NORTH CAROLINA COURT OF APPEALS REPORTS

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CITE THIS VOLUME

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OF
NORTH CAROLINA

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Judges

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ROBERT M. MARTIN
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GERALD ARNOLD
JOHN WEBB
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1. Appointed 30 August 1979.
2. Appointed 12 October 1979.
3. Appointed 1 February 1980 to succeed Ben H. Neville who retired 31 January 1980.
4. Appointed 18 January 1980.
5. Appointed 1 November 1979.
6. Appointed 15 February 1980.
7. Retired as Twenty-sixth District Judge and constituted Emergency Judge 1 February 1980.

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CASES REPORTED WITHOUT PUBLISHED OPINION

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TERRY LYNN McGINNIS, BY HIS GUARDIAN AD LITEM, LOIS McGINNIS v. JOHN ROBINSON AND ELAM TORRENCE ROBINSON, SR.

No. 7826SC1055

(Filed 18 September 1979)

1. **Rules of Civil Procedure § 60.2— failure to find subornation of perjury—perjury not fraud upon court—no grounds for new trial**

Since the evidence would have permitted a finding that defendant father encouraged a witness to give false testimony, but the judge did not so find, G.S. 1A-1, Rule 60(b)(3) would not apply to give plaintiff a new trial; furthermore, perjured testimony is not usually recognized as a fraud upon the court within the meaning of the provision of Rule 60(b) which states that the rule "does not limit the power of a court to entertain an independent action . . . to set aside a judgment for a fraud upon the court."

2. **Rules of Civil Procedure § 60.1— motion for new trial—timeliness**

Plaintiff's motion for a new trial was made within a reasonable time pursuant to G.S. 1A-1, Rule 60(b)(6) where plaintiff made a new trial motion eight days after the jury verdict; the motion specified no particular rule but the wording made out the grounds provided by Rule 59(a)(7) and (8); while this motion was pending and less than three months after the jury verdict, plaintiff filed another motion requesting a new trial because of materially harmful perjury on the part of one of defendants' witnesses; the motion was made within a short time of plaintiff's learning of the perjured testimony; and the fact that plaintiff did not specify the rule under which he was proceeding until eleven months later did not affect the timeliness of his motion.

3. **Rules of Civil Procedure § 7— grounds for motion —failure to state rule number not fatal**

Where there is an awareness by the trial judge of the grounds for a motion, the motion is adequately stated for the purposes of Rule 6 of the General Rules of Practice for the Superior and District Courts; failure to state the rule was not fatal in this case where the trial judge expressed his opinion that he

was proceeding under G.S. 1A-1, Rule 60(b)(3) and (6) and then granted plaintiff's motion to amend his original motion to reflect that opinion.

4. **Rules of Civil Procedure § 15— amendment of motion to allege rule number—no error**

Defendants could not complain of the amendment of plaintiff's motion to reflect the procedural rule followed at the hearing on plaintiff's motion for a new trial, since defendants, in their response to plaintiff's motion, had raised the failure to state the rule number as a ground for opposition; it was in response to this that the amendment was made; and liberal amendment of pleadings is encouraged by the Rules of Civil Procedure.

5. **Rules of Civil Procedure § 60— perjury by nonparty witness—new trial granted**

The trial court did not abuse its discretion in awarding plaintiff a new trial under G.S. 1A-1, Rule 60(b)(6) where the court found that a nonparty witness for defendants committed perjury which resulted in an injustice to plaintiff.

APPEAL by defendants from *Friday, Judge.* Order granting a new trial to plaintiff entered 19 May 1978. Heard in the Court of Appeals 23 August 1979.

Plaintiff brought this action on 20 January 1976 for damages resulting from injuries sustained in a one car accident. It was stipulated that the accident was caused by the negligence of the driver. On trial, the issues for the jury were (1) whether defendant John Robinson (Robinson) was the driver of the car when the wreck occurred; (2) whether defendant Elam Torrence Robinson, Sr. (Robinson, Sr.), maintained the car involved in the wreck for a family purpose; (3) whether the actionable negligence of the driver was the proximate cause of plaintiff's injury; (4) whether plaintiff was contributorily negligent; and (5) the amount of damages. The jury decided for defendants by reaching only the first issue and finding defendant John Robinson was not the driver. Judgment was entered on 15 February 1977.

The evidence was in dispute on whether plaintiff or Robinson was the driver of the car at the time of the wreck. Three boys were in the car at the time of the wreck. One died instantly and was placed by witnesses for both sides in the backseat of the car. Because of head injuries, Robinson could not recall the accident. Plaintiff, who lost all use of both legs and most use of his arms, could remember the wreck and testified Robinson was the driver. Gail Stephens testified for plaintiff that she had seen the boys in

the car shortly before the accident. She met them in a convenience store parking lot. Robinson was behind the wheel and plaintiff was in the passenger seat. She left before they did and they later passed her on the road. When both cars came to a stop sign 3.3 miles from the accident, she pulled up by their car and saw Robinson driving.

Defendants presented several witnesses who appeared on the scene shortly after the wreck. They found Robinson twenty feet from the car. Plaintiff was pinned in the front seat of the car by the dashboard and steering wheel. The deceased was in the backseat. Floyd Anthony King testified that he had seen the boys in the car and that he had ridden back to the convenience store with them. King testified that Robinson, because he was drunk, asked plaintiff to drive and that plaintiff drove with Robinson sitting in the passenger seat. Another witness also testified to seeing Robinson on the passenger side in the parking lot of the convenience store.

Plaintiff filed a motion on 23 February 1977, eight days after trial, which he captioned "Motion for New Trial." Plaintiff's mother and guardian hired a private investigator on 21 February 1977 who interviewed Floyd Anthony King in March. King admitted to lying when he testified about seeing the boys the night of the wreck. On 2 May 1977, plaintiff filed an additional paper captioned "Motion" in which he moved for a new trial for the reason "that Anthony King, a material witness for the plaintiff, committed perjury concerning issues that were so material to the case that the plaintiff was deprived of a fair trial." He attached an affidavit by the investigator stating that King had admitted his perjury at trial and that it was prompted by defendant Elam Robinson, Sr.'s promise of money and that Robinson did arrange for him to get the money as promised. Neither plaintiff's 23 February nor his 2 May motion cited any rule or statute. A response to plaintiff's 2 May motion was made on 24 May 1977. Plaintiff notified defendants by phone on 21 April 1978 of an amendment filed that day stating his 2 May motion was pursuant to Rule 59(a)(1)(2)(3)(4)(9) and Rule 60 of the North Carolina Rules of Civil Procedure. The original trial judge held a hearing on the motions on 24 April 1978. The judge expressed his opinion that he was proceeding under Rule 60(b)(3) and (6). Plaintiff asked to

amend his motion to reflect the opinion of the judge. Defendants raised no objection at the hearing.

The private investigator hired by plaintiff's guardian and mother testified he talked with King on 15 March 1977. King told the investigator he had not seen Robinson or plaintiff the night of the wreck. King was granted immunity from prosecution for his testimony. He then testified that he first learned of the wreck the day after it occurred. A few days later, Robinson, Sr., who had been asking around for witnesses to the wreck, approached King. King told him he knew nothing of the wreck. A good while later, King saw Robinson, Sr., again. This time he told him he did know something about the wreck. He told Robinson, Sr., his son was not driving. Later, King negotiated a bad check for $300.00 forged by another of the sons of Robinson, Sr., and received $50.00 in exchange. The bank threatened King with check fraud procedures if he did not pay the amount of the check. King approached Robinson, Sr., about the matter. Robinson did not directly loan King money but did guarantee a loan to King from a third person and then repaid that person.

King testified that defendants never asked him to give false testimony, and he was not changing his story because of threats from plaintiff or his family. His motive for coming forward and admitting his perjury was his feeling of responsibility for plaintiff's suffering. Robinson, Sr., testified his only motive in helping King with the check problem was to help his other son avoid trouble.

On 19 May 1978, the judge who presided over both the hearing and trial entered an order, wherein he made extensive findings of fact and conclusions of law. There are no exceptions to any of the findings of fact which are, in part, as follows:

> "1. The plaintiff was involved in a serious automobile accident on November 4, 1975, as a result of which, among other things, he was paralyzed in such a way that he was unable to use his arms and his body below the waist. . . ."
>
> * * *
>
> "4. Of the three occupants in the automobile at the time of the accident which occurred just a few miles from the

mini-market, only the plaintiff was able to testify who was driving and he testified that Robinson was driving.

5. Robinson testified that he had amnesia and could not remember anything about who was driving the automobile and Barron, the third occupant of the automobile, was killed in the accident.

6. The question of who was driving the automobile was a very vital issue in this case, and this Court, in observing the demeanor of the witnesses and the reaction of the jury during the course of the trial, is of the opinion that the aforesaid testimony of King was a major factor which contributed to the jury verdict for the defendant, and this Court so finds."

* * *

"9. This Court finds that King committed perjury during his testimony at the original trial and that his testimony that plaintiff was driving the automobile when he left the mini-market just before the collision and his testimony that the plaintiff was smoking marijuana and was drunk to the point where he was staggering, was sufficiently prejudicial to the plaintiff to prevent and did prevent his having a fair trial. . . .

10. King committed perjury about highly material matters, and if King's testimony had not been a part of the trial, it is probable that the jury would have ruled in favor of the plaintiff.

11. . . .Robinson, Sr. should have known by that time that King's proposed testimony for the subject trial was highly questionable, if not false. Robinson's lawyer advised against lending money to King, but Robinson, Sr. agreed (without the knowledge of his counsel) to arrange with an intermediary, one Frank Dwyer, for King to borrow from him $250 to $300 on Robinson's guarantee. King thereafter borrowed such a sum of money with no intention of repaying it, and within a short time thereafter, and substantially in advance of the trial, Robinson, Sr. repaid to Frank Dwyer the money which he had loaned to King. King has never repaid the money to anyone, and does not intend to do so.

12. Charlotte Police Officer Knabb, in charge of the investigation concerning a possible charge of manslaughter arising out of the accident, had concluded prior to the statement of King, that John Robinson was the driver. Robinson, Sr., told Knabb about the statement of King, and upon questioning King, Knabb then concluded that plaintiff was the driver.

13. Plaintiff had filed and served a motion for a new trial on the grounds that there was an insufficiency of evidence to justify the verdict, that the verdict was contrary to law and there was error in the trial. While this motion was pending, plaintiff learned for the first time that the witness, King, had repudiated his earlier testimony and within a short period of time after receiving this information, the plaintiff filed his motion for relief on this ground. Plaintiff has acted with due diligence in seeking the relief prayed for."

The court then made conclusions of law as follows:

"1. This Court has jurisdiction to hear the pending motions.

2. The motions were filed in apt time and plaintiff has used due diligence in having the motions heard.

3. The plaintiff was prevented from having a fair trial by the perjury which was committed.

4. The witness, King, who committed the perjury at the original trial has been granted immunity from prosecution for that offense and such witness is now beyond the jurisdiction of the Courts.

5. This Court, in its discretion, has the power to set aside this judgment in this action and to grant plaintiff a new trial.

6. In the interest of justice and in the Court's discretion, the judgment should be set aside and the plaintiff granted a new trial."

The court ordered that the judgment previously entered be set aside and that plaintiff be granted a new trial. Defendants appeal from that order.

Walker, Palmer and Miller, by James E. Walker and Raymond E. Owens, Jr., for plaintiff appellee.

Womble, Carlyle, Sandridge and Rice, by H. Grady Barnhill, Jr., and W. G. Champion Mitchell, for defendant appellants.

VAUGHN, Judge.

The trial judge was of the opinion that the proceeding was under Rule 60(b)(3) and (6). The pertinent parts of Rule 60(b) provide:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action."

The trial judge properly proceeded pursuant to Rule 60(b)(3) and (6). If a party is unsure under which of subsections (1), (2) and (3) or (6) of Rule 60(b) to proceed, "he need not specify if his 'motion is timely and the reason justifies relief.'" *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E. 2d 446, 448 (1971).

[1] The evidence would have permitted a finding that Robinson, Sr., encouraged King to give false testimony but the judge did not so find. In the absence of a finding of fraud, misrepresentation or other misconduct on the part of an adverse party, Rule 60(b)(3) would not apply.

The next to the last sentence of Rule 60(b) provides that "this rules does not limit the power of a court to entertain an in-

dependent action . . . to set aside a judgment for a fraud upon the court." Generally, however, perjured testimony is not usually recognized as a "fraud upon the court" within the meaning of the quoted sentence. *Serzysko v. Chase Manhattan Bank*, 461 F. 2d 699 (2d Cir.), *cert. den.*, 409 U.S. 883, *reh. den.*, 409 U.S. 1029 (1972); *Keys v. Dunbar*, 405 F. 2d 955 (9th Cir.), *cert. den.*, 396 U.S. 880 (1969); *Dowdy v. Hawfield*, 189 F. 2d 637 (D.C. Cir.), *cert. den.*, 342 U.S. 830 (1951); *contra: Toscano v. Commissioner*, 441 F. 2d 930 (9th Cir. 1971); *see* Annot. 19 A.L.R. Fed. 761 (1974).

The question now is whether plaintiff was properly granted relief under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment." We first consider defendants' procedural objection. They question the timeliness of the motions and the alleged failure to state grounds or rules for the motions.

[2] Timing under Rule 60(b)(6) requires the motion to be made within a reasonable time. What constitutes a reasonable time depends on the circumstances of the individual case. 7 Moore's Federal Practice, ¶ 60.27[3] at 383 (2d ed. 1979). Rule 60(b)(3) motions in their timing must not only be reasonble but also within one year. Defendants contend plaintiff did not meet the laches-type limitation on a Rule 60(b)(6) motion or the express statute of limitation on a Rule 60(b)(3) motion. Plaintiff made a new trial motion on 23 February 1977, eight days after the jury verdict. The motion specified no particular rule but the wording made out the grounds provided by subsections (7) and (8) of Rule 59(a). These grounds of insufficiency of the evidence, verdict contrary to rule of law and error in law in admitting certain evidence had nothing to do with perjury. While this motion was pending, plaintiff, on 2 May 1977, filed another motion requesting a new trial because of materially harmful perjury on the part of defendants' witness, King. Defendants maintain the motions were not properly made until the 24 April 1978 hearing because it was not until then that plaintiff amended his motion to reflect the rule under which he was proceeding. Plaintiff's 2 May 1977 motion was within a year of judgment while a motion for new trial filed within ten days was pending. It was made within a short time of plaintiff's learning of the perjured testimony. It was all done within a year of judgment. We hold plaintiff acted within a reasonable time on the facts of the case.

[3] Defendants also object to the failure of plaintiff to state any rules or procedural grounds for his motions of 23 February and 2 May 1977 as originally filed. The substantive grounds and relief desired as manifest on the face of the motions as required by Rule 7(b)(1) of the North Carolina Rules of Civil Procedure. Rule 6 of the General Rules of Practice for the Superior and District Courts, which supplement the Rules of Civil Procedure as provided by G.S. 7A-34, provides, in part: "All motions, written or oral, shall state the rule number under which the movant is proceeding." Rule 1 of the same General Rules of Practice provides: "These rules . . . shall at all times be construed and enforced in such a manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them." Where there is an awareness by the trial judge of the grounds, the motion is adequately stated for the purposes of General Practice Rule 6. *Wood v. Wood*, 297 N.C. 1, 252 S.E. 2d 799 (1979); *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *cert. den.*, 289 N.C. 619, 223 S.E. 2d 396 (1976). Failure to state the rule is not fatal in this case where the trial judge expressed his opinion that he was proceeding under Rule 60(b)(3) and (6) and then granted plaintiff's motion to amend his original motion to reflect that opinion. This case is distinguishable from *Sherman v. Myers*, 29 N.C. App. 29, 222 S.E. 2d 749, *cert. den.*, 290 N.C. 309, 225 S.E. 2d 830 (1976), where neither the rule number nor any grounds for relief found in Rule 60 were set forth in the motion. In this case, the grounds for relief were presented.

[4] Defendants cannot complain of the amendment of plaintiff's motion at the hearing to reflect the procedural rule followed. Defendants in their response to the motion for a new trial had raised the failure to state the rule number as a ground for opposition. It was in response to this that the amendment was made. Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure. N.C. R. Civ. P. 15; *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). The philosophy of Rule 15 has been applied to Rule 60 motions. *Taylor v. Triangle Porsche-Audi, Inc., supra.* In the words of that case,

> "the trial judge averted a decision on the basis of a mere technicality in allowing the defendant to amend his motion to set out the rule numbers under which it (*sic*) was proceeding

and his action in so doing was in keeping with the spirit of the rules and was not an abuse of his discretion." 27 N.C. App. at 714, 220 S.E. 2d at 809.

[5] On the substantive issue of the granting of a new trial, we first note that "a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532, 541 (1975). The trial judge found that Floyd Anthony King, a nonparty witness for defendants "with intent to ingratiate himself" to Robinson, Sr., committed perjury; that Robinson, Sr., should have been suspicious of the testimony and that it resulted in an injustice to plaintiff. Rule 60(b)(6), that "grand reservoir of equitable power to do justice in a particular case," 7 Moore's Federal Practice, *supra*, ¶ 60.27[2] at 375, has been held to permit relief from this nonadverse third party intrinsic fraud of perjury. *See, e.g., McKinney v. Boyle*, 404 F. 2d 632 (9th Cir. 1968), *cert. den.*, 394 U.S. 992 (1969).

As we have previously noted, there are no exceptions to the court's findings of fact. They are, consequently, conclusive on appeal. A trial judge on hearing Rule 60(b) motions should consider such factors as

> "(1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities." *Standard Equipment Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E. 2d 499, 501-502 (1978).

The able judge who allowed the motion for a new trial is the same judge who presided over the first trial. He is in a far better position to decide whether there is a "reason justifying relief from the operation of the judgment" than the appellate courts. There is nothing in this record to indicate that the judge did other than balance the desire of finality in judgments with fairness and equity in the individual case. No abuse of discretion has been shown. His order, therefore, must be affirmed.

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

GEORGE P. RHONEY, JR. v. DEBORAH WHITENER RHONEY SIGMON

No. 7825DC1099

(Filed 18 September 1979)

1. **Divorce and Alimony § 23.3— child custody and support—issues not determined in divorce action—independent action in another county**

The matters of child custody and support were not brought to issue and determined in a prior divorce action in Burke County within the purview of G.S. 50-13.5(f), and the issues of child custody and support could properly be determined in an independent action in another county, where defendant did not file answer in the divorce action and the issues of child custody and support were not presented by the pleadings, and provisions in the divorce decree relating to child custody, visitation and support merely followed in abbreviated form the provisions of a prior separation agreement.

2. **Divorce and Alimony § 23.3— child custody and support—acquired jurisdiction by divorce court—waiver**

Under G.S. 50-13.5, the district court in Catawba County had jurisdiction of a child custody and support action, and any prior acquired jurisdiction of the district court in Burke County because of its inclusion of custody and support provisions in a divorce decree was waived by the parties, where defendant admitted allegations in plaintiff's complaint relative to the jurisdiction of the court in Catawba County; defendant participated in several days of hearings without objecting to the court's jurisdiction; and defendant waited until 20 days after judgment against her had been signed and her appeal had been noted before making any objection to the Catawba County proceedings.

APPEAL by defendant from *Tate, Judge*. Orders dated 20 July 1978 and 15 August 1978 entered in District Court, CATAWBA County. Heard in the Court of Appeals 20 August 1979.

This is an appeal from an order changing the custody of a minor child.

Plaintiff and defendant were married in 1968 and thereafter lived together as husband and wife until 26 August 1973, when they separated. One child, George Brian Rhoney, was born of their marriage. On 16 July 1974 they signed a separation agree-

ment in which they agreed that custody of the child should be awarded to its mother and that the father should have visitation rights as specifically set forth in detail in the agreement. It was also agreed that the father pay $125.00 per month for support of the child. The separation agreement was acknowledged in Catawba County and recited that the parties were "both of Catawba County." The parties were subsequently divorced in Burke County on 14 October 1974.

The present action was commenced on 12 January 1978, when plaintiff-father filed his verified complaint against defendant-mother in the district court in Catawba County praying that he be awarded permanent custody of the child. Plaintiff alleged that both he and the defendant were residents of Catawba County and that the court had jurisdiction of this proceeding pursuant to G.S. 50-13.5(c)(2)(a) in that the child resided, had his domicile, and was physically present in Catawba County. In her answer defendant admitted these allegations of the complaint.

Plaintiff attached a copy of the 16 July 1974 separation agreement to his complaint and alleged that a substantial change in circumstances had occurred since the execution of that agreement making it in the best interest of the child that he now be placed by the court in the custody of the plaintiff-father. As facts showing a change in circumstances, plaintiff alleged that since their divorce both plaintiff and defendant had remarried; that plaintiff's new wife was a registered nurse and a person of high moral character; that defendant's husband, Larry Gene Sigmon, managed a poolroom; that defendant frequently allowed the child to be taken to the poolroom, which was not a desirable environment for a child of tender years; that in January 1978 Larry Gene Sigmon shot a man in the poolroom; that Sigmon was subsequently charged with murder and this charge was still pending; and that the child was experiencing difficulties at school and needed close parental supervision and guidance. In her answer, in addition to admitting the allegations of the complaint concerning the residence of the parties and of their child and the jurisdiction of the court in Catawba County over this proceeding, the defendant admitted the separation agreement, the divorce of the parties, and their subsequent marriages. She denied the other material allegation of the complaint. As a further defense she alleged that plaintiff was making considerably more money than in 1974 and

that the expenses of the child had substantially increased. She prayed that custody of the child remain with her and that the support payments be increased.

After hearings on several different dates, at which both parties presented evidence, the court entered an order dated 20 July 1978 making detailed findings of fact on the basis of which the court concluded:

> 1. That since the Separation Agreement entered into between the Plaintiff and Defendant on or about the 16th day of July, 1974, whereby Deborah Whitener Rhoney Sigmon received the primary custody of George Brian Rhoney, a substantial change of circumstances in law and in fact in the situation of the parties and of their said minor child, George Brian Rhoney, has occurred and that it is in the best interest of the minor child, George Brian Rhoney, that he now be placed by the Court in the custody of his father, the Plaintiff, George P. Rhoney, Jr.
>
> 2. That the Plaintiff, George P. Rhoney, Jr., is a fit, proper and suitable person to have the custody, care and control of the minor child, George Brian Rhoney, and that the Defendant, Deborah Whitener Rhoney Sigmon, is a fit and proper person to have the secondary custody and reasonable visitation with the minor child, George Brian Rhoney, and that the best interests of the child, George Brian Rhoney, would be served by placing his custody in his father, the Plaintiff, George P. Rhoney, Jr.

In accord with its findings and conclusions, the court awarded primary custody of the child to the plaintiff-father with specified visitation rights being given to the defendant-mother. The defendant immediately gave notice of appeal, the appeal entries being signed by the judge on 20 July 1978.

On 9 August 1978, defendant filed a motion in the trial court to set aside its 20 July 1978 order as being void because the court lacked jurisdiction over the subject matter. As grounds for this motion she alleged that an order had been previously entered in the Burke County divorce action awarding custody of the child to her and visitation rights to the plaintiff, and she asserted that only the court which had entered the previous order could modify

or vacate it by a motion in the cause and a showing of a change of circumstances. Defendant attached to her motion a copy of the judgment dated 14 October 1974 which had been entered by the district court in Burke County in the previously filed divorce action. From this it appears that the divorce action had been instituted by the plaintiff against the defendant in the district court in Burke County upon grounds of separation of the parties for a period in excess of one year, that complaint was filed in that action on 4 September 1974, and that on 6 September 1974 defendant accepted service of summons but did not thereafter file an answer to the complaint. In addition to granting an absolute divorce, the judgment contained the following:

> That the defendant, Deborah Whitener Rhoney, is hereby granted the custody, care, control and supervision of said minor child, subject to reasonable visitation rights of the plaintiff.
>
> It is furthered ORDERED that the plaintiff pay into the office of the Clerk of Superior Court for the use and benefit of said minor child, the sum of $125.00 Dollars per month.

On 15 August 1978 the court dismissed defendant's motion to set aside its 20 July 1978 order, concluding as a matter of law that, there being an appeal pending from that order, the trial court lacked jurisdiction to rule on the matter.

Defendant appeals both from the 20 July 1978 order awarding custody of the child to the plaintiff and from the dismissal of her motion to have that order declared void.

Sigmon, Clark & Mackie by Jeffrey T. Mackie for plaintiff appellee.

Harris and Bumgardner by Don H. Bumgardner for defendant appellant.

PARKER, Judge.

On this appeal defendant contends that, since the district court in the Burke County divorce action had awarded custody of the child to her, the district court in Catawba County thereafter lacked jurisdiction to inquire into the matter. We do not agree either with her major premise that the district court in the Burke

County divorce action had actually made a judicial determination as to custody of the child or with her conclusion that the Catawba County court lacked jurisdiction to make such a determination in this action.

The procedure in actions for custody or support of minor children is governed by G.S. 50-13.5. Subsection (b) of G.S. 50-13.5 prescribes the types of actions which may be maintained to obtain custody or support, and subdivision (1) of that subsection provides that such an action may be maintained "[a]s a civil action."

Subsection (f) of G.S. 50-13.5 provides for the proper venue for the actions allowed under G.S. 50-13.5(b). Insofar as pertinent to the question presented by this appeal, G.S. 50-13.5(f) provides:

> (f) Venue.—An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action.

In the present case, both parties and their child reside in Catawba County.

Speaking of G.S. 50-13.5, Professor Lee in his authoritative treatise on North Carolina Family Law said:

> Except for the limited instances set forth in the second sentence of N.C. Gen. Stat. § 50-13.5(f), the jurisdiction over custody and support of a minor child does not, as formerly, automatically become a concomitant of a divorce action and vest in that court a continuing and an exclusive jurisdiction to determine matters of custody and support of minor children . . . . This provision [referring to the second sentence of G.S. 50-13.5(f)] merely prohibits the bringing of any action or proceeding for the custody and the support of a minor child while a previously instituted action for annulment, divorce, or alimony without divorce is pending.

3 Lee, North Carolina Family Law, 3d ed., 1976 Cumulative Supplement, p. 8.

In a case arising soon after the enactment of G.S. 50-13.5, this Court, analyzing the effect of the provision made by the second sentence of subsection (f), said:

> The foregoing proviso, when read in conjunction with the first sentence of this subsection (f) and in conjunction with subsection (b), makes it clear that after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. . . . Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains *in fieri* until the children have become emancipated.

In re Holt, 1 N.C. App. 108, 112, 160 S.E. 2d 90, 93 (1968); *accord, Wilson v. Wilson*, 11 N.C. App. 397, 181 S.E. 2d 190 (1971).

[1] The question initially presented by this appeal thus becomes whether the matters of custody and support of the child were actually brought to issue and determined in the previously instituted Burke County divorce action. In this connection, the opinion of this Court in *Wilson v. Wilson, supra*, is particularly instructive. In that case the plaintiff had obtained an absolute divorce from the defendant in Wake County. In addition to granting the divorce, the judgment in the divorce action, after reciting that the parties had "disposed of all matters at issue by a separation agreement," provided "that the plaintiff shall have the custody of the minor children in accordance with the amended separation agreement heretofore mentioned." Thereafter the plaintiff instituted an action against the defendant in the district court in New Hanover County to obtain increased support for the minor children of the marriage. Defendant moved to dismiss the New Hanover County action, contending that the proper venue was in Wake County where the divorce had been granted. The district court in New Hanover County allowed the motion and dismissed plaintiff's action. On appeal, this Court reversed. In an

opinion written by Morris, Judge (now Chief Judge), the Court said:

> The record before us does not disclose the contents of the pleadings in the Wake County action. The judgment recites that complaint was filed and in due time answer was filed "raising certain issues." We do not know what those issues were. The judgment further recites that all issues except the divorce had been settled by the parties and disposed of by separation agreement including the custody of the children of the parties, the agreement providing that custody of the children be in the wife, plaintiff in the action, and plaintiff in this action. The judgment is completely silent as to support of the children and does not even refer to any such provision in the separation agreement. Nor was the consent portion of the judgment signed by either of the parties or counsel for either. The judgment refers to a separation agreement and an amended separation agreement, but contains nothing by which any separation agreement could be identified as to date or content. Certainly, the separation agreements referred to are not incorporated in the divorce judgment.
>
> It appears clear to us that the custody and support of the children had not been brought to issue or determined in the previous action between the parties, within the meaning of the statute.

Wilson v. Wilson, supra, at pp. 399-400, 181 S.E. 2d at pp. 191-192.

In the case now before us, as was true in *Wilson v. Wilson, supra*, the record does not disclose the contents of the pleadings in the prior divorce action. The judgment in that action recites that complaint was filed therein and that defendant accepted service of summons but did not file answer. It does not appear, therefore, that any issue concerning the custody or support of the minor child of the parties was presented for the determination by the court by the pleadings in that action. It is true that the court in that action included in its divorce decree, just as the divorce court had done in the *Wilson* case, a provision relating to the custody of the child. However, the manner in which the provisions relating to child custody, visitation, and support in the Burke County judgment followed so exactly but in abbreviated form the

more elaborate provisions of the prior separation agreement clearly indicates that these provisions were contractual rather than decretal in nature. In any event, it appears clear to us in this case, just as it did to this Court in the *Wilson* case, that the custody and support of the child "had not been brought to issue or determined in the previous action between the parties, within the meaning of the statute." Therefore, under the holdings in *In re Holt, supra,* and *Wilson v. Wilson, supra,* it was proper to determine the issues as to child custody and support in an independent action in another county.

[2] For an additional reason defendant's attack upon the jurisdiction of the district court in Catawba County must fail. Even had the matter of custody and support of the child been brought to issue and judicially determined in the Burke County divorce action, when this action was subsequently instituted in Catawba County defendant made no objection to it. On the contrary, she admitted all allegations in plaintiff's complaint relative to the jurisdiction of the court in Catawba County, and she thereafter participated in several days of hearings before the court without once objecting to the jurisdiction of the court. Indeed, it does not appear that she in any way even brought to the attention of the court the fact that the Burke County divorce decree may have contained some language relating to the custody and support of the child. Instead, she waited until twenty days after judgment against her had been signed and her appeal had been noted before making any objection to the Catawba County proceedings. Under these circumstances, defendant's objection came too late. Her contention that the question presented involves the court's jurisdiction over the subject matter, which can neither be granted by consent of the parties nor waived by their failure to make timely objection, has already been decided by this Court against her position. In *Snyder v. Snyder,* 18 N.C. App. 658, 197 S.E. 2d 802 (1973), the parties had been divorced in Mecklenburg County. By order in that action custody of the oldest child was awarded to his father and the father was directed to make monthly payments for the support of three younger children then residing with their mother pursuant to terms of a separation agreement. Thereafter, the three younger children came to be under the control of their father in Wake County, and the mother instituted an action in the district court in Wake County to obtain their custody. Orders

were entered awarding custody of the three younger children to the father. On appeal, the mother contended that the district court in Wake County lacked jurisdiction to hear evidence and enter orders relating to the custody of the three younger children, since the district court in Mecklenburg County had entered an order relating to their custody and support. This Court rejected this contention, the opinion of the Court stating:

> Having made an order of support, the District Court held in Mecklenburg County had undertaken jurisdiction and thus became the proper venue of the case. *Tate v. Tate*, 9 N.C. App. 681, 177 S.E. 2d 455 (1970). Despite this, however, when the plaintiff instituted this action in Wake County and the defendant made no objection to it, the action was subject to determination in Wake County.
>
> It is not a question of jurisdiction, which cannot be waived or conferred by consent, but it is a question of a prior pending action and this can be waived by failure to raise it. *Hawkins v. Hughes*, 87 N.C. 115 (1882). Under the statute, the District Court held in Wake County had jurisdiction and the prior acquired jurisdiction in Mecklenburg County was waived by the parties.

Snyder v. Snyder, supra, at p. 660, 197 S.E. 2d at p. 804.

We hold in the present case that under the statute, G.S. 50-13.5, the district court in Catawba County had jurisdiction and the prior acquired jurisdiction of the Court in Burke County was waived by the parties.

Defendant also assigns error to certain of the court's findings of fact and conclusions of law on the basis of which custody was awarded to the plaintiff. A review of the record reveals ample evidence to support the court's crucial findings of fact and these in turn support the court's finding and conclusion that it is in the best interest of the child that he now be placed in the custody of the plaintiff.

The order appealed from is

Affirmed.

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

BARBARA L. JOHNSON v. KENNETH A. PODGER

No. 7814SC1117

(Filed 18 September 1979)

Limitation of Actions § 4.2; Physicians, Surgeons and Allied Professions § 13— medical malpractice—injury not readily apparent—accrual of cause of action

Under former G.S. 1-15(b), plaintiff's claim based upon defendant physician's alleged negligent causation, misdiagnosis and treatment of an infection during surgery and post-operative care accrued at the time her injury was discovered or should reasonably have been discovered by her, and the three-year limitation of G.S. 1-52(5) began to run on such date, since her injury was not readily apparent at the time of its origin.

APPEAL by plaintiff from *Wood, Judge*. Judgment entered 22 August 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 August 1979.

The trial judge entered summary judgment for defendant on the grounds that plaintiff's action is barred by the three-year statute of limitations found in G.S. 1-52(5). Plaintiff's medical malpractice action is for damages due to the causation, negligent treatment and misdiagnosis of an infection. The pleadings, affidavits and depositions considered in a light most favorable to plaintiff reveal the following.

On 30 March 1970, plaintiff was admitted to Watts Hospital for surgery under the care of defendant, who specializes in gynecology. Defendant performed an abdominal hysterectomy and removed plaintiff's cervix and uterus. The surgical incision became infected and defendant treated the infection. Plaintiff was released from the hospital under defendant's care on 7 April 1970. At that time, she was experiencing a vaginal discharge which defendant described as a routine consequence of the surgery which would disappear in three to four weeks. Defendant saw plaintiff for follow-up office examinations on 13 April and 20 April 1970.

