsibilities to the child and has refused to support the child.

On 20 March 1978, a hearing was held on motions pending in the case. Thereafter, on 21 March 1978, the trial court entered an order dismissing the action with prejudice. Among other findings of fact and conclusions of law, the trial court determined that this action was not commenced within the time requirements of G.S. 49-14 and that the running of the time period was not suspended by G.S. 1-21. The trial court also concluded that the doctrine of equitable estoppel did not apply to prevent defendant from pleading the statute of limitations.

From entry of the order dismissing the action, plaintiff appeals.

Eugene C. Brooks III and Richard N. Watson for plaintiff appellant.

Powe, Porter, Alphin & Whichard, by N. A. Ciompi, for defendant appellee.

MORRIS, Chief Judge.

The trial court entered its order dismissing plaintiff's action pursuant to defendant's motion to dismiss under G.S. 1A-1, Rule 12(b). Nevertheless, because matters outside the pleadings were considered by the court in reaching its decision, the ruling should

be treated as an order granting summary judgment. G.S. 1A-1, Rule 12(b). *See Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *see generally Annot.*, 2 A.L.R. Fed. 1027, 1028, n. 2. Therefore, in our consideration of this matter, we must remain cognizant of the fundamental proposition that a motion for summary judgment properly is granted only when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c).

Although the parties present other questions on appeal, the ultimate question for resolution concerns whether plaintiff is foreclosed from having the issue of her child's paternity, and that child's entitlement to support and maintenance, determined by a jury. Plaintiff's primary obstacle is the time limitation for instituting civil actions for paternity under G.S. 49-14, which, when this action was initiated, provided:

> "Civil action to establish paternity.—(a) The paternity of a child born out of wedlock may be established by civil action. Such establishment of paternity shall not have the effect of legitimation.
>
> (b) Proof of paternity pursuant to this section shall be beyond a reasonable doubt.
>
> (c) Such action shall be commenced within one of the following periods:
>
> (1) Three years next after the birth of the child; or
>
> (2) Three years next after the date of the last payment by the putative father for the support of the child, whether such last payment was made within three years of the birth of such child or thereafter.
>
> Provided, that no such action shall be commenced nor judgment entered after the death of the putative father."

Identical civil actions were instituted 17 June 1976 and 10 February 1977, although each was dismissed without prejudice because of plaintiff's failure properly to serve the defendant John Harding Lucas, Jr. The present action was dismissed for failure to bring the action by 9 November 1976, three years next after

the birth of the child. Plaintiff's own allegations that defendant has continually refused to support the child precludes the application of G.S. 49-14(c)(2).

The initial question presented is whether G.S. 49-14 provides a "procedural" or "substantive" statute of limitations. The general rule acknowledged by both parties generally provides that when a statute which creates a right of action not existing at common law includes a limitation as to the time within which to bring the action, the limitation of time becomes an element of the right of action itself. Failure to commence the action within the specified time generally results not only in a loss of the right to enforce the action, but in a loss of the substantive right of action itself. *See generally* 51 Am. Jur. 2d, Limitation of Actions § 15. Defendant contends that the time limitation in G.S. 49-14 is just such a substantive limitation on the right of action. It is firmly established that the statute abrogates the common law. *Allen v. Hunnicutt*, 230 N.C. 49, 52 S.E. 2d 18 (1949); *see also Conley v. Johnson*, 24 N.C. App. 122, 210 S.E. 2d 88 (1974); *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E. 2d 592 (1955); *see generally* 2 Lee, N.C. Family Law, § 177 (1963).

As support for the viability and applicability of this general rule in North Carolina, defendant cites cases applying our wrongful death act prior to the 1959 amendment which removed from the statute what the courts had construed as a substantive one-year limitation on the right of action. The law applying former G.S. 28-173 established that the provision requiring the action to be brought within one year was not a statute of limitation, but it was construed as a condition precedent to maintenance of the right of action. *Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700 (1948); *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857 (1930). The statute, as then written, appeared in pertinent part as follows:

> "Death by wrongful act; recovery not assets; dying declarations.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages,

> to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. . . ."

The statute as written clearly annexed to the right of action the requirement that the action "be brought within one year after such death". We note that the harsh results of this statute were ameliorated in 1959 when the limitation was taken from that statute and transferred to G.S. 1-53(4), which is contained among the general limitation provisions in the chapter on civil procedure.

The structure and language of G.S. 49-14 do not compel us to the same interpretation applied to the former G.S. 28-173. The right of action under G.S. 49-14 was created in subsection (a) of the section. The procedural aspects of the action were thereafter delineated in the succeeding subsections. The language expressing the time limitation was not annexed to the language creating the cause of action, as was true in former G.S. 28-173. G.S. 49-14, being a remedial statute, not a penal statute, is to be construed liberally so as to assure fulfillment of the beneficial goal for which it was enacted. *Cf. Jernigan v. Insurance Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972). The purpose of the statute is to establish a means of support for illegitimate children and "[s]tatutory construction should seek to accomplish that purpose and not frustrate legislative intent." *Wright v. Gann*, 27 N.C. App. 45, 47, 217 S.E. 2d 761, 763 (1975). Whether the statute is to be regarded as "substantive" or "procedural" depends upon the language employed, not merely upon whether it appears in a statute creating a new liability. *See Firemen's Insurance Co. v. Diskin*, 255 Cal. App. 2d 502, 63 Cal. Rptr. 177 (1967); *Myers v. Stevenson*, 125 Cal. App. 2d 399, 270 P. 2d 885 (1954); *see generally* 51 Am. Jur. 2d, Limitation of Actions § 15; 53 C.J.S., Limitation of Actions § 1(c).

In our opinion, the time limitations of G.S. 49-14 should be considered as a procedural limitation. We reach this conclusion not only because of the language and structure of the statute, but also out of concern resulting from the harshness of the statute in its application and the constitutional implications of more strictly

limiting the rights to support of an illegitimate than those of a legitimate child. We are cognizant of the mandate of *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977); *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed. 2d 56 (1973), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972). We recognize that no child is responsible for its birth, and penalizing the illegitimate for the irresponsibility of its parents who had the opportunity to conform their conduct to societal norms would be ineffectual and illogical.

Having reached the conclusion that the time limitation of G.S. 49-14 is not a substantive limitation on the right of action, we need not consider plaintiff's argument addressing the constitutionality of G.S. 49-14. However, questions concerning the time barring provisions of G.S. 1-21 and the equitable doctrine of estoppel to plead the statute of limitations are presented. It appears from the judgment that the trial court did not consider that either of these theories was applicable because of its previous conclusion that the time requirements were substantive. Furthermore, to the extent that the trial court concluded that plaintiff had clear knowledge, as early as January of 1974, that defendant would refuse to support the child, the order improperly resolves genuine issues of material fact.

Our resolution of the primary question on appeal renders it unnecessary to consider plaintiff's remaining assignments of error. The asserted errors of which plaintiff complains are harmless in light of the fact that this matter must be returned to the district court for further consideration.

Furthermore, plaintiff's assignment of error with respect to the effect of the dismissal of the prior criminal action is not properly before this Court. The trial court's order did not rely upon the prior dismissal of the criminal action as grounds to estop prosecution of the civil action.

For the foregoing reasons, we conclude that the order of the trial court dismissing plaintiff's action must be

Reversed.

Judges HEDRICK and WEBB concur.

JOSEPH W. HOOPER, JR., AND WIFE, NELL T. HOOPER, PLAINTIFFS v. CITY OF WILMINGTON, NORTH CAROLINA, DEFENDANT

No. 785SC1085

(Filed 7 August 1979)

1. **Municipal Corporations § 20.2— drainage ditch—adoption by city as part of drainage system**

Evidence was sufficient to support the findings of the trial court that defendant city had adopted, managed and controlled an entire ditch, a portion of which ran by plaintiffs' land, where such evidence tended to show that the ditch was a part of the city's drainage system; the city controlled all drains and culverts above and below the plaintiffs' property in that drainage basin; other city owned ditches drained into the ditch in question above plaintiffs' property; the city director of public works admitted that the city "used" the entire ditch; a report of the city's drainage facilities indicated that the ditch was part of a lake drainage basin and referred to the ditch as a sub-basin; and city work crews had regularly snagged and worked the ditch above and below plaintiffs' property.

2. **Municipal Corporations § 20.2— drainage ditch adopted by city—duty of due care imposed on city**

Where a city adopts an open drainage ditch as part of its drainage system, it is under a duty to use due care in controlling the water in the ditch and is liable for erosion damage to private property proximately caused by its negligence.

3. **Municipal Corporations § 20.2— drainage ditch—maintenance by city—negligence—sufficiency of evidence**

Evidence was sufficient to support the trial court's finding of negligence by defendant city in its maintenance of a drainage ditch which bordered plaintiffs' property where such evidence tended to show that defendant received notice of an erosion problem as early as 1966; several studies were conducted by defendant to determine a means of preventing the erosion and several recommendations were made; and defendant took no steps to prevent the erosion.

4. **Municipal Corporations § 20.2— drainage ditch—maintenance by city—negligence—proximate cause of erosion—sufficiency of evidence**

In an action to recover damages for erosion of plaintiffs' property caused by the flow of water through a drainage ditch which bordered their property, evidence was sufficient to establish that the damage was proximately caused by defendant's negligence and not by increased runoff from the area due to land development where such evidence consisted of testimony by defendant's director of engineering and services and by a consulting engineer that the erosion was caused by the scouring action of the flow of water around the bend at plaintiffs' property; increased velocity of the water increased erosion; the velocity was controlled by the size of culverts and pipes; pipes placed

upstream could have increased the velocity of the water flowing in the ditch; the size of the pipe at the outfall behind plaintiffs' property could also increase the velocity of the water; the culvert above plaintiffs' property was not large enough adequately to control the flow of water; and installation of pipes below plaintiffs' property compounded the problem by increasing the velocity of the water flowing past plaintiffs' property.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 24 March 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 June 1979.

In 1955 the plaintiffs purchased a lot outside the city limits of Wilmington, North Carolina, and built a house on the lot in 1957. On the south and west sides of the lot was a drainage ditch known as Jumping Run Branch (hereinafter referred to as Branch). In 1964, the City of Wilmington annexed the lot. In 1972, plaintiffs filed a complaint alleging, *inter alia*, that beginning in 1965 the waters flowing through the Branch had eroded their lot; that the Branch was a part of the City's drainage system and that the City had diverted additional water into the Branch; that the City had been notified of the problem but had not taken any steps to halt the erosion; and that the City's acts constituted negligence, a continuing nuisance and a taking of plaintiffs' property. Plaintiffs sought $50,000 in damages.

The City filed an answer denying that the Branch was a part of the City water system, denying that the City had diverted additional water into the Branch, denying that the City had not cleaned the Branch or halted the erosion and denying that the damages amounted to $50,000. The defendant also pled the statute of limitations.

At trial without a jury by consent the plaintiffs called Robert F. Coleman, Jr., Director of Public Works of the City of Wilmington as an adverse witness. Coleman testified that he had worked for the City as an engineer for 31 years. His responsibilities included street drainage and maintenance, drainage system maintenance, refuse removal and watersheds. The street division was responsible for keeping the drainage systems functioning properly. Coleman admitted that the streets shown on Plaintiffs' Exhibit 15 were under the control of the City, including the culverts, manholes, and piping connected to the streets. Coleman

stated that the Branch was a part of the City drainage system in that water from Independence Boulevard located to the east of plaintiffs' house, as well as water from other streets in the watershed, was drained into the Branch which ran behind plaintiffs' property and flowed from there to the Cape Fear Country Club. The City maintained piping and culverts on the Branch above and below plaintiffs' property. Various ditches and drainage systems in the watershed, including the Branch, were in existence prior to annexation, and the City had accepted them by use or maintenance. Some drainage systems were dedicated to the City, but the Branch had not been. The City had, however, repaired a pipe which drained water into the Branch to the rear of plaintiffs' property. That pipe had originally been installed by a developer. The City had also maintained the areas where the Branch intersected with city streets and had installed culverts, pipes and pavement. Work of this nature had been performed on the Branch where it crossed streets above and below plaintiffs' property. Coleman admitted that the City had a duty to keep the flow of water between city streets unimpeded. Coleman had visited plaintiffs' property beginning in 1966 and other city officials also visited the site. The City prepared a list of recommendations for correcting the erosion including such remedies as piping the ditch or placing sandbags or cement rip-rap on the slopes. Coleman testified that the City had taken none of these steps because it would require permanent rights-of-way from landowners along the Branch. Coleman stated that the culverts were too far upstream to have affected the velocity of the water in the Branch and stated that the City had not diverted any water into the Branch.

Plaintiffs also presented a study of the city drainage system, conducted by the firm of Hazen and Sawyer, which showed that the drainage system above plaintiffs' property was inadequate to control flooding and that correcting the deficiency would reduce the velocity of the flow of water where it passed through an enlarged structure such as a culvert. Velocity of the water would contribute to erosion. The report suggested diverting the flow of water to a pipeline down Gillette Drive and closing the Branch.

Plaintiffs also called Norman Tyson, Superintendent of Streets for the City of Wilmington, as an adverse witness. Tyson testified that he was responsible for cleaning streets and drainage systems. His crews cleaned and maintained the Branch below

plaintiffs' lot on a regular basis, as well as other areas of the Branch. His crews had repaired the outfall pipe from Brookhaven Road which was behind plaintiffs' lot, had run draglines down the Branch since 1975 and had cleared the Branch above the plaintiffs' lot since 1969. Tyson testified that the grid map which he used to schedule his work crews included the Branch.

James Ward Andrews, Director of Engineering and Services for the City of Wilmington also called as an adverse witness by plaintiffs, testified that in 1972 he had been asked by the City Manager of Wilmington to investigate methods for correcting the erosion problem behind plaintiffs' lot on the Branch. All of the methods for correcting the problem required dedication of a right-of-way to the Branch to the City.

Dr. Hooper testified that the Branch had grown from a small creek which one could step over, to a width of 40 feet in some places. The pipe from Brookhaven Drive, located on the bank opposite plaintiffs' lot, continuously discharged water at right angles to the Branch, and had washed away the bank on plaintiffs' lot. Plaintiffs' property had eroded as much as 20 feet, and the water had washed away plants and shrubbery as well as a dog run.

Dr. Hooper testified that 75% of the erosion had occurred since 1969. His property was worth $160,000 in 1964, $190,000 in 1969, and $200,000 at trial. Without erosion it would have been worth $205,000 in 1969 and worth $250,000 at the time of trial.

John D. Grady, Jr., a consulting engineer, testified that the natural drainage had altered since 1964 and the flow of water through the Branch had increased. The culvert above plaintiffs' property was too small and increased the velocity of the water. The Brookhaven Drive outfall altered the drainage pattern and created erosion.

Defendant's evidence tended to show that the increase of residences constructed in the area had increased the flow of water.

The court entered judgment finding in substance that the City had adopted the Branch as a part of its drainage system, had performed work along the Branch, had exercised control and management of the Branch, and that the City had been notified of

the erosion but had negligently failed to correct the problem. The court awarded plaintiffs $20,000 in damages for erosion occurring within the three years immediately preceding the institution of the suit.

Marshall, Williams, Gorham & Brawley by A. Dumay Gorham, Jr. and Daniel Lee Brawley for plaintiff appellees.

John C. Wessell and Crossley & Johnson by Robert White Johnson for defendant appellant.

CLARK, Judge.

[1] Defendant first assigns as error the court's finding of fact that the defendant had adopted, controlled and maintained Jumping Run Branch, since there was no evidence tending to show that the Branch had been dedicated to the City and evidence that the City adopted and controlled the Branch where it intersected with city streets does not constitute an adoption of the entire Branch.

> "[T]he general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof. (Citations omitted.) Accordingly, there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality. . . ."

Johnson v. Winston-Salem, 239 N.C. 697, 707, 81 S.E. 2d 153, 160 (1954). 63 C.J.S. *Municipal Corporations* § 877 (1950). In *Mitchell v. City of High Point*, 31 N.C. App. 71, 228 S.E. 2d 634 (1976), this Court held that evidence that the City controlled a culvert downstream from plaintiffs' property "does not mean that the City adopted the stream nor did it constitute a dedication of a private stream to public use." 31 N.C. App. at 74, 228 S.E. 2d at 636. In the case *sub judice*, however, there is considerably more evidence of control over the entire stream than was present in *Mitchell*. Mr. Coleman testified that the Branch was a part of the City's drainage system. The city controlled all drains and culverts

above and below the plaintiffs' property in that drainage basin. Other city owned ditches drained into the Branch above plaintiffs' property. Coleman admitted that the City "used" the entire branch. Plaintiffs' Exhibit No. 30, a 1975 report of the City's drainage facilities prepared by Hazen and Sawyer, indicates that the Branch was part of the Greenfield Lake Drainage Basin. The report refers to the Branch as a sub-basin. In addition, Tyson testified that city work crews had regularly snagged and worked the Branch above and below plaintiffs' property. After a careful review of the record and plaintiffs' exhibits, we hold that there is ample evidence to support the findings of the trial court that the city had adopted, managed and controlled the entire Branch.

[2] Defendant also contends that the court erred in concluding as a matter of law that the City had a duty to exercise due care and failed to do so. Defendant contends that a municipality is only held liable for private damage in instances of culvert failure, for blockage causing water to back up, or for diversion of water onto private property. This contention is without merit. Assuming that a municipality has adopted an open drainage ditch as part of its drainage system "it may become liable for injury caused by its negligence in the control of the water. Where a city adopts a natural water course for sewage or drainage purposes, it has the duty to keep it in proper condition and free from obstructions, and it is liable for damage resulting therefrom." *Milner Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E. 2d 35 (1966). Since we have affirmed the trial court's conclusion that the City adopted the entire branch, we conclude that the defendant had a duty to use due care in controlling the water in the Branch and is liable for erosion damage to private property proximately caused by the negligence of the municipality.

[3] Defendant also contends that there is no evidence to support the court's finding of negligence. The evidence tends to show that the City received notice of the erosion problem as early as 1966. Several studies were conducted by the City to determine a means of preventing the erosion and several recommendations were made. The City, however, took no steps to prevent the erosion. This evidence is sufficient to support the court's finding of negligence.

[4] Defendant further argues that there is insufficient evidence to establish that the damage was proximately caused by defendant's negligence. Defendant contends that increased runoff from the area due to land development caused the erosion to plaintiffs' property.

On appeal, the court's findings of fact are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed even though there is evidence *contra*. *Cogdill v. North Carolina State Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967). 1 Strong's N.C. Index 3d *Appeal and Error* § 57.2 (1976). Plaintiffs presented Mr. Andrews, Director of Engineering and Services for the City of Wilmington, called as an adverse witness, who testified that the erosion was caused by the scouring action of the flow of water around the bend at plaintiffs' property, and that increased velocity of the water increased erosion, and the velocity is controlled by the size of culverts and pipes. Pipes placed upstream could have increased the velocity of the water flowing in the Branch and the size of the pipe at the outfall behind plaintiffs' property could also increase the velocity of the water. John D. Grady, a consulting engineer, testified that the natural drainage in the Branch had changed since 1964. The culvert above plaintiffs' property was not large enough to adequately control the flow of water. Installation of pipes at Gillette Drive located below plaintiffs' property compounded the problem by increasing the velocity of the water flowing past the plaintiffs' property. The Brookhaven Drive outfall pipe altered the natural drainage pattern and contributed to the erosion. The plaintiffs presented sufficient evidence to support the court's findings that the City's negligence had proximately caused the erosion damage to plaintiffs' property. Defendant's assignment of error is overruled.

We have carefully examined and considered defendant's other assignments of error, which relate primarily to evidentiary matters in light of the rule that the findings by the court are conclusive if supported by any competent evidence. We find no prejudicial error.

The judgment is fully supported by findings of fact and conclusions of law, and the same is

Affirmed.

Judges MITCHELL and ERWIN concur.

LELAND B. DANIELS v. EDDIE HOWARD JONES

No. 788SC901

(Filed 7 August 1979)

Trial § 33.3— failure to give equal stress to contentions

In a passenger's action against the driver of the vehicle in which he was riding, the trial court failed to give equal stress to the primary contentions of the parties on the issue of contributory negligence in violation of G.S. 1A-1, Rule 51(a) where the court charged that "the defendant contends, and the plaintiff denies, that the plaintiff was negligent in one or more of the following respects" and then summarized defendant's contentions that plaintiff rode with defendant while he knew or should have known that defendant was intoxicated and that plaintiff failed to protest the manner in which defendant operated the vehicle, since it was necessary for the court, after having stated defendant's contentions, also to state plaintiff's contentions that defendant was not noticeably under the influence of alcohol when they entered the vehicle and that, when defendant's reckless driving became apparent, plaintiff did in fact remonstrate as best he could under the circumstances.

APPEAL by plaintiff from *Allsbrook, Judge*. Judgment entered 8 March 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 June 1979.

Plaintiff initiated this action to recover damages for personal injury arising out of an automobile collision at 2:30 p.m. on 24 December 1975 on rural paved State Road 1144 in Wayne County. Plaintiff was a passenger and one of three occupants in his 1969 Chevrolet pickup truck which was being driven by defendant. Plaintiff alleges that defendant negligently drove plaintiff's truck at an excessive speed; that he failed to heed plaintiff's direction to slow down; that defendant lost control of the truck as it hit the right shoulder of the road; and that it then swerved left of the center line of the two-lane road and struck an oncoming vehicle being driven by Ella Barfield Brewington. Plaintiff alleges that he has suffered painful and disfiguring personal injury. He alleges damages of $9,464.32 in medical expense and $13,125 in lost

wages. Plaintiff prays for $150,000 in damages as compensation for past and future medical expenses, lost wages, and pain and suffering. Defendant answered the complaint denying negligence. Pleading in the alternative, defendant avers that, even if he should be found negligent, plaintiff was contributorily negligent in continuing to ride in the same vehicle with defendant whom plaintiff knew to have been operating the vehicle while under the influence of intoxicating beverages. Defendant avers that plaintiff was contributorily negligent and assumed the risk of injury by failing to remove himself from the vehicle and in failing at any time to protest the negligent manner in which defendant operated the vehicle. Defendant avers that plaintiff as owner-occupant of the truck had a legal duty to direct and control the manner in which his vehicle was being operated by defendant. At trial, the evidence indicated that plaintiff and defendant both were attending a "pig-pickin' " for the employees of Wayne Hardwood Lumber Company on 24 December 1975 at defendant's home. Plaintiff testified that he consumed a couple of one-ounce mixed alcoholic beverages and that he saw defendant drink about the same amount. He said Jones looked normal and did not appear to be intoxicated. Jones was indoors preparing slaw for the meal. Outside, a fellow employee named Atkinson was in the process of slicing the pig on a cutting board when he suffered an apparently serious cut on his thumb. Defendant observed the wound and suggested that they take him to a doctor. Plaintiff aided Atkinson by holding a handkerchief on his thumb while they all three climbed into plaintiff's truck which was parked in defendant's driveway. Defendant proceeded to drive the truck while plaintiff continued aiding Atkinson.

Plaintiff testified that defendant drove normally for about 500 feet to a paved road, and then turned right onto rural paved State Road 1144, which plaintiff characterized as a "curvy road". Plaintiff testified that defendant was driving in excess of the 35 mile-per-hour posted speed limit on State Road 1144 when he ran onto the shoulder of the road some 700 feet after turning onto the paved road. Plaintiff testified that he then told defendant to slow down before he reached a second curve approximately 800 feet farther down the road. Defendant negotiated the second curve and then plaintiff warned defendant to "look out, that car is going to hit us". The truck collided with an oncoming car driven by Ella

B. Brewington nearly 200 feet past the second curve. The plaintiff did not notice on which side of the center line of the highway the impact occurred. The truck eventually came to rest upside down at which time plaintiff crawled from the wreckage. As a result of injuries to his right arm, plaintiff was taken by ambulance to Wayne County Memorial Hospital where he was treated for compound fractures of the arm, extensive injury to the tendons and soft tissue of the arm, and loss of skin from the top of his hand up his forearm. He underwent extensive skin graft procedures and physical therapy.

Defendant presented an eyewitness to describe the accident. The witness, a high school student, testified that the truck appeared to go out of control after leaving the road in the first curve; that its speed was approximately 70 miles per hour; that as the truck approached the second curve it pulled to the left inside of the curve; that after the curve, but before it could get back to the right hand side of the road, the truck collided with an oncoming car. The truck flipped over two or three times and came to rest upside down in the middle of the road. The witness testified that all three passengers appeared by their actions after the collision to be intoxicated. He testified that Daniels was crawling around cursing; that Jones kept refusing help and telling everyone "why don't you go home"; and that Atkinson couldn't stand up out of the ditch and said he was going home. The case was submitted to the jury on three issues: defendant's negligence, plaintiff's negligence, and damages. The jury found that defendant was negligent, but also found that plaintiff was contributorily negligent, thus denying any damages to plaintiff. Plaintiff appeals assigning error to the trial court's charge.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith, for plaintiff appellant.

Taylor, Warren, Kerr, & Walker, by Gordon C. Woodruff and John H. Kerr III, for defendant appellee.

MORRIS, Chief Judge.

Plaintiff brings forward on appeal two assignments of error addressed to the trial court's instructions to the jury concerning the issue of contributory negligence. First, he argues that the trial court committed reversible error in failing to instruct the

jury with respect to plaintiff's contention that, when he entered as a passenger the truck being driven by defendant, he had no reasonable grounds for believing that defendant was intoxicated. Second, plaintiff assigns error to the failure of the trial judge to instruct the jury that plaintiff contended that before the collision he had protested with defendant concerning the manner in which he was driving the truck. We will address assignments of error together.

The principles of review of a trial court's instructions with respect to the contentions of the parties to a lawsuit are well established. In the first place, the trial court is not required to state the contentions of the parties. *In re Will of West*, 227 N.C. 204, 41 S.E. 2d 838 (1947) (decided under predecessor G.S. 1-180). However, when he does so he must give equal stress to the contentions of each party. G.S. 1A-1, Rule 51(a); *Watt v. Crews*, 261 N.C. 143, 134 S.E. 2d 199 (1964) (applying "old" G.S. 1-180); *Comer v. Cain*, 8 N.C. App. 670, 175 S.E. 2d 337 (1970) (applying "new" G.S. 1A-1, Rule 51(a)). Nevertheless, the trial court's duty to give equal stress to the contentions of each party does not require that each statement must be of equal length so long as each party's contentions receive equal emphasis. *Comer v. Cain, id.*

The focus of our inquiry is upon the trial court's treatment of the contributory negligence issue. The contentions concerning this issue were handled similarly to those concerning the first issue: defendant's negligence. The court first explained the concept of negligence and then stated, "the plaintiff contends, and the defendant denies, that the defendant, Eddie Howard Jones, was negligent in one or more of the following respects". The court thereafter enumerated plaintiff's contentions gleaned from the pleadings and evidence concerning defendant's primary negligence. The court also explained the duty of care relevant to each of plaintiff's contentions. Thereafter, on the second issue, the trial court addressed defendant's contentions. The court, after explaining the concept of contributory negligence, stated, "the defendant contends, and the plaintiff denies, that the plaintiff was negligent in one or more of the following respects". The court then summarized defendant's contentions that plaintiff rode with defendant while he knew or should have known that defendant was driving while intoxicated, and that plaintiff failed at any time to protest the manner in which defendant was operating the vehi-

cle. He did not give any contentions of plaintiff on the second issue.

In our opinion, the trial court failed to give equal stress to the primary contentions of the parties as required by G.S. 1A-1, Rule 51(a), and the relevant case law. Upon a cursory review of the record, it first appears that the trial court equally stressed plaintiff's contentions with respect to the first issue and defendant's contentions with respect to issue two. However, under the peculiar posture of this case, this did not satisfy the mandate of the statute. It became apparent as the trial progressed that defendant had conceded negligence and had focused his defense on the issue of contributory negligence. Defendant's theory was to so clearly establish his own intoxication and negligence that the jury would conclude that plaintiff was negligent and assumed the risk by entering, and continuing to ride in, the truck being driven by defendant. Defendant's defense was based partially upon the theory that a passenger who voluntarily enters an automobile with knowledge that the driver is intoxicated is guilty of contributory negligence *per se*. *See Atwood v. Holland*, 267 N.C. 722, 148 S.E. 2d 851 (1966); *Bank v. Lindsey*, 264 N.C. 585, 142 S.E. 2d 357 (1965); *Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33 (1964). Defendant also relies on the alleged failure of plaintiff to remonstrate with the driver concerning his negligent control of the truck. *See Beam v. Parham*, 263 N.C. 417, 139 S.E. 2d 712 (1965); *Mason v. Johnston*, 215 N.C. 95, 1 S.E. 2d 379 (1939).

With the case in this posture, in our opinion, it was necessary for the trial court, after having stated defendant's contentions, to state plaintiff's contentions with respect to the second issue concerning contributory negligence. *See Watt v. Crews*, supra. At a minimum, the trial court should have stated that plaintiff contended (1) defendant was not noticeably under the influence of alcohol when they entered the truck, and that (2) when defendant's reckless driving became apparent to plaintiff, he did in fact remonstrate as best he could under the circumstances. In order effectively to give equal stress to the contentions of the parties, those contentions of a party which are summarized must be relevant to the decisive issues which develop at trial.

New trial.

Judges PARKER and MARTIN (Harry C.) concur.

MARGARET M. GILMORE v. JOHN HORACE GILMORE

No. 787DC863

(Filed 7 August 1979)

1. **Divorce and Alimony § 24.8— child support—changed circumstances not shown—reduction improper**

The trial court erred in decreasing the amount of child support payments required of defendant by one-third where defendant's showing of changed circumstances related almost exclusively to the additional expenses to which defendant had obligated himself, including sending a child who had reached majority to college, the expenses of a new home and family, and additional travel and telephone expense incident to visiting his children from out of State; defendant made no showing with respect to changed circumstances affecting the remaining minor children; and defendant made no showing that the expenses relating to the children's maintenance and support decreased by one-third when one of the children reached majority.

2. **Divorce and Alimony § 27— child support and alimony—reduction sought—award of attorney's fees properly denied**

The trial court did not abuse its discretion in denying plaintiff attorney's fees to defray the expense of resisting defendant's motion for reduction in alimony and child support payments since there was no finding by the court that plaintiff was unable to defray the expense of the suit, nor did the evidence compel such a conclusion, and since there was no finding that defendant refused to provide adequate support at the time the motion was made.

APPEAL by plaintiff from *Matthews, Judge*. Judgment entered 24 May 1978 in District Court, NASH County. Heard in the Court of Appeals 21 May 1979.

This appeal is from an order entered upon a motion in the cause to decrease alimony and child support payments to which defendant became obligated as the result of an absolute divorce decree entered 16 June 1976. In the suit for absolute divorce, defendant was determined to have abandoned plaintiff and their three minor children. Plaintiff then was awarded $500 per month in alimony, custody of the children, and $500 per month in child support and maintenance. Defendant at that time enjoyed a net income of $1,536.73 per month. The residence belonging to the parties as tenants by the entirety was awarded to plaintiff until the youngest child reaches majority, or enters college, whichever occurs first. Payments on the house, then amounting to approximately $282 per month, were to be paid from the support and alimony payments. Defendant was ordered to pay all major

repairs on the residence and to be reimbursed therefor upon sale of the house. The decree obligated defendant to pay all hospital, medical, and dental expenses, and he was ordered to maintain life insurance benefits of at least $47,000 until the youngest child reaches age 25 or completes her higher education.

Defendant initiated this action 3 April 1978 in the form of a motion in the cause to reduce child support and maintenance payments. Defendant alleges simply that John Horace Gilmore, Jr., the oldest child, attained his majority since entry of the original judgment on 7 November 1977; that defendant's needs and obligations have substantially increased; and that plaintiff's earnings and earning ability have substantially increased. He prayed for a one third reduction in support payments, retroactively effective on 7 November 1977, a decrease in alimony payments, and a similar one third decrease in support effective upon the majority of the second eldest child. In support of the motion, defendant submitted an affidavit reiterating the allegations in the motion and further alleging that he has incurred and will continue to incur the expense of between $3,000 and $4,000 per year for tuition and expenses of his eldest child, John Horace Gilmore, Jr., who attends the University of Virginia. He testified at trial that these expenses have made it necessary for him to withdraw $1300 from his savings, to borrow $1,000 against his life insurance, and to spend $900 out of his current income. He anticipated that he would have to further deplete his savings and borrow on his life insurance to meet expenses for the upcoming year.

Defendant testified that when his eldest son, John, reached 18 years of age, he requested a $150 reduction in support. Plaintiff agreed to accept only a $75 reduction. He also testified that his son, William, helped pay his own expenses with a job paying $60 every two weeks. Defendant testified that he has more living expenses now because of his transfer to South Carolina. Defendant testified that he now pays $210 in monthly rent as opposed to the $100 monthly rent paid in Rocky Mount, and that living in South Carolina now makes it expensive for him to keep in touch with and visit his children. On re-cross examination, defendant admitted that his gross monthly income was $3,145 at the time of the hearing, and that this amounted to $37,740 gross income per year. The court found his net monthly income to be $1,928.35. Defendant admitted that his alimony payments were tax deductible,

and that he claims all three children as dependents for purposes of determining his liability for income tax.

Plaintiff's response to the motion and evidence at the trial tended to show that the $75 per month reduction in child support agreed to by her adequately represented the change of circumstances occasioned by the eldest child's majority. She contends that her expenses and those of supporting the two remaining minor children have substantially increased. While this has occurred, her house payments have increased to $303 per month, leaving $622 (after the $75 agreed to decrease in child support) per month for her children and herself. She testified that her lack of a college education and the needs of her minor children have precluded her from increasing her earnings, although she recently has begun work as a real estate salesperson. She testified that the $500 alimony payments are taxable to her as income. She testified that defendant's obligation should not be reduced because he has remarried. She contends that the defendant's wife is a skilled secretary who contributes substantially to help defray defendant's new household expenses. Plaintiff alleges that her automobile is badly in need of replacement; that the family has insufficient means with which to pay the costs of defending this action; and that this action initiated by defendant is frivolous. She prayed for denial of the motion, and reasonable attorney's fees pursuant to G.S. 50-13.6.

An order was entered 9 June 1978 finding facts and decreeing that there has been a substantial change of circumstances since entry of the decree of absolute divorce. The court ordered a one third decrease in child support, amounting to a $166 monthly decrease, effective 1 June 1978, and denied plaintiff's prayer for attorney's fees.

Plaintiff appeals assigning error to findings of facts and conclusions of law.

Dill, Exum, Fountain and Hoyle, by Thomas G. Dill, for plaintiff appellant.

Early and Chandler, by John S. Williford, Jr., for defendant appellee.

MORRIS, Chief Judge.

Prior to consideration of this action on the merits, we offer this observation concerning plaintiff's preparation of the Record on Appeal. Plaintiff has sufficiently set out in the record her exceptions to the judgment of the court. *See* North Carolina Rules of Appellate Procedure, Rule 10(b)(2). However, plaintiff has placed unnecessarily repetitious matter in the record. In the interest of economy of expense and judicial time, plaintiff should have set out her exceptions within the order as it properly appears in the record on pages 52 through 59. It was unnecessarily repetitious to reprint thereafter the entire order therein setting out the exceptions on appeal.

It is firmly established in this State that a decree of child support is not final, but is subject to modification upon a showing that the circumstances have so changed since the previous order as to justify a modification in the award. G.S. 50-13.7; *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). The changed circumstances with which the courts are concerned are those which relate to child-oriented expenses. *See Waller v. Waller*, 20 N.C. App. 710, 202 S.E. 2d 791 (1974); *see also Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963) (change of circumstances affecting child or children). The burden is upon the party seeking the modification to establish the requisite change in circumstances. *Crosby v. Crosby, supra.*

[1] Defendant's showing of changed circumstances relates almost exclusively to the additional expenses to which he has obligated himself. These include the expenses of sending a child who has reached majority to college, the expenses of his new home and family, and the additional travel and telephone expense incident to visiting his children from out of State. Defendant has made no showing with respect to changed circumstances affecting the remaining minor children. He has made no showing that the expenses relating to their maintenance and support have decreased proportionately one third. Absent proof of this fact, it is impermissible to presume that such child-oriented expenses are proportionally divisible. The presumption, if any is appropriate at all, would be to the contrary in light of the fixed and indivisible costs of providing a home, and the varying requirements of the children. *Compare Friedman v. Friedman*, 521 S.W. 2d 111 (Tex.

Civ. App. 1975); *Cosgrief v. Cosgrief*, 126 N.W. 2d 131 (N.D. 1964); *Cooper v. Matheny*, 220 Ore. 390, 349 P. 2d 812 (1960).

We are not inadvertent to the statutory mandate that the court, when exercising its discretionary power to determine the appropriate amount of child support, shall consider the relative ability of the parties to provide support for dependent children. *See* G.S. 50-13.4. Indeed, the evidence in this record shows a rather substantial increase in the defendant's ability to pay child support, whereas defendant has not satisfied his burden to prove, as he alleged, that the plaintiff's earnings have substantially increased. Indeed, the evidence shows that defendant's present wife makes a substantial contribution to the household. Although defendant alleges that his needs and obligations have substantially increased, it is clear from the record that such obligations result primarily from (1) entering into another marital and family relationship, and (2) assuming the obligation of providing for the expense of sending his eldest son to the University of Virginia. Both increases in expenses were voluntarily assumed additional obligations which, although they may render the child support payments more burdensome, do not justify a reduction in such payments. *See Crosby v. Crosby, supra* (child support payments); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966) (alimony payments). The fact that defendant voluntarily has assumed the financial burden to send his eldest child to a high-tuition, out-of-state university does not justify the court in considering this factor in lowering child support payments. *See Crouch v. Crouch*, 14 N.C. App. 49, 187 S.E. 2d 348 (1972), *cert. denied*, 281 N.C. 314, 188 S.E. 2d 897 (1972). *Cf. Briggs v. Briggs*, 312 So. 2d 762 (Fla. App. 1975); *West v. West*, 131 Vt. 621, 312 A. 2d 920 (1973); *Crane v. Crane*, 45 Ill. App. 2d 316, 196 N.E. 2d 27 (1964). *See generally Annot.*, 56 A.L.R. 2d 1207 (1957).

[2] Plaintiff contends that she is entitled to attorney's fees to defray the expense of resisting defendant's motion for reduction in alimony and child support payments. An award under either G.S. 50-13.6 for "reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit" or under G.S. 50-11(c) and G.S. 50-16.4 applying the doctrine of *Shore v. Shore*, 15 N.C. App. 629, 190 S.E. 2d 666 (1972), is appropriate upon a finding by the trial court in the exercise of its discretion that the plaintiff is unable to defray the ex-

pense of the suit. There is no such finding by the trial court, and the evidence does not compel such a conclusion. The trial court's exercise of its authority to grant or disallow attorney's fees, when properly exercised in accordance with statutory requirements, must stand. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975). There is no showing of an abuse of discretion. Moreover, the court did not find, as it must do before ordering defendant to pay attorney's fees under G.S. 50-13.6, that the defendant refused to provide adequate support at the time the action was instituted. In fact, the trial court specifically found to the contrary. The fact that plaintiff voluntarily had agreed to a $75 per month reduction of support payments substantiates that finding.

That part of the order of the trial court decreasing by one third the amount of child support payments is reversed. That part of the order denying plaintiff attorney's fees for the expense of defending the motion is affirmed.

Reversed in part; affirmed in part.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. EUGENE WILLARD ENSLIN

No. 794SC220

(Filed 7 August 1979)

1. **Constitutional Law § 12.1; Municipal Corporations § 37.2— privilege license for massage business—two ordinances—notice of prohibited conduct**

The fact that a city had two ordinances requiring a privilege license for a massage business did not render the ordinance under which defendant was charged for failure to obtain such a license void for vagueness, since such ordinance provided defendant with abundant fair notice that operating a massage business without a privilege license was prohibited

2. **Constitutional Law § 12.1; Municipal Corporations § 37.2— privilege license for massage business—equal protection**

A city ordinance requiring a privilege license for the operation of a massage business did not violate the Equal Protection Clause because it exempted regularly established and licensed medical clinics and offices or clinics operated by a licensed medical practitioner, osteopath or chiropractor in connection with his practice, since such exemptions were reasonable.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 12 December 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 June 1979.

Defendant was charged with operating a massage business known as "International Massage" without first having applied for and received a privilege license from the Jacksonville City Tax Collector in violation of Jacksonville City Ordinance, Chapter 14A, Section 1-1, subsection (c)(1), which provides as follows:

> "No person, partnership, corporation or association shall operate a massage business as herein defined unless such person, partnership, corporation or association shall first have applied for and received a privilege license from the City Tax Collector."

Section 1-1(b)(3) defining massage business provides that:

> "MASSAGE BUSINESS means any establishment or business wherein massage is practiced, including establishments, commonly known as health clubs, physical culture studios and massage parlors."

Defendant was found guilty as charged in district court and sentenced, suspended on condition that a fine of $50 and costs be paid, and that defendant obtain a license under Chapter 14A of the Jacksonville City Ordinance. The conviction was appealed to Superior Court.

Defendant filed in Superior Court a motion seeking to dismiss the charges on the grounds that the ordinance denies defendant the equal protection of the laws. Defendant's motion also pointed out that the City of Jacksonville's city ordinances contained in Chapter 17-15 another ordinance regulating the same conduct, and he alleged that having two applicable ordinances rendered the ordinance under which he was charged void for vagueness. The motion was heard and denied after the trial court considered counsel's briefs and documents. Defendant was brought for trial de novo in the Superior Court. His trial motion for a directed verdict was denied, and the jury returned a guilty verdict. Defendant appeals assigning error to the denial of his motion to dismiss the charges, and appeals the denial of his motion for directed verdict at trial.

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

Fred W. Harrison for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant challenges the rulings of the trial court and the applicable ordinance on two grounds. First, defendant contends Jacksonville's massage business licensing laws are unconstitutionally vague because two different ordinances purport to cover the same conduct. Defendant does not argue that the statute under which he is charged is vague in itself, but he argues that having two ordinances in effect, neither of which has been repealed or expressly superseded, violates due process by failing to provide fair warning of the prohibited acts and leaving impermissible discretion to law enforcement officers. *See generally Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972).

The ordinance under consideration operates in the field of business regulation, although it is in some respects a penal act. The courts recognize greater leeway in the sweep of statutory language in the regulation of business. *Id.* Furthermore, since the statute does not involve First Amendment freedoms, the ordinance will be considered in light of the specific facts of this case, and the specificity of the ordinance will be less strictly scrutinized. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed. 2d 561 (1963), *reh. denied*, 372 U.S. 961, 83 S.Ct. 1011, 10 L.Ed. 2d 13 (1963). Therefore, we consider the fundamental due process question whether the ordinance "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989, 996 (1954); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed 888 (1939).

In our opinion, the ordinance under which defendant was convicted provided defendant with abundant fair notice that operating a massage business without a privilege license was prohibited. The applicable provisions of the "new" statute quoted

above clearly requires a privilege license. Similarly, the "old" ordinance, even if it also were applicable, requires that:

> "SECTION 1-2. APPLICATION FOR LICENSE.
>
> Any person desiring to engage in the business, trade or profession of masseur or masseuse or the operation or carrying on of any of the businesses, trades, professions, occupations or callings mentioned in Section 1-1 shall, before engaging in such business, trade, profession, occupation or calling, file an application for a license addressed to the City Council of the City of Jacksonville. Such application shall be in writing and shall set forth the following.
>
> (a) Name and address of applicant. If such applicant be a corporation, the address or addresses of such corporation.
>
> (b) Qualifications must be plainly stated and must be submitted together with required exhibits annexed to said application."

The fact that there were two ordinances which might apply did not deny this defendant notice that a privilege license was required. Under either ordinance, defendant knew that he must have a license and that he should apply to the City Council for it. This he did not do, in violation of both ordinances.

Defendant also argues that the ordinance is so vague as to permit arbitrary enforcement. We need not address the question concerning whether the standards for granting the privilege license are sufficient and whether the procedures satisfy procedural due process requirements. There is no indication that this defendant has ever applied for a license. The only infirmity of which this defendant may complain is that concerning whether the ordinance requires that he apply for a privilege license. In this respect, as we noted above, the ordinance is plain and unambiguous.

[2] Defendant also attacks the ordinance on equal protection grounds asserting that the ordinance improperly granted immunity to businesses similarly situated. The ordinance specifically exempts from the licensing requirements a "regularly established and licensed hospital, sanitarium, nursing home or medical clinic" or an "office or clinic operated by a duly qualified and licensed

medical practitioner, osteopath or chiropractor in connection with his practice . . ." In the first section of the ordinance defining the law's purpose, the specific target for licensing was "the privilege of carrying on the business, trade or profession of masseur or masseuse and for the operation or carrying on of the businesses, . . . commonly known as massage parlors, health salons, physical culture studios, . . . or similar establishments by whatever name designated . . ." To satisfy the requirements of equal protection, it is only necessary that the classifications established by the ordinance be based upon reasonable, non-arbitrary standards. *Check v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968). The ordinance exempts already licensed health care facilities from the further requirement of obtaining a privilege license from the city. Qualifications for the privilege license simply require that each applicant show proof of good moral character and furnish a health certificate from a medical doctor. Such requirements are far below the qualifications necessary to establish a licensed health care facility or to obtain a license to practice in one of the enumerated schools of medicine. In our opinion, the exclusion of licensed health care facilities and the enumerated professional health care providers from the additional requirements of the privilege license is reasonable.