On 27 April 1970, plaintiff developed rectal problems unrelated to the hysterectomy which were treated by Dr. John M. Cheek, a general surgeon. He performed surgery on 9 May 1970. Plaintiff continued to have a foul, heavy vaginal discharge, abdominal pains and a low-grade fever. Because of this, Dr. Cheek

requested defendant examine plaintiff. Defendant found plaintiff to be well healed. Dr. Cheek gave plaintiff a follow-up examination on 19 May and, again because of plaintiff's pain, fever and discharge, insisted defendant reexamine plaintiff.

Defendant saw plaintiff the next day and performed a pelvic examination. He confirmed the discharge but made no culture and diagnosed it as "trichomonas," a bacterial infection. He prescribed a drug specifically designed to treat this type of infection. Defendant saw plaintiff again on 3 June 1970. He told her she was completely healed. When she complained about the pain, he lost patience with her and told her it was in her mind, that he would no longer see her and that any future complaints should be directed to her regular medical doctor.

Through June and July her pain, fever and discharge worsened. She made an appointment with Dr. Cheek on 6 August 1970. Dr. Cheek made a rectal examination and found no problems. He advised plaintiff to see defendant. She related her experience of 3 June with defendant. Dr. Cheek then advised her to see another gynecologist. She then requested that he treat her and he consented. An appointment was made for 13 August. On that date, Dr. Cheek performed a pelvic examination. For the first time, plaintiff was informed that the fever, vaginal discharge and pain were the result of an infection for which he prescribed an antibiotic. He saw her a week later and noted improvement.

Plaintiff's rectal problems occurred in late August. Surgery for this problem was performed on 8 September 1970. At a follow-up examination on 15 September 1970, Dr. Cheek noticed the vaginal discharge and again advised plaintiff to seek the care of a gynecologist.

Plaintiff arranged an appointment for 24 September 1970 with Dr. Clifford C. Byrum, a gynecologist. Dr. Byrum examined plaintiff and informed her she had not healed from defendant's surgery of 1 April and that she was suffering from a "staph" infection. Dr. Byrum refused to treat her, on ethical grounds, considering her still a patient in defendant's and Dr. Cheek's post-operative care. Dr. Byrum did call Dr. Cheek and advised him of his findings. Beginning 28 September 1970, Dr. Cheek attempted unsuccessfully to treat the "staph" infection. The infection was so extensive that complete surgical removal was impossible. The in-

fection and its consequences persisted, and Dr. Cheek turned the case over to a gynecologist and a general surgeon at Duke University Hospital. These physicians operated on plaintiff on 4 December 1970 and supervised a course of treatment that involved weekly anti-staphylococcal injections which continued through 28 February 1973.

Plaintiff instituted this action on 10 September 1973 by issuance of a summons upon application and order extending time for filing a complaint until 30 September 1973. The complaint was filed on 28 September 1973.

Grover C. McCain, Jr., and Murdock and Jarvis, by Jerry L. Jarvis, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James D. Blount, Jr., and Nigle B. Barrow, Jr., for defendant appellee.

VAUGHN, Judge.

The sole question on appeal is whether plaintiff's claim is barred by the statute of limitations. Defendant and the trial court below were of the opinion that G.S. 1-52(5) barred plaintiff's claim. Plaintiff felt G.S. 1-15(b) permitted her claim.

As adopted for purposes of this action, G.S. 1-52(5) provided that an action must be within three years "for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." This statute has been applied to medical malpractice actions. *See, e.g., Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1957). In applying G.S. 1-52(5), a three-year period of limitations on actions is established. This does not, however, answer the question of when this three-year period begins to run. The time of accrual of this three-year period for plaintiff's cause of action is the central issue of this case.

In 1971, the General Assembly amended G.S. 1-15. The amendment created G.S. 1-15(b) which provided:

> "Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances

making the injury, defect or damages not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claims for relief."

Prior to the enactment of this statute, the rule in this State which was contrary to the majority rule was that the cause of action accrued when the negligent act was done and not when the damages resulted. *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965); *Shearin v. Lloyd, supra; Blount v. Parker*, 78 N.C. 128 (1878). This harsh rule of law was changed by G.S. 1-15(b). *Raftery v. Vick Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976). If (1) an essential element of a claim is nonapparent bodily injury or damage to property and (2) no statute otherwise provides, the period of limitation may run from the discovery of the injury but in no event for more than ten years from the last act or omission of the defendant. By this statute, the Legislature adopted a discovery rule for the accrual of actions if these two requirements are met. *See* Lauerman, *The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina*, 8 Wake Forest L. Rev. 327 (1972).

We note that in 1975, G.S. 1-15(b) was amended to exempt from its coverage a cause of action "for malpractice arising out of the performance of or failure to perform professional services," along with the already exempted wrongful death. The Legislature, at the same time, created G.S. 1-15(c), a special statute for accrual and limitation of actions for professional malpractice. This indicates malpractice actions were included in G.S. 1-15(b) before G.S. 1-15(c) was adopted. In terms of the period of limitations, G.S. 1-15(c) does differentiate between cases involving a "foreign object, which has no therapeutic or diagnostic purpose or effect," and any other case of "bodily injury to the person . . . which originates under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin, and . . . is discovered . . . two or more years after the occurrence of the last act of the defendant giving rise to the cause of action." For the latter, the maximum time in which a cause of action can be brought is not more than "four years from the last act of

defendant giving rise to the cause of action" and in the former case "10 years from the last act of defendant giving rise to the cause of action." Negligent treatment or misdiagnosis would both come under the four-year outside limit. But for both foreign object injury and other cases of nonapparent injury, as in this case, accrual time based on discovery by plaintiff is provided. Unless the injury is nonapparent or involves a foreign object in the body, the action accrues on the occurrence of the last act of the defendant. Before the enactment of G.S. 1-15(c), any claim for nonapparent bodily injury however arising was governed by G.S. 1-15(b) as to the time of accrual of a cause of action. The 1979 General Assembly repealed G.S. 1-15(b) altogether. 1979 N.C. Sess. Laws c. 654, s. 3(a). The repealing session law does not affect G.S. 1-15(c) but adds a new discovery statute for all other cases for personal injury or damages to property. 1979 N.C. Sess. Laws c. 654, s. 3(b). For purposes of this appeal, G.S. 1-15(b), as set out above, provides the wording of the statute to be interpreted.

In a malpractice action for G.S. 1-15(b) to apply, we must have "a cause of action . . . having as an essential element bodily injury to the person . . . which originated under circumstances making the injury . . . not readily apparent to the claimant at the time of its origin. . . ." Plaintiff's cause of action has as an essential element bodily injury as the result of defendant's actions in negligent causation, misdiagnosis and treatment of a "staph" infection. Her evidence shows the injury originated in the surgery and post-operative care of defendant. It was not readily apparent to plaintiff at the time it occurred. While the manifestations of the injury—fever, vaginal discharge and pain—were known to plaintiff, the cause was not discovered until either 13 August or 24 September. On 13 August, plaintiff discovered she had an infection. On 24 September, the infection was diagnosed as a "staph" infection related to defendant's surgery. The injury was not readily apparent at the time of its origin; it was a latent undiscovered injury.

The three-year limitations statute for personal injury is not one to which the "[e]xcept where otherwise provided by statute" clause of G.S. 1-15(b) would apply. This exception is for other statutes that provide a time of accrual or an overall limitation period different from that provided in this statute. Examples are G.S. 1-52(9) which provides an action for fraud or mistake does not

accrue until discovery and must be brought within three years and G.S. 1-50(5) which provides that an action against an improver of real property brought by parties not in actual control or possession shall accrue on "the performance or furnishing of such services and construction" and must be brought not more than six years from the performance or furnishing. Unlike these statutes, G.S. 1-52(5) says nothing about the accrual of an action, which is the primary issue of this case. This answer is provided by G.S. 1-15(b). The statute provides the time of accrual to be on discovery and the maximum period of limitation to be ten years from the last act of the defendant. The three-year limitation of G.S. 1-52(5) is applicable to the case but does not begin to run until discovery and in no event could it have been brought more than ten years after the last act of defendant.

Applying the statute, plaintiff's claim accrues from the time the injury was discovered or should reasonably have been discovered by her. If defendant negligently caused, misdiagnosed or failed to treat the infection, defendant had an immediate claim for relief grounded on this malpractice. If the injury was not readily apparent to plaintiff when she was treated, G.S. 1-15(b) provides that plaintiff's claim, instead of accruing at the time of misdiagnosis or improper treatment, accrues when the injury is discovered or ought reasonably to have been discovered by her. In no event can plaintiff have longer than ten years to sue from defendant's last act which would be his dismissal of plaintiff from his care on 3 June 1970. Plaintiff's suit comes well within this period. But plaintiff still must file within three years of *discovery* or within three years of the time she ought reasonably to have discovered the injury. Defendant may be able to establish that plaintiff ought reasonably to have discovered the injury at a time three years before this action was brought. That question, however, is unresolved. It was inappropriate to grant summary judgment in this case. Whether plaintiff ought to have discovered the injury three years before 10 September 1973, is an issue for the jury and not a matter of law for the court.

Our application of G.S. 1-15(b) to cases of malpractice in misdiagnosis and improper treatment is consistent with the Supreme's Court interpretation of the statute in *N.C. Ports Authority v. Fry Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978). This Court has held G.S. 1-15(b) did not extend the statute of

limitations in contract actions. 32 N.C. App. 400, 232 S.E. 2d 846 (1977). The Supreme Court, while concluding we reached the right result in the case, found our reasoning wrong on this point. "The statute, by its terms, applies to *any* cause of action (other than one for wrongful death, and except where otherwise provided by statute) if an 'essential element' thereof is a defect in property which defect originated under circumstances making it 'not readily apparent to the claimant' at the time of its origin." 294 N.C. at 85, 240 S.E. 2d at 352 (emphasis added). If the statute applies where there is a defect in property to determine the accrual of a contract action, we see no difference where there is personal injury to determine the accrual of a malpractice action where the injury is not readily apparent at the time of its origin.

On the allegations of this case taken in a light most favorable to the plaintiff as we must in summary judgment cases, we have negligence in both the misdiagnosis and the course of treatment. Where a harmful substance, though not necessarily foreign, is left in the body of a patient through negligence, an action based on failure to discover or remove such harmful substance should not run until the *later* in time of (1) termination of treatment or (2) the time the patient himself finally discovers and removes the substance. *Wilkinson v. Harrington*, 104 R.I. 224, 243 A. 2d 745 (1968). *Billings v. Sisters of Mercy*, 86 Idaho 485, 389 P. 2d 224 (1964); Annot. 80 A.L.R. 2d 368, 387-96 (1961); 61 Am. Jur. 2d Physicians § 185; 54 C.J.S. Limitation of Actions § 174(b). Defendant would have us run the period of limitations from the *earlier* time, the termination of treatment on 3 June 1970. We rely on the express words of the Legislature and the Supreme Court's interpretation of those words in the *N.C. Ports Authority* case to run the period of limitations from the time of discovery or the time plaintiff should have discovered the injury. We are aware of the opinion of this Court in *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978). We have, nevertheless, taken the facts of this case and applied the law in accord with what we believe the Legislature has expressly provided.

Finally, we note the conflict of other jurisdictions in applying the discovery rule to cases of misdiagnosis and negligent treatment. *See, e.g., Robinson v. Weaver*, 550 S.W. 2d 18 (Tex. 1977) (discovery rule not applied); *Frohs v. Greene*, 253 Or. 1, 452 P. 2d 564 (1969) (discovery rule applied); *see also Wyler v. Tripi*, 25

Ohio St. 2d 164, 267 N.E. 2d 419 (1971) and cases cited therein at 169-70, 267 N.E. 2d at 422. Our Legislature, however, in G.S. 1-15(b), provided a discovery rule for any action except wrongful death.

It was error to grant summary judgment for defendant on the ground that the statute of limitations had run.

Reversed.

Judges HEDRICK and ARNOLD concur.

STROUP SHEET METAL WORKS, INC. v. HERITAGE, INC.

No. 7828DC1118

(Filed 18 September 1979)

1. **Rules of Civil Procedure § 56.2— summary judgment for party with burden of proof—credibility of affiant—affiant interested party**

In an action by plaintiff to recover for services rendered in installing, modifying and starting up heating systems for defendant, there was no merit to defendant's contention that summary judgment for plaintiff was improper because the court granted summary judgment for the party with the burden of proof on the basis of that party's affidavits, since there were only latent doubts as to the credibility of plaintiff's affiant and those stemmed from the fact that he was a vice-president of plaintiff; defendant did not produce any affidavits contradicting the statements in plaintiff's affidavit regarding the account in question, did not point to any specific grounds for impeachment, and did not utilize G.S. 1A-1, Rule 56(f); and the information in plaintiff's affidavit would necessarily have to come from a witness who was familiar with the books and records of plaintiff, and thus it would be impossible to establish the facts necessary for plaintiff's claim by a totally disinterested witness.

2. **Accounts § 1; Rules of Civil Procedure § 56.4— summary judgment—no genuine issue of material fact**

In an action by plaintiff to recover for services rendered in installing, modifying and starting up heating systems for defendant, there was no merit to defendant's contention that summary judgment was inappropriate because genuine issues of material fact were raised, since defendant's answer only generally denied the allegations of the complaint; the affidavit filed by defendant in opposition to plaintiff's motion related to a prior account with plaintiff for the initial installation of the heating system in question and not to the cost of modification for which plaintiff sought payment; and the statement in defendant's affidavit that the affiant was "informed, advised and believe" that all

the charges incurred with a certain job had been paid was incompetent and was properly not considered by the court in ruling on the summary judgment motion.

3. Accounts § 1— charge for starting up heating system—issue as to whether charge paid—summary judgment inappropriate

In an action to recover $27 on an account for "starting up" a residential heating system, the trial court erred in entering summary judgment for plaintiff, since defendant's affidavit stated that this charge was one normally included in the installation price and that the installation had been paid for, thus controverting the plaintiff's allegation and raising a factual issue as to whether plaintiff was entitled to recover for that charge.

APPEAL by defendant from *Allen, Judge (C. Walter)*. Judgment entered 26 September 1978 in District Court, BUNCOMBE County. Heard in the Court of Appeals on 30 August 1979.

This is a civil action wherein plaintiff seeks to recover $744.70 for services rendered in installing, modifying, and starting up heating systems for the defendant. Plaintiff filed a complaint alleging only that "[d]efendant owes plaintiff $744.70 on an account." Defendant filed a motion for a more definite statement pursuant to G.S. § 1A-1, Rule 12(e) which was subsequently denied. Thereafter, defendant filed an answer denying the allegation in the complaint.

Plaintiff moved for summary judgment and filed the affidavit of Jack D. Peden, Vice-President of Stroup Sheet Metal Works, Inc., in support of its motion. The affiant alleged that he was in charge of the record keeping for plaintiff; that on 9 September 1976, plaintiff "installed the equipment in a residence situated at 23 Chippengreen Drive, Arden, North Carolina"; that "reasonable and proper charges for said work was $717.70"; that on 9 February 1977, plaintiff was "requested to start the furnace working for the defendant, Heritage, Inc., at a residence situated at 9 Fairway Drive, Asheville, North Carolina, and that they did so and made a charge of $27.00, which was reasonable for the work."

Defendant also moved for summary judgment and filed the affidavit of George B. Brewster, the Vice-President of Heritage, Inc., in support of its motion. The affiant alleged that he was in charge of the books and records of the defendant; that in March 1976, a purchase order was issued to plaintiff to install a heating system in Job 2512 for a total price of $1,176.00; that plaintiff did

not install the heating system in a manner that complied with local building codes; that because of this noncompliance, the building inspector refused to certify the installed system for use unless certain changes were made; that "Stroup was requested to make said changes by Heritage, Inc."; that on 25 June 1976, plaintiff rendered an invoice for the installation in the amount of $1,677.60; that defendant has paid this invoice; that he was "informed, advised and believe that said Invoice included all additional labor and material charges for Job 2512 and that all charges incurred by Heritage, Inc. in connection with Job 2512 have been paid"; and that the other invoice in the amount of $27.00 is for work normally performed in the installation of a heating system, "the invoice for which contract was paid in full."

On 15 September 1978, a hearing on the motions for summary judgment was held and plaintiff offered the testimony of W. E. Chapman, a manager for Stroup Sheet Metal Works. This testimony tended to show that at the time the heating system was installed in Job 2512, the basement of the residence was unfinished. Subsequently the basement was finished, and it was constructed in such a manner as to violate certain provisions of the building code. Chapman was called by Monty Baker, an employee of defendant, and "advised that the inspector had 'turned down the job' and that the heating system work would have to be modified to meet the provisions of the [Building] Code." Thereafter, plaintiff "at the request of Heritage, by Heritage's agent, made the changes in the heating system which were necessary to bring it in compliance with the [Building] Code." The reasonable value of the work performed was $717.70, which charge remains on an account unpaid.

On 26 September 1978, a summary judgment was entered for plaintiff in the amount of $744.70. Defendant appealed.

Penland & Barden, by Talmage Penland, for plaintiff appellee.

Morris, Golding, Blue and Phillips, by Steven Kropelnicki, Jr., for defendant appellant.

HEDRICK, Judge.

By assignment of error number two, defendant contends the trial court erred in granting plaintiff's motion for summary judg-

ment. Under Rule 56, summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The judge's role in ruling on a motion for summary judgment is to determine whether any material issues of fact exist that require trial. The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976).

[1] Defendant argues that summary judgment for the plaintiff was improper because the court granted summary judgment for the party with the burden of proof on the basis of that party's affidavits. Defendant contends that the affidavit relied upon by the plaintiff is that of an interested witness, and thus it raises an issue as to credibility that cannot be resolved on a Rule 56 motion. Defendant specifically argues that the statements in the affidavit that the amount charged for the work is "reasonable" present such an issue of credibility because it relates to "matters of opinion involving a substantial margin for honest error." *Kidd v. Early*, 289 N.C. at 366, 222 S.E. 2d at 408.

In *Kidd v. Early, supra*, our Supreme Court dealt at length with the issue whether summary judgment is appropriate in a case where the party with the burden of proving a material fact relies on the testimony of an interested witness to establish that fact. The Court stated:

> We hold that summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate. . . . To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of

fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury.

Kidd v. Early, 289 N.C. at 370, 222 S.E. 2d at 410. *See also Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 242 S.E. 2d 785 (1978).

As previously indicated, plaintiff's supporting affidavit, if true, establishes the material facts that it performed work on a heating system at a residence located at 23 Chippengreen Drive, Arden, North Carolina, at the request of the defendant; that the plaintiff charged the defendant $717.70 on an account for the work performed; that such charge was reasonable and it has not been paid. As to the credibility of the affiant, there are only latent doubts, that is, doubts which stem from the fact that he is a vice-president of the plaintiff. Defendant, however, has not produced any affidavits contradicting the statements in plaintiff's affidavit regarding the $717.70 account, has not pointed to any specific grounds for impeachment, and has not utilized Rule 56(f). Furthermore, the information in the plaintiff's supporting affidavit would necessarily have to come from a witness who was familiar with the books and records of the plaintiff, and thus it would be impossible to establish the facts necessary for plaintiff's claim by a totally disinterested witness. The affidavit is not inherently incredible, nor are the circumstances suspect. Thus, we hold that any latent doubts as to the credibility of the plaintiff's supporting affidavit do not present a bar to the granting of summary judgment in the present case.

[2] Next the defendant argues that summary judgment for the plaintiff was inappropriate because it raised "triable issues of material fact" by its own affidavit offered in opposition to the motion. Once the plaintiff had made and supported its motion for summary judgment, under Rule 56(e), the burden was on the defendant to introduce evidence in opposition to the motion setting forth "specific facts showing that there is a genuine issue for trial." The answer filed by the defendant only generally denies the allegations of the complaint. The affidavit filed by the defendant in opposition to plaintiff's motion relates to a prior account with the plaintiff for the initial installation of the heating system

in question. The affidavit states that a Purchase Order was issued to the plaintiff in March, 1976, to install the heating system; that on 25 June 1976, plaintiff rendered its invoice for the work performed; that on 2 July 1976, defendant prepared a check payable to plaintiff for the work; and that the check was received and deposited by plaintiff. The affidavit also contains statements that the plaintiff did not install the heating system in a manner that complied with local building codes, and that because of this noncompliance the building inspector refused to certify the system for use. All of these statements relate to the prior account that has been paid; and they have no relevancy to the plaintiff's claim on the account alleged in the complaint for $717.70.

Furthermore, the statement in Brewster's affidavit that he was "informed, advised and believe" that all of the charges incurred in connection with Job 2512 had been paid was incompetent and was properly not considered by the court in ruling on the motion. Rule 56(e) specifically requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The statement made on information and belief in the affidavit relied on by the defendant meets none of these criteria, and thus the trial court could not consider this portion of the affidavit. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Nugent v. Beckham*, 37 N.C. App. 557, 246 S.E. 2d 541 (1978).

In short, defendant has failed to show by its materials introduced in opposition to the plaintiff's motion for summary judgment that there exists any specific areas of impeachment or that there exists any genuine issue of material fact with regard to the claim on an account for $717.70. We hold that summary judgment for the plaintiff was appropriate in the present case on the $717.70 claim.

[3] With regard to plaintiff's claim on an account for $27.00 for "starting up" the heating system at another residence, the defendant's affidavit states that this charge is one normally included in the installation price and that it has paid for the installation, thus controverting the plaintiff's allegation and raising a factual issue as to whether plaintiff is entitled to recover for that charge.

Consequently, with respect to that claim of the plaintiff, summary judgment was inappropriate, and that portion of the trial judge's Order granting the plaintiff's motion with respect to the claim for $27.00 is reversed.

Because of our disposition of this case, it is unnecessary for us to discuss defendant's remaining assignments of error.

Affirmed in part, reversed in part, and remanded.

Judges VAUGHN and ARNOLD concur.

ROBERT W. ROBINSON, ANCILLARY ADMINISTRATOR OF LYNSTA C. ROBINSON, DECEASED v. NASH COUNTY AND MARGARET B. DOUGHTIE, INDIVIDUALLY AND AS REGISTER OF DEEDS

No. 787SC1088

(Filed 18 September 1979)

1. **Counties § 9; Registers of Deeds § 1— operation of register of deeds office— immunity of county from suit for negligence**

   The operation and maintenance of a register of deeds office in a county courthouse is a governmental function for which the county enjoys immunity from suit for negligence.

2. **Counties § 9; Registers of Deeds § 1— operation of register of deeds office—immunity of register of deeds from suit for negligence**

   A register of deeds is protected from tort liability by governmental immunity to the same extent as the county when he or she undertakes the performance of his or her official governmental duties. Therefore, a register of deeds was not subject to personal liability for the death of a person who was killed in a fall down a stairway in the register of deeds office while using records kept in that office.

APPEAL by plaintiff from *Brown, Judge*. Judgment entered on 30 August 1978 in Superior Court, NASH County. Heard in the Court of Appeals on 28 August 1979.

This is a civil action wherein plaintiff seeks to recover in excess of $200,000 for the wrongful death of his mother Lynsta C. Robinson, who fell down a stairway located in the Nash County Courthouse while looking at various records kept in the Register

of Deeds Office. In his complaint, plaintiff alleged "that the injuries and death of the deceased were proximately and directly caused by the joint and concurrent negligence of the Defendant [Nash] County and the defendant [Margaret] Doughtie acting in her capacity as Register of Deeds." The alleged negligence of the Register of Deeds and of officers, employees, and agents of Nash County consisted of the "removing, or allowing to be removed, [a] gate, barrier, or other obstruction located at the head of the steep stairway in the office of the Register of Deeds"; the placement of books on shelves near the top of the "open stairway . . . where it was foreseeable that invitees and licensees would be unreasonably exposed to the hazard of a fall down the open stairway"; and the failure to warn of the hazard. Defendant Nash County filed an answer denying the material allegations of the complaint and further alleging as an affirmative defense that it had "not insured itself or its officers, agents or employees against liability pursuant to G.S. § 153A-435"; that it was "performing a governmental function"; and that it is therefore immune from any liability. Defendant Margaret Doughtie answered denying the material allegations of the complaint and argued further that any alleged negligence on her part related to actions taken by her "in her capacity as a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, and in this situation, she may not be held personally liable for mere negligence in respect thereto."

Both defendants moved for summary judgment and filed affidavits in support of their motions. Subsequently, the plaintiff filed affidavits in opposition to the motion. On 30 August 1978, the trial court entered Orders granting the defendants' motions for summary judgments. Plaintiff appealed.

Everett, Everett, Creech & Craven, by Robinson O. Everett, for plaintiff appellant.

Keel & Duffy, by James W. Keel, Jr., for defendant appellee Nash County.

Battle, Winslow, Scott & Wiley, by J. B. Scott, for defendant appellee Margaret B. Doughtie.

HEDRICK, Judge.

By assignment of error number one, plaintiff contends that the defendant Nash County was liable in tort for the wrongful death of plaintiff's intestate which resulted from a hazardous condition in the office of the Register of Deeds. In support of its motion for summary judgment, defendant Nash County submitted the affidavit of L. R. Holoman, Jr., the Nash County Manager, who is in charge of procuring insurance at the direction of the Nash County Board of Commissioners. The affiant stated that Nash County had not procured any liability insurance for any negligent act or omission of the County or any of its officers, agents, or employees. The plaintiff has not contested the affiant's statement, and thus no question is raised as to whether the County has waived its governmental immunity by purchasing liability insurance, as it is empowered to do by G.S. § 153A-435. Indeed, the record affirmatively establishes that the County has not purchased such insurance. The sole question presented by this assignment of error, therefore, is whether the defense of governmental immunity is available to the defendant Nash County.

It is well established in this State that counties or municipal corporations have no governmental immunity for activities that are "proprietary" in nature. *Bowling v. City of Oxford*, 267 N.C. 552, 148 S.E. 2d 624 (1966); *Aaser v. City of Charlotte*, 265 N.C. 494, 144 S.E. 2d 610 (1965). But, it is equally well settled that, "[w]hen the activity of a governmental entity is clearly governmental in nature, and not proprietary, the rule of sovereign immunity will protect the government from suit." *Vaughn v. County of Durham*, 34 N.C. App. 416, 418, 240 S.E. 2d 456, 458 (1977), *cert. denied*, 294 N.C. 188, 241 S.E. 2d 522 (1978). *See also Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Clark v. Scheld*, 253 N.C. 732, 117 S.E. 2d 838 (1961); *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889).

In *Sides v. Cabarrus Memorial Hospital, Inc., supra*, our Supreme Court extensively reviewed its prior decisions on the proprietary-governmental distinction and noted that "all of the activities held to be governmental functions by this Court are those historically performed by the government, and which are not ordinarily engaged in by private corporations." *Id.* at 23, 213 S.E. 2d at 303. While the line between governmental and proprietary

operations is sometimes a difficult one to draw, the distinction has been stated thusly:

> When power conferred has relation to public purposes and for the public good, it is to be classified as governmental in its nature. . . . But when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability . . .; while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation.

Metz v. City of Asheville, 150 N.C. 748, 750, 64 S.E. 881, 882 (1909). *See also McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E. 2d 169 (1969); *Stone v. City of Fayetteville*, 3 N.C. App. 261, 164 S.E. 2d 542 (1968).

[1] We are persuaded that the function of the office of a register of deeds is primarily and directly for the "common good", *McCombs v. City of Asheboro*, 6 N.C. App. at 241, 170 S.E. 2d at 174, that it serves a "public purpose", *Metz v. City of Asheville, supra*, and that the operation thereof is one of the "traditional" services rendered by local government, *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. at 25, 213 S.E. 2d at 304. While we recognize that "the modern tendency [is] to restrict rather than to extend the application of governmental immunity", *Koontz v. City of Winston-Salem*, 280 N.C. 513, 529, 186 S.E. 2d 897, 908 (1972), we are of the opinion that the operation and maintenance of a register of deeds office in a county courthouse is clearly a governmental function for which the county enjoys immunity from suit for negligence. Thus, we hold that the trial judge properly granted the defendant Nash County's motion for summary judgment.

[2] By his remaining assignment of error, plaintiff contends that the defendant, Margaret Doughtie, the Register of Deeds of Nash County, was subject to personal liability for the wrongful death of plaintiff's mother. Plaintiff argues that even if the defense of governmental immunity is available to the defendant county, the defendant Doughtie is not entitled to the shelter of this defense because "the allegations in the present complaint are directed to ministerial acts . . . rather than to any act involving the exercise

of discretion." The complaint further alleges that these acts on the part of defendant Doughtie constituted negligence and consisted of the following:

> (a) Her removing, or allowing to be removed, the gate, barrier, or other obstruction located at the head of the steep stairway in the office of the Register of Deeds, over which office she had control and responsibility in the course of her official duties;
>
> (b) Her failure to replace promptly the gate, barrier or other obstruction at the head of the steep stairway leading down from the portion of the Office of the Register of Deeds into a basement or lower area;
>
> (c) Her placement of books, maintained in the performance of her official duties, on shelves near the top of the open stairway and with only a narrow clearance from the top of the open stairway where it was foreseeable that invitees and licensees would be unreasonably exposed to the hazard of a fall down the open stairway;
>
> (d) Her failure to rectify the hazardous condition that had been created prior to July 20, 1976, despite complaints she had received concerning the hazard and the danger of injury to invitees and licensees using the office;
>
> (e) Her failure to give any sort of warning to persons lawfully using the office of the Register of Deeds, as was deceased, concerning the hazard created by the open stairway.

Plaintiff's argument misses the point. With respect to the actions of defendant Doughtie in her official capacity, the question before this Court is not one of negligence, but rather one of immunity. That is, is this individual public officer protected from tort liability by governmental immunity to the same extent as the defendant Nash County when she undertakes the performance of her official governmental duties? The answer must be "yes." In *Seibold v. Kinston-Lenoir County Public Library*, 264 N.C. 360, 361, 141 S.E. 2d 519, 520 (1965) (per curiam), it is said: "Having reached the conclusion that the service rendered was a governmental function, it follows that the governmental agency *and its officers* are protected against . . . tort liability." [Emphasis added.]

The Court held in *Seibold* that the operation of a public library is a governmental function. Thus, both the County and the officials responsible for the operation of the library were exempt from tort liability for personal injuries which allegedly resulted from negligence in the maintenance of the library. *Id.* The question of negligence was not reached by the Court.

Whether the acts performed by the public official be characterized as "governmental" duties, *Wilkins v. Burton*, 220 N.C. 13, 16 S.E. 2d 406 (1941), "discretionary" acts, *Nelson v. Comer*, 21 N.C. App. 636, 205 S.E. 2d 537 (1974), or "ministerial" acts, *Langley v. Taylor*, 245 N.C. 59, 95 S.E. 2d 115 (1956), the public official is immune from individual liability "where the duties are of a public nature, imposed entirely for the public benefit. . . ." *Hipp v. Ferrall*, 173 N.C. 167, 169, 91 S.E. 831, 832 (1917). *See also Langley v. Taylor, supra*; *Hudson v. McArthur*, 152 N.C. 445, 67 S.E. 995 (1910). In the present case the record establishes that the allegedly negligent acts attributed to the defendant Doughtie were clearly "of a public nature," *Hipp v. Ferrall, supra*, imposed by statute, *see* N.C. General Statutes, Chapter 161, and carried out in the performance of a governmental duty.

Thus, the trial court correctly entered summary judgment for the defendant.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. RAYMOND EDWARD BARBOUR

No. 7915SC378

(Filed 18 September 1979)

1. Criminal Law § 75.9— defendant in custody—inculpatory statement to wife—volunteered statement

The trial court in a homicide prosecution did not err in allowing an officer to testify that defendant stated to his wife in the presence of the officer, "I shot him . . . . You know what happened," since the statement was made in response to an inquiry by defendant's wife; the officer asked defendant no questions; and defendant's statement was volunteered and not the product of custodial interrogation.

2. Criminal Law § 102.11— prosecutor's jury argument—comment on defendant's guilt—no impropriety

There was no merit to the defendant's contention that the private prosecutor, during his jury argument, improperly expressed his personal opinion that defendant was "guilty as sin," since defense counsel immediately objected when the prosecutor uttered the word "believe"; the prosecutor thereafter confined his expression to a contention that defendant was guilty; and counsel was properly permitted to contend that the jury should find defendant guilty.

3. Criminal Law § 102.1— prosecutor's jury argument—comment on defense of accident—no impropriety

The prosecutor's jury argument in a homicide prosecution that defendant and his lawyer fabricated for trial defendant's assertion that he slipped on a curb and that the gun he was holding then fired accidentally was not improper.

4. Jury § 9— lack of attention by juror—disqualification—explanation unnecessary—substitution of alternate juror proper

The trial court did not abuse its discretion in disqualifying a juror on the ground of "lack of attention" and in substituting an alternate juror at the conclusion of the final arguments of counsel; and the court was not required to explain "lack of attention."

APPEAL by defendant from *Lewis, Judge*. Judgment entered 22 September 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals on 28 August 1979.

Defendant was tried on a bill of indictment proper in form for the second degree murder of William Samuel Abner. Upon his plea of not guilty, the State offered evidence which tended to show that, on the night of 13 June 1974, defendant intentionally shot Abner in the back as Abner walked away from defendant. Witnesses for the State testified that defendant leaned across the open rear door of the car in which he and Abner had been riding, and shot Abner when Abner refused to stop walking away as defendant had demanded.

Defendant's evidence tended to show that he accidentally shot Abner while trying to "arrest" Abner on a "drug bust." Defendant, a private citizen, testified that Police Chief William F. Miles of Graham, North Carolina, had authorized him to work on a drug case on the evening of June 13 and to use his pistol "in making an arrest, and that he could use it only for his own self-protection and for no other purpose." Defendant suspected Abner of being heavily involved in drug trafficking and attempted to

"arrest" Abner that evening after finding a large quantity of pills in Abner's possession. Abner refused to cooperate with defendant. Defendant alleged that he then prepared to fire a warning shot as Abner walked away from him. He testified that his foot slipped off the curb as he prepared to fire, causing the gun to discharge as he stumbled into the car.