For the foregoing reasons, we find in the trial below

No error.

Judges PARKER and MARTIN (Harry C.) concur.

JOHN R. WILLIAMSON AND WIFE, NOEL T. WILLIAMSON v. PERCY N. VANN AND WIFE, JOSEPHINE VANN

No. 784SC849

(Filed 7 August 1979)

1. Adverse Possession § 24— evidence of intent to steal land—defendants not prejudiced

In an action to establish the true boundary line between the parties' property where defendants claimed adverse possession, defendants were not prejudiced by the plaintiffs' question as to whether a witness had ever heard

defendants' predecessor in title say that she was stealing the land in question, since (1) counsel for plaintiffs merely was attempting to elicit a response from the witness concerning whether defendants' predecessor ever acknowledged that she intended to take the property in question as her own, and the question thus struck at the heart of the issue presented at trial; (2) on a subsequent occasion where counsel for plaintiffs asked a similarly phrased question, the trial court on its own motion and in the presence of the jury cautioned plaintiff's counsel that the implicit criminal characterization of adverse possession was improper since the acquisition of title by adverse possession is a legally recognized procedure; and (3) by failing to object to a similar line of questioning of subsequent witnesses, defendants effectively waived their right to object to such questioning.

2. **Adverse Possession § 25.3— possession under mistaken belief of ownership—instruction required**

In an action to declare the true boundary line between the parties' property where defendants claimed adverse possession, there was sufficient evidence to support the trial court's instructions concerning the rule of law with respect to the occupation of another's land under the mistaken belief that it belongs to the person occupying the land.

APPEAL by defendants from *Reid, Judge*. Judgment entered 11 April 1978 in Superior Court, SAMPSON County. Heard in the Court of Appeals 30 May 1979.

Plaintiffs initiated this action seeking to establish the common boundary line between plaintiffs and defendants. Plaintiffs allege ownership of lots one through nine, Block A, of the W. M. Peterson Subdivision of the "Pugh Lands", recorded in book 888, page 324 of the Sampson County Registry. They alleged that defendants are the owners of the adjoining lot ten, and that their lot nine and defendants' lot ten have a common boundary. Plaintiffs allege that the true boundary between lot nine and lot ten begins at a common corner on Highway 24 and runs thence S. 02° 58′ 39″ E. 151.99 feet. This line is indicated as the boundary in the "Map of a Lot Subdivision for W. M. Peterson" dated April, 1928, which map is located in Map Book 1, page 86, of the Sampson County Registry. Plaintiffs pray that this line be established as the true boundary between plaintiffs' lot nine and defendants' lot ten. Defendants answered the petition averring that they and their predecessors in title have possessed a portion of the property claimed by plaintiffs under known and visible boundaries adversely to all persons for more than 20 years next preceding the commencement of this action. The action was transferred to the civil issue docket of the Sampson County Superior Court.

The evidence at trial indicated that the boundary line claimed by defendants was marked by a hedgerow beginning at the common corner in Highway 24 and running generally southward to a point 25 feet west of the point claimed by plaintiffs to be the southwestern corner of defendants' property. The boundary claimed by defendants constitutes a diagonal line bisecting lot nine from the northeast corner to the southwest corner. Defendants called numerous witnesses familiar with the property who testified that it was widely acknowledged in the community that the hedgerow was the common boundary and that the triangularly-shaped parcel in question had been tended by the owners of lot ten exclusively.

The case was submitted to a jury on the following issue: "Was the possession of the property by the defendants of such a character and of sufficient duration as to vest title in the property in the defendants?" The jury answered the issue "No". Defendants appeal.

Paderick, Warrick, & Johnson, by Benjamin R. Warrick, for plaintiff appellees.

Louis Jordan for defendant appellants.

MORRIS, Chief Judge.

Defendants have presented four assignments of error on appeal, two of which are directed to rulings on evidence and two of which are directed to the trial court's instructions to the jury. We will address the assignments of error in the order in which they are presented in the briefs.

[1] Defendants called as a witness Ophelia Blackmore who was familiar with the property in question, and who was an acquaintance of Annie Brewington Stevens, a predecessor in title to defendants and a resident of the house for nearly 40 years. She testified that around 1936 or 1937, the owner of the house once situated on lot nine, Mr. Fisher Smith, built a wire fence along the line now marked by the hedgerow. She testified that Mrs. Stevens' daughter later planted a hedgerow inside the fence and that Mrs. Stevens tended as her own that portion of lot nine now in question. On cross-examination by counsel for plaintiffs, the witness was asked, "Did you ever hear—did you ever hear Mrs.

Stevens say, point back to her flowers and that hedgerow and say, 'I'm stealing that land'?" Defendants' objection to the question was overruled and the witness responded, "She [Mrs. Stevens] thought the land was hers . . . [s]he thought that was the land she had purchased."

Defendants contend that plaintiffs' question improperly introduced into the case the element of criminal intent to steal. They assert, correctly of course, that criminal intent is not an essential element of establishing adverse possession. There is required only an intent to claim adversely to the true owner. *See Garris v. Butler*, 15 N.C. App. 268, 189 S.E. 2d 809 (1972). The unintentional possession of a tract of land or possession under the mistaken belief that it was embraced within the conveyance to the possessor will not constitute adverse possession. *Garris v. Butler, id.*; *see also Waldo v. Wilson*, 173 N.C. 689, 92 S.E. 692 (1917), *on rehearing*, 174 N.C. 626, 94 S.E. 442 (1917). However, we do not believe that the defendants were prejudiced by this testimony. First, counsel merely was attempting to elicit a response from the witness concerning whether Mrs. Stevens ever acknowledged that she intended to take that property as her own. An affirmative response would have negated the possibility of a mistake. Although imprecisely phrased in the legal sense, the question struck at the heart of the issue presented at trial: Was the property in question possessed under a mistaken belief that it was included in the deed description, or was the property being possessed by defendants and their predecessors in title in an actual, open, hostile, exclusive, and continuous manner? Second, we note that on a subsequent occasion where counsel for plaintiffs asked a similarly phrased question, the trial court on its own motion and in the presence of the jury cautioned plaintiffs' counsel that the implicit criminal characterization of adverse possession was improper since the acquisition of title by adverse possession is a legally recognized procedure. It is also true that the court's instructions properly defined the requisite intent to possess adversely as "a conscious intention to claim title to the land of the true owner". *See generally Bland v. Beasley*, 145 N.C. 168, 58 S.E. 993 (1907); *Garris v. Butler, supra.* Finally, by failing to object to a similar line of questioning of subsequent witnesses, defendants effectively have waived their right to object to such questioning. *See Highway Comm. v. McDonald*, 8 N.C. App. 56,

173 S.E. 2d 572 (1970); *see generally* 1 Stansbury's North Carolina Evidence § 30 (Brandis rev. 1973).

Defendants' second assignment of error is directed to the failure of the trial court, even in the absence of a special request, to instruct the jury that the question concerning the intent to steal was improper. Defendants contend such an instruction was necessary to insure that the jury was aware that an intent to steal was not required to establish adverse possession. We disagree. As we noted above, the trial court cautioned plaintiffs' counsel in the presence of the jury not to characterize the conduct necessary to establish adverse possession as "stealing". The jury must have understood that plaintiffs' characterization of adverse possession as "stealing" was not proper. Furthermore, the jury instructions which accurately defined the requisite intent necessary to establish adverse possession must have removed any possible confusion.

Defendants next assign error to a portion of the jury charge which they contend improperly summarized the evidence and was misleading to the jury. We initially note that the portion of the charge to which defendants except is a statement of the contentions of the plaintiffs, not a summary of the evidence. The court's summary, although perhaps at times awkwardly worded, is an accurate summary of the plaintiffs' contentions, and it could not have misled the jury. The summary properly states as plaintiffs' contention that even the testimony of defendants' own witnesses suggests that the defendants and their predecessors in title occupied that portion of the land in question out of a mistaken belief that it was included in the deed description of their lot ten.

[2] Finally, defendants contend that there was insufficient evidence in the record to support the trial court's instructions concerning the rule of law with respect to the occupation of another's land under the mistaken belief that it belongs to the person occupying the land. As noted above, the existence of such a mistake negates the requisite intent to establish adverse possession of property. Our reading of the record compels us to the conclusion that, not only was the instruction supported by the evidence, but that the trial court would have been in error if it had failed to instruct the jury on the issue of mistake. The record is replete with testimony which strongly suggests that the de-

fendants and their predecessors in title occupied the land in question under a mistaken belief that that land was encompassed within the description in their deed covering lot ten. G.S. 1A-1, Rule 51, compels the trial judge to declare and explain the law arising on the evidence. Where the evidence is susceptible of several interpretations, it is incumbent upon the trial court to give and explain the law on each variant interpretation which is supported by a reasonable view of the evidence. *Foods, Inc. v. Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975). Furthermore, "where the possession is so limited in area as to afford a fair presumption that the party mistook his boundaries and did not intend to set up a claim within the lines of the other's deed, it is proper ground for presuming that the possession is not adverse." *Waldo v. Wilson*, 173 N.C. at 693, 92 S.E. at 694.

No error.

Judges HEDRICK and WEBB concur.

FIRST UNION NATIONAL BANK v. ROSS M. OLIVE AND NANCY M. OLIVE

No. 7826DC819

(Filed 7 August 1979)

Appeal and Error § 6.2 — interlocutory order — appeal premature

The trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal therefrom was fragmentary and premature.

APPEAL by defendant from *Saunders, Judge*. Order entered 27 June 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 23 May 1979.

This is an action brought to recover the balance allegedly due on a purchase money security agreement covering defendants' purchase of five mobile homes. Plaintiff is the assignee of Guardian Credit Corporation and is a purchaser for value of the conditional sales contract. When defendants became four

payments in arrears under the security agreement, the entire balance was declared due and payable, and plaintiff repossessed the mobile homes on 3 November 1975. Plaintiff alleges that due notice of sale was given, and that the collateral was sold bringing a net sum, after expenses, of $5,115. Plaintiff alleges that, after giving defendants full credit for offsets and credit due, defendants jointly and severally are indebted to plaintiff in the sum of $2,667.70. Plaintiff also seeks attorney's fees according to the terms of the security agreement. Defendants, without legal counsel, answered the complaint averring that Mr. Alan Withrow of Arrowood Mobile Homes was the "seller, guarantor, and management for the five mobile homes with recourse". They aver that plaintiff had already satisfied the indebtedness by deducting $2,953.75 from the Arrowood Mobile Homes "Reserve Account". Defendants also aver that the expenses in connection with repossession and sale of the mobile homes were excessive. Defendants seek damages from plaintiff in the amount of $5,469.84.

Plaintiff filed, on 21 October 1977, a combined motion for summary judgment and request for admissions with respect to the genuineness of all relevant documents. There was no reply to the request for admissions, and summary judgment was thereafter entered in plaintiff's behalf on 19 January 1978. Defendants then obtained the services of counsel. A motion was filed to vacate the judgment on the grounds that defendants never were given the proper notice of hearing on the motion for summary judgment. An order vacating the judgment was entered 21 April 1978. Defendants then served plaintiff with interrogatories seeking information concerning the "Dealer Reserve Account" maintained with Alan T. Withrow. Soon thereafter, defendants filed a motion to permit them to answer plaintiff's request for admissions filed 21 October 1977. Plaintiff filed objections and moved to strike certain interrogatories on the grounds that they were irrelevant to the pending action. Defendants responded with a motion to compel discovery. On 12 June 1978, defendants requested that the trial court make findings of fact and conclusions of law with respect to defendants' pending motions and plaintiff's motion to strike interrogatories. An order was entered denying both defendants' motion to compel discovery and their motion to allow answers to the request for admissions. Plaintiff's motion to strike interrogatories was granted. Defendants appeal.

Clontz and Morton, by Ralph C. Clontz III, for plaintiff appellee.

Holleman and Stam, by Paul Stam, Jr., for defendant appellant.

PARKER, Judge.

Defendants are appealing from an order of the district court sustaining objections to, and granting a motion to strike, certain interrogatories directed to the plaintiff concerning a so-called "Dealer Reserve Account". In the same order, the court denied defendants' motion to compel answers to those interrogatories. Defendants also appeal from the denial of their motion to permit them to respond to plaintiff's request for admissions. Defendants, therefore, are seeking to appeal from an order which is interlocutory in nature. However, it is well established in this State that no appeal lies from an interlocutory order or ruling unless such ruling deprives the appellant of a substantial right which would be lost if the ruling were not reviewed before final judgment. G.S. 1-277, G.S. 7A-27. *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975) (lists examples of appealable interlocutory rulings). Defendants' appeal is fragmentary and premature. *Pack v. Jarvis*, 40 N.C. App. 769, 253 S.E. 2d 496 (1979). The posture in which the issues are presented render this Court's determination of the prejudicial effect of alleged errors purely conjectural. The case of *Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 231 S.E. 2d 597 (1977), is distinguishable on the compelling facts of that case.

Appeal dismissed.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. JEROME LOVICK

No. 788SC464

(Filed 7 August 1979)

Receiving Stolen Goods § 5 — removal of hams by store employees — larceny rather than embezzlement

The State's evidence in a prosecution for feloniously receiving stolen goods was sufficient to show that the goods were taken under such circumstances so as to constitute larceny as alleged in the indictment where it tended to show that two grocery store employees removed hams from the storeroom without the permission of their employer and sold them to defendant at half price, and that the employees had been hired to bag groceries and sweep up, since the employees were not entrusted with the hams and thus acquired possession of them illegally, which would make their crime larceny and not embezzlement.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 1 March 1978 in Superior Court, LENOIR County. Heard in the Court of Appeals 20 September 1978.

Defendant was tried on his plea of not guilty to a charge of feloniously receiving stolen goods. The State presented evidence to show that Winefred Parker and Clarence Ingram were employed to bag groceries and sweep up at J. C. Moore's store. Without permission from their employer, the two men removed hams from the storeroom and took them at night to the house of the defendant, who bought them at half price, having first been informed where the hams came from and having been cautioned not to let anyone know where he got them. For their part in these transactions, the two employees were charged with felonious larceny and embezzlement. They pled guilty to nonfelonious larceny, and the felony charges were dropped.

The defendant testified and denied having bought any hams from Parker or Ingram.

The jury found defendant guilty of non-feloniously receiving stolen goods. From judgment sentencing him to jail for ninety days, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Claude W. Harris for the State.

Fred W. Harrison for defendant appellant.

PARKER, Judge.

Defendant first contends that his motion for a directed verdict should have been allowed because the State's evidence failed to show that the goods were taken under such circumstances as to constitute larceny. The indictment charged that defendant did feloniously receive property knowing the same to have been "feloniously stolen, taken and carried away." If the State's evidence had indeed failed to show a larceny, defendant's motion should have been allowed. *See State v. Babb*, 34 N.C. App. 336, 238 S.E. 2d 308 (1977). In *Babb* the defendant was tried and found guilty on a charge similar to that involved in the present case. The State's evidence showed that defendant Babb had purchased tires from a tire department foreman to whom the tires had been entrusted by his employer and who had apparent and actual authority to sell them. On appeal, this Court held that defendant's motion for nonsuit should have been allowed because of the variance between the charge, which alleged the goods to have been stolen (a violation of G.S. 14-72), and the proof, which showed that the goods had been embezzled by the foreman from his employer in violation of G.S. 14-74.

The present case is distinguishable from *State v. Babb*, supra, on its facts. In the present case both J. C. Moore and his employees testified that the employees were hired to bag groceries and sweep up. There is nothing in the evidence to show that Moore in any sense entrusted the hams to Parker and Ingram before the two men removed the hams from the store. Thus, in this case, contrary to the situation in *Babb*, the evidence shows that the employees acquired *possession* of their employer's property illegally, which would make their crime larceny and not embezzlement.

> Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent . . . . In embezzlement [on the other hand] the possession of the property is acquired lawfully by virtue of a fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime.

State v. Griffin, 239 N.C. 41, 45, 79 S.E. 2d 230, 232-33 (1945). Using this analysis, it is clear that the evidence in the present case, unlike the evidence in *State v. Babb*, tended to prove the commission of larceny, not embezzlement. Thus, in this case there was no variance between the charge and the proof, and defendant's motion for a directed verdict was properly denied.

Defendant's remaining contention is that the court erred in its charged to the jury. In this connection the court instructed the jury that they should return a verdict of guilty if they found from the evidence beyond a reasonable doubt that defendant, with a dishonest purpose, received from Parker or Ingram hams which he knew "or had reasonable grounds to believe" someone had stolen. Defendant concedes that the quoted portion of the charge was justified by the amendments effected to G.S. 14-71 and G.S. 14-72(c) by Ch. 163 of the 1975 Session Laws, which added the words "or having reasonable grounds to believe" after the word "knowing" in each of those statutes. Defendant's contention is that the court erred in failing to go further and to charge the jury that they should judge the reasonableness of defendant's belief from the circumstances as they appeared to him at the time he received the stolen goods. We do not agree that such additional instruction was required. From the charge as given the jury must have clearly understood that they could find defendant guilty only if they should find from the evidence beyond a reasonable doubt that *at the time he received the stolen hams* he knew or had reasonable grounds to believe they had been stolen.

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

No error.

Judges HEDRICK and MARTIN (Robert M.), concur.

GLADYS MARIE GERRINGER v. OTIS JOHN CALVIN GERRINGER

No. 7818DC784

(Filed 7 August 1979)

Divorce and Alimony § 13.2— absolute divorce after one year's separation—effect of abandonment—beginning of separation

In plaintiff's action for absolute divorce on the ground of one year's separation, there was no merit to defendant's contention that as a matter of law their period of separation did not begin until the entry of judgment in plaintiff's prior action for permanent alimony and alimony pendente lite wherein alimony was denied because of plaintiff's willful abandonment of defendant, since abandonment is not available as a defense to an action under G.S. 50-6 and since the prior judicial determination did not mark the beginning of the parties' separation, their physical separation having occurred over three years before such determination.

APPEAL by defendant from *Cecil, Judge*. Judgment entered 14 July 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 21 May 1979.

Facts necessary for this decision are summarized in the opinion below.

Gerald C. Parker for defendant appellant.

No counsel contra.

MORRIS, Chief Judge.

Defendant appeals assigning error to the order of the district court granting plaintiff a decree of absolute divorce pursuant to G.S. 50-6. Plaintiff filed her action 22 March 1978 alleging that she and defendant were married 7 June 1952 in South Carolina; that they separated and continuously have been living apart since 3 May 1974; that she has been a resident of North Carolina for six months next preceding the commencement of this action; and that there are no pending actions for support or alimony between the parties. Plaintiff prayed only for a decree of absolute divorce. Defendant answered the complaint generally admitting the allegations, but denied that the parties had been separated since 3 May 1974. He pled in bar of this action a prior judgment entered 26 September 1977 in which plaintiff's action for alimony was dismissed and in which she was found to have abandoned defendant and their two minor children. Defendant also pleads as his

third defense plaintiff's adultery. He moved to dismiss the complaint. Nevertheless, the trial court entered judgment granting plaintiff an absolute divorce without alimony.

Defendant contends that as a matter of law their period of separation did not begin until the entry of judgment in his wife's prior action for permanent alimony and alimony pendente lite wherein alimony was denied because of her willful abandonment of defendant. His reasoning is apparently that at the time that prior suit was initiated, G.S. 50-6 permitted a plea of abandonment in bar of divorce because of one year's separation. Therefore, defendant would argue, our law cannot consider the period of separation prior to entry of that previous judgment 26 September 1977. We find no support for defendant's strained interpretation of the history of G.S. 50-6. Affecting all cases initiated since 1 August 1977, G.S. 50-6 has eliminated recriminatory defenses by the addition of the following language: "A plea of res judicata or of recrimination, with respect to any provision of G.S. 50-5 [and effective 11 June 1978, also G.S. 50-7] shall not be a bar to either party obtaining a divorce [under G.S. 50-6]." This amended statutory language was in effect when plaintiff initiated her action 22 March 1978. Therefore, abandonment is not available as a defense to an action under G.S. 50-6.

Defendant contends, nevertheless, that he is not pleading the prior judicial determination of abandonment in bar of the action, but only as a factor in determining the length of separation. We note that a judicially recognized separation may be considered in determining the period of separation. *See e.g., Earles v. Earles*, 29 N.C. App. 348, 224 S.E. 2d 284 (1976). However, a physical separation of the parties, which occurred 3 May 1974, accompanied by an intention on the part of at least one of the parties to cease the matrimonial obligation, is also a sufficient separation under the statute. *See Earles v. Earles, id.* There is no question but that such a separation occurred. Merely because abandonment was a defense to this action during a period of the separation does not render that period of separation ineffectual.

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

Affirmed.

Judges HEDRICK and WEBB concur.

GERALD P. WILLIS, ADMINISTRATOR OF THE ESTATE OF DAVID S. WILLIS, DECEASED v. DUKE POWER COMPANY, A CORPORATION

No. 7826SC535

(Filed 21 August 1979)

1. **Death § 3— wrongful death action—death of primary beneficiary—no abatement**

A wrongful death action did not abate upon the death of decedent's mother, the primary beneficiary, pending trial of the action; rather, the action should be continued by decedent's administrator for the recovery of damages measured by the loss to decedent's mother up to the time of her death.

2. **Electricity § 7.1— ladder touching uninsulated wires—negligence—question of fact**

In an action to recover for the death of plaintiff's intestate which occurred when an aluminum ladder he was moving while painting a house came into contact with an uninsulated high voltage wire maintained by defendant power company, the evidence on motion for summary judgment presented a question of material fact as to defendant's negligence where it tended to show that another person had been electrocuted less than a year before when an aluminum ladder came into contact with the same uninsulated wire while painting the same house, and the wire was located only 3' 10" from the side of the house.

3. **Electricity § 8— ladder touching uninsulated wire—contributory negligence—question of fact**

In an action to recover for the death of plaintiff's intestate which occurred when an aluminum ladder he was moving while painting a house came into contact with an uninsulated high voltage wire maintained by defendant power company, the trial court erred in entering summary judgment for defendant on the ground that decedent was contributorily negligent as a matter of law where the evidence did not lead to the inescapable conclusion that decedent knew the location of the wires, knew that they carried a high voltage, or could have seen the wires from his location on the ground.

APPEAL by plaintiff from *Thornburg, Judge*. Judgment entered 17 January 1978 in the Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 March 1979.

Plaintiff's intestate, a young man 24 years of age, was killed on 4 October 1973, when the aluminum ladder he was attempting to move came near or in contact with one of defendant's uninsulated main distribution high tension wires located on property situate at 112 Tranquil Avenue, in Charlotte. Plaintiff alleged that approximately one year prior to his intestate's death, a former

owner of the property was killed "by electric current from the same uninsulated wires at the same place under the same or substantially similar circumstances as those alleged in this complaint," and that defendant, therefore, had notice of the "position, height, condition and obscurity of its naked high voltage wires and of the dangerous proximity of its wires to the house; and Duke Power had actual knowledge and notice of the extraordinary danger of said high tension wires to any person lawfully on or about the east side of said house, including particularly the owners of the property, their agents, employees, servants, licensees, invitees, guests or family, and particularly the inherent dangers to any person attempting to paint or perform any kind of work on the east side of the house requiring the use of a ladder." Plaintiff alleged further that his intestate was without knowledge that the wires were situate as they were, carried high voltage current, were uninsulated and otherwise unprotected, that he was exposed to extraordinary risks and special danger, or that a person had been electrocuted at the same location under substantially similar conditions a year earlier, but that even if he had known that Duke maintained uninsulated high voltage wires a few feet from the house he was painting, he was unable to see them or recognize that he was directly under them because of the height and thickness of the shrubbery, underbrush and trees all along the area on the east side of the property at 112 Tranquil Avenue.

Duke answered the complaint, denying all allegations of negligence, and setting up a plea of contributory negligence of plaintiff's intestate and alleging that the acts of negligence of plaintiff's intestate were the sole proximate cause of his death.

After extensive discovery, defendant moved for summary judgment, stating as grounds therefor the following: (1) the action had abated by reason of the death, after action was brought, of Elizabeth Shelton Willis, mother of the intestate, and sole beneficiary entitled to recover for his death under the wrongful death statute, (2) that defendant, as a matter of law, was not negligent, and (3) that plaintiff's intestate was contributorily negligent as a matter of law. The court granted defendant's motion on the grounds stated therein. Plaintiff appeals assigning as error the granting of the motion.

Cansler, Lockhart, Parker & Young, by Thomas Ashe Lockhart, Joe C. Young, and John M. Burtis, for plaintiff appellant.

William I. Ward, W. Edward Poe, Jr., and Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins III, for defendant appellee.

MORRIS, Chief Judge.

[1] The threshold question for decision on this appeal is whether the action abated upon the death of Elizabeth Shelton Willis, mother of decedent, after commencement of the action but pending trial. The trial court, by granting defendant's motion for summary judgment "based on the grounds stated in the motion", held that it did. We do not agree.

Resolution of this question of first impression in this State requires consideration of the former wrongful death statute, cases interpreting that statute, and the new wrongful death statute.

No right of action for wrongful death existed at common law, and it has oft been said that it was cheaper to kill than to injure. By "The Fatal Accidents Act", 1846, 9 & 10 Victoria, c. 93, §§ 1-6, commonly known as Lord Campbell's Act, a right of action for wrongful death was brought into being. Section 1 of that statute provided:

> "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued should be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

This basic portion of Lord Campbell's Act has now been adopted by every State. There are differences among the States in the method of measuring damages and distributing recovery. The basic portion of Lord Campbell's Act was adopted in North Carolina in 1868-69 and remains in almost identical verbiage in

present G.S. 28A-18-2(a). (The 1969 Legislature rewrote G.S. 28-174, the damages section of the wrongful death statute, and the 1973 Legislature combined G.S. 28-173 and G.S. 28-174 into one statute designated as G.S. 28A-18-2.)

Prior to the 1969 amendment, the statute (G.S. 28-173) provided that the amount recovered in such an action would not be applied as an asset of the estate to the payment of debts of the decedent, except for burial expenses of the deceased and reasonable hospital and medical expenses not exceeding $500, "but shall be disposed of as provided in the Intestate Succession Act." G.S. 28-174 provided for the recovery of "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." That language remained unchanged from 1869 to 1969. The Court construed the language to mean that the jury was required to determine the amount of money decedent would have earned during the period the jury should find he would have lived, determine and deduct his ordinary living expenses, and then ascertain the present net worth of the accumulation of those net earnings. The resulting figure represented the pecuniary value of the life of the decedent to his estate. *See Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49 (1952). The statute made no provision for punitive damages, nor did it allow for nominal damages if there was no pecuniary loss. *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E. 2d 793 (1958).

Under the former statute, it is very clear that the action did not abate upon the failure or absence of next of kin prior to judgment. *See* Note, Wrongful Death Damages in North Carolina, 44 N.C.L. Rev. 402, at 425. In *Warner v. The Railroad Co.*, 94 N.C. 250 (1886), the trial court had indicated that plaintiff's complaint was defective because it failed to allege in a wrongful death action that decedent left surviving him next of kin and refused to allow plaintiff to amend. Plaintiff submitted to a nonsuit and appealed. In addressing this question, the Court noted that the statute required that damages were not simply to be "distributed", but "*disposed of*", (*id.* at 257) and that it appeared that the purpose of the statute was to give the right of action for the recovery of damages for wrongful death without regard to who might become beneficiaries, excluding, of course, creditors and legatees. The Court regarded this view as strengthened by the fact that the North Carolina statute was different from the

majority of statutes in the United States in that the statutes in most states provided for a designated beneficiary or beneficiaries —usually wife and children—and the measure of damages generally was made to depend on who was designated to receive the proceeds of the action. The Court in holding it unnecessary to allege the survival of next of kin, said:

> "We are unable to see anything in the terms or purpose of the statute, that warrants such interpretation of it as would exclude the University from taking the damages recovered in the absence of next-of-kin. The statute, (The Code, Sec. 1498), in broad and comprehensive terms, gives the action; Sec. 1499, prescribes in terms quite as comprehensive, that the damages recoverable shall be such 'as are a fair and just compensation for the pecuniary injury resulting from such death,' and Sec. 1500 prescribes that such damages shall not be applied as assets in the payment of debts or legacies, 'but shall *be disposed of* as provided in this chapter, for the distribution of personal property, *in case of intestacy*.' It is observable that the damages are not simply to be *disposed* of as provided in this chapter for the *distribution* of *personal* property, but as '*in case of intestacy*.' These latter words are significant, as tending to show a definite purpose, to make a complete disposition in any case, of the damages. As we have seen, in case of intestacy, the personal property of the intestate is to be distributed, first, to the widow and children, or the legal representative of such child or children as may be dead; if there be none, the representative of children; then to the succeeding next-of-kin generally, and if the classes thus entitled, do not claim it in the way and within the time prescribed, it is just as certainly to be disposed of to the University.
>
> It is said that the purpose of actions like this, is to provide for the widow and children of the intestate, and this is no doubt true, but it is likewise just as true and certain—the provision is plain—that their further purpose is to provide for the next succeeding next-of-kin, who, in many cases, have very little natural claim upon the intestate. The purpose of such actions reaches certainly beyond the claim of those who are first entitled to the benefit of the labor and efforts of the intestate. It seems to have been part of the purpose of the

> statute giving the action and disposing of the damages recoverable in it, to give the latter to the University in case of the possible absence of next-of-kin. It has for a long period been the settled policy of the State, to dispose of unclaimed property in the hands of executors and administrators, to the University, and a like disposition is made of damages in actions like the present.
>
> So, that in any case, the statute directs a disposition of the damages that may be recovered from the defendant in this action. It cannot, therefore, concern it to inquire who shall be entitled to take benefit of the same. It has no right or interest in that respect. Hence, it was not only not necessary, but it would have been improper, to allege in the complaint that there were next-of-kin of the intestate. Any issue raised in such respect, would have been beside the case, immaterial and improper." 94 N.C. at 259-60.

See also Wilson v. Massagee, 224 N.C. 705, 32 S.E. 2d 335 (1944); *McCoy v. R.R.*, 229 N.C. 57, 47 S.E. 2d 532 (1948); *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203 (1947); *Abernethy v. Utica Mutual Insurance Company*, 373 F. 2d 565 (4th Cir. 1967).

The Court also noted that in some states, though not uniformly so held, where the statutes designated the persons to take, it might be quite in order to require an allegation in the complaint of the existence of such persons, "because, in the absence of persons to take, the action would not lie." 94 N.C. at 260.

And in *Neill v. Wilson*, 146 N.C. 242, 59 S.E. 674 (1907), the Court said that the wrongful death statute gave clear indication of the intent of the Legislature to impress upon the right of action for wrongful death "the character of property as a part of the intestate's estate, and that, for the purpose of devolution and transfer, the rights of the claimants should be fixed and determined as of the time when the intestate died." *Id.* at 245.

A case strikingly similar in pertinent aspects to the one before us is the leading case of *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 57 S.Ct. 452, 81 L.Ed. 685 (1937). There the Court was construing the portion of the Merchant Marine Act of 1920 (46 U.S.C.A. § 688) which provides (by reference to provisions of

Federal Employer's Liability Act, 45 U.S.C. § 51) in event of the death of a seaman, for an action for the benefit of "the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." The seaman died unmarried, leaving surviving him his mother and several brothers. Thus the mother was the sole beneficiary of the statutory cause of action. She was appointed administratrix of her son's estate and, as administratrix, filed claim for damages. Pending determination of the suit, the mother died, and a brother of the deceased seaman was appointed to succeed her as administrator. The District Court dismissed the action on the ground that at the death of the mother, liability abated. The Court of Appeals affirmed. The Supreme Court granted certiorari and reversed. Mr. Justice Cardozo, writing the opinion for the Court, noted that the action is for the wrong to the beneficiaries and is confined to their pecuniary loss by his death and said:

> "Viewing the cause of action as one to compensate a mother for the pecuniary loss caused to her by the negligent killing of her son, we think the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter, the damages when collected to be paid to her estate. Such is the rule in many of the state courts in which like statutes are in force. It is the rule in New York, in Pennsylvania, in New Jersey, in Oklahoma, in Georgia, in Kentucky, in North Carolina, and under statutes somewhat different in Connecticut and Massachusetts. . . .
>
> When we remember that under the death statutes an independent cause of action is created in favor of the beneficiaries for their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, like a cause of action for injury to a property right or interest, to the extent that the estate of the deceased beneficiary is proved to be impaired. To that extent, if no farther, a new property right or interest, or one analogous thereto, has been brought into being through legislative action. True, there are decisions under the death statutes of some states that teach a different

> doctrine, refusing to permit a recovery by the administrator after the beneficiary has died, though the ruling has been made at times with scant discussion of the problem.
>
> . . .
>
> Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied." 300 U.S. at 347-51, 57 S.Ct. 452, 81 L.Ed. at 688-90.

Although our wrongful death act was amended drastically in some respects in 1969, there was absolutely no change in the basic portions allowing the action and providing for the disposition of the recovery. The statute, now G.S. 28A-18-2(a), in language identical to the former statute, provides that the action shall be brought by the personal representative or collector of the decedent; that the amount recovered is not an asset of the estate for the payment of debts and legacies except for burial expenses and the $500 limitation on hospital and medical expenses; that the recovery "shall be disposed of as provided in the Intestate Succession Act." We find nothing in the amended statute which would, in any way, indicate any intent on the part of the Legislature that a wrongful death action should abate upon the death of the primary beneficiary pending determination of the action. We are aware that some states do hold that an action abates. Indeed, there are a few states which so provide by statute, and at least one which, by statute specifically provides that the action shall not abate upon death of the "person wronged". Tenn. 20-602. Our research discloses that in states which use the loss to the estate as the measure of damages, there is no abatement, because the existence of beneficiaries is not a requisite to the bringing of the action. In those states where the damages are measured by loss to the beneficiaries, the action abates only when the beneficiary who dies during the pendency of the action is the only surviving beneficiary who can qualify under the statute to receive the compensation for the wrongful death. *See Note*, Wrongful Death Damages in North Carolina, *supra*; *Annot.*, 13 A.L.R. 225 (1921); *Annot.*, 34 A.L.R. 1247 (1925); *Annot.*, 59 A.L.R. 760 (1929); *Annot.*, 43 A.L.R. 2d 1291 (1955). The cases cited

by defendant are cases from jurisdictions having entirely different statutory provisions with respect to those entitled to the recovery. Our conclusion that the General Assembly did not intend that the action abate in the circumstances of the case before us is bolstered by the fact that the new statute provides that the damages recoverable for wrongful death shall include "nominal damages when the jury so finds" G.S. 28A-18-2(b)(6); this, in spite of and in addition to the provisions that damages shall include "the present monetary value of the decedent to the persons entitled to receive the damages recovered, . . ." G.S. 28A-18-2(b)(4). The intimation that there shall not be an abatement is, we think, quite clear in the statute, and there is nothing which indicates that the court's interpretation of the former statute should not be just as applicable to the present statute.

[1] For the reasons set out, the court erred in granting the motion for summary judgment on the grounds that the action had abated. The action shall be continued by the administrator for the recovery of damages measured by the loss to decedent's mother up to the time of her death, in accordance with the provisions of G.S. 28A-18-2(b).

We turn now to the question of whether the court erred in granting the motion for summary judgment on the ground that defendant, as a matter of law, was not negligent, or on the ground that plaintiff's intestate was contributorily negligent as a matter of law.

In determining whether a movant is entitled to summary judgment under G.S. 1A-1, Rule 56, we must first determine whether there is no genuine issue of material fact and then whether movant is entitled to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), and cases there cited. Summary judgment is a rather drastic remedy and one to be granted cautiously. This is particularly true in actions alleging negligence as a basis for recovery. In *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 173-74, 249 S.E. 2d 827, 828-29 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979), we said:

> "Nevertheless, it has often been said by the courts of this and many other jurisdictions that only in exceptional cases involving the question of negligence or reasonable care will summary judgment be an appropriate procedure to resolve

the controversy. (Citations omitted.) The propriety of summary judgment does not always revolve around the elusive distinction between questions of fact and law. Although there may be no question of fact, when the facts are such that reasonable men could differ on the issue of negligence courts have generally considered summary judgment improper. (Citations omitted.) Judge Parker for this Court explained:

> 'This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries.' *Robinson v. McMahan*, 11 N.C. App. at 280, 181 S.E. 2d at 150; *see also Edwards v. Means*, supra.

The jury has generally been recognized as being uniquely competent to apply the reasonable man standard. *See generally* Prosser, Torts § 37 at 207 (4th Ed. 1971). Because of the peculiarly elusive nature of the term 'negligence', the jury generally should pass on the reasonableness of conduct in light of all the circumstances of the case. This is so even though in this State '[w]hat is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does nor does not exist.' *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E. 2d 457, 461 (1972)."

[2] Applying these principles to the facts of the case before us as contained in depositions, affidavits, and interrogatories, in addition to the sworn pleadings and admissions, we cannot agree that the court properly entered summary judgment based on the ground that defendant, as a matter of law, was not negligent.

Less than a year before the death of plaintiff's intestate, and on 28 October 1972, Nelson L. Hale, Jr., died as the result of electrocution which occurred on the same premises. There, too, the decedent had been engaged in painting the house trim. The plaintiff's intestate there had been the owner of the house, and he was using an aluminum extension ladder. In maneuvering the ladder, Hale brought it into contact with the defendant's uninsulated wires at the same place on the premises. We think what we said

in that case, *Hale v. Power Co.*, 40 N.C. App. 202, 204-05, 252 S.E. 2d 265, 267-68 (1979), is just as applicable here as it was there.

> "Our courts have repeatedly stated that a supplier of electricity owes the highest degree of care. *See Small v. Southern Public Utilities Co.*, 200 N.C. 719, 158 S.E. 385 (1931), and cases cited therein. This is not because there exists a varying standard of duty for determining negligence, but because of the 'very dangerous nature of electricity and the serious and often fatal consequences of negligent default in its control and use.' *Turner v. Southern Power Co.*, 154 N.C. 131, 136, 69 S.E. 767, 769 (1910). 'The danger is great, and care and watchfulness must be commensurate to it.' *Haynes v. The Raleigh Gas Co.*, 114 N.C. 203, 211, 19 S.E. 344, 346 (1894). 'The standard is always the rule of the prudent man,' so what reasonable care is 'varies . . . in the presence of different conditions.' *Small v. Southern Public Utilities Co., supra* at 722, 158 S.E. at 386.
>
> We cannot agree with defendant's argument that the 'prudent man' rule has been supplanted by the requirements of the National Electrical Safety Code, adopted in 1963 as Rule R8-26 of the North Carolina Utilities Commission. Even assuming that defendant complied with the Code, we cannot say that such compliance would make defendant free of negligence as a matter of law. Taking the evidence for the moment in the light most favorable to the defendant, the record shows that the wires here were 7200 volt distribution lines (a much higher voltage than that of the house service lines, which in this case carried 122 and 240 volts) which passed the east side of the Hale house 3′ 10″ from the side of the house, and 22′ 7″ above the ground, clearances which complied with the National Electrical Safety Code. The distribution line was uninsulated, also in compliance with the Code. The house was Tudor style and had two stucco and wood gables, the lowest 18′ and the highest 24′ 8″.
>
> On these facts there is a genuine issue of material fact relating to defendant's duty to insulate the high voltage wires maintained in such close proximity to a house which would obviously need maintenance, such as paint. In *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E. 2d

255, 257 (1979), our Supreme Court noted the rule in this jurisdiction with regard to the duty to insulate wires:

> 'That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore, the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go.' (cite omitted)

Moreover, we cannot say that the alleged negligence of defendant could not have been the (sic) proximate cause of Hale's injury. As noted in *Williams, supra* at 403, 'it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." ' The factual occurrences of this case do not present such an exceptional case, and it is for a jury to determine whether defendant did all it was required to do under the circumstances."

[3] We must now consider whether the court erred in allowing defendant's motion for summary judgment on the ground that plaintiff's intestate was contributorily negligent as a matter of law. Again we must disagree with the trial court.

We are certainly aware of the rule, which is well settled in this State, that a person has a legal duty to avoid contact with an electrical wire of which he is aware and which he knows may be very dangerous. *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788 (1956). "That does not mean, however, that a person is guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap." *Williams v. Power & Light Co.*, 296 N.C. 400, 404, 250 S.E. 2d 255, 258 (1979).

In the cases on which defendant relies, *Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966); *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31 (1977), *cert. denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977); *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976), plaintiff's intestate had been explicitly warned about the specific wire which subsequently killed him. The evidence before the court in the case before us leaves to conjecture whether the plaintiff's intestate knew the location of the uninsulated high voltage wire or could have seen it even if he knew of its location.

Charles F. Edwards, Jr., by deposition, testified that he met David Willis (plaintiff's intestate) and James S. Thompson at the Tranquil Avenue house on 4 October 1973 for the purpose of showing them what painting needed to be done on the house. Mrs. Baylis, the owner of the house, had shown Mr. Edwards what she wanted done some week prior to this date, and she was around that day. She met them in the front yard and walked around the house with them. At that time, nothing was said about wires. They walked around the east side of the house, where the accident occurred, but Edwards did not notice any wires. Willis and Thompson started working. Between 10:00 and 10:30 Edwards returned to the Baylis house with additional equipment for Willis and Thompson. At that time they were on the west side of the house. As he was leaving, Mrs. Baylis stopped him and said, "Charlie, there are some wires back there, back of the house, that if you touch them you could get electrocuted", gesturing with her arms toward the rear of the house. He told her the painters needed to hear it, so they walked over to where they were, and she repeated it but did not motion to the rear of the house. She was very casual about it. He noticed some telephone wires going to the middle of the back of the house and thought they were the wires about which she was talking. "At no time prior to the death of David Willis did I notice the wires on the east side of the house . . . Prior to David Willis's death, I did not know that the wires that were lying along the east side of the Baylis's house were not insulated. I did not notice the wires at all, as a matter of fact. They were almost hidden . . . It was difficult to see them because they have a lot of cane and shrubbery and it's very dark so any wire would be difficult to see around that area on the east side. It's very dark, therefore, making it difficult to see any wire on

the east side . . . concerning my observations the day after the accident when the wires had been put back up, they were extremely, extremely difficult to see at that time. I was amazed that Tommy, who had been painting and who had almost finished the east side, had not been killed because they were extremely difficult to see. Unless you were really looking for them, you could not—you would not notice them. You would not have noticed them." The growth on the east side of the house was thick and at least 15' high. "When I looked up to see the top of the greenery, I did not see any wires at all that I noticed."

James Thompson testified that he did not hear any conversation between Mrs. Baylis and Edwards about the wires; that about mid-afternoon Mrs. Baylis came out with a friend. He was working on the east side of the house. She said there were some live wires in the back of the house and to be careful and to tell David. "I told David. I told him that Mrs. Baylis had said there were some live wires and that we should be careful. There were some drop wires that led to the back that came into the house for the appliances and telephone and whatever. I assumed those were the ones because we were right there beside them and he said okay, he'd watch it. When Mrs. Baylis told me and when I went back to tell him to be careful, I did not see the wires that ran along the easterly edge of the property. Later in the afternoon, when I was beside them sitting on the roof, I noticed them over to my side." Mrs. Baylis never pointed to the particular wires. Thompson did not think David heard Mrs. Baylis because he was in the back of the house on the roof and was around the corner where Thompson was sitting on the roof. She was out of sight of David and the radio was playing loudly. David never painted on the east side. David came over for them to decide whether to stop for the day. They decided to try to finish. David knew how to move the ladder and Thompson had never done it. He helped David stand it up and David began to move the ladder when it was in an upright position. A couple of seconds later, Thompson heard the noise. David had moved four or five steps with the ladder.

With respect to whether the lines were easily seen, Mrs. Baylis testified: "I have a problem seeing the wires. To me, the trees obscured the lines and when you are that close to the house in a seven foot area with the overhanging bamboo, you have a

very crowded feeling." She said her husband had worked on that side of the house and had no problem with seeing the wires. She said when she told Edwards to be careful of the wires she indicated the east side of the house. She did not mention Hales's death because she thought the situation had been corrected. She said she cautioned the boys three or four times. At the time she talked to Thompson on the east side of the house, David was in the back of the house "ten to twenty feet, well maybe more than that, away". She believed her voice was loud enough for him to hear it.

Her husband testified, as did others, that the wires were not obstructed by the shrubbery.

Evidence of the people who were at the scene at various times during the day does not lead to the inescapable conclusion that plaintiff's intestate knew the location of the wires, knew that they carried the voltage that they did, could have seen the wires from his location on the ground, or, as a matter of fact, negligently moved the ladder.

Even if there were no contradictions in the evidence, and there are, we think "reasonable men could differ on the issue of negligence." *Gladstein v. South Square Assoc., supra.* It follows that the trial court erroneously entered summary judgment for defendant based on plaintiff's intestate's contributory negligence as a matter of law.

For the reasons stated in this opinion, the judgment of the trial court must be

Reversed.

Judges CLARK and ARNOLD concur.

KENNETH C. LEWIS v. JESSE ROBERT BOLING, JR. AND WIFE, BETTY JEAN BOLING

No. 783SC811

(Filed 21 August 1979)

1. **Evidence § 32— partnership agreement unchanged by testimony—no violation of parol evidence rule**

Where a partnership agreement was neither contradicted, added to, nor varied by plaintiff's evidence at trial, no violation of the parol evidence rule was shown.