Defendant was found guilty of second degree murder and was sentenced to a prison term of 25 to 30 years from which he appealed.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

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

HEDRICK, Judge.

[1] Defendant first assigns error to the Court's allowing Officer Hoggard to testify that the defendant stated to his wife in the presence of the officer, "I shot him. . . . You know what happened." When defendant objected to testimony of what he said, the Court conducted a *voir dire* examination to determine the admissibility of the offered evidence.

The substance of the *voir dire* testimony was as follows:

Officer Hoggard testified that he advised defendant of his Miranda rights when he first arrived at the scene of the shooting:

> I advised him that he had a right to remain silent. That anything he said would be used in a court of law. I advised him he had a right to an attorney. If he could not afford an attorney, one would be appointed for him by the state. And, I also advised him that he had a right to stop talking to me at anytime he wanted to.

Defendant did not request an attorney, nor did he refuse to talk to Officer Hoggard. He told the officer that "he had to stop Bill Abner. That Bill Abner was getting away with his drugs and he had to stop him and that's the reason he shot him."

Defendant was then taken to the police station to be booked. He was not re-advised of his Miranda rights. Later on that night,

defendant's wife appeared and asked Officer Hoggard if she could see her husband. Officer Hoggard initially refused her request, but subsequently agreed to accompany her to the booking room. Officer Hoggard testified that he insisted on being present during the visit for security reasons. As they walked into the booking room, the following conversation occurred between defendant and his wife:

Mrs. Barbour: "Raymond, tell me it's not true."

Defendant: "Yes, I shot him."

Mrs. Barbour: "Why?"

Defendant: "Because you know what happened."

At the conclusion of Officer Hoggard's testimony, the court found that the statements by defendant to his wife were made in response to her question, "Tell me it's not true", and that Officer Hoggard had asked no questions of defendant. The Court therefore concluded that defendant's statement was "spontaneous", and "not the product of custodial interrogation, even though it was made at a time when he was in custody."

Defendant excepted to the Court's ruling and contends on appeal that he was not "effectively" advised of his *Miranda* rights and that his statement to his wife was involuntary. We disagree. The decision of the North Carolina Supreme Court in *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971), is dispositive of this issue.

In *Fletcher*, the defendant confessed his guilt to the victim of the crime. He made his statement while in jail and in the presence of a police officer, who failed to recite the *Miranda* warnings to defendant. However, the confession resulted from a question put to defendant by the victim, and not by the police officer. The Court found that the defendant's statement was not the result of custodial interrogation. Therefore, the *Miranda* warnings were not required. *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245 (1969); *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968).

We hold in the case at bar that defendant's statement to his wife was volunteered in response to the question she asked. The statement was not the result of custodial interrogation, and the

failure to give the *Miranda* warnings did not render the statement inadmissible.

Moreover, even if the statement was erroneously admitted, the error was harmless. Defendant does not contend that he did not shoot Abner. There is no reasonable possibility, therefore, that the statement contributed to his conviction. *State v. Fletcher, supra.*

[2] Defendant next assigns error to remarks made by the private prosecutor in his closing argument to the jury. Citing *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967), he argues that the prosecutor improperly expressed his personal opinion that defendant was "guilty as sin." Defendant's assertion in this regard is clearly unsound. Immediately upon the prosecutor's uttering the word "believe", defense counsel objected, and the prosecutor thereafter confined his expression to a contention that defendant was guilty. Counsel was properly permitted to contend that the jury find defendant guilty. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977).

[3] Defendant also attacks that portion of the final argument wherein the prosecutor maintained that defendant and his lawyer fabricated for trial defendant's assertion that he slipped on the curb. The prosecutor pointed out that defendant had not mentioned "slipping" to his wife on the night of the shooting; he then commented,

> He didn't even open his mouth about it being an accident. And, the first time that this defendant has opened his mouth about slipping and being an accident, is when he's been on trial in this Court. That's his lawyer's defense. . . . That's a defense that's been thought up since it happened that night.

According to defendant, this language was "calculated to cause prejudice." He contends that the prosecutor traveled outside of the record and impermissibly commented upon the defendant's silence while in custody. This argument misses the point. The reference, if any, to defendant's silence served merely to point out that defendant failed to characterize or explain the shooting as an accident to his wife when she asked him why he had shot Abner.

In *State v. Williams*, 276 N.C. 703, 712, 174 S.E. 2d 503, 509 (1970), it is said:

> In this jurisdiction wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466. . . .

We hold that the prosecutor's argument was not "sufficiently grave to be prejudicial in order to entitle defendant to a new trial." *State v. Parks*, 14 N.C. App. 97, 100, 187 S.E. 2d 462, 464 (1972), *cert. denied*, 281 N.C. 157, 188 S.E. 2d 366 (1972); *State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960).

[4] Finally, defendant contends that the Court erred in disqualifying a juror and substituting an alternate juror at the conclusion of the final arguments of counsel. He argues that the judge's disqualification of the original juror on grounds of "lack of attention" is not a permissible basis under N.C. General Statutes § 15A-1215 (a). Defendant also asserts error in the judge's failure to explain what he meant by "lack of attention."

G.S. § 15A-1215(a) provides in pertinent part:

> If before final submission of the case to the jury, any juror dies, becomes incapacited *or disqualified, or is discharged for any other reason*, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. [Emphasis added.]

Furthermore, the statute provides that alternate jurors "must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury, and obey all orders and admonitions of the judge."

It is well settled that the decision as to a juror's continued competency to serve rests within the trial judge's sound discretion. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Moore*, 24 N.C. App. 582, 211 S.E. 2d 470 (1975). There was no necessity for the trial judge in this case to explain "lack of attention." We hold that his action did not constitute an abuse of his discretion and, therefore, no reversible error was committed.

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

No error.

Judges VAUGHN and ARNOLD concur.

ELIZABETH HARRIS v. RAYMOND STEELE, LOIS STEELE, GLENDA PIERCE, JEAN MILES AND LOIS STEELE, GUARDIAN AD LITEM FOR BRUCE STEELE

No. 7823DC1082

(Filed 18 September 1979)

Estoppel § 1; Deeds § 12 — deed to husband — subsequent deed to husband and wife — no land conveyed — no estoppel

Where a grantor conveyed property in fee to a husband, a subsequent deed to the husband and wife did not convey any interest in the property to the grantees, as the grantor did not own any title or interest in the property at the time; furthermore, plaintiff, who claimed title by a conveyance from the wife, could not rely upon estoppel since the husband and wife acted together to procure the execution of the subsequent deed, no right of estoppel arose between husband and wife, and plaintiff's rights were the same as and no greater than those of the wife.

APPEAL by defendants from *Davis, Judge*. Judgment entered 28 August 1978 in District Court, WILKES County. Heard in the Court of Appeals 27 August 1979.

Plaintiff seeks a declaratory judgment determining the rights of the parties to certain real property in Wilkes County. Plaintiff alleges the property was conveyed by Myrtle Steele Mitchell, widow, to Ivey Steele on 2 January 1945, the deed being recorded in Book 218, page 623, Office of the Register of Deeds, Wilkes County. Ivey was then married to Carrie Steele. On 23 January 1957, Myrtle Steele Mitchell conveyed the property to Ivey Steele and wife, Carrie Steele, deed being recorded in Book 393, page 395, Wilkes County Registry. Ivey died intestate prior to the commencement of this action and was survived by his wife, Carrie Steele, three children, Evelyn Steele Taylor, Charles R. Steele, Raymond Steele, and the lineal issue of Ivey Steele, Jr. Evelyn

Steele Taylor and Charles R. Steele have conveyed any interest they had in the property to plaintiff.

Ivey Steele, Jr., who predeceased his father, died intestate, survived by his wife, Lois Steele, and four children: Floyd Steele (who has conveyed to plaintiff any interest he had in the property), Glenda Pierce, Jean Miles, and Bruce Steele.

Plaintiff contends Carrie Steele acquired complete title to the property by right of survivorship under the deed to Ivey Steele and wife, Carrie Steele, recorded in Book 393, page 395. Carrie Steele conveyed the property to plaintiff after the death of Ivey Steele, but the record does not contain this deed or the date of its recordation.

Defendants answered, denying plaintiff's title to the property, and alleging that Myrtle Steele Mitchell had no interest in the property to convey when she executed the second deed in 1957. There had been no reconveyance to her after the 1945 deed. Defendants admit that at the death of Ivey Steele, Carrie Steele owned a one-third undivided interest in the property and that each of Ivey Steele's children owned a one-sixth interest.

Both plaintiff and defendants filed motions for summary judgment. Plaintiff introduced affidavits tending to show that Carrie Steele and her husband intended to hold the property as tenants by the entirety and that when it was discovered in 1957 that Carrie's name was not on the deed, her husband, Ivey Steele, arranged for a lawyer to prepare another deed and got Myrtle Steele Mitchell to execute it. Myrtle Steele Mitchell's affidavit states Carrie's name was left off the deed by mistake and the second deed was executed at the instance of Ivey Steele in an effort to correct it.

Defendants moved to amend their answer to allege the defense of the three years statute of limitations. N.C. Gen. Stat. 1-52(9). The record does not disclose any ruling by the trial court on this motion.

The court denied defendants' motion for summary judgment and granted plaintiff's motion for summary judgment, adjudicating plaintiff the sole owner of the property.

McElwee, Hall, McElwee & Cannon, by William H. McElwee III, for plaintiff appellee.

Vannoy, Moore and Colvard, by Michael E. Helms and J. Gary Vannoy, for defendant appellants.

MARTIN (Harry C.), Judge.

We hold the trial court erred in granting plaintiff's motion for summary judgment and in denying defendants' motion. Plaintiff alleges she acquired the disputed property by a deed from Carrie Steele, executed after the death of Ivey Steele. Defendants deny this in their answer. However, in their brief they state as a part of the facts that "Carrie Steele conveyed the subject property, in fee, to Respondent-Appellee."

Therefore, it appears that whatever interest plaintiff acquired in the disputed property from Carrie depends upon the interest Carrie owned when she made the conveyance to plaintiff. This requires us to determine what interests passed under the 1945 and 1957 deeds. By executing and delivering the deed 2 January 1945, Myrtle Steele Mitchell conveyed to Ivey Steele all of her interest in the disputed property. This deed is not a part of the record and there are no allegations or evidence that it contained any conditions that would reserve to the grantor any interest in the property. Upon due execution and delivery without reservation of the deed to the grantee, title to real property passes between the parties. *Phillips v. Houston*, 50 N.C. 302 (1858). The registration of the deed in the Wilkes County Register of Deeds' office created a rebuttable presumption that it was signed, sealed and delivered by the grantor. *Jones v. Saunders*, 257 N.C. 118, 125 S.E. 2d 350 (1962).

The execution and recording of the second deed to the property 23 January 1957 did not convey any interest in the property to the grantees, as the grantor did not own any title or interest in the property at that time.

Plaintiff relies in her brief upon estoppel, contending that because Ivey Steele procured the execution of the 1957 deed, he and those in privity with him are barred from attacking the validity of the deed. *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540 (1956).

Is the plea of estoppel good? The law answers in the negative.

It is true that an estoppel can arise where *A* allows *B* to convey *A*'s property to a bona fide purchaser for value without notice. *Francis v. Mann*, 207 N.C. 84, 175 S.E. 696 (1934); *Shattuck v. Cauley*, 119 N.C. 292, 25 S.E. 872 (1896). Plaintiff contends the acts of Ivey Steele in procuring the execution of the 1957 deed created an estoppel under the holdings of *Francis* and *Shattuck*. We do not agree. Plaintiff overlooks the participation by Carrie Steele in securing the execution of the 1957 deed and her knowledge concerning both the 1945 and 1957 deeds. Carrie stated in her affidavit that she and Ivey purchased the property from Myrtle Steele Mitchell; there was a mistake in leaving her name off the deed and when this was discovered the parties agreed that a new deed be drafted showing Carrie as a grantee and that this was done in 1957; that it was always their intention that the property be held as tenants by the entirety.

Plaintiff attempts to create and rely upon an estoppel based, at least in part, upon the acts of Carrie Steele, her predecessor in title. Ivey, with the knowledge and encouragement of Carrie, persuaded Myrtle Steele Mitchell to execute a deed purporting to convey property, owned by Ivey, to Carrie and Ivey jointly. Neither Carrie nor Ivey Steele was a bona fide purchaser for value without notice in 1957. Where Carrie and Ivey Steele acted together to procure the execution of the 1957 deed, no right of estoppel arose between Carrie and Ivey Steele. With respect to the plea of estoppel, plaintiff's rights are the same as and no greater than those of Carrie. One cannot by his own act create an estoppel in his favor. The party asserting the estoppel must show on his part lack of knowledge and the means of knowledge as to the truth of the facts in question, reliance upon the conduct of the party sought to be estopped and action based thereon to his prejudice. *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967); *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955); *Trust Co. v. Casualty Co.*, 237 N.C. 591, 75 S.E. 2d 651 (1953).

The 1957 deed was void, as nothing passed by the deed. *Scott v. Battle*, 85 N.C. 184 (1881). A deed having no validity cannot be made the basis of an estoppel. *Cruthis v. Steele*, 259 N.C. 701, 131 S.E. 2d 344 (1963); *Buford v. Mochy*, 224 N.C. 235, 29 S.E. 2d 729 (1944); 5 Strong's N.C. Index 3d, Estoppel § 1.1.

We hold defendants are not estopped to deny the validity of the 1957 deed, and they may rely on the 1945 deed.

It thus appears by the undisputed evidence that in 1945 Ivey Steele acquired the title in fee to the property in question and that he died seized of the same. Upon the death of Ivey Steele intestate, the property passed to his widow, Carrie, his three surviving children, and the lineal issue of Ivey Steele, Jr.

There is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

The summary judgment for plaintiff is reversed and vacated. The order denying defendants' motion for summary judgment is reversed. The case is remanded to the district court for entry of partial summary judgment in favor of defendants, adjudging that upon the death of Ivey Steele, Sr. intestate, the disputed property descended to the following:

Carrie Steele, widow of Ivey Steele, Sr., a one-third interest;

Evelyn Steele Taylor, daughter of Ivey Steele, Sr., a one-sixth interest;

Charles R. Steele, son of Ivey Steele, Sr., a one-sixth interest;

Raymond Steele, son of Ivey Steele, Sr., a one-sixth interest;

The lineal issue of Ivey Steele, Jr., son of Ivey Steele, Sr., who predeceased his father, a one-sixth interest.

The record before us does not contain sufficient facts for this Court to determine the present ownership of the property. Therefore the district court shall conduct such further proceedings as may be appropriate to determine that question.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JEROME EDWARD BRINCEFIELD

No. 7915SC364

(Filed 18 September 1979)

1. **Constitutional Law § 49— waiver of counsel at trial**

Defendant knowingly, intelligently and voluntarily waived his right to counsel in compliance with G.S. 15A-1242 where the trial judge fully informed defendant in open court of the nature of the charges against him, his right to have counsel appointed to represent him, and the meaning and effect of waiver of counsel, and defendant stated under oath that he had been informed of the charges against him, the statutory punishment therefor, the nature of the proceeding, the right to counsel, and the consequences of waiver of counsel, that he understood the foregoing, and that he waived the assignment of counsel and elected to appear in his own behalf.

2. **Constitutional Law § 40— representation of self at trial—court's failure to appoint standby counsel**

The trial court did not abuse its discretion in failing to appoint standby counsel for a defendant who elected to represent himself or to inquire of defendant whether he desired standby counsel. G.S. 15A-1243.

3. **Constitutional Law § 48— effective assistance of counsel—defendant's representation of self**

When a defendant elects to represent himself at trial, he cannot thereafter complain that the quality of his own defense amounted to a denial of the effective assistance of counsel.

4. **Criminal Law § 89.2— corroborative evidence—limiting instruction—necessity for request**

The trial court did not err in failing to instruct that an officer's testimony as to statements made by the prosecutrix was competent only for corroborative purposes absent a request for such a limiting instruction.

APPEAL by defendant from *McLelland, Judge*. Judgments entered 11 October 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 22 August 1979.

Defendant was tried upon charges of assault with intent to commit rape and felonious breaking or entering. The jury found defendant guilty of the assault charge and of non-felonious breaking or entering. Judgments of imprisonment were entered and defendant appealed.

The record shows that defendant was represented by counsel of his choice in the district court. On 12 September 1978, defendant's counsel was allowed to withdraw and defendant signed a

waiver of right to have assigned counsel. Judge McLelland signed the judicial certificate accompanying the waiver.

The trial began 9 October 1978 before Judge McLelland. At the outset he inquired if defendant was ready for trial and defendant responded that he did not have a lawyer, did not expect to have one and was as ready for trial as he would ever be.

The state's evidence showed defendant was painting a house across the street from the home of the prosecuting witness, Charlene Yvonne Stephens. She was fourteen years of age. Defendant came to her house, requested a glass of water and she told him to wait at the door. When she returned with the water, defendant had entered the house. She told him to leave and he replied, "No, I want you." When defendant advanced toward her she ran, but he caught her in the hall and grabbed her arm. Defendant said, "If you'd let me do it, I won't hurt you." She struggled to get away from him but he was able to pull her halter top all the way down and to get her pants down to her knees. He unzipped his pants and took out his penis. She continued to resist him and he finally left with the threat that he was coming back.

The police were called, she told them what had happened and defendant was arrested the same day.

Defendant's evidence showed that he had met the prosecuting witness at the school cafeteria where he was working, and that she had followed him around and told everyone he was her boyfriend. While he was painting the house, she brought water to him at times. He went to her house, knocked and asked for another glass of cold water. She said, yeah, for him to come on in. He went in and drank the water she had brought to him. She made remarks to him of a sexual nature but he told her she was too ugly and too young. She put her arms around him from behind but he left. Defendant's evidence tended to show that he did not assault her in any manner but that she made sexual advances to him that he rebuffed.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

Daniel H. Monroe for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant contends the trial court did not comply with N.C.G.S. 15A-1242 and 15A-1243. Section 1242 allows a defendant to go to trial without the assistance of counsel where the *trial judge* makes thorough inquiry and is satisfied defendant (1) has been advised of his right to the assistance of counsel and right to appointed counsel; (2) understands the consequences of his decision; and (3) comprehends the nature of the charges and the range of permissible punishments.

Judge McLelland was the trial judge and also presided at the pretrial hearings of defendant when defendant executed the waiver of counsel form. At that time, Judge McLelland fully informed defendant in open court of the nature of the proceedings or charges against him and of his right to have counsel appointed to represent him. With this information and understanding and after the judge explained the meaning and effect of waiver of counsel, defendant waived his right to counsel in the judge's presence.

Defendant, under oath, stated he had been informed of the charges against him, the nature of them, the statutory punishment therefor, the nature of the proceeding, the right to counsel and the consequences of waiver of counsel. He further swore that he understood the foregoing and thereupon waived the assignment of counsel and elected to appear in all respects in his own behalf, without counsel, which he understood he had a right to do.

Brincefield, a defendant in a state criminal trial, had the right, protected by the United States Constitution, to represent himself in this case. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972). Under the laws of North Carolina, a defendant may appear either in person or by attorney. N.C. Gen. Stat. 1-11; *State v. Pritchard*, 227 N.C. 168, 41 S.E. 2d 287 (1947); *State v. Lashley*, 21 N.C. App. 83, 203 S.E. 2d 71 (1974). *See* Leippe, *Right To Defend Pro Se*, 48 N.C.L. Rev. 678 (1970).

We hold the defendant knowingly, intelligently and voluntarily waived right to counsel before Judge McLelland. *Faretta v. California, supra.* All the provisions of N.C.G.S. 15A-1242 were obeyed. The assignment of error is overruled.

[2] The appointment of standby counsel for a defendant is entirely in the sound discretion of the trial judge. N.C. Gen. Stat. 15A-1243. The court had no statutory duty to inquire of defendant whether he desired standby counsel. There is nothing in the record suggesting abuse of discretion by the trial court in failing to inquire of defendant at the outset of the trial concerning standby counsel.

[3] Defendant contends that by representing himself he did not receive effective assistance of counsel. As Chief Justice Stacy said, "He proved to be a poor lawyer and an unwise client." *State v. Pritchard, supra* at 169, 41 S.E. 2d at 287. When a defendant represents himself, he gives up many of the traditional benefits associated with the right to counsel. Brincefield's technical knowledge of the law was not relevant to an assessment of his knowing exercise of the right to represent himself. *Faretta v. California, supra.* When a defendant elects to represent himself in a criminal action, the trial court is not required to abandon its position as a neutral, fair and disinterested judge and assume the role of counsel or advisor to the defendant. The defendant waives counsel at his peril and by so doing acquires no greater rights or privileges than counsel would have in representing him.

Whatever else a defendant may raise on appeal, when he elects to represent himself he cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel. *Id.*

[4] The trial court did not err in failing to instruct the jury that the portion of the officers' testimony containing statements made by the prosecuting witness was competent only for corroborative purposes. Defendant made no request for such instruction. Absent a request for a limiting instruction, the court's failure to do so is not error. *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449 (1944); *State v. Spain*, 3 N.C. App. 266, 164 S.E. 2d 486 (1968).

There was plenary evidence in the record to submit the stated charges to the jury. Defendant testified in his own behalf and produced other witnesses. The jury reconciled the evidence against defendant. The trial judge accorded the defendant a fair trial, free of prejudicial error, under difficult circumstances. We find

No error.

Chief Judge MORRIS and Judge PARKER concur.

ROBERT D. WILLIAMS v. EDGAR D. CONGDON

No. 7829SC1019

(Filed 18 September 1979)

Physicians, Surgeons, and Allied Professions § 11; Libel § 11 — psychiatrist's report in judicial proceeding — absolute privilege — no malpractice or libel

Where defendant psychiatrist interviewed plaintiff, his estranged wife, and the couple's daughter for the purpose of rendering a report to the court as to the custody of the daughter, defendant conducted his interviews and made his report as a witness in the due course of a judicial proceeding; therefore, his report was absolutely privileged and could not be made the basis of a cause of action for either medical malpractice or libel.

APPEAL by plaintiff from *Baley, Judge*. Judgment entered 9 June 1978 in Superior Court, POLK County. Heard in the Court of Appeals 22 August 1979.

This is a civil action wherein the plaintiff sought damages for the malpractice of the defendant psychiatrist.

The essential allegations of the complaint are as follows. Defendant held himself out to be a medical doctor possessing skills and training as a practicing psychiatrist. Plaintiff and plaintiff's estranged wife, Naomi, were parties to a civil dispute pending in the District Court, Twenty-Ninth District, Polk County, involving the custody of their eleven year old daughter. Defendant contracted with plaintiff to investigate and examine the relations of plaintiff, wife, and daughter, and to render a report to the court in said civil case. Defendant agreed, as a part of said report, to give his professional, expert opinion as to the best disposition of the custody of the daughter, with the understanding that the court would utilize the report as a factor in determining the custody of the daughter. Pursuant to said contract, the defendant interviewed all three parties to the dispute and subsequently rendered his report to the court. In making his report the defendant negligently, improperly, and unprofessionally accepted biased

and untrue statements of plaintiff's estranged wife and then, based upon such statements, arrived at conclusions which were untrue, insulting, and unfair to the plaintiff. Defendant, in his report, recommended custody be awarded plaintiff's estranged wife. Defendant negligently, unprofessionally, wilfully, and wantonly published his report by furnishing a copy to persons other than the court. Defendant did not furnish a copy of the report to plaintiff or plaintiff's attorney, and his failure to do so constituted unprofessional, wilfull, and wanton negligence. Defendant's malpractice caused injury and loss to the plaintiff by depriving him of the companionship of his daughter and caused him mental anguish.

Defendant answered, admitting that plaintiff and his estranged wife agreed to be interviewed by him for the purpose of his rendering a report to the court as to the custody of the daughter. Defendant further answered that he conducted the interviews, informed plaintiff of his findings, submitted his report to the court, but did not submit a copy to either plaintiff, his estranged wife or their respective counsel. As a further defense, defendant answered that plaintiff accepted the judgment of the District Court awarding custody of his daughter to his estranged wife, did not appeal from said judgment, seek rehearing, nor otherwise petition for relief from said judgment.

Defendant moved for summary judgment and in support of said motion submitted the affidavit of the trial judge in the custody dispute. In said affidavit Judge Hart stated that he had requested that the parties to the custody proceedings be interviewed by defendant; that plaintiff agreed to said interviews; that plaintiff agreed that defendant would report his findings and recommendations to the court; and that defendant rendered his report to the court.

The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

Lee Atkins for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A., by O. E. Starnes, Jr., for defendant appellee.

WELLS, Judge.

The sole question presented in this appeal is: Assuming the facts alleged in plaintiff's complaint to be true, was defendant entitled to summary judgment as a matter of law? We think so.

Summary judgment is appropriate only where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Bentley v. Langley*, 39 N.C. App. 20, 249 S.E. 2d 481 (1978), *disc. rev. den.*, 296 N.C. 735, 254 S.E. 2d 176 (1979). "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." *Singleton v. Stewart*, 280 N.C. 460, 465, 186 S.E. 2d 400, 403 (1972), quoting from 6 Moore, Federal Practice, § 56.15[8], at p. 2439 (2d ed. 1971).

Where the pleadings or proof discloses that no cause of action exists, summary judgment may be granted. *Harrison Associates v. Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972), *rehearing denied*, 281 N.C. 317 (1972).

Indulgently regarded, the plaintiff's complaint may be considered to be asserting a cause of action grounded in medical malpractice or libel. Neither can succeed under the record before us. Plaintiff has alleged, and proof submitted by defendant supports, that defendant conducted his interviews and made his report as a witness in the due course of a judicial proceeding. Accordingly, defendant's report is absolutely privileged and cannot be made the basis of a cause of action for either medical malpractice or libel. *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860 (1957); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954). *See also Fowle v. Fowle*, 255 N.C. 720, 122 S.E. 2d 722 (1961).

The granting of summary judgment in favor of defendant is

Affirmed.

Judges CLARK and ERWIN concur.

HARLAND CLAYTON PHILLIPS v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY

No. 7818SC1030

(Filed 18 September 1979)

1. **Insurance § 79— action against liability insurer—refusal to give reason for rate increase—false notice of termination—false statement that uninsured motorist coverage waived—summary judgment for insurer**

In an action for damages based upon allegations that defendant insurer showed a callous, willful, wanton and reckless disregard for plaintiff's rights and well-being in that defendant ignored plaintiff's efforts to find out why a premium for insurance covering his motorcycle had increased by $68.00, defendant attempted to harass, embarrass and punish plaintiff for questioning the rate increase by sending a false "Notice of Termination of Liability Insurance" to the Department of Motor Vehicles, and defendant issued a false insurance policy to plaintiff containing a false statement of waiver of uninsured motorist coverage, the trial court properly denied plaintiff's motion for summary judgment and properly entered summary judgment in favor of defendant where plaintiff's deposition and other exhibits showed that defendant was prompt in providing the information requested by plaintiff; a letter from plaintiff to defendant constituted a rejection of uninsured motorist coverage; an affidavit of defendant's general manager showed that the "Notice of Termination" was sent to the Department of Motor Vehicles because of an inadvertent clerical error, and plaintiff presented no contrary evidence; and plaintiff failed to produce any evidence of damages.

2. **Damages § 11— punitive damages—compensatory damages as prerequisite**

Punitive damages may not be awarded where plaintiff is not entitled to recover any compensatory damages.

3. **Pleadings § 33.3— disallowance of amendment as to punitive damages**

It was not error for the court to disallow an amendment to the complaint asking for $100,000 punitive damages when it had dismissed the original request for $40,000.

APPEAL by plaintiff from *Kivett, Judge*. Orders entered 21 August and 23 August 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 August 1979.

Plaintiff initiated an action against defendant insurer (Universal) on 21 November 1977. Plaintiff also named as defendants the Commissioner of Insurance and the Commissioner of Motor Vehicles for the state of North Carolina, but neither is involved in this appeal. The thrust of plaintiff's complaint was that in renewing plaintiff's insurance policy for the period of 12

September 1977 to 12 September 1978 Universal showed a "callous, wilful, wanton, and reckless indifference, and total disregard for plaintiff's rights and well-being." Plaintiff specifically alleged that Universal totally ignored his efforts to find out why the premium for a policy covering his Yamaha motorcycle had increased by $68; that Universal attempted to harass, embarrass and punish plaintiff for questioning the rate increase, by sending to N.C. Department of Motor Vehicles a "Notice of Termination of Liability Insurance" (FS-4), knowing said notice to be wholly false and untrue; and that Universal issued a false insurance policy to plaintiff since it contained a statement of waiver of Uninsured Motorist Coverage which Universal knew to be false. Plaintiff demanded compensatory damages of $4,000 and punitive damages of $40,000. Letters exchanged between plaintiff and Universal were attached as exhibits.

Universal answered the complaint, denying plaintiff's allegations and specifically alleging that an inadvertent clerical error was responsible for the FS-4 notice being sent and that it endeavored to explain to plaintiff the reasons for the change in premium. Plaintiff submitted a request for admissions and written interrogatories to Universal; Universal then took plaintiff's deposition. Plaintiff filed a motion for leave to amend his complaint, after which both parties moved for summary judgment. Universal submitted an affidavit by its regional sales manager to support its motion; plaintiff submitted his own affidavit. The court, after hearing arguments on the motions for summary judgment and leave to amend, denied plaintiff's motions, granted Universal's motion, and dismissed the case. Plaintiff appeals from these orders.

J. W. Clontz for plaintiff appellant.

Johnson, Patterson, Dilthey and Clay, by Grady S. Patterson, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Did the trial court commit reversible error either in denying plaintiff's motion for summary judgment, in granting Universal's motion for summary judgment, or in denying plaintiff's motion to amend his complaint? We answer this question in the negative and therefore affirm.

In discussing the standard for summary judgment as fixed by Rule 56(c) of the North Carolina Rules of Civil Procedure, the North Carolina Supreme Court has succinctly stated: "Rule 56 is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). In reviewing the criteria for the grant of Universal's motion for summary judgment, we find that the court was not in error.

The deposition of plaintiff and certain exhibits established that Universal was prompt in providing the information which plaintiff requested, contrary to his allegation that his efforts to find out why his premium had increased had been ignored.

Furthermore, the insurance policy was not false in its notation that Uninsured Motorist Coverage had been waived. Plaintiff's letter of 2 September 1977 to Universal was clearly a separate written rejection of Uninsured Motorist Coverage. ". . . I expressly waived this coverage and I don't want it now!"

Finally, no genuine issue of material fact was presented as to the FS-4 statement. The question was whether Universal sent the notice of termination to the Department of Motor Vehicles deliberately, with total and reckless disregard for plaintiff's rights, or whether the notice was sent because of a clerical error. The affidavit of Universal's regional sales manager maintained that the FS-4 statement was simply a clerical error. And, when asked if plaintiff had any evidence upon which to base his "statement that these things you have complained of, about the company, were harassments rather than errors on the part of someone working for the company?" plaintiff responded, in his deposition, "No."

In addition, plaintiff totally failed to produce any evidence of damages. To the contrary, by his own admissions, he sustained no loss.

To be entitled to compensatory damages plaintiff must show that the damages claimed are the natural and probable result of the acts complained of; he must also show the amount of loss with reasonable certainty. *Norwood v. Carter*, 242 N.C. 152, 87 S.E. 2d 2 (1955). " 'However, where actual pecuniary damages are sought,

there must be evidence of their existence and extent, and some data from which they may be computed.' " *Id.* at 156, 87 S.E. 2d at 5. Implicit within this principle of law is the fact that plaintiff must have suffered some loss, no matter how minimal. In this case, plaintiff admitted in his deposition that he had sustained no monetary damages whatsoever. In response to questions concerning his monetary loss and compensatory damages, plaintiff answered that his only monetary loss had been a thirty-dollar fee for filing his lawsuit. He further admitted that he had sustained no loss to his motorcycle. It had neither been involved in an accident nor damaged in any way. There were absolutely no items of damage the plaintiff could point to. In other words, plaintiff claimed $4,000 in compensatory damages for losses that did not exist.

[2] Plaintiff also claimed punitive damages of $40,000 in his original complaint. Punitive damages are awarded above and beyond compensatory damages in proper instances. *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). Punitive damages may not be awarded where plaintiff is not entitled to recover any compensatory damages. *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936). It follows that because plaintiff sustained no actual compensatory damages, he is not entitled to punitive damages.

[3] Plaintiff's argument that the court erred in denying his motion for leave to file an amended complaint is without merit. Since plaintiff's proposed amended complaint essentially asked for $100,000 punitive damages instead of $40,000 demanded originally, it was not prejudicial for the court to disallow the amendment asking for $100,000 punitive damages when it had dismissed the original request for $40,000.

The orders and judgment of the trial court are

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

PATRICIA W. BEVERLY v. TED M. BEVERLY

No. 7826DC1163

(Filed 18 September 1979)

1. **Rules of Civil Procedure § 56— summary judgment—complaint unverified—no supporting material offered—sufficiency of motion**

Plaintiff complied with the requirements for a summary judgment motion though her complaint was unverified and though she offered no affidavit or other material to support her motion.

2. **Husband and Wife § 11— separation agreement—duration of support payments—intent of parties**

In an action to recover payments due under a separation agreement, there was no merit to defendant's contention that it was the intent of the parties that payments for maintenance and support should continue only until plaintiff wife was capable of supporting herself, since defendant's affidavit showed only his unwillingness to make payments to plaintiff indefinitely but did not show that it was the intent of *both* the parties that he would cease making payments when she became self-supporting.

3. **Husband and Wife § 11.1— separation agreement—child support provisions—change in child custody—amount of support changed**

Though a separation agreement between the parties provided that defendant should pay plaintiff child support of $450 per month and that such amount should not be reduced until the youngest child reached 18 years of age, defendant was nevertheless entitled to a credit against his obligation for the support of one of the children who, at plaintiff's request, went to live with defendant.

APPEAL by defendant from *Cantrell, Judge*. Judgment entered 6 October 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1979.

Plaintiff alleges that the parties are divorced, and that defendant has failed to make payments due under their separation agreement. Defendant admits that he has paid $900 less than the agreement requires, but he seeks credit of one-fourth of the agreed-upon child support payments due to the fact that one of the children has been living with him rather than with the plaintiff. Defendant admits the genuineness of the separation agreement, which provides for monthly payments of $265 to the plaintiff and $450 child support.

Plaintiff moved for summary judgment. In opposition to the motion defendant filed his affidavit, stating that it was the intent

of the parties that he make payments to plaintiff only until she was able to support herself, which she is now able to do. In addition, he indicated that the parties' oldest son Mike had come to live with him at plaintiff's request, and that he had been able to support Mike only by reducing the total child support payments to plaintiff. Recently a second son had come to live with him, and his daughter had expressed a desire to do so as well.

Plaintiff's motion for summary judgment was granted and defendant appeals.

Samuel M. Millette for plaintiff appellee.

Wardlow, Knox, Knox, Robinson & Freeman, by William G. Robinson & John S. Freeman, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that plaintiff failed to carry her burden of proving that she is entitled to judgment as a matter of law, which is required for summary judgment. G.S. 1A-1, Rule 56(c). He points to the fact that her complaint is unverified, and that she offered no affidavit or other material to support her motion. However, G.S. 1A-1, Rule 56(c) provides that pleadings may be considered on a motion for summary judgment, and G.S. 1A-1, Rule 11(a) indicates that as a general rule, pleadings need not be verified. Furthermore, G.S. 1A-1, Rule 56(a) provides that a party may move "with or without supporting affidavits" for a summary judgment. Plaintiff complied with the requirements for a summary judgment motion.

[2] The parties' separation agreement provides that "[t]he Husband shall pay to the Wife, for her support and maintenance, the sum of $265.00 per month." Defendant argues that it was the intent of the parties that these payments should continue only until the wife was capable of supporting herself.

The payments at issue are not alimony, but periodic payments provided for by a contract. See *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826 (1961). A separation agreement, like any other contract, turns upon the intent of the parties. *Bowles v. Bowles*, 237 N.C. 462, 75 S.E. 2d 413 (1953). By affidavit, the defendant presented evidence that before signing the separation agreement he "had a discussion with . . . the plaintiff, and . . . told

her that I was not going to pay her alimony forever and did further state to her that I was quite willing to pay her a reasonable amount of support for her until such time as the plaintiff could adjust to being employed and could be making her own way without my help. She did not say much about that but the agreement entered into was signed after that discussion." Defendant argues that the consideration of this evidence to "clarify the writing" would not violate the parol evidence rule.

Without ruling on the parol evidence question, we find that, even if this evidence were considered, defendant has not presented sufficient evidence to show that there exists a genuine issue as to the termination date for the periodic payments. Defendant's affidavit, at most, shows that he expressed to the plaintiff his unwillingness to make payments to her indefinitely. It does not show that it was the intent of *both* the parties that he would cease making payments when she became able to support herself. See 17 Am. Jur. 2d, Contracts § 18 (an objective manifestation of mutual assent is necessary to form a contract). As we said in *Grady v. Grady*, 29 N.C. App. 402, 403-04, 224 S.E. 2d 282, 283 (1976), "[t]he effect of the agreement is not controlled by what one of the parties intended or understood." Summary judgment for plaintiff on this issue was proper.

[3] The separation agreement also provides that "[t]he Husband shall pay to the Wife, for the support and maintenance of the children of the marriage, the sum of $450.00 per month and such child support shall not be reduced until the youngest child of the marriage reaches 18 years of age, at which time all child support shall cease." Defendant, relying upon *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977), contends that he is entitled to credit of $112.50 (one-fourth of the child support amount) for each month that the parties' son Mike has been living with him rather than with plaintiff. Plaintiff would have us read the language of the separation agreement literally and allow no reduction in support payments.

In *Goodson v. Goodson, id.*, plaintiff father who was ordered to pay child support to his ex-wife sought credit against his obligation for expenses he incurred for clothing, recreation and medical treatment. We determined that credit should be allowed to prevent an injustice. Likewise in the case before us we are per-

suaded by equitable considerations that credit is necessary. It is uncontradicted that Mike went to live with defendant at plaintiff's request. An injustice would result if defendant were not given some credit for amounts spent for Mike's support. Therefore, we remand for the trial court to determine the amount of credit to which defendant is entitled.

Affirmed in part.

Reversed and remanded in part.

Judges HEDRICK and VAUGHN concur.

NORTH CAROLINA NATIONAL BANK v. R. D. MORGAN, JR. AND WIFE, ELIZABETH M. MORGAN

No. 7812SC1007

(Filed 18 September 1979)

Negligence § 30.1— fire insurance—failure to explain lack of coverage—insufficiency of evidence of negligence

Where defendant guarantors obtained fire insurance on certain equipment, the equipment was subsequently sold at a foreclosure sale, and the purchase was financed by plaintiff and guaranteed by defendants, defendants failed to offer evidence sufficient to show that plaintiff breached its duty in failing to inform them that the insurance policy provided coverage only when the owner of the equipment was the named insured of the policy.

APPEAL by defendants from *Braswell, Judge.* Judgment entered 30 May 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 21 August 1979.

In December 1974, Manchester Woodyards, Inc. (Manchester) was guarantor on a note for the purchase price of certain equipment owned by one Edward Reddick. Defendant R. D. Morgan as agent for Manchester obtained fire insurance on the equipment. The policy was mailed directly to plaintiff and defendant never received a copy of the policy.

In May 1975 plaintiff foreclosed on the note, and Manchester purchased the equipment at the foreclosure sale. This purchase

was financed by plaintiff and guaranteed by defendants. The equipment was destroyed by fires in August and November of 1975, and when defendants notified the insurance agency of the loss, they were advised that Manchester could not recover under the policy, since only equipment owned by the named insured of the policy was protected against fire loss.

Defendants allege that prior to the foreclosure sale they consulted Ernest Cook, plaintiff's agent, about what changes in documents would be necessary to protect their interest if they became the highest bidder at the foreclosure sale, and Cook told them that no changes would be necessary. They seek to defend against plaintiff's action to recover on Manchester's note by alleging that plaintiff was negligent in failing to inform them that the owner of the equipment must be the named insured of the policy, which estops plaintiff from collecting any funds from them.

The trial court found "that no evidence was presented of any duty owed by plaintiff to defendants that was breached, nor any evidence of representations from plaintiff to defendants concerning the subject matter of this action," and held defendants liable on the note. Defendants' motions for amendment of judgment and for a new trial were denied. They appeal.

Barrington, Jones, Witcover & Carter, by Henry W. Witcover, for plaintiff appellee.

Russ, Worth & Cheatwood, by Donald J. McFadyen, for defendant appellants.

ARNOLD, Judge.

Defendants argue that the trial court erred by failing to consider all the evidence produced at trial. They contend that they did produce evidence that plaintiff breached a duty it owed to defendants.

The testimony at trial, considered in the light most favorable to defendants, is that prior to the foreclosure Ernest Cook, plaintiff's agent, gave defendant his opinion that after the foreclosure Manchester, as the new owner, would be covered under the policy. Unless plaintiff breached a duty by the giving of this incorrect information, there is no actionable negligence. See 57 Am. Jur. 2d, Negligence § 36.

Defendants concede that plaintiff had no duty to disclose voluntarily to them information bearing upon the risk they were proposing to undertake. See *Magee v. Manhatten Life Ins. Co.*, 92 U.S. 93, 23 L.Ed. 699 (1876); *Construction Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962); *Trust Co. v. Akelaitis*, 25 N.C. App. 522, 214 S.E. 2d 281 (1975). They contend, however, that once the plaintiff undertook to answer defendants' inquiry, it opened itself to liability for an incorrect answer.

Defendants' reliance upon language in 74 Am. Jur. 2d, Suretyship § 130 is misplaced, since that language deals with the duty of an obligee to answer a surety's inquiry by disclosing all facts that are *material* to the surety's risk. Defendants' inquiry as to insurance coverage did not relate to a material fact, that is, one immediately affecting defendants' liability as surety. *See id.*, § 131.

Defendants argue further that by undertaking to advise them about insurance coverage, plaintiff invoked a common-law duty to act with due care. While it is true that one who attempts to do anything has a duty to use some care and skill, 57 Am. Jur. 2d, Negligence § 45, defendants have presented no evidence that plaintiff did not use sufficient care and skill under the circumstances. Plaintiff's agent did not hold himself out as an expert on insurance. In addition, defendants had purchased the policy from their own insurance agent, and could have consulted him about the effect of a change in the ownership of the equipment. There is no evidence that the plaintiff breached any duty it owed to defendants.

The record supports the trial court's findings. We find no error in his denial of the motions for amendment of judgment and for new trial.

Affirmed.

Judges HEDRICK and VAUGHN concur.

JOE McLEOD v. JANET WIGGS McLEOD

No. 7812DC1107

(Filed 18 September 1979)

1. **Divorce and Alimony §§ 16.9, 24.1— amount awarded for alimony and child support**

The trial court did not err in ordering plaintiff husband to pay alimony of $1500 per month and child support of $1000 per month in an action in which the evidence showed that the parties had a gross income for 1976 of over $91,000, of which only $3,000 was the separate income of defendant wife, and a gross income for 1977 of nearly $90,000, of which $5,300 was the separate income of defendant wife.

2. **Divorce and Alimony § 27— erroneous award of counsel fees to wife**

The trial court erred in awarding defendant wife counsel fees in an action in which plaintiff husband was ordered to pay alimony and child support where the evidence showed that the wife had $27,000 in a savings account which would enable her to employ adequate counsel.

APPEAL by plaintiff from *Grant, Judge.* Judgment entered 16 June 1978 in District Court, CUMBERLAND County. Heard in the Court of Appeals 21 August 1979.

On 3 November 1978, plaintiff husband instituted this action against defendant wife seeking an absolute divorce. Defendant filed an answer and counterclaim. Before trial it was stipulated that defendant was a dependent spouse and entitled to alimony. The matter came on for hearing before Judge Grant with the only matters in controversy being the amount of alimony and child support for their two children, and whether the defendant is entitled to counsel fees from plaintiff. On the basis of extended exhibits and testimony, the court found facts that the parties' joint federal income tax returns showed a gross income for 1976 of $91,256.56, of which approximately $3,000.00 was the separate income of the defendant, and a gross income for 1977 of $89,914.61, of which approximately $5,300.00 was the separate income of the defendant. No exception was taken from these findings of fact. The court ordered plaintiff to pay $1,500.00 per month as alimony and $1,000.00 per month for child support. He was also ordered to pay medical and dental expenses for his wife and children, to maintain a medical insurance policy for them, to deliver to the defendant the title to a 1974 Cadillac, and to pay attorney fees to

be fixed by subsequent order. The defendant was awarded possession of the parties' home with its furnishings. Plaintiff appealed.

Williford, Person and Canady, by N. H. Person, and McLeod and Senter, by William L. Senter and Joe McLeod, Pro Se, for plaintiff appellant.

Jordan, Morris and Hoke, by John R. Jordan, Jr. and Joseph E. Wall, and Clark, Shaw, Clark and Bartlett, by Heman R. Clark, for defendant appellee.

WEBB, Judge.

[1] Plaintiff contends the amounts awarded as alimony and child support were too liberal, not supported by the evidence and constitute an abuse of discretion. This contention is without merit. The award of alimony is governed by G.S. 50-16.5(a) which says:

> 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.

Child support is governed by G.S. 50-13.4(c) which says:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

We hold that using these sections of the statute as a guide, the court was well within its discretion in the amount of alimony and child support which was ordered. In support of the motion for alimony, the defendant has filed an affidavit itemizing her various expenses. The plaintiff argues that some of these items of expense are not proper. We do not feel this should be determinative. In a case such as this, with the substantial income of the plaintiff as compared to the limited income of the wife, we believe the court is required by the statute to award the wife such alimony as will allow her to live as the wife of a man of plaintiff's income is entitled to live. The amount of alimony awarded in this case is not too generous by this standard. *See*

Beall v. Beall, 290 N.C. 699, 228 S.E. 2d 407 (1976); *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975), and *Schloss v. Schloss*, 273 N.C. 266, 166 S.E. 2d 5 (1968). Child support is governed by the same rule. For a man with the income of the plaintiff, $1,000.00 per month is not unreasonable for the support of his two children. We are aware that this Court has held in *Williams v. Williams*, 42 N.C. App. 163, 256 S.E. 2d 401 (1979) and *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978) that in order to support an order for child support, the court must make certain findings of fact. We hold that the findings made by the court in this case as to the income of plaintiff are adequate to support the child support awarded. Children of a man of plaintiff's income are entitled to live accordingly.

[2] The appellant also assigns as error the finding that he must pay the defendant's counsel fees. This assignment of error has merit. In order for the defendant to be awarded counsel fees from plaintiff, she must show that she needs such counsel fees to enable her, as a litigant, to meet her husband on substantially even terms by making it possible for her to employ adequate counsel. *Schloss v. Schloss, supra*, and *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). In this case the evidence is that among the assets of defendant is $27,000.00 in a savings account. This should enable defendant to employ adequate counsel.

We affirm the judgment of the district court as to the award of alimony and child support, and reverse as to ordering the plaintiff to pay defendant's attorney fees.

Affirmed in part and reversed in part.

Judges PARKER and MARTIN (Robert M.) concur.

GENEVA CRAWFORD v. RAY WILSON AND WIFE, MARTHA WILSON, WILLIAM CAUBLE AND WIFE, JUANITA CAUBLE, STEVE WILSON AND WIFE, BEULAH WILSON, AND TERRY BUCKNER AND WIFE, DENISE BUCKNER

No. 7828SC1045

(Filed 18 September 1979)

Deeds § 12— conveyance of "right of way"—no fee simple conveyed

The deed upon which plaintiff's title was based conveyed an easement where the granting clause described it as a "right of way"; at the end of the description were the words "to be allowed as right of way to the highway"; the words "right of way" usually connote an easement; and G.S. 39-1 was inapplicable since it was plainly intended by the conveyance to convey an estate of less dignity than fee simple.

APPEAL by plaintiff from *Fountain, Judge.* Judgment entered 16 October 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 23 August 1979.

This is a civil action which involves the interpretation of a deed. Charles Cauble, by deed recorded 10 November 1948, made a conveyance to Scott Boone. The granting clause said:

> "[P]arty of the first part . . . do give, grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described real estate: Right of way. A certain piece, parcel or lot of land, situate, lying and being in Fairview Township, Buncombe and bounded and more particularly described as follows:
>
> > BEGINNING at at [sic] stake at the Charlotte Highway and runs N 50-1/2 E 23.6 poles with the Charles E. Cauble line to a stake; thence N 25-1/2 E 20 feet with the Cauble line; and 12 feet in width to be allowed as right of way to the highway."

Boone subsequently conveyed the twelve-foot strip and a larger parcel of land to George W. Crawford and wife, Geneva Crawford, and in 1968, George Crawford conveyed both parcels to Geneva Crawford.

Thereafter, Charles Cauble made other conveyances of the same right-of-way to all the defendants except Steve Wilson and his wife, Beulah Wilson.

Several issues were raised by the pleadings. The parties stipulated that the determination of all issues would be continued except the question of what interest was conveyed by the deed recorded 10 November 1948, which issue was tried on an agreed statement of facts.

Upon the agreed statement of facts, the superior court concluded as a matter of law that plaintiff was the owner of an easement of right-of-way in the property described in the deed to Boone. From this judgment, plaintiff has appealed.

Riddle and Shackelford, by John E. Shackelford, for plaintiff appellant.

Long, McClure, Parker, Hunt and Trull, by Jeff P. Hunt, for defendant appellees.

WEBB, Judge.

We affirm the judgment of the superior court. Reading the deed as a whole and giving effect to all its parts as we are required to do, *Ellis v. Barnes*, 231 N.C. 543, 57 S.E. 2d 772 (1950) and *Strickland v. Jackson*, 259 N.C. 81, 130 S.E. 2d 22 (1963), we hold that the deed recorded 10 November 1948, on which the plaintiff's title is based, conveyed an easement. The granting clause described it as a "right of way." At the end of the description were the words "to be allowed as right of way to the highway." The words "right of way" usually connote an easement. *See Pearson v. Chambers*, 18 N.C. App. 403, 197 S.E. 2d 42 (1973). Giving effect to these words, we hold that the deed did not convey a fee simple interest to Scott Boone. For cases from other jurisdictions with a similar result, *see Parks v. Gates*, 186 Cal. 151, 199 P. 40 (1921); *Gulf Coast Water Co. v. Hamman Exploration Co.*, Tex. Civ. App., 160 S.W. 2d 92 (1942); *Tallman v. Eastern Illinois and Peoria R. Co.*, 379 Ill. 441, 41 N.E. 2d 537 (1942).

The appellant argues that G.S. 39-1 and *McCotter v. Barnes*, 247 N.C. 480, 101 S.E. 2d 330 (1958) require that we hold the deed conveyed a fee simple title to the property. G.S. 39-1 says:

> When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such con-

veyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

As to the application of this statute, we hold that for reasons stated in this opinion, it was plainly intended by the conveyance to convey an estate of less dignity than fee simple. *McCotter v. Barnes, supra,* dealt with a deed to a railroad company. The land was described as a right-of-way, and the Court held the deed conveyed a fee simple interest. The Court said the use of the term "right of way" was descriptive of the use to which the land was to be put and did not limit the quantum of land conveyed. *Pearson v. Chambers, supra,* interpreted *McCotter.* In that case, Judge Parker, writing for this Court, explained that land used by railroads is often denominated a right-of-way whatever title the railroad may own in the land. In *Pearson,* in which no railroad was involved, it was held that the use of the term right-of-way was descriptive of the interest conveyed. That reasoning is persuasive in the case sub judice.

Appellees have attempted to argue in their brief that the description in the deed is too vague to convey any interest to plaintiff. Appellees did not take any exception to the judgment of the superior court and have assigned no error. We do not consider their argument.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

HAYWOOD COUNTY CONSOLIDATED SCHOOL SYSTEM v. UNITED STATES FIDELITY & GUARANTY COMPANY

No. 7830SC1116

(Filed 18 September 1979)

Principal and Surety § 10— performance bond—later damage to gym floor caused by plumbing contractor's negligence

A contractor's performance bond in which defendant insurer agreed to indemnify the owner for damages resulting from the contractor's negligent performance of plumbing work for the owner provided coverage for water damage

to a wooden gym floor caused by the contractor's negligent installation of a defective pressure reducing valve in a line leading to a water cooler, and defendant insurer was not relieved of liability by a contract provision requiring the contractor to carry liability insurance against claims for damages because of injury to or destruction of tangible property.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 19 September 1978 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 30 August 1979.

The facts are stipulated by the parties: Plaintiff contracted with Norman's Mechanical Contractors, Inc. (Contractor) for Contractor to perform plumbing work in the Central Elementary School. Plaintiff required a performance bond, and one was executed by Contractor and defendant. Included in the plumbing work performed by Contractor were certain repairs and alterations to a water cooler and the lines leading to it. In performing this work, Contractor installed a defective pressure reducing valve. As a direct result of the installation of the defective valve, the supply tube to the water cooler blew out of a valve fitting, causing water damage to a newly-constructed wooden gym floor. The cost of repairing the defective pressure valve and the supply line was approximately $500, which was paid by defendant. The cost of repairing the water-damaged wood floor was $4,546. Defendant denied that the terms of the bond required it to pay for these repairs. Contractor's general liability policy, in effect while the work was in progress, had been cancelled some ten months prior to the blow out. Plaintiff was advised of this cancellation nine days subsequent to the blow out. Prior to the blow out, Contractor was adjudicated a bankrupt.

The trial court held that defendant must pay for the repairs to the damaged wood floor. Defendant appeals.

Brown, Ward & Haynes, by Gavin A. Brown, for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by Philip J. Smith, for defendant appellant.

ARNOLD, Judge.

The sole issue on this appeal is whether defendant is required under the performance bond to pay for later damages to

property caused by Contractor's improper performance under the contract. In answering this question, we must construe the bond and the construction contract together to determine the intent of the parties. *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744 (1962); *Ideal Brick Co. v. Gentry,* 191 N.C. 636, 132 S.E. 800 (1926).

By the terms of the performance bond defendant is obligated if Contractor does not "well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of [the] contract." The contract refers to plaintiff as Owner. Subsection 4.18.1 provides in pertinent part: "The Contractor shall indemnify . . . the Owner . . . against all . . . damages, losses and expenses . . . arising out of or *resulting from* the performance of the Work, provided that any such . . . damage, loss or expense (1) is attributable . . . to injury to or destruction of tangible property (other than the Work itself) . . . , and (2) is caused in whole or in part by any negligent act or omission of the Contractor." (Emphasis added.) Defendant admits that this language "may seem to cover the consequential damages which the plaintiff is seeking," but argues that it is not liable under this section because the contract by subsection 11.1.1 requires the Contractor to carry liability insurance against "claims for damages because of injury to or destruction of tangible property." We are unpersuaded. Contractor's responsibility to carry liability insurance did not remove his liability under 4.18.1. And Contractor's liability is the measure of defendant's liability. *State v. Guarantee Co.,* 207 N.C. 725, 178 S.E. 2d 550 (1935). As Contractor is liable for damages *resulting from* his negligent performance of the work, so is defendant. It is undisputed that the damage to the gym floor resulted from Contractor's negligent performance. The trial court ruled correctly.

Affirmed.

Judges HEDRICK and VAUGHN concur.

MASLIN H. RUSS v. ZACK RUSS, JR.

No. 7827DC1104

(Filed 18 September 1979)

Divorce and Alimony § 19.1— modification of alimony order—condition of payment of arrearages—no jurisdiction to order

Where plaintiff brought an action to enforce an alimony and child support arrearage judgment given by a Florida court, defendant counterclaimed for a reduction in alimony, and the actions were severed with defendant's action being transferred to district court, the trial court erred in conditioning a reduction of alimony upon defendant's payment of arrearages, since the matter of arrearages was not before the court at the trial of defendant's counterclaim.

APPEAL by defendant from *Bulwinkle, Judge.* Order entered 19 July 1978 in District Court, GASTON County. Heard in the Court of Appeals 21 August 1979.

The parties were divorced in Florida in 1965, and alimony of $600 per month was awarded to plaintiff. In November 1977 plaintiff brought suit against defendant in the Superior Court of Gaston County to enforce an alimony and child support arrearage judgment given by a Florida court. Defendant counterclaimed for a modification of the amount of prospective alimony, as permitted by G.S. 50-16.9(c).

Subsequently, defendant moved to transfer the action to District Court, pursuant to G.S. 7A-244. The court found that the plaintiff's action did not come within G.S. 7A-244 (actions for annulment, divorce, alimony, child support, and child custody), but that defendant's counterclaim did. Accordingly, the counterclaim was severed and heard in the District Court. The trial court found a change in circumstances sufficient to justify the reduction of alimony to $300 per month, but conditioned the reduction upon defendant's payment of his alimony arrearages. From this judgment defendant appeals.

Jeffrey M. Guller for plaintiff appellee.

Garland & Alala, by Richard L. Voorhees, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in making findings of fact and conclusions of law pertaining to arrearages he allegedly owed, and in conditioning the reduction of alimony upon defendant's payment of these arrearages. We agree.

G.S. 50-16.9(c) provides that a court of this state with personal jurisdiction over both parties may, upon a showing of changed circumstances, modify the alimony order of another jurisdiction. At the trial of defendant's counterclaim, the court found a substantial change of circumstances, and concluded that the change was such that the alimony payments should be reduced by half.

The court's additional findings and conclusions relating to arrearages on defendant's part have no basis in the evidence. That matter was not before the court at the trial of defendant's counterclaim; plaintiff's action for enforcement of the Florida arrearage judgment remained in the Superior Court after severance. No evidence as to arrearages was presented at trial. The trial court apparently based his findings and conclusions upon information contained in plaintiff's complaint in the original action, but this information should not have been before the District Court. Since these findings and conclusions have no basis in the evidence properly before the court, they cannot stand. *See Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977).

When these improper findings and conclusions are disregarded, the court's order holds that defendant is entitled to have his alimony payments reduced to $300 per month. The trial court's order as so modified is affirmed.

Modified and affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. DIANNA W. ALMOND, PHYLLIS J. FISHBACK, DENISE M. GROVE

No. 7912SC380

(Filed 18 September 1979)

Prostitution § 2— being in public place to solicit act of prostitution—city ordinance—insufficiency of warrants

Warrants were insufficient to charge defendants with violation of a city ordinance making it unlawful for any person to be in a public place for the purpose of soliciting or procuring another to commit an act of prostitution where they failed to allege where the purported offenses occurred or whether they were committed in places which were public places, and failed to describe conduct proscribed by the ordinance.

APPEAL by the State from *Herring, Judge.* Judgment entered 6 November 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 August 1979.

Attorney General Edmisten, by Associate Attorney Benjamin G. Alford, for the State.

No appearance by defendants.

MARTIN (Robert M.), Judge.

The State appeals from a ruling that Fayetteville City Ordinance § 21-39 is unconstitutional. The portion of that ordinance under which the defendants were charged is as follows:

> "(d) It shall be unlawful for any person to be present in a public place for the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution. Among the circumstances to be considered in determining whether a person is present in a public place for an unlawful purpose within the meaning of this subsection are: that such person is a known prostitute or procurer; that such person repeatedly beckons to, or stops or attempts to stop, or engages or attempts to engage in conversation, passersby, or repeatedly stops or attempts to stop motor vehicles by hailing or waving of arms or by other bodily gesture. No arrest shall be made for a violation of this section unless the arresting officer first affords the suspected person an opportunity to explain his/her conduct and satisfies himself that the suspected person had an unlawful purpose within this subsection. No one

shall be convicted of violating this subsection if it appears that there was a lawful purpose for the arrested person's conduct.

We do not reach the question of the constitutionality of this ordinance. The warrants under which defendants were charged are fatally defective, in that they do not charge an offense under this ordinance or any other statutory provision of which we are aware. The warrants do not allege where the offenses occurred, or whether the purported offenses were committed in places that were public places, and do not describe conduct proscribed by the ordinance. The cases are remanded for entries of dismissal as to each defendant. Since the trial court never acquired jurisdiction over the defendants, the ruling as to the constitutionality of the statute is vacated, that issue not having been properly before the trial court.

Vacated and remanded for dismissal.

Judges CLARK and WEBB concur.

RAY M. MANSFIELD, PLAINTIFF v. DALE RAY ANDERSON, DEFENDANT AND REUBEN ANDERSON GALYEANS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DIMENSION MILLING COMPANY, INC., THIRD-PARTY DEFENDANT

AND

WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY, PLAINTIFF v. DALE RAY ANDERSON, DEFENDANT AND REUBEN ANDERSON GALYEANS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DIMENSION MILLING COMPANY, INC., THIRD-PARTY DEFENDANT

No. 7822SC972

(Filed 2 October 1979)

1. Railroads § 5— grade crossing—reciprocal duties of trainmen and motorists

When approaching a railroad grade crossing, both trainmen and travelers on the highway owe a reciprocal duty to keep a proper lookout and to exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid a collision.

2. Railroads § 5.4— duty of motorist to look in both directions

While it is the duty of a railroad to give reasonable and timely warning of the approach of its train to a crossing, its failure to do so does not relieve a traveler on the highway of his duty to exercise due care for his own safety, and the highway traveler who knows or should know that he is approaching a railroad crossing may not proceed to and upon it without looking in both directions along the track merely because he has heard no signal of an approaching train.

3. Railroads § 5.3— obstructed view at crossing—duty of motorist to reduce speed

If a driver knows or should know that he is approaching a railroad crossing at which his view of the track is obstructed, he owes the duty to reduce his speed so that he can stop his vehicle, if necessary, in order to avoid a collision with an approaching train.

4. Railroads § 5.8— obstructed view at grade crossing—failure of motorist to reduce speed sufficiently—contributory negligence

The driver of a tractor-trailer which collided with a train at a grade crossing was contributorily negligent as a matter of law where his testimony showed that he was familiar with the crossing and knew that his view northward up the tracks to his right would be obstructed until he got within 3 or 4 feet of the tracks; he knew that his tractor-trailer was hauling a heavy load and that, even moving at only 3 to 4 miles per hour, a distance of 5 to 6 feet would be required in which to bring his vehicle to a stop; and when he reached the position where he knew he must be in order to see a safe distance up the track, he was moving at a speed which he knew would not permit him to stop his vehicle before it reached the crossing.

5. Railroads § 5.2— instructions on negligence in failure to remove trees and bushes—harmless error

In this action arising out of a railroad grade crossing accident, the trial court's instruction that plaintiff railway could be held negligent for failure to remove trees and bushes from the sides of the tracks if they obstructed the view of a traveler on the highway, if erroneous because there was no evidence showing such trees and bushes were on the railway's right-of-way, was not prejudicial to plaintiff railway where it was derivatively responsible for the negligence of its engineer in the operation of its train; the jury did not reach issues as to whether plaintiff railway was independently negligent for failure to keep its right-of-way clear of obstructions; and nothing in the record indicates that the instruction tended to bolster defendants' contentions of negligence.

6. Railroads § 5.1— negligent operation of train not insulated by motorist's negligence

A train engineer's negligence in operating a train too fast and in failing to give timely warning of its approach to a grade crossing was not insulated by the negligence of a motorist in failing to reduce the speed of his vehicle so that he could stop his vehicle before it reached the crossing after he reached a point where he could see whether a train was coming.

7. Trial § 40— agency of driver—question not moot

In an action arising out of a collision between a train and a tractor-trailer at a grade crossing, an issue as to whether the driver of the tractor-trailer was the agent of the owner was no longer moot where the appellate court held that the driver was contributorily negligent as a matter of law.

Judge MARTIN (Harry C.) dissenting.

APPEALS by plaintiffs and by defendant, Reuben Anderson Galyeans, from *Mills, Judge.* Plaintiffs appeal from judgment entered 23 May 1978 and defendant Galyeans appeals from said judgment and from order entered 27 June 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 20 August 1979.

On the morning of 19 March 1976, between 8:00 and 9:00 a.m., a railroad engine owned by Winston-Salem Southbound Railway Company and being operated by its engineer, Ray M. Mansfield, collided with a tractor-trailer at the grade crossing where N.C. Highway 47 crosses the railroad tracks. The tractor-trailer belonged to Reuben Anderson Galyeans and was being operated by Dale Ray Anderson. It was carrying a load of lumber owned by Dimension Milling Company, Inc. As result of the collision Mansfield was injured, and the railroad engine, the tractor-trailer, and the lumber being carried thereon was damaged. Anderson was not injured.

These two civil actions were brought by Mansfield and by the Railway Company against Anderson and Galyeans to recover damages sustained by the plaintiffs as a result of the collision. The issues and pleadings in the two cases were substantially similar, and the parties stipulated that they be tried jointly.

In their complaints plaintiffs alleged that Anderson was the agent of Galyeans and that Anderson had been negligent in driving too fast, in failing to stop before crossing the tracks, and in failing to keep a proper lookout.

In his answer defendant Anderson denied negligence and pled contributory negligence on the part of Mansfield. Galyeans also denied negligence on the part of Anderson, and he counterclaimed against Mansfield and the Railway Company for damages to the tractor-trailer. He further denied that Anderson was acting as his agent or employee at the time the accident occurred and cross-claimed against Anderson, both for damages to the tractor-

trailer and for indemnity should Galyeans be found liable to the plaintiffs. In reply to Galyeans's answer, plaintiff Mansfield pled last clear chance and alleged that if he, Mansfield, had been negligent, that negligence was insulated by the independent negligence of the driver Anderson.

Anderson then filed what he denominated as a "third-party complaint" against Mansfield and the Railway Company charging that Mansfield's negligence in failing to sound the whistle and the railroad's failure to clear vegetation within the right-of-way and to instruct its engineer Mansfield to operate the train at a reasonable rate of speed and to sound the train whistle proximately caused the damage to the tractor-trailer. Anderson alleged that because of such negligence on the part of Mansfield and the Railway Company, should there be any recovery by Galyeans against him he was entitled to contribution from Mansfield and the railroad. Mansfield and the Railway Company answered Anderson's "third-party complaint," denying negligence and counterclaiming for contribution from Anderson should Galyeans prevail on his counterclaim.

Galyeans, Mansfield, and the Railway Company also filed third-party complaints, alleging that Dimension Milling Company, Inc., was derivatively liable because Anderson was acting as its servant and employee when the collision occurred. Dimension denied negligence on the part of Anderson, but admitted Anderson was its agent, and filed a counterclaim against Mansfield and the Railway Company for damages to its lumber allegedly sustained in the collision.

The parties stipulated that between 8 a.m. and 9 a.m. on 19 March 1976, a railroad engine under the supervision and control of Mansfield as engineer was traveling south toward the railroad crossing at Highway 47 near the point where that highway intersects Highway 8. At the same time a tractor-trailer owned by defendant Galyeans and driven by defendant Anderson was traveling west on Highway 47 toward the same railroad crossing. Galyeans knew that Anderson was driving his tractor-trailer on that date. The tractor-trailer contained a load of lumber owned by Dimension Milling Company, Inc. Evidence pertinent to the questions presented on this appeal will be discussed in the opinion.

At the close of defendants' evidence, plaintiffs moved for a directed verdict on the ground that defendants' evidence showed Anderson's negligence as a matter of law. The motion was denied. The following issues were submitted to and answered by the jury:

1. Were the plaintiffs Ray M. Mansfield and Winston-Salem Southbound Railway Company injured and damaged by the negligence of the defendants Dale Ray Anderson and Dimension Milling Company, Inc.?

ANSWER: No.

2. Did the plaintiff Ray M. Mansfield by his negligence contribute to the injury and damage of the plaintiffs Ray M. Mansfield and Winston-Salem Southbound Railway Company?