2. **Trusts § 18; Evidence § 32— conversations prior to execution of deed—fiduciary relationship between grantor and grantee**

In an action to impose a trust upon a one-half undivided interest in real property, the trial court did not err in permitting plaintiff to testify to conversations between the parties, who were business partners, prior to the signing of a deed by which legal title to the parties' property was conveyed to a corporation solely owned and controlled by defendants, since obligations between a grantor and grantee arising from a fiduciary relationship will be enforced by a court of equity by imposition of a constructive trust if necessary, even if there has been no fraud in the original procurement of the conveyance.

3. **Trusts § 16— amendment of complaint to allege constructive trust proper**

The trial court did not err in permitting plaintiff to amend his complaint to allege a constructive trust rather than a resulting trust, where plaintiff's evidence tended to show that the parties were business partners; plaintiff conveyed his interest in property which the parties held as joint tenants to a corporation solely owned by defendants for the purpose of securing a loan for completing a building on the property; subsequent to execution of the deed, the parties continued their partnership as it existed before such execution; and defendant thereafter claimed the property as his own to the exclusion of plaintiff.

4. **Partnership § 3— rule against suit between partners—conversion of joint property as exception**

Where joint property has been wrongfully converted, the rule that one partner may not sue another upon a demand arising out of a partnership transaction until there has been a complete settlement of partnership affairs and a balance has been struck is inapplicable.

APPEAL by defendants from *Bruce, Judge*. Judgment entered 16 May 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals 23 May 1979.

This is a civil action to impose a trust upon a one-half undivided interest in real property. Plaintiff in substance alleged

and at trial before the court without a jury presented evidence to show:

Plaintiff and the male defendant, Jesse Robert Boling, Jr., were each in the building construction business, each having his own company. By deed dated 8 May 1973 they purchased Lot 12 on Pond Drive and Canal Street in Atlantic Beach, Carteret County, taking title in their joint names. The purchase price was approximately $14,000.00, which amount they secured by borrowing from the Carolina Bank and Trust Company, giving their demand note to the Bank in the amount of $14,000.00 and securing the note by a deed of trust on the property. They agreed they would hold the premises in equal ownership and would construct a duplex dwelling thereon for two-family occupancy, with each providing materials and labor from their respective construction companies. Construction commenced in May 1973 and continued through the summer and early fall of that year, with each contributing approximately equally in labor, materials, and money. Construction was very slow during the fall and winter months of 1973-74. By May 1974 the building was approximately one-half completed. The $14,000.00 note to Carolina Bank and Trust Company was due. Funds were needed to pay that note and additional funds were needed to complete construction. Because of a recession in the building construction business during the winter of 1973-74, plaintiff was in severe financial difficulties and for that reason was unable to borrow money. Through the efforts of the male defendant, the Capitol National Bank of Raleigh agreed to loan $30,000.00 upon the property, provided the borrower was a corporation known as J. B. Builders, Inc., a North Carolina corporation solely owned by the defendants. To accomplish this financing, the plaintiff and his wife and the defendants executed a deed dated 10 May 1974 conveying the property to J. B. Builders, Inc.

Prior to executing this deed, the plaintiff and the male defendant executed and acknowledged the following written partnership agreement dated 8 May 1974, which was subsequently recorded in the Carteret County Registry:

> THIS CONTRACT, Made this 8th day of May 1974, by and between KENNETH C. LEWIS, of Wake County, North Carolina, and Jesse Robert Boling, Jr. (JRB Jr.) Wake County, North Carolina;

WITNESSETH: That said parties have formed a partnership for the purpose of purchasing lot and constructing thereon a dwelling for joint-tenancy, upon the following terms and conditions.

First. The name under which the partnership will do business is BOLING AND LEWIS with its principal office located at Lot 12, Pond Drive and Canal St., Atlantic Beach, North Carolina, until changed by mutual consent.

Second. The kind of business for which this partnership is formed is the General Construction Business, which includes the construction of a dwelling for joint tenancy on Lot 12, Pond Drive and Canal Street, Atlantic Beach, North Carolina, and the possible future construction on other lots where title is vested in the partnership.

Third. This partnership is to begin on this date and to continue in full force and effect until one of the partners has given to the other partner two months written notice of his desire to dissolve the partnership. The prior death of a partner shall not terminate this contract. The amount due the estate of a deceased partner shall be ascertained and paid in the manner hereinafter set out, and the partnership shall continue as a sole proprietorship of the survivor.

Fourth. Each partner has contributed in cash or in personal property upon an agreed valuation the sum of Ten Thousand and No/100 Dollars.

Fifth. Each partner shall receive and withdraw the same amount for his services as from time to time may be mutually agreed upon, and shall share equally in all profits and losses derived from the sale of each house, and upon dissolution receive an equal share of the assets after all partnership debts have been paid.

Sixth. If any partner should die while this contract of partnership is in force, the value of the deceased partner's interest shall be determined in the manner set out in section 59-81 of the General Statutes of North Carolina, and thereupon the interest of the deceased partner, at the value so determined shall become a loan of the surviving partner payable upon dissolution of the partnership.

Seventh. In the conduct of the partnership, each partner shall have equal authority and all matters and things not set forth in this contract shall be decided by mutual consent.

Eighth. If any differences should arise between the partners which they are unable to adjust, either with regard to the meaning of this contract or with regard to any act or thing which either partner has done or failed to do, such differences shall forthwith be submitted to arbitration. One arbitrator shall be selected by each partner and if they are unable to agree, they shall select a third arbitrator, and the decision of any two of these shall be final and binding upon both partners.

After title to the property was conveyed to J. B. Builders, Inc. on 10 May 1974, Capitol National Bank loaned $30,000.00 on the property, taking from J. B. Builders, Inc. its promissory note in that amount secured by a deed of trust on the property, the note and deed of trust being both dated 10 May 1974. Part of the proceeds of this loan was used to pay off in full the $14,000.00 obligation to Carolina Bank and Trust Company and the balance was used to help pay the cost of completing the building. During the rest of the month of May 1974, and continuing until Labor Day weekend, 1974, the plaintiff and the male defendant proceeded to complete the dwelling on the property, with each party providing materials and labor and with the use of part of the money borrowed from Capitol National Bank. By Labor Day weekend 1974 the dwelling was completed, and on that weekend the two families jointly held an open house on the premises.

The building had been constructed as a duplex with separate facilities for occupancy by two families at the same time. In October 1974 plaintiff and his family moved into one of the units, which they continued to occupy until mid-January 1975. Without the knowledge of the plaintiff, the male defendant, acting as President of J. B. Builders, Inc., and his wife, the female defendant, acting as Secretary of said corporation, executed in the name of the corporation a deed dated 4 December 1974 conveying title to Lot 12 and the newly constructed building thereon to the two defendants as tenants by the entirety. This deed was acknowledged by the male defendant, acting in his capacity as President of J. B. Builders, Inc., on 4 December 1974. It was not presented

for registration to the Register of Deeds of Carteret County until 18 March 1975.

In the meantime, in January and February 1974, plaintiff and the male defendant discussed selling the property. On 5 March 1975, the two defendants, without the knowledge or consent of the plaintiff, executed and acknowledged a deed conveying a one-half undivided interest in the property to third parties, John R. Smith and Charles K. Earnhardt, Jr. This deed was presented for registration to the Register of Deeds for Carteret County on 18 March 1975 at the same time the deed dated 4 December 1974 conveying title from J. B. Builders, Inc. to the two defendants was presented for registration.

On learning of the execution and recording of the two deeds above described, plaintiff made demand upon the defendants to convey the one-half undivided interest in the property still being held by the defendants to the plaintiff or to the partnership existing between the plaintiff and the male defendant. Defendants refused to make either conveyance and refused to recognize any ownership interest in the property in the plaintiff, either individually or as a partner.

Plaintiff testified that in his opinion the property at the time of trial had a market value of $125,000.00.

The defendants did not present any evidence. The court entered judgment making detailed findings of fact in accordance with plaintiff's evidence and substantially as above set forth. Based on its findings of fact, the court made the following conclusions of law:

> 2. That the partnership agreement of May 8, 1974, has not been dissolved or otherwise terminated and is still in full force and effect and the plaintiff and Jesse Robert Boling, Jr., are still equal partners in said partnership.
>
> 3. That the conveyance of the property in question on December 4, 1974, to the defendants was in breach of the fiduciary duty owed by Jesse Robert Boling, Jr., to the plaintiff.
>
> 4. That the defendants jointly hold title to a one-half undivided interest in the property hereinabove described under

a constructive trust for the use and benefit of the partnership of Kenneth C. Lewis and Jesse Robert Boling, Jr., and that the partnership of Kenneth C. Lewis and Jesse Robert Boling, Jr., are the equitable owners of said premises in question trading under the partnership name of Boling and Lewis.

In accord with these conclusions, the court adjudged that defendants hold title to a one-half undivided interest in the property in trust for the benefit of the partnership between the plaintiff and the male defendant trading as Boling and Lewis. From this judgment, defendants appeal.

Bennett, McConkey & Thompson by Thomas S. Bennett for plaintiff appellee.

Ward and Smith by Grady L. Friday and J. Randall Hiner for defendant appellants.

PARKER, Judge.

[1] Appellants first contend that the trial court erred in admitting evidence relative to conversations between the plaintiff and the male defendant prior to and contemporaneously with the signing of the written partnership agreement dated 8 May 1974. Appellants contend admission of such evidence violated the parol evidence rule. The short answer to this contention is that the written partnership agreement was neither contradicted, added to, nor varied by plaintiff's evidence at trial, and no violation of the parol evidence rule has been shown.

[2] Appellants next contend it was error to permit the plaintiff to testify to such conversations prior to the signing of the 10 May 1974 deed by which legal title to the property was conveyed to the corporation which was solely owned and controlled by the defendants. In support of this contention, appellants cite the well established general rule that in the absence of evidence sufficient to establish fraud, undue influence, or mistake, evidence of a parol agreement in favor of a grantor, entered into at the time of or prior to his execution of a deed and at variance with the written conveyance, is inadmissible. *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548 (1961); *Loftin v. Kornegay*, 225 N.C. 490, 35 S.E. 2d 607 (1945); *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028 (1909). "To permit the enforcement of such an agreement would

be tantamount to engrafting a parol trust in favor of a grantor upon his deed, which purports to convey the absolute fee-simple title to the grantee. A parol trust in favor of a grantor cannot be engrafted upon such a deed." *Loftin v. Kornegay, supra*, at 492, 35 S.E. 2d at 608.

The principle of law cited by appellants is not controlling of our disposition of the present case. There was evidence here that a partnership existed between the plaintiff and the male defendant at the time the 10 May 1974 deed was executed. For approximately a year they had been working together erecting a dwelling on land owned jointly by them, and only two days earlier they had executed a formal written partnership agreement. "It is elementary that the relationship of partners is fiduciary and imposes on them, the obligation of the utmost good faith in their dealings with one another in respect to partnership affairs. Each is the confidential agent of the other . . ." *Casey v. Grantham*, 239 N.C. 121, 124, 79 S.E. 2d 735, 738 (1954). The grantee in the deed, J. B. Builders, Inc., was a corporation wholly owned and controlled by the male defendant and so far as disposition of this case is concerned is properly to be considered his *alter ego*. Where, as here, a fiduciary relationship is shown to exist between the grantor and the grantee, the grantee is more than morally bound to act in the best interest of the grantor, and the grantor is justified in imposing a special trust and confidence in the grantee's fidelity. If in such a case the grantee violates the confidence justifiably imposed in him and breaches his fiduciary obligations, a court of equity will enforce those obligations by imposition of a constructive trust, even though there had been no fraud in the original procurement of the conveyance. Under such circumstances it has been said that "the law presumes fraud in transactions where confidential relationships exist between the parties," *Sorrell v. Sorrell*, 198 N.C. 460, 465, 152 S.E. 157, 160 (1930).

In *Koefoed v. Thompson*, 73 Neb. 128, 102 N.W. 268 (1905), the Supreme Court of Nebraska was confronted with a case strikingly similar on its facts to the case presently before us. In that case the plaintiff and the defendant had been working together, farming and carrying on other business ventures, in Nebraska. They jointly purchased the land in question, each contributing one-half of the first payment and borrowing on a mortgage the

funds to pay the balance of the purchase price. Plaintiff thereafter moved to Chicago, leaving defendant in sole possession of the premises. The mortgage became subject to foreclosure. For the purpose of enabling the defendant to renew the mortgage or secure a new loan, plaintiff executed a quitclaim deed to the defendant. Thereafter, defendant refused to recognize plaintiff as having any interest in the property. The trial court entered a decree finding plaintiff to be owner of a one-half undivided interest in the property. In affirming the decree, the Supreme Court of Nebraska said:

> The transaction in the case at bar was between parties who, as shown by the testimony, believed themselves to be partners, and who, we conclude, were such, although no formal agreement of partnership existed between them. The relation of partnership is fiduciary, in its strictest sense, and involves the greatest confidence between the parties thereto. The confidence which the appellee in this case reposed in the appellant had its origin in their previous dealings, and their previous partnership arrangements in farming and other matters. So that when it became necessary to place the title of the premises in the appellant, as a matter of convenience in securing a new loan, and executing the proper papers in that behalf, in order to save the property from the foreclosure sale for their mutual benefit, there was no reason why the appellee should not repose the strictest confidence in the good faith of his former partner, and execute a conveyance in the nature of a quitclaim deed, without other and further consideration, and for that sole purpose. The betrayal of this confidence by the appellant, and his subsequent refusal to carry out his contract to account for the property or its proceeds to the appellee, is sufficient to raise the presumption that he intended from the first to defraud his partner of his interest in said land, and gives rise to a constructive trust.

73 Neb. at 133, 102 N.W. at 269.

In the present case we find no error in the court's admitting evidence of the conversations between plaintiff and the male defendant which explain the reasons for plaintiff joining in the deed dated 10 May 1974 by which title was conveyed to defendants' corporation. Appellants' assignment of error and the exceptions on which it is based directed to that question are overruled.

[3] Appellants next contend that the court erred in permitting the plaintiff to amend his complaint at the close of the evidence to allege a constructive trust rather than a resulting trust. They argue that there was no evidence introduced at trial which would justify the amendment under G.S. 1A-1, Rule 15(b). We do not agree.

A resulting trust is normally imposed to carry out the presumed intention of the parties, as where one person pays part or all of the purchase price for property but title is taken in another. A constructive trust, on the other hand, is an obligation imposed by a court of equity irrespective of, and often contrary to, the intent of the grantee.

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, *breach of duty* or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. (Emphasis added.)

Wilson v. Development Co., 276 N.C. 198, 211, 171 S.E. 2d 873, 882 (1970).

A constructive trust is frequently imposed to enforce obligations incurred as result of transactions between persons occupying a confidential relationship to each other.

> Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896. Intent to deceive is not an essential element of such constructive fraud. *Miller v. Bank*, 234 N.C. 309, 67 S.E. 2d 362. Any transaction between persons so situated is "watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." *Rhodes v. Jones*, 232 N.C. 547, 61 S.E. 2d 725.

Link v. Link, 278 N.C. 181, 192, 179 S.E. 2d 697, 704 (1971).

Plaintiff's evidence was amply sufficient to show grounds for imposing a constructive trust in this case, and the court did not err in permitting him to amend his complaint to conform his allegations to his evidence. G.S. 1A-1, Rule 15(b).

Defendants have not excepted to any of the trial court's findings of fact. They do except and assign error to its conclusions of law. We find the court's conclusions amply supported by its findings of fact, and the court did not err in decreeing a constructive trust in this case.

[4] Finally, appellants contend that plaintiff is barred from maintaining this action by the general rule that one partner may not sue another upon a demand arising out of a partnership transaction until there has been a complete settlement of partnership affairs and a balance has been struck. This position is untenable. There are numerous exceptions to the rule laid down in *Pugh v. Newbern*, 193 N.C. 258, 136 S.E. 707 (1927), one of them being where joint property has been wrongfully converted.

The judgment appealed from is

Affirmed.

Judges MITCHELL and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; NORTH CAROLINA NATURAL GAS CORPORATION, APPLICANT; AND ALUMINUM COMPANY OF AMERICA, INTERVENOR v. FARMERS CHEMICAL ASSOCIATION, INC., PETITIONER.

No. 7810UC366

(Filed 21 August 1979)

1. Gas § 1— surcharge on natural gas—method for determining amount—propriety

In determining the amount of an emergency surcharge to which a natural gas supplier was entitled, the Utilities Commission did not err in adopting a price method somewhere between rolled-in pricing and incremental pricing that appeared to be fair and equitable to the parties.

2. Gas § 1; Utilities Commission § 21— surcharge on natural gas—recovery for past use improper

The Utilities Commission exceeded its statutory authority in requiring a fertilizer manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective, though the supplier did not bill the manufacturer for such gas until after the tariff became effective.

Judge MARTIN (Robert M.) concurs in the result.

APPEAL by petitioner from order of the North Carolina Utilities Commission entered 14 February 1978 in Docket No. G-21, Sub 148. Heard in the Court of Appeals 31 January 1979.

Farmers Chemical Association (hereinafter referred to as FCA) operates a plant in Hertford County to manufacture nitrogen fertilizer. The plant uses natural gas for feedstock purposes (as a raw material to be converted into fertilizer) and as a fuel to effectuate the conversion. FCA has a long-term contract for gas supply with North Carolina Natural Gas Corporation (hereinafter referred to as NCNG). It is NCNG's largest customer and under normal circumstances, uses 29,200 Mcf per day, for which it pays NCNG nearly one million dollars per month. For safety and efficiency reasons, the plant must either generate at virtually full capacity or shut down entirely. Anticipating a gas shortage during the 1975-76 winter season (from 16 November 1975 through 15 April 1976), the Utilities Commission established priorities for allocation of NCNG's gas: residential customers were awarded first priority; commercial and industrial customers (of which FCA had one of the highest priorities) were awarded second priority; and certain other users were given third-level priorities.

In October 1975, Transcontinental Gas Pipeline (hereinafter referred to as Transco), NCNG's sole supplier of gas, predicted a shortage so severe that FCA could expect to receive only forty-five percent (45%) of its normal requirements for the 1975-76 winter season. NCNG and FCA officials met on 6 November 1975, and it was agreed that FCA would use its forty-five percent (45%) entitlement of gas as follows: (1) operate at full capacity from 16 November 1975 through 3 January 1976, thereafter, close for three weeks, and (2) reopen and operate at full capacity until 12 February 1976. Some adjustments to this schedule were anticipated if the shortage was not as predicted; however, FCA

made it clear at this meeting that it would rather close down than use emergency gas, which might become available from suppliers other than Transco at higher prices.

Transco's shortage was not as severe as predicted, and it was able to make three restorations of service to NCNG, which were announced as follows: on 13 November 1975, an increase of 1,019,000 Mcf of gas; on 10 December 1975, an increase of 608,000 Mcf of gas; and on 15 January 1976, an increase of 1,494,000 Mcf of gas. Additionally, NCNG purchased 1,441,362 Mcf of emergency gas from Michigan Consolidated Gas (hereinafter referred to as Michigan). Delivery of this gas began on or about 1 December 1975.

The emergency gas cost more, and by letter dated 8 December 1975, FCA advised NCNG that it did not want any of the emergency gas. The increases in NCNG's gas supply were such that FCA never had to close down, and its plant operated throughout the 1975-76 winter season. NCNG's other commercial and industrial customers suffered some shortages early in the season. Its residential customers suffered no shortages and would not have done so even if the emergency gas had not been purchased.

On 22 December 1975, NCNG applied to the Utilities Commission for recovery of the $1,544,211, the cost of the emergency gas from Michigan. No hearing was held. On 6 January 1976, the Commission ruled that NCNG could recover the cost by a surcharge of 18.5 cents per Mcf on all gas other than that used by residential customers. NCNG filed such tariffs on 7 January 1976 and then billed FCA for December gas including the surcharge. FCA's billings for subsequent months also included the surcharge. On 2 February 1976, FCA asked the Commission to review its 6 January 1976 surcharge ruling, asking that the emergency gas be priced on either an incremental basis (under which the entire cost of the emergency gas is charged to those customers who would not have been served without it) or on a rolled-in basis (under which the cost is averaged out and shared by all customers). A hearing was held and evidence presented. The Commission entered an order on 3 June 1976 affirming its 6 January 1976 ruling.

Inter alia, the Commission concluded that residential customers had not benefited from the purchase of emergency gas, but that FCA and all other industrial and commercial customers had benefited from the purchase and should pay for it. FCA appealed, and this Court reversed the 3 June 1976 order of the Commission and remanded the case for a new order. The first case is reported in 33 N.C. App. 433, 235 S.E. 2d 398, *dis. rev. denied*, 293 N.C. 258, 237 S.E. 2d 539 (1977).

Sanford, Cannon, Adams & McCullough, by H. Hugh Stevens, Jr., William H. McCullough, and Charles C. Meeker, for petitioner appellant.

Public Staff North Carolina Utilities Commission, by Chief Counsel Jerry B. Fruitt and Robert F. Page, for North Carolina Utilities Commission, appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy, for North Carolina Natural Gas Corporation, intervenor-appellee.

Joyner & Howison, by Henry S. Manning, Jr., for Aluminum Company of America, intervenor-appellee.

ERWIN, Judge.

This Court remanded this case on its first appeal with the following instructions:

> "In addition to those already discussed, the Commission made no findings and conclusions on the following important issues in the case:
>
> 1. Whether on November 6, 1975 Farmers Chemical and NCNG agreed that appellant would accept its fifty-five percent (55%) winter curtailment by operating at full capacity until January 3, 1976, and then closing down completely for various periods thereafter;
>
> 2. Whether the three Transco restorations permitted Farmers Chemical to operate at one hundred percent (100%) capacity throughout the 1975-76 winter without resorting to the use of any emergency gas;

3. Whether Transco Interim Settlement established prices for emergency gas volumes incrementally and treated such gas as being injected last into the pipeline system for the period covered by such settlement;

4. Whether Farmers Chemical put NCNG on notice in November and December, 1975 that it did not want any emergency gas; and

5. Whether residential customers should be excluded from paying their share of the emergency surcharge.

. . .

Such findings and conclusions are necessary to enable this Court to determine whether the Commission had performed the duty imposed by statute. The matter is remanded to the Commission to make necessary findings and conclusions on which it may base its order."

See Utilities Comm. v. Farmers Chemical Assoc., 33 N.C. App. 433, 446, 235 S.E. 2d 398, 405, *dis. rev. denied*, 293 N.C. 258, 237 S.E. 2d 539 (1977).

The Commission's findings and conclusions, if supported by competent, material, and substantial evidence, are conclusive on the appeal before us. *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972), and *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461 (1967).

The Commission found in the case *sub judice* that FCA directly benefited from the purchase of emergency gas in the amount of 273,073 Mcf which is supported by Nery's Exhibit No. 3. The Commission acknowledges that the figures shown on the exhibit are projections rather than actual usages. Projections are permitted to be used in some events over the actual experiences of the companies involved. *See Utilities Comm. v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972).

[1] Over objections of petitioner, the Commission adopted a price method somewhere between rolled-in pricing and incremental pricing that appears to be fair and equitable to the parties. We cannot conclude as a matter of law that the Commission

committed error in its method of reaching the price of the gas used in this event. The law imposes a duty on the Commission, and not the courts, to fix rates. *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966). We do not find the acts of the Commission to be unreasonable, but rather a legitimate use of its statutory authority. This assignment of error is without merit.

The second question presented by petitioner is: Did the Commission err in failing to make proper findings and conclusions about the 6 November 1975 agreement between NCNG and Farmers Chemical? The Commission made the following finding in response to our remand order:

> "16. On November 6, 1975, representatives of NCNG and FCA met, pursuant to the Commission's directive (Decretal paragraph No. 4, Docket No. G-100, Sub 24), to discuss FCA's requirements for the winter season and how such requirements might be met. FCA was informed that it could be served 2,003,876 Mcf, or 45% of requirements. On the basis of 29,200 Mcf per day, this supply could serve FCA at 100% for 68.6 days of the 152-day winter period. It was agreed that FCA would be allowed to oprate 100% from November 16, 1975, through January 3, 1976. If consumption averaged less than 29,200 Mcf per day, FCA would be served the unused portion for up to three days or through January 6, 1976. The Tunis plant would then shut down for three weeks and reopen and run until February 12 or the balance of the winter depending upon the availability of gas. It was understood that, if Transco made restorations to its gas supply and NCNG had not experienced an abnormally cold winter, FCA would be given further service depending on NCNG's flexibility. The meeting of November 6, 1975, primarily concerned days of service during the winter season. The discussion of purchase of emergency gas occurred near the end of the meeting. (FCA witness Lawrence; No. 7610UC825, R pp 63-64, 66.)
>
> 17. At the November 6, 1975 meeting, FCA's response to NCNG's question concerning the purchase of emergency gas referred to a direct purchase for FCA at incremental pricing to supplement its 45% supply of flowing gas, not to emergen-

cy gas purchased for the system with costs borne by other customers as well. (FCA witness Borst, No. 7610UC825, R p 18, '. . . closing the plant if what we had to operate on was high priced INTRASTATE gas,' (emphasis added), R p 20, 'FCA contends . . . emergency gas . . . should be . . . rolled-in'; R p 24, '. . . gas should be priced on a rolled-in basis'; R p 27, 'The incremental cost of that emergency gas is so high that it would not be economical . . . The incremental price . . . is something on the order of a dollar ninety-seven. That's an extremely high cost'; R p 27, 'If . . . we knew that our only source of gas was emergency gas at . . . $1.97 per Mcf, we would have shut down.'

(EXCEPTION #8)"

We hold the above findings (Nos. 16 and 17) are sufficient and supported by the record before us. The credibility of the evidence and the weight to be given to it are for the determination of the Commission. *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974), and *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). We find no merit in this assignment of error.

Petitioner's next assignment of error reads: Did the Commission err in failing to make proper findings and conclusions concerning whether residential customers should be excluded from the emergency surcharge?

The Commission found:

"27. Residential customers (Priority R. 1) were never expected to be even partially curtailed, even if the winter had been abnormally cold, and therefore could not have benefited from the emergency gas purchase. (See Appendix A, Case 1; Compare R. 1 requirements of 4,726,853 Mcf with known total supplies of 10,130,260 Mcf.) (EXCEPTION No. 13)"

The whole record and the evidence therein support Finding of Fact No. 27. We are mindful that whether the Commission's findings are supported by competent, material, and substantial evidence is a question of law and is reviewable. Our review of the record compels us to overrule this assignment of error.

Petitioner assigns the following question as error: Did the Commission err by making findings and conclusions that were irrelevant, improper, and prejudicial to Farmers Chemical? Petitioner takes issue with the following eleven findings of fact, to wit:

1. "The incremental or additional cost of emergency gas was $1.03 per Mcf (NCNG witness Wells, No. 7610UC825, R p 77 $1.89613 divided by 0.96 for Transco's line retention of 4%, minus $0.945)."

2. "The additional cost of serving FCA with direct-purchased emergency gas to supplement its 45% supply would have been $2,514,354 (0.55 times 4,438,400 Mcf times $1.03 per Mcf). (EXCEPTION No. 9)"

3. "By telegram of December 1, 1975, NCNG notified Farmers Chemical of its intent to make an emergency purchase of natural gas supply and indicated the approximate amount of the surcharge on all nonresidential gas sales during the winter period as $.22 per Mcf. FCA's new winter period share of NCNG's gas supply was 3,626,173 Mcf, including 741,213 Mcf of emergency gas (No. 7610UC825, R p 69; 3,626,173 less 2,884,960, which was FCA's share after Transco's first restoration on November 13, 1975. (EXCEPTION No. 10)"

4. "Had FCA paid the estimated surcharge on its projected winter season volumes of 3,626,173 Mcf (as of December 1, 1975), the additional cost would have been $797,758,173 (3,626,173 times $0.22 per Mcf.) (EXCEPTION No. 11)"

5. "Had FCA been charged incrementally for its share of the purchased emergency gas, the additional cost would have been $763,449 (741,213 times $1.03 per Mcf) plus gross receipts tax. (EXCEPTION No. 12)"

6. "FCA directly benefited from the purchase of emergency gas in the amount of 243,073 Mcf (4,438,400 Mcf minus 4,195,327 Mcf). (See Appendix A, Case IV; Supplemental Brief of FCA, filed December 16, 1977, p. 1.) (EXCEPTION No. 16)"

7. "Under FCA's proposal in this docket, namely, fully rolled-in pricing at an estimated surcharge of 11.81 ± per Mcf (NCNG witness Wells; No. 7610UC825, R pp 73-74), the total surcharge to FCA would have been $523,731 (4,438,400 Mcf times 11.8 ± per Mcf.) (EXCEPTION No. 17)"

8. "The difference between what FCA paid under the emergency purchase surcharge and what it has been willing to pay is $57,099. (EXCEPTION No. 18)"

9. "FCA's total base billing for the 1975-1976 winter season was approximately $6,058,416 (4,438,400 Mcf times $1.365 per Mcf). (EXCEPTION No. 19)"

10. "FCA's surcharge costs for emergency gas which enabled it to operate at 100% of requirements for the entire season amounts to 9.6% of its total base billing for the period ($580,830 divided by $6,058,416). (EXCEPTION No. 20)"

11. "The difference between what FCA paid and what FCA was willing to pay amounts to 0.94% of FCA's total base winter season billing ($57,099 divided by $6,058,416). (EXCEPTION No. 21)"

We note that petitioner does not call our attention to any authority to support its contentions on this assignment of error. On the whole record before us, we find no error in any of these findings of fact. The record supports each of them.

[2] The last assignment of error reads: Did the Commission err by authorizing a retroactive rate increase?

Petitioner contends:

"The January 7, 1976 tariff, as filed by NCNG, gave the following effective date. 'Effective: Billings on and after January 7, 1976.' (76 R p 8) Since NCNG did not bill Farmers Chemical for December, 1975 gas until January 8, 1976, NCNG added the 18.5¢ per Mcf emergency surcharge to the charges for all gas used by Farmers Chemical in December, 1975. Indeed, NCNG withheld Farmers Chemical's December bill until January 8, 1976, apparently in expectation of the Commission's letter order of January 6. (76 R pp 67, 26, 18)

The emergency surcharge also was applied to volumes used by Farmers Chemical in the January 1-6, 1976 period."

Petitioner argues that NCNG delayed its December 1975 billing until after the filing of its new tariff, that it then billed for December 1975 and 1-6 January 1976 services according to the new tariff, and that this amounts to a retroactive rate increase which is illegal under G.S. 62-139(a).

G.S. 62-139(a) provides:

"(a) No public utility shall directly or *indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this Article*, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules." (Emphasis added.)

In *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 468, 232 S.E. 2d 184, 194 (1977), Justice Lake stated the following for the Supreme Court:

"The Attorney General argues that such a surcharge would be retroactive rate making, which, as all of the parties agree, would be improper. *Utilities Commission v. City of Durham*, 282 N.C. 308, 318, 193 S.E. 2d 95 (1972); *Utilities Commission v. Morgan*, 277 N.C. 255, 267, 177 S.E. 2d 405 (1970). We agree with the argument of the companies, and of the Commission, that this contention of the Attorney General is not technically correct. Technically, retroactive rate making occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use."

A rate is fixed or allowed when it becomes effective pursuant to G.S. 62-130(a), and rates must be fixed prospectively from their effective date. G.S. 62-136(a) provides that the Commission shall determine rates "to be thereafter observed and in force." The Commission may not fix rates retroactively so as to make them collectible for past services. *Utilities Comm. v. City of Durham*,

282 N.C. 308, 193 S.E. 2d 95 (1972). G.S. 62-139(a) does not distinguish between permanent rates, temporary rates, or surcharges.

We hold that the Commission exceeded its statutory authority by billing petitioner with a surcharge for emergency gas prior to 7 January 1976. For that reason, the order of the Commission is remanded to conform with the opinion of this Court. All other exceptions of petitioner are overruled. We note the Commission and the parties were faced with a very difficult problem in December 1975 and proceeded in good faith to work out their destinies without benefit of past experiences of any magnitude.

That portion of the Commission's order relating to billing petitioner with a surcharge from December 1975 to 6 January 1976 is vacated and remanded for a proper order.

Vacated in part and remanded.

Affirmed in part.

Judge MITCHELL concurs.

Judge MARTIN (Robert M.) concurs in the result.

BANK OF NORTH CAROLINA, N.A. v. INVESTORS TITLE INSURANCE COMPANY v. B. R. DORSETT AND WIFE, ESTHER C. DORSETT AND B. R. DORSETT CONSTRUCTION COMPANY

No. 785SC840

(Filed 21 August 1979)

Contracts § 4.1; Mortgages and Deeds of Trust § 9— release of land from deed of trust—option on land exercised—consideration for substitution of collateral

A bank's agreement to release from its deed of trust land subject to a prior recorded option to purchase which was exercised by the optionee constituted sufficient consideration for an agreement to substitute other collateral for the released land.

Bank v. Insurance Co.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 10 April 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 30 May 1979.

In this civil action, plaintiff seeks to recover from defendant for breach of a contract, whereby defendant agreed to pay certain escrow funds to plaintiff and third-party defendants jointly, but wrongfully paid the funds to third-party defendants alone in disregard of plaintiff's right under the contract. Defendant responded that the contract was not supported by consideration and therefore void.

Defendant also filed a third-party complaint against third-party defendants, who received and disposed of the escrow funds, seeking judgment against them for any amount for which it was found liable to plaintiff. Third-party defendants stipulated that in the event judgment was entered against defendants in favor of plaintiff, a judgment in like amount should be entered against B. R. Dorsett and wife, Esther C. Dorsett (hereinafter referred to as third-party defendants), in favor of defendant.

At trial, the evidence tended to show that in November 1974, plaintiff loaned $175,000 to third-party defendants, who executed a promissory note secured by a deed of trust on five parcels of real property as collateral; that one of the parcels, Tract 5, was subject to a lease which contained an option to purchase, exercisable by the lessee, by July 1975; that the lease had been duly recorded in July 1973; that Tract 5 was also subject to a first deed of trust in the amount of $95,000 in favor of First Citizens Bank and Trust Company; that Tract 5 was appraised at $150,000; that at the time plaintiff took Tract 5 as collateral, plaintiff was aware of the existing option to purchase; that during the same period of time, third-party defendants became involved in a controversy with another party, which party deposited money in an escrow fund, held by defendant as escrow agent, to be disbursed upon settlement of the dispute; that in June 1975, the lessee of Tract 5 exercised his option to purchase; that in order for third-party defendants to be able to sell the land to the lessee, plaintiff agreed to release Tract 5 from its deed of trust if third-party defendants would substitute additional collateral for it; that in July 1975, plaintiff and third-party defendants executed an agreement for substitution of collateral, whereby third-party defend-

ants agreed to substitute as collateral any sum determined to be due them from the escrow fund held by defendant; that the agreement specifically provided that third-party defendants would pay said amount to plaintiff; that defendant would disburse the funds by check made payable to plaintiff and third-party defendants jointly; that the agreement was executed by defendant; that plaintiff subsequently released Tract 5 from its deed of trust; that in September 1975, after resolution of the controversy regarding the escrow fund in third-party defendants' favor, defendant disbursed to third-party defendants, without naming the plaintiff as a co-payee, the sum of $29,951.23; that third-party defendants disposed of the entire sum, and plaintiff did not receive any of the funds; that through 1976, plaintiff negotiated with third-party defendants who were seeking an extension of the note which was in default; that plaintiff accepted, at this time, a pledge of 4,000 shares of stock from third-party defendants as additional collateral on the loan; that plaintiff's net profit from the sale of the stock was approximately $17,000; that the plaintiff did not accept the stock in settlement of its dispute with defendant and never told third-party defendants that it would refrain from suing defendant upon receipt of the stock; and that on 18 January 1978, the principal balance owing to plaintiff on third-party defendant's note was $126,522.35.

Defendant's evidence tended to show that plaintiff told third-party defendants that it would not sue defendant if third-party defendants delivered additional collateral to plaintiff; and that third-party defendants thereafter delivered the stock to plaintiff to be held for 90 days, but that plaintiff never said it was taking the stock in satisfaction of the misappropriated escrow funds.

The court concluded that defendant had breached the Agreement for Substitution of Collateral by failing to make plaintiff a co-payee of the disbursed funds and that as a result thereof, plaintiff had been damaged in the amount of $29,951.23. Defendant appealed.

Burney, Burney, Barefoot & Bain, by Roy C. Bain, for plaintiff appellee.

Smith & Kendrick, by Vaiden P. Kendrick, for defendant appellant.

ERWIN, Judge.

The defendant presents five questions for our determination: (1) Did the trial court err in failing to find facts and concluding as a matter of law that the release of a deed of trust recorded subsequent to an option, where the property is purchased by the optionee, is not sufficient consideration to support the alleged Substitution of Collateral Agreement? (2) Did the trial court err in denying defendant's motions to dismiss at the close of plaintiff's evidence and at the close of all the evidence and in finding as fact and concluding as a matter of law that plaintiff was damaged in the sum of $29,951.23, where there was not competent evidence of damages in that amount? (3) Did the trial court err in finding as fact that plaintiff heretofore obtained judgment against B. R. Dorsett and wife, and there was a judgment against the Dorsetts in the amount of $126,522.35 after credit for foreclosure, Findings of Fact Nos. 8 and 9, where there was no evidence to support said Findings of Fact? (4) Did the trial court err in failing to find as fact and concluding as a matter of law that plaintiff's damages had been mitigated to the extent of $17,386.25? (5) Did the trial court err in entering judgment against defendant Investors Title Insurance Company? We have considered each question presented and answer each of them, "No," and affirm the judgment entered by the trial court for the reasons that follow.

Defendant contends: that the Agreement for Substitution of Collateral is not supported by consideration; that Tract 5 was the subject of an option recorded prior to the plaintiff's deed of trust; and that upon the exercise of the option, plaintiff had no interest or rights in Tract 5 to release.

Defendant further contends that upon payment of the net proceeds of the sale from James Hall to plaintiff, the plaintiff had a duty to release Tract 5 without the substitution of additional collateral.

The court found the following facts:

> "That on or about the 21st day of July, 1975, the defendant, Investors Title Insurance Company, agreed to the terms and conditions of a document entitled 'Agreement for Substitution of Collateral' recorded in Book 1054 at Page 130 of the New Hanover County Register of Deeds, one of the

terms and conditions being that after resolution of the lawsuit between Resort Properties and B. R. Dorsett Construction Company, one of the third-party defendants, the remaining funds in escrow would be made payable jointly by check or draft to the Bank of North Carolina, N.A., Wilmington, North Carolina, and B. R. Dorsett Construction Company."

The court concluded as a matter of law as follows:

"1. That on July 21, 1975 the plaintiff, the defendant Investors Title Company and the third-party defendants entered into a valid contract supported by consideration, with no condition precedents.

EXCEPTION NO. 8."

Plaintiff contends that these facts were found by the trial court after a jury trial had been waived and that such facts are based upon competent evidence and may not be disturbed on appeal. Plaintiff further contends that there was sufficient consideration to support the Agreement for Substitution of Collateral, because plaintiff was not legally bound to release Tract 5 from its deed of trust and obviously suffered a detriment by doing so.

We note that defendant does not explain why it failed to issue its check to Bank of North Carolina, N.A., Wilmington, North Carolina, and B. R. Dorsett Construction Company jointly as it contracted to do. Defendant does not question any terms of the Agreement for Substitution of Collateral or the execution of the agreement.

This Court held as follows in *Foundation, Inc. v. Basnight*, 4 N.C. App. 652, 654, 167 S.E. 2d 486, 488 (1969), with Judge Britt (now Justice Britt) speaking:

"Defendant insists that the purported contract relied on by plaintiff was not supported by sufficient consideration. In *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362, we find the following: '* * * "It may be stated as a general rule that 'consideration' in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of some benefit or advantage to the promisor, *or*

> some loss or detriment to the promisee. *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15; *Cherokee County v. Meroney*, 173 N.C. 653, 92 S.E. 616; *Institute v. Mebane*, 165 N.C. 644, 81 S.E. 1020; *Findley v. Ray*, 50 N.C. 125. It has been held that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.'" (Citations omitted.)

The lease does provide an option to purchase. However, the lease does not state whether or not the property would be sold free and clear of any and all liens as the defendant would have us to believe. Under the lease, the Dorsetts were required to seek release of the property from plaintiff on terms and conditions that would be mutually agreeable to the parties. We note further that defendant's duty under the contract was to pay money which was contingent upon the debtor's obligation to pay. We find that the contract in question is supported by adequate consideration, and defendant's assignment of error is without merit.

Defendant moved pursuant to G.S. 1A-1, Rule 41(b), of the Rules of Civil Procedure for an involuntary dismissal which was denied at the close of the plaintiff's case and again at the close of all of the evidence. Rule 41(b) of the Rules of Civil Procedure does not provide for a motion for involuntary dismissal at the close of all of the evidence. *Castle v. Yates Co.*, 18 N.C. App. 632, 197 S.E. 2d 611 (1973). Under Rule 41(b), in a trial without a jury, where as here, the motion was made at the close of the plaintiff's case, the trial judge does not consider the evidence in the light most favorable to the plaintiff. Instead, he must consider and weigh all competent evidence before him, passing upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom. *Bridge Co. v. Highway Comm.*, 30 N.C. App. 535, 227 S.E. 2d 648 (1976).

In applying the above rule to the case before us, we hold there was ample evidence before the court to support the court's denial of the defendant's motion.

We further find no error in the findings of fact and the entry of judgment by the trial court.

It is the rule in this State that, where as here, the parties waive a jury trial and agree that the court may find the facts, they thereby transfer to the judge the function of weighing the evidence, and his findings are conclusive on appeal if supported by any competent evidence, notwithstanding the fact that evidence to the contrary may have been offered. *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967); *Young v. Insurance Co.*, 267 N.C. 339, 148 S.E. 2d 226 (1966). The evidence presented supports the findings of fact, which in turn, supports the conclusions of law.

In the trial, we find no error.

Judgment affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

LOIS B. PIERCE, INDIVIDUALLY, AND ADDICE PIERCE MILLER AND STEVE PIERCE, INDIVIDUALLY AND AS ADMINISTRATORS OF JOHN Q. PIERCE, DECEASED v. PHIL GADDY AND WIFE, JOHNNIE GADDY

No. 7720SC1066

(Filed 21 August 1979)

Frauds, Statute of § 7— contract to convey real property—receipt—insufficiency of writing

In an action to establish a contract to convey real property, a receipt by which defendant acknowledged receipt of one thousand dollars from plaintiff's intestate was insufficient to show compliance with the statute of frauds, since the notation "For farm" on the receipt did not, either expressly or by necessary implication, contain the essential features of an agreement to sell land, nor was the "farm" referred to in the receipt identified therein and no reference was made in the receipt to any extrinsic source by which the particular "farm" referred to could be made certain.

APPEAL by plaintiffs from *Smith (Donald L.), Judge.* Judgment entered 12 October 1977 in the Superior Court, UNION County. Heard in the Court of Appeals 27 September 1978.

This is an appeal by plaintiffs from summary judgment in favor of defendants. Allegations and admissions in the pleadings, stipulations of the parties, and depositions submitted to the court

at the hearing on defendants' motion for summary judgment show that there is no genuine issue as to the following material facts:

John Q. Pierce died intestate on 15 February 1976 leaving surviving his widow, Lois B. Pierce, and three children, Addice Pierce Miller, Steve Pierce, and Johnny Pierce Gaddy. The widow individually and the first two named children, both individually and as administrators of their father's estate, are the plaintiffs in this action. The third child, Johnny Pierce Gaddy is the wife of Phil Gaddy and, together with her husband, is a defendant herein.

On 12 August 1954 John Q. Pierce was the owner in fee simple of a tract of land in Union County containing 106.45 acres, which tract is particularly described by metes and bounds in the complaint. On 12 August 1954 John Q. Pierce and wife, Lois B. Pierce, executed a fee simple warranty deed, absolute in form, conveying title to said tract of land to their son-in-law, the defendant, Phil Gaddy. By an amendment to their complaint, plaintiffs alleged that in consideration for this deed "the defendant Phil Gaddy did loan the plaintiffs' intestate, John Q. Pierce, the sum of $8000.00 and did promise to reconvey the lands to the plaintiffs' intestate if plaintiffs' intestate repaid the amount lent plus 6% interest within 1 year from the date of the warranty deed." In his deposition, the defendant, Phil Gaddy, testified "that he had entered into an agreement with Mr. Pierce, unsigned, giving Mr. Pierce the option to buy the land back for cost plus 6 percent interest within one year of the time Mr. Gaddy purchased the land, but that this was the limit of the agreement to reconvey."

In their answer defendants pled the statute of frauds as an affirmative defense. At the hearing on defendants' motion for summary judgment, the parties stipulated in writing "[t]hat all of the written memorandum pertaining or referring to the alleged agreement of Phil Gaddy to convey the property described in the complaint to John Q. Pierce are attached to this stipulation," that "the Court may hear and determine without objection whether or not the written memorandum attached to this stipulation is sufficient to comply with the Statute of Frauds, G.S. 22-2," and "that if said memorandum is insufficient to comply with the Statute of Frauds, G.S. 22-2, then in that event, the defendant is entitled to summary judgment." The written memorandum referred to will be described in the opinion.

Harry B. Crow, Jr., for plaintiff appellants.