ANSWER: _____

3. Did the plaintiff Winston-Salem Southbound Railway Company by its negligence contribute to its damage?

ANSWER: _____

4. What amount, if any, is the plaintiff Ray M. Mansfield entitled to recover for personal injuries?

ANSWER: $_____

5. What amount, if any, is the plaintiff Winston-Salem Southbound Railway Company entitled to recover for property damage?

ANSWER: $_____

6. Was the defendant Dale Ray Anderson the agent of the defendant Reuben Anderson Galyeans?

ANSWER: Yes.

7. Was the defendant Reuben Anderson Galyeans damaged by the negligence of the defendant Dale Ray Anderson?

ANSWER: No.

8. Was the defendant Reuben Anderson Galyeans damaged by the negligence of the plaintiff Ray M. Mansfield?

ANSWER: Yes.

9. Was the defendant Reuben Anderson Galyeans damaged by the negligence of the plaintiff Winston-Salem Southbound Railway Company?

ANSWER: _____

10. Was the defendant Dimension Milling Company, Inc., damaged by the negligence of the plaintiff Ray M. Mansfield?

ANSWER: Yes.

11. Was the defendant Dimension Milling Company, Inc., damaged by the negligence of the plaintiff Winston-Salem Southbound Railway Company?

ANSWER: _____

12. What amount, if any, is the defendant Reuben Anderson Galyeans entitled to recover for property damage?

ANSWER: $10,000.00.

13. What amount, if any, is the defendant Dimension Milling Company, Inc., entitled to recover for property damage?

ANSWER: $267.66.

Plaintiffs moved for judgment notwithstanding the verdict and for a new trial. The motion was denied. Plaintiffs appeal from judgment on the verdict that Galyeans recover $10,000.00 and that Dimension recover $267.66 against the plaintiffs. Defendant Galyeans also appeals, assigning as error the denial of his post-judgment motion to amend the judgment by striking out the jury's answer to issue number 6.

Brinkley, Walser, McGirt & Miller by Charles H. McGirt for plaintiff appellant Ray M. Mansfield.

Craige, Brawley, Liipfert & Ross by C. Thomas Ross and F. Kevin Mauney for plaintiff appellant Winston-Salem Southbound Railway Company.

Stoner, Bowers and Gray by Bob W. Bowers for defendant appellee Dale Ray Anderson.

Womble, Carlyle, Sandridge & Rice by Daniel W. Donahue for defendant and third-party plaintiff, Reuben Anderson Galyeans.

Jack E. Klass for third-party defendant appellee Dimension Milling Company, Inc.

PARKER, Judge.

PLAINTIFFS' APPEAL

Evidence presented by the parties concerning the speed of the train and whether the whistle was timely blown was sharply conflicting. Plaintiffs' evidence tended to show that the train approached the crossing at a speed of 25 to 30 miles per hour and that the whistle blew when the train was a quarter mile from the crossing and kept blowing with only short pauses until the train reached the crossing. Defendants' evidence tended to show that the train was going 40 to 50 miles per hour and that the whistle did not blow until approximately three seconds before the collision, when the tractor-trailer was already on the railroad tracks. By its answers to issues 8 and 10, the jury has resolved these conflicts against the plaintiffs, and on this appeal they have raised no question concerning the jury's determination that Mansfield, the engineer, was negligent in the manner in which he operated the train, nor have they questioned Mansfield's status as an agent and employee of the Railway Company. Thus, for purposes of this appeal it may be taken as established that Mansfield was negligent in his operation of the train and that the Railway Company is derivatively liable for his negligence.

Plaintiff-appellants assign error to the court's denial of their motion for a directed verdict on the issue of defendant Anderson's contributory negligence. In considering the question thus presented, we view the case in the context of the defendants' counterclaims against the plaintiffs, the defendants with respect to their counterclaims being in the position normally occupied by a plaintiff and plaintiff-appellants being in the position normally occupied by a defendant.

In its pleadings, Dimension Milling Company, Inc. acknowledged that Anderson was its agent, and the jury by its

answer to Issue No. 6 has found that Anderson was also the agent of the defendant Galyeans. Thus, both of these counterclaiming defendants would be derivatively responsible for Anderson's contributory negligence should it be determined that he was guilty of contributory negligence.

The court's ruling denying appellants' motion for a directed verdict on the ground of Anderson's contributory negligence must be sustained unless defendants' evidence, taken as true and interpreted in the light most favorable to them, so clearly shows his negligence to have been a proximate cause of the collision and of the counterclaiming defendants' resulting damages that it will support no other conclusion as a matter of law. *Neal v. Booth*, 287 N.C. 237, 214 S.E. 2d 36 (1975); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Defendants' evidence, taken as true and interpreted in the light most favorable to them, supplemented by such portions of plaintiffs' evidence as are favorable to the defendants, shows the following:

On the morning of 19 March 1976, Anderson, accompanied by a passenger, Fred Gothke, drove the tractor-trailer owned by Galyeans in a westerly direction on Highway 47 toward the grade crossing at which the railroad tracks crossed the highway at a right angle. In the vicinity of the crossing, Highway 47 was a paved two-lane road approximately 20 feet wide. The pavement was rough asphalt as the road crossed the railroad tracks. On either side of the tracks there was a regular railroad crossing sign, but there were no electrical or mechanical signs or devices to indicate the approach of a train to persons traveling on the highway.

The engine of the tractor which Anderson was driving was located beneath the driver's seat, and the driver sat right up at the front of the cab. The trailer was 40 feet long and was loaded with lumber. The lumber weighed approximately 40,000 pounds, and the total weight of the tractor-trailer and the lumber was 75,000 to 79,000 pounds. The weather was clear. It was not cold, and the window on the driver's side was half-way down.

Between 75 and 100 yards east of the tracks, the road passed over the crest of a hill. As Anderson drove over the crest of this hill, the railroad tracks came into his view. At that time he had already started slowing down and was going 25 to 30 miles per

hour when he topped the hill. After he crested the hill and started down hill toward the crossing, he continued to slow down by applying pressure to the brakes and shifting gears down. When he was 50 feet from the tracks, he was traveling at 8 to 10 miles per hour and had a view of the tracks about 50 feet to the north, but bushes and trees growing on a little bank 7 or 8 feet from the railroad tracks and approximately 50 or 60 feet from the road prevented him from seeing further in that direction. His window was rolled down, but he heard no whistle or train noise. As he approached nearer to the tracks, he leaned forward in the cab and started to look both ways for a train. He first saw the train when he was 3 to 4 feet from the tracks. At that time the train was 50 to 60 feet up the tracks to his right, approaching the crossing from the north. His speed at that moment was 3 to 4 miles per hour. He immediately braked in an attempt to stop. When he realized he could not stop completely without the train hitting the cab in which he and his passenger were riding, he accelerated in an attempt to clear the tracks. The tractor and about half of the trailer did clear the tracks, but the train engine struck the trailer near its rear wheels, the impact knocking the tractor-trailer off the tracks and south of the highway, a distance of about 49 feet. Anderson heard the whistle blow "approximately three seconds or so before it hit, it blew, then it hit." The train continued southward along the tracks until it came to a stop with the engine approximately 730 feet south of the highway crossing.

Anderson testified that he was familiar with the road on which he was traveling, having traveled on it "quite a few times" before, and that he was familiar with the crossing, having crossed it "many times." He testified that as he approached the crossing he had a conversation with his passenger, Gothke, about the crossing, and that when they were "topping the hill and coming over the hill I was telling him how bad the track was." Anderson further testified:

> "As I approached that track and was within five feet of the track I had not seen any train on the track at that time. I had not heard any noise.
>
> * * *
>
> "I didn't see the train and had no knowledge the train was coming until I was about 3 to 4 feet from the track. At

that time my first reaction was to naturally hit the brakes. I was going a very slow speed at that time. As soon as I hit the brakes—I kept moving forward the whole time—I realized that if I stopped I was going to be hit in the cab area so I decided to get across so at least I would not get hit where Mr. Gothke and I were seated.

* * *

"Yes, I knew, of course, if I needed to stop my truck it would be necessary to go even slower than the speed I was in if I had to put brakes on. As to whether it occurred to me as I came down the hill that maybe a train was using that track that morning, yes, that's what I was looking for. As to how many feet it takes to stop my truck, it depends on how fast I am going—when I am going 3 to 4 mph, I don't know. As to whether I don't have an opinion, 5 feet, something like that. As to whether at the speed I was traveling I could have stopped in 5 or 6 feet, something like that.

* * *

"When I first saw the train it was about 50 to 60 feet from the crossing and I was right up on the track. I couldn't see more than 50 to 60 feet in the direction the train was coming. No, there was no point when I was coming down the road, any point other than when I was within 3 or 4 feet of the tracks that I could see beyond 50 to 60 feet.

* * *

"Yes, I say I was familiar with this crossing and I passed it many times. I knew I couldn't see until I got within 3 or 4 feet of the track, I knew that before I came along. If I wanted to look I know I would have to get to that area and stop and look, but I didn't stop."

[1-3] It is well established that when approaching a railroad grade crossing both trainmen and travelers on the highway owe a reciprocal duty to keep a proper lookout and to exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid a collision. *Irby v. R. R.*, 246 N.C. 384, 98 S.E. 2d 349 (1957). While it is the duty of the railroad to give reasonable and timely warning of the approach of its train

to a crossing, its failure to do so does not relieve a traveler on the highway of his duty to exercise due care for his own safety, *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137 (1941), and the highway traveler who knows or should know that he is approaching a railroad crossing "may not proceed to and upon it without looking in both directions along the track merely because he has heard no signal of an approaching train." *Cox v. Gallamore*, 267 N.C. 537, 543, 148 S.E. 2d 616, 621 (1966). In addition, if in such a case the driver knows or should know that he is approaching a crossing at which his view of the track is obstructed, he owes the duty to reduce his speed so that he can stop his vehicle, if necessary, in order to avoid a collision with an approaching train. *Price v. Railroad*, 274 N.C. 32, 161 S.E. 2d 590 (1968); *Cox v. Gallamore*, *supra*.

[4] Application of these principles to the facts shown by the evidence favorable to the defendants in the present case discloses that the driver, Anderson, was contributorily negligent as a matter of law. His own testimony establishes that he was familiar with the crossing and knew it to be hazardous. In particular, he knew that his view northward up the tracks to his right would be obstructed until he got within three or four feet of the tracks. He also knew that his tractor-trailer was hauling a heavy load and that even moving at only 3 to 4 miles per hour he would require a distance of "something like" five to six feet in which to bring his vehicle to a stop. He admitted: "Yes, I knew, of course, if I needed to stop my truck it would be necessary to go even slower than the speed I was in if I had to put brakes on." Yet with this full knowledge of the hazards of the crossing, he failed to stop or to slow his vehicle sufficiently to permit him to avoid a collision. His own testimony establishes that when he reached the position where he knew he must be in order to see a safe distance up the track, he was moving at a speed which he knew would not permit him to stop his vehicle before it reached the crossing. By the time he could know whether a train was coming, his speed was such that it was already too late for him to avoid being hit. Albeit he was moving slowly and looking from side to side, he knew that his rate of travel was still too great to permit these cautions to be effective.

In holding a plaintiff in a railroad crossing case guilty of contributory negligence as a matter of law, our Supreme Court has said:

> It does not suffice to say that plaintiff stopped, looked, and listened. His looking and listening must be timely, so that his precaution will be effective. It was his duty to "look attentively, up and down the track," in time to save himself, if opportunity to do so was available to him. (Citations omitted.)

Parker v. R. R., 232 N.C. 472, 474, 61 S.E. 2d 370, 371 (1950).

In the present case the driver, Anderson, had the opportunity, of which he was fully aware, to know whether he could cross the tracks in safety. He testified that he knew he couldn't see until he got within three or four feet of the track, and that "[i]f I wanted to look I knew I would have to get to that area and stop and look, but I didn't stop." The conclusion is inescapable that, with full knowledge both of the danger and of the means readily available to save himself from it, he elected to take the chance that no train would be coming. Making such an election was contributory negligence as a matter of law.

[5] The plaintiff Railway Company also assigns error to a portion of the court's charge to the jury in which the court instructed that the Railway Company could be held negligent for failure to remove trees and bushes "from the sides of the tracks" if they obstructed the view of a traveler on the highway so that he could not cross the tracks in safety. Appellant contends this instruction was erroneous because there was no evidence concerning the width of the Railway Company's right-of-way or showing that the Company had any responsibility to clear any of the trees and bushes which had been described by the witnesses in this case. Even so, the instruction of which the Railway Company complains was given while the court was instructing on the third issue, which related to the Railway Company's independent contributory negligence, an issue which the jury did not reach. Although the instruction might also have had some relevance to Issues 9 and 11, the jury did not reach these issues either. Since the jury did not reach any issue to which the instruction pertained, and since in any event the Railway Company is derivatively responsible for the negligence of its agent, Mansfield, as to which

no error has been assigned, the error in the charge of which the Railway Company complains, if any error occurred, could not have been prejudicial to it. *Penny v. R. R. Co.*, 10 N.C. App. 659, 179 S.E. 2d 862 (1971), cited by the Railway Company, is not controlling. In that case, which also arose out of a railroad crossing accident, the trial court instructed the jury that there were "some obstructions along the right-of-way of the railroad track and the highway, such as an embankment along the track and trees and bushes along the track and highway at the southwest corner of the intersection." On appeal by the Railroad Company from judgment rendered on the jury's verdict finding against it on issues of negligence, contributory negligence, and damages, this Court found the instruction erroneous because a review of the record disclosed no evidence that any embankment, trees, shrubbery, or other obstructions were on defendant's right-of-way, and thus the instruction assumed the existence of material facts not in evidence. This Court found the error sufficiently prejudicial to warrant granting the Railroad Company a new trial, since, even though the plaintiff had relied primarily on the failure of the defendant to give reasonable and timely warning as its train approached the crossing, it was felt that the erroneous instruction had the tendency to bolster the plaintiff's contentions of negligence. In the present case the instruction of which the Railway Company complains did not so clearly assume the existence of any material facts not supported by the evidence, and more importantly, the form of the issues submitted in the present case and the jury's answers thereto make it abundantly clear that the jury did not find the Railway Company independently negligent for failure to keep its right-of-way clear of obstructions, and nothing in the record indicates that the instruction otherwise tended to bolster the appellees' contentions of negligence. The Railway Company's assignment of error directed to the court's charge to the jury is overruled.

[6] We also overrule plaintiff's assignment of error directed to the denial of their motion for judgment notwithstanding the verdict. In support of this assignment, plaintiffs contend that defendants' evidence not only discloses that Anderson was guilty of contributory negligence as a matter of law, a conclusion with which we have agreed, but also establishes that Anderson's negligence was the sole proximate cause of the collision. We find no

merit in this latter contention. As previously noted, for purposes of this appeal it is established that plaintiff Mansfield was negligent in operating the train too fast and in failing to give timely warning of its approach to the crossing by blowing the whistle. It is also established that his negligence is imputed to the plaintiff Railway Company under the doctrine of *respondeat superior*. These acts of negligence on the part of Mansfield continued to operate and were in force and effect up to the moment of impact. Mansfield's negligence was not "insulated" or "superseded" by that of Anderson, but the negligence of both combined to proximately cause the collision. "No negligence is 'insulated' so long as it plays a substantial and proximate part in the injury." *Brown v. R. R. Co.*, 276 N.C. 398, 402, 172 S.E. 2d 502, 505 (1970); *accord, Price v. Railroad*, 274 N.C. 32, 161 S.E. 2d 590 (1968); *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876 (1942).

Finally, plaintiffs contend that the court erred in denying their motion to set the verdict aside and for a new trial on the grounds that the verdict on issues 1, 7, 8 and 10 was against the greater weight of the evidence. This motion was addressed to the sound discretion of the trial judge and his ruling thereon is not appealable absent a showing of manifest abuse of discretion. *Rayfield v. Clark*, 283 N.C. 362, 196 S.E. 2d 197 (1973); *Williams v. Boulerice*, 269 N.C. 499, 153 S.E. 2d 95 (1967). No abuse of discretion has been shown.

Plaintiffs' remaining assignments of error have not been brought forward in their brief and for that reason are deemed abandoned.

The result on plaintiffs' appeal is that the judgment rendered against them and in favor of defendants Galyeans and Dimension Milling Company, Inc. is reversed on the grounds that the evidence shows the contributory negligence of their agent, Anderson, as a matter of law.

DEFENDANT GALYEANS'S APPEAL

[7] On his appeal, defendant Galyeans contends that the court erred in failing to instruct the jury that they should consider and answer issue number 6 only if they had first answered issue number 1 "yes," and in failing to allow his post-judgment motion

to amend the judgment by striking out the jury's answer to issue number 6. Galyeans admits that the issue as to whether Anderson was his agent was raised by the pleadings, and he does not contend there was any error in the admission or exclusion of evidence or in the court's instructions on the sixth issue other than in the court's failure to instruct the jury that they should not consider and pass on that issue unless they had answered the first issue in the affirmative. He contends that the jury's negative finding on the first issue rendered any question as to Anderson's status as his agent moot. If so, in view of our holding that Anderson was contributorily negligent as a matter of law, the question of his status as Galyeans's agent is moot no longer, and we see no sound reason why Galyeans should be permitted to relitigate that question.

The result is:

On plaintiffs' appeal, the judgment against them is

Reversed.

On defendant Galyeans's appeal,

No Error.

Chief Judge MORRIS concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting:

I respectfully dissent from the scholarly opinion of my distinguished colleague. This dissent is limited to the holding of the majority that Anderson was contributorily negligent as a matter of law. I concur in the other holdings set forth in the majority opinion.

Appellants' motion for a directed verdict based on Anderson's contributory negligence must be denied unless Anderson's evidence, taken as true and considered in the light most favorable to him, so clearly shows his negligence to have been a proximate cause of the collision and defendants' resulting damages that it will support *no other conclusion* as a matter of law. *Neal v. Booth*, 287 N.C. 237, 214 S.E. 2d 36 (1975).

As I view it, the controlling question in this appeal may be stated as follows:

Is it contributory negligence as a matter of law for the driver of a loaded tractor-trailer, when approaching a crossing with vision of the track partially obstructed by growth on the right-of-way, to enter upon the railroad crossing without stopping when the train operator is negligent in the operation of the train by travelling too fast and in failing to give timely warning of its approach to the crossing?

In reciting the evidence favorable to Anderson on the motion for directed verdict, the majority overlooks the important facts that the train was approaching the crossing at an excessive speed and failed to give any warning of its approach by horn, bell, whistle or other device and that vision of the crossing was partially obstructed by growth on the right-of-way. Anderson's actions must be viewed in this setting. He was not bound to anticipate that the train would approach the crossing in a negligent manner; however, his not hearing a warning signal of the approaching train would not justify his assuming that no train was approaching. *Neal v. Booth, supra.*

With no warning being given by the train crew that the train was approaching the blind crossing, would a reasonably prudent person stop his tractor-trailer in order to look for such train, when he was already looking and listening for the train as he approached the crossing at 3-4 m.p.h.? The majority say yes, or at least that he would operate his vehicle at a speed slower than 3-4 m.p.h., so as to be able to stop before reaching the rail. They further hold that such failure is "contributory negligence" as a matter of law.

The evidence establishes that Anderson reduced the speed of his vehicle as he approached the crossing; he was alert for the existence of an approaching train; he looked, and maintained a lookout for the train; he listened and continued to listen; he maintained his vehicle under control.

Anderson in approaching the track was in much the same position as the plaintiff in *Townsend v. Railway Co.*, 35 N.C. App. 482, 241 S.E. 2d 859 (1978), affirmed without precedential value by an equally divided Court in 296 N.C. 246, 249 S.E. 2d 801 (1978). In

Townsend, plaintiff was first faced with a sidetrack located forty-seven feet from the main line track. He stopped his vehicle at the sidetrack, looked, listened and proceeded forward. Townsend, on approaching the main line, was in circumstances similar to those facing Anderson as he approached the railroad track. Their view of the track was partially blocked because of obstructions near the track, both were going at a slow rate of speed, both were looking and listening; not hearing or seeing a train, both continued onto the crossing and were struck by an approaching train. In *Townsend*, the Court stated:

> A driver of an automobile or truck is expected to stop at a point before the crossing which yields a clear view of the tracks, and "look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company." *Johnson v. R.R.*, 255 N.C. 386, 388, 121 S.E. 2d 580, 582 (1961). "A traveler on the highway has the right to expect timely warning, but the engineer's failure to give such warning will not justify an assumption that no train is approaching." *Neal v. Booth, supra* at 242, 214 S.E. 2d at 39. "Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury." *Johnson v. R.R., supra* at 388-9, 121 S.E. 2d at 582.

Id. at 485-86, 241 S.E. 2d at 862.

This Court in *Townsend* held the truck driver was not negligent as a matter of law and that the question was properly for the jury.

Here, the evidence raises inferences that Anderson drove upon the main line at an unreasonable speed in that he could not stop short of the rail before seeing the train; that a reasonably prudent person in similar circumstances would have stopped, got out of the vehicle, gone to a position closer than three to four feet from the track to look for an approaching train. *See Moore v. R.R.*, 201 N.C. 26, 158 S.E. 556 (1931). However, those are not the *only* conclusions reasonably deducible from the evidence. *Neal v. Booth, supra*. That same evidence likewise gives rise to inferences that Anderson slowed his vehicle to a reasonable speed in approaching the crossing; that he kept his vehicle under proper con-

trol; that he kept a reasonable and proper lookout for approaching trains; that he listened in a reasonable manner for approaching trains; and that his failure to see the train was proximately caused by the obstructions along the tracks interfering with his view of the tracks. The question of contributory negligence necessarily involves several unknown quantities determinable only by the jury. The evidence does not support a finding of negligence as a matter of law.

In making his motion for directed verdict at the close of all the evidence, counsel for plaintiffs Mansfield and the railway company argued that the evidence disclosed as a matter of law that Anderson was acting as the agent of Galyeans at the time of the collision. The trial court simply denied plaintiffs' motions without specific reference to either the questions of agency or the negligence of Anderson. The trial court submitted issues to the jury of Anderson's negligence in the first and seventh issues, both being answered that he was not negligent. The question of Anderson being the agent of Galyeans was submitted to the jury in the sixth issue and answered in the affirmative. It must be remembered that Anderson made no claim against plaintiffs. In order for plaintiffs to defeat Galyeans' and Dimension's claims, they must show as a matter of law that Anderson was the agent of Galyeans and Dimension and that the negligence of Anderson was one of the proximate causes of their damages.

Dimension alleged Anderson was its agent; Galyeans denied Anderson was his agent and crossclaimed against him and Dimension. Plaintiffs' counsel did not move for a directed verdict against Galyeans on the limited question of Anderson's negligence, leaving the issue of agency for the jury. Their motions necessarily involved both negligence and agency. At the time the motions for directed verdict were made, it had not been judicially determined that Anderson was the agent of Galyeans when the collision occurred. This was later determined by the verdict of the jury. The evidence does not support a finding that Anderson was Galyeans' agent as a matter of law. The appellant railway company in its reply brief argues that this question of agency was properly submitted to the jury. In its principal brief, the railway company does not argue that the evidence supported a directed verdict on the agency issue at the close of all the evidence. Ab-

sent a finding of agency as a matter of law, the directing of a verdict against Galyeans would have been improper.

I find the evidence considered under the above-stated rule is not sufficient to constitute contributory negligence as a matter of law. It was a question for the twelve, and they have reconciled it. I vote to affirm.

DANIEL BOONE COMPLEX, INC., A NORTH CAROLINA CORPORATION, CAMILCO, INC., A VIRGINIA CORPORATION, CLARENCE A. McGILLEN, JR., AND LINDA S. BROYHILL McGILLEN, PLAINTIFFS v. MITCHELL FURST, INDIVIDUALLY, MITCHELL FURST, TRUSTEE, AND MATTHEW MEZZANOTTE, DEFENDANTS

MITCHELL FURST, TRUSTEE, PLAINTIFF v. CAMILCO, INC. AND CLARENCE A. McGILLEN, JR., DEFENDANTS

CAMILCO, INC., PLAINTIFF v. MITCHELL FURST, TRUSTEE, MITCHELL FURST, INDIVIDUALLY, DANIEL BOONE COMPLEX, INC., DALTON H. LOFTIN, TRUSTEE, JAMES J. FREELAND AND WIFE, MAXINE H. FREELAND, CENTRAL CAROLINA BANK AND TRUST COMPANY, ASSIGNEE, MATTHEW H. MEZZANOTTE AND WIFE, GENEVIEVE D. MEZZANOTTE, DEFENDANTS

No. 7815SC847

(Filed 2 October 1979)

1. **Estoppel § 4.3; Trusts § 13.3— furnishing purchase price of land—resulting trust—recognition of title in another—estoppel to assert equity of redemption**

Even though the property in question was conveyed by a corporation to secure an agent's loan to a second corporation, the second corporation was the owner of the equity of redemption, mortgagor, to the extent that it furnished the first corporation a portion of the purchase price; however, the second corporation was estopped by the doctrine of ratification from asserting the existence of its equity of redemption, since, in the execution of an agreement to repurchase the land upon certain conditions, the second corporation recognized the existence of the title in the agent.

2. **Conspiracy § 6— principal and agent—misrepresentation by agent—no conspiracy**

Evidence was sufficient to support the trial court's findings as to the absence of a conspiracy to defraud appellants where appellants contended that

an agent and principals conspired to defraud them of their interests in certain property by intentionally misrepresenting the identity of the lender of their money, but there was competent evidence before the court indicating that the principals had not instructed the agent to lie as to their identity.

3. **Fraud § 12— loan and mortgage with unidentified party—misrepresentation as to identity—inducement to borrow—failure to make finding—error**

Where the trial court found that the agent of lenders had intentionally misrepresented the identity of his undisclosed principals, the court erred in failing to determine what significance the agent's misrepresentation had on borrower's execution of the loan, since there was fraud only if borrower was induced by the misrepresentation to obtain money from the agent's lenders and would not have otherwise done business with those particular lenders.

4. **Fraud § 12— loan and mortgage with unidentified party—damage—sufficiency of evidence of fraud**

There was no merit to respondents' contention that the trial court did not err in its determination of no fraud because appellants suffered no damage as a result of an agent's misrepresentation concerning the identity of lenders, since the execution of a loan and mortgage agreement with a party with whom appellants did not wish to deal would be sufficient injury to constitute an essential element of fraud.

5. **Judgments § 41— validity of sale of stock—consent judgment—res judicata**

Appellants were estopped from contending that an agent's sale of stock of an amusement park corporation, purportedly authorized by the power of sale in a deed of trust, was invalid because no default existed under the mortgage terms, since the parties had entered into a consent judgment expressly providing that the sale of the stock was valid, the judgment had been entered by a federal court, and the judgment was therefore *res judicata* as to matters in issue between the parties and their privies.

6. **Principal and Agent § 5; Mortgages and Deeds of Trust § 4— apparent authority to act as agent—deed of trust—no description of land**

Though a person had apparent authority to act as an agent for a borrower in executing an agreement to modify the borrower's prior agreement with lenders and their agent, the modification agreement was nevertheless without legal effect, since such agreement failed to contain a description of the land being conveyed by deed of trust and therefore failed to satisfy the requirement of the statute of frauds.

APPEAL by plaintiffs in Case Nos. 75CVS561 and 74CVS882 and defendants in Case No. 74CVS889 from *McKinnon, Judge.* Judgment entered 14 December 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 30 May 1979.

Matthew Mezzanotte and his wife, Genevieve Mezzanotte, (hereinafter the Mezzanottes) contracted to purchase the Daniel

Boone Complex from James J. Freeland and his wife, Maxine H. Freeland, (hereinafter the Freelands). The complex is an 83 acre amusement park and campground in Hillsborough. The Mezzanottes assigned their rights in the purchase contract to Daniel Boone Complex, Inc. (hereinafter Daniel Boone), a North Carolina corporation then wholly owned by the Mezzanottes. The Mezzanottes sold all ten shares of Daniel Boone stock to Camilco, Inc. (hereinafter Camilco), a Virginia corporation wholly owned by its president and sole stockholder, Linda S. Broyhill a.k.a. Linda S. Broyhill McGillen. Camilco, as partial payment for the Daniel Boone stock, executed a promissory note in the face amount of $100,000 which was to become due and payable at the time of the Daniel Boone and Freeland closing. Daniel Boone, a wholly owned subsidiary of Camilco, was to go to settlement on the sale of the complex but did not have sufficient monies to pay the expected and required settlement costs. Clarence McGillen, husband of Camilco's president and sole stockholder, approached Mitchell Furst, principal in a Washington, D. C. title company, seeking a loan in an amount sufficient to satisfy the settlement costs. Furst, acting as agent for the Mezzanottes who were undisclosed principals, agreed to loan Camilco $136,550.73 in return for Camilco's secured note, obligating it to repay $273,101.46 with interest thereon at eight percent interest. As security for the loan, Furst received (1) a pledge of the ten shares of Daniel Boone stock, (2) the pledge of two $100,000 Metropolitan Real Estate Investment Trust notes, and (3) a conveyance to him of the legal title to the complex with a companion security and trust agreement. The loan had been structured as a Virginia transaction in order to evade the usury laws of North Carolina. At the initial loan closing attempt in North Carolina, McGillen had asked Furst whether his undisclosed principals were the Mezzanottes. Furst intentionally denied that the Mezzanottes were the undisclosed principals. After the loan was restructured as a Virginia transaction, the loan was made. Using the funds from the Furst loan to Camilco, Daniel Boone, Camilco's wholly-owned subsidiary, purchased the complex, acquired legal title, and then conveyed title to Furst to secure Furst's loan to Camilco.

A portion of the loan money, $20,000, was earmarked for payment of the premium for fire and casualty insurance coverage, which was required under the terms of the purchase money deed

of trust executed and given by Daniel Boone to Dalton H. Loftin, trustee for the Freelands, while $10,600 was allocated for title insurance and title search expenses.

Instead of using the $20,000 to purchase fire and casualty insurance, Gant Redmon, attorney for Camilco and Daniel Boone, applied a portion of the money for other purposes and arranged for financing of the insurance premiums through AFCO Credit Corporation. The Freelands, sellers and mortgagees of the complex, and Loftin, trustee, insisted that they receive acceptable evidence of fire and casualty insurance on the complex. They threatened to foreclose if they did not receive adequate assurances of coverage.

Meanwhile, Furst paid $5,000 of the $10,000 allocated for title insurance and search fees to A. B. Coleman, Jr., but no title insurance was ever procured by Furst for the benefit of Daniel Boone and Camilco. Furst wrote the Metropolitan Real Estate Investment Trust to advise them that their notes had been endorsed to him as collateral security. He was informed that the notes were not valid obligations of the trust, because they had not been authorized nor properly issued. Furst informed Camilco that the invalidity of the notes given as collateral security for their loan constituted a condition of default under the terms of the parties' agreement. Furst and Mezzanotte then took possession of the complex. Exercising his power of sale under the deed of trust, Furst sold the ten shares of Daniel Boone stock given him as collateral security and filed suit in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that the sale of the Daniel Boone stock under the power of sale was valid. Furst also filed suit in Case No. 74CVS889 in Superior Court, Orange County, praying for an injunction to prohibit Camilco and Clarence McGillen from interfering with his operation of the complex.

Camilco and Daniel Boone filed suit in Case No. 74CVS882 praying that (1) Camilco be declared the owner of the Daniel Boone stock, (2) the foreclosure sale be set aside, and (3) the $273,101.46 loan be declared usurious. Subsequently, McGillen, acting purportedly as Camilco's vice-president, entered into an agreement with Furst which provided for (1) entry of a consent judgment as to the validity of the sale of the stock, (2) refinancing

of the Furst-Camilco loan, (3) cancellation of the original $273,101.46 promissory note, and (4) tendering of $27,005 by Furst to cure the default in the Freeland purchase money trust and/or to contest the proposed foreclosure by the Freelands. Paragraphs 6 and 8 of the agreement provided:

> "6. The parties hereto reserve all rights arising from the original transaction between Mitchell Furst, Trustee, and Camilco, Inc.
>
> . . .
>
> 8. The parties hereto agree to forthwith dismiss without prejudice or to cause to be dismissed without prejudice, all lawsuits that have been instituted by and between them."

The United States District Court judge entered the following order:

> "Upon agreement of counsel and the undersigned, that they have settled and compromised their differences and that the declaratory judgment sought should be entered; it is
>
> ADJUDGED, ORDERED and DECREED that the plaintiff had the right to convey and did convey title in fee simple absolute to all the issued and outstanding shares of Daniel Boone Complex, Inc., a North Carolina corporation, to Judith S. Maley for Hillsboro Properties, Inc., a District of Columbia corporation, at a public sale held on July 8, 1974. . ."

Two weeks later, McGillen, apparently on behalf of Camilco, agreed with Furst to cancel the prior executed agreement.

Loftin, acting as trustee under the Freeland deed of trust, instituted foreclosure proceedings when they did not receive evidence that the complex was insured. The Freelands purchased the property at the foreclosure sale.

Camilco filed suit in Case No. 75CVS561 seeking damages allegedly arising from the original Furst-Camilco loan agreement on the grounds that: (1) Furst had misrepresented the identity of his undisclosed principals, the Mezzanottes; (2) the Mezzanottes and Furst had engaged in a conspiracy to deprive Camilco of its property interest in the complex; and (3) Furst had breached the parties' original agreement to take all steps necessary to prevent

foreclosure on the property by the Freelands, even though the Freelands had been willing to consent to a judgment against them.

Furst, the Mezzanottes, and Daniel Boone denied the material allegations of Camilco's complaint and pleaded the cancellation of the parties' original agreement as bar to enforcement of their agreement to prevent the foreclosure. They also asserted that the doctrine of *res judicata* and collateral estoppel precluded any claims arising from the sale of the Daniel Boone stock. Camilco amended its complaint to allege its right to recover under the theory of either a resulting or constructive trust.