James E. Griffin for defendant appellees.

PARKER, Judge.

In their complaint as originally filed, plaintiffs alleged that the 12 August 1954 deed "was intended to be a security interest" in the land conveyed, and they prayed the court to reform the deed by declaring it to be a security interest only. In their amended complaint they alleged an agreement by defendant, Phil Gaddy, to reconvey the property if plaintiffs' intestate repaid the loan he had obtained from Gaddy plus interest within one year from the date of the warranty deed. From the stipulations presented to the trial court at the hearing on defendants' motion for summary judgment, it is apparent that plaintiffs have now come to consider their action solely as one to enforce that agreement. That this is so is confirmed by the following statement in plaintiffs' brief on this appeal:

> Now, it should be obvious that plaintiffs wish to proceed solely upon the theory that there was an agreement to reconvey the land in dispute to John Q. Pierce, evidenced by a memorandum sufficient under the statute of frauds, and that they, as his representatives and heirs, are entitled to the specific performance of this agreement.

We accept plaintiffs' theory of their action and treat this case as one to enforce a contract to convey real property. So treated, the only question presented by this appeal is whether plaintiffs have presented any written memorandum sufficient to make the contract enforceable under the statute of frauds, G.S. 22-2. We agree with the trial court that they have not, and accordingly we affirm the summary judgment for the defendants.

Our statute of frauds, G.S. 22-2, provides, in pertinent part, that "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." "A valid contract to convey land, therefore, must contain expressly or by necessary implication, all the essential features of an agreement to sell, one of which is a description of the land, certain in

itself or capable of being rendered certain by reference to an extrinsic source designated therein." *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E. 2d 392, 400 (1976); *accord, Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964); *Hurdle v. White*, 34 N.C. App. 644, 239 S.E. 2d 589 (1977).

To show compliance with the statute of frauds, plaintiffs in the present case rely principally upon a written receipt dated 3 September 1958 signed by the defendant, Phil Gaddy, by which Gaddy acknowledged receipt from J. Q. Pierce of one thousand dollars. The receipt bears the single notation, "For farm."

The receipt dated 3 September 1958 does not, either expressly or by necessary implication, contain the essential features of an agreement to sell land. No reference is made therein to any agreement on the part of defendant Gaddy to sell, nor may any such agreement be necessarily implied from anything appearing on the receipt. For that reason alone the receipt is insufficient to meet the requirements of the statute of frauds. *See, Chason v. Marley*, 224 N.C. 844, 32 S.E. 2d 652 (1945). For all that appears on the receipt or from anything referred to therein, it may have been given, as defendant Gaddy contends it was, to acknowledge receipt of rent rather than of purchase price.

In addition to the lack of any mention of any agreement to sell, the "farm" referred to in the receipt is not further identified therein, nor is reference made in the receipt to any extrinsic source by which the particular "farm" referred to can be made certain. The stipulation of the parties, which was presented to the trial court at the hearing on defendants' motion for summary judgment, that on the date the receipt was given, 3 September 1958, "Phil Gaddy owned a home and approximately 2.6 acres of land which was not a farm and that the said Phil Gaddy did not own any other real estate as of that date, save and except for, the 106.45 acres of land which is the subject of this lawsuit," cannot serve to make the receipt sufficient to comply with the statute of frauds. The stipulation was not in existence at the time the receipt was given and, of course, was in no way referred to therein. Moreover, even granting that at the time the receipt was given the only "farm" owned by Gaddy was the 106.45 acre tract involved in this case, it is not a necessary implication from this fact that the "farm" referred to in the receipt is the 106.45 acre

tract. There are thousands of tracts of land in this State to which the single word "farm" could apply, and one may make a valid contract, enforceable at least by way of a judgment for damages, to sell property which one does not own at the time the contract is made, as anyone who sells short on the stock market will quickly find out. Because the 3 September 1958 receipt contains neither expressly nor by necessary implication any agreement to sell, and because the "farm" referred to in the receipt is not identified in the receipt and no extrinsic source is designated therein by reference to which certain identification is possible, we find the receipt insufficient to meet the requirements of the statute of frauds.

Sessoms v. Bazemore, 180 N.C. 102, 104 S.E. 70 (1920), relied on by the plaintiffs, is distinguishable. In that case the plaintiff brought an action for specific performance of a written contract signed by defendant by which he expressly agreed "to sell my farm to Mr. J. D. Sessoms for $7,000 any time within 30 days." In affirming judgment for the plaintiff, our Supreme Court held that the reference to "*my* farm" (Emphasis added) was sufficiently definite to permit the reception of parol evidence to fit the description to the property claimed as the subject matter of the contract. In the present case, the "farm" referred to was not identified in the written receipt as the farm belonging to the defendant, and in addition, as above noted, the writing contained no mention of any agreement to sell.

The other writings presented by plaintiffs to show compliance with the statute of frauds are also inadequate for that purpose. These were receipts of various dates for sums of money which bore such notations as "on place" or "paid on place," and a check drawn by Pierce to Gaddy and endorsed by the letter which bore the notation "For Land Payment." Nothing in any of these instruments makes it possible to determine what "place" or what "land" is referred to.

Finally, we note that defendant Phil Gaddy's admission in his deposition that he entered into an oral agreement with J. Q. Pierce giving Pierce the option to buy the land back within one year is unavailing to make the oral contract enforceable in the face of defendants' plea of the statute of frauds. *Breaid v. Munger,* 88 N.C. 297 (1883); *Barnes v. Teague,* 54 N.C. 277 (1854).

In view of our decision that the contract alleged by the plaintiffs was void and unenforceable under the statute of frauds, we find it unnecessary to consider defendants' contention that plaintiffs' action was in any event barred by the statute of limitations.

The judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

GUILFORD COUNTY AND CITY OF HIGH POINT v. CLARENCE C. BOYAN AND WIFE, MARGARET W. BOYAN; LEE F. STACKHOUSE, TRUSTEE FOR CLARENCE C. BOYAN AND WIFE, MARGARET W. BOYAN; JIMMY D. RIDGE; AND PIEDMONT HARDWOOD LUMBER COMPANY

No. 7818DC86

(Filed 21 August 1979)

1. **Municipal Corporations § 28— action to recover installments on special assessments—statute of limitations**

The legislature did not intend for G.S. 160A-233(d) to bar a city's action for installments of special assessments falling due within the ten-year limitation period, even when installments which became due more than ten years before the institution of the action are sought to be included in the action; rather, the legislature intended that the limitation period as to each installment should run from the due date of that installment.

2. **Municipal Corporations § 28— foreclosure of special assessment lien—attorney's fee**

Construed together, G.S. 160A-233(c) and G.S. 105-374(i) provide for an award of one reasonable attorney's fee, in the court's discretion, in a foreclosure of a special assessment lien by action in the nature of an action to foreclose a mortgage.

APPEAL by plaintiff City of High Point from *Hatfield, Judge.* Judgment entered 17 October 1977 and Order entered 9 November 1977 in District Court, GUILFORD County. Heard in the Court of Appeals at Winston-Salem 15 November 1978.

This is an appeal from judgment of dismissal entered against plaintiff based on the trial court's conclusion that plaintiff's entire claim was barred by the ten-year limitation provision of G.S.

160A-233(d). The plaintiff City of High Point (hereinafter "plaintiff") brought this action by filing a complaint on 24 January 1975 seeking to foreclose 1963 and 1964 water and sewer assessment liens upon property at 701 Oakview Road in High Point. (The complaint also included claims to foreclose the liens of unpaid ad valorem taxes due to Guilford County and the City of High Point for the years 1971 through 1974, but these taxes were paid during the pendency of this litigation, and no question concerning these taxes is presented on this appeal.) The water and sewer assessments were payable in five equal annual installments, each successive installment being due on the anniversary date of the first installment. The first installment of the 1963 assessment was due on 6 December 1963. The first installment of the 1964 assessment was due on 20 November 1964.

By amended answer, defendants pled the statute of limitations as a bar to plaintiff's action. At the close of the plaintiff's evidence the trial court entered judgment of dismissal against the plaintiff on 17 October 1977 after making findings of fact and the following conclusion of law:

> That the plaintiff City of High Point is barred from maintaining this action or proceeding to enforce, collect or foreclose on the special assessments against the real property of the defendant Jimmy D. Ridge, located in the City of High Point at the intersection of James Road and Oakview Road and known as 701 Oakview Road, by reason of the failure of the plaintiff City of High Point to commence this action or proceeding within ten (10) years from the date that the assessments or the earliest installments thereof included in this action or proceeding became due.

On 12 October 1977, plaintiff filed a petition for attorney's fees and a motion to amend its complaint to seek only recovery of installments of assessments becoming due within ten years next preceding the filing of the complaint. On 9 November 1977 the trial court entered an order allowing plaintiff's 12 October 1977 motion to amend its complaint and denying plaintiff's petition for attorney's fees.

From judgment of dismissal and denial of attorney's fees, plaintiff appeals.

Hugh C. Bennett, Jr., for the plaintiff appellant.

Joseph E. Slate, Jr., and W. Edmund Lowe for the defendant appellees.

PARKER, Judge.

[1] G.S. 160A-233(d) provides:

> (d) No city may maintain an action or proceeding to enforce any remedy for the foreclosure of special assessment liens unless the action or proceeding is begun within 10 years from the date that the assessment or the earliest installment thereof included in the action or proceeding became due. Acceleration of installments under subsection (b) shall not have the effect of shortening the time within which foreclosure may be begun, but in that event the statute of limitations shall continue to run as to each installment as if acceleration had not occurred.

The intent of the legislature controls our interpretation of this statute. Taken out of context and read literally, the first sentence of G.S. 160A-233(d) appears to provide that if the foreclosure action includes any installment payments falling due more than ten years prior to institution of the action, maintenance of the entire action is completely barred even as to those installments falling due within the limitation period. Thus interpreted, the first sentence has an effect which is both illogical and contrary to the way in which statutes of limitations normally operate. The inherent illogic of the sentence's literal meaning, the sentence's context, and the statute's history all show, and we find, that the legislature did not intend to bar an action for installments of assessments falling due within the ten-year limitation period, even when installments which became due more than ten years before the institution of the action were sought to be included in the action.

The second sentence of G.S. 160A-233(d) makes plain that the legislature intended the statute of limitations to run anew from the due date of each individual installment. G.S. 160A-233(d) provides that "[i]f any installment of an assessment is not paid on or before the due date, all of the installments remaining unpaid shall immediately become due and payable . . . ." The second sentence

of G.S. 160A-233(d) provides that this acceleration shall not have the effect of shortening the limitation period, "but in that event the statute of limitations shall *continue* to run as to *each* installment as if the acceleration had not occurred." (Emphasis added.) The second sentence of G.S. 160A-233(d) would be meaningless if the first sentence were interpreted to mean that the statute of limitations runs as to all installments from the due date of the earliest installment sued for.

The statute's history, always an important tool in statutory interpretation and here made particularly significant by G.S. 160A-2, shows a legislative intent for a running of the limitation period as to each installment from the due date of that installment. The previous version of this statute of limitations, enacted by 1929 Public Laws, ch. 331, s. 1(b), former G.S. 160-93, read:

> No statute of limitation . . . shall bar the right of the municipality to enforce any remedy provided by law for the collection of the unpaid assessments . . . save from and after ten years from default in the payment thereof, or if payable in installments, ten years from the default of any installments.

In somewhat clearer language than the present statute, former G.S. 160-93 provided for a limitation period of "ten years from the default of any installments," or, as our Supreme Court interpreted it in *Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E. 2d 97 (1942), ten years from the default of *each* installment.

Former G.S. 160-93 is given continuing importance for interpretation of G.S. 160A-233(d) by G.S. 160A-2 which provides, "The provisions of this Chapter, insofar as they are the same *in substance* as laws in effect as of December 31, 1971, are intended to continue such laws in effect and not to be new enactments." (Emphasis added.) G.S. 160-93 was repealed effective 1 January 1972. 1971 Sessions Laws, ch. 698, s. 2. The limitation provision of G.S. 160A-233(d) is the same in substance as the limitation provision of former G.S. 160-93. In accordance with G.S. 160A-2, we interpret G.S. 160A-233(d) in uniformity with the interpretation which our Supreme Court gave former G.S. 160-93 in *Charlotte v. Kavanaugh, supra.*

We note that the question we have addressed here may have been rendered irrelevant by the trial court's allowing plaintiff's motion to amend its complaint to seek only those installments which fell due within the statutory period. We have addressed the question nevertheless because it is apparent that the trial court's judgment of dismissal was based upon an erroneous interpretation of G.S. 160A-233(d).

[2] The appellant also assigns error to the denial of its petition for attorney fees. The trial court in its 9 November 1977 order found that plaintiff's attorney's services in the action "were directed primarily toward the collection of assessments deemed by this court to be barred as previously stated herein and, therefore, should not be allowed."

This action was originally brought by Guilford County and the City of High Point to foreclose liens for delinquent ad valorem taxes as well as to foreclose the liens for unpaid 1963 and 1964 City of High Point water and sewer assessments upon the property. The delinquent taxes were paid by the defendants before entry of judgment in this action, leaving only the assessments unpaid. The procedure for foreclosure of assessment liens is prescribed by G.S. 160A-233(c) which provides: "Assessment liens may be foreclosed under any procedure prescribed by law for the foreclosure of property tax liens . . . ." In this case plaintiff chose to foreclose its assessment liens by means of the procedure prescribed by G.S. 105-374 entitled, "Foreclosure of tax lien by action in nature of action to foreclose a mortgage."

G.S. 105-374(i) provides:

> Costs.—Subject to the provisions of this subsection (i), costs may be taxed in any foreclosure action brought under this section in the same manner as in other civil actions . . . .
>
> The word "costs" as used in this subsection (i) shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow.

Construed together, G.S. 160A-233(c) and G.S. 105-374(i) provide for an award of one reasonable attorney's fee, in the court's discretion, in a foreclosure of an assessment lien by action in nature of action to foreclose a mortgage. The ruling of the trial

court denying an attorney fee in this case does not appear to have been made as a matter of discretion but as a matter of law. Upon remand of this case, plaintiff's attorney may reapply to the court for allowance of one reasonable attorney's fee, which application will be addressed to the trial court's sound discretion.

The judgment dismissing plaintiff's action is reversed and this cause is remanded for further proceedings relating to foreclosure of the unpaid installments of the assessments which fell due within ten years prior to institution of this action.

Reversed and remanded.

Judges MARTIN (Robert M.) and ERWIN concur.

ANN HARRISON HADDON v. WILLIAM WINFIELD HADDON

No. 787DC1075

(Filed 21 August 1979)

1. **Divorce and Alimony § 18.8— alimony pendente lite—evidence of sexual acts—admissibility**

Testimony by a wife concerning unnatural sex acts between the parties was not rendered inadmissible by G.S. 8-56, establishing a spousal privilege applicable to the testimony of husband or wife in an action in consequence of adultery, or for divorce on account of adultery, since the testimony regarding sexual conduct in this temporary alimony proceeding was offered to establish constructive abandonment.

2. **Divorce and Alimony § 18.12— alimony pendente lite—right to relief—sufficiency of evidence**

Evidence in an action for temporary alimony was sufficient to support the trial court's finding that defendant forced plaintiff to participate in abnormal and unnatural sexual conduct, and that such conduct was so abhorrent and degrading to plaintiff as to render it impossible for her to maintain the marital relationship.

3. **Divorce and Alimony § 18.11— alimony pendente lite—dependency of wife—sufficiency of evidence**

Evidence was sufficient to support the trial court's award of alimony pendente lite to plaintiff where the evidence tended to show that plaintiff had to use her savings and borrow money from her family in order to buy food and gasoline, and defendant failed to accept responsibility in his business, failed to

file federal or state income tax returns, and failed to pay promptly household bills.

4. **Divorce and Alimony § 18.9— alimony pendente lite—defendant's income—sufficiency of evidence**

Evidence was sufficient to support the trial court's award of alimony pendente lite and child support, though there was no evidence of defendant's earnings because he had never filed an individual income tax return, where the evidence did show that defendant was sole proprietor of a wholesale business; there was $1500 to $1600 in the cash drawer of the business; his accounts receivable were between $25,000 and $40,000; and the business inventory was between $45,000 and $60,000.

5. **Divorce and Alimony § 18.16— alimony pendente lite— attorney fee award—finding required**

In an action for alimony pendente lite, the trial court erred in awarding plaintiff attorney fees without making a finding as to the reasonable value of the legal services rendered.

APPEAL by defendant from *Britt (George M.), Judge.* Order entered 13 July 1978 in District Court, NASH County. Heard in the Court of Appeals 29 June 1979.

Plaintiff-wife instituted this action by filing a complaint on 5 May 1978 in which she requested permanent and temporary alimony, child custody and support and possession of the parties' home place. A hearing to consider plaintiff's requests, with the exception of permanent alimony, was held on 25 May 1978.

At the hearing, evidence for the plaintiff tended to show that the plaintiff and the defendant were married on 6 July 1973. No children were born of the marriage; however, plaintiff's child of a prior marriage was adopted by the defendant in 1973. The relationship between the parties began to deteriorate in 1974 when the defendant began bringing pornographic magazines into the home and placing unreasonable sexual demands on the plaintiff. The defendant threatened to cut off plaintiff's grocery money if she did not comply with his sexual demands. Evidence for the plaintiff further tended to show that the defendant failed to operate his business properly and that as a consequence the plaintiff was forced to borrow money from her parents to pay for necessities for herself and the child.

Evidence presented by the defendant tended to show that the plaintiff did not object to the defendant's sexual demands, and

that the plaintiff specifically told the defendant that the defendant's sexual demands were not the reason for her decision to separate from the defendant. The defendant denied that he failed to adequately support the plaintiff and testified that his business had between $45,000-$60,000 in inventory with $3,200 in accounts payable and $25,000-$40,000 in current accounts receivable.

After hearing the evidence, the trial judge entered an order awarding temporary alimony, custody of the child and child support, possession of the home place and attorney's fees to the plaintiff. The judge found in part that the defendant: (1) failed to provide adequate support for the plaintiff and child; (2) intimidated the plaintiff to participate in sexual practices which were intolerable to her; (3) practiced deviate sexual practices in the home; (4) refused to carry on his business in a normal fashion; and (5) refused to pay household bills and face his financial problems to the detriment of the plaintiff and the child. The judge further found that the defendant's conduct was so abhorrent and degrading that the plaintiff was justified in leaving the home.

From the entry of the order, defendant appeals.

Thorp, Anderson & Slifkin by William L. Thorp and Michael J. Anderson for plaintiff appellee.

Don Evans for defendant appellant.

CLARK, Judge.

[1] Defendant first assigns as error the admission by the trial court of evidence concerning unnatural sex acts between the plaintiff and the defendant. Defendant contends that evidence of spousal sexual conduct is not admissible as such evidence constitutes a "confidential communication" within the meaning of G.S. 8-56.

G.S. 8-56 establishes a spousal privilege applicable to the testimony of husband or wife in "any action or proceeding in consequence of *adultery*, or in any action or proceeding for divorce on account of *adultery*; or in any action or proceeding for or on account of *criminal conversation* . . . ." (Emphasis added.) Clearly, an application of G.S. 8-56 is not proper where, as here, the testimony regarding sexual conduct is offered to establish constructive abandonment in a temporary alimony proceeding. De-

fendant's reliance on cases such as *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972) and *Hicks v. Hicks*, 271 N.C. 204, 155 S.E. 2d 799 (1967), is misplaced, as the purpose of the testimony offered in those cases was to prove adultery on the part of one of the spouses. Furthermore, the defendant failed to object to the introduction of the testimony at trial and in fact in his own testimony admitted the performance of certain deviate sexual acts. *See Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). This assignment of error is overruled.

The defendant contends that there is no evidence to support the findings by the trial court that defendant (1) failed to provide adequate support and (2) forced participation in sex practices which were intolerable to plaintiff, the grounds for alimony alleged in the complaint.

[2] One of the requirements for an award of alimony *pendente lite* is that the court find as an ultimate fact that it appears from the evidence that the alleged ground for alimony appears to be true. G.S. 50-16.3(a)(1), and *see Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972). It is sufficient if the trial court finds that it *appears* from the evidence that the dependent spouse is entitled to the relief demanded and that it appears the said spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to pay the necessary expenses thereof. *Painter v. Painter*, 23 N.C. App. 220, 208 S.E. 2d 431 (1974); *Sprinkle v. Sprinkle, supra.*

Evidence of abnormal and unnatural sexual conduct was offered by both plaintiff and defendant. There was conflicting evidence on the question of whether such conduct was abhorrent and intolerable to the plaintiff. However, the plaintiff did offer abundant evidence that defendant's persistent sexual conduct was intolerable to her and that she was forced against her will to engage in them with defendant. We find such evidence sufficient to support the finding of the trial court that such conduct by defendant was so abhorrent and degrading as to render it impossible for plaintiff to maintain the marital relationship and to cause her to separate from defendant. G.S. 50-7(4) and G.S. 50-16.2(7).

[3] Plaintiff also presented evidence which tended to show that the plaintiff depleted her personal savings in order to provide

necessities for the family. She was forced on several occasions to borrow money from her family in order to buy food and gasoline. Standing alone, the defendant's failure to provide support would be sufficient to uphold the judge's award of alimony *pendente lite* to the plaintiff. Moreover, in this case, the defendant's failure to accept responsibility in his business, his failure to file federal or state income tax returns and his recurring failure to promptly pay household bills could collectively constitute constructive abandonment. *See Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971).

[4] Defendant next contends that the trial court failed to make sufficient findings of the defendant's income and financial ability to support the award of alimony *pendente lite* as required by G.S. 50-16.5, and for child support as required by G.S. 50-13.4(c). There was no evidence of defendant's earnings because he had never filed an individual income tax return. Defendant testified that he was in contact with an IRS agent about his failure to file tax returns for 1975, 1976, and 1977. However, it did appear from the evidence that defendant was sole proprietor of a wholesale business, that there was $1500 to $1600 in the cash drawer of the business, that his accounts receivable were between $25,000 and $40,000, and that the business inventory was between $45,000 and $60,000. It is apparent that defendant has substantial assets and some earnings, but that defendant's failure to prepare business statements and file income tax returns precluded any competent evidence of his earnings. We concede that it would be more desirable for the trial court to have more evidence of defendant's earnings and financial condition and that the court make more detailed findings of fact based on such evidence, but in view of the fact that such evidence was not available to the court because of defendant's failure or refusal to prepare business records and file income tax returns and that the alimony was temporary, we conclude that the evidence and findings are sufficient to support the awards of alimony *pendente lite* and child support. This is a situation where the statutory requirements for determining awards for support of dependent children (G.S. 50-13.4) and spouses (G.S. 50-16.5) must be so construed that legislative purpose is not vanquished by the rule of strick construction. A parallel situation arises where the supporting spouse deliberately depresses income in disregard for the duty to provide for the de-

pendent spouse and children, in which case it is established that capacity to earn may be the basis of an award. *See Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976).

[5] Defendant finally argues and the plaintiff concedes that the trial court erred in awarding attorney fees to the plaintiff in the absence of findings as to the value of the legal services.

In this contention, the defendant is correct. A finding by the trial court as to the reasonable value of legal services rendered is necessary in order to sustain an award of attorney fees. *Self v. Self*, 37 N.C. App. 199, 245 S.E. 2d 541, *cert. denied*, 295 N.C. 648, 248 S.E. 2d 253 (1978). No such finding was made in this case. Therefore, this portion of the order is vacated and remanded to the trial court for further proceedings.

The order appealed from is

Affirmed in part; reversed in part; and remanded.

Judges MITCHELL and ERWIN concur.

STATE OF NORTH CAROLINA v. SAMUEL H. BRITT

AND

STATE OF NORTH CAROLINA v. TERESA BRITT

No. 788SC506

(Filed 21 August 1979)

1. Criminal Law § 35— evidence of another's guilt

The admissibility of evidence tending to show the guilt of one other than the accused depends upon its relevancy in the case in which it is offered—whether it logically tends to prove or disprove some material fact at issue in the particular case.

2. Criminal Law § 35— evidence of another's possession of heroin—relevancy

In a prosecution of a husband and wife for possession of heroin in which the State presented evidence that a small plastic bag containing heroin was found in the back bedroom of defendants' residence, the trial court erred in

refusing to permit defendants to elicit on cross-examination of the State's witnesses evidence that a third person, who was the only person seen by officers to come from the back bedroom, had on his person eight small plastic bags exactly like the one found in the back bedroom, since evidence which logically tends to show that someone other than the defendants had actually possessed the heroin while on their premises is relevant in the jury's determination of whether defendants had such knowledge of the presence of heroin in their residence and such power and intent to control its disposition and use as to make them guilty of possessing it.

APPEAL by defendants from *Strickland, Judge.* Judgments entered 6 January 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 27 September 1978.

In Case No. 77CR6661 Sgt. Samuel H. Britt was charged with felonious possession with intent to sell of heroin. In Case No. 77CR6663 his wife, Teresa Britt, was charged with the same offense. Each defendant pled not guilty, and the two cases were consolidated for trial. (In addition, two other cases, in which each defendant was charged with unlawful possession of marijuana, were tried at the same time; however, each defendant was found not guilty on the charge of unlawful possession of marijuana, and the marijuana cases are not involved on this appeal.)

All cases grew out of a search made on 19 May 1977 of the residence occupied by the defendants on the Seymour Johnson Air Force Base. The search was made by both military and civilian officers acting under an "Authority to Search and Seize" signed by the commanding officer of the base. The validity of the search was before this Court in *State v. Long*, 37 N.C. App. 662, 246 S.E. 2d 846 (1978), in which the search was found valid, and that question will not be further discussed on this appeal.

The State's evidence, presented at pretrial and at voir dire hearings during the trial to determine the admissibility of evidence, showed the following: When the officers entered the Britt residence at about 10:30 p.m. on the night of 19 May 1977 for the purpose of searching for heroin and marijuana, they found on the premises, in addition to Sgt. Britt and his wife, Teresa Britt, three other persons, James L. Woodard, Ben H. Murray, and Walter Douglas Long. Mrs. Britt opened the door when the officers knocked. The officers then made a "rather rapid" entry

into the house. Murray was found in the living room, Sgt. Britt and Woodard in the bathroom, and Long was seen coming out of the back or master bedroom. The officers immediately took all five into the living room. Only thirty to forty-five seconds elapsed between the time the officers entered the house and the time everyone was rounded up. In the living room the officers conducted a "pat down" of all five occupants of the house to determine whether they were armed. As a result of this "pat down," the officers found in Long's left boot a spoon wrapped in plastic, a needle, three white Q-tips, and eight small plastic bags containing a brownish powder type substance. Nothing was found on any of the other four occupants of the house as result of the "pat down." The officers then searched the Britt residence. In the back or master bedroom they found, on a dinner plate which was lying on the bed, a small plastic bag containing a brownish powder type substance. This bag was exactly like the bags found in Long's boot. Subsequent analysis revealed that the brownish substance in the plastic bag found in the bedroom and in the eight bags found in Long's boot contained heroin.

In a pretrial order, Judge George M. Fountain found the search of the Britt premises lawful and accordingly denied the motion of defendant Samuel H. Britt to suppress the evidence found as result of a search of the house. However, Judge Fountain found, in an order dated 6 December 1977, that the "pat down" search of Long's person was unlawful and accordingly concluded "that the offer of such evidence against Walter D. Long would be incompetent." (The State appealed from Judge Fountain's order of 6 December 1977, and this Court, while agreeing with his conclusion that the search of the premises was valid, disagreed with his conclusion that the "pat down" search of Long's person was invalid; accordingly, this Court reversed the order granting Long's motion to suppress and remanded the case against Long for further proceedings. *See State v. Long, supra.*)

At the trial of the present cases against Sgt. Britt and his wife, the State presented evidence concerning the small plastic bag and its contents found in the bedroom of the Britt home. The defendants did not present evidence, but sought by cross-examination of the State's witnesses to bring before the jury the fact that Long, who was the only person seen by the officers to

come from the bedroom, had on his person eight small plastic bags exactly like the one found in the bedroom. The trial judge sustained the State's objections to this line of cross-examination and would not permit the defendant to bring before the jury any information as to what was found on Long's person as result of the "pat down."

The jury found each defendant guilty of possession of heroin. From judgments imposing prison sentences, the defendants appeal.

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

Braswell & Taylor by Roland C. Braswell for defendant appellants.

PARKER, Judge.

The validity of the search having been already determined by this Court in *State v. Long*, 37 N.C. App. 662, 246 S.E. 2d 846 (1978); *cert. denied*, 295 N.C. 736, 248 S.E. 2d 866 (1978), defendants' assignments of error directed to that question are overruled.

Defendants' assignments of error directed to the denial of their motions for directed verdicts are also overruled. In the first place, the record on this appeal does not contain a narration of all, or even of most, of the evidence presented before the jury. Therefore, no question as to the sufficiency of the evidence to take the cases to the jury is properly presented for our review on this appeal. Moreover, the record does show that evidence was presented that heroin was found in the bedroom of defendants' home, and "[w]here such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972); *accord, State v. Wells*, 27 N.C. App. 144, 218 S.E. 2d 225 (1975); *State v. Summers*, 15 N.C. App. 282, 189 S.E. 2d 807 (1972).

This brings us to the principal question presented by this appeal, whether the court erred in excluding the evidence sought to

be elicited by defendant's counsel through cross-examination of the State's witnesses concerning the eight plastic bags of heroin found on the person of Walter Long. We find that the court erred in its rulings excluding this evidence.

[1] The law of this State with respect to the admissibility of evidence tending to show the guilt of one other than the accused has been described by our Supreme Court as being "rather unsettled." *State v. Gaines*, 283 N.C. 33, 41, 194 S.E. 2d 839, 845 (1973). In that case the Supreme Court found it unnecessary to discuss this area of the law, since the Court found the evidence in question in that case was properly excluded because it was "totally lacking in probative value" and was "wholly irrelevant." In our view, the admissibility of such evidence should depend upon its relevancy in the case in which it is offered—whether it logically tends to prove or disprove some material fact at issue in the particular case. *State v. Couch*, 35 N.C. App. 202, 241 S.E. 2d 105 (1978); 1 Stansbury's N.C. Evidence (Brandis Rev.) § 93; 1 Wigmore on Evidence 3d ed., §§ 139-142. Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded. Examples of this type of situation may be found in *State v. Shinn*, 238 N.C. 535, 78 S.E. 2d 388 (1953) and *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). Similarly, evidence that someone other than the accused may have had a motive to commit the offense, without more, is not sufficiently relevant to be admissible. Examples of this are *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Couch, supra; State v. Jones*, 32 N.C. App. 408, 232 S.E. 2d 475 (1977).

[2] Applying the test of relevancy to the excluded evidence in the present case, we find it relevant as tending to show, not just by way of conjecture but as a logical inference which the jury might draw, that Long, rather than either of the defendants, had possession of the one packet of heroin found in the bedroom. Long was the only person seen coming from the bedroom or known by the officers to have been there shortly before the search was made. Evidence that he had secreted on his person eight exactly similar packets gives rise to the logical inference that he also had had actual possession of the single packet left in the bedroom. No

evidence showed that the defendants had had actual possession of the heroin, the State depending entirely on the theory of constructive possession to show their guilt. Certainly, evidence which logically tends to show that someone other than the defendants had actually possessed the heroin while on their premises is relevant in the jury's determination of whether the defendants had such knowledge of the presence of the heroin in their home and such power and intent to control its disposition and use as to make them guilty of possessing it.

That Judge Fountain had ruled the evidence of the heroin found on Long's person was incompetent *as against him*, would not warrant its suppression when the defendants sought to use it in their defense. This would be true even had Judge Fountain's ruling been correct. The purpose of the exclusionary rule is to deter officers from making unlawful searches, a purpose which can hardly be achieved when a defendant seeks to use the evidence as relevant to his defense. For the error in excluding the evidence as to the eight packets of heroin found on Long, the defendants are granted a

New trial.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. RUTH WILSON KEETER AND ROY RICHARD KEETER

No. 7929SC280

(Filed 21 August 1979)

1. Narcotics § 4.1— possession of controlled substances—aiding and abetting—insufficiency of evidence

The trial court erred in denying the male defendant's motions to dismiss on the ground that the evidence was insufficient from which an inference of aiding and abetting in the unlawful possession of controlled substances could be drawn since the evidence tended to show at most a close, friendly relationship with the female defendant, in whose pocketbook the contraband and money were found, but there was no evidence that the male defendant who claimed that the money was his procured, encouraged or assisted the female

defendant in the unlawful possession of the controlled substances or was present for such purpose to the knowledge of the female defendant.

2. Criminal Law § 101— comment heard by one juror—individual polling not required

The trial court did not err in failing to poll all of the jurors to determine whether their verdicts would be affected by the dismissal of a juror because the juror stated that her verdict would be influenced by a comment she had heard, since the trial judge did question the jurors about the incident, and all of them stated that they had not heard any comments.

APPEAL by defendants from *Seay, Judge.* Judgment entered 15 November 1978 in Superior Court, HENDERSON County. Heard in the Court of Appeals 13 June 1979.

Upon trial by jury, defendant Ruth Wilson Keeter was convicted of felonious possession of marijuana with intent to distribute, and felonious possession of meprobamate and phencyclidine, violations of the Controlled Substances Act, N.C.G.S. 90-95. Defendant Roy Richard Keeter was convicted of aiding and abetting in the above named offenses.

The evidence tended to show that pursuant to a search warrant detectives with the Henderson County Sheriff's Department searched the residence of Ray Justice around noon on 1 December 1977. At the time of the search, defendant Ruth Wilson Keeter and her infant were present within the residence. All persons present in the house were sitting around the kitchen table except Ray Justice. Defendant Roy Keeter arrived at the residence about ten minutes after the search began. In the search, detectives seized a pocketbook from a shelf in the kitchen. The pocketbook contained, *inter alia,* a wallet holding driver's license issued to Ruth Wilson Keeter, as well as other papers in her name, a plastic bag containing 46.9 grams of marijuana (28.35 grams = 1 ounce), a plastic film canister containing 1.47 grams of phencyclidine, three tablets containing meprobamate, and a leather pouch containing $1,617.96 in United States currency. A set of postage scales, pipes and a small bag of cold capsules were also seized from the house in the search.

Upon seizure of the pocketbook, the officers counted the money on the kitchen table for inventory purposes. At that

point, defendant Roy Keeter stated that the money was his and asked whether he would be able to get it back.

Defendant Ruth Wilson Keeter was sentenced to imprisonment for three years as a committed youthful offender on the marijuana and phencyclidine counts and to six months suspended on the meprobamate count. Defendant Roy Keeter was sentenced to imprisonment for two to four years on the marijuana and phencyclidine counts and six months concurrent on the meprobamate count. From these judgments, defendants appeal.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Jack H. Potts for defendant appellants.

MARTIN (Harry C.), Judge.

Six assignments of error are raised on appeal. Three assignments of error are raised on behalf of both defendants, one solely on behalf of defendant Ruth Wilson Keeter and two solely on behalf of Roy Keeter. We find no error in the trial of Ruth Wilson Keeter and vacate the judgments of Roy Keeter.

[1] Defendant Roy Keeter contends the trial court erroneously denied his motions to dismiss pursuant to N.C.G.S. 15A-1227 because the evidence was insufficient from which an inference of aiding and abetting could be drawn. We agree.

To withstand a motion to dismiss, there must be substantial evidence of all material elements of the offense. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 54 L.Ed. 2d 281 (1977). The legal principles of aiding and abetting must be applied to the evidence offered in this case to decide whether there was sufficient evidence to require submission of the charges to the jury with respect to defendant Roy Keeter.

> All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. [Citations omitted.]

> An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. [Citations omitted.]
>
> To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary.

State v. Ham, 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953).

The crime of possession requires that the contraband be in the custody and control of the defendant and subject to his disposition. *State v. McDougald*, 18 N.C. App. 407, 197 S.E. 2d 11, *cert. denied*, 283 N.C. 756, 198 S.E. 2d 726 (1973).

Considering all the evidence in the light most favorable to the State and resolving any inconsistencies in its favor, the evidence against defendant Roy Keeter tends to show: Defendant Roy Keeter was not present at the time the search began but arrived approximately ten minutes thereafter. The pocketbook of defendant Ruth Wilson Keeter was found containing the controlled substances, money, and other articles. When the officers proceeded to count the money found in the pocketbook, Roy Keeter stated that the money was his and wanted to know if he would be able to get it back. Defendant Roy Keeter was not married to defendant Ruth Wilson Keeter at the time of the search on 1 December 1977, although they subsequently married. Detective Harris had seen the defendants together numerous times prior to 1 December 1977.

We hold this evidence was insufficient to warrant submission to the jury and to support a verdict that defendant Roy Keeter was aiding and abetting defendant Ruth Wilson Keeter in the unlawful possession of the controlled substances. There was no evidence that Roy Keeter procured, encouraged or assisted Ruth Wilson Keeter in the unlawful possession of the controlled substances or was present for such purpose to the knowledge of Ruth Keeter. To aid or abet one in the crime of possession, the act or encouragement must be done knowingly with the intent to

aid the possessor obtain or retain possession. *People v. Doemer*, 35 Mich. App. 149, 192 N.W. 2d 330, 47 A.L.R. 3d 1236 (1971). He merely stated the money was his. The fact of Roy Keeter's close, friendly relationship with Ruth Keeter, without additional evidence of Roy Keeter aiding and abetting in the perpetration of the crime, is not sufficient to support a conviction. *State v. Ham, supra*. Mere association is not aiding and abetting. His convictions must be, and are, reversed.

[2] Defendant Ruth Wilson Keeter contends that the trial court erred in failing to poll all of the jurors to determine whether their verdicts would be affected by the dismissal of a juror because the juror stated that her verdict would be influenced by a comment she had heard. The evidence tended to show that during a recess at the trial, a juror heard a comment concerning the case. When court resumed, the juror was questioned by the judge, and she stated that the comment she had heard would influence her decision. The juror was dismissed from the case. Defense counsel moved for a mistrial on the ground that this incident may have influenced the remaining jurors. Upon questioning by the trial judge, the remaining jurors stated they had not heard any comments. We hold the veteran trial judge properly denied defendant's motion for mistrial.

Upon careful review of defendant Ruth Wilson Keeter's remaining assignments of error, we find them to be without merit.

For the foregoing reasons, in the cases of Ruth Wilson Keeter we find no error.

In the cases of Roy Richard Keeter the judgments are reversed.

Chief Judge MORRIS and Judge PARKER concur.

MERIWETHER W. HUDSON v. FITZGERALD S. HUDSON

No. 7814DC1018

(Filed 21 August 1979)

1. **Divorce and Alimony § 27— consent judgment as to child custody—action still one for custody and support**

An action remained an action for child custody *and* support even though the court entered a consent order on the question of custody prior to trial, since an agreement for custody was not final and binding on the court, and the court retained jurisdiction to protect the interests and welfare of the minor children.

2. **Divorce and Alimony § 27— action for child custody and support—counsel fees**

Although the trial court was not required to make findings of fact in awarding counsel fees in an action for child custody and support, the court's award of counsel fees to plaintiff wife was supported by its finding that after defendant left the home of the parties he paid $834 per month for support of the three children, but one year later he deliberately reduced that amount to $375 per month, since $375 was not adequate or reasonable for children accustomed to residences in Durham and Southern Pines, a vacation home in Maine, trips, horses, country clubs, hunt clubs, and private boarding schools, and that amount was not commensurate with defendant's financial condition and position in society.

APPEAL by defendant from *Gantt, Judge.* Judgment entered 20 February 1978 in District Court, DURHAM County. Heard in the Court of Appeals 25 June 1979.

Plaintiff brought this action on 12 February 1976 for, *inter alia*, alimony without divorce, custody and support of three children born of the marriage, and attorney fees. Defendant answered and counterclaimed for divorce from bed and board. On 20 June 1976, the court entered a consent order giving plaintiff custody of the children and defendant visitation privileges.

The remainder of the claims came up for trial on 16 January 1978. After selecting and empanelling the jury on the alimony and support actions, the parties stipulated that if the court should find plaintiff to be a dependent spouse, then plaintiff was entitled to alimony. Following this stipulation, the jury was dismissed and the court heard evidence on the above issue and the issue of child support. On 20 February 1978, the trial court awarded plaintiff alimony, child support, and attorney fees.

The order for alimony and child support required defendant: to continue to provide the residence in Durham, North Carolina, for the minority of the children and until the death or remarriage of plaintiff; to pay taxes, insurance and mortgage payments on the home and to keep it in reasonably good repair; to pay for the benefit of the minor children the costs of private schooling, $500 per year per child for clothing, all medical and dental expenses, and $150 per month per child while the children are living at home with plaintiff (this amount reduced to $50 per month per child during the nine-month period the child is at boarding school); to pay plaintiff alimony of $866.67 per month; to pay the sum of $1,000 for a family membership to the Hope Valley Country Club and the sum of $500 for a family membership to the Triangle Hunt Club; and to maintain the Maine home for a vacation place, including taxes, insurance, upkeep and repair.

Plaintiff's net estate was valued at $665,652. Defendant's net estate was valued at $492,941. The trial court found that in 1977 plaintiff received a spendable income of $9,192 and defendant received a salary of $101,000, and after all expenses he had a spendable income of $24,124.

In the litigation of this action plaintiff incurred attorney fees totalling $66,000. The court awarded $22,000 in counsel fees for legal services rendered for the benefit of plaintiff and the children. From the judgment awarding counsel fees, defendant appeals.

Haywood, Denny & Miller, by George W. Miller, Jr., for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Robert A. Wicker, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant's sole contention on appeal is that the trial court erred in awarding plaintiff attorney fees for legal services rendered on her behalf and on behalf of the children. This case involves actions for alimony, child *custody and* support, bringing it within the ambit of N.C.G.S. 50-13.6.

[1] Defendant contends this is not an action for custody *and* support because the court entered a consent order on the question of

custody of the children before trial. The initiation of the action for the custody of the children placed the custody and welfare of the children with the court. Separation agreements or a consent judgment cannot "withdraw children of the marriage from the protective custody of the court." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). Even though parties may stipulate and agree as to the custody of minor children, such stipulations are not final and binding upon the court, and the court retains jurisdiction and authority to protect the interests and welfare of minor children. *Fuchs v. Fuchs, supra; Finley v. Sapp*, 238 N.C. 114, 76 S.E. 2d 350 (1953). Therefore, even after the agreement of the parties, this case remained one for *custody and* support.

[2] The award of counsel fees in a custody *and* support action does not have to be supported by findings of fact. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). An award of counsel fees in a custody and support action is within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of an abuse of discretion. N.C. Gen. Stat. 50-13.6; *Stanback v. Stanback, supra.* In an action solely for support, an award of counsel fees is not only limited by the abuse of discretion but also by the second provision of N.C.G.S. 50-13.6. *Stanback v. Stanback, supra.*

The trial judge exercised his discretion cautiously and carefully in reaching his decision, making findings of fact even though they were not required. We hold the trial judge did not abuse his discretion in the award of counsel fees. Although findings of fact are not required in an award for counsel fees in a custody and support action, it is considered to be the better practice to make such findings.

Even though not required, the findings of fact support the award for attorney fees. Specifically, the court found that after the defendant left the home of the parties he paid $834 per month for support of the three children and one year later he deliberately reduced this amount to $375 per month to compel plaintiff to bring legal action. This finding would allow a recovery for attorney fees in a support action under the following terms of N.C.G.S. 50-13.6: "Before ordering payment of a fee in a support

action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; . . .." Although the amount of child support is not before this Court, we consider the amount paid after the separation of the parties only for the purpose of the application of this statute. "What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties." *Williams v. Williams*, 261 N.C. 48, 57, 134 S.E. 2d 227, 234 (1964). The amount of $375 per month was not adequate nor reasonable for children accustomed to residences in Durham, Southern Pines, a summer vacation home in Maine, trips, horses, country clubs, hunt clubs and private boarding schools. In this case, $375 per month child support was not commensurate with defendant's financial condition and position in society. *Williams v. Williams, supra.* Under the circumstances existing at the time of the institution of this action, it is obvious that the amount of $375 was inadequate for the support of the three children.

The order awarding counsel fees is

Affirmed.

Judges PARKER and ERWIN concur.

WILLIAM H. DIXON v. SEDGEFIELD REALTY COMPANY AND JOSEPH K. LENKOWSKY

No. 7818SC50

(Filed 21 August 1979)

Evidence § 32.4— parol evidence—contradiction of price shown in memoranda of agreement

The trial court erred in permitting plaintiff to contradict with parol evidence the contract price which appears in the parties' written memoranda of their agreement.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 24 August 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals at Winston-Salem 14 November 1978.

This is an appeal by defendants from judgment upon a jury verdict awarding plaintiff $4,275.60 as damages for the uncompensated portion of the reasonable value of dry wall installation services rendered defendants by plaintiff. Plaintiff sued defendants for the unpaid balance of money allegedly due and owing on an express contract, or in the alternative, due and owing as the uncompensated portion of the reasonable value of plaintiff's services rendered to defendants.

The following facts are not in dispute: Plaintiff is a dry wall contractor. In 1972 plaintiff completed installation of sheetrock in 70 apartment units and 8 stairwells of the Sedgefield Garden Apartments, a project then being constructed by the defendants. Plaintiff originally agreed with defendants to do the dry wall work in 121 apartment units. Plaintiff approved a written memorandum dated 10 March 1972 prepared on plaintiff's printed letterhead addressed to "Sedgefield Gardens, Greensboro, N.C." which had typed and written thereon, "Furnish sheetrock labor and Materials for the sum of $59,000.00 as per plans & Specs." After completion of the first 24 units, plaintiff also agreed to dry wall 12 stairwells. At this time, plaintiff and defendant Lenkowsky affixed their signatures to an undated memorandum which reads as follows:

Sedgefield Apartments

> My contract price originally was $59,000 for the Labor and Material. The thirteen [this word is lined through and the figures 12 are written above it] stairways have been added to my contract at $488.00 each. This put my contract at the total of $65,344.00 [under this number, 488 is subtracted to get the remainder 64,856 which is initialed WHD] for the complete job.
>
> William H. Dixon (Signature)
> Joseph K. Lenkowsky (Signature)

Plaintiffs stopped work after completing 70 apartment units and 8 stairwells for which he received four payments totalling $35,672.80. Statements prepared under plaintiff's own letterhead show that these payments were at the rate of $488.00 per apartment unit completed and $488.00 per stairwell completed.

At trial, plaintiff was permitted to testify over defendants' objections: He originally agreed with defendants to dry wall the apartments for $576.00 per unit. The signed written memorandum quoted above was signed by him "to clarify the stairwell question." Plaintiff did not prepare the document but he read it before he signed. Concerning the payments received, plaintiff testified that he had not approved the statements which had been prepared on his letterheads. He disagreed with the amount of money he received and objected every time, "but when your money is out you got to agree."

The trial court submitted issues to the jury which answered as follows:

1. Did the defendant, Joseph K. Lenkowsky, acting as a partner of Sedgefield Realty Company, enter into a contract with the plaintiff, William H. Dixon, whereby the plaintiff was to be paid for the installation of sheetrock on the Sedgefield Garden Apartments job at an apartment unit price of $576.00 and at a stairwell unit price of $488.00?

ANSWER: No

4. Did the plaintiff and the defendants enter into a contract whereby the plaintiff was to install sheetrock with labor and materials provided by the plaintiff on 121 apartments and 12 stairwells at the Sedgefield Apartments at $488.00 per apartment and $488.00 per stairwell?

ANSWER: No

7. Is the plaintiff entitled to recover from the defendants upon quantum meruit for work, labor and/or services performed?

ANSWER: Yes.

8. What amount of damages, if any, is the plaintiff entitled to recover from the defendants for work, labor and for services performed?

ANSWER: $4275.60

From judgment entered on the verdict, defendants appeal.

M. Douglas Berry for the plaintiff appellee.

Benjamin D. Haines for the defendant appellants.

PARKER, Judge.

The sole question to be addressed on this appeal is whether the trial court erred in permitting plaintiff to contradict with parol evidence the contract price which appears in the parties' written memoranda of their agreement. We find that the admission of this evidence was error.

> A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953); *see, Craig v. Kessing*, 297 N.C. 32, 253 S.E. 2d 264 (1979).

The contract in this case is not one required to be in writing. However, the memoranda on which appellants rely establish in writing the contract price. The written memoranda do not state the number of units included within that price. However, the number of units was established by plaintiff's own testimony. The one element of their engagement which the parties deliberately put in writing was the contract price. This element cannot be contradicted by parol evidence. There is no allegation or evidence of fraud or mistake but rather, on the contrary, an admission by plaintiff that he approved the first memorandum after it was completed and signed the second after having read it.

The contract price according to plaintiff's own testimony covered 121 apartment units. At the written contract price of

$59,000.00, the unit cost of 121 units very closely approximates $488.00. It was error to permit plaintiff to testify in contradiction of the written memoranda that the parties' agreement was that plaintiff would be paid $576.00 per unit.

New trial.

Judges MARTIN (Robert M.) and ERWIN concur.

LELIA HESTER COLETRANE v. JAMES CHRISTIAN LAMB III

No. 7815SC927

(Filed 21 August 1979)

1. Damages § 17— instructions

The trial court's original instruction and additional response to the jury's question that it was the jury's province to determine the amount of damages and that plaintiff had the burden of proving the amount of damages sustained by the greater weight of the evidence clearly and correctly declared and explained the law on damages.

2. Trial § 52.1— adequacy of award—refusal to set aside verdict proper

The trial court did not err in denying plaintiff's motion to set aside the verdict because the damages were inadequate, even though the parties stipulated that plaintiff incurred hospital and doctor bills of $8,716.79, but the jury returned a verdict of $3,215.59, since the stipulation did not state that such medical bills were incurred by plaintiff in the treatment of injuries resulting from defendant's negligence, and there was evidence of illness of a nature other than the type that defendant's negligence could have caused.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 4 May 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 June 1979.

Plaintiff sued defendant for damages for personal injuries sustained in an automobile accident. On the morning of 26 March 1976, while plaintiff was turning left into her mother's driveway, the defendant's car crashed into the left passenger area of plaintiff's car. Plaintiff sustained numerous injuries from the collision, a broken left clavicle, broken ribs, a badly torn fifth finger and a ruptured spleen. Plaintiff's finger was amputated and her spleen removed.

At trial, the jury was given three issues to consider:

(1) Did the plaintiff sustain personal injuries as a result of the negligence of the defendant as alleged in the Complaint?

(2) If so, did the plaintiff by her own negligence contribute to her injuries and damages?

(3) What amount, if any, is plaintiff entitled to recover from the defendant for personal injuries?

After deliberating, the jury returned to the courtroom and requested further instructions on the question of damages. The court responded and the jury returned to its deliberations. The jury's verdict was in favor of plaintiff on the first two issues, and plaintiff was awarded damages of $3,215.59 on the third issue.

Plaintiff moved for a new trial on the issue of damages and also on all issues on the ground that the verdict was inconsistent and invalid as a matter of law. Both motions were denied and judgment was entered in accord with the verdict. Plaintiff appeals from this judgment.

Latham, Wood and Balog, by James F. Latham and B. F. Wood, for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and George W. Dennis III, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Plaintiff argues in her first assignment of error that when the jury foreman requested an explanation of the law on damages, the trial court inadequately responded to the question. The jury foreman asked in essence whether the jury was bound by amounts given of certain expenses. The trial judge responded:

> The jury—the jury puts the amount that—if you feel that the plaintiff is entitled to any amount of damages, it's the jury's province to determine that amount. The Court has not instructed you that you are required to return any particular figure. That is your job to determine the amount from the evidence, and the plaintiff has the burden to prove to you as to the amount of damages sustained by the greater weight

of the evidence. That is your job to determine the amount of damages.

Judge Farmer's additional instruction was correct in law and was a sufficient response to the jury's question. In the initial charge the jury was properly instructed on all pertinent issues raised by the evidence offered. Plaintiff did not request any specific instructions in the trial court and is barred from asserting them on appeal. A peremptory instruction as to damages would not have been proper in this case because the evidence was in conflict. *Distributing Corp. v. Parts, Inc.*, 7 N.C. App. 483, 173 S.E. 2d 41, *cert. denied*, 276 N.C. 575 (1970). The appellate court must review the trial court's charge to the jury contextually as a whole. *Nance v. Long*, 250 N.C. 96, 107 S.E. 2d 926 (1959). We hold the trial court's original instruction and additional response to the jury's question clearly and correctly declared and explained the law arising on all phases of the evidence. *Id.*

[2] Plaintiff's second assignment of error challenges the trial court's denial of her motion pursuant to Rule 59(a) of the North Carolina Rules of Civil Procedure to vacate and set aside the verdict of the jury as to damages and for a new trial. Plaintiff contends the verdict on the amount of damages was "inconsistent with uncontradicted evidence, not rendered in accordance with law, arbitrary, indicative of a manifest disregard by the jury of the instructions of the court, inadequate in view of the uncontradicted evidence and invalid as a matter of law." The granting or denial of a motion to set aside the verdict and for a new trial is within the sound discretion of the trial judge. *Dixon v. Young*, 255 N.C. 578, 122 S.E. 2d 202 (1961); *Evans v. Coach Co.*, 251 N.C. 324, 111 S.E. 2d 187 (1959). The ruling by a trial judge on a motion for a new trial is not subject to appellate review absent "a manifest abuse of discretion." *Scott v. Trogdon*, 268 N.C. 574, 575, 151 S.E. 2d 18, 18 (1966). Plaintiff contends there was a manifest abuse of discretion because the jury verdict on damages was contrary to the greater weight of the evidence. This argument is premised on the stipulation between the parties that plaintiff incurred hospital and doctor bills in the total sum of $8,716.79, yet the jury returned a verdict of $3,215.59.

A review of the evidence and the effect of the stipulation on the jury in its role as the trier of fact shows no manifest abuse of

discretion by the trial judge in his denial of plaintiff's motion to set aside the verdict and for a new trial. In the first issue submitted to the jury, it found that plaintiff was injured and that her injury resulted from the negligence of defendant. In the second issue submitted to the jury, it found that plaintiff was not contributorily negligent. The parties stipulated plaintiff incurred medical bills in the sum total of $8,716.79. However, this stipulation did not state that such medical bills were incurred by plaintiff in the treatment of injuries resulting from defendant's negligence. There was evidence of illnesses of a nature other than the type that defendant's negligence could have caused. First, plaintiff was hospitalized and treated for pneumonia. Although Dr. Battigelli testified that plaintiff's internal injuries received in the auto accident "could or might have been related in some logic [*sic*] fashion to the accident," the jury as trier of fact could or could not believe the testimony of this witness on this point. It is the province of the jury to weigh the evidence and determine questions of fact. *Howard v. Mercer*, 36 N.C. App. 67, 243 S.E. 2d 168 (1978). The function of the jury as the trier of fact, allocated to it by the Constitution, must be given the utmost consideration and deference before a jury's decision is to be set aside. N.C. Const. art. I, § 25. Second, Dr. Battigelli testified that a diagnosis of cancer emerged in the treatment of plaintiff. He stated that he did not treat plaintiff for the cancer, but that he referred her to the GYN service at UNC Memorial Hospital. This evidence left open the question of whether plaintiff was treated for the cancer at UNC Memorial Hospital and, if so, whether the cost of this treatment was included in the stipulated medical bills. Plaintiff did not allege or offer proof that the cancer was a result of the accident.

The jury was instructed to find by the greater weight of the evidence whether the medical expenses incurred by the plaintiff were the proximate result of the defendant's negligence. As discussed above, questions were raised by the evidence as to whether all of the stipulated medical expenses were incurred by plaintiff as a result of defendant's negligence.

Plaintiff also contends the jury failed to award other damages for personal injury. This we do not know and as to this question cannot speculate since the jury did not allocate the damages to particular causes. Plaintiff argues that her evidence

was uncontradicted. However, the above discussion tends to show the evidence was not so unequivocal and clear. Even though evidence is uncontradicted, the credibility of the evidence is exclusively for the jury. *Morris v. Tate*, 230 N.C. 29, 51 S.E. 2d 892 (1949). "Even though, upon plaintiff's evidence, reasonable minds might well differ as to the amount of damages to which she is entitled, yet an abuse of discretion is not manifest." *Sherrill v. Boyce*, 265 N.C. 560, 144 S.E. 2d 596 (1965).

We hold the trial court judge did not abuse his discretion in the denial of plaintiff's motions to set aside the verdict and for a new trial because the damages were inadequate.

No error.

Chief Judge MORRIS and Judge PARKER concur.

MARY FRANCES INGRAM ALMOND v. LARRY JOE ALMOND

No. 7820DC1035

(Filed 21 August 1979)

1. **Divorce and Alimony § 25.1; Infants § 6.5 — mother as fit and proper custodian of children — illegal cohabitation in presence of children — award of custody to mother**

Plaintiff mother's illegal cohabitation with a male person in the presence of her minor children did not prohibit the court from finding that she was a fit and proper person to have custody of her children, and the court properly awarded custody to the mother where the father had been given custody by a separation agreement; the parties gave considerable weight to the wishes of the children when they stipulated in the separation agreement that defendant should have custody; the relationship between the father and the children has deteriorated and is now poor; and the children, fourteen and ten years old, now prefer to reside with their mother.

2. **Injunctions § 4 — injunction to restrain criminal conduct**

The trial court properly denied defendant's plea to enjoin further criminal cohabitation between plaintiff mother and a male person in the presence of her minor children, since injunctive relief is not available to restrain the violation of a criminal statute where the remedy of a criminal prosecution is available.

APPEAL by defendant from *Honeycutt, Judge.* Order entered 8 August 1978 in District Court, STANLY County. Heard in the Court of Appeals 25 June 1979.

Plaintiff brought this action for custody of two minor children. Prior to this action defendant had custody of the children pursuant to a separation agreement entered into on 14 February 1978. On 26 May 1978, the minor son, Larry Joe Almond, Jr., decided to live with his mother. On the following day, the daughter, Mitzi Almond, also left to live with her mother.

The evidence tended to show a serious conflict between the minor son and the defendant. On one occasion the defendant chased the minor son with his truck, causing him to run approximately a half mile to the home of a family friend. On the day the minor son left defendant to go live with plaintiff, he did not wash the dishes and defendant punished him with his hands, fists and belt, causing bruises and welts on the child's upper body. Defendant had on occasion left his minor daughter with the eight-year-old daughter of his girlfriend, unsupervised and unattended for several hours at a mall in Charlotte. After the children went to live with their mother, defendant refused to allow them to get their clothes, personal belongings, toys, books and other recreational items, with the exception of four paper bags of clothing.

The plaintiff was cohabitating with a male person. She, the two children and the male friend all live in a three-bedroom mobile home.

After finding both plaintiff and defendant to be fit and proper persons to have custody of the two minor children, the trial court awarded plaintiff custody. The court concluded that there had been a substantial change of circumstances since the separation agreement and that in light of all the circumstances, the welfare and best interest of the children were served by granting custody to the mother. From the entry of this order, defendant appeals.

Hopkins, Hudson & Tucker, by Elton S. Hudson, for plaintiff appellee.

Wesley B. Grant for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant argues three assignments of error on appeal. The first two assignments challenge the trial court's conclusions that plaintiff was a fit and proper person to have custody and that it was in the best interest of the minor children for them to be placed in plaintiff's custody. Defendant contends these findings were in error in light of plaintiff's open and continuous cohabitation with another male person.

"[T]he welfare of the infants themselves is the polar star by which the discretion of the courts is to be guided" in determining questions of their custody. *In re Lewis*, 88 N.C. 31, 34 (1883). The trial court has wide discretionary power in reaching decisions in particular cases. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967). The decision must be made in light of all the circumstances of the case. *Harrington v. Harrington*, 286 N.C. 260, 210 S.E. 2d 190 (1974). The trial judge must make findings of fact adequately supported by competent evidence that the order entered is in the best interest and welfare of the children. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

[1] We now review the factors considered by the trial court in awarding custody to plaintiff. The foremost factor challenged by defendant is the cohabitation by plaintiff with a male person in the presence of the children. Although cohabitation by unmarried persons of the opposite sex is not condoned by this Court, nor by the laws of this state, evidence of cohabitation alone is not always sufficient to support a finding that a party is not a fit and proper person to have custody of minor children. "The establishment of adultery does not *eo instanti juris et de jure* render the guilty party unfit to have custody of minor children." *In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E. 2d 1, 5 (1969). Adulterous conduct is only one of numerous factors to be considered by the court in determining the fitness of a party.

Among other factors considered by the court was the evidence of the poor relationship between the father and the children as indicated in the above stated facts. Additionally, the court considered the wishes of the children that they preferred to reside with their mother, the plaintiff. "The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight when the contest is between

parents, but is not controlling." *James v. Pretlow*, 242 N.C. 102, 105, 86 S.E. 2d 759, 761 (1955). Two factors in this case require that great weight be given the wishes of the children. First, from the evidence it appears the children, fourteen and ten years old, are of an age to exercise discretion in choosing a custodian. Secondly, it is evident that the parties gave considerable weight to the wishes of the children when they stipulated in the separation agreement that defendant should have custody of the children. The children lived with their father for approximately three months following the separation agreement. After the experience of living with their father, they then chose to live with their mother. At the time of the hearing they had been living with their mother for over two months and still indicated that it was their preference to reside with her. We find the court properly gave considerable weight to the wishes of the children in this case.

Where the trial court finds that both parties are fit and proper persons to have custody of the children and finds that it is in the best interest of the children that one particular parent have custody, such holding will be upheld if it is supported by competent evidence. *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966). In such case, the trial court has wide discretionary power. *Swicegood v. Swicegood, supra.* Where there are adverse circumstances affecting both parties that do not justify taking the children away from the parents, the court may rely upon the guidance of the old adage that it must choose the lesser of two evils. For the foregoing reasons, the order awarding plaintiff custody of the minor children is sustained.

[2] Defendant's third and final assignment of error challenges the trial court's denial of defendant's plea to enjoin further criminal cohabitation of plaintiff and the male person in the presence of the two minor children. The trial court judge properly denied defendant's plea for injunctive relief. The violation of a criminal statute does not invoke the equitable jurisdiction of the court. *Yandell v. American Legion*, 256 N.C. 691, 124 S.E. 2d 885 (1962). Injunctive relief is not available to restrain the violation of a criminal statute where the remedy of criminal prosecution affords relief. *Id.* In this assignment, we find no merit.

Affirmed.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. PRESTON WILLIAMS AND ANGELA MILLANDER

No. 794SC331

(Filed 21 August 1979)

Searches and Seizures § 40— warrant to search for heroin—seizure of identifying materials—validity of seizure

The State failed to carry its burden of presenting evidence sufficient for the trial court to determine the validity of a search for and seizure of articles identifying defendants, including letters addressed to each defendant and photographs of the defendants, where the warrant under which the search was made specified heroin as the only item to be seized, and the State did not establish validity of the seizure under the "plain view" doctrine or any doctrine recognizing exigent circumstances which justify a warrantless search and seizure.

APPEAL by defendants from *Stevens, Judge.* Judgment entered 16 November 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 27 June 1979.

Defendants were charged and convicted of the felonious possession of the Schedule I controlled substance heroin with the intent to manufacture, sell, and deliver. Upon pleas of not guilty, defendants were brought to trial and found guilty by a duly impanelled jury. Defendant Millander was sentenced for a term of not less than two nor more than five years with a recommendation for work release. Defendant Williams was sentenced for a term of not less than three nor more than five years. Both defendants appeal.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Hamilton & Sandlin, by Billy G. Sandlin, for defendant appellant Preston Williams.

Gaylor & Edwards, by Jimmy F. Gaylor, for defendant appellant Angela Millander.

MORRIS, Chief Judge.

The primary question presented by defendants' appeal is whether certain items, including letters addressed to each defendant and photographs of the defendants, found in a bedroom on the premises at 212-K Maplehurst Road in Jacksonville were lawfully seized during a search pursuant to a search warrant specifying the above-mentioned address. The search warrant described heroin as the only item to be seized.[1] The items were seized in order to provide evidence of the identity of the persons occupying the premises where the heroin was found. The evidence tends to indicate that the defendants exclusively occupied the master bedroom and bath portion of the house trailer. The heroin was found in a "cooker cap" hidden within a lady's hygiene kit underneath a cabinet in the bathroom which is connected with the master bedroom. The letters and pictures were found in the adjoining master bedroom. Defendants contend that the items were not within the scope of the search warrant and were not within the plain view of the officers during their search for the heroin.

The evidence elicited on voir dire is inconclusive as to the validity of the seizure of the items identifying defendants as occupants of the premises. The defendant has not established the invalidity of the warrantless seizure nor has the State established its validity under the "plain view" doctrine or any doctrine recognizing exigent circumstances which justify a warrantless search and seizure. Searches and seizures without a warrant are unreasonable *per se* subject only to a few specific and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). The "plain view" doctrine is just such an exception. *See Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). When the State seeks to justify the warrantless seizure of evidence by one of these exceptions to the warrant requirement, it has the burden of bringing the seizure within an exception. *Coolidge v. New Hampshire, id.; Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed. 2d 409 (1970); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.

1. We reject summarily the argument of the State that the application for the search warrant also specified that any items constituting evidence of the identity of persons participating in the crime could be seized. The form of the application provides a blank for listing the items to be seized. Heroin was the only item listed. One or both of the parenthetical phrases appearing after the blank are supposed to be marked to indicate whether the item named is evidence of a crime or evidence of the identity of a party to a crime. Neither parenthetical could support seizure of evidence not specifically itemized in the blank provided for a listing of the items to be seized.

2d 685 (1969); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970). *See generally 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).

Because the State failed to carry its burden of presenting evidence sufficient for the trial court to determine the validity of the search for and seizure of the articles identifying defendants, the evidence was not properly admissible in evidence.

Defendants contend that without the incompetent evidence, the State's case was not sufficient to be presented to the jury, and their motions for nonsuit should, therefore, have been granted. This does not necessarily follow. The rule in this State is that, on a motion for nonsuit in a criminal action, the court is to consider *all* evidence admitted which is favorable to the State, regardless of its competency, and that evidence is to be deemed true and considered in the light most favorable to the State with discrepancies and contraditions therein disregarded and with the State entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977), and cases there cited. When the evidence introduced by the State in this case is so considered, without regard to competency, it is ample to carry the case to the jury.

Nevertheless, the error of the court in admitting the evidence of identity was sufficiently prejudicial to entitle defendant to a new trial.

New trial.

Judges PARKER and MARTIN (Harry C.) concur.

State v. School

THE STATE OF NORTH CAROLINA, THE CHILD DAY-CARE LICENSING COMMISSION OF THE DEPARTMENT OF ADMINISTRATION AND JOSEPH W. GRIMSLEY, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION, EX REL. RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA v. FAYETTEVILLE STREET CHRISTIAN SCHOOL AND ITS OPERATOR MR. BRUCE D. PHIPPS; GOSPEL LIGHT CHRISTIAN SCHOOL AND ITS OPERATOR MRS. DELORES B. YOKELY; GRACE CHRISTIAN SCHOOL AND ITS OPERATOR MR. EARL R. EATON; IMMANUEL DAY CARE CENTER AND ITS OPERATOR MRS. ELIZABETH HARRELL; BAPTIST TEMPLE SCHOOL AND ITS OPERATOR MR. DONALD R. CARTER; GRACE CHRISTIAN SCHOOL AND ITS OPERATOR MR. ROBERT DURHAM; BETHANY CHURCH SCHOOL AND ITS OPERATOR REVEREND GENE WOODALL; TABERNACLE CHRISTIAN SCHOOL DAY CARE AND ITS OPERATOR MR. RANDALL SHOOK; SOUTH PARK BAPTIST SCHOOL AND ITS OPERATOR MR. DANIEL D. CARR; GOSPEL LIGHT BAPTIST CHURCH AND ITS OPERATOR REVEREND GARY BLACKBURN; FRIENDSHIP CHRISTIAN SCHOOLS AND ITS OPERATOR MR. CHARLES STANLEY; AND ALL OTHERS SIMILARLY SITUATED

No. 7910SC230

(Filed 4 September 1979)

1. **Constitutional Law § 22; Infants § 4— licensing of church owned day-care centers—freedom of religion**

The application of the licensing requirements of the Day-Care Facilities Act of 1977 to church owned day-care centers does not violate the Freedom of Religion Clause of the First Amendment, since the required license does not relate to the ministry of the churches but only to the condition of the physical facilities of the day-care centers.

2. **Constitutional Law § 22; Infants § 4— licensing of church owned day-care centers—no exemption as vacation Bible school**

Church owned day-care centers are not exempted from the licensing requirements of the Day-Care Facilities Act of 1977 by the exception in G.S. 110-86(3) for "Bible schools normally conducted during vacation periods," since the operations of the day-care centers are year around and not vacation Bible schools.

3. **Venue § 2— licensing of church owned day-care centers—declaratory judgment action—action for injunction**

Wake County was the proper venue for an action by the Child Day-Care Licensing Commission against church owned day-care centers located in various counties for a declaratory judgment as to the Commission's authority to require defendants to be licensed pursuant to G.S. Ch. 110, Art. 7, and for an injunction prohibiting defendants from operating a day-care facility without obtaining a license from the Commission.

4. Injunctions § 13— licensing of church owned day-care centers—injunction against operation without license

The trial court did not err in entering a preliminary injunction prohibiting defendant church owned day-care centers from operating day-care facilities without obtaining a license from the Child Day-Care Licensing Commission pending a declaratory judgment action determining the Commission's authority to require defendants to be licensed pursuant to G.S. Ch. 110, Art. 7.

APPEAL by defendants from *Smith (Donald L.), Judge*. Orders entered 11 December 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 29 June 1979.

This action was instituted in Wake County on 20 October 1978 by the State of North Carolina and the Child Day-Care Licensing Commission of the Department of Administration (hereinafter referred to as the Commission) seeking a declaratory judgment relating to the plaintiffs' authority to require defendants, church operated day-care centers, to be licensed by the Commission pursuant to G.S., Chap. 110, Art. 7, G.S., Chap. 143B, Art. 9 (Part 4), and the rules and regulations promulgated thereunder by the Commission.

The named defendants are church operated day-care centers and their directors who have either refused to renew their expired licenses, or who have returned their expired licenses, and who have asserted their refusal to be licensed by plaintiff, although they have agreed to make available to plaintiffs evidence that they are complying with fire, health, and safety regulations.

In addition to the named defendants, plaintiffs bring this action against the class of all persons similarly situated; namely, church owned day-care facilities which continue to operate but which have refused to remain licensed by plaintiffs and have denied plaintiffs' authority to regulate them in any manner whatsoever. Plaintiffs also seek preliminary and permanent injunctions enjoining defendants and all others similarly situated from operating any day-care facility without having obtained a license from plaintiff Commission.

The named defendants moved to dismiss the action on the grounds that: (1) the licensing statutes are unconstitutional if they purport to authorize plaintiffs to license church owned day-care facilities; (2) there is no justiciable controversy; (3) church owned

day-care centers are excepted from the licensing requirements by G.S. 110-86(3); (4) the plaintiffs have failed to obtain proper venue and jurisdiction for injunctive relief against those defendants not located in Wake County; and (5) this action is not an appropriate class action, because defendants do not adequately represent the class, and plaintiffs have failed to exhaust administrative remedies.

Plaintiffs filed affidavits of the Secretary of Administration, the Director and the Assistant Director of the Office of Child Day-Care Licensing in the Department of Administration, the Licensing Supervisor for the Office of Child Day-Care Licensing, the Head of the Sanitation Branch, Division of Health Services in the Department of Human Resources, and the Code Consultant Supervisor for the Engineering and Building Codes Division of the Department of Insurance, stating that the day-care licensing requirements speak only to minimum standards of health and safety and do not interfere with any religious practice or contain any educational requirements for staff or children.

Defendants filed an affidavit signed by each of their directors stating that the operation of their day-care centers is part of the ministry of their churches, that the activities of the centers are not compartmentalized into religious and secular components, and that to require licensing by the State would seriously violate defendants' religious liberty. Defendants also filed affidavits of various sanitation and fire inspectors, stating that the various day-care centers operated by defendants were in satisfactory condition.

The court entered an order denying defendants' motion to dismiss on each ground asserted by defendants with leave to defendants to file additional motions should the action not be certified as a class action.

As to plaintiffs' request for a preliminary injunction, the court entered an order granting the injunction. The order provided in part as follows:

> "Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Commission is required by Article 7 of Chapter 110 of the General Statutes to regulate and supervise all day-care facilities within the State to the end that all such facilities shall be licensed. Refusal of the defendants to be licensed prevents the Commission from fulfilling its responsibilities and constitutes irreparable injury to the people of North Carolina.

EXCEPTION NO. 11

2. Because the defendants have been licensed as day-care facilities in the past, it does not appear that any harm or injury will befall them by requiring them to be licensed as day-care facilities pending a final determination of the rights of the parties.

EXCEPTION NO. 13

3. It appears that plaintiffs will succeed on the merits. The State has an undoubted right to regulate day-care facilities to protect the health and safety of the children in care.

EXCEPTION NO. 15

BASED UPON THE FOREGOING, it is ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for a preliminary injunction be and the same is hereby granted and the named defendants, their agents, servants, employees, members or (D.L.S.) anyone else acting by, under through or in concert with them are hereby enjoined from opening or operating any day-care facilities until such time as they have complied with Article 7 of Chapter 110 of the General Statutes and 1 NCAC 16."

This Court stayed the preliminary injunction pending appeal. Defendants appealed.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr. and Special Deputy Attorney General Ann Reed, for the State.

Strickland & Fuller, by Thomas E. Strickland; and Lake & Nelson, by I. Beverly Lake, Jr., for defendant appellants.

ERWIN, Judge.

Ten assignments of error appear in the record. Defendants bring nine of them forward on appeal in seven arguments. After careful consideration of each of the assignments of error in the record before us, we conclude that the orders entered by the trial court were proper in all respects and affirm both orders.

Constitutional Question

[1] Defendants contend that application of the licensing requirements of the Day-Care Facilities Act of 1977 to their day-care centers amounts to State prohibition of the free exercise of religion and is therefore unconstitutional. We do not agree.

The Act in question provides in part:

"§ 110-88. *Powers and duties of the Commission.*—The Commission shall have the following powers and duties:

(1) To develop policies and procedures for the issuance of a license to any day-care facility which meets the health and safety standards established under this Article.

(2) To approve the issuance of licenses for day-care facilities based upon inspections by and written reports from existing agencies of State and local government where available, or based upon inspections by and reports from personnel employed by the Commission where such services are not otherwise available.

(3) To develop a system or plan for registration of day-care plans in such form and place as shall be determined by the Commission so that day-care plans which are not subject to licensing may be identified, so that there can be an accurate census of the number of children placed in day-care resources, and so that providers of day care who do not receive the educational and consultation services related to licensing may receive educational materials or consultation through the Commission.

. . .

(5) To make rules and regulations and develop policies for implementation of this Article, including procedures for application, approval, renewal and revocation of licenses.

(6) To make rules and regulations for the issuance of a provisional license to a day-care facility which does not conform in every respect with the standards relating to health and safety established in this Article provided that the Secretary of Administration finds, and the Commission concurs in the finding that the operator is making a reasonable effort to conform to such standards, except that a provisional license shall not be issued for more than one year and shall not be renewed.

(7) To develop and promulgate standards which reflect higher levels of day care than required by the standards established by this Article, which will recognize better physical facilities, more qualified personnel, and higher quality programs. The Commission shall be empowered to issue two grades of licenses: an "A" license for compliance with the provisions of the Article, and an "AA" license for those licensees meeting the voluntary higher standards promulgated by the Commission.

(8) To develop a procedure by which the Department [of Administration] shall furnish such forms as may be required for implementation of this Article.

(9) To serve as an administrative-appeal body to determine all issues related to the issuance, renewal and revocation of licenses."

At the outset, we note: (1) that the wording of the Act in question does not grant to the State any authority to interfere with the religious belief or freedom of defendants; (2) that the day-care licensing requirements speak only to minimum standards of health and safety and do not interfere with any religious practices or contain any educational requirements for staff or children; (3) that all of the defendants have heretofore been li-

censed by the Commission without any objections; and (4) that defendants do not contend or show that it is contrary to their sincere religious belief to seek licenses.

The First Amendment of the United States Constitution, applicable to the State through the Fourteenth Amendment of the said Constitution, prevents State enactment of laws prohibiting the free exercise of religion. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900, 128 A.L.R. 1352 (1940). *See Church v. State*, 40 N.C. App. 429, 253 S.E. 2d 473 (1979).

Defendants contend that the State may not require "a church" to obtain a license or permit from a state agency as a condition precedent to its performing a major portion of its ministry.

The State responds that despite the breadth of the First Amendment's words, defendants do not enjoy absolute freedom of religion. While their freedom to believe remains inviolate, their freedom to act is subject to reasonable regulation for the protection of society. By general and nondiscriminatory legislation, the State may reasonably safeguard the health, safety, and welfare of its citizens without violating Fourteenth Amendment liberties.

In *In re Williams*, 269 N.C. 68, 80, 152 S.E. 2d 317, 326, *cert. denied*, 388 U.S. 918, 18 L.Ed. 2d 1362, 87 S.Ct. 2137 (1967), our Supreme Court held:

> "The liberty secured by the First Amendment to the United States Constitution and by Article I, § 26, of the Constitution of North Carolina are, however, so basic and fundamental that one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a 'compelling state interest in the regulation of a subject within the State's Constitutional power to regulate.' " (Citations omitted.)

In *Wisconsin v. Yoder*, 406 U.S. 205, 214, 32 L.Ed. 2d 15, 24, 92 S.Ct. 1526, 1532 (1972), the Supreme Court of the United States held:

> "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate

religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

G.S. 110-88(1) permits the Commission "[t]o develop policies and procedures for the issuance of a license to any day-care facility which meets the health and safety standards established under this Article." The stated purpose of the Act is to protect the "physical safety and moral environment" of children who will use such facilities. G.S. 110-85(2). This is a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.

The question raised by the case *sub judice* is the validity of the Act, whether the legislation on its face is in conflict with the Freedom of Religion Clause of the First Amendment. The power granted to the Child Day-Care Licensing Commission by the Act in attaining the statutory purpose must be exercised so as not to unduly infringe upon the freedom of religion. The religious beliefs of the defendants and other religious bodies may not endanger the peace, good order, and morals of society. We hold the Act to be constitutional on its face and as applied in the case at bar. The license in question does not relate to defendants' ministry in any manner, but to the condition of the physical facility. *See Roloff Evangelistic Enterprises v. State*, 556 S.W. 2d 856 (Texas, Ct. App. 1977). We find no merit in this assignment of error.

[2] Defendants contend that even if the Act is constitutional, it does not apply to defendants because of the exception in G.S. 110-86(3) for "Bible schools normally conducted during vacation periods." We do not agree.

G.S. 110-86(3) provides:

"(3) 'Day-care facility' includes any day-care center or child-care arrangement which provides day care on a regular basis for more than four hours per day for more than five children, wherever operated and whether or not operated for profit, except that the following are not included: public schools; nonpublic schools whether or not accredited by the State

> Department of Public Instruction, which regularly and exclusively provide a course of grade school instruction to children who are of public school age; summer camps having children in full-time residence; summer day camps; and Bible schools normally conducted during vacation periods."

To us, the record is clear that defendants provide care away from home on a regular basis for more than four hours per day for more than five children less than thirteen years of age. The operations of defendants are year around and are not vacation Bible schools. Defendants' operations are not temporary in nature. This assignment of error is overruled.

Venue

[3] G.S. 110-104 provides:

> "*Injunctive relief.*—The Secretary or his designee is empowered to seek injunctive relief in the superior court of the county in which a day-care center is located against the continuing operation of that day-care facility at any time, whether or not any administrative proceedings are pending. The superior court may grant injunctive relief, temporary, preliminary or permanent when there is any violation of this Article, or of the rules and regulations promulgated by the Commission, which threatens serious harm to children in the day-care facility or when a final order to deny or revoke a license has been violated or when a day-care facility is operating without a license."

Defendants contend that the above statute requires an action to enjoin the operation of a day-care facility on the ground that it is operating without a license be brought in the county wherein the facility is located. Defendants are located in several counties throughout the State, and this action was brought in Wake County; therefore, the trial court only had jurisdiction over the Wake County defendants.

Plaintiffs elected to pursue the remedy of declaratory relief provided for by Article 26 of Chapter 1 of the General Statutes to test the licensing issue. Plaintiffs sought injunctive relief as an adjunct to the declaratory relief in order to maintain the status quo of compliance with the present statute.

This action was brought in Wake County. Defendants have not shown how they have been prejudiced thereby. Venue is not jurisdictional. *Miller v. Miller*, 38 N.C. App. 95, 247 S.E. 2d 278 (1978); 13 Strong's N.C. Index 3d, Venue, § 1, p. 269.

We hold that Wake County is the proper venue for this declaratory judgment action and that the plaintiffs' motion for preliminary injunction was properly granted. We find no error.

Findings of Fact and Conclusions of Law

[4] Defendants contend that the trial court's findings of fact and conclusions of law in the preliminary injunction order do not support the order, particularly Findings of Fact Nos. 2, 27, and 33. The findings of fact in question read:

> "2. The Child Day-Care Licensing Commission (hereinafter Commission) is an agency of the State of North Carolina and has been vested by the General Assembly of North Carolina with the responsibility and authority of regulating and supervising all day-care facilities within the State to the end that all such day-care facilities shall be licensed.
>
> EXCEPTION NO. 7
>
> * * *
>
> 27. Pursuant to and in conformity with the duties and responsibilities imposed upon it by the provisions of Article 7 of Chapter 110 of the General Statues [sic] and Part 4 of Article 9 of Chapter 143B of the General Statutes, the Commission has promulgated regulations codified at 1 NCAC 16, which along with the requirements set by the General Assembly in Article 7 of Chapter 110 of the General Statutes establish minimum standards which must be met by all day-care facilities. In order to ascertain whether these minimum standards have been met, the Commission, as a part of these regulations, requires all day-care facilities to submit an annual application to the Commission, and requires inspections of the facilities by State and local agencies to determine compliance with certain health and safety requirements.
>
> EXCEPTION NO. 8
>
> * * *

33. The defendants' failure to comply with the plaintiffs' requirements in this area prevents the plaintiffs from carrying out the duties and responsibilities imposed upon them by Article 7 of Chapter 110 of the General Statues [sic] and Part 4 of Article 9 of Chapter 143B of the General Statutes.

EXCEPTION NO. 10"

Defendants argue that the foregoing findings are erroneous and in direct conflict with G.S. 110-86(3) which specifically excludes the defendants from the operation of the statute. We have rejected this contention of the defendants and have concluded that defendants are not exempted from the Act. We find no error in the court's findings of fact.

Our Supreme Court held in *Conference v. Creech* and *Teasley v. Creech and Miles*, 256 N.C. 128, 139-40, 123 S.E. 2d 619, 626-27 (1962):

> "Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. *Edmonds v. Hall*, 236 N.C. 153, 72 S.E. 2d 221.
>
> It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only. In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. *Service Co. v. Shelby, supra*; *Lance v. Cogdill*, 238 N.C. 500, 78 S.E. 2d 319; *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116.
>
> On appeal we are not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. 'Even so, there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error.' *Lance v. Cogdill, supra.*"

After complete examination of the whole record before us, we are compelled to affirm both orders entered by the trial court. The record reveals there is probable cause to believe the plaintiffs can establish the rights they assert; and there exists a reasonable apprehension of irreparable loss unless the relief is granted. Plaintiffs have statutory obligations to enforce.

Class Action

The trial court entered the following ruling on defendants' motion to dismiss: "Defendants' motion to dismiss for reason that the action has not been certified as a class action is hereby denied without prejudice to defendants to file such additional motions as they think are necessary should this action not be certified as a class action." We hold the issue of a class action has not been determined by the trial court and therefore not before us. The trial court will be governed by G.S. 1A-1, Rule 23, of the Rules of Civil Procedure in ruling on this issue.

Conclusion

Plaintiffs have stated a claim upon which relief may be granted.

The orders entered by the trial court are in all respects proper and are affirmed.

The stay ordered heretofore entered by this Court is dissolved herewith.

Orders affirmed.

Judges CLARK and MITCHELL concur.

Judge MITCHELL concurred in this opinion on 17 August 1979 prior to his resignation from the Court on 20 August 1979.

STATE OF NORTH CAROLINA v. BASIL EDWARD HARDEN, JR.

No. 796SC366

(Filed 4 September 1979)

1. **Burglary and Unlawful Breakings § 5.7; Larceny § 7— breaking into business—larceny of agricultural chemicals—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious larceny of agricultural chemicals where it tended to show that defendant had possession and control of his truck on the night of the crime; his truck, fully loaded and driven by a white man, was observed on the night of the crime on the premises of the business which was broken and entered; the morning after the theft, the chemicals were found on defendant's father's farm near the defendant's deer stand concealed in a pine thicket; tire tracks matching the tires on defendant's truck were found at the crime scene; defendant admitted that the tire tracks around the chemicals stashed in the pine thicket were his; paint chips and staples matching those of the containers of the stolen chemicals were found in the truck; and when defendant encountered law officers on the state road near the chemicals, at the time knowing of the break-in, he did not tell the officers of their location.

2. **Larcency § 8.4— possession of recently stolen property—instruction supported by evidence**

Evidence in a felonious larcency prosecution was sufficient to support the trial court's instruction on possession of recently stolen property where such evidence tended to show that the stolen property was found on land owned by defendant's father whom he assisted in farming; the property was near defendant's home and he had a deer stand nearby; one set of tracks from defendant's truck circled the stolen goods; and less than a day elapsed from the theft to the discovery of the goods.

3. **Criminal Law § 101.2— jurors' view of writing on blackboard—defendant not prejudiced**

Defendant was not prejudiced when six jurors saw writing on a blackboard in the courtroom which had been made by the prosecutor and which related to his closing argument, since the words were nothing more than references to matters already in evidence; the words were relatively meaningless; and defendant failed to show that he was adversely affected by any possible error of the court in denying his motion for mistrial.

4. **Constitutional Law § 30— exhibits not provided defendant prior to trial—no prejudice**

Defendant could not complain of the admission into evidence of exhibits which were not provided him by the State prior to trial since he did not make a written request for discovery in compliance with G.S. 15A-902, nor was there any unfair prejudice or surprise in the exhibits which served to illustrate or corroborate the testimony of witnesses.

5. Criminal Law § 87— surprise witness—no prejudice

There was no merit to defendant's contention that the trial court erred in permitting a surprise witness to testify, since the witness who came forward in the middle of the trial was apparently no more of a surprise to defendant than he was to the State; the prosecutor did not act in bad faith; defendant was given advance warning and a chance to interview the witness before he was called; and in any event defendant was not entitled to a list of State's witnesses.

6. Criminal Law § 102.5— prosecutor's reference to black man—no prejudice

The prosecutor's reference to a black man as one who "slaved for" defendant's father was not inflammatory and prejudicial to defendant's case.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 29 September 1978 in Superior Court, BERTIE County. Heard in the Court of Appeals 23 August 1979.

Defendant was charged with felonious breaking and entering and felonious larceny. Upon his pleas of not guilty, the jury returned verdicts of guilty to both charges. From a consolidated judgment sentencing him to a term of ten years, defendant appealed.

The State presented evidence which tended to show that on 6 April 1977, the W. R. Grace Company (Grace) office and warehouse in Windsor, North Carolina was broken into and entered, and agricultural chemicals worth $7,109.10 were taken. Drink money which was kept in a desk drawer was also taken. The break-in and theft were discovered about 7:00 a.m. by Grace employee Kenneth Holt Simmons when he came to work. The screen door and the glass window were broken out.

In closing up the night before, Simmons used a payloader to smooth the dirt area in front of the warehouse entrance. On the morning in question, one set of large mud grip tire tracks was found in this area. Law enforcement officers were called by Simmons.

Around 7:15 a.m., Simmons noticed defendant driving slowly by in a blue truck. Simmons saw defendant again five minutes later coming from the opposite direction, still driving slowly and looking at the Grace building. Simmons then made an inventory of the missing chemicals based on an inventory taken the day before. He was able to determine the exact quantities taken and the serial numbers on the containers.

The investigating officers made casts of the mud grip tire tracks found on the Grace premises. The officers then went to defendant's home. He was not there. On the way back to the main road, they met the defendant and other members of his family. They stopped and talked. Defendant was driving a blue truck with large mud grip tires. Defendant made no mention of the chemicals. The officers drove three quarters of a mile down the dirt road from the point where they had met defendant and talked with him. They noticed tracks similar to the ones found at Grace going off the state road onto a field road. The officers followed them behind a pine thicket and found the chemicals taken from Grace. The land belonged to defendant's father.

Defendant consented to a search of his truck later that day. Casts were made of his tires. A SBI specialist from Raleigh testified that in his opinion the tires on defendant's truck made the tracks found at Grace. Certain paint chips and staples found in defendant's truck were also linked to the Grace break-in. An SBI forensic chemist qualified as an expert was of the opinion that the yellow-orange and blue paint found in defendant's truck bed matched the colors on the outside of the containers of the stolen chemicals. An SBI specialist in tool markings testified on his examination of certain staples found in defendant's truck bed. It was his opinion in comparison with staples from the chemical containers that they were made either by the same machine or put in place by the same staple gun.

Finally, Mr. Milton Bazemore, who came forward while the trial was in progress, testified that he had seen defendant's truck parked at Grace on the morning of the break-in between 2:30 a.m. and 3:00 a.m. Mr. Bazemore testified that he pulled off the road and waited for the truck to go by him. The heavily loaded truck went past, and he was able to see the driver. He was white and had straight hair.

Defendant's evidence tended to show that he was home in bed the night of the break-in. The truck to which he had the only key had been used by his father the day before to haul some boxes and chemicals which would explain the paint chips and staples. He admitted his tire tracks were around the chemicals in the field. His father had told him to go out there and check the land. He found the chemicals and went to tell his father. He met

the officers after he had found the chemicals. He knew of the break-in but did not tell the officers about the chemicals because of past run-ins he had with the law. Through cross-examination of State's witnesses, the defense attempted to implicate Charlie White, a black employee of defendant's father, as the culprit.

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

Carter W. Jones and Donnie R. Taylor, for defendant appellant.

VAUGHN, Judge.