The trial court allowed for consolidation of the suits in Case Nos. 74CVS882, 74CVS889, 75CVS561, and a companion case, Case No. 74CVS1135. After hearing all the evidence, the trial court concluded that: (1) the taking possession of the property and the foreclosing of the stock by Furst were not wrongful, and the McGillens and Camilco had not shown any right to damages from Furst or the Mezzanottes; (2) the Mezzanottes were entitled to judgment against Camilco for the recovery of the $100,000 note given to the Mezzanottes for the purchase of the Daniel Boone stock; and (3) Camilco is entitled to judgment against the Mezzanottes for double the amount of usurious interest paid and the amount of $5,600 with interest thereon for the title insurance policy premium that had never been obtained. Plaintiffs in Case Nos. 75CVS561 and 74CVS882 and defendants in Case No. 74CVS889, Daniel Boone, Camilco, and the McGillens appealed.

Everett, Everett, Creech & Craven, by Robinson O. Everett; and Robert E. Cooper, for plaintiff appellants.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by Josiah S. Murray III, for defendant appellees.

ERWIN, Judge.

The threshold issue essential to determination of the questions raised by appellants is what were the respective rights of the parties at the beginning of the loan transactions?

[1] Daniel Boone Complex, Inc. executed a purchase money deed of trust to the Freelands in the amount of $1,085,000 to secure the purchase price of the complex. This deed of trust had priority

over the amount of money secured by the Furst-Camilco loan. Camilco asserts that since it furnished the consideration, the $136,550.73 used for settlement costs, it was the owner of the equity of redemption *ab initio*. This is not altogether correct.

Daniel Boone's conveyance of title to the complex property to Furst was intended as a mortgage. A mortgage or deed of trust to secure a debt passes legal title to the mortgagee or trustee, as the case may be, but the mortgagor or trustor is looked on as the equitable owner of the land with the right to redeem at any time prior to foreclosure. This right, after the maturity of the debt, is designated as his equity of redemption. *Riddick v. Davis*, 220 N.C. 120, 16 S.E. 2d 662 (1941).

In the absence of circumstances indicating a contrary intent, where one person pays the purchase price for land, but legal title is taken in the name of another for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase. *Vinson v. Smith*, 259 N.C. 95, 130 S.E. 2d 45 (1963); *Grant v. Toatley*, 244 N.C. 463, 94 S.E. 2d 305 (1956); *Summers v. Moore*, 113 N.C. 394, 18 S.E. 712 (1893); *accord, Campbell v. Freeman*, 99 Cal. 546, 34 P. 113 (1893). To the extent that Camilco furnished funds enabling Daniel Boone to purchase the property, a resulting trust arose in its favor. *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979); *McWhirter v. McWhirter*, 155 N.C. 145, 71 S.E. 59 (1911); *Cunningham v. Bell*, 83 N.C. 328 (1880); Edwards and Van Hecke, Purchase Money Resulting Trusts in North Carolina, 9 N.C. L. Rev. 177, 185 (1930-31).

We are well aware that the presumption of a resulting trust which arises from the furnishing of consideration to another who purchases the property in his own name is a rebuttable one. Edwards and Van Hecke, *supra*. However, the record before us is void of any evidence that the money furnished by Camilco was intended as a loan, *Cf. In re Gorham*, 173 N.C. 272, 91 S.E. 950 (1917); *Lassiter v. Stainback*, 119 N.C. 103, 25 S.E. 726 (1896), nor have the respondents raised this contention below.

Even though the property was conveyed by Daniel Boone to secure Furst's loan to Camilco, Camilco was the owner of the equity of redemption, mortgagor, to the extent that it furnished

Daniel Boone a portion of the purchase price. *Cline v. Cline, supra.*

In Osborne, Nelson & Whitman's, Real Estate Finance Law, § 3.20, pp. 70-71 (1979), the law of mortgages of tripartite transactions is stated as follows:

> " '. . . The conveyance is nonetheless a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him, as a security for the money that he had previously borrowed with which to make the purchase.' "

Even so, we hold that Camilco is estopped by the doctrine of ratification from asserting the existence of its equity of redemption.

Camilco voluntarily executed the July 30th agreement, which stated:

> "WHEREAS, pursuant to the terms of a Security and Trust Agreement dated March 14, 1974, title in fee simple absolute to that real and personal property known as Daniel Boone Complex, located at Hillsborough, North Carolina, as further described in that deed dated March 14, 1974, was conveyed by Daniel Boone Complex, Inc., to Mitchell Furst, Trustee."

In the agreement, Camilco arranged to repurchase the land upon certain conditions. In doing so, it recognized the existence of the title in Furst. *See Council v. Land Bank*, 213 N.C. 329, 196 S.E. 483 (1938). Where, in the course of making a contract, the title of one party or the other to the property involved in the transaction is recognized, and the dealing proceeds on that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it. 31 C.J.S., Estoppel, § 125, p. 656. We hold that by executing the July 30th agreement, Camilco acknowledged the existence of Furst's ownership of the property in fee simple absolute. *Cf. Denson v. Davis*, 256 N.C. 658, 124 S.E. 2d 827 (1962).

Appellants contend that the trial court erred in finding that it had not been damaged by civil conspiracy or fraud on the part

of Furst and the Mezzanottes. We affirm the trial court's findings as to civil conspiracy, but we must reverse its ruling on the question of fraud.

[2] An action for civil conspiracy will lie when there is an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way, resulting in injury inflicted by one or more of the conspirators pursuant to a common scheme. *Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771 (1966); *Burton v. Dixon*, 259 N.C. 473, 131 S.E. 2d 27 (1963); 3 Strong's N.C. Index 3d, Conspiracy, § 1, p. 144. Appellants contend that Furst and the Mezzanottes conspired to defraud them of their interests in the property by intentionally misrepresenting the identity of the lender of their money. The trial court had competent evidence before it indicating that the Mezzanottes had not instructed Furst to lie as to their identity. Since there is competent evidence to support it, the trial court's finding must be upheld as to the absence of a conspiracy to defraud appellants.

[3] Where an owner of land is induced by fraud or misrepresentation to execute a mortgage which he would not have given if fully and truly informed of the circumstances, the fraud thus practiced on him will be fatal to the validity of the instrument. 59 C.J.S., Mortgages, § 141, p. 186. Only recently, we set out the elements of fraud in our State as follows:

> "While our courts have been hesitant to formulate an all-embracing definition of fraud, the Supreme Court has stated the following elements of actionable fraud in *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974): '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' "

Russo v. Mountain High, Inc., 38 N.C. App. 159, 162, 247 S.E. 2d 654, 656-57 (1978).

The trial court found in its findings of fact that Furst had intentionally misrepresented the identity of his undisclosed principals, the Mezzanottes. In doing so, the trial court focused on the Mezzanottes' reasons for not having their identity revealed; however, the court's crucial inquiry, as trier of fact, should have

focused on what significance Furst's misrepresentation of the identity had on Camilco's execution of the Furst-Camilco loan.

A contract can be avoided against one who through misrepresentation on his part or the part of his agent has become a party to it knowing that someone else was intended or knowing merely that he was not intended to be a party. *Pearce v. Desper*, 11 Ill. 2d 569, 144 N.E. 2d 617 (1957); Restatement (Second) of Agency § 304 (1957); *see also Walker v. Galt*, 171 F. 2d 613 (5th Cir. 1948), *cert. denied*, 336 U.S. 925, 93 L.Ed. 1086, 69 S.Ct. 656 (1949). The rule does not differ when the identity of a money lender is the fact being misrepresented. *Gordon v. Street*, 2 Q.B. 641 (1899). Persons borrowing money may very well consider the identity of their lender. In the instant case, Camilco has presented evidence indicating that it would not have dealt with the Mezzanottes for various reasons. We hold that the trial court erred in not making any determination of fact on the existence of this requisite element of fraud.

[4] Respondents contend that, even if evidence of the first four elements of fraud exists, the trial court did not err in its determination of no fraud, because appellants suffered no damage. It is true that the appellants do not presently have any liability on the original $273,101.46 promissory note. Should the court determine that the identity of the undisclosed lenders, the Mezzanottes, was essential to Camilco's execution of the loan and mortgage agreements, Camilco would be able to meet the requisite damage element of fraud. The execution of the loan and mortgage agreement with a party with whom it did not wish to deal would be sufficient injury.

Ordinarily, a party who has been fraudulently induced to enter into a contract or sale has a choice of remedies. He may repudiate the contract, and tendering back what he has received under it, may recover what he had parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action for deceit the damages caused by the fraud. *Parker v. White*, 235 N.C. 680, 71 S.E. 2d 122 (1952). In the instant case, appellants have chosen to affirm the original loan transaction. Their complaints pray the court to declare the loan usurious and to award punitive damages for the fraud. They have elected to maintain their actions, con-

cerning the validity of the Furst-Camilco loan, as one based on fraud. Thus, appellants are not entitled to rescission even if they establish fraud. *See Parker v. White, supra*; *Hutchins v. Davis*, 230 N.C. 67, 52 S.E. 2d 210 (1949); *Fields v. Brown*, 160 N.C. 295, 76 S.E. 8 (1912); *Van Gilder v. Bullen*, 159 N.C. 291, 74 S.E. 1059 (1912).

Should the trial court determine that Furst's fraudulent misrepresentation of the identity of his undisclosed principals induced Camilco to execute the loan and mortgage agreements, then Camilco would be entitled to recover any damages shown to result therefrom. *Clark v. Lumber Co.*, 158 N.C. 139, 73 S.E. 793 (1912); 37 Am. Jur. 2d, Fraud and Deceit, § 293, pp. 390-91. Thus, we need not decide the constructive trust issue presented by appellants.

[5] Appellants contend that Furst's sale of the Daniel Boone stock, purportedly authorized by the power of sale in the deed of trust, was invalid, because no default existed under the mortgage terms. We hold that the appellants are estopped from raising this contention.

In the order entered by Judge Bryan of the United States District Court for the Eastern District of Virginia, it was adjudged and decreed that Furst's sale of the Daniel Boone stock under the deed of trust's power of sale was valid. A declaratory judgment has the force and effect of a final judgment or decree. 22 Am. Jur. 2d, Declaratory Judgments, § 102, p. 970. Such a judgment is, therefore, *res judicata* of the matters at issue as between the parties and their privies, even where it is a consent judgment that is involved. 22 Am. Jur. 2d, Declaratory Judgments, § 102, p. 971.

In North Carolina, the law of consent judgments is stated as follows:

> "'A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court. (Citations) It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties. (Citations) It acquires the status of a judgment, with all its incidents, through the ap-

> proval of the judge and its recordation in the records of the court.' *McRary v. McRary*, 228 N.C. 714, 719, 47 S.E. 2d 27, 31. Accord: *Owens v. Voncannon*, 251 N.C. 351, 354, 111 S.E. 2d 700, 703; 3 Strong, N.C. Index, Judgments § 8."

Cranford v. Steed, 268 N.C. 595, 598, 151 S.E. 2d 206, 208 (1966). A valid consent judgment is entitled to *res judicata* effect, so as to preclude relitigation of the same claim or cause of action as was covered by the judgment. *See Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909 (1955); *Yancey v. Yancey*, 230 N.C. 719, 55 S.E. 2d 468 (1949); Annot., 91 A.L.R. 3d 1176-77 (1979); *see also Randle v. Grady*, 228 N.C. 159, 45 S.E. 2d 35 (1947).

The consent judgment in question expressly provides that the sale of the foreclosure stock was valid. Essential to such determination was the existence of default. We hold that appellants are estopped by the consent order from denying the existence of a default under the terms of the mortgage. Consequently, appellants' argument that Furst and the Mezzanottes wrongfully obtained possession of the complex is overruled.

A consent judgment is often referred to as an agreement of the parties. *See Owens v. Voncannon*, 251 N.C. 351, 111 S.E. 2d 700 (1959); *McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948); 8 Strong's N.C. Index 3d, Judgments, § 8, p. 24. Since it is a "creature" of contract, a consent judgment may be modified by the parties. However, because the order or judgment is entered by the court upon the consent of the parties, it cannot subsequently be opened, changed, or set aside, even with the consent of the parties, unless an appropriate legal proceeding is brought. *See King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945); *Keen v. Parker*, 217 N.C. 378, 8 S.E. 2d 209 (1940). The rationality of the rule is exemplified in the instant case. The parties entered into an agreement providing for, among other things, the entry of a consent judgment as to the validity of the sale of the Daniel Boone stock. Subsequently, the Federal District Court entered the consent judgment. Later, the parties attempted to modify their prior agreement and accordingly, declare the court's consent judgment void. This they could not do. Although the parties to a consent judgment are free to modify the terms of their contract, the consent judgment has all the incidents of a regular judgment, *see McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948), and is not a

nullity. The judgment could be altered only with the court's sanction in an appropriate proceeding.

[6] Appellants contend that the parties' modification agreement executed after the entry of the consent judgment was without legal effect. We agree.

Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact. *Ferguson v. Amusement Co.*, 171 N.C. 663, 89 S.E. 45 (1916); *Trollinger v. Fleer*, 157 N.C. 81, 72 S.E. 795 (1911). The rule is equally applicable when a corporation holds out or permits a person to hold himself out as its agent. *Moore v. WOOW, Inc.*, 253 N.C. 1, 116 S.E. 2d 186 (1960); 19 Am. Jur. 2d, Corporations, § 1164, p. 590.

Camilco contends that it is not bound by Clarence McGillen's execution of the modification agreement, because no resolution of the board of directors authorized it. No formal resolution is needed. The power to act in a particular matter may be inferred from the circumstances. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E. 2d 496 (1970); Robinson, North Carolina Corp. Law, § 13-6, p. 267 (2d ed., 1974); 19 Am. Jur. 2d, Corporations, § 1176, p. 601. In the present case, Clarence McGillen had acted for Camilco throughout their dealings with Furst and the Mezzanottes. He had taken care of most of the business affairs of the corporation and had executed the original agreement embodying the consent judgment. The execution of the original agreement was purportedly as vice-president. Camilco was aware of the former representation of his status and had subsequently ratified his execution of the agreement. The record reveals that after McGillen realized the adverse effect of his signing the second agreement, he sought to invalidate it by having the corporation repudiate his actions. Mrs. McGillen testified:

> "[W]ith respect to the purported agreement of August 17, 1974, my husband and I jointly prepared corporate minutes, being Exhibit '0-4,' reflecting disapproval of this particular transaction. Since the date is August 19, it would have been a meeting sometime after the 19th. The purpose of preparing these minutes was to reject the August 17 agreement."

The question of whether an agent of a corporation does have express, implied, or apparent authority is a question of fact. *Yaggy v. B.V.D. Co., supra.* We have no doubt that, at the very least, McGillen had apparent authority to execute the modification agreement.

Parties to a contract may, by mutual consent, agree to change its terms, but to be effective as a modification, the new agreement must possess all the elements necessary to form a contract. *Peaseley v. Coke Co.*, 12 N.C. App. 226, 182 S.E. 2d 810, *cert. denied*, 279 N.C. 512, 183 S.E. 2d 688 (1971); *Electro Lift v. Equipment Co.*, 4 N.C. App. 203, 166 S.E. 2d 454 (1969); 3 Strong's N.C. Index 3d, Contracts, § 18, p. 408. The parties' modification of their prior agreement is unenforceable.

A valid contract to convey land 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, 222 S.E. 2d 392 (1976); *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964); *Kelly v. Kelly*, 246 N.C. 174, 97 S.E. 2d 872 (1957). Since both mortgages and deeds of trust are conveyances of land, they must meet all the requirements for transferring land. Webster, Real Estate Law in North Carolina, § 230, p. 274 (1971).

Here, the modification agreement between the parties specifically referred to Exhibit A for description of the property. However, Exhibit A was not contemporaneously delivered and is not available to provide an adequate description of the land. *Cf. Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974). The modification agreement is unenforceable because of failure to satisfy the requirement of the Statute of Frauds, *see Herring v. Merchandise, Inc.*, 249 N.C. 221, 106 S.E. 2d 197 (1958), and the parties' original agreement (July 30th) was still in effect. Restatement of Contracts § 223 (1932).

We have carefully reviewed appellants' assignments of error dealing with the trial court's findings of fact. Except to the extent inconsistent with the foregoing text of this opinion, we find them to be supported by competent evidence. However, the court's

findings of fact as to damages and credits should be reconsidered in accordance with our opinion.

The judgment entered below is

Reversed and remanded.

Judges MARTIN (Robert M.) and ARNOLD concur.

HENRY JAMES, JR. v. JAMES B. HUNT, JR.

No. 7826SC930

(Filed 2 October 1979)

1. **Declaratory Judgment Act § 4.2— removal of Cemetery Commission member—applicability of Administrative Procedure Act—authority to suspend—availability of declaratory judgment**

A declaratory judgment action was appropriate to obtain a determination as to whether the Governor is required to follow the Administrative Procedure Act in removing for cause a member of the N. C. Cemetery Commission and whether the Governor has authority to suspend the Cemetery Commission member pending a hearing on his removal.

2. **Public Officers § 12— removal of Cemetery Commission member—inapplicability of Administrative Procedure Act—power to suspend pending hearing**

The Administrative Procedure Act is not applicable to the Governor's removal for cause of a member of the N. C. Cemetery Commission, and the Governor has the authority to suspend the Cemetery Commission member pending a hearing on his removal. G.S. 65-50; G.S. 143B-13(d).

APPEAL by plaintiff from *Ervin, Judge.* Judgment entered 26 June 1978, Mecklenburg Superior Court. Heard in the Court of Appeals 13 June 1979.

In 1976 plaintiff was appointed by Governor James E. Holshouser, Jr., as a member of the North Carolina Cemetery Commission for a term expiring 30 June 1980. On 13 February 1978, defendant, James B. Hunt, Jr., Governor of North Carolina, wrote to plaintiff requesting plaintiff's resignation as a public member of the North Carolina Cemetery Commission because plaintiff's "legal representation of thirteen cemeteries and

Cemetery Funds of North Carolina, Inc. erodes the public's confidence in the ability of the Cemetery Commission to represent the people in matters which the Commission considers". By letter dated 17 February 1978, directed to Governor Hunt, plaintiff refused to resign and gave his reasons for the refusal. On 8 March 1978, Governor Hunt wrote to plaintiff enumerating seven matters and instances, any one of which would, according to defendant, warrant plaintiff's removal from the Commission. He informed plaintiff that he could secure a public hearing by requesting such a hearing in writing within 10 days of receipt of the letter, and plaintiff was further informed that he was suspended from the Commission pending final determination of the matter.

On 9 March 1978, plaintiff, through counsel and in writing, demanded a hearing "in accordance with the provisions of N.C.G.S. 150A-1 *et seq.*" The letter advised that plaintiff intended to proceed with immediate discovery including adverse examination of defendant, suggested that the hearing officer should not be an appointee of defendant or have any connection with defendant "in any significant way", suggested that the defendant have no *ex parte* communication with the hearing officer, and advised that plaintiff would not recognize that portion of defendant's letter suspending plaintiff. On 14 March 1978, the Attorney General, through an Associate Attorney General, advised the Cemetery Commission as follows:

> "(1) The Governor has the power to remove an appointee to an independent administrative board, who was appointed by a governor for a definite term, when the Governor has 'cause' to do so;
>
> (2) The definition of 'cause' is to be determined by the Governor in the first instance;
>
> (3) Removal of the board member can be accomplished by executive order or by letter;
>
> (4) The Governor must afford the appointee an opportunity for procedural due process by giving the appointee an opportunity for a hearing prior to final removal at which the appointee may contest the determination of the facts giving rise to 'cause';

(5) Pending a hearing and until the matter is finally resolved, the Governor can suspend the appointee from the board;

(6) The Attorney General, upon request of the Governor, presents the evidence against the appointee at the 'cause' hearing."

By letter dated 14 March 1978, plaintiff, through counsel, wrote to the Chairman of the Commission advising him that he had suggested to defendant's legal counsel that defendant furnish plaintiff with any authority he had for the suspension of plaintiff but none had been received, that the opinion of the Attorney General did not have the force and effect of law, and requesting that the Chairman "simply ignore the inappropriate statements of Mr. Hunt and any subsequent unauthorized and nonsupportable edicts from the Attorney General". On 15 March 1978, the Chairman of the Commission issued a statement recognizing the suspension as proper on the advice of the Attorney General and further "[i]f Mr. James desires to contest the Governor's authority to suspend him from the Commission, that matter should be taken up with the Governor or the Attorney General."

On 28 March 1978, defendant, through counsel, notified plaintiff's counsel that a hearing would be held before Zia C. Schostal, a hearing officer of the North Carolina Personnel Commission at 10:00 a.m. on 12 April 1978 in Room 213, Dobbs Building, Raleigh. The letter further advised that the hearing officer would preside over the hearing and see that a transcript of the hearing was prepared and forwarded to defendant "for his decision in this matter". Defendant advised that he had determined that the Administrative Procedure Act "is not appropriate in this action" and that "the issues for the hearing will be those seven items outlined in Governor Hunt's March 8, 1978 letter to Mr. James. Those issues will be presented at the April 12 hearing by Deputy Attorney General Millard R. Rich, Jr. You may present a brief at the hearing or you may file a brief with Governor Hunt after the hearing." The hearing was later rescheduled for 10 May 1978.

On 8 May 1978, plaintiff instituted this action seeking, among other things (1) an order restraining the defendant and the hearing officer from conducting the hearing scheduled for 10 May; (2) a declaratory judgment that defendant has no power under G.S. 65-50 to suspend plaintiff from the Commission; (3) a declaratory

judgment that prior to plaintiff's removal from office he is entitled to a hearing and other procedural due process protections enumerated in the Administrative Procedure Act; and (4) an order directing defendant to reinstate plaintiff pending a decision by a hearing officer appointed pursuant to the Administrative Procedure Act.

The request for a restraining order was rendered moot by the voluntary cancellation of the hearing pending further decisions of the court.

Defendant filed answer in which he admitted that the State Personnel System Act is not applicable; that plaintiff is not an employee of the State as a member of the Commission, receives no salary, but is compensated on a per diem basis; that defendant had restricted the hearing officer's authority to the taking of evidence which would then be presented to defendant for his decision regarding plaintiff's removal from office; that the Administrative Procedure Act applies to agency decisions but averred that it does not apply to discretionary acts of the Governor because of constitutional separation of powers; that he is an officer of the State but averred that "as a constitutional officer vested with the executive power of the State, his discretionary decisions are not subject to definition as an 'agency decision' within the meaning of G.S. 150A-2." He denied that he had refused plaintiff a hearing before an impartial hearing officer; that the procedural rules established by him would not afford plaintiff the due process protection of the Administrative Procedure Act; that his "suspension and/or removal of plaintiff" from the Commission is an agency decision under the Administrative Procedure Act; that plaintiff is entitled to a hearing under the provisions of that Act; that he had no power to suspend plaintiff; and that the hearing officer is an appointee of defendant, averring that she is a registered Republican employed by Governor Holshouser and, as the most experienced hearing officer in the State, was selected because of her expertise.

As additional defenses the defendant averred that the court lacked jurisdiction because, since the matter involves a political question concerning a discretionary decision by the Governor of the State, the submission of the matter for judicial review at this point encroaches upon the doctrine of separation of powers, and

that the Governor has given plaintiff notice that he is entitled to a hearing on the merits and until that is done and a decision rendered, judicial review is premature. As a counterclaim, defendant alleged that he has the power and authority under G.S. 65-50 and 143B-13 to remove plaintiff permanently from his appointed position; that "prior to permanent removal, the Governor must give the plaintiff notice and an opportunity for a hearing which comports with procedural due process", but "is not bound by the provisions of the Administrative Procedure Act"; and that, incident to the power of removal, defendant has the power and authority to suspend plaintiff pending determination on the merits.

Defendant asked for dismissal of the complaint or, in the alternative, a judgment declaring that the defendant has the power to suspend plaintiff and that the Administrative Procedure Act does not apply to a hearing concerning the Governor's removal of the plaintiff from his appointive position on the Cemetery Commission.

The matter was heard on the pleadings and exhibits introduced by plaintiff (the letters detailed above). The court found facts, and no exception has been taken to those findings. On the facts found, the court concluded:

> "3. The issues addressed to this Court in this action are not 'ripe' for judicial review at this time. Declaratory relief should not be given by this Court regarding an ongoing administrative process. Until the Defendant Governor has made his final decision after a hearing on the merits, this matter does not present a justiciable 'case or controversy' within the purview of Article 26 of Chapter 1 of the General Statutes of North Carolina. The appropriate time and forum for review of this administrative decision is on judicial review after a hearing on the merits wherein the issues are crystallized and developed. Therefore, the case at bar is not 'ripe' for judicial scrutiny at this time, and the action should be dismissed pursuant to Rule 12(b)(6) and 12(b)(1) of the Rules of Civil Procedure and G.S. § 1-257.
>
> Although the foregoing is dispositive of the Plaintiff's Complaint and the Defendant's Counterclaims, having heard the

evidence and arguments of counsel on the merits, this Court further concludes as a matter of law;

4. The defendant Governor has the authority to suspend the Plaintiff for a reasonable period of time pending a hearing on the merits regarding Plaintiff's removal for cause. This power to suspend is incident to the Defendant's power to remove a Cemetery Commissioner for misfeasance, malfeasance, and nonfeasance pursuant to G.S. § 65-50 and G.S. § 143B-13. This suspension power is necessary to protect the welfare of the citizens of North Carolina. This power is analogous to the provision allowing summary suspensions of an occupational license pending a revocation hearing on the merits when a licensing agency finds that the public health, safety, or welfare requires such action under G.S. § 150A-3(c). If, in the interest of public welfare, summary suspension is authorized in a situation where an individual can lose his livelihood, then *a fortiori*, this Court is persuaded that the Governor's suspension of the Plaintiff should be upheld when the Plaintiff loses only the prestige of sitting on the Cemetery Commission and participating in the conduct of Commission business;

5. The Administrative Procedure Act does not apply to extraordinary matters entrusted to the sole discretion of the Defendant acting in his individual capacity as Governor and Chief Executive pursuant to a clear statutory command to exercise his individual judgment. The provisions of G.S. § 65-50 and G.S. § 143-13, regarding removal of Cemetery Commissioners, falls within this category of decisions. After a hearing on the merits, the courts, upon judicial review, will have the opportunity to scrutinize the record of the proceedings to determine whether the hearing afforded the Plaintiff comports with the constitutional due process requirements guaranteed the Plaintiff by the North Carolina and United States Constitutions.",

and dismissed the action for lack of a "ripe" justiciable "case or controversy". Plaintiff appealed, excepting to the above conclusions of law and assigning them as error.

Attorney General Edmisten, by Assistant Attorney General Thomas F. Moffitt, for defendant appellee.

James, McElroy & Diehl, by William K. Diehl, Jr., and Allen J. Peterson, for plaintiff appellant.

MORRIS, Chief Judge.

The trial judge held that until the defendant has made his final decision after a hearing on the merits, no justiciable "case or controversy" exists and that, therefore, the case is not "ripe" for judicial scrutiny at this time. We disagree. Plaintiff's complaint raises two questions: Whether the Administrative Procedure Act (G.S. 150A-1 *et seq.*) is applicable and must be followed in the removal proceedings initiated by defendant and whether defendant has the authority to suspend plaintiff pending a hearing on the merits.

It is true that plaintiff is entitled to a hearing. This is conceded by defendant and affirmatively averred in his counterclaim. After such a factual hearing is held, appeal may be had from the determination resulting therefrom. Plaintiff does not seek, in this action, to have any *factual* controversy settled. The question of whether the facts constitute cause for removal is not now before us. The only issues sought to be determined are questions of law.

The Declaratory Judgment Act (G.S., Chapter 1, Art. 26) provides that courts shall have the power to "declare rights, status, and other legal relations" regardless of whether "further relief is or could be claimed.". G.S 1-253.

By G.S. 1-254 provision is made for any person interested "under a deed, will, written contract or other writings constituting a contract" or whose rights may be affected by a statute, ordinance, contract, or franchise to have determined "any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise . . ." and G.S. 1-255 sets out those who may apply for a declaration of rights or legal relations with respect to trusts or estates of decedents, infants, lunatics, or insolvents. However, G.S. 1-256 specifically provides that "[t]he enumeration in §§ 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in § 1-253 in any proceedings where declaratory relief is sought, in which a

judgment or decree will terminate the controversy *or remove an uncertainty*" (emphasis supplied) and G.S. 1-264 declares that the Declaratory Judgment Act is intended to be remedial, that "its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered".

> "The courts have on numerous occasions stated that the Uniform Declaratory Judgment Act furnishes a particularly appropriate method for determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. (Citations omitted.)" *Woodard v. Carteret County*, 270 N.C. 55, 59-60, 153 S.E. 2d 809, 812 (1967).

[1] Here plaintiff alleges that defendant must follow the procedure set out in the Administrative Procedure Act. (Chapter 150A, General Statutes of North Carolina.) Defendant maintains this statute should be construed as having no application under these circumstances. Plaintiff urges that defendant has no authority to suspend him pending final determination on the merits. Defendant, on the other hand, urges a construction of the statutes, G.S. 65-50 and G.S. 143B-13(d), to allow for suspension.

We think this is clearly an appropriate case for declaratory judgment. *See Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971).

[2] We now discuss the problem of whether, in removing plaintiff, the defendant must follow the procedure set up in the Administrative Procedure Act.

Article 9, Chapter 65 of the General Statutes of North Carolina, is entitled "North Carolina Cemetery Act". That Act establishes "in the Department of Commerce a North Carolina Cemetery Commission with the power and duty to adopt rules and regulations to be followed in the enforcement of this Article." G.S. 65-49. The Governor is given the power to appoint the seven members of the Commission (for fixed terms with staggered expiration dates), and is also given "the power to remove any member of the Commission from office for misfeasance,

malfeasance, and nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973". G.S. 65-50.

Section 13 of Chapter 143B (Executive Organization Act of 1973) is entitled "Appointment, qualifications, terms, and removal of members of commissions". It provides that commission members must be residents of the State, establishes criteria for the use of the Governor in selecting appointees, sets out the events the happening of which would create a vacancy in a commission membership, delineates proscribed political activities, and specifically provides: "In addition to the foregoing, any member of a commission may be removed from office by the Governor for misfeasance, malfeasance, and nonfeasance." G.S. 143B-13(d).

It is clear from the statutory provisions that members of the Commission are not removable at the pleasure of the Governor, nor does defendant so contend. Indeed the statutory provisions specifically provide that the removal must be for cause. This is entirely necessary, given the duties and purpose of the Commission. It is charged "with the power and duty to adopt rules and regulations to be followed in the enforcement" of the North Carolina Cemeteries Act, including the licensing of cemeteries operating in this State. It must act with entire impartiality. The duties of the Commission are neither political nor executive. They are predominantly quasi-judicial and quasi-legislative. Its members are required to exercise the judgment of experts in the field "appointed by law and informed by experience". *Illinois Central Railroad Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454, 51 L.Ed. 1128, 1134, 27 S.Ct. 700, 704 (1907).

The question of removal of appointees by the Chief Executive Officer of the United States has often been discussed and reference is frequently made to a trilogy of cases in which the problem is discussed in much detail. *See Myers v. United States*, 272 U.S. 52, 71 L.Ed. 160, 47 S.Ct. 21 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602, 79 L.Ed. 1611, 55 S.Ct. 869 (1935); and *Wiener v. United States*, 357 U.S. 349, 2 L.Ed. 2d 1377, 78 S.Ct. 1275 (1958). In *Humphrey*, the Court considered whether President Roosevelt had the power to remove a member of the Federal Trade Commission because he felt that the aim of his administration with respect to the work of the Commission could best be carried out with personnel of his own choosing despite

the provision in the Federal Trade Commission Act that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620, 79 L.Ed. at 1614, 55 S.Ct. at 870. The Court, in holding that removal by the President could only be for cause, said:

> "The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control, cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.
>
> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' Andrews, The Works of James Wilson (1896) vol. 1, p. 367 and Mr. Justice Story, in the first volume of his work on the Constitution, 4th ed. § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' And see *O'Donoghue v. United States*, supra (289 U.S. 530, 531, 77 L.Ed. 1361, 1362, 53 S.Ct. 740).
>
> The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly

disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." 295 U.S. at 629-30, 79 L.Ed. at 1619-20, 55 S.Ct. at 874-75.

Our Court, in 1897, in holding that the Governor had the right to suspend a member of the Railroad Commission of North Carolina, said:

"We realize the responsibilities of this Court in settling the line of demarkation between the legislative, executive and supreme judicial powers, which, by constitutional obligation, must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free alike from the palsied touch of interest and subserviency and the itching grasp of power. Should the legislative or executive departments of the State cross that line we will put them back where they belong; but upon us rests the equal obligation of keeping upon our own side. This is a question not of discretion, but of law; a matter not of expediency, but of right.

. . .

Upon the foregoing authorities we are of opinion that the disputed provisions of the act are constitutional and that the power of suspension rests in the hands of the Governor, which, when exercised in an orderly manner, is not reviewable by the courts. Whether the action of the Governor was justified by the facts, which he alone could find, is not for us to say." *State ex rel. Caldwell v. Wilson*, 121 N.C. 425, 471-72, 28 S.E. 554, 562 (1897).

The statutory authority of defendant to remove appointees to the Cemetery Commission for cause is not objectionable as constituting a delegation of legislative or judicial power to the executive branch of government. *State v. Morton*, 140 W.Va. 207, 84 S.E. 2d 791 (1954). *See generally* 38 Am. Jur. 2d, *Governor*, § 8 (1968).