[1] Defendant attempts to assign error in the denial of his motion to dismiss at the close of the State's evidence. Following the denial of the motion, he put on evidence in his own behalf. No motion was made at the conclusion of all the evidence. He, therefore, waived his prior motion and cannot now bring it forward as appealable error. G.S. 15-173; *State v. Fikes*, 270 N.C. 780, 155 S.E. 2d 277 (1967); *State v. Rhyne*, 39 N.C. App. 319, 250 S.E. 2d 102 (1979). Defendant has not asserted, as he could have without exception at trial, that all the evidence was insufficient as a matter of law. G.S. 15A-1446(d)(5); G.S. 15A-1227(d). We have, nevertheless, reviewed the evidence and conclude that it was sufficient to take both the felony breaking and entering and felony larceny to the jury. When considered in the light most favorable to the State, the evidence discloses that defendant had possession and control of his truck the night of the crime. His truck, fully loaded and driven by a white man, was observed on the Grace premises the night of the crime. The morning after the theft, the chemicals were found on the defendant's father's farm near defendant's deer stand. They were hidden in a pine thicket. Tire tracks matching the tires on defendant's truck were found on the Grace lot. Defendant admitted that the tire tracks around the chemicals stashed in the pine thicket were his. Paint chips and staples matching those of the containers of the stolen chemicals were found in the truck. When defendant encountered law officers on the state road near the chemicals and knowing of the break-in, he did not tell the officers of their location. This evidence was sufficient to withstand a motion to dismiss.

[2] Defendant assigns error to the instruction of the jury on the doctrine of possession of recently stolen goods. The doctrine merely permits an inference or presumption of fact after the State proves "beyond a reasonable doubt that (1) the property described in the indictment was stolen; (2) the property shown to have been possessed by the accused was the stolen property, and (3) the possession was recently after the larceny." *State v. Fair*, 291 N.C. 171, 174, 229 S.E. 2d 189, 190 (1976). Defendant argues the evidence of his possession of the stolen chemicals was not strong enough to warrant the charge. The judge must instruct on the evidence as it arises in the case being tried. It is for the jury to decide what weight and what inferences it will draw from that evidence.

While defendant did not own the land upon which the chemicals were found and others had access to the land, other evidence presented in the case required the instruction. Defendant's truck was used in the theft. The chemicals were found on land owned by defendant's father whom he assisted in farming. It was near defendant's home, and he had a deer stand nearby. One set of tracks from defendant's truck circled the stolen chemicals. Less than a day elapsed from the theft to the discovery. The exact quantities and brands were found. The jury could find beyond a reasonable doubt from this evidence that defendant was in possession of the stolen property.

> "The sense of the term of possession in this connection is not necessarily limited to custody about the person. It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn, where the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or with his undoubted concurrence." *State v. Johnson*, 60 N.C. (Win.) 236, 237 (1864).

We hold the evidence was sufficient to support the charges on the doctrine of possession of recently stolen goods. That evidence was also sufficient to overcome defendant's motion for dismissal. *State v. Hales*, 32 N.C. App. 729, 233 S.E. 2d 601, *cert. den.*, 292 N.C. 732, 235 S.E. 2d 782 (1977); *State v. Lilly*, 25 N.C. App. 453, 213 S.E. 2d 418 (1975); *State v. Hinton*, 20 N.C. App. 210, 200 S.E. 2d 836 (1973).

[3] Prior to the close of all the evidence, the prosecutor wrote the following words on a blackboard: "tires, staples, dime, tracks, five to seven farms, seven hundred acres, one quarter of a mile, deep pine thicket, told no one, Milton, paint, mud and motive." These were notes related to the prosecutor's closing argument. They were apparently written the last morning of the trial. Defendant's redirect examination was carried over to this last morning and two other witnesses were called. The trial judge addressed the jury. He determined that six of the jurors had seen the writing on the blackboard. He then instructed the jury not to consider the writing in their deliberations in any way or to draw any inferences from it one way or the other. Defendant moved for a mistrial which the trial judge denied. The motion for mistrial was addressed to the sound discretion of the trial judge. *State v. Trivette*, 25 N.C. App. 266, 212 S.E. 2d 705 (1975). The record of this case indicates no abuse of discretion by the trial judge. The words were nothing more than references to matters already in evidence. We think the trial judge was correct in his decision that the words were "relatively meaningless." Defendant has not met his burden of showing that the possible error adversely affected him. *State v. Harris*, 23 N.C. App. 77, 208 S.E. 2d 266 (1974). We find no prejudice to defendant. *See State v. Pridgen*, 20 N.C. App. 116, 200 S.E. 2d 815 (1973).

[4] Defendant assigns error in the admission of certain exhibits. He alleges unfair surprise in the admission of two photographs of the area where the chemicals were found, a sketch of the staples found in defendant's truck and notes made by an investigating officer on the day in question. Apparently, there was some sort of informal pretrial discussion between the prosecutor and defendant's attorney at which some or all these exhibits were not mentioned or provided to the defense by the State. The assignment of error has no merit in either procedure or substance. Procedurally, defendant made no written request for discovery in compliance with G.S. 15A-902. The statutory scheme which overruled the unavailability at common law of discovery in criminal cases was not followed by defendant. He cannot use its provision now to assert error. Substantively, there was no unfair prejudice or surprise in these exhibits which served to illustrate or corroborate the testimony of witnesses.

[5] As part of the same assignment of error, defendant alleges error in the calling of a surprise witness. This argument has even less merit than defendant's attack on the exhibits. The witness who came forward in the middle of the trial was apparently no more of a surprise to defendant than he was to the State. The prosecutor did not act in bad faith. Defendant was given advance warning and a chance to interview the witness before he was called. In any event, neither the common law nor the criminal discovery statute, G.S. 15A-903, entitles a defendant to a list of State's witnesses. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *see also*, Official Commentary to G.S. 15A-903 and G.S. 15A-910.

[6] On cross-examination of defendant's father, the prosecutor asked:

> "And you and your son through Mr. Jones for half of this trial have tried to tell the ladies and gentlemen of this jury that Charlie White back there who *slaved* for you and worked for you so long, could have taken these chemicals?" (Emphasis added.)

Defendant contends this question referring to a black man before a mixed jury was inflammatory and prejudicial to his case. We do not agree. An objection to the question was immediately sustained by the trial judge. The jury was instructed not to consider the question and the witness was instructed not to answer. There was no other instance of this sort in the whole trial. It is inconceivable that it affected the outcome of the case especially in light of the trial judge's prompt and proper handling of the matter. *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978); *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972).

No error.

Judges HEDRICK and ARNOLD concur.

IN THE MATTER OF: JAMES R. YARBORO, CLAIMANT AND COLLINS AND AIKMAN CORPORATION AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 789SC638

(Filed 4 September 1979)

Master and Servant § 108.2— unemployment compensation—plea of guilty to criminal charge—prayer for judgment continued—unavailability for work

Where a claimant for unemployment compensation pled guilty to a charge of selling a controlled substance on 8 September 1975, prayer for judgment was continued until January 1976, and claimant testified that he was unsuccessful in finding work because prospective employers were waiting to see what his sentence would be, the Employment Security Commission could properly find that claimant had placed such an impediment in the way of his being employed that he was not "available for work" during the time he was awaiting sentencing.

Judge MARTIN (Robert M.) dissenting.

APPEAL by the Employment Security Commission of North Carolina from *Lee, Judge.* Judgment entered 22 May 1978 in Superior Court, PERSON County. Heard in the Court of Appeals 30 March 1979.

James R. Yarboro was employed by Collins and Aikman. On 8 September 1975 he pleaded guilty to selling a controlled substance. Prayer for judgment on his sentence was continued until January 1976 at which time he received a suspended sentence. Yarboro was discharged by Collins and Aikman the day after his arrest. He was unsuccessful in finding work and he testified "the reason I'm not being hired is because they are waiting to see what my sentence will be." The Employment Security Commission held that by pleading guilty to a criminal charge with a prayer for judgment continued, the claimant had placed such an impediment in the way of his being employed that he was not available for work during the time he was awaiting sentencing. The superior court reversed the Employment Security Commission. The Commission has appealed.

Gail C. Arneke, Howard G. Doyle, Garland D. Crenshaw, Thomas S. Whitaker and V. Henry Gransee, Jr., by Gail C. Arneke, for appellant Employment Security Commission of North Carolina.

No counsel for Collins and Aikman Corporation.

No counsel for James R. Yarboro.

WEBB, Judge.

This appeal poses the question of whether the Employment Security Commission's finding that claimant was not available for work should have been reversed by the superior court. We hold that the superior court committed error in reversing the Employment Security Commission.

G.S. 96-13 provides:

> (a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—
>
> * * *
>
> (3) He is able to work, and is available for work. . . .

We can find no cases on all fours with the case sub judice. The term "available for work" has been construed in other contexts in several cases. *See In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968); *In re Thomas*, 281 N.C. 598, 189 S.E. 2d 245 (1972), and *In re Beatty*, 286 N.C. 226, 210 S.E. 2d 193 (1974). We believe that to be available for work a person must be in a position so that prospective employers will hire him for work of which he is capable of performing. In this case the claimant testified that he was not hired because prospective employers were "waiting to see what my sentence will be." We hold that the Commission could conclude from this that claimant was not in a position that prospective employers would hire him and he was not "available for work."

We reversed the judgment of the superior court and remand this case for the entry of a judgment conforming to this opinion.

Reversed and remanded.

Judge MITCHELL concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

The question for decision is whether the claimant, having pled guilty on a narcotics charge and awaiting sentence thereon, is, by reason of the impending sentence, ineligible for benefits under the Employment Security Law of North Carolina, on the ground that during the time of his unemployment he was unavailable for work. There is no hard and fast rule as to what constitutes "availability" within the meaning of the statute providing that an individual must be available for work in order to be entitled to employment compensation benefits. Availability for work depends largely on the facts and circumstances of each case. Under the facts in this case I think claimant was entitled to benefits and I dissent from the majority opinion.

The Commission found that claimant suffered no disqualification because of his separation from Collins and Aikman Corporation. The decision of the Commission that he was ineligible to receive benefits from 6 July 1975 through 24 January 1976 rested wholly and solely on the conclusion that the claimant, in "his dealing with illegal drugs and in his guilty plea to that charge, voluntarily placed upon his availability an impediment so great that it rendered him beyond consideration by the employers in the area and, therefore, unavailable for work as availability is contemplated by the Employment Security Law."

Claimant had been employed by Collins and Aikman Corporation for two years, and last worked on 7 July 1975. He was charged with distributing and manufacturing L.S.D. early in the month of July 1975. The employer had a policy which provided that anyone arrested for drug charges would be suspended until the trial. If found guilty, they would be terminated; if acquitted, they would be reinstated. On 8 September 1975, the claimant pleaded guilty to the charge of selling L.S.D. and the other charges were dropped. He was given a "prayer for judgment continued" until January at which time he was to be sentenced.

Claimant is a high school graduate and attended college for three years. He is married and knew of no reason that would keep him from going to work if suitable employment was offered. When asked why employers were reluctant to hire him, claimant stated: "Some of them wouldn't want to hire me whether or not I would be getting a prison sentence or not, some of them wouldn't want to hire me just because I'd gotten involved. Some of them would hire me if they thought I would be here to work, you know."

The reason for the trial court's postponing the sentencing of claimant is not explained. I concede that, as here, where the Commission concluded that claimant suffered no disqualification because of his separation from his employer, he may still be held ineligible for benefits because of unavailability.

I do not concede that the evidence before the Commission shows that claimant, in his dealings with illegal drugs and in his guilty plea to that charge, voluntarily placed upon his availability an impediment rendering him beyond consideration by employers. The question is whether the impending drug charge limits the work which claimant can accept to such a degree that he is no longer genuinely attached to the labor force.

"The availability for work requirement has been said to be satisfied when, and only when, an individual is willing, able, and ready to accept suitable work or employment, whether permanent, temporary, full-time, or part-time, which he does not have good cause to refuse." 81 C.J.S. § 259. The evidence is abundantly clear that claimant is able and willing to work and has actually searched for work.

The court, in delaying sentencing of claimant for approximately four months, most likely was considering some type of probation or suspension of sentence. The ability of the accused to secure and maintain employment during that four-month period would furnish insight to the court into his likelihood of future adjustment. Release on probation or suspension of sentence would be more readily indicated if successful work adjustment could be visualized.

It is contrary to experience that an employer would withhold employment to the claimant under the facts of this case on the

premise that he may be required to serve a prison sentence. Employers throughout the State have cooperated with the courts in providing job opportunities for defendants to be placed on probation or released on conditions. To say that an accused is unavailable for employment because of an impending charge when the court is obviously seeking a means of rehabilitation without incarceration may meet the technical requirements of the Commission for unavailability but is unfair to the claimant in depriving him of compensation during a period of involuntary unemployment.

Claimant's statement relating to the cause of his unemployment may be an assumption on his part without a foundation. There was no supporting evidence that the impending criminal charge was the cause of his failure to obtain employment. Surely, his statement without some supporting evidence was insufficient to support a conclusion by the Commission that such was the case.

Martha Hall, an agency witness, testified: "He [claimant] worked at Collins and Aikman here in Roxboro for one year and ten months. He was a loom fixer there."

Sandy Dunavan, an agency witness and supervisor of claims, answering questions, testified:

Q. All right. And what is his primary occupational classification?

A. Loom fixer. . . .

Q. Does he have any secondaries?

A. No.

Q. Does it reflect any referrals being made to job opportunities by the local office?

A. No, it doesn't.

Q. Do you have an opinion satisfactory to yourself as to why no referrals have been made to job opportunities by the local office?

A. Yes, I do.

Q. What?

A. We in Person County have had so few jobs available that we have not had enough jobs for the applicants that we have had. And the loom fixing occupations . . . textile industry . . . is one of the hardest hit in our county at this time. Not had any job orders in those occupations.

Q. All right. Does the 511 reflect any type of handicap?

A. No, sir.

Q. What does it reflect for Mr. Yarboro's work experience?

A. Other than . . . at this point . . . the only work experience we have reflected on here is a year and ten months at Collins and Aikman, which is an textile industry.

Q. That's the only work experience reflected? All right.

A. We do have some other educational experience reflected in which he has not worked yet. He has . . . Technical Institute, had six quarters of data processing. But has not worked in that occupation at this time.

Q. All right. So he probably should have another . . .

A. Well, he did not receive a degree.

Obviously, the claimant was available for work and the fiction of unavailability should not preclude him from obtaining benefits where there were no jobs available in the job market. For the reasons above, I respectfully dissent from the majority.

EDWARD EARL STALLINGS v. W. G. PURVIS, STANLEY B. RUPY, CHARLES W. TROUTMAN, J. FRANKLIN KRIEGER, WILLIAM F. BEAL, JR. AND EDWARD E. HOLLOWELL, TRADING AS INVESTMENT PROPERTY ASSOCIATES AND W. G. PURVIS, INDIVIDUALLY

No. 7810SC1087

(Filed 4 September 1979)

1. **Landlord and Tenant § 2— sufficiency of evidence of lease**

Evidence presented by plaintiff would permit the jury to find a lease agreement between the parties where the evidence tended to show that plaintiff as lessee agreed to rent from one defendant individually as lessor or all defendants collectively as lessors particularly described realty for a term of one year for a monthly rental of $250.

2. **Principal and Agent § 6— lease of property by one partner—proof of agency—ratification by other partners**

Evidence presented by plaintiff was sufficient to permit the jury to find that one defendant as agent for the other defendants and in his own capacity contracted to lease the property in question where it tended to show that the defendant land owners were engaged in business as general partners; one defendant's phone number was on the for sale sign located on the premises; he was referred to as the "leg man" or "custodian" of the property by two of the other five owners; a check made out to the defendant as agent for rent and tendered to another of the owners was accepted by him; this acceptance of rent could constitute a ratification of the defendant's actions; in his dealings with the defendant and two of the other owners, plaintiff was at no time given notice that the defendant did not have the power he claimed to have to deal with the property; no one objected to plaintiff's going into possession and making major renovations; and the defendant's statements in front of other people seemed to indicate that he could have made a lease for one year, though he was not the fee owner.

3. **Evidence § 33— evidence excluded as hearsay—error**

The trial court erred in excluding on the ground of hearsay testimony by a witness that one defendant had told her that he had bought the real property in question from the partners, the other defendants, since such testimony was admissible to corroborate plaintiff's testimony that the same defendant had told him that he was in control of the property which plaintiff attempted to rent.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 5 July 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 28 August 1979.

Plaintiff instituted this action by filing a complaint and summons on 25 April 1973. The case came on for trial on 3 July 1978.

At the close of plaintiff's evidence, defendants moved for a directed verdict.

The evidence presented by plaintiff, in the light most favorable to him, tends to show the following: For six years prior to 1970, plaintiff leased a restaurant and club in the 5800 block of Glenwood Avenue. When the ownership changed, he was required to vacate by 30 March 1970. He wished to stay in the same area. A suitable building located at 6311 Glenwood Avenue was for sale. He contacted a realtor who drew up an offer to purchase. The realtor knew Stan Rupy, a defendant in this action, to be one of several investors who owned the building. Rupy rejected the offer for the others and signed the rejection in his own name. The realtor delivered the rejection to plaintiff and suggested that he contact a Mr. Gordon Purvis about leasing the premises, as he was the "leg man" for the group of investors. The realtor had made plaintiff aware that the property was owned jointly by several people but did not reveal their names.

Plaintiff called Purvis on the realtor's suggestion. Purvis' number was on the for sale sign in front of the building. Purvis told plaintiff he had "sole custody" of the building and that a lease could be arranged. Mr. Purvis and his son came to plaintiff's business on 25 March 1970. Plaintiff testified that they agreed on a one year lease for $250.00 a month beginning 1 May 1970 with an option to renew. Plaintiff would care for the interior of the building and pay the utilities, and Purvis would be responsible for the exterior. Purvis gave plaintiff a key so that he could renovate the interior during the month of April. Plaintiff was aware that some of the people involved in this suit as defendants had invested in clubs in the area, but he relied on Mr. Purvis' statement that he had taken over this particular property and had the right to lease it. Plaintiff did not check for the record owners and assumed Purvis was empowered either for himself or as agent to lease it.

Plaintiff began renovations which took several months and cost more than $6,000.00 in materials and labor. Purvis came out several times to observe and approve the renovations. During one of these visits, a workman overheard a discussion of the lease during which Purvis assured plaintiff a written lease at $250.00 per month rental would be forthcoming as they earlier agreed.

Problems developed with the septic tank in late April. Plaintiff also wanted the lease in writing. When plaintiff contacted Purvis, he was told to contact an attorney, Mr. Edward Hollowell, also a defendant in this action. This was the first time plaintiff had heard of Hollowell. When he called Hollowell on 28 April, he learned for the first time that six people were involved as owners. Hollowell did not tell plaintiff that Purvis had no authority to enter into a lease. He referred to Purvis as the "custodian" of the property. Mr. Hollowell said the owners would meet soon, and a lease would be ready by 1 May for plaintiff to pick up. At the meeting, plaintiff tendered and Hollowell accepted a check for the first month's rent less certain deductions approved by Purvis. The check was payable to "W. G. Purvis, Agent." On 5 May, plaintiff still did not have the lease in writing, but Purvis assured him that one would be forthcoming. Plaintiff was told there was a misunderstanding among the partners. Plaintiff subsequently learned the property was still for sale. He made a written demand to Hollowell for a written lease. Purvis came out to the 6311 Glenwood Avenue property on 14 May when plaintiff complained about a faulty water heater. On the premises, Purvis reaffirmed the same terms given on 25 March. One of plaintiff's employees overheard this discussion. She remembered that all the terms were stated but could not recall who said what.

On or about 1 June, plaintiff forwarded the next monthly payment of $250.00 to Purvis. On 4 June, Purvis came to the premises with a written lease. The written lease had materially different terms from the oral agreement. The rent was for $300.00 rather than $250.00 per month after 30 December 1970, and the term was for ninety days instead of a year. Plaintiff returned the lease with a certified letter to each member in the association demanding a lease reflecting the oral agreement by 10 June. No such lease or any offer to reimburse for expenses was forthcoming. Plaintiff began vacating the premises in July but had no place to store all his equipment. In September, when he obtained storage facilities, the locks were changed and he was unable to get his property out and had not been able to as of trial despite demands on the owners of the property.

The two rent checks were never cashed. Plaintiff filed for bankruptcy on 23 December 1970 and all money in the account was withdrawn by the bankruptcy trustee. On cross-examination

of the plaintiff's witnesses, defendants attempted to prove that plaintiff's renovation had damaged the premises.

The judge granted defendants' motion for directed verdict and plaintiff appeals.

Tharrington, Smith & Hargrove, by Wade M. Smith, for plaintiff appellant.

Vaughan S. Winborne, for defendant appellees.

VAUGHN, Judge.

The central issue of this case is whether plaintiff offered evidence from which the jury might find that the parties entered into a contract in April, 1970 for the lease of the property at 6311 Glenwood Avenue, Raleigh, North Carolina. All three of plaintiff's assignments of error deal with the proof of this matter.

At the close of plaintiff's evidence, which we have set out at some length, the trial court granted defendants' motion for directed verdict pursuant to Rule 50(a) of the Rules of Civil Procedure.

> "A motion for a directed verdict pursuant to Rule 50(a) presents the same question as did a motion for nonsuit prior to the adoption of the New Rules of Civil Procedure. The question is whether the evidence presented is sufficient to carry the case to the jury. In passing on this motion, the trial judge must consider the evidence in the light most favorable to the non-movant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the non-movant. The motion may be granted only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law."
>
> *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E. 2d 452, 455 (1979), *citing Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

Under this standard, we hold that the trial court erred in granting defendants' motions for directed verdict. Enough evidence was presented to permit a jury to find that Purvis as agent for the others and in his own capacity contracted to lease the property.

[1] The essentials of a lease creating an estate for years are (1) the names of the parties (lessor and lessee); (2) a description of the demised realty; (3) a statement of the term of the lease; and (4) the rent or other consideration. A lease is a contract for valuable consideration whereby one agrees to let another have the occupation and profits of realty for a definite period of time. *Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964). The one year lease did not have to be in writing to be enforceable. G.S. 22-2. Taken in a light most favorable to plaintiff as non-movant, the evidence presented by plaintiff would permit the jury to find a lease agreement. The evidence provides the essentials of a lease of particularly described realty, being 6311 Glenwood Avenue, for a term of one year for a monthly rental of $250.00 by plaintiff as lessee from defendant Purvis individually as lessor or all defendants collectively as lessors. The evidence in a light most favorable to plaintiff does indicate that Purvis had capacity to enter into the lease which was made.

[2] It is admitted in the pleadings that the defendant owners were engaged in business as general partners. The acts of Purvis and also of Hollowell as well could, therefore, bind the partnership.

> "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority." G.S. 59-39(a).

The principles of agency law could bind the investors. Principals are liable upon contracts duly made by an agent with a third person "(1) when the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority." *Investment Properties of Asheville, Inc. v. Allen*, 283 N.C. 277, 285-86, 196 S.E. 2d 262, 267 (1973).

Under agency law principles, even if the evidence in this case does not show that Purvis acted as an agent within the scope of his actual authority, it tends to show that the other defendants ratified his actions and could therefore be estopped to now deny his authority and that the other defendants held Purvis out to others, including plaintiff, as having apparent authority to lease the realty. Both implied agency authority or agency by estoppel as it is sometimes known and apparent authority theories could be upheld by the facts in evidence and the inferences therefrom at the time plaintiff rested his case. Purvis's phone number was on the for sale sign located on the premises. He was referred to as the "leg man" or "custodian" of the property by Rupy and Hollowell, two of the other five owners. A check made to "W. G. Purvis, Agent" for rent tendered to Hollowell was accepted by Hollowell. This acceptance of rent could constitute a ratification. On his dealings with Purvis and Hollowell directly and Rupy through the realtor, plaintiff was at no time given notice that Purvis did not have the power he claimed to have to deal with the property. No one objected to plaintiff going into possession and making major renovations.

Purvis individually could have made a lease for one year. His statements to plaintiff in front of others seem to indicate he could. One does not have to be the fee owner to make a lease. *See* Webster, Real Estate Law in North Carolina, § 206 (1971). Although the present case, as well as others at the directed verdict stage, present thorny problems (*see e.g. Investment Properties of Asheville, Inc. v. Allen*, 13 N.C. App. 406, 185 S.E. 2d 711, *aff'd.*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *reversed on rehearing*, 283 N.C. 277, 196 S.E. 2d 262 (1973)), we hold plaintiff's evidence sufficient to take the case to the jury.

The trial court on defendants' motions struck two of plaintiff's responses on direct examination concerning his 25 March meeting with Purvis. Plaintiff testified, "It was my understanding that we had an agreement," and "Well, we may have discussed some of the lease agreements again, I don't know, I don't recall exactly, but I felt the lease was secure." These statements were obviously incompetent, and the trial court's action striking them from evidence was proper.

[3] Plaintiff produced a witness who would have testified, if permitted, that she talked with Mr. Purvis in late 1969 about leasing the property at 6311 Glenwood Avenue and that "he told me he had bought out the other partners and that he had paid $45,000.00 for the property." The trial court sustained defendants' objection to this evidence. Plaintiff contends this evidence was not hearsay or, if so, was admissible to corroborate the plaintiff's testimony that Purvis told him he was owner or custodian of the property. Defendants make some sort of argument that this information lacks logical relevance. We hold that it was logically and legally relevant. For the purpose plaintiff seeks to use it, it is admissible. It does not prove the truth of the matter asserted—that Purvis owned the land—but instead corroborates the plaintiff's testimony that Purvis told him he was in control. It was not hearsay and, if offered at the next trial, should be admitted. *Kelly v. Furniture Co.*, 199 N.C. 413, 154 S.E. 674 (1930). 1 Stansbury, N.C. Evidence, § 141 (Brandis rev. 1973).

The judgment is reversed and the case is remanded.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. MARCUS WARREN HOLSCLAW, JR.

No. 7914SC339

(Filed 4 September 1979)

1. Homicide § 23.2— proximate cause—error in instructing on brain death statute

The trial court in a homicide case erred in instructing the jury on the brain death statute, G.S. 90-322, since the purpose of the statute is not to protect criminal assailants but is to provide a legal procedure for physicians to terminate life support functions where no brain function exists without incurring civil or criminal liability; however, the error was favorable to defendant, and he has no cause to complain thereof.

2. Homicide § 23.2— voluntary manslaughter—instructions on proximate cause

The trial court sufficiently charged the jury on proximate cause in its instructions on voluntary manslaughter in this homicide prosecution wherein defendant contended that the sole cause of death was the termination of life

support systems by medical authorities rather than the shooting of deceased by defendant.

3. **Criminal Law § 87.2— exclusion of leading question**

The trial court properly sustained the State's objection to a leading question asked defendant on direct examination as to whether he felt "that he was going to attack you."

4. **Criminal Law § 75.7— on-the-scene investigation—no custodial interrogation—Miranda warnings not necessary**

Where an officer who arrived at the scene of a shooting was told that the man who did the shooting was in defendant's apartment, the officer entered the apartment and asked defendant, "Where is the gun?", defendant pointed to the couch, and a rifle was in plain view on the couch, the officer's question to defendant was not a custodial interrogation but was merely an on-the-scene investigation of an emergency situation, and defendant's response thereto and the rifle were properly admitted in evidence although defendant had not been given the *Miranda* warnings prior to the officer's question.

5. **Criminal Law § 48— silence after Miranda warnings—admissibility to show chronology of investigation**

The court did not err in the admission over objection of testimony that defendant refused to make a post-Miranda warning statement while in custody on a certain date since (1) such testimony had previously been admitted without objection, and (2) defendant's silence on that date was not used to impeach statements later made by defendant while in custody but was used only to show the chronology of the investigation.

APPEAL by defendant from *Hobgood, Judge*. Judgments entered 31 August 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 August 1979.

The defendant was charged in a bill of indictment with the second degree murder of Conway Luther Chisenhall. When this case came on for trial, the defendant consented also to be tried upon a bill of information charging him with assault on Willie T. Chisenhall with a deadly weapon inflicting serious bodily injury with intent to kill. Upon pleas of not guilty, the State offered evidence tending to show the following.

In the early morning of 17 November 1977, Conway Luther Chisenhall and his cousin, Willie T. Chisenhall, went to visit Mae Nash, a friend, at a duplex located at 806 Park Avenue. The defendant occupied one side of the duplex and Mae Nash the other.

Willie T. Chisenhall testified that they knocked on the door of Mrs. Nash's apartment and received no answer. The defendant then came to the door of his apartment and asked the Chisenhalls what they were doing. Conway told him, "I don't think it's none of your business." The defendant then shot both Conway and Willie and called for an ambulance. Police and medical personnel arrived shortly. On directions from Willie, one of the police officers found the defendant in his apartment. The officer found a rifle on the couch. He arrested the defendant. Willie and Conway were taken to the hospital.

When he arrived at the hospital emergency room, Conway had no pulse, heartbeat or blood pressure. Five or six minutes passed before Conway's heartbeat was revived. His pupils were still dilated. His respiration was minimal. He had no spontaneous movement. An operation was then performed to repair the gunshot damage. After the operation, doctors discovered Conway's kidneys were not functioning. He was put on a dialysis machine for his kidneys, a respirator to maintain his breathing and was given continuous injections to keep his heart beating. An encephalogram revealed no brain activity. By 21 November, Conway had no response to pain, no reflex activity and no ability to breathe on his own. The attending physicians agreed that brain death had occurred. The wife was informed and voiced no objection to the removal of the life support systems.

An autopsy was performed on 22 November 1977. Conway's brain was very soft, mushy, heavy and crumbly. This finding indicated the brain was dead some days prior to the discontinuance of the life support systems. The pathologist attributed death to cardiac arrest occasioned by the interruption of the normal flow of blood due to the gunshot wound which resulted in brain death.

The defendant offered testimony to the effect that he fired in self-defense.

From a verdict of guilty of voluntary manslaughter and assault with a deadly weapon inflicting serious injury, the defendant appeals.

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

Eric C. Michaux and Robert Brown, Jr., for defendant appellant.

VAUGHN, Judge.

Two assignments of error are brought forward by the defendant on the trial judge's instruction to the jury. Both deal with the issue of proximate cause. We find no merit in these arguments.

"Proximate cause is an element of second degree murder *and* manslaughter." *State v. Sherrill*, 28 N.C. App. 311, 313, 220 S.E. 2d 822, 824 (1976). The acts of the defendant must be a real cause, a cause without which the decedent's death would not have occurred. The weight of the evidence supports the apparent jury conclusion that the defendant's acts were the proximate cause of death. The jury could but was not required to find that the sole cause of death was the termination of life support systems by medical authorities rather than the shooting by the defendant.

[1] The trial judge was overly careful in his instruction on proximate cause. He instructed at length on brain death. There was no need for this. The statute on brain death, G.S. 90-322, has no application to this case. The procedures in G.S. 90-322(a) and (b) and the exculpatory clause in G.S. 90-322(d) are not for the protection of criminal assailants. The statute provides a legal procedure for physicians to terminate life support systems where no brain function exists which, if followed, would protect the *physician* from civil or criminal liability. *See* Comment, 14 Wake Forest L. Rev. 771, 784-85 (1978). The law in criminal prosecutions for murder is still that the intervening act must be the sole cause of death. It is sufficient that the defendant's act in shooting the deceased was a contributing factor which in combination with the subsequent acts of the doctor in treatment proximately caused the death. Even if the doctor was negligent, the defendant will not escape liability. *State v. Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976). The trial judge's instruction greatly exceeded this position of our Courts to the defendant's benefit.

[2] The argument that the trial judge erred in his instruction on voluntary manslaughter in not properly instructing on proximate cause is not supported by the charge. The trial judge did properly instruct the jury. He properly defined voluntary manslaughter as the unlawful killing of a human being without malice. *See State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971). Immediately preceding the discussions of the voluntary manslaughter charge, the trial judge discussed extensively the issue of proximate cause as related to this case. At the opening of his charge on voluntary manslaughter, he said, "*if* you do not find the defendant not guilty on account of what I have just given you in reference to the life support system . . . you would determine whether or not he is guilty of voluntary manslaughter. . . ." (Emphasis added.) In doing this, he properly put the causation issue before the jury. Before reaching voluntary manslaughter, the jury would have to resolve the issue of proximate cause involved in the determination of brain death and termination of the life support systems. Later in the charge, the trial judge explicitly made reference to proximate cause as an issue to be resolved in voluntary manslaughter. The defendant relies on *State v. Ramey*, 273 N.C. 325, 160 S.E. 2d 56 (1968) and *State v. Sherrill*, 28 N.C. App. 311, 220 S.E. 2d 822 (1976). In referring to this line of cases cited by the defendant, the Supreme Court has said

> "We do not, however, understand these cases to create an exception to the general rule that no specific language is required to give a correct instruction, so long as the jury is properly instructed on the law bearing upon each essential element of the offense charged. Unlike the charge before us, in the cases cited above the jury was instructed in language which assumed that the defendant had indeed killed the deceased, thus taking the issues away from the jury's consideration." *State v. Smith*, 294 N.C. 365, 381, 241 S.E. 2d 674, 683 (1978). (Citations omitted.)

Here, as in *State v. Smith*, proximate cause was not removed from the trial judge's instruction on voluntary manslaughter but was instead an express part of it.

[3] The defendant contends the trial judge erred in sustaining an objection by the State to a question put to him on direct examination by his attorney. The defendant was asked on direct examina-

tion, "Did you feel that he was going to attack you?" This is a leading question as it suggests the desired answer from a friendly witness on direct examination and is answerable by yes or no. The trial judge properly sustained objection to it and did not abuse his discretion. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974).

[4] The first officer to arrive on the scene was told that the man who did the shooting was in the defendant's apartment. The officer identified himself and entered with gun drawn and was met by the defendant who said, "Don't shoot. I am the person who called the ambulance." The officer then asked, "Where is the gun?" The defendant pointed to the couch. A rifle was in plain view on the seat of the couch. The defendant's argument that these statements and the rifle were inadmissible under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966) has no merit. The defendant was not yet under arrest. This was not a custodial interrogation but an on-the-scene investigation of an emergency situation. The question was proper under the circumstances. *State v. Archible*, 25 N.C. App. 95, 212 S.E. 2d 44 (1975); *State v. Thomas*, 22 N.C. App. 206, 206 S.E. 2d 390, *appeal dismissed*, 285 N.C. 763, 209 S.E. 2d 287 (1974). The rifle, in plain view, was observed by an officer lawfully present following a general investigatory question. It was properly admitted. Either *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971) or *Warden v. Hayden*, 387 U.S. 294, 18 L.Ed. 2d 782, 87 S.Ct. 1642 (1967) would permit the police officer's actions in this case.

[5] The defendant assigns an additional error under *Miranda* rules in the use of his post custody silence at trial. In *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), the United States Supreme Court held the use for impeachment purposes of a defendant's silence after receiving *Miranda* warnings violated the Due Process Clause of the Fourteenth Amendment. In the case before us, the State on direct examination of the investigating officer and cross-examination of the defendant brought into evidence the fact that the defendant through counsel refused to make any statement on 17 November 1977. Twice on direct examination, the officer related this fact without objection. Later on cross-examination of the defendant, objection was raised. Thus, the evidence to which the defendant now assigns error had

already been placed before the jury, without objection. The benefit of the objection was lost. It will not furnish the basis for a new trial. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977).

In any event, both instances where defendant now attempts to show error concern questions propounded by the District Attorney just before he asked questions relating to the statement made by defendant on 21 November 1977, while his attorney was present. The questions were properly allowed to make it clear that it was the 21 November 1977 statement about which the District Attorney was making inquiry. This was necessary because of the number of statements in the case. On 17 November, defendant gave responses to an officer's general investigatory questions which were admitted into evidence. Defendant also made a statement after he was in custody that day which was suppressed by the trial judge. Still later on 17 November, defendant with his attorney present, refused to make a statement. Then, on 21 November, defendant did make a statement. No exculpatory statement at trial was impeached or contradicted by earlier post-*Miranda* warning silence as in *Doyle v. Ohio, supra.* It was not even used to impeach the 21 November statement of the defendant. It served merely to explain the chronology of the investigation.

No error.

Judges HEDRICK and ARNOLD concur.

IN THE MATTER OF: STATE OF NORTH CAROLINA EX REL. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. BLUE RIDGE BROADCASTING CORPORATION, TRADING AS RADIO STATION WFGW, AM & RADIO STATION WMIT, FM, POST OFFICE BOX 158, BLACK MOUNTAIN, NORTH CAROLINA 28711, EMPLOYER NO. 96-11-034

No. 7828SC1014

(Filed 4 September 1979)

Master and Servant § 102— unemployment security tax—liability of employer—exemption taken away—method of determining liability

Where an employer, otherwise subject to the provisions of the Employment Security Act, N.C.G.S. Chapter 96, is exempted from those provisions by

legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under Chapter 96 that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption.

APPEAL by petitioner from *Lewis, Judge.* Judgment entered 14 July 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 21 August 1978.

Thomas S. Whitaker, V. Henry Gransee, Jr. and Gail C. Arneke, by V. Henry Gransee, Jr., for the Employment Security Commission of North Carolina, petitioner appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William L. Rikard, Jr., for the respondent appellee.

MARTIN (Robert M.), Judge.

Respondent Blue Ridge Broadcasting Corporation operates radio stations WFGW-AM and WMIT-FM. In 1967 respondent was notified by petitioner that, because it was a non-profit corporation exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code, it was exempt from the application of the North Carolina Employment Security Act. At the time respondent received this notice, it had an employer's account with petitioner in the amount of $5,006.19, and was entitled to a cumulative experience rating of .9%. By action of the 1971 General Assembly, respondent's exemption was terminated as of 1 January 1972. Respondent, for reasons unknown, did not receive notification or otherwise become aware of the termination of its exemption until petitioner made an administrative determination of that fact and served a notice of demand and payment upon respondent. At this time, respondent's prior credit balance with petitioner was disregarded and respondent was assigned the highest assignment rate for contributions under the Act, a rate of 2.7%, three times higher than its prior rating of .9%. Respondent, while conceding that it was properly liable for assessments for contributions after 1 January 1972, contended to petitioner that it should have both its prior credit balance and its previous experience rating taken into consideration in determining the rate of contribution to be assessed after the termination of its exemp-

tion. Petitioner disagreed, and on appeal from the ruling of the full Commission to the Superior Court, the Superior Court ruled in favor of respondent and remanded the cause to petitioner for further proceedings consistent with its ruling. Petitioner appealed to this Court, arguing that strict construction of the admittedly complex statutory provisions pertinent to the question before us compels the result reached by the Commission.

The question posed for our resolution is, therefore, whether respondent, solely by reason of its exercising the statutory exemption from the North Carolina Employment Security Act for the period 1 September 1967 through 31 December 1971, ceased to be an employer for the purpose of the Act, requiring petitioner to disregard its prior credit balance and experience rating, even though the business and employing acts of respondent continued without interruption during the period of exemption. We conclude that petitioner is in error, and affirm the ruling of the Superior Court. The answer to this question lies in a careful reading of the applicable statutes.

N.C. Gen. Stats. § 96-8(4) (as in effect prior to 1 January 1972) defined an "employing unit" as any individual or organization (including a broad list of categories) which had *in its employ* one or more individuals performing services for it within this State. N.C. Gen. Stats. § 96-8(5) (as in effect prior to 1 January 1972) defined an "employer" as being any employing unit which, within a current or preceding calendar year and which in each of 20 different weeks within such calendar year (whether or not the weeks were consecutive) had *in employment* four or more individuals. Employment is defined in N.C. Gen. Stats. § 96-8(6) (a through g), where lists of activities are characterized either as being included in (N.C. Gen. Stats. § 96-8(6)(a-f)) or excluded from (N.C. Gen. Stats. § 96-8(6)(g)) the term "employment." All activities included as "employment" require the existence of "the legal relationship of employer and employee" between an employing unit and the individual performing services for that employing unit (N.C. Gen. Stats. § 96-8(6)(a)). N.C. Gen. Stats. §§ 96-9(a)(1) and 96-9(b)(1) provide that contributions are due from employers with respect for wages paid for employment. N.C. Gen. Stats. § 96-8 provides initially that the defined terms in that section are used in that meaning unless the context clearly requires otherwise. Therefore, by reading N.C. Gen. Stats. §§ 96-8(4),

96-8(5), 96-8(6), 96-9(a)(1) and 96-9(b)(1) together, it may be deduced that (for the purposes of the statute prior to 1 January 1972) when an employing unit has four or more individuals in its employ, and the services performed by those individuals constituted employment as defined by the Chapter, the employing unit became an employer and thus becomes subject to the provisions of the Chapter.

N.C. Gen. Stats. § 96-9(c)(5) provides that if an employer subject to Chapter 96 "ceases to be such an employer," his account shall be closed and that account "shall not be used in any future computation of such employer's rate." An employer ceases to be an "employer subject to this Chapter" when that employer "has not had any individuals [four or more prior to 1 January 1972] in employment for a period of two consecutive calendar years," N.C. Gen. Stats. § 96-11(d).

As stated above, the term "employer" by its definition and use in Chapter 96 means an "employing unit" which is subject to the provisions of the Chapter. Yet, N.C. Gen. Stats. §§ 96-9(c)(5) and 96-11(d) both employ the phrase "employer subject to this Chapter" as if there were another type of "employer." To use the defined term "employer" (as contemplated by N.C. Gen. Stats. § 96-8) in the context of these two provisions leads to redundant and ambiguous expressions. Additionally, N.C. Gen. Stats. § 96-11(d), when it uses the term "employment," refers in one place specifically to the statutory definition, but is silent as to whether the other uses of the term are to be made with reference to the definition. Either usage yields an intelligible meaning, but under the circumstances (some specific references to defined terms as defined by statute and some uses of the same terms without such references in the same section) we cannot say which meaning is intended for which particular term in the absence of specific references. Arguably, "context clearly requires" the interpretation of a term in its common sense where, in a given section, some uses of that term specifically refer to the statutory definition and some do not. There is no clear line of demarcation between the use of the defined terms and the use of general terms in the statute.

Petitioner has argued that the difficulty in interpreting this statute derives from its technical nature; we are of the opinion that the difficulty derives from poor draftsmanship and ambigu-

ous interchange of specific and generic terms. Notwithstanding, the position of petitioner, based as it is upon a technical reading of the statute, might be tenable were it not for two principal factors: First, the result reached is inherently inequitable, in that an employer who, without any action on its part, was accorded an exemption from Chapter 96 by the legislature and who utilitized that exemption, is now penalized for having done so, even though its actual status and conditions as an employer have not changed. Unlike a situation where an employer actually ceased doing business and then began anew (a situation where the construction of the statute urged by petitioner would be both reasonable and appropriate), the only change pertinent to the situation before us was in statutory language and definitions. No fact changed about the respondent which would justify forfeiture of its account or the raising of its experience rating to a level three times that which it was before the statutory exemption went into effect.

Second, the language of Chapter 96 itself suggests that the result argued for by petitioner was not intended or contemplated by the Legislature when the Chapter was enacted. N.C. Gen. Stats. § 96-8(6)(g)(8) provides that "no retroactive liability shall be imposed on any employer for any year in which the employer held an exemption from income tax under § 501(a) . . . ." N.C. Gen. Stats. § 96-11(d) apparently contemplates the "reactivation" of the account of this type of exempted employer under certain circumstances. These two provisions are sufficient to make us confident that the Legislature did not intend the punitive effect upon organizations similarly situated which a strict and technical reading of the statute would seem to require. It appears that the instant situation was, by inadvertance, simply not contemplated by the drafters at the time Chapter 96 was enacted.

Contributions imposed upon employers by Chapter 96 are taxes, *Unemployment Compensation Commission v. Harvey,* 227 N.C. 291, 42 S.E. 2d 86 (1947); *Prudential Ins. Co. of America v. Powell,* 217 N.C. 495, 85 S.E. 2d 619 (1940). As a taxing statute, Chapter 96 is to be construed strictly against the taxing authority and in favor of the taxpayer. *See In re Assessment of Franchise Taxes,* 1 N.C. App. 133, 160 S.E. 2d 128 (1968). We find that the use of the terms "employer" and "employment" in Chapter 96 is unclear and ambiguous, owing to the significant distinctions be-

tween the specific defined term and the generic term and the lack of contextual guides to where one or the other is appropriate for use, and this lack of clarity makes it difficult to determine what the cited terms mean when used in the expression "employer subject to this Chapter" and in N.C. Gen. Stats. § 96-11(d). We further find that the interpretation of the statute urged by petitioner would work a harsh and inequitable result, that result being apparently contrary to the intent of the Legislature as expressed elsewhere in Chapter 96. Accordingly, we hold that where an employer, otherwise subject to the provisions of Chapter 96, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under Chapter 96 that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the Commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. The order of the trial court is affirmed; the cause is remanded to the Superior Court with instructions to remand to the Employment Security Commission for further proceedings not inconsistent with this opinion.

Affirmed and remanded with instructions.

Judges PARKER and WEBB concur.

ELSIE EARL HIGH AND ISHAM HIGH v. IRENDA HIGH PARKS, AND HUSBAND, JOHN T. PARKS AND DOROTHY JEAN HIGH

No. 7810SC1010

(Filed 4 September 1979)

1. Deeds § 9— no deed of gift

A deed was not a deed of gift and void because not recorded within two years as required by G.S. 47-26 since the deed recited consideration and the grantee's payment of a debt obligation to the grantor constituted consideration.