A case strikingly similar to the case before us is *Hall v. Tirey*, --- Okl. ---, 501 P. 2d 496 (1972). A member of the State Board for Property and Casualty Rates brought an action to review the Governor's action in removing him from office. The

trial court held that the record before the hearing examiner did not contain sufficient evidence to justify removal. On the Governor's appeal, the Supreme Court held that the proper procedure for the appointee to obtain review of the Governor's action was by petition for writ of mandamus in the trial court to require the State's payroll officer to pay the compensation the appointee claimed. The Governor had notified the appointee that he could request a hearing and suspended him pending final determination of the matter. The appointee challenged the Governor's power to suspend him and refused to obey the executive order. The Governor appointed a hearing examiner whose function was to conduct the presentation of evidence but not to make a decision or find facts. A transcript was prepared for the Governor who entered a final order of removal. The order contained findings of fact and conclusions of law. The Court, after holding that the Governor had the power to suspend and remove, noted that the appointee claimed that his removal was subject to judicial review under the Administrative Procedure Act. The Court adopted the rationale of Humphrey's Executor in holding that judicial review was appropriate but held that the Administrative Procedure Act did not apply to removals by the Governor.

We think this is a logical conclusion. The early opinions in other states indicate that the propriety of a Governor's exercise of his power of removal was not reviewable at all. *See* Annot., 52 A.L.R. 7 (1928) and Annot., 92 A.L.R. 998 (1934). In recent years, courts have shown an increased willingness to review. *See Humphrey's Executor*, *Weiner*, and *Hall*, supra. However, we find no case nor indication by any court that the courts should bind the Governor to any statutory procedure unless the Constitution of the State or the statutory provisions giving him the power of removal specify a specific procedure therefor. Here, G.S. 65-50 gives the Governor the power to remove a member of the Cemetery Commission for cause "according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973". There is no reference to the Administrative Procedure Act. Nor does G.S. 143B-13(d), which gives the Governor power to remove for cause any member of a commission, refer to the Administrative Procedure Act. Had the General Assembly intended for the Governor to be bound by the provisions of the Administrative Procedure Act, it could have referred to that Act rather than the Executive

Organizations Act. Absent a specific legislative enactment requiring removals by the Governor to be subject to the Administrative Procedure Act, we do not believe the Act is applicable to removals by the Governor, and we so hold.

[2] We turn now to appellant's contention that the Governor had no power or authority to suspend him. It is true that the statutes giving the Governor the power of removal do not specifically include the power of suspension. However, the suspension of public officers pending a removal for cause seems to be fair and it is quite often essential. Although there is some authority contra [*see, e.g., Cull v. Wheltle*, 114 Md. 58, 79 Atl. 820 (1910) and *Gregory v. Mayor of the City of New York*, 113 N.Y. 416, 21 N.E. 119 (1889)], "[t]he power to suspend is generally considered as included in the power of removal for cause, since a suspension is merely a less severe disciplinary measure". 63 Am. Jur. 2d, *Public Officers and Employees*, § 256 (1972). In *State ex rel. Carlson v. Strunk*, 219 Minn. 529, 18 N.W. 2d 457 (1945), the Governor had suspended and removed one Wenzel as Commissioner of Conservation, under a statute giving him the power to remove, and had appointed an acting commissioner on the day Wenzel was suspended. The Court upheld the suspension and quoted with approval from *State ex rel. Clapp v. Peterson*, 50 Minn. 239, 244, 52 N.W. 655, 655-56 (1892), where the Court said:

> "Whether the power to suspend is included generally in the power to remove, so that the former may be exercised independently of the latter, we need not consider. But we are very clear that the power of temporary suspension, so far as necessary and ancillary to the power to remove, is included in the latter. This is under the familiar doctrine of implication, that, where a constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. Cooley, Const. Lim. 78.
>
> 'As is well said in *State v. Police Com'rs*, 16 Mo. App. [48] 50: "The suspension of an officer pending his trial for misconduct, so far as to tie his hands for the time being, seems to be universally accepted as a fair, salutary, and often necessary incident of the situation. His retention at such a time of all the advantages and opportunities afforded by of-

ficial position may enable and encourage him, not only to persist in the rebellious practices complained of, but also to seriously embarrass his triers in their approaches to the ends of justice." * * *

'The safety of the state, which is the highest law, imperatively requires the suspension, pending his trial, of a public officer,—especially a custodian of public funds,—charged with malfeasance or nonfeasance in office. *Suspension does not remove the officer, but merely prevents him, for the time being, from performing the functions of his office;* and from the very necessities of the case must precede a trial or hearing.' (Italics supplied.)" 219 Minn. at 532-33, 18 N.W. 2d at 459.

Accord: *Burnap v. United States*, 252 U.S. 512, 64 L.Ed. 692, 40 S.Ct. 374 (1920); *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E. 2d 231 (1956). *See also Caldwell v. Wilson*, supra. The view above expressed appears to us to be by far the better reasoned view. We, therefore, hold that the Governor did not exceed his power and authority when he suspended appellant.

We do not discuss the cause for the suspension and removal. That is not before us. We merely hold that the Governor has the power to suspend and remove for cause and that the Administrative Procedure Act has no applicability to the Governor's removal for cause.

The trial court correctly dismissed the action but the matter is remanded for the entry of judgment in conformity with this opinion.

Judges PARKER and MARTIN (Harry C.) concur.

IN THE MATTER OF THE WILL OF GLENN EDISON SIMMONS, DECEASED

No. 7825SC1044

(Filed 2 October 1979)

1. **Wills § 22.1; Evidence § 11.6— caveat proceeding—testimony by preparer of will—mental capacity**

Testimony by the attorney who prepared the paper writing in question in a caveat proceeding regarding transactions and communications with the deceased was properly admitted for the reasons that (1) he was not an "interested witness" within the meaning of G.S. 8-51 and (2) his testimony was not hearsay because it was offered to show the basis of his opinion that testator had the mental capacity to execute a will.

2. **Wills § 19— question raised by caveator—further explanation by witness proper**

In a caveat proceeding where caveators first raised a question concerning a "no visitors" sign on deceased's hospital door and where a witness was allowed, without objection, to testify on cross-examination that the sign was put there at the deceased's request, the trial court did not err in permitting the witness to explain how she reached this opinion.

3. **Wills § 19; Evidence § 11.3— caveat proceeding—testimony about deceased's conduct—independent knowledge of witness**

The trial court in a caveat proceeding did not err in allowing a woman who lived with deceased and had his children but who was not his wife to testify that deceased gave "accurate" responses to questions at the social security office regarding the preparation of an affidavit legitimating the witness's children, since the witness stated that the responses were accurate according to her personal knowledge, and G.S. 8-51 does not prevent a witness from testifying as to the acts and conduct of deceased where the witness is merely an observer and is testifying to facts based upon independent knowledge.

4. **Wills § 23— caveat proceeding—failure to give limiting instruction—no request**

No prejudicial error was committed by the trial court in a caveat proceeding in failing to give a limiting instruction with respect to testimony of witnesses who testified that, in their opinion, deceased had testamentary capacity, since no request for such instruction was made.

5. **Wills § 23— caveat proceeding—evidence of transactions and communications with deceased—limiting instruction proper**

The trial court in a caveat proceeding did not err in giving a limiting instruction which provided that testimony by the heirs of deceased concerning personal transactions and communications with deceased should be considered only for the purpose of showing the basis of their opinions with respect to deceased's mental capacity, and such instruction did not allow the jury to give unlimited consideration to the testimony of the attorney who prepared the will

or to that of the designated executrix under the will, nor could the jury take the instruction to mean that the rule did not apply to the witness who lived with deceased and bore his children, but was not married to him.

6. **Wills § 23— mental condition of testator—no evidence of undue influence—limiting instruction proper**

The trial court's instructions limiting certain testimony of caveator's witnesses regarding conversations with the deceased to the issue of mental capacity were proper, since such testimony concerned deceased's mental condition only; there was no independent evidence of undue influence; and the court's use of the expression "mental capacity" properly precluded the jury from considering the testimony on the issue of undue influence.

7. **Wills § 13— caveat proceeding—propounders entitled to open and close jury argument**

The trial court in a caveat proceeding did not err in allowing propounders to open and close the arguments to the jury.

APPEAL by caveators from *Gaines, Judge.* Judgment entered 29 June 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 23 August 1979.

This is a caveat proceeding instituted on 14 March 1978 by the six legitimate sons and daughters of the deceased who claim that the "paper writing" presented for probate as the last will and testament of their father one week following his death was not his last will and testament for the reasons that he lacked testamentary capacity at the time he executed such "paper writing" and that its execution was procured through the exercise of undue influence. Propounders, who are the woman with whom the deceased was living at the time of his death, the four illegitimate children he had by her, and the executrix of the purported will, duly answered the caveat, denying the material allegations therein. At trial evidence tending to show the following was offered:

Glenn Edison Simmons died on 16 November 1977 survived by his wife Hattie, from whom he had been legally separated since 1967; six sons and daughters ranging in age from twenty to forty-two who were born to the deceased and his wife during their marriage; and four sons and daughters ranging in age from seven to seventeen who were born out of wedlock to deceased and Ruth Townsend, a woman whom he had dated since 1957 and lived with since 1970. By a writing dated 16 August 1977, pur-

porting to be a written attested will, he sought to leave all his property to Townsend and their four children.

Propounders offered the testimony of Larry Pitts, the attorney who drew the will in question, and of Pitts' secretary who typed it. Both testified that the paper writing presented for probate was the document prepared by them for the deceased on 16 August 1977; that deceased had duly executed such document in their presence; and that they had thereafter signed the document as attesting witnesses.

Pitts testified further that he had known the deceased for "something over thirty (30) years"; that he had represented the deceased on "various and sundry matters" since 1968; that in August 1977 he had discussed and prepared divorce papers for the deceased and had subsequently filed a divorce action against Hattie Simmons; that on 16 August 1977 he prepared, at deceased's request, the script at issue here and a social security affidavit legitimating the four children of Townsend. Pitts said he knew that deceased had cancer and was undergoing radiation therapy, but that he had not detected any changes in deceased's mental or physical condition. Based upon his dealings with and observations of the deceased, Pitts stated that, in his opinion, deceased possessed the requisite testamentary capacity. Pitts was also allowed to relate that deceased had said

> several times that he was not going to leave anything to the children of [Hattie] . . . because they were grown and on their own and these four children that he had named by Ruth Townsend were young and he did not feel like she could or would be able to support them. . . .

Caveators called ten witnesses, four of whom were the deceased's legitimate sons, who testified in substance that their father lacked testamentary capacity because of his deteriorating physical condition. To support their opinions, they related that their father's memory began failing after a biopsy and subsequent surgery in the Summer of 1977; that he had difficulty remembering who they were on several occasions; that he sometimes forgot their names; and that Ruth Townsend and her children were almost always present when they visited their father at the hospital or at his home.

Upon objection by propounders, the court limited certain testimony offered by caveators by instructing the jury that such testimony was to be considered "only for the purpose of offering evidence concerning his mental capacity." Under such an instruction, Max Simmons testified that his father's physical condition was so weak in August 1977 that he had trouble eating and drinking; that he could not see to drive at night; and that his mind was failing. He recalled that there was friction between some members of the Simmons' family and the Townsends, but that Ruth Townsend's reaction to him during his father's hospitalization had been "overly friendly, happy to see us all and everything. Just as nice as she could be." On cross-examination, propounders established that Max Simmons did not send his father birthday or Christmas presents; that he had not gone to visit his father after seeing him in the hospital in June 1977 and learning that he would die from the cancer within three to six months; that "[s]ometimes my father would be perfectly normal and then other times he would be a different person. . . . Sometimes he could recollect things that he wanted to do and other times he could not"; and that this witness had not seen his father on 16 August 1977 so as to know deceased's mental condition on that date.

The three remaining sons of the deceased testified to similar effect. None of them believed that their father possessed testamentary capacity, but none of them had talked with him on 16 August 1977, and all of them stated that at times he was perfectly normal.

Caveators also called William E. Butner, a local attorney, who testified that he had prepared a will for the deceased on 8 March 1969; that "Mr. Simmons was a person of strong will. He knew what he wanted to do, but he sought advice concerning business matters from more than one person. After he asked for advice and made up his mind, that was his decision"; that he had seen the deceased in the Summer of 1977; and that, although he noticed a change in deceased's physical condition, "[h]e did not say anything to me that indicated a change in his mental condition. . . ."

Caveators called adversely Ruth Townsend and Margie Hedrick, the executrix under the "paper writing" dated 16

August 1977. Townsend testified as to her relationship with the deceased; that their first child was born in 1960 and the last in 1970; and that they had all lived together since 1970 "when he purchased the trailer which we lived in." She related that arguments sometimes erupted between the Simmons and the Townsends, but that the Simmons' children had occasionally visited their father at the trailer and that she had never tried to keep them from seeing him. In her opinion, although the deceased was weak after his surgery, "[h]e did not get confused about things, nor did he ever confuse his children."

Hedrick testified in substance that she had been the deceased's bookkeeper since about 1962; that she had handled a lot of his business matters; that she had driven him to his attorney's office on the day the purported will was drawn; and that, in her opinion, the deceased had testamentary capacity.

Before the case was submitted to the jury, the parties stipulated that the script offered for probate was signed and executed according to law. The following issues were submitted to and answered by the jury as indicated:

1. Was the paper writing dated August 16, 1977 offered for probate as the Last Will and Testament of Glenn Edison Simmons signed and executed according to law?

ANSWER: YES

2. At the time of the signing and execution of said paper writing dated August 16, 1977, did the said Glenn Edison Simmons, lack sufficient mental capacity to make and execute the Last Will and Testament?

ANSWER: NO

3. Was the execution of the said paper writing dated August 16, 1977 procured by undue influence of Margie S. Hedrick, Ruth L. Townsend or others?

ANSWER: NO

4. Is the paper writing dated August 16, 1977 and each and every part thereof, the Last Will and Testament of Glenn Edison Simmons?

ANSWER: YES

From judgment entered on the verdict, caveators appealed.

Gaither and Gorham, by James M. Gaither, Jr., and J. Samuel Gorham, III, for caveators appellants.

Corne and Pitts, by Larry W. Pitts and Stanley J. Corne, for propounders appellees.

HEDRICK, Judge.

By various assignments of error, based on numerous exceptions noted in the record, caveators attack the admission of certain testimony of the witnesses Pitts, Townsend and Hedrick. Caveators argue that their testimony was hearsay and in violation of the "Dead Man's" statute, G.S. § 8-51. They contend that the hearsay rule operates to exclude certain of this testimony because such testimony was offered solely to prove the truth of declarations made by decedent before and after execution of the purported will. Furthermore, caveators assert that the provisions of G.S. § 8-51 prohibiting an interested party from testifying in his own behalf and against the estate "concerning a personal transaction or communication between the witness and the deceased person" compel the exclusion of the challenged testimony.

[1] With respect to the testimony of Pitts, the attorney who prepared the "paper writing" in question, we are of the opinion that his testimony regarding transactions and communications with the deceased was properly admitted for the reasons that (1) he is not an "interested witness" within the meaning of G.S. § 8-51; *Hall v. Holloman*, 136 N.C. 34, 48 S.E. 515 (1904); *Propst v. Fisher*, 104 N.C. 214, 10 S.E. 295 (1889); and (2) his testimony was not hearsay because it was offered "mostly for the purpose of showing the basis for his opinion that [testator] at the crucial time in question had the mental capacity to execute a will." *In re Will of Ricks*, 292 N.C. 28, 42, 231 S.E. 2d 856, 866 (1977).

[2] Similarly, caveators contend that certain testimony of the witness Townsend was incompetent because it was either hearsay, or in violation of G.S. § 8-51, or both. At the outset, we point out that Townsend was offered as a witness by caveators who now challenge two particular instances of testimony elicited from her on cross-examination. First, caveators attack the action of the trial judge in allowing Townsend to testify as to the reason that

the deceased requested a "no visitors" sign for his hospital door. It appears from the record that caveators had asked Townsend on direct examination about the sign, and she answered that she was not responsible for having it placed on the door. Later, on cross-examination, she testified, without objection, "I had nothing to do with the no visitors sign being placed on Glenn's hospital door. Glenn himself requested the sign." When asked why the decedent so requested, caveators objected and excepted to the overruling of their objection. Thus, Townsend was allowed to state: "Hattie was getting on his [nerves] and he had gotten tired of her making repeated statements, that she was his legal wife and he felt that she was no longer his legal wife."

While the entire matter of the "no visitors" sign might have been irrelevant, since the caveators first raised the question of the sign, and since the witness was allowed, without objection, to testify on cross-examination that the sign was put there at the deceased's request, we find no error in the witness' being permitted to explain how she reached this opinion. Assuming, *arguendo*, that the Court erred in allowing the testimony, no conceivable prejudice could have resulted to the caveators since the deceased's attitude toward his wife was manifest in all of the testimony.

[3] Secondly, caveators assert that the court erred in allowing Townsend to testify that the deceased gave "accurate" responses to questions at the social security office regarding the preparation of an affidavit legitimating Townsend's children. Responding to questions on cross-examination, Townsend in substance stated that the deceased's responses were accurate according to her personal knowledge. It is settled that the prohibitions of G.S. § 8-51 do not prevent a witness from testifying as to the acts and conduct of the deceased where the witness is merely an observer and is testifying to facts based upon independent knowledge. *In re Will of Bowling*, 150 N.C. 507, 64 S.E. 368 (1909); *March v. Verble*, 79 N.C. 19 (1878); 1 Stansbury's N.C. Evidence, *Witnesses* § 73 (Brandis rev. 1973). Townsend's characterization of the responses as accurate was obviously based on independent facts known to her otherwise than through personal transactions or communications with the deceased. Thus, this assignment of error is without merit.

Caveators' eighteenth and nineteenth assignments of error, based on a number of exceptions duly noted in the record, relate to the testimony of Margie Hedrick, who was also offered as a witness by the caveators, and who testified on direct examination that she had worked for deceased as his bookkeeper and accountant for approximately fifteen years; that she had advised him on business matters many times, but that she did not advise him on personal matters; that she was named executrix under the "paper writing" in question; that she had driven Mr. Simmons to Pitts' office and back home on the day the purported will was prepared; and that she had gone over part of the completed will with the deceased before he executed it. Based on these exceptions, caveators argue that the court erred in allowing the witness on cross-examination to testify as to specific conversations she overheard between Pitts and Mr. Simmons when she accompanied him to the former's office for the preparation of the will in question. Caveators further contend that the court erred in not giving a limiting instruction to the jury with respect to such testimony.

We have carefully examined each exception upon which these contentions are based and find them to be without merit. The witness was offered by the caveators, and all the testimony challenged by these exceptions was fair cross-examination. Moreover, we note that the gist of the "objectionable" testimony concerned personal observations of the deceased by the witness Hedrick rather than "personal transactions or communications" with him. She was merely an observer of, and not a participant in, the conduct she described, and such testimony was clearly admissible. *In re Will of Bowling, supra; see also Hodges v. Hodges,* 257 N.C. 774, 127 S.E. 2d 567 (1962).

Furthermore, even assuming that the testimony was competent only for the limited purpose of showing a basis for Hedrick's opinion as to the deceased's testamentary capacity, *In re Will of Ricks, supra,* since the caveators did not request a limiting instruction, *In re Will of Thompson,* 248 N.C. 588, 104 S.E. 2d 280 (1958); *In re Will of Hinton,* 180 N.C. 206, 104 S.E. 341 (1920), under the circumstances of this case we find no error in the trial judge's failure to give a limiting instruction with respect to the testimony challenged by these exceptions.

[4] Based on assignments of error numbers 3, 19, and 28, caveators next assert that the court erred

> by admitting testimony of propounders' witnesses without giving instructions limiting the consideration thereof by the jury to the issue of mental condition, while voluntarily giving such limiting instructions to testimony by caveators' witnesses, and then instructing in his charge that the limiting instructions applied only to testimony of heirs of Glenn Simmons.

As pointed out above, caveators did not request a limiting instruction with respect to the testimony of any of the witnesses who testified that, in their opinion, deceased had testamentary capacity. In our opinion, no prejudicial error was committed by the court in failing to give a limiting instruction with respect to the testimony of Pitts, Townsend, or Hedrick, for the reason that no request for such instruction was made. *In re Will of Thompson, supra; In re Will of Hinton, supra; see also In re Will of Kestler,* 228 N.C. 215, 44 S.E. 2d 867 (1947).

[5] Neither do we find prejudicial error with respect to the limiting instruction given in the charge. The trial judge instructed the jury that when

> heirs of Glenn Edison Simmons have testified concerning the personal transactions and communications between that class of witness and Mr. Simmons, it is admitted in evidence and is competent only for the limited purpose of showing the basis of their opinion in respect to his mental capacity on the date and at the times they specified. . . .

In their brief caveators argue that the use of the word "heirs" in this instruction allowed the jury to give "unlimited consideration" to the testimony of Pitts and Hedrick, and to "take the instruction to mean that the rule did not apply to Ruth Townsend."

We do not agree. The challenged instruction has no application to the witness Pitts, since he was not an "interested witness" within the meaning of G.S. § 8-51. *In re Will of Ricks, supra; Propst v. Fisher, supra; see also In re Will of Brown,* 203 N.C. 347, 166 S.E. 72 (1932). Likewise, the challenged instruction has no application to the witness Hedrick since, even assuming that she was an "interested witness" within the meaning of G.S. § 8-51 because she was the designated executrix under the "paper writing" at issue, *Whitesides v. Green,* 64 N.C. 307 (1870), 1

Stansbury's N. C. Evidence, *Witnesses* § 68 (Brandis rev. 1973), she did not testify as to any "personal transaction" with the deceased. She testified as to her personal observations of certain of his conduct. *In re Will of Bowling, supra.*

Finally, the limiting instruction has no application to the testimony of Townsend since that portion of her testimony challenged by the caveators likewise did not relate to "personal transactions" with the deceased in violation of G.S. § 8-51. *Id.*

We therefore hold that the Court's charge with respect to the limiting instruction was free from prejudicial error.

By assignments of error numbers 25, 26, 29 and 30, based on seven exceptions duly noted, caveators attack that portion of the court's charge instructing the jury and applying the law with respect to testamentary capacity and undue influence. Suffice it to say that we have carefully examined each exception upon which these assignments of error are based and find them to be without merit.

[6] Caveators' assignments of error numbers 12 and 21, based on eight exceptions, attack the court's instructions limiting certain testimony of caveators' witnesses regarding conversations with the deceased to the issue of mental capacity. They argue that the court's use of the expression "mental capacity" precluded the jury from also considering this testimony on the issue of undue influence. According to the caveators, their evidence of conversations with the deceased showing that he was in a weakened physical state and had trouble eating; that he "could not see hardly to drive after it turned dark"; that his memory sometimes failed him; and that his mental condition had deteriorated, was competent evidence on the issue of deceased's susceptibility to undue influence, as well as mental capacity, and the jury should have been instructed accordingly. While such evidence may be pertinent to the issue of undue influence, *In re Will of Hinton, supra,* where there is a total absence of "other facts and circumstances tending to show that he was unable to exercise his will freely and intelligently," *Id.* at 216, 104 S.E. at 346, there is no evidence of undue influence. *In re Will of Ball,* 225 N.C. 91, 33 S.E. 2d 619 (1945). Evidence of mental or physical condition, standing alone, is not sufficient to raise the issue.

We have carefully examined the record in this case and find it devoid of any independent evidence of undue influence. Thus, we find no error in the limiting instruction complained of. Caveators got the benefit of this testimony under proper instructions. *See In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1 (1960).

[7] Caveators, by assignment of error number 23, assert that the court erred to their prejudice by "allowing propounders to open and close the arguments to the jury when propounders were allowed to put on substantive proof of mental capacity and lack of undue influence at the probate in solemn form [stage] of the trial." It has long been established in this State that the trial upon a caveat is a proceeding *in rem* to which there are, strictly speaking, no parties. *Syme v. Broughton*, 85 N.C. 367 (1881). And, even when, as here, caveators admit the due execution of the purported will, leaving only the issues of mental capacity and undue influence to be tried, propounders still have the privilege of opening and concluding the case for reasons well stated in *Syme v. Broughton, supra* at 369-70:

> The inquiry is . . . whether the paper propounded is his will or not. Both parties, the propounders and caveators, are actors for this purpose. The subscribing witnesses are the witnesses of the law, and when the will is once propounded, it is under the control and power of the court . . . . [T]he caveators have no . . . control or power . . . to admit the execution of the will so as to dispense with the proof required . . . for the law is explicit that a written will with witnesses can only be proved by *the oath* of at least two subscribing witnesses.
>
> . . .
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> It follows, if the will must be proved by the subscribing witnesses, that the burden is upon the propounder, and he would have the privilege of opening and concluding. And when the will has been *prima facie* established . . . if the caveators should seek to defeat the will by proving the insanity of the deceased, the burden would be shifted to them, but that would not take from the propounder the right to open and conclude the argument. *McRae v. Lawrence*, 75 N.C., 289. [Emphasis in original.]

This assignment of error has no merit.

Caveators undertake to bring forward and argue additional assignments of error based on numerous exceptions. We have carefully examined these additional assignments of error and find them to be repetitive, inconsequential, and wholly without merit. No useful purpose would be served by further elaboration on the well-settled principles discussed under these assignments. We conclude that all parties to this litigation have had a fair trial, and the jury has rendered its verdict.

No error.

Judges MARTIN (Robert M.) and WEBB concur.

MARY FRANCES BELL, PLAINTIFF v. BOBBY MARTIN, JR., DEFENDANT

No. 7826DC1108

(Filed 2 October 1979)

1. **Rules of Civil Procedure § 56— motion for summary judgment rather than default judgment**

In an action in which defendant failed to file an answer, plaintiff could properly move for summary judgment under Rule 56 rather than for judgment by default under Rule 55.

2. **Bastards § 10— summary judgment adjudicating paternity and ordering support payments**

In an action to establish paternity under G.S. 49-14 and to obtain child support pursuant to G.S. 110-128 *et seq.*, the trial court properly entered summary judgment for plaintiff adjudicating defendant to be the father of plaintiff's illegitimate child and ordering defendant to pay $80.00 per month for support of the child where defendant did not file an answer to the complaint and thus admitted allegations that he is the father of the child, that he is a responsible parent within the meaning of G.S. 110-139, and that he is able-bodied and capable of supporting a minor child; defendant did not file any materials in opposition to plaintiff's motion; plaintiff submitted an affidavit of defendant's employer that defendant's disposable income was $130.00 per week; and plaintiff submitted an affidavit from the Mecklenburg County Department of Social Services that plaintiff is receiving $80.00 per month under the Aid to Families with Dependent Children program for support of the child and that this amount is based upon the Department's evaluation of the child's needs.

3. Jury § 1.3— waiver of jury trial

Defendant waived his right to a jury trial on the issue of damages, the only issue left unadmitted by his failure to file answer, by failing to file a timely demand for a jury trial.

4. Rules of Civil Procedure § 60.1— motion for relief from judgment—authority of trial court to hear while appeal pending

The trial court may consider a Rule 60(b) motion for relief from a judgment while an appeal from the judgment is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. At the time the motion is made in the lower court the movant should notify the appellate court so that it may delay consideration of the appeal until the trial court has considered the Rule 60(b) motion. If the trial court indicates that it is inclined to rule in favor of the motion, the movant should move that the appellate court remand to the trial court for judgment on the motion. An indication by the trial court that it would deny the motion would be binding on that court and the movant could then request appellate court review of the lower court's action.

APPEAL by defendant from *Saunders* and *Bennett, Judges.* Judgment entered 28 August 1978 and order entered 3 November 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 22 August 1979.

Pursuant to G.S. 49-14, plaintiff's verified complaint sought a judicial determination that defendant was the father of her illegitimate child and asked for custody and child support for said child under G.S. 49-15 and G.S. 110-128 *et seq.* The complaint was served personally on defendant on 14 December 1977. On 23 June 1978 plaintiff mailed to the defendant her motion for summary judgment and notice of a hearing to be held on said motion on 26 July 1978. At the hearing, the defendant appeared with counsel and the court ordered a continuance until 24 August 1978, stating that either party could file such documents as may be permissible under the Rules of Civil Procedure. The plaintiff amended her complaint by adding a copy of the child's birth certificate and filed an affidavit with the court from the defendant's employer showing the defendant was currently earning $130.00 per week. Additionally, the plaintiff filed an affidavit from the Mecklenburg County Department of Social Services stating the plaintiff was receiving $80.00 per month from the Aid to Families with Dependent Children program for the support of her illegitimate child. At the time plaintiff's motion for summary judgment was heard on 24 August 1978, defendant had not filed an answer to plaintiff's

complaint nor any other document in opposition to plaintiff's motion. Plaintiff did not move for entry of a judgment by default under Rule 55.

Judge Saunders granted plaintiff's motion for summary judgment, finding that defendant was the father of plaintiff's illegitimate child; that defendant had failed and refused to contributed adequate support for the child; that plaintiff was the recipient of public assistance in the sum of $80.00 per month for the support of the child; that defendant was able-bodied and employed, earning $130.00 per week after taxes and other withholdings; and that defendant had the ability to contribute at least $80.00 per month to the support of the child. The court, based on said findings of fact, ordered the defendant to pay $80.00 per month for the support of the child. The defendant gave timely notice of appeal and on 20 September 1978 filed an answer to the original complaint without leave of court.

On 20 September 1978 defendant filed a motion under G.S. 1A-1, Rule 60(b) for relief from judgment and an affidavit sworn to by defendant alleging he was mislead by plaintiff's attorney into believing he was not required to file an answer to plaintiff's complaint prior to being notified by plaintiff's attorney to do so. The plaintiff at this point moved under G.S. 1A-1, Rule 12(f) to strike defendant's answer from the record. A hearing was held before Judge Bennett on both motions on 24 October 1978, and on 3 November 1978 Judge Bennett entered an order dismissing both motions on grounds that the prior appeal taken by the defendant deprived the District Court of jurisdiction to hear or determine either motion. From both the judgment of Judge Saunders granting plaintiff's motion for summary judgment and the order of Judge Bennett dismissing the defendant's motion for relief from judgment defendant appeals to this Court.

Ruff, Bond, Cobb, Wade and McNair, by Timothy M. Stokes, for plaintiff appellee.

McConnell, Howard, Pruett and Bragg, by Rodney S. Toth, for defendant appellant.

WELLS, Judge.

The questions raised on appeal are whether the trial court properly granted plaintiff's motion for summary judgment and

whether the trial court was without jurisdiction to hear defendant's motion for relief from judgment.

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978); *Knowles v. Coach Co.*, 41 N.C. App. 709, 255 S.E. 2d 576 (1979). Summary judgment is available to a claimant as well as a defendant. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Here the defendant failed to file any answer to plaintiff's complaint or any affidavit in opposition to plaintiff's motion pursuant to Rule 56 prior to the hearing on this motion. Under Rule 8(d), "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." All averments of the complaint other than those as to the amount of damage will stand admitted unless the defendant answers. *Fagan v. Hazzard*, 29 N.C. App. 618, 225 S.E. 2d 640 (1976); 2A Moore's Federal Practice ¶ 8.29 (2d ed. 1975).

[1] The defendant argues that the plaintiff should properly have moved for entry of judgment by default under Rule 55 and not for summary judgment under Rule 56. We find this contention without merit. Rule 56(a) provides that summary judgment is available to a claimant anytime after the expiration of thirty days from the commencement of the action. *See Village, Inc. v. Financial Corp.*, 27 N.C. App. 403, 219 S.E. 2d 242 (1975), *disc. rev. denied*, 289 N.C. 302, 222 S.E. 2d 695 (1976); *Whitaker v. Whitaker*, 16 N.C. App. 432, 192 S.E. 2d 80 (1972).

[2] In the case before us it is clear that defendant, by failing to file an answer within nine months after receiving service of plaintiff's summons and complaint, waived his right to submit an answer without leave of court. Accordingly, all of the allegations of plaintiff's complaint with the exception of damages are deemed admitted under Rule 8(d). The allegations which are admitted include those that defendant is the father of plaintiff's illegitimate child, that defendant is a responsible parent within the meaning of G.S. 110-139, and that defendant is able-bodied and capable of supporting a minor child.

Defendant questions the credibility and quality of plaintiff's evidence and urges us to hold that summary judgment is improper under the peculiar requirement of G.S. 49-14(b) that a plaintiff must prove paternity of the defendant beyond a reasonable doubt. Defendant has presented a strong argument on this point, but under the limits of this case the argument cannot succeed. Since defendant failed to deny the basic, essential allegation of paternity set out in the complaint the fact stands admitted and the trial court was therefore under no obligation to travel any farther along the evidentiary trail.

Defendant cites *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976) in support of his contention that summary judgment was inappropriate in the present case. In *Kidd*, the Supreme Court set forth guidelines for determining the circumstances under which summary judgment may be granted to the party with the burden of proof even when the opposing party fails to submit affidavits or other evidence in support of its position. The defendant in *Kidd* did file an answer which denied the allegations contained in plaintiff's complaint and this denial, although general, was sufficient to place in issue all of plaintiff's allegations not admitted. The Court concluded that *once placed in issue*, under certain circumstances, some allegations would not by their nature be susceptible to summary administration whether or not the party opposing the motion for summary judgment supported its denial of claimant's allegations with additional evidence. In the case at bar, since the defendant did not timely deny any of the allegations in plaintiff's complaint, none of these allegations, with the exception of the amount of damages, was in issue. These allegations remain admitted and not in issue throughout the course of the lawsuit. *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972).

[3] The defendant further maintains that entry of summary judgment against him deprived him of his right to a trial by jury. Defendant's failure to timely file a demand for trial by jury resulted in his having waived any right to a jury trial on the only issue left unadmitted by his failure to answer—damages. G.S. 1A-1, Rule 38(d); *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439 (1971); *Fagan v. Hazzard*, 29 N.C. App. 618, 225 S.E. 2d 640 (1976). Bastardy proceedings which simply seek to compel the putative father to support his child are nonpenal, and are uniformly held to

be civil in nature and governed by the state's rules of procedure applicable to civil actions. 10 Am. Jur. 2d, Bastards § 75, pp. 901-902. Under Rule 38 of the North Carolina Rules of Civil Procedure the right to trial by jury must be timely asserted or it is waived.