2. Equity § 1.1; Trusts § 13.5— unclean hands—acts toward third parties

In an action to have the court declare that defendants hold an interest in land conveyed to them by the female plaintiff in trust for plaintiffs, the plaintiffs were not barred from equitable relief by the "unclean hands" doctrine on the ground that the purpose of a conveyance of the land from the male plaintiff to the female plaintiff was to defraud creditors, since the third party creditors were not involved in the dispute between plaintiffs and defendants, and whatever interest defendants have was derived from this same allegedly unclean act.

3. Trusts § 13.2— oral agreement to hold land in trust

A conveyance of land upon an oral agreement by the grantees to hold the land until a third party paid a debt owed to the grantor and then to convey the land to the third party did not constitute an oral contract to convey land in violation of the statute of frauds, G.S. 22-2, but constituted a valid oral trust.

APPEAL by plaintiffs from *Godwin, Judge*. Judgment entered 3 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 21 August 1979.

Plaintiffs, Isham High (Isham) and Elsie Earl High (Elsie), who are brother and sister, brought suit against their niece, Dorothy Jean High (Dorothy), their sister, Irenda High Parks (Irenda), and their sister's husband, John T. Parks (John) on 6 October 1976 to determine the ownership of certain real property located in the Little River Township of Wake County.

Plaintiffs allege in their complaint that Isham acquired the property by purchase at a foreclosure sale. Title was vested in him by a foreclosure deed dated 2 January 1970 and recorded 27 January 1970. Isham borrowed $1,218.00 from Elsie for purchase of the land. Isham had other creditors and, in order to protect the land and Elsie's interest, the land was conveyed to Elsie by a deed dated 2 January 1970 but actually executed on the day recorded, 17 February 1970. At the same time, Elsie executed a deed to the same property back to Isham. The deed from Elsie to Isham was not to be recorded until the $1,218.00 debt had been repaid. Isham repaid Elsie on or about 14 April 1976 and recorded the 17 February 1970 deed from Elsie to him on 14 April 1976. Elsie was involved in a car wreck in April. Fearing that her brother would not repay her, she conveyed to Irenda and Dorothy each a one-third interest under an oral agreement to hold the property until Isham paid the debt. The deed to Irenda and Dorothy was dated 20 April 1976 and recorded 21 April 1976.

Irenda and Dorothy refused to reconvey the property on Elsie's request. Plaintiffs requested that the court find Isham the record owner of the land and that any interest held by Irenda or Dorothy be declared an express, implied, constructive or resulting trust for the benefit of Isham and Elsie.

In answer to the complaint, defendants alleged that the funds loaned to Isham by Elsie were taken from funds deposited in a savings account by Dorothy. They alleged the 17 February 1970 deed from Elsie to Isham was a deed of gift not recorded within two years and therefore void. Defendants alleged also this conveyance was a scheme to defraud third party creditors and, thus, plaintiffs were seeking equity with "unclean hands." Finally, the defendants alleged the agreement of Elsie with Dorothy and Irenda was unenforceable under the statute of frauds. In a reply to defendants' answer, plaintiffs denied any attempt to defraud creditors, alleging that sufficient property was retained to pay all debts and the debts were, in fact, paid. Plaintiffs also denied any of the purchase money was provided by Dorothy and alleged it came from Elsie's Mechanics and Farmers Bank account.

A pretrial conference was held on 24 July 1978. The pretrial order contained a stipulation of undisputed facts based on the pleadings. Trial was set for that day. When the case came on for trial, defendants moved for judgment on the pleadings. The trial court concluded, as a matter of law, the contract to hold and convey between Elsie and the defendants was in violation of the statute of frauds, that the plaintiffs were barred from the equitable relief because of "unclean hands" in the transaction and granted defendants' motion to dismiss.

Hatch, Little, Bunn, Jones, Few & Berry, by T. W. Bunn and David H. Permar, for plaintiff appellants.

Alfred D. Ward, Jr., and Joshua W. Willey, Jr., for defendant appellees.

VAUGHN, Judge.

[1] Defendants moved for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The function of Rule 12(c) is to dispose of baseless claims or defenses which the pleadings show on their face lack any merit or fail to

present any controversy of fact. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). Rule 12(c) provides, in part, "If, on a motion for judgment on the pleadings, matters outside the pleadings 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. . . ." In this case, a pretrial order had been entered wherein certain facts were stipulated. All of the material facts stipulated, however, had been admitted in the pleadings. Plaintiffs and defendants conceded on oral argument that there were no facts outside of the pleadings for consideration by the court. The motion and its granting must, therefore, be judged under the standards of Rule 12(c). When so considered, we conclude that the trial court erred in the granting of the motion. There is no showing on the face of the pleadings that they lack merit or fail to present any controversy of fact. The deeds of 2 January 1970 and 17 February 1970 from Isham to Elsie and from Elsie to Isham and the recordation of these deeds before any deed from Elsie to the defendants was ever executed makes Isham's claim of title valid on its face. The reconveyance from Elsie to Isham recites consideration. The repayment of the debt obligation would also be consideration. Therefore, it does not appear to be a deed of gift and, consequently, void for failure of registration within two years as required by G.S. 47-26. Thus, upon appropriate proof of title under his deeds of record, Isham could prevail in the action without regard to the various trust theories alleged.

We also note that the court, in the order for judgment on the pleadings, made findings of fact and conclusions of law.

> "The court is not required to find facts in a judgment on the pleadings since the facts determining disposition are those alleged in the pleadings; and the court cannot select some of the alleged facts as a basis for granting the motion on the pleadings if other allegations, together with the selected facts, establish material issues of fact." *Contracting Co. v. Rowland*, 29 N.C. App. 722, 725, 225 S.E. 2d 840, 842, *cert. den.*, 290 N.C. 660, 228 S.E. 2d 452 (1976).

The court made selective findings of fact and conclusions of law inappropriate for a Rule 12(c) motion.

The court found for example "[t]hat the acts and conduct of the plaintiffs themselves in their pleadings, constituted a calculated design and scheme to defraud creditors and they therefore have come into equity with unclean hands." The plaintiffs pled no such fact. Their pleadings state "[t]hat in an effort to secure his indebtedness to his sister, the Plaintiff, Elsie Earl High, and to protect said land from possible lien, Plaintiff, Isham High, and his wife executed a Form Warranty Deed describing said property to the Plaintiff Elsie Earl High. . . ." The plaintiffs in a reply reiterated that the deed secured the money loaned by Elsie to Isham to buy the land and to give him an opportunity to farm the land to pay off the creditors rather than defraud the creditors who were, in fact, paid. The trial court's findings went beyond the pleaded facts and resolved material disputed issues of fact that should have been resolved on trial.

[2] The trial court concluded as a matter of law "[t]hat the equitable relief sought by plaintiffs is barred by the 'clean hands' doctrine" and denied relief upon the maxim of equity that "he who comes into equity must come with clean hands." In this case, if the plaintiffs did anything inequitable—and this is a material issue of fact for trial—it was not against defendants but against third party creditors not involved in the property dispute in any way. A person is not barred from his day in court in a particular case because he acted wrongfully in another unrelated matter or because he is generally immoral. *Branch Banking & Trust Co. v. Gill*, 286 N.C. 342, 211 S.E. 2d 327 (1975), *withdrawn*, 293 N.C. 164, 237 S.E. 2d 21 (1977); *see also*, 27 Am. Jur. 2d, Equity § 142; 30 C.J.S. Equity § 98c. Further, whatever interest defendants derive also comes from this same allegedly unclean act against third persons by plaintiffs.

[3] The trial court also concluded that the agreement of Elsie with Irenda and Dorothy was an oral contract to convey land in violation of the statute of frauds. G.S. 22-2. We conclude, however, that if this interest in land conveyed by Elsie was to be held in trust for Isham as well as Elsie as the plaintiffs' complaint alleges, the statute of frauds would not apply. *Thompson v. Davis*, 223 N.C. 792, 28 S.E. 2d 556 (1944). Elsie could not, of course, contradict her deed to defendants by alleging an oral trust for herself alone without pleading fraud, mistake or undue influence. *Loftin v. Kornegay*, 225 N.C. 490, 35 S.E. 2d 607 (1945). An ex-

press trust on the land can be oral in this State which has no statute of frauds provision such as the seventh section of the English statute of 1676 which required a writing signed by the party declaring the trust. 29 Charles II, c. 3 s. 7. If applicable to the case, the equitable trust remedies alleged by plaintiffs do not require a writing. However, if plaintiff Isham proves his title by his deeds executed and recorded before those of defendants, it will not be necessary to reach and further litigate the questions involved in the equitable remedies.

For the reasons stated, the judgment of the trial court granting judgment on the pleadings is reversed.

Reversed.

Judges HEDRICK and ARNOLD concur.

IN THE MATTER OF JAMES BEDDINGFIELD II, A JUVENILE

No. 7928DC326

(Filed 4 September 1979)

1. **Constitutional Law § 50; Infants § 12— Speedy Trial Act—inapplicability to juvenile proceedings**

The provisions of G.S. 15A-701 *et seq.*, the Speedy Trial Act, are inapplicable to juvenile proceedings.

2. **Evidence § 48— officer expert in identifying marijuana—sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that a police officer was an expert in the field of identifying marijuana where the evidence tended to show that the officer had handled other cases involving marijuana, had examined marijuana on other occasions and had smelled marijuana smoke on other occasions.

3. **Searches and Seizures § 33— juvenile in parking lot at night—officer's investigation reasonable—marijuana in plain view**

Marijuana taken from respondent in a juvenile delinquency proceeding was not discovered as a result of an unlawful search and the court did not err in admitting it into evidence, where an officer observed that the twelve year old respondent was left alone by an adult in a car in the parking lot of a convenience store at 10:45 p.m.; the officer's conduct in approaching the automobile to investigate was reasonable; upon approaching respondent the of-

ficer smelled marijuana and observed a plastic bag in respondent's pocket containing vegetable material; the bag was within plain view of the officer; and a search warrant was therefore unnecessary.

APPEAL by respondent from *Styles, Judge.* Judgment entered 13 February 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals 27 June 1979.

This is an action, pursuant to G.S. 7A-278(2) to have James Beddingfield II, age 12, adjudicated a juvenile delinquent. Respondent was arraigned on 3 October 1978 and was brought to trial on 13 February 1979, 130 days later. At hearing, Lenora Topp, a State Alcohol Law Enforcement Agent testified for the State. Officer Topp testified that about 10:45 p.m., on 15 September 1978 she was on duty and saw the respondent and another person sitting in a Mustang in the parking lot at Mr. Zip in Swannanoa. The person sitting in the driver's seat left the car and entered the store. Officer Topp observed the respondent for five or ten minutes and then she approached the car, identified herself as an Alcohol and Law Enforcement Agent, shone her flashlight on her badge, and said, "Please roll the window down." The respondent rolled down the car window, and as he did so, Officer Topp smelled a strong odor of marijuana. She observed a plastic bag containing green vegetable material protruding from his left front shirt pocket. The respondent covered the pocket with his hand. She took the bag and searched him. Officer Topp testified that she had handled other cases involving marijuana, had examined marijuana on other occasions and had smelled marijuana smoke before. Officer Topp then testified, over objection, that the vegetable material she obtained from the respondent was, in her opinion, marijuana. The bag of vegetable material was not offered in evidence, but Officer Topp testified that the material was sent to the S.B.I. chemist laboratory in Raleigh and had been sealed since its return from the laboratory.

On 13 February 1979, the court entered an order finding that the respondent was delinquent for the possession of marijuana, and also entered a Juvenile Disposition Order placing the respondent on probation for one year.

Attorney General Edmisten by Associate Attorney Robert L. Hillman for the State.

Assistant Public Defender Lawrence C. Stoker for respondent appellant.

CLARK, Judge.

[1] Respondent first assigns as error the denial of his motion to dismiss on the grounds that the State violated the Speedy Trial Act, G.S. 15A-701(a1) by bringing the case to trial more than 120 days after arraignment. G.S. 15A-701(a1) provides in relevant part that the trial of the criminal defendant who is arrested and indicted between 1 October 1978 and 1 October 1980, shall begin:

> "(a1)(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is notified pursuant to G.S. 15A-630 that an indictment has been filed against him, whichever occurs last; . . . "

It is clear that the Speedy Trial Act applies only to criminal prosecutions. In *In re Burrus*, 275 N.C. 517, 529, 169 S.E. 2d 879, 886-887 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971), the court considered the nature of juvenile proceedings and noted that "[w]hatever may be their proper classification, they certainly are not 'criminal prosecutions.' Nor is a finding of delinquency in a juvenile proceeding synonymous with 'conviction of a crime.' " We hold that the statutory requirements of G.S. 15A-701, *et seq.*, are inapplicable to juvenile proceedings, and respondent's motion was properly dismissed. It should be noted that this assignment of error is limited to the alleged violation of the Speedy Trial Act, G.S. 15A-701, since the respondent did not raise an issue as to whether he was entitled to a speedy trial under the Sixth and Fourteenth Amendments of the Constitution.

[2] Respondent also assigns as error the admission into evidence of Officer Topp's opinion as to the contents of the plastic bag found in respondent's pocket. Respondent contends that the court erred in qualifying Officer Topp as an expert in the field of identifying marijuana.

"The qualification of a witness to testify as an expert in a particular field is a matter addressed initially to the sound discretion of the trial court, and the trial court's finding that the witness is, or is not, qualified to testify as an expert is ordinarily conclusive and will not be reviewed on appeal, unless there be no evidence to support the finding or unless the trial court abused its discretion. . . ." *State v. Jordan*, 14 N.C. App. 453, 456, 188 S.E. 2d 701, 702, *cert. denied*, 281 N.C. 626, 190 S.E. 2d 469 (1972). In the case *sub judice*, Officer Topp testified that she had handled other cases involving marijuana, had examined marijuana on other occasions and had smelled marijuana smoke on other occasions. In *State v. Clark*, 30 N.C. App. 253, 226 S.E. 2d 398 (1976), it was recognized that a police officer's experience may be competent to qualify him as an expert in the field of identifying marijuana. *See*, Annot., 75 A.L.R. 3d 717 § 7 (1977). We find that there was sufficient evidence to support the court's finding that Officer Topp was an expert in the field of identifying marijuana.

[3] Respondent next assigns as error the admission of testimony regarding the substance taken from the respondent. Respondent argues that the substance was discovered as a result of an unlawful search. We do not agree.

Respondent bases his contention that the officer had no authority to apprehend the defendant and subsequently search him on the holding of *Delaware v. Prouse*, 47 U.S.L.W. 4323 (1979). That case, recently decided by the United States Supreme Court, held that motorists cannot be stopped at random by law enforcement officers for inspection of driver's licenses and auto registrations. Respondent's reliance on *Delaware v. Prouse, supra*, is misplaced, however, as the situation in the case *sub judice* revolves around distinctly dissimilar facts. In the case *sub judice*, the pre-arrest conduct of Officer Topp was reasonable and did not violate any rights of the respondent. Though the record on appeal contains little evidence as to what the officer observed prior to approaching the automobile, it is uncontradicted that the young respondent, age 12, was sitting in the vehicle with an adult at a public place which the officer had under surveillance, that the adult got out of the automobile and left respondent alone in the automobile, all of which the officer observed for 5 to 10 minutes. The presence of a 12-year-old child at such a public place and at 10:45 p.m. justified an investigative inquiry by Officer

Topp. The right of a law enforcement officer to make an investigative inquiry, including a limited detention for that purpose, is based on reasonableness. It does not require the probable cause needed to arrest. *See State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979); *State v. Bridges*, 35 N.C. App. 81, 239 S.E. 2d 856 (1978); *State v. Williams*, 32 N.C. App. 204, 231 S.E. 2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E. 2d 924 (1977).

Upon her lawful approach of the juvenile respondent, the officer smelled the odor of marijuana. The officer observed a plastic bag in the respondent's pocket containing vegetable material. The bag was within the plain view of the officer. Therefore, a search warrant was not necessary. *See State v. Rigsbee*, 21 N.C. App. 188, 203 S.E. 2d 660, *aff'd*, 285 N.C. 708, 208 S.E. 2d 656 (1974); 11 Strong's N.C. Index 3d, *Searches and Seizures*, § 33 (1978). This assignment of error is overruled.

Respondent finally contends that the chain of custody of the plastic bag taken from the defendant was not sufficiently established by the State. This assignment is also without merit as the bag and its contents were never directly introduced into evidence, thereby obviating the necessity for any proof of chain of custody.

No error.

Chief Judge MORRIS and Judge ERWIN concur.

LESLIE J. ALBERTSON v. STELLA JONES

No. 788DC1012

(Filed 4 September 1979)

Husband and Wife § 3.1; Principal and Agent § 4— procurement of insurance policy—husband as wife's agent—insufficiency of evidence

In an action to recover the amount of an insurance premium for a tobacco floater insurance policy on defendant's tobacco, the trial court erred in not directing a verdict for defendant where the evidence tended to show that defendant's husband procured the insurance, but there was neither allegation nor proof that defendant's husband was acting as her agent in procuring the insurance policy.

Albertson v. Jones

APPEAL by defendant from *Ellis (Kenneth R.), Judge.* Judgment entered 1 August 1978 in District Court, LENOIR County. Heard in the Court of Appeals on 21 August 1979.

This is a civil action wherein plaintiff, as assignee of North Carolina Farm Bureau Mutual Insurance Company, seeks to recover a $562.00 insurance premium from the defendant. At trial, plaintiff introduced evidence tending to show the following:

Plaintiff is an insurance salesman for North Carolina Farm Bureau Mutual Insurance Company. The plaintiff prepared an application for and caused to be issued a tobacco floater insurance policy for 60,000 pounds of tobacco owned by the defendant and stored in a packbarn. The original insurance policy was mailed from the home office to the insured, and the plaintiff also received a copy of the policy issued to defendant. Plaintiff mailed a copy of the statement for the amount of the premium owed, $562.00, to the defendant on 1 September 1977. The defendant did not request that any insurance be written through the plaintiff's office. However, the defendant's husband, Bonnie Jones, who is not a party to this lawsuit, requested it for her. The plaintiff "did not have any conversation with [defendant] as to whether or not her husband had authority to ask [the plaintiff] to issue a policy of insurance in her name for her tobacco." Plaintiff prepared the application for the tobacco floater policy "at the authority and direction of Mr. Bonnie Jones." Over objection, plaintiff was permitted to testify that Bonnie Jones, the defendant's husband, was making the application for the insurance "on behalf of his wife." The plaintiff had written a similar tobacco floater policy covering the defendant's tobacco in 1976 which was requested by the defendant's husband. The defendant paid the premium for the 1976 policy, but has not paid the 1977 premium.

The defendant presented evidence tending to show the following:

Bonnie Jones did not authorize the plaintiff to write a tobacco floater policy for tobacco owned by the defendant in 1976 or 1977. Bonnie Jones does not handle business affairs for the defendant. The defendant did not request any insurance policy from the plaintiff or from North Carolina Farm Bureau Mutual Insurance Company in 1976 or 1977. The defendant did not receive an insurance policy or a bill from the plaintiff in 1977. The defend-

ant paid the 1976 premium "to keep down an argument in the home." When she paid the premium in 1976, defendant told the plaintiff that she "definitely did not want insurance of any kind anymore."

The parties stipulated to the following issue which was submitted to the jury and answered by it as indicated:

1. In what amount, if any, is Stella Jones, the defendant, indebted to Leslie Albertson, the plaintiff?

ANSWER: $562.00

From a judgment entered on the verdict, defendant appealed.

No counsel for plaintiff appellee.

Gerrans & Spence, by William D. Spence, for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the refusal of the trial judge to grant her motion for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence. Defendant argues that there was no evidence that Bonnie Jones was the agent of the defendant or authorized to procure the tobacco floater insurance policy, and thus she is entitled to a directed verdict. We agree.

One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract. *Godwin Building Supply Co., Inc. v. Hight*, 268 N.C. 572, 151 S.E. 2d 50 (1966); *Bell v. Traders and Mechanics Insurance Co., Inc.*, 16 N.C. App. 591, 192 S.E. 2d 711 (1972). The marital relationship raises no presumption that the husband is authorized to act as an agent for his wife, and if such agency is relied upon, it must be proved. *Beaver v. Ledbetter*, 269 N.C. 142, 152 S.E. 2d 165 (1967). Agency is a fact to be proved as any other, and where there is no evidence presented tending to establish an agency relationship, the alleged principal is entitled to a directed verdict. *Lindsey v. Leonard*, 235 N.C. 100, 68 S.E. 2d 852 (1952); *Smith v. VonCannon*, 17 N.C. App. 438, 194 S.E. 2d 362, *aff'd.*, 283 N.C. 656, 197 S.E. 2d 524 (1973).

In the present case, the plaintiff has neither alleged nor offered any evidence that Bonnie Jones, the defendant's husband, was acting as the defendant's agent in procuring the tobacco floater insurance policy. The statement by the plaintiff that the defendant's husband was making the application for the insurance "on behalf of his wife" tends only to show that the plaintiff believed Bonnie Jones to be so acting; it does not tend to establish the factual existence of any agency relationship between the defendant and Bonnie Jones. Furthermore, such a statement from one seeking to enforce against an alleged principal a contract made by the alleged agent would not be competent evidence to prove the existence of the agency relationship. The existence of the agency also cannot be proved by the agent's extrajudicial statements. It must be established *aliunde* or by the alleged agent's testimony. *Mathis v. Siskin*, 268 N.C. 119, 150 S.E. 2d 24 (1966); 2 Stansbury's N.C. Evidence § 169, at 19 (Brandis rev. 1973).

Since there is no evidence that the defendant contracted to purchase the insurance, and since there is no evidence that her husband was acting as her agent in purchasing the insurance, the trial judge erred in not directing a verdict for the defendant. The judgment appealed from is reversed.

Reversed.

Judges VAUGHN and ARNOLD concur.

PEGGY D. NORRIS, INDIVIDUALLY AND WILLIAM DALE NORRIS BY HIS GUARDIAN AD LITEM, PEGGY D. NORRIS v. HOME SECURITY LIFE INSURANCE COMPANY

No. 7813DC1032

(Filed 4 September 1979)

Insurance § 44.1 — hospital and medical policy — addition of newborn — no extension of coverage back to birth

Where a hospital, medical and surgical expense policy issued to a named insured was in effect when she gave birth to a son, the insured applied after the birth of her son to have the coverage of the policy extended to the son,

and the policy was thereafter endorsed to extend coverage to the son and the premium was increased to reflect this new coverage, the provisions of G.S. 58-251.4 did not cause the policy to extend coverage to insured's son back to the moment of his birth, since the statute applies only where there is a policy in effect at the birth of a child which provides coverage for the child.

APPEAL by plaintiffs from *Wood, Judge*. Judgment entered 8 August 1978 in District Court, COLUMBUS County. Heard in the Court of Appeals on 23 August 1979.

This is a civil action wherein plaintiff Peggy D. Norris seeks to recover $1,706.95 in hospital, surgical, and medical expenses allegedly incurred in the treatment of her son, William Dale Norris, who was born prematurely. Plaintiff alleged in her complaint that the defendant is obligated to pay this amount by virtue of a policy of insurance issued to her and made applicable to her dependent child by G.S. § 58-251.4. Defendant filed an answer denying liability for the amount claimed.

The parties stipulated to the following facts:

A comprehensive hospital, surgical, and medical expense policy # A446497 was issued to the plaintiff, Peggy D. Norris, on 1 September 1973. This policy was in full force and effect on 2 October 1975 when the minor plaintiff was prematurely born. On 4 October 1975, Peggy Norris signed a personal health declaration for an "Additional Member" for this insurance policy. On 14 October 1975, the following endorsement was typed on the back of the policy of insurance:

> Upon written request of the insured, William Dale Norris, Son, is added as a member of the insureds family and is insured under this policy as provided in the policy. In consideration for this change, the monthly premium is increased from $16.70 to $24.25 effective November 1, 1975. Dated at Durham, North Carolina this 14th day of October, 1975.
>
> S / Chris C. Hamlet
> Vice Pres. and Secretary

The parties also stipulated that the sole issue for determination was whether the medical insurance policy provided coverage to the minor child in light of the provisions of G.S. § 58-251.4. Based on the stipulated facts, the court concluded that coverage

was not afforded to the child, and entered an Order dismissing the plaintiffs' claim. Plaintiffs appealed.

Soles and Phipps, by R. C. Soles, Jr., for plaintiff appellants.

McGougan and Wright, by D. F. McGougan, Jr., for defendant appellee.

HEDRICK, Judge.

Plaintiff contends that the provisions of G.S. § 58-251.4 cause the policy of insurance issued to her to also extend coverage to her minor child from the moment of his birth. We disagree. Such a result would contravene the plain and express language contained in G.S. § 58-251.4 which provides as follows:

> Every policy of insurance and every hospital service or medical service plan as defined in Chapter 57 of the General Statutes (regardless of whether any of such policies or plans shall be defined as individual, family, group, blanket, franchise, industrial or otherwise) which provides benefits on account of any sickness, illness, or disability of any minor child or which provides benefits on account of any medical treatment or service authorized or permitted to be furnished by a hospital under the laws of this State to any minor child shall provide such benefits for such occurrences beginning with the moment of birth of such child if such birth occurs while said policy or subscriber contract with such a plan is in force.

It is a fundamental principle that when the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977); *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974); *Jackson v. Stanwood Corp.*, 38 N.C. App. 479, 248 S.E. 2d 576 (1978).

In the present case, the policy of insurance in question was issued to Peggy D. Norris, insured her for hospital, medical, and surgical expenses and was in full force and effect when she gave birth to William Dale Norris. Subsequent to the birth of her son, Peggy Norris made application to have the insurance policy in-

clude her newborn child. The policy was thereafter endorsed to extend coverage to William Norris, and her premium was increased to reflect this new coverage. Plaintiff now contends, in effect, that the policy should be retroactive and pay for expenses incurred prior to the time she applied for the increased coverage.

G.S. § 58-251.4 expressly provides, "Every policy of insurance . . . which provides benefits on account of any sickness, illness, or disability of any minor child . . . shall provide such benefits for such occurrences beginning with the moment of birth of such child *if such birth occurs while said policy or subscriber contract with such a plan is in force.*" [Emphasis added.] In the present case, it is undisputed that at the time the minor plaintiff was born, there was no policy in effect that provided benefits for the child. Thus, this statute has no application in the present case.

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

Affirmed.

Judges VAUGHN and ARNOLD concur.

CAROLINA NARROW FABRIC COMPANY, SUCCESSOR TO CAROLINA INSULATING YARN COMPANY v. ALEXANDRIA SPINNING MILLS, INC., WILLIAM A. POPP AND ASSOCIATES, INC., AND WILLIAM A. POPP

No. 7821SC998

(Filed 4 September 1979)

Rules of Civil Procedure § 4— service of summons 31 days after issuance—invalidity

Pluries summons which was issued on 16 June 1977 and served on defendants on 19 July 1977 was insufficient to bring defendants into court and entry of default against them was therefore invalid, since service of the summons was made on the thirty-first day, as computed under G.S. 1A-1, Rule 6, rather than within thirty days as required by G.S. 1A-1, Rule 4(c).

APPEAL by defendants William A. Popp and Associates, Inc. and William A. Popp from *McConnell, Judge*. Order entered 24 May 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 20 August 1979.

Plaintiff instituted this action to recover on a promise to pay $15,141.31 for services rendered to defendant Alexandria Spinning Mills, Inc. in the dyeing of yarn. Summons was issued 1 July 1976 against defendants William A. Popp and Associates, Inc. and William A. Popp. This summons was returned unserved 6 August 1976. Alias summons was issued 17 September 1976 and returned unserved 9 November 1976. Pluries summons was issued 16 June 1977, and served on William A. Popp and Associates, Inc. and William A. Popp on 19 July 1977.

Defendants failed to file any pleading and plaintiff was granted entry of default against William A. Popp and Associates, Inc. and William A. Popp individually on 19 August 1977. On 6 September 1977, these defendants filed motion to set aside the entry of default, alleging that because of insufficiency of service the court did not have jurisdiction over the person of either defendant. This motion was denied by order of the superior court on 24 May 1978, and defendants appealed.

Adams, Hendon & Carson, by George W. Saenger, for defendant appellants.

No counsel contra.

MARTIN (Harry C.), Judge.

The pluries summons served upon appellants was issued Thursday, 16 June 1977, and served Tuesday, 19 July 1977, the thirty-third day after issuance of the summons. N.C.G.S. 1A-1, Rule 6(a), contains the method for computing any period of time under the Rules of Civil Procedure. Personal service of a summons must be made within thirty days after the date of issuance of the summons. N.C. Gen. Stat. 1A-1, Rule 4(c). In applying Rule 6 to the pluries summons in this case, the date of issuance, 16 June 1977, is not counted in determining the thirty-day period. The last day to be computed, the thirtieth, fell on Saturday. Therefore, under Rule 6, the thirtieth day became Monday, 18 July 1977. Service was made on the 19th day of July, the thirty-first day, under Rule 6, after the issuance of summons.

Is the service of the pluries summons on these defendants, more than thirty days after the date on which it was issued, sufficient to bring them into court and to render entry of default

based thereon valid and binding? Our Supreme Court has answered this question "no," in *Green v. Chrismon*, 223 N.C. 724, 28 S.E. 2d 215 (1943). The Court held that by the failure of service within the time prescribed the summons loses its vitality. It becomes *functus officio*. The statute contains no authority for service of summons after the date therein fixed for its return.

After the return day the summons lost its vitality and service made thereafter could not confer upon the court jurisdiction over the appellants. *Hatch v. R.R.*, 183 N.C. 617, 112 S.E. 529 (1922).

In order to obtain personal service, Rule 4(c) requires the summons *must* be served within thirty days after the date of the issuance of the summons. Service thereafter is ineffective. *Webb v. R.R.*, 268 N.C. 552, 151 S.E. 2d 19 (1966). Such service did not confer jurisdiction over the person of the defendants. As the court was without jurisdiction to make entry of default against defendants on 19 August 1977, the entry is void and must be set aside. *Cole v. Cole*, 37 N.C. App. 737, 247 S.E. 2d 16 (1978).

The order of the court dated 24 May 1978 is reversed, and the case is remanded for entry of an order vacating the entry of default against appellants dated 19 August 1977.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JESSE ELY BROWN, JR., PALMER JUNIOR COFFEY

No. 7924SC328

(Filed 4 September 1979)

Criminal Law § 155.1— failure to file record on appeal in apt time

Appeal is dismissed for failure of appellants to file the record on appeal within 150 days after giving notice of appeal as required by App. R. 12(a).

APPEAL by defendants from *Howell, Judge*. Judgments entered 15 September 1978 in Superior Court, WATAUGA County. Heard in the Court of Appeals 20 August 1979.

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

Richard E. Mattar for defendant Jesse Ely Brown, Jr.

Gerald I. Applefield for defendant Palmer Junior Coffey.

MARTIN (Harry C.), Judge.

Defendants Brown and Coffey appeal from convictions for armed robbery and common law robbery, respectively. Judgment was entered against each defendant on 15 September 1978. Brown entered notice of appeal on 15 September 1978; and Coffey, on 25 September 1978. A joint record on appeal was filed in this Court on 11 April 1979.

As to Brown, the record on appeal was filed 208 days after giving notice of appeal. With regard to Coffey, it was filed 198 days after his notice of appeal. Rule 27(a), North Carolina Rules of Appellate Procedure.

Neither defendant has filed a motion in this Court requesting extension of time in which to file the record on appeal pursuant to App. R. 27(c). Neither defendant has filed a petition for writ of certiorari pursuant to App. R. 21.

Defendants violated App. R. 12(a) in filing their record on appeal more than 150 days after giving notice of appeal.

The North Carolina Rules of Appellate Procedure are mandatory. *In re Allen*, 31 N.C. App. 597, 230 S.E. 2d 423 (1976). "These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . .." Rule 1(a), North Carolina Rules of Appellate Procedure.

In *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930), the appellant failed to docket his appeal in the Supreme Court within the time allowed by the Rules of Practice in the Supreme Court. Speaking for the Court, Chief Justice Stacy said:

> We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. *Calvert v. Carstarphen*, 133 N.C., 25, 45 S.E., 353. They may not be disregarded or set at naught (1) by act of the Legislature (*Cooper v. Commissioners*, 184 N.C., 615, 113

S.E., 569), (2) by order of the judge of the Superior Court (*Waller v. Dudley*, 193 N.C., 354, 137 S.E., 149), (3) by consent of litigants or counsel. *S. v. Farmer*, 188 N.C., 243, 124 S.E., 562. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. *Womble v. Gin Co.*, 194 N.C., 577, 140 S.E., 230. See *Porter v. R. R.*, 106 N.C., 478, 11 S.E., 515, for summary of the decisions.

. . . The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties. *Battle v. Mercer*, 188 N.C., 116, 123 S.E., 258. . . .

On facts identical in principle with those appearing on the present record, the appeal in the case of *Stone v. Ledbetter*, 191 N.C., 777, 133 S.E., 162, was dismissed *ex mero motu*. The present appeal will be treated in like fashion. . . .

. . . .

We are minded to say, that hereafter, in disposing of appeals for failure to comply with the rules, the Court shall not feel impelled to state the reasons for its decisions, or to file written opinions in such cases. Hence, when a case is dismissed on authority of *Pruitt v. Wood* (this case), the profession will understand that it is for a failure in some respect to comply with the rules, whether specifically mentioned herein or not, and that the Court cannot pause to discuss the procedural question, but must conserve its time for the consideration of other matters.

Id. at 789-90, 792, 156 S.E. at 127-28.

This opinion of Chief Justice Stacy, though written almost fifty years ago, is especially pertinent today. Counsel must comply with the Rules of Appellate Procedure in order for this Court to properly discharge its duties.

For failing to comply with the Rules of Appellate Procedure, the joint appeal of defendants Brown and Coffey is

Dismissed.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES THOMAS ALLEN, JR.

No. 7913SC340

(Filed 4 September 1979)

1. **Assault and Battery § 14— sufficiency of evidence of assault**

The State's evidence was sufficient for the jury in an assault case where it tended to show that defendant engaged in an altercation with a person to whom the prosecutrix was talking, and that defendant subsequently grabbed the prosecutrix by the head and hair and threw her against a truck, causing her to strike her head against the vehicle and fall to the ground.

2. **Assault and Battery § 18— simple assault—fine and jail sentence—excessive punishment**

A judgment imposing a sentence of 30 days in jail for simple assault and suspending the sentence on condition that defendant pay a fine of $50.00 exceeded the limits of G.S. 14-33(a) since that statute provides for punishment by a fine not to exceed $50.00 *or* imprisonment for not more than 30 days, and the imposition of both a fine and a jail sentence exceeds the limits of that statute.

Judge VAUGHN concurring.

APPEAL by defendant from *Clark, Judge.* Judgment entered 12 January 1979 in Superior Court, COLUMBUS County. Heard in the Court of Appeals on 21 August 1979.

Defendant was charged in a warrant with assaulting Christy Thompson. From a verdict finding him guilty of "simple assault" and a judgment imposing a jail sentence of thirty days which was suspended on condition that "(1) he be [of] good behavior and violate no laws of the state of North Carolina during the suspension of said sentence; (2) he pay a fine of $50.00 and costs of court; (3) he not assault, molest, harass or in any way interfer [sic] with Christy Thompson or any member of her family during the period of suspension," defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Marvin J. Tedder for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. The evidence, when considered in the light most favorable to the State, tends to show the following:

The defendant and Christy Thompson had known one another for approximately five years. On 31 October 1978, at approximately 10:00 p.m. Christy Thompson was at the Columbus County Courthouse parking lot, and was talking to David Knowles and Lisa Walker. The defendant arrived at the parking lot, walked over to where these three were standing, and became involved in an altercation with David Knowles. Subsequently, the defendant grabbed Christy Thompson by her head and hair and threw her up against a truck, causing her to strike her head against the vehicle and fall to the ground.

The defendant presented evidence tending to show that on 31 October 1978 he was fighting with David Knowles in the parking lot when someone grabbed his arm from behind, that he later discovered that the person who had grabbed his arm was Christy Thompson, that he never walked over and grabbed or touched Christy Thompson that night, and that he did not intend to hurt Christy Thompson.

The evidence is sufficient to require submission of the case to the jury and to support the verdict.

The defendant's remaining assignments of error merit no discussion.

[2] We note that the judgment in the present case is not within the limits of G.S. § 14-33(a), which provides in pertinent part: "Any person who commits a simple assault . . . is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) *or* imprisonment for not more than thirty (30) days." [Emphasis added.] Where the penalty for violation of a criminal statute provides for both the imposition of a fine *and* imprisonment, it is not error for a judgment to include as a condition of suspension of a sentence the payment of a fine within the statutory lim-

its. *State v. Brown*, 253 N.C. 195, 116 S.E. 2d 349 (1960); *State v. Calcutt*, 219 N.C. 545, 15 S.E. 2d 9 (1941); *State v. Wilson*, 216 N.C. 130, 4 S.E. 2d 440 (1939). However, where the penalty for violation of a criminal statute is phrased in the disjuntive, as here, the imposition of a fine in addition to a jail sentence, exceeds the limitations of the statute, and the judgment is improper. *State v. Taylor*, 124 N.C. 803, 32 S.E. 548 (1899) (per curiam). The judgment in the present case must be vacated and the cause remanded to the superior court for the entry of a proper judgment.

The result is: In the defendant's trial we find no error. Vacated and remanded for entry of a proper judgment.

Vacated and remanded.

Judges VAUGHN and ARNOLD concur.

Judge VAUGHN concurring:

I concur in that part of the opinion which finds no error in the trial. I do not agree, however, that the sentence was excessive.

STATE OF NORTH CAROLINA v. LESTER ALLEN CROUCH

No. 7925SC172

(Filed 4 September 1979)

1. **Criminal Law §§ 34.4, 86.2 — prior convictions of drunk driving — stipulation — cross-examination for impeachment proper**

In a prosecution for driving under the influence, third offense, the trial court did not err in allowing the State to cross-examine defendant concerning his prior convictions of driving under the influence, though defendant had stipulated for the purpose of trial that he had been so previously convicted, since the evidence sought by defendant's cross-examination was for impeachment purposes and was therefore competent.

2. **Criminal Law § 7 — entrapment — insufficiency of evidence**

In a prosecution for driving under the influence, third offense, evidence was insufficient to support defendant's contention that he was entrapped.

Judge MITCHELL concurred in the result.

State v. Crouch

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.

The decision of this Court dismissing defendant's appeal for failing to comply with the Rules of Appellate Procedure (41 N.C. App. 612, 255 S.E. 2d 192 (1979)) was vacated by order of the Supreme Court 31 July 1979, and the case was remanded to this Court for further consideration on the merits.

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, third offense, and sentence was imposed. Defendant appealed.

[1] Defendant contends the court erred in allowing the state to cross-examine him concerning prior convictions of driving under the influence of intoxicants when he had stipulated for the purpose of trial that he had been so previously convicted. N.C. Gen. Stat. 15A-928. The evidence sought by the cross-examination of defendant was for impeachment purposes and not as substantive evidence of an element of the offense charged. Such evidence was held competent in *State v. Guinn*, 32 N.C. App. 595, 233 S.E. 2d 73 (1977). Defendant's assignment of error is overruled.

[2] Defendant next contends he was entrapped. The evidence does not support this contention. The trial judge submitted the issue of entrapment to the jury and by its verdict the question was resolved against defendant.

Defendant received a fair trial, free of prejudicial error.

No error.

Judge PARKER concurs.

Judge MITCHELL concurred in the result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 AUGUST 1979

MANEY v. MANEY No. 7830DC953	Swain (78CVD59)	No Error
STATE v. RUDISILL No. 7929SC149	Henderson (78CRS254)	No Error
STATE v. SAWYER No. 793SC195	Craven (78CRS9946)	No Error

FILED 21 AUGUST 1979

HOLCOMB v. DOVER No. 7821DC950	Forsyth (77CVD0958)	Affirmed
PEARSON v. JOHNSON No. 7823DC786	Wilkes (77CVD354)	No Error
STATE v. FULP No. 7921SC87	Forsyth (78CR13154) (78CR13111)	No Error

FILED 4 SEPTEMBER 1979

MULLIS v. CHURCH No. 7825DC1037	Burke (77CVD655)	Affirmed
POWER & LIGHT CO. v. JACKSON No. 7810SC1062	Wake (77SP874)	Affirmed
STATE v. BUNTON No. 7915SC396	Orange (78CRS7336)	No Error
STATE v. MATTHEWS No. 7918SC346	Guilford (78CRS50837) (78CRS50838)	No Error
STATE v. SMITH No. 7923SC376	Wilkes (78CRS8622)	No Error
STATE v. WHITLEY No. 7918SC371	Guilford (78CRS35476)	Affirmed
TATE v. TATE No. 7826DC976	Mecklenburg (77CVD8574)	Dismissed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

ABATEMENT

§ 13. Actions Arising Out of Legal Relationships

There was no merit to defendant's contention that plaintiff's cause of action to collect a debt abated because he had not been served with process at the time of the death of plaintiff. *Mazzocone v. Drummond*, 493.

ADVERSE POSSESSION

§ 7. By One Tenant in Common Against Other Tenants in Common

A tenant in common or a widow with a dower interest will not be presumed to have ousted a cotenant or deceased's heirs by sole possession of the property for 20 years where the tenant or widow has recognized the cotenancy or the rights of the deceased's heirs. *Hi-Fort, Inc. v. Burnette*, 428.

§ 24. Competency of Evidence

In an action to establish the true boundary line between the parties' property where defendants claimed adverse possession, defendants were not prejudiced by plaintiffs' question as to whether a witness had ever heard defendants' predecessor in title say that she was stealing the land in question. *Williamson v. Vann*, 569.

§ 25.3. Instructions to Jury

Evidence was sufficient to support trial court's instructions concerning the rule of law with respect to the occupation of another's land under the mistaken belief that it belongs to the person occupying the land. *Williamson v. Vann*, 569.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

Defendant's appeal from the trial court's entry of an order denying his motion to strike plaintiff's amended complaint is interlocutory and is dismissed. *Clark v. Clark*, 84.

An appeal from an order granting partial summary judgment on the issue of liability, reserving for trial the issue of damages, is interlocutory and must be dismissed. *Whalehead Properties v. Coastland Corp.*, 198.

Trial court's order sustaining objections to and granting a motion to strike certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal therefrom was premature. *Bank v. Olive*, 574.

§ 14. Appeal and Appeal Entries

Where entry of judgment was noted by the clerk on the court minutes for 13 March 1978 and written judgment was filed on 15 May 1978, plaintiffs' notice of appeal filed on 25 May 1978 was not timely. *Cochrane v. Sea Gate, Inc.*, 375.

§ 50.2. Harmless Error in Instructions

Where the rights of the parties are determined by the jury's answer to one of the issues, any error relating to another issue cannot be prejudicial. *Jones v. Morris*, 10.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

The Federal Arbitration Act did not apply to the construction of the Durham County General Hospital. *Electric Co. v. Hospital Corp.*, 351.

§ 1.1. Effect of Uniform Act

Correspondence between the parties in 1975 created a contract between them for arbitration, but under G.S. 1-567.2 the contract bound them to arbitrate only controversies existing at that time. *Electric Co. v. Hospital Corp.*, 351.

ARCHITECTS

§ 3. Liability for Defective Conditions

A third party general contractor has a cause of action against an architect for negligent approval of defective materials and workmanship even though there is no privity of contract. *Industries, Inc. v. Construction Co.*, 259.

ARREST AND BAIL

§ 3.5. Legality of Arrest for Breaking and Entering

Probable cause existed for the arrest of defendant by a Tyrrell County deputy sheriff where a Manteo police officer had probable cause for the arrest and had a radio message sent to Tyrrell County officers to stop defendant's vehicle for questioning of its occupants. *S. v. Whitehead*, 506.

§ 3.8. Legality of Arrest for Drunk Driving

Trial court erred in failing to conclude that an arresting officer had reasonable grounds to believe that petitioner had operated a motor vehicle upon a public highway while under the influence of intoxicating liquor. *Harper v. Peters, Comr. of Motor Vehicles*, 62.

§ 6.2. Sufficiency of Evidence of Resisting Arrest

State's evidence was sufficient for the jury in a prosecution for resisting arrest. *S. v. Zigler*, 148.

§ 11.4. Judgments Against Sureties on Bail Bonds

Trial court did not err in finding that the surety on a forfeited appearance bond in a felonious assault case had shown "extraordinary cause" for remission of a portion of the amount forfeited. *S. v. Locklear*, 486.

The statute permitting the remission of amounts adjudged forfeited on criminal appearance bonds does not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used for public schools. *Ibid.*

ASSAULT AND BATTERY

§ 14. Sufficiency of Evidence of Simple Assault and Communicating Threats

Evidence that defendant made numerous threatening statements to officers was sufficient for the jury in a prosecution for communicating threats. *S. v. Zigler*, 148.

State's evidence was sufficient for the jury in an assault case. *S. v. Allen*, 727.

ASSAULT AND BATTERY—Continued

§ 15.6. Form of Instruction on Self-Defense

There was no merit to defendant's contention that the trial court should have included a distinct mandate on self-defense in its charge as to each lesser included offense. *S. v. Carter*, 325.

Trial court in a felonious assault case properly told the jury what to consider in determining whether defendant used more force than necessary in repelling an alleged assault by the prosecuting witness. *S. v. Quicksley*, 217.