That defendant waived his right to a trial by jury on the issue of damages does not in itself settle whether this issue was one appropriate for adjudication by the trial court on motion for summary judgment. In the case at bar plaintiff submitted two affidavits in support of the motion before the trial court. One affidavit was sworn to by defendant's employer and stated that the defendant's disposable income was $130.00 per week. The other affidavit was sworn to by an employee of the Mecklenburg County Department of Social Services who had the duty of determining the eligibility and financial needs of AFDC applicants and who knew the plaintiff personally. This affidavit recites that the plaintiff was receiving $80.00 per month in AFDC payments. This $80.00 per month figure represents the County Department of Social Services' investigation and evaluation of the needs of the child as determined under G.S. 108-40 *et seq.*

Since there were no inherent doubts about the credibility of plaintiff's affiants and defendant failed to utilize Rule 56(f), summary judgment was appropriate. The plaintiff having presented competent evidence before the trial court showing the defendant's financial ability to provide for the child and the needs of the child, it then became incumbent on the defendant to rebut this evidence in some manner permitted by the Rule. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976). The defendant's failure to answer or otherwise offer any cognizable opposition to the motion requires us to find that entry of summary judgment against him was proper.

[4] Defendant assigns as error the trial court's dismissal of his Rule 60(b) motion for relief from judgment on grounds of mistake, inadvertance, surprise, excusable neglect, misrepresentation or other misconduct of an adverse party. Defendant's motion was filed twenty-three days after entry of judgment against him, well within the one year limitation set forth in the Rule. The trial court dismissed this motion on grounds that the defendant's pending appeal in this Court divested it of jurisdiction to determine *or hear* the motion.

We note at the outset the general rule that when one party gives notice of appeal the jurisdiction of the trial court is ousted and it may take no further action in the case except in aid of the appeal, unless the case is remanded to it by the appellate court. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971), *rehearing denied*, 281 N.C. 317 (1972); *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E. 2d 748 (1977).

There is authority, however, for the proposition that the trial court retains limited jurisdiction, after an appeal has been taken, to hear and consider a Rule 60(b) motion for the purpose of indicating what action it would be inclined to take on such a motion if it had jurisdiction to rule on the motion. In *Sink v. Easter*, 288 N.C. 183, 199, 217 S.E. 2d 532, 542 (1975), our Supreme Court, quoting from Wright & Miller, Federal Practice and Procedure: Civil § 2873, pp. 263-265 (1973) stated:

> The earlier cases on Rule 60(b) took the view that the district court has no power to consider a motion under the rule after notice of appeal has been filed. This always seemed anomalous since the time for making the motion continues to run while the case is pending on appeal. These cases required a party seeking relief from a judgment during the pendency of an appeal first to present his ground to the appellate court. If it thought that the motion should be heard it would remand the case to the district court for that purpose. One alternative to actual remand was for the appellate court to give permission to the district court to rule on the motion.
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> Other cases have developed a different and more satisfactory procedure. They hold that during the pendency of an appeal the district court may consider a Rule 60(b) motion and if it indicates that it is inclined to grant it, application can then be made to the appellate court for remand. This procedure is sound in theory and preferable in practice. The logical consequence is that the district court may deny the motion although it cannot, until there has been a remand, grant it, and this seems to be the interpretation followed by many courts. . . .

The Court in *Sink* did not expressly approve or disapprove of either of these techniques because it did not reach the issue, holding that the trial court retained jurisdiction to determine

whether the appeal had been abandoned. However, the Court's discussion of the availability of techniques whereby the trial court could state how it would rule on a 60(b) motion after an appeal has been taken indicates that the Court felt such options were available and could not be summarily dismissed if the need to revert to them arose. *See also* 2 McIntosh, N.C. Practice and Procedure § 1720 (1970 Supp.), p. 94. In the case at bar the trial court's conclusion that it could not hear defendant's Rule 60(b) motion is directly in issue.

We now need to consider which of the two alternative procedures referred to by our Supreme Court in *Sink* would best serve the ends of justice in this case. As our Rule 60(b) is practically identical to its Federal counterpart, and had its genesis there, we have looked to the Federal cases for additional guidance.

First, we are confronted with the one year time limit within which a Rule 60(b) motion must be made in the trial court. We find no cases holding that the one year limit is tolled during pendency of an appeal. The reasoning seems to be grounded on the right of an appellant to present a Rule 60(b) motion during the pendency of the appeal.

> "The motion can be made even though an appeal has been taken and is pending. For this reason, it is held that the pendency of an appeal does not extend the one year limit. . . ."

11 Wright & Miller, Federal Practice and Procedure: Civil § 2866, p. 233 (1973). The defendant in the case *sub judice* had the option of filing his Rule 60(b) motion in this Court after the appeal was taken but within the one year period. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971), *rehearing denied*, 281 N.C. 317 (1972); *Rhodes v. Henderson*, 14 N.C. App. 404, 188 S.E. 2d 565 (1972). He did not, and we are therefore not squarely presented with that question in this case. We believe, however, that a proper disposition of this case requires discussion of this alternative.

It is virtually universally accepted that the trial court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. of Calif. v. United States*, 429 U.S. 17, 19, 50 L.Ed. 2d 21, 24, 97 S.Ct. 31, 32 (1976)

(quoting from *Wilkin v. Sunbeam Corp.*, 405 F. 2d 165 (10th Cir. 1968)). In ruling on such motions, the trial judge must make findings of fact as to both the grounds asserted and as to a meritorious defense. *Sprinkle v. Sprinkle*, 241 N.C. 713, 86 S.E. 2d 422 (1955). The trial court's findings are binding on appeal if supported by any competent evidence. *Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407 (1971), *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602 (1971). While such motions may be made in the appellate division, they are not looked upon with favor. *Locklear v. Snow*, 5 N.C. App. 434, 168 S.E. 2d 445 (1969). We agree that the initial consideration of Rule 60(b) motions at the appellate level does not provide the essential ingredient of trial court review and that this procedure should not be encouraged.

It appears to us that the better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. At the time the motion is made in the lower court the movant should notify the appellate court so that it may delay consideration of the appeal until the trial court has considered the 60(b) motion. Upon an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered. An indication by the trial court that it would deny the motion would be considered binding on that court and appellant could then request appellate court review of the lower court's action. This procedure allows the trial court to rule in the first instance on the Rule 60(b) motion and permits the appellate court to review the trial court's decision on such motion at the same time it considers other assignments of error.

The above technique, first utilized in *Smith v. Pollin*, 194 F. 2d 349 (C.A.D.C. 1952), has since been adopted in the Second, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. *See Ryan v. U.S. Lines Co.*, 303 F. 2d 430 (2d Cir. 1962); *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928 (5th Cir. 1976); *Bank v. Hirsch*, 535 F. 2d 343 (6th Cir. 1976); *Washington v. Board of Education*, 498 F. 2d 11 (7th Cir. 1974); *Insurance Co. v. Gelt*, 558 F. 2d 1303 (8th Cir. 1977); *Crateo, Inc. v. Intermark, Inc.*, 536 F. 2d 862 (9th Cir. 1976), *cert. denied*, 429 U.S. 896, 50 L.Ed. 2d 180, 97 S.Ct. 259

(1976); *Aune v. Reynders*, 344 F. 2d 835 (10th Cir. 1965). None of the remaining Circuits has recently expressed disapproval of the *Smith v. Pollin* procedure. While the United States Supreme Court has yet to rule on the matter, it should be noted that the Supreme Court recently allowed a 60(b) motion to be made initially in the District Court without leave of an appellate court, although it must be acknowledged that the appeal in that case had already been determined by the appellate court. *Standard Oil Co. of Calif. v. United States*, 429 U.S. 17, 50 L.Ed. 2d 21, 97 S.Ct. 31 (1976). *See also* 65 Yale L.J. 708, 709-710 (1956).

We hold in the present case that the trial court should have considered appellant's Rule 60(b) motion for the limited purpose of indicating how it would have been inclined to rule on the motion and the trial court erred in dismissing the Rule 60(b) motion.

Since we have disposed of appellant's other assignments of error, we see no need to retain jurisdiction over this case and we therefore remand this case to the District Court to hear and determine appellant's Rule 60(b) motion.

Summary judgment for plaintiff is affirmed.

The dismissal of defendant's Rule 60(b) motion is reversed and this cause is remanded for a hearing on said motion.

Affirmed in part, and reversed in part and remanded.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. HELEN PARTIN BARBOUR

No. 7911SC317

(Filed 2 October 1979)

1. Embezzlement § 6— school treasurer—sufficiency of evidence of embezzlement

In a prosecution of defendant for embezzlement pursuant to G.S. 14-92, evidence was sufficient to be submitted to the jury where it tended to show that defendant was the secretary-treasurer of an elementary school; she had the duty to receive money on behalf of the school, to maintain financial records of that money, and to deposit it in the school account at the bank; defendant did receive large amounts of money and did make deposits in the bank; she

made all deposits for the school; $7,831.72 received by the school was not so deposited; defendant had personal financial problems during the time involved; defendant often took the school money home with her; and sometimes deposits were in excess of collections and sometimes they were less. Furthermore, the lack of evidence of control and possession of the funds by defendant, to the exclusion of all other persons, was not fatal to the State's case.

2. **Criminal Law §§ 73, 81— embezzlement case—testimony from bank statements proper**

In a prosecution of defendant for embezzlement from a school, the trial court did not err in permitting the school principal to testify concerning dates, amounts and balances shown on a bank statement, since the principal's testimony was not used to prove the truth of the figures on the statement but was offered to show the circumstances which alerted the principal and caused him to take action.

3. **Criminal Law § 80— embezzlement case—bank ledger—entries made in regular course of business**

The trial court in an embezzlement case did not err in allowing an assistant cashier of a bank to testify as to entries on the bank's ledger card without his having made the entries, having supervised them, or having knowledge of them, since the entries to which the cashier testified were made in the regular course of business, near the time of the transaction involved, and were properly authenticated.

4. **Criminal Law § 56; Embezzlement § 5— opinion testimony of CPA—admissibility**

The trial court in an embezzlement case did not err in qualifying a CPA as an expert and in allowing his opinion based upon an examination of only a portion of the entire financial record, since the opinion expressed was supported by data and was within the field of expertise of the CPA.

5. **Embezzlement § 6.1— defendant as fiduciary person—instruction proper**

The trial court in an embezzlement case did not err in charging the jury that defendant was a "fiduciary person," though the statute under which defendant was charged neither contained nor referred to those words, since the court was not restricted to using the exact words of the statute in giving instructions, and the use of "fiduciary person" to define the statutory phrasing of G.S. 14-92 has been specifically approved by the N.C. Supreme Court.

APPEAL by defendant from *Canaday, Judge*. Judgment entered 23 August 1978 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 27 August 1979.

Upon a plea of not guilty, defendant was tried on an indictment charging her with the unlawful misapplication of sums of money belonging to her public employer, a violation of N.C.G.S. 14-92. The state alleged that over a period of time from 1

September 1976 until 1 April 1977 the defendant, secretary and treasurer of the Four Oaks Elementary School, embezzled over $7,000 belonging to the school, a unit of the Johnston County Board of Education.

The evidence for the state tended to show that in June 1976 defendant was requested by the new principal of Four Oaks, John W. Floyd, to remain as secretary-treasurer of the school; defendant had served in this position for twelve years. Defendant's primary duties were to "keep up with the money" and to make deposits and prepare disbursement reports. Defendant was to maintain the financial ledger of the school and keep it in her office. Money received from students and teachers was to be placed into envelopes, with notations of source and amount. A receipt was to be given if the amount stated coincided with the amount actually in the envelope. Only the defendant and Mr. Floyd receipted school money; the money was put into defendant's desk drawer. On eighty-seven occasions Mr. Floyd received funds, writing the defendant's initials on receipts he issued; in this manner he collected in excess of $1500. Defendant was instructed to make daily deposits of collected funds; Mr. Floyd made no deposits. Defendant also was required to make monthly receipt and disbursement statements for the county superintendent's office; on three occasions Mr. Floyd received notice that such statements had not been received.

Monthly bank statements of the school's account were turned over to defendant by Mr. Floyd. The statement for February 1977 showed a balance of only $1551.44; when questioned, the defendant said that a mistake had occurred. In April, Mr. Floyd examined the bank records of the school's account; further examination of the school financial journal revealed that no entries had been made for the period September through March. The school's books and records were turned over to auditors.

On two occasions during the period in question defendant told Mr. Floyd that $65 was missing, following a breaking or entry of the school. Disbursement of funds could only take place over the joint signatures of defendant and Mr. Floyd. Mr. Floyd testified that at no time did he alter or destroy any of the school's records.

Evidence offered by the state included the expert opinion of a certified public accountant that an overall deficiency of $7,831.72 existed between the master receipt books and amounts deposited in the bank. For the months of September and October 1976 and February 1977, there were deficiencies in the deposits; for November and December 1976 and for January and March 1977, deposits exceeded the receipts.

Defendant's evidence tended to show that the desk drawer in which the funds and records were kept could not be locked and that the desk was in a large, open room with easy access. The assistant principal testified he had seen as many as twenty-five students per day in the defendant's office when defendant was not present; teachers also came into the office for various reasons. On one occasion a student was seated at defendant's desk while two others stood near the desk. Defendant's duties were greatly expanded after Mr. Floyd became principal. Her receipting of money and serving as receptionist were often interrupted by constant traffic in and out of her office. Mr. Floyd told an insurance adjuster that defendant had not had time to properly keep the books. Defendant sometimes had to be out of her office, leaving it unattended. There was no regular procedure for collecting school money. On numerous occasions Mr. Floyd received money from teachers, and without counting the money, defendant wrote receipts based on what Mr. Floyd told her he had received. Defendant suggested that a safe be provided for the office, and when one was not provided, defendant unsuccessfully tried to get a protective counter built.

Defendant often observed Mr. Floyd seated at her desk. She told fellow workers she did not have time to work on the books. She had considered resigning from her position in late September or early October 1976.

Further evidence for the defendant tended to show that she never received instructions from Mr. Floyd pertaining to the deposit of money in the bank and that more than once she signed a check drawn on the school account in blank and gave it to Mr. Floyd for his use. On several occasions defendant did not immediately deposit money collected, and on days of heavy collections defendant deposited money before running receipts. Defendant left money overnight in her desk at times; on at least one

occasion money was stolen. Sometimes defendant locked school money in the trunk of her car overnight. Defendant told a member of the school advisory board that she did not take the missing money and did not know what happened to it. Defendant called sixteen witnesses who testified to her good character and reputation in the community.

Defendant moved for dismissal at the close of the state's evidence and again at the end of all the evidence. These motions were denied.

The jury returned a verdict of guilty of embezzlement against the defendant. Judgment was entered imposing a prison sentence of not less than five years nor more than seven years, which was suspended for five years upon certain conditions, including restitution to the school of $7,831.72. Defendant appealed.

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

Philip C. Shaw and T. Yates Dobson, Jr. for defendant appellant.

MARTIN (Harry C.), Judge.

[1] The primary argument of defendant on appeal is that there was insufficient evidence, either to take the case to the jury or to support the jury verdict of guilty. As defendant states her concerns: "The State never traced a penny and produced not one scintilla of evidence of criminal intent, fraud, misapplication or subterfuge by the defendant. Nothing incriminating was ever shown except sloppy bookkeeping and the fact defendant was present at Four Oaks School." The essence of defendant's argument is that the lack of evidence of control and possession of the funds by defendant, to the exclusion of all other persons, is fatal to the state's case. Defendant emphasizes the fact that "the money was simply left in a desk drawer, for all the world to steal, . . ."

We hold the trial court did not err in denying defendant's motions for dismissal. The test to be applied in ruling on a motion to dismiss is whether there is "substantial evidence of all material elements of the offense to withstand the motion to dismiss." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956). Such a

motion requires consideration of the evidence in the light most favorable to the state; the state is entitled to every reasonable inference which may be drawn from the evidence. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). The substantial evidence may be circumstantial or direct, or both. *State v. Stephens, supra.* The court is not required to find that the evidence excludes every reasonable hypothesis of innocence in denying a defendant's motion to dismiss. To do so would constitute the presiding judge the trier of facts. Substantial evidence of every material element of the crime charged is required before the court can submit the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. *Id.*

Defendant was charged with a violation of N.C.G.S. 14-92, which provides in part that "if any person having or holding any moneys or property in trust for any . . . educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony, ..." It is not necessary for the state to prove that defendant had exclusive possession of the funds to sustain the charge of embezzlement. *United States v. Harper*, 33 F. 471 (C.C.S.D. Ohio 1887); *Young v. State*, 44 Ohio App. 1, 184 N.E. 24 (1932); *State v. Larson*, 123 Wash. 21, 211 P. 885, *mod. on other grounds*, 216 P. 28 (1923); 29A C.J.S. Embezzlement § 9 (1965). More than one person can have possession of the same property at the same time. *State v. Finney*, 29 N.C. App. 378, 224 S.E. 2d 263, *rev'd on other grounds*, 290 N.C. 755, 228 S.E. 2d 433 (1976); *State v. Wells*, 27 N.C. App. 144, 218 S.E. 2d 225 (1975).

The fraudulent intent required in the charge of embezzlement can be inferred from the facts proven. It is not necessary that there be direct evidence of such intent. *State v. Helsabeck*, 258 N.C. 107, 128 S.E. 2d 205 (1962); *State v. McLean*, 209 N.C. 38, 182 S.E. 700 (1935).

The record supports the trial court's determination that the case against defendant should not have been dismissed. Defendant, secretary-treasurer of Four Oaks Elementary School, testified that she took the school money home with her each night. Other evidence showed that entries in the master receipt book and bank deposits varied greatly. In September 1976

receipts of $10,686.90 were compared to deposits of $7,669.40; in October 1976, although $7,685.01 was receipted, only $48.00 was deposited. In November and December 1976 and January 1977 defendant made deposits greater than receipts for those months. The CPA expert gave his opinion that these deposits were attempts to reduce the existing shortage. Defendant had financial problems in 1976; she and her husband borrowed money during the year. When we view this evidence in the light most favorable to the state, we find substantial evidence of all material elements of the charged offense.

Although it is a basic tenet of our criminal law system that proof of guilt beyond a reasonable doubt is required before the jury can convict, once the trial court finds that substantial evidence exists to take the case to the jury, "it is *solely* for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty." *State v. Smith*, 40 N.C. App. 72, 79-80, 252 S.E. 2d 535, 540 (1979). The jury returned a verdict of guilty in this case, and there is no reason for this Court to reverse that verdict.

In considering the motions to dismiss, and the challenge to the sufficiency of the evidence to support the verdict, we are mindful of the recent United States Supreme Court opinion in *Jackson v. Virginia*, ---- U.S. ----, 61 L.Ed. 2d 560 (1979). The Supreme Court in *Jackson* established a constitutional standard applicable to state courts for review of motions testing the sufficiency of evidence to support a conviction of a criminal charge. This standard is: Could a rational trier of fact have found the defendant guilty beyond a reasonable doubt of the crime charged under the laws of North Carolina? The Court held that the United States Constitution protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt. Perhaps this is merely a restatement of the North Carolina rule requiring substantial evidence of every material element of the crime charged to support a conviction. However, the requirement that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt appears to announce a second test to be applied in such rulings.

Although the majority opinion did not treat the question of retroactivity, it expressly held that "[a] challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim." *Id.* at ---, 61 L.Ed. 2d at 575-76. Constitutional doctrine has generally been applied retroactively where its purpose is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and reflects upon the accuracy of guilty verdicts. *Hankerson v. North Carolina*, 432 U.S. 233, 53 L.Ed. 2d 306 (1977); *Williams v. United States*, 401 U.S. 646, 28 L.Ed. 2d 388 (1971).

The defendant Barbour was tried prior to 28 June 1979, the certification date of *Jackson*. We hold the principles of *Jackson* are applicable to the trial of defendant Barbour. In the instant case there is substantial evidence to support beyond a reasonable doubt these findings: defendant was an employee of an educational institution; defendant had the duty to receive money on behalf of the school, to maintain financial records of that money, to deposit it in the school account at the Bank of Four Oaks; defendant did receive large amounts of money and did make deposits in the bank; defendant made all deposits; $7,831.72 received by the school was not so deposited; defendant had personal financial problems during the time involved; defendant often took the school money home with her; sometimes deposits were in excess of collections; sometimes deposits were less than receipts.

In applying the standard announced in *Jackson* to the evidence, we hold that a rational trier of fact could reasonably have found the defendant committed embezzlement as charged under the laws of North Carolina. The trial court properly denied the motions to dismiss and the motion for appropriate relief.

Two of defendant's additional arguments are related to the law of evidence. Defendant contends that the court committed reversible error in allowing two witnesses for the state to testify from records which they did not prepare. At trial the witnesses were handed bank statements, asked to examine them, and permitted to tell the jury dates, amounts, and balances shown thereon. According to defendant this testimony violated the best evidence rule and the hearsay rule.

[2] It is basic hornbook law that only if "the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted" is the evidence hearsay and inadmissible, unless it falls within one of the recognized exceptions to the rule. 1 Stansbury's N.C. Evidence (Brandis rev. 1973), § 138. In this case, the principal's testimony was not used to prove the truth of the figures on the statement; its purpose was to show the circumstances which alerted the principal and underlay his actions. The hearsay rule was not violated.

[3] Defendant also questions the court's allowing the assistant cashier of the bank to testify as to entries on the bank's ledger card without his having made the entries, having supervised the entries, or having knowledge of them. The test for receiving business entries into evidence is that they be "made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they are made, ..." *Id.* § 155. The record reveals that all the steps of this test were met; therefore, the court did not err in allowing the ledger as a business record or in permitting the assistant cashier to testify as to its contents.

[4] Defendant's other evidentiary argument is that the court committed error in qualifying a certified public accountant as an expert and in allowing his opinion based upon an examination of only a portion of the entire financial record. Defendant stipulated that the witness was a CPA. It is ordinarily within the exclusive province of the trial judge to determine whether a witness has the requisite skill to qualify as an expert. *Id.* § 133. The competency of a witness to testify as an expert is a matter primarily within the sound discretion of the trial court; this discretion is not ordinarily disturbed by a reviewing court. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972); *LaVecchia v. Land Bank*, 218 N.C. 35, 9 S.E. 2d 489 (1940). There is no reason to disturb the exercise of such discretion here.

Defendant maintains that a complete general audit might have disclosed what happened to the missing funds. The CPA did not conduct a complete audit; he examined and compared only the master receipt books and the bank deposit statements. The pur-

pose of the special audit was to determine if money receipted was then deposited in the bank. The CPA testified that although $32,489.65 was receipted from 1 September 1976 through 1 April 1977, only $24,657.93 was deposited. His opinion was that the amount of deficiency was $7,831.72. He further testified that there were some months when bank deposits were greater than amounts shown in the receipt books. This opinion was supported by data and was within the field of expertise of the CPA. It was not prejudicial error for the judge to allow the CPA's opinion, based on the special audit.

[5] Defendant's final argument is that the court committed prejudicial error in charging the jury that defendant was a fiduciary person. Defendant contends that by using the words "fiduciary person" in the charge, the trial judge expressed his opinion, contrary to the mandate of N.C.G.S. 15A-1222.

It is true that the statute under which defendant was indicted, N.C.G.S. 14-92, neither contains nor refers to the words "fiduciary person." However, the trial court was not restricted to using the exact words of the statute in giving instructions. *State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975), *mod. on other grounds*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976); *State v. Mundy*, 265 N.C. 528, 144 S.E. 2d 572 (1965). Moreover, the use of "fiduciary person" to define the statutory phrasing of N.C.G.S. 14-92 has been specifically approved. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124 (1978); *State v. Shipman*, 202 N.C. 518, 163 S.E. 657 (1932). Therefore, this assignment of error is without merit.

No error.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. STEVEN ANTHONY PUCKETT

No. 7921SC362

(Filed 2 October 1979)

1. **Criminal Law §§ 23, 138— guilty pleas—no violation of plea bargain by sentences imposed**

There is no merit in defendant's contention that the trial court violated a plea bargain arrangement by imposing on him two consecutive two-year sentences rather than consolidating all charges for judgment where defendant failed to object to the sentences when imposed and made no reference to the sentences imposed in his motion to set aside his guilty pleas, and the primary bargaining part of the plea arrangement was a provision that the sentences imposed would run concurrently with a twelve-year sentence defendant was then serving.

2. **Criminal Law § 23.3— guilty pleas—warning of right to silence—informed choice**

There is no merit in defendant's contention that the trial court failed to advise him of his right to remain silent as required by G.S. 15A-1022(a)(1) before accepting his pleas of guilty to five misdemeanor charges and that he was misled as to the consequences of his pleas and they were not the product of informed choice as required by G.S. 15A-1022(b).

APPEAL by defendant from *Washington, Judge.* Judgments entered 9 January 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 August 1979.

Defendant was charged in a Magistrate's Order and four warrants for arrest with five misdemeanors, to wit: (1) Case No. 78CR44402, an assault in violation of G.S. 14-33(a); (2) Case No. 78CR44404, possession of marijuana in violation of G.S. 90-95(a)(3) and (d)(4); (3) Case No. 78CR45378, carrying weapons onto school property in violation of G.S. 14-269.2; (4) Case No. 78CR45382, rioting in violation of G.S. 14-288.2(a); and (5) Case No. 78CR45409, assault with a deadly weapon in violation of G.S. 14-33(b).

Defendant entered a plea of guilty in each case pursuant to a plea bargain with the State. Four of the cases were consolidated for judgment (Case Nos. 78CR44402, 78CR44404, 78CR45378, and 78CR45382), and defendant was sentenced in Case No. 78CR45382 to an active sentence of two years in custody of the Department of Correction. This sentence is to run at the expiration of the sentence imposed in Case No. 78CR45409. In Case No. 78CR45409, defendant was sentenced to an active confinement for two years;

both sentences to run concurrently with the sentence imposed in Forsyth County on 30 November 1978.

Defendant moved to set aside the guilty plea, which motion was denied. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

Stephens, Peed & Brown, by Herman L. Stephens, for defendant appellant.

ERWIN, Judge.

Defendant presents four questions for our determination:

(1) "Did the trial court commit prejudicial error by failing to consolidate all charges for entry of judgment and by imposing two consecutive two-year sentences upon defendant which action resulted in a different and greater sentence being imposed than that provided for in the plea arrangement with the State?"

(2) "Did the trial court commit prejudicial error by accepting defendant's guilty plea and entering judgment imposing sentence thereon because of violations of Chapter 15A, Article 58, *Pleas* [sic] Relating to Guilty Pleas in Superior Court, in defendant's guilty plea proceeding?"

(3) "Did the trial court commit prejudicial error by violating defendant's right to due process under the Fourteenth Amendment to the United States Constitution in accepting defendant's guilty plea and entering judgment imposing sentence thereon on the grounds the record does not support the court's determination that his guilty plea was the product of informed choice and freely, voluntarily and understandingly made?"

(4) "Did the trial court commit prejudicial error by denying defendant's motion to set aside his plea of guilty and the judgment and sentence imposed thereon for the reasons set forth in the foregoing questions presented?"

After careful study of the record and for the reasons that follow, we answer each of the questions, "No," and affirm the judgments entered by the trial court.

The Supreme Court of the United States held as follows in *Santobello v. New York*, 404 U.S. 257, 261, 30 L.Ed. 2d 427, 432, 92 S.Ct. 495, 498 (1971):

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative propects [sic] of the guilty when they are ultimately imprisoned." (Citation omitted.)

Our Supreme Court stated in *State v. Slade*, 291 N.C. 275, 278, 229 S.E. 2d 921, 923-24 (1976):

> "In the past, 'plea bargaining' was carried on informally between the prosecution and the defendant or defendant's attorney subject to the approval of the presiding judge as to the proper sentence to be imposed. In 1973, the procedure for 'plea bargaining' was formalized by the enactment of G.S. 15A-1021 through G.S. 15A-1026. G.S. 15A-1026 provides:
>
> > 'A verbatim record of the proceedings *at which the defendant enters a plea of guilty or no contest* and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and transcribed.' (Emphasis added.)
>
> G.S. 15A-1021(c) allows the parties to a plea arrangement to advise the trial judge of the terms of the proposed agreement, provided an agreement has been reached."

In view of the importance of plea bargaining as indicated in the above cases, we now examine the record before us in order of the assignments of error set out above.

Consolidation of Charges

[1] The record reveals the following in regard to defendant's plea:

"Have you agreed to plead as a part of a plea bargain—now, let me advise you what is written on this piece of paper: that all charges be consolidated and that any sentence, if imposed, would run concurrent with the sentence you are now serving. This agreement includes probationary sentences in Davie County and two counts of aiding and abetting the charge of contributing to the delinquency of a minor. What sentence are you now serving?

A. Twelve years.

Q. Twelve years?

A. Yes, sir.

Q. And your understanding is that if you enter these pleas of guilty, that the sentence will run concurrently with that twelve year sentence, is that right?

A. Yes, sir.

Q. Other than what I have just said and you have said to me, has there been any promise made to you or any threat made to you for you to enter these pleas of guilty?

A. No, sir.

Q. Do you have any questions you want to ask me about anything I have said to you?

A. No, sir.

Q. Do you know what you are doing?

A. Yes, sir.

Q. Do you now tell the Court of your own free will you wish to enter pleas of guilty to these charges?

A. Yes, sir.

THE COURT: All right, Mr. District Attorney, as I understand the plea transcript, no objection to a concurrent sentence.

MR. LYLE: No, sir."

Defendant was sentenced without objection to two consecutive two-year sentences on 9 January 1979, and on the follow-

ing day, the court heard defendant's motion to set aside his plea on the grounds that: (1) he was not advised that any active sentence imposed would prohibit him from being released on the bond of $24,000 which had been set in prior cases now on appeal to this Court; and (2) he was not advised that the sentences imposed would result in his probationary sentences in Davie County being revoked. We note that the record does not show that any action has been taken in defendant's cases in Davie County.

Defendant did not object to his sentences until he testified on his motion to withdraw his plea. We note in his written motion to withdraw his plea that he did not object to the sentences imposed. The problem with defendant's contentions is the fact that no sentence was agreed upon. The record does not reveal the number of years the defendant was to receive under the agreement. To us, the primary bargaining part of the plea arrangement was the provision that the sentences imposed would run concurrently with the twelve-year sentence which had been imposed on 30 November 1978. The conduct of defendant, in not objecting to the sentences when imposed and then filing his motion to set aside the pleas without references to the sentences imposed, leads us to conclude that the terms of the plea bargain agreement were fully met. We overrule this assignment of error.

Acceptance of Plea

[2] Defendant first contends that the trial court failed to advise him of his right to remain silent as required by G.S. 15A-1022(a)(1). The record reveals:

> "The defendant having tendered a plea of guilty and being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:
>
> . . .
>
> 2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?
> Answer Yes"

We find no merit in this contention of defendant.

Defendant contends that his constitutional rights to due process were violated, in that he was misled as to the consequences

of his guilty plea, and that the plea was not the product of an informed choice, voluntarily made.

The record reveals that the court asked and that the defendant answered that: (1) he understood his entry of pleas of guilty to five charges, each a misdemeanor; (2) each charge had been explained to him; (3) he understood that he could be imprisoned for a maximum of six years and seven months; (4) he could have a trial by jury and be confronted by the witnesses against him, and by entering a plea, he was giving up these constitutional rights; and (5) he entered the plea of guilty on his own free will, understanding what he was doing. Defendant was 24 years of age at the time he entered his plea and had completed the twelfth grade in school.

The court entered the following:

"PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of counsel for the defendant and the prosecutor, the undersigned finds:

1. That there is a factual basis for the entry of the plea.

. . .

3. That the plea is the informed choice of the defendant and is made freely, voluntarily, and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded."

To us, the record is clear that all of defendant's constitutional rights were explained to him by the court. He stated that he understood his constitutional rights; that he wished to plead guilty; and that he was, in fact, guilty. We cannot conceive of a clearer record of acceptance of a plea of guilty than the one before us. A defendant may not enter a plea of guilty to a criminal charge and withdraw such plea without legal justification. Such does not appear on this record.

We hold that G.S. 15A-1022(b) was fully complied with, and the acceptance of the plea was proper.

Conclusion

We find no error in the trial of defendant, nor do we find error in the court's denial of defendant's motion to set aside his plea.

Judgment affirmed.

Judges CLARK and WELLS concur.

JOAN ANN SOUTHERN v. WILLIAM MONROE SOUTHERN

No. 7821DC1162

(Filed 2 October 1979)

1. **Divorce and Alimony § 16.2— alimony without divorce—verified complaint not necessary**

   Verification of the complaint in an action for alimony without divorce is no longer required.

2. **Divorce and Alimony § 21.8; Judgments § 51.1— English judgment for alimony and child support—no enforcement in N. C. courts**

   The district court in Forsyth County could not properly give effect to a judgment for alimony and child support rendered in England against a North Carolina resident based on service in North Carolina by uncertified and unregistered mail where defendant, an American citizen, married plaintiff in England, but England was not the parties' matrimonial domicile, the marriage in England was insufficient to give the English courts jurisdiction to render a judgment against defendant which could be enforced in our courts, and there were no other contacts which would give the English courts such jurisdiction.

APPEAL by defendant from *Freeman, Judge.* Order entered 18 October 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 27 August 1979.

This suit was brought in the District Court in Forsyth County to recover the dollar equivalent of arrearages due under an English decree for alimony and child support and to obtain an award of future alimony and child support.

Plaintiff in the present action, an English citizen and resident, and defendant, a resident of Forsyth County, were married in London, England, on 25 February 1971. On 20 May 1972, a

child, Justin Mark Southern, was born to the marriage. On 7 March 1976 plaintiff filed a petition for divorce in the Croydon County court in England. Defendant was served in Forsyth County, N.C., with notice of the action by unregistered and uncertified mail. On 24 September 1976 plaintiff prayed in the same court for alimony and child support. Defendant neither answered nor made any appearance in the action. By order of the English court dated 29 March 1977, plaintiff was awarded alimony of 3,000 pounds per