Trial court's instruction on self-defense in its final mandate was sufficient. *Ibid.*

§ 15.7. Instruction on Self-Defense Not Required

Trial court in an assault case did not err in failing to instruct on self-defense when one is assaulted on his own premises. *S. v. Lee*, 77.

§ 18. Punishment

Judgment imposing both a fine and a jail sentence for simple assault exceeded the limits of G.S. 14-33(a). *S. v. Allen*, 727.

ATTORNEYS AT LAW

§ 4. Testimony by Attorney

Trial court in an alimony action did not err in refusing to allow plaintiff's counsel to withdraw and to testify as a witness. *Wise v. Wise*, 5.

§ 7. Compensation and Fees Generally

A contract between attorneys for the division of fees upon termination of their association was not ambiguous and plaintiff was entitled to only a percentage of fees actually collected by defendant. *Olive v. Williams*, 380.

§ 7.1. Contingency Fee Contracts

There was no merit to defendant's contention that contingency fee contracts entered into between defendant and clients of plaintiff's law firm were void as contrary to public policy. *Olive v. Williams*, 380.

§ 7.5. Allowance of Fees as Part of Costs

Trial court did not abuse its discretion in awarding plaintiff attorney fees of $1200 in an action on an automobile collision policy. *Black v. Insurance Co.*, 50.

AUTOMOBILES

§ 2.4. Revocation of Driver's License in Proceedings Related to Drunk Driving

Petitioner's driver's license was properly revoked for his refusal to submit to a breathalyzer test after his lawful arrest. *Harper v. Peters, Comr. of Motor Vehicles*, 62.

§ 76.2. Contributory Negligence in Hitting Parked Vehicle

In an action to recover for personal injuries sustained by plaintiff when his truck collided with defendant's truck which partially blocked the highway, evidence established plaintiff's contributory negligence as a matter of law. *Gibson v. Tucker*, 214.

AUTOMOBILES—Continued

§ 90.2. Instructions on Proper Lookout

Trial court's instruction that the failure of a driver to keep a proper lookout would constitute negligence was not inconsistent with the court's later instruction that it would not be negligence within itself for a driver to fail to maintain a reasonable lookout for other vehicles when he enters an intersection on a green light. *Jones v. Morris*, 10.

§ 126.3. Breathalyzer Test in Drunk Driving Case

Facts found by the trial court were sufficient to support its conclusion of law that petitioner did not wilfully refuse to take a breathalyzer test where the court found that petititoner "wanted to take the test" at the conclusion of the thirty minute waiting period. *Durland v. Peters, Comr. of Motor Vehicles*, 25.

G.S. 20-16.2 does not require that a breathalyzer test be administered within 30 minutes of the time a person's rights are read to him. *Pappas v. Dept. of Motor Vehicles*, 497.

BANKS AND BANKING

§ 11. Liability for Mistaken Payment of Check

The maker of a check who examines the check when presented at the bank and instructs the bank to pay it may not then collect from the bank for paying the check. *IFCO v. Bank*, 499.

BASTARDS

§ 10. Civil Action to Establish Paternity

The time limitation in G.S. 49-14 for bringing a civil action to establish paternity is only a procedural limitation which may be tolled under G.S. 1-21 by defendant's absence from the State, and a party may be equitably estopped from asserting such limitation. *Joyner v. Lucas*, 541.

BILLS OF DISCOVERY

§ 6. Criminal Cases

A pretrial discovery order requiring the State to provide statements made by defendant was not violated by the State's failure to provide to defendant before trial letters written by defendant to his brother in jail. *S. v. Setzer*, 98.

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Elements of Offense

The statutory requirement that a decal be posted on a coin or currency operated machine stating it is a crime to break into vending machines and that a second offense is a felony does not constitute an element of the offense of feloniously breaking into a coin or currency operated machine in violation of G.S. 14-56.1. *S. v. Whitehead*, 506.

§ 5.7. Sufficiency of Evidence of Breaking and Entering and Larceny

Evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious larceny of agricultural chemicals. *S. v. Harden*, 677.

CONSTITUTIONAL LAW

§ 8.1. Delegation of Powers by Local Governmental Bodies

An ordinance enacted by a county board of education which made it unlawful for a person to be on school property after sundown unless participating in an extracurricular activity previously approved by the superintendent was not unconstitutional. *S. v. Rhoney*, 40.

§ 12.1. Regulation of Trades and Professions

The fact that a city had two ordinances requiring a privilege license for a massage business did not render the ordinance under which defendant was charged void for vagueness, and the ordinance did not violate the Equal Protection Clause because it exempted medical clinics operated by a licensed practitioner. *S. v. Enslin*, 565.

§ 18. Right of Free Speech and Assemblage

Plaintiffs' First and Fourteenth Amendment rights are not infringed because a county permits smoking in its public facilities. *GASP v. Mecklenburg County*, 225.

§ 22. Religious Liberty

The application of the licensing requirements of the Day-Care Facilities Act of 1977 to church owned day-care centers does not violate the Freedom of Religion Clause of the First Amendment. *S. v. School*, 665.

§ 28. Due Process in Criminal Proceedings

Defendant was not prejudiced by denial of his first appearance rights prescribed by G.S. 15A-601. *S. v. Pruitt*, 240.

§ 30. Discovery in Criminal Cases

Defendant could not complain of the admission into evidence of exhibits not provided him by the State prior to trial. *S. v. Harden*, 677.

§ 31. Affording Accused the Basic Essentials for Defense

Trial court did not err in the denial of defendant's motion to employ various experts at State's expense. *S. v. Setzer*, 98.

Trial court did not err in denying defendant's motion for an order directing that he be furnished a free transcript of his N. Y. extradition hearing. *S. v. Carter*, 325.

§ 44. Time to Prepare Defense

Defendant was not prejudiced where the trial court required his counsel to represent him in a probation revocation hearing only two hours after appointment of counsel by the court. *S. v. Dement*, 254.

§ 46. Withdrawal of Appointed Counsel

Court did not err in refusing to permit defendant's court-appointed counsel to withdraw during the course of the trial. *S. v. Potts*, 357.

§ 50. Speedy Trial

The provisions of the Speedy Trial Act are inapplicable to juvenile proceedings. *In re Beddingfield*, 712.

§ 66. Presence of Defendant at Proceedings

Defendant waived his right to be present at portions of his trial when he failed to appear after an evening recess. *S. v. Potts*, 357.

CONSTITUTIONAL LAW—Continued

§ 67. Identity of Informants

Defendant was not entitled to the name of a confidential informant when she presented no evidence to support her contention that no confidential informant existed. *S. v. Lofton*, 168.

§ 74. Self-Incrimination

Trial court's order requiring defendant to answer questions asked him on oral deposition did not infringe upon defendant's privilege against self-incrimination. *Trust Co. v. Grainger*, 337.

CONTRACTS

§ 4.1. Consideration Sufficient

A bank's agreement to release from its deed of trust land subject to a prior recorded option to purchase which was exercised by the optionee constituted sufficient consideration for an agreement to substitute other collateral for the released land. *Bank v. Insurance Co.*, 616.

§ 15. Right of Third Person to Sue for Negligent Breach of Contract

A third party general contractor has a cause of action against an architect for negligent approval of defective materials and workmanship even though there is no privity of contract. *Industries, Inc. v. Construction Co.*, 259.

§ 16. Conditions Precedent

A "subject to closing" provision in a contract was a condition precedent to the closing of the contract to purchase plaintiff's house. *Cox v. Funk*, 32.

§ 18. Modification

Evidence was sufficient for the jury to find that a contract for the sale of a tractor was modified by the actions of the parties. *Owens v. Harnett Transfer*, 532.

§ 26.1. Parol Evidence Rule

Trial court properly allowed plaintiff to present evidence aliunde the written contract which dealt with alleged modifications or additions made subsequent to execution of the written contract. *Hanover v. Twisdale*, 472.

§ 27.1. Sufficiency of Evidence of Existence of Contract

Evidence was sufficient to show a contract between defendant and plaintiff's assignor for repairs to a truck owned by defendant's driver. *Financial Corp. v. Transfer, Inc.*, 116.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Evidence was sufficient for the jury in an action to recover for breach of a contract for the sale of a tractor. *Owens v. Harnett Transfer*, 532.

§ 28. Instructions

Where defendant's president telephoned plaintiff's assignor and specifically requested that a truck be repaired and stated that he would pay the bill, trial court did not err in failing to instruct on quantum meruit. *Financial Corp. v. Transfer, Inc.* 116.

COUNTIES

§ 10. Actions Against Counties

Plaintiffs described as persons who are harmed or irritated by tobacco smoke do not constitute a class of "handicapped persons" within the meaning of G.S. 168-1 et seq., and plaintiffs are not entitled to relief under those statutes to compel defendant county to prohibit smoking in its public facilities. *GASP v. Mecklenburg County*, 225.

CRIMINAL LAW

§ 5. Mental Capacity to Commit Crime

Trial court did not err in refusing to permit defendant's mother to state her opinion as to whether her son "knows the difference between right and wrong." *S. v. Potts*, 357.

§ 7. Entrapment

In a prosecution for driving under the influence, third offense, evidence was insufficient to support defendant's contention that he was entrapped. *S. v. Crouch*, 729.

§ 21. Preliminary Proceedings

Defendant was not prejudiced by trial court's failure to rule on defendant's pretrial motions until the day before trial. *S. v. Setzer*, 98.

§ 21.1. Preliminary Hearing

Defendant was not prejudiced by denial of his first appearance rights prescribed by G.S. 15A-601. *S. v. Pruitt*, 240.

§ 29.1. Proceedings to Determine Mental Capacity to Stand Trial

Trial judge sufficiently complied with requirements of G.S. 15A-1002 for a hearing on defendant's capacity to proceed with trial. *S. v. Potts*, 357.

§ 34.4. Evidence of Other Offenses

In a prosecution for driving under the influence, third offense, trial court did not err in allowing the State to cross-examine defendant concerning his prior convictions of driving under the influence, though defendant had stipulated for the purpose of trial that he had been so previously convicted, since the evidence sought by defendant's cross-examination was for impeachment purposes. *S. v. Crouch*, 729.

§ 34.5. Evidence of Other Offenses to Show Identity of Defendant

In a prosecution upon two charges of kidnapping, testimony relating to a third incident was admissible to identify defendant as the perpetrator of the crimes charged. *S. v. Hoskins*, 108.

§ 35. Evidence that Offense Was Committed by Another

In a prosecution for possession of heroin in which the State presented evidence that a small plastic bag containing heroin was found in the back bedroom of defendants' residence, trial court erred in refusing to permit defendants to present evidence that a third person, who was the only person seen by officers to come from the back bedroom, had on his person eight small plastic bags exactly like the one found in the back bedroom. *S. v. Britt*, 637.

CRIMINAL LAW—Continued

§ 46.1. Flight as Implied Admission

An officer's testimony concerning his efforts to find defendant and the subsequent discovery of defendant in Florida was competent in this larceny case. *S. v. Miller*, 342.

§ 48. Silence of Defendant as Implied Admission

Trial court did not err in the admission of testimony that defendant refused to make a post-Miranda warning statement while in custody on a certain day. *S. v. Holsclaw*, 696.

§ 57. Evidence Concerning Firearms

Trial court's determination that a witness was an expert in ballistics was supported by the evidence. *S. v. Zigler*, 148.

§ 75.7. What Constitutes "Custodial Interrogation"

Officer's question to defendant, "Where is the gun?" was not a custodial interrogation but was merely an on-the-scene investigation, and defendant's response thereto and the gun were properly admitted into evidence although defendant had not been given the Miranda warnings. *S. v. Holsclaw*, 696.

§ 75.9. Volunteered Statements

Defendant's incriminating statement to an officer at the time of his arrest was not the result of custodial interrogation but was volunteered and admissible in evidence. *S. v. Setzer*, 98.

§ 75.11. Waiver of Constitutional Rights Before Interrogation

Defendant sufficiently waived his constitutional rights prior to in-custody interrogation although it is questionable whether defendant explicitly waived counsel. *S. v. Curry*, 69.

§ 80.1. Authentication of Writings

Letters written by defendant to his brother while in jail were properly authenticated for admission into evidence. *S. v. Setzer*, 98.

§ 82.2. Physician-Patient Privilege

When construed together, G.S. 8-53 and G.S. 8-53.3 permit the trial court to compel disclosure of privileged information obtained by a physician or psychologist prior to trial and prior to the filing of criminal charges. *In re Mental Health Center*, 292.

§ 83. Husband-Wife Privilege

An officer's testimony that he heard defendant tell his wife that he was "in real trouble this time" did not violate the husband-wife privilege of G.S. 8-56. *S. v. Setzer*, 98.

§ 87. Direct Examination of Witnesses; What Witnesses May Be Called

Defendant was prejudiced when he refrained from calling a witness who he knew would plead the Fifth Amendment because of the trial court's erroneous belief that it would be unethical for defendant's attorney to do so. *S. v. Bumgarner*, 71.

There was no merit to defendant's contention that the trial court erred in permitting a surprise witness to testify. *S. v. Harden*, 677.

CRIMINAL LAW—Continued

§ 87.2. Leading Questions

Trial court properly sustained the State's objection to a leading question asked defendant as to whether he felt "that he was going to attack you." *S. v. Holsclaw*, 696.

§ 89.10. Cross-Examination as to Prior Degrading and Criminal Conduct

The district attorney could properly cross-examine a witness concerning his prior criminal activity for the purpose of impeachment. *S. v. Mendez*, 141.

§ 91. Time of Trial

Defendant was not prejudiced by the fact that the district attorney filed the calendar of cases to be tried six days before the beginning of the session rather than a full week before the session. *S. v. Miller*, 342.

§ 91.5. Continuance on Ground Indictment Returned Shortly Before Trial Is to Commence

Trial court properly denied defendant's motion for continuance made on the ground that the indictment had been returned only seven days prior to the trial. *S. v. Miller*, 342.

§ 99.7. Expression of Opinion in Court's Explanation to Witness

It was improper for the court to advise a witness not to testify, but defendant was not prejudiced thereby. *S. v. Mendez*, 141.

§ 101. Conduct or Misconduct Affecting Jurors

Trial court did not err in failing to poll all of the jurors to determine whether their verdicts would be affected by the dismissal of a juror because the juror stated that her verdict would be influenced by a comment she had heard. *S. v. Keeter*, 642.

§ 101.2. Exposure of Jurors to Evidence Not Formally Introduced

Defendant was not prejudiced when six jurors saw writing on a blackboard made by the prosecutor and related to his closing argument. *S. v. Harden*, 677.

§ 102.4. Conduct of Prosecutor During Trial

Defendant was not prejudiced by the alleged statement of the prosecutor that he intended to have one of defendant's witnesses indicted. *S. v. Mendez*, 141.

§ 102.5. Improper Questions by Prosecutor

Trial court in an arson and murder case did not err in refusing to declare a mistrial when the prosecutor violated an order requiring prior approval of the court for any questions relating to any previous fire that had occurred in the proximate vicinity of defendant. *S. v. Setzer*, 98.

§ 113. Court's Statement of Evidence and Application of Law Thereto

Trial court's instructions, when considered as a whole, could not have misled the jury into believing that defendant could be found guilty of all three charges of forcibly breaking into a currency-operated machine if it found that he aided and abetted in the forcible breaking into only one of the machines. *S. v. Whitehead*, 506.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial court's instruction that there was evidence tending to show that defendant confessed "that he had participated in the crimes in which he was charged"

DIVORCE AND ALIMONY—Continued

§ 18.11. Findings as to Dependency

Evidence was sufficient to support the trial court's award of alimony pendente lite to plaintiff where the evidence tended to show that plaintiff was a dependent spouse. *Haddon v. Haddon*, 632.

§ 18.12. Findings as to Right to Relief

Evidence in an action for temporary alimony was sufficient to support trial court's finding that defendant forced plaintiff to participate in abnormal and unnatural sexual conduct which was so abhorrent to plaintiff as to render it impossible to maintain the marital relationship. *Haddon v. Haddon*, 632.

§ 18.13. Amount of Alimony Pendente Lite

Trial court did not abuse its discretion in awarding defendant alimony pendente lite of $750 per month. *Ingle v. Ingle*, 365.

§ 18.16. Attorney's Fees in Action for Alimony Pendente Lite

In an action for alimony pendente lite, trial court erred in awarding plaintiff attorney fees without making a finding as to the reasonable value of the legal services rendered. *Haddon v. Haddon*, 632.

§ 18.17. Validity and Construction of Alimony Pendente Lite Orders

Sexual intercourse between the parties constitutes a reconciliation which voids an order for alimony pendente lite. *Pennington v. Pennington*, 83.

§ 19.5. Modification of Alimony Decree; Effect of Consent Judgment

Provisions in a consent judgment for support payments to defendant and for transfer of realty to plaintiff constituted reciprocal consideration, and the support provision was not subject to modification by the court. *Jones v. Jones*, 467.

§ 20. Divorce as Affecting Right to Alimony

Trial court did not err in concluding as a matter of law that no final order or judgment for permanent alimony had been entered at the time defendant was granted an absolute divorce. *Wise v. Wise*, 5.

A stay of plaintiff's action for absolute divorce was not required pending resolution of defendant's counterclaim for alimony in plaintiff's earlier action for divorce from bed and board. *Edwards v. Edwards*, 301.

§ 23.3. Jurisdiction Over Child Custody After Divorce

Jurisdiction over contempt proceedings related to a child custody order remains in the court which had jurisdiction over the custody proceeding. *Morris v. Morris*, 222.

§ 23.8. Effect of Separation Agreement on Child Custody

A separation agreement was sufficient to establish permanent custody of the children with defendant wife. *Hassell v. Means*, 524.

§ 24.6. Sufficiency of Evidence in Child Support Action

Trial court erred in ordering defendant to pay child support of $450 per month where there were no evidence and findings as to the actual needs of the child. *Williams v. Williams*, 163.

DIVORCE AND ALIMONY—Continued

§ 24.8. Changed Circumstances Not Shown

Trial court erred in decreasing the amount of child support required of defendant by one-third when one of the children reached majority. *Gilmore v. Gilmore*, 560.

§ 25.1. Fitness to Have Child Custody

In a controversy between husband and wife for the custody of minor children, it is error for the trial court to award custody to the husband as a matter of law on the sole ground that the wife has prior to that time been adjudged mentally incompetent. *Price v. Price*, 66.

Plaintiff mother's illegal cohabitation with a male person in the presence of her minor children did not prohibit the court from finding she was a fit and proper person to have custody of her children. *Almond v. Almond*, 658.

§ 25.7. Modification of Child Custody Order

Where a separation agreement granting custody of a minor child to its mother was incorporated by reference in a divorce decree, but the question of custody was not decided by the court after hearing the evidence, it was not necessary for the court to find a substantial change of circumstances in order to modify custody of the child. *Newsome v. Newsome*, 416.

§ 25.9. Sufficient Evidence of Changed Circumstances

Where the changes in circumstances are such as to warrant but not compel a change in a child custody award, the decision of the trial judge to modify or not to modify that award will not be disturbed on appeal. *Charett v. Charett*, 189.

§ 25.10. Insufficient Evidence of Changed Circumstances

There was no sufficient change of circumstances to warrant a change in custody of minor children from their mother to their father. *Hassell v. Means*, 524.

§ 25.11. Findings in Child Custody Action

Evidence supported the trial court's finding that the environment in which plaintiff mother had placed her minor child was not in the child's best interest, and the court did not abuse its discretion in awarding custody of the child to its father. *Newsome v. Newsome*, 416.

§ 25.12. Visitation Privileges

The issue of visitation was before the court upon plaintiff's motion for modification of a child custody award on the basis of changed circumstances, and trial court did not abuse its discretion in requiring the parties to split the expense of the child's transportation for visitation purposes. *Charett v. Charett*, 189.

§ 27. Attorney's Fees

Trial court erred in awarding counsel fees to plaintiff wife in an alimony action where she was not a dependent spouse. *Williams v Williams*, 163.

Trial court did not abuse its discretion in denying plaintiff attorney's fees to defray the expense of resisting defendant's motion for reduction in alimony and child support payments. *Gilmore v. Gilmore*, 560.

An action remained an action for child custody and support even though the court entered a consent order on the question of custody prior to trial, and although the trial court was not required to make findings of fact in awarding

DIVORCE AND ALIMONY—Continued

counsel fees in such action, findings made by the court did support its award of counsel fees to plaintiff wife. *Hudson v. Hudson*, 647.

EJECTMENT

§ 3. Nonpayment of Rent

Trial court properly allowed plaintiff's motion for summary judgment in an action for summary ejectment for failure to make rental payments on time. *Housing Authority v. Truesdale*, 256.

ELECTRICITY

§ 7.1. Sufficiency of Evidence of Negligence

Evidence on motion for summary judgment presented a question of material fact as to defendant's negligence in an action for the death of plaintiff's intestate which occurred when an aluminum ladder he was moving while painting a house came into contact with an uninsulated high voltage wire maintained by defendant power company. *Willis v. Power Co.*, 582.

EMINENT DOMAIN

§ 5.10. Entitlement to Interest on Award

Court did not err in instructing the jury it should not add interest to its verdict of just compensation but the court would do so. *Power Co. v. Winebarger*, 330.

§ 6.2. Value of Property in Vicinity

A witness could properly testify that his method of appraising the property in question included a consideration of sales of similar property. *Power Co. v. Winebarger*, 330.

§ 6.9. Cross-Examination of Value Witness

Court erred in permitting petitioner's counsel to ask respondents' expert witness on cross-examination whether he did not know that certain individuals had sold property for stated sums per acre. *Power Co. v. Winebarger*, 330.

§ 7.8. Instructions

Testimony by plaintiff's witness that the value of defendants' land was increased by the taking because a roadway fronting the property was paved was insufficient to require the court to instruct on general and special benefits to defendants' property resulting from a highway project. *Board of Transportation v. Rand*, 203.

EQUITY

§ 1.1. Nature of Equity and Maxims

Plaintiffs were not barred from equitable relief by the "unclean hands" doctrine on the ground that the purpose of a conveyance of the land in dispute from the male plaintiff to the female plaintiff was to defraud creditors who were not a party to this action. *High v. Parks*, 707.

ESTOPPEL

§ 4.7. Sufficiency of Evidence of Equitable Estoppel

In an action by plaintiffs seeking an adjudication that they were owners in fee of three tracts of land, plaintiffs presented sufficient evidence of equitable estoppel to reach the jury. *Thompson v. Soles*, 462.

§ 7. Competency of Evidence

Parol evidence is ordinarily admissible to establish an estoppel unless it contravenes the rules of competency and relevancy. *Thompson v. Soles*, 462.

EVIDENCE

§ 1.1. Judicial Notice

Since the trial court judicially knew the facts alleged in plaintiff's complaint, plaintiff's testimony under oath before the trial court that the allegations as set forth in the complaint were true was sufficient to serve as a basis for the court's finding that those allegations were true. *Craven v. Craven*, 243.

§ 11. Transactions or Communications with Decedent

In an action to recover for labor and materials for work done on property owned by the individual defendant, testimony concerning conversations with an agent of defendants who died before trial was not admitted in violation of G.S. 8-51. *Hanover Co. v. Twisdale*, 472.

§ 29.1. Admissibility of Letters

A mailgram giving notice of termination of a lease was sufficiently authenticated for admission into evidence. *Milner Hotels v. Mecklenburg Hotel*, 179.

A letter received in due course which purports to be in response to a letter previously sent by the receiver is prima facie genuine and is admissible in evidence without other proof of its authenticity. *Freight Lines v. Pope, Flynn & Co.*, 285.

§ 32. Parol or Extrinsic Evidence Affecting Writings

In an action to impose a trust upon a one-half undivided interest in real property, trial court did not err in permitting plaintiff to testify to conversations between the parties, who were business partners, prior to the signing of a deed by which legal title to the parties' property was conveyed to a corporation solely owned and controlled by defendants. *Lewis v. Boling*, 597.

§ 32.4. Parol Evidence as to Consideration

Trial court erred in permitting plaintiff to contradict with parol evidence the contract price which appears in the parties' written memoranda of their agreement. *Dixon v. Realty Co.*, 650.

§ 34.2. Admissions Against Interest

In an action to recover for repairs made to a truck, trial court properly admitted evidence concerning defendant's offer to pay an inflated price for trucks subsequently purchased in order to cover the repair bill, since this amounted to an admission by defendant that he was liable for the repair bill. *Financial Corp. v. Transfer, Inc.*, 116.

§ 47. Expert Testimony in General

Trial court properly refused to allow plaintiff's witness to testify as to his opinion concerning the path a fire had taken and its point of origin. *Insurance Co. v. Building Co.*, 21.

MALICIOUS PROSECUTION

§ 11.2. Proof of Existence of Probable Cause; Action of Examining Magistrate

Plaintiff's action for malicious prosecution should have been dismissed where the evidence showed as a matter of law that probable cause existed for the issuance of warrants against plaintiff. *Johnson v. Whittington*, 74.

MASTER AND SERVANT

§11.1. Covenants Not to Compete

An agreement by defendant employee not to compete with plaintiff employer for a one year period after termination of employment within a 25 mile radius of any city where there was a Manpower office was reasonable as to the time limitation but not reasonable with respect to territorial restriction. *Manpower, Inc. v. Hedgecock*, 515.

§ 55.1. Workmen's Compensation; What Constitutes Accident

The mere fact that plaintiff was performing a task for his employer which involved a greater volume of lifting than his ordinarily assigned task could not be taken as an indication that an injury sustained while performing the work was the result of an accident within the meaning of the Workers' Compensation Act. *Reams v. Burlington Industries*, 54.

§ 62. Workmen's Compensation; Injuries on Way to or from Work

Plaintiff's injury was not compensable under the Workmen's Compensation Act where the evidence tended to show that plaintiff fell on a public street after she left her employer's premises for the day. *Brannon v. Academy*, 58.

§ 67.2. Workmen's Compensation; Disease as Constituting Injury or Accident

Evidence was insufficient to support the conclusion of a deputy commissioner of the Industrial Commission that deceased employee's death resulted from cancer caused by asbestos which the employee encountered while working for defendant. *Bullard v. Johns-Manville Corp.*, 370.

§ 69.3. Workmen's Compensation; Compromise Settlement

The Industrial Commission did not err in setting aside a compromise settlement agreement on the ground it had been procured by fraud. *Graham v. City of Hendersonville*, 456.

§ 102. Unemployment Compensation; Liability for Employment Security Tax Generally

Where an employer is exempted from the provisions of the Employment Security Act and such exemption is subsequently terminated, upon reinstatement of liability under the Act, the employer is entitled to credit for its prior account balance, and its contribution rate should be determined by reference to its former experience rating at the time of its exemption. *Employment Security Comm. v. Broadcasting Corp.*, 702.

§ 108. Right to Unemployment Compensation Generally and During Vacation

A teacher for the Charlotte Area Fund Project Headstart was not entitled to unemployment benefits when school was terminated for the summer. *In re Huntley*, 1.

Claimant was not entitled to unemployment compensation where he resigned at his supervisor's suggestion because he had been arrested on six felony charges. *In re Vinson*, 28.

MASTER AND SERVANT—Continued

§ 108.2. Right to Unemployment Compensation; Availability for Work

Evidence supported a finding that a claimant for unemployment compensation who was unable to work as a long-distance truck driver because of diabetes was "able to work" within the meaning of the Employment Security Act where the Employment Security Commission found he had a reasonable chance of obtaining employment as a local driver on a part-time basis. *In re George*, 490.

The Employment Security Commission erred in awarding unemployment compensation benefits without finding that the claimant had registered for work and that he had made a claim for benefits in accordance with G.S. 96-15(a). *Ibid.*

A claimant was not "available for work" during the time he was awaiting sentencing after having pled guilty to a charge of selling a controlled substance. *In re Yarboro*, 684.

MORTGAGES AND DEEDS OF TRUST

§ 9. Release of Part of Land from Mortgage Lien

A bank's agreement to release from its deed of trust land subject to a prior recorded option to purchase which was exercised by the optionee constituted sufficient consideration for an agreement to substitute other collateral for the released land. *Bank v. Insurance Co.*, 616.

MUNICIPAL CORPORATIONS

§ 20.2. Injuries in Connection with Water Supply; Natural Watercourse as Drain

Evidence was sufficient to support the findings of the trial court that defendant city had adopted, managed and controlled a ditch which ran by plaintiff's land as a part of the city's drainage system, and that the city was negligent in maintaining the ditch. *Hooper v. City of Wilmington*, 548.

§ 28. Public Improvements; Payment and Enforcement of Assessment of Lien

The legislature did not intend for G.S. 160A-233(d) to bar a city's action for installments of special assessments falling due within the ten-year limitation period, even when installments which became due more than 10 years before the institution of the action are sought to be included in the action. *Guilford County v. Boyan*, 627.

Statutes allow an award of one reasonable attorney's fee, in the court's discretion, in a foreclosure of a special assessment lien by action in the nature of an action to foreclose a mortgage. *Ibid.*

§ 36. Regulation of Taxicabs

Where the citation upon which defendant was tried alleged a violation of the Morehead City Code, operating a taxicab without securing the required permit, but failed to charge that the offense occurred within the city limits, the citation was insufficient to charge a crime. *S. v. Johnson*, 234.

§ 37.2. Regulations Relating to Public Morals

The fact that a city had two ordinances requiring a privilege license for a massage business did not render the ordinance under which defendant was charged void for vagueness, and the ordinance did not violate the Equal Protection Clause because it exempted medical clinics operated by a licensed practitioner. *S. v. Enslin*, 565.

NARCOTICS

§ 4. Sufficiency of Evidence

In a prosecution for possession with intent to sell and sale of LSD, defendant was not entitled to have the case dismissed even if he did think that the LSD which he possessed and sold was mescaline. *S. v. Mendez*, 141.

In a prosecution for manufacturing marijuana and possession of heroin and marijuana, evidence was sufficient for the jury where it tended to show that marijuana plants were growing on defendant's balcony and that heroin was found on defendant's kitchen table. *S. v. Lofton*, 168.

§ 4.1. Insufficiency of Evidence

Evidence that defendant possessed 70 phenobarbital tablets was insufficient to withstand a motion for nonsuit on a charge of possession with intent to sell. *S. v. King*, 210.

Trial court erred in denying one defendant's motions to dismiss on the ground that the evidence was insufficient from which an inference of aiding and abetting in the unlawful possession of controlled substances could be drawn. *S. v. Keeter*, 642.

NEGLIGENCE

§ 2. Negligence Arising from Performance of a Contract

A third party general contractor has a cause of action against an architect for negligent approval of defective materials and workmanship even though there is no privity of contract. *Industries, Inc. v. Construction Co.*, 259.

§ 57.4. Invitee's Fall on Steps; Sufficiency of Evidence

Evidence was sufficient for the jury in an action to recover for injuries sustained by plaintiff when she fell on defendant's motel steps. *Fields v. Chappell Associates*, 206.

§ 57.7. Water on Floor; Invitee's Action for Negligence

Plaintiff's evidence was insufficient for the jury on the issue of defendant store proprietor's negligence in an action to recover for injuries received by plaintiff when she fell on water on the store floor. *Hill v. Supermarkets*, 442.

PARENT AND CHILD

§ 1.1 Presumption of Legitimacy

Defendant was conclusively presumed to be the father of a child born during his marriage to the child's mother where the evidence showed both he and another person had access to the mother within the normal period of gestation. *S. v. White*, 320.

PARTITION

§ 1. Definition and Nature of Right to Partition

Location of the property in question on the ground was not necessary in a partition proceeding. *Hi-Fort, Inc. v. Burnette*, 428.

PARTNERSHIP

§ 3. Rights, Duties and Liabilities of Partners Among Themselves

Where joint property has been wrongfully converted, the rule that one partner may not sue another upon a demand arising out of a partnership transaction until there has been a complete settlement of partnership affairs and a balance has been struck is inapplicable. *Lewis v. Boling*, 597.

PRINCIPAL AND AGENT

§ 4. Proof of Agency Generally

In an action to recover the amount of an insurance premium, trial court erred in not directing a verdict for defendant where the evidence tended to show that defendant's husband procured the insurance and there was neither allegation nor proof that defendant's husband was acting as her agent. *Albertson v. Jones*, 716.

§ 4.2. Proof of Agency; Evidence of Extrajudicial Statements of Agent

Trial court did not err in admitting testimony of witnesses about conversations with an alleged agent of defendants. *Hanover Co. v. Twisdale*, 472.

§ 6. Ratification and Estoppel

Evidence presented by plaintiff was sufficient to permit the jury to find that one defendant as agent for the other defendants and in his own capacity contracted to lease the property in question. *Stallings v. Purvis*, 690.

PROPERTY

§ 4.2. Malicious Destruction of Property; Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for willful and wanton damage to real property by firing a shotgun into a police station. *S. v. Zigler*, 148.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence

State's evidence was sufficient to show that the goods were taken under such circumstances so as to constitute larceny as alleged in the indictment. *S. v. Lovick*, 577.

REGISTRATION

§ 5. Parties Protected by Registration

An improperly acknowledged and registered deed was not inadmissible in a partition proceeding against a party claiming an interest in the land by descent. *Hi-Fort, Inc. v. Burnette*, 428.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 2. Government and Management

Trial court properly granted summary judgment for plaintiffs in their action to have defendant enjoined from acting as pastor or member of the church to which they belonged since the church was congregational in form and had voted unanimously to remove defendant as pastor. *Graham v. Lockhart*, 377.

RULES OF CIVIL PROCEDURE

§ 4. Process

Pluries summons which was issued on 16 June 1977 and served on defendants on 19 July 1977 was insufficient to bring defendants into court and entry of default against them was therefore invalid. *Fabric Co. v. Spinning Mills, Inc.*, 722.

§ 12. Defenses

Trial court's inconsistent ruling denying additional defendant's motion for summary judgment but allowing his Rule 12(b)(6) motion to dismiss for failure to state a claim for relief was not prejudicial error. *Industries, Inc. v. Construction Co.*, 259.

§ 12.1. Defenses; When and How Presented

Defendant waived his defense of pendency of a prior action between the parties involving the same cause of action since defendant did not present his defense in a properly filed answer. *Mazzocone v. Drummond*, 292.

§ 25. Substitution

The substituted plaintiffs were never properly made parties to a lawsuit where no substitution motion was made, the substitution was made over three years after the death of one of the plaintiffs, and no supplemental complaint was filed. *Silverthorne v. Land Co.*, 134.

§ 37. Failure to Make Discovery; Consequences

Plaintiffs failed to show any justification for their failure to comply with the court's order to answer interrogatories, and the court could properly dismiss their action with prejudice. *Silverthorne v. Land Co.*, 134.

§ 38. Jury Trial of Right

Failure to appear at trial does not constitute consent to a withdrawal of a valid jury trial demand. *Heidler v. Heidler*, 481.

§ 41. Dismissal of Actions

There was no merit to defendant's contention that to gain the benefit of the "saving" provision of G.S. 1A-1, Rule 41(a), there must be a specific reference to Rule 41 in plaintiff's voluntary dismissal. *Freight Lines v. Pope, Flynn & Co.*, 285.

§ 51.1. Recapitulation of Evidence in Instructions

The trial court's instructions were inadequate where they failed to give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issues. *Owens v. Harnett Transfer*, 532.

§ 55.1. Setting Aside Default

Trial court did not err in refusing to permit defendants to file an answer and counterclaim after an entry of default had been entered where defendants did not show any cause for setting aside the entry of default. *Quis v. Griffin*, 477.

§ 56. Summary Judgment

When a court decides to dismiss an action pursuant to Rule 12(b)(6) for failure to state a claim for relief, any pending motion for summary judgment against plaintiff may be treated as moot. *Industries, Inc. v. Construction Co.*, 259.

A summary judgment may not be entered granting an absolute divorce in this State. *Edwards v. Edwards*, 301.

RULES OF CIVIL PROCEDURE—Continued

§ 58. Entry of Judgment

Where the trial court had no independent recollection of what had occurred at a hearing for alimony more than a year earlier and no judgment had been entered at the conclusion of that hearing, trial court did not err in refusing to sign the judgment and order tendered by plaintiff. *Wise v. Wise*, 5.

SCHOOLS

§ 6. School Property

An ordinance enacted by a county board of education which made it unlawful for a person to be on school property after sundown unless participating in an extracurricular activity previously approved by the superintendent was not unconstitutional. *S. v. Rhoney*, 40.

§ 13.2. Dismissal of Teachers

A school teacher who was dismissed for insubordination was not denied due process, and evidence that she used corporal punishment on her handicapped students in violation of her principal's orders was substantial evidence of insubordination. *Baxter v. Poe*, 404.

SEARCHES AND SEIZURES

§ 8. Search and Seizure Incident to Warrantless Arrest

Probable cause existed for the arrest of defendant by a Tyrrell County deputy sheriff where a Manteo police officer had probable cause for the arrest and had a radio message sent to Tyrrell County officers to stop defendant's vehicle for questioning of its occupants, and statements made by defendant and evidence obtained by a search after defendant's arrest were not products of an illegal arrest. *S. v. Whitehead*, 506.

§ 11. Warrantless Search of Vehicles, Probable Cause

An officer had probable cause to search defendant's vehicle for shotgun shells at the time he arrested defendant, and the fact that shells were seized later after the vehicle had been removed to the police station did not make the search and seizure unreasonable. *S. v. Zigler*, 148.

§ 13. Search and Seizure by Consent

Officers lawfully searched defendant's residence pursuant to the terms of a suspended sentence which required defendant to consent to a search of his residence by any law officer to determine if he had possession of any controlled substance. *S. v. King*, 210.

§ 15. Standing to Challenge Lawfulness of Search

Defendants had no standing to contest the search of a residence where they were not on the premises at the time of the search and alleged no proprietary or possessory interest in the premises. *S. v. Sheppard*, 125.

§ 16. Consent to Search Given by Members of Household

Search of a residence was illegal where the court found consent given by defendant's wife was not voluntary. *S. v. Sheppard*, 125.

SEARCHES AND SEIZURES—Continued

§ 33. Plain View Rule

Marijuana taken from respondent in a juvenile delinquency proceeding was not discovered as a result of an unlawful search and the court did not err in admitting it into evidence. *In re Beddingfield*, 712.

§ 40. Execution of Search Warrant; Items Which May Be Seized

The State failed to carry its burden of presenting evidence sufficient for the trial court to determine the validity of a search for and seizure of articles identifying defendants where the warrant under which the search was made specified heroin as the only item to be seized. *S. v. Williams*, 662.

§ 43. Motions to Suppress Evidence

Defendant was not entitled to have evidence seized from her apartment suppressed on the grounds that the affidavit was not truthful and that there was no probable cause to search her apartment. *S. v. Lofton*, 168.

TAXATION

§ 25.4. Valuation

The method used by a county in revaluation of real property for ad valorem tax purposes was not arbitrary where the valuation was accomplished by means of a mass appraisal. *In re Wagstaff*, 47.

§ 31.1. Sales Tax; Particular Transactions

Sales tax was due upon the sales price, including fabrication labor, of sheet metal articles made to order for the taxpayer's customers. *Roofing Co. v. Dept. of Revenue*, 248.

TRESPASS

§ 7. Sufficiency of Evidence

Trial court erred in entering summary judgment for defendant landlord in plaintiff's action for forcible trespass. *Hendrix v. Guin*, 36.

§ 10. Damages for Forcible Trespass

Plaintiff's complaint was sufficient to permit the jury to consider an award of punitive damages for forcible trespass. *Hendrix v. Guin*, 36.

TRIAL

§ 33.3. Instructions on Contentions of Parties

Trial court erred in failing to give equal stress to plaintiff passenger's contentions in an action against the driver of the vehicle in which the passenger was riding. *Daniels v. Jones*, 555.

§ 52.1. Setting Aside Verdict for Inadequate Award

Trial court did not err in denying plaintiff's motion to set aside the verdict because the damages were inadequate. *Coletrane v. Lamb*, 654.

TRUSTS

§ 13.2. Parol Agreement to Purchase or Accept Title for Benefit of Another

A conveyance of land upon an oral agreement by the grantees to hold the land until a third party paid a debt owed to the grantor and then convey the land to the third party did not violate the statute of frauds but constituted a valid oral trust. *High v. Parks*, 707.

§ 13.5. Creation of Resulting Trusts; Clean Hands

Plaintiffs were not barred from equitable relief by the "unclean hands" doctrine on the ground that the purpose of a conveyance of the land in dispute from the male plaintiff to the female plaintiff was to defraud creditors who were not a party to this action. *High v. Parks*, 707.

§ 16. Pleadings

Trial court did not err in permitting plaintiff to amend his complaint to allege a constructive trust rather than a resulting trust. *Lewis v. Boling*, 597.

§ 18. Action to Establish Trust; Competency and Relevancy of Evidence

In an action to impose a trust upon a one-half undivided interest in real property, trial court did not err in permitting plaintiff to testify to conversations between the parties, who were business partners, prior to the signing of a deed by which legal title to the parties' property was conveyed to a corporation solely owned and controlled by defendants. *Lewis v. Boling*, 597.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Trial court did not err in dismissing plaintiffs' cause of action under the Unfair Trade Practices Act brought against the individual defendants, but did err in dismissing plaintiffs' cause of action against defendant realtors. *Rosenthal v. Perkins*, 449.

UNIFORM COMMERCIAL CODE

§ 8. Sales; Statute of Frauds

The fact that various parts were required to repair and service a truck was merely incidental to the parties' repair contract, and the contract was not rendered unenforceable by the statute of frauds provision of G.S. 25-2-201. *Financial Corp. v. Transfer, Inc.*, 116.

§ 37. Warehouse Receipts

A warehouse receipt need not be delivered in order to be issued. *Grundey v. Transfer Co.*, 308.

Proper issuance of a warehouse receipt required not only a mailing of the receipt to the owner of the stored goods but a mailing to the proper address. *Ibid.*

A newspaper advertisement description of goods to be sold to satisfy a warehouseman's lien as the "household goods" of a named person was insufficient to satisfy the requirements of the U.C.C., but this did not invalidate the sale but entitled the owner of the goods to whatever damages he could prove resulted from noncompliance with the U.C.C. *Ibid.*

USURY

§ 1. What Constitutes Usury

A loan transaction secured by real estate or personalty in N. C. is governed by the usury laws of this State. *Equilease Corp. v. Hotel Corp.*, 436.

§ 1.3. Excess of Legal Maximum

A transaction between the parties which called for a 12.1226% interest rate was usurious as a matter of law. *Equilease Corp. v. Hotel Corp.*, 436.

§ 6. Recovery of Double Amount of Usurious Interest Paid

Defendant was entitled to recover twice the amount of interest paid on a usurious note, but the evidence was insufficient to show how monthly payments were allocated between principal and interest. *Equilease Corp. v. Hotel Corp.*, 436.

UTILITIES COMMISSION

§ 10. Regulation of Carriers; Sufficiency of Findings and Evidence

The Utilities Commission had insufficient evidence before it to support its determination that a proposed rate increase by appellant rail carriers was a general rate increase. *Utilities Comm. v. Common Carriers*, 314.

§ 21. Power to Regulate Rates

The Utilities Commission exceeded its statutory authority in requiring a fertilizer manufacturer to pay a surcharge for emergency natural gas used by the manufacturer prior to the date that the tariff including the surcharge became effective. *Utilities Comm. v Farmers Chemical Assoc.*, 606

VENDOR AND PURCHASER

§ 1. Validity of Contracts to Convey

Provisions in a contract for sale of land that the seller could mortgage the property or make a prior sale did not render the contract unconscionable. *Land Co. v. Byrd*, 251.

VENUE

§ 2. Residence of Parties as Fixing Venue

Wake County was the proper venue for an action by the Child Day-Care Licensing Commission against church owned day-care facilities for a declaratory judgment as to the Commission's authority to require defendants to be licensed. *S. v. School*, 665.

§ 3. Actions Against Executors

An action against defendant executors to determine rights in the balance on deposit in a joint savings account opened by testatrix and another was properly removed to the county where defendants' letters testamentary were issued. *Stanley v. Miller*, 232.

§ 4. Actions Against Municipalities

Proper venue in an action against a city to recover the price of equipment installed in its municipal building was in the county in which the city was located. *Fire Safety Service v. City of Greensboro*, 79.

WAREHOUSEMEN

§ 1. Issuance of Warehouse Receipts; Liability of Warehouseman

A warehouse receipt need not be delivered in order to be issued. *Grundey v. Transfer Co.*, 308.

Proper issuance of a warehouse receipt required not only a mailing of the receipt to the owner of the stored goods but a mailing to the proper address. *Ibid.*

A newspaper advertisement description of goods to be sold to satisfy a warehouseman's lien as the "household goods" of a named person was insufficient to satisfy the requirements of the U.C.C., but this did not invalidate the sale but entitled the owner of the goods to whatever damages he could prove resulted from the noncompliance with the U.C.C. *Ibid.*

WEAPONS AND FIREARMS

§ 3. Discharging Weapon

State's evidence was sufficient for the jury in a prosecution for discharging a firearm into an occupied building. *S. v. Zigler*, 148.

WILLS

§ 21.4. Sufficiency of Evidence of Undue Influence

Evidence in a caveat proceeding was insufficient to be submitted to the jury on the question of undue influence. *In re Andrews*, 86.

WITNESSES

§ 7.1. Direct Examination; Nonresponsive Answer of Witness

Trial court in an alimony action properly sustained defendant's objection to a leading question. *Wise v. Wise*, 5.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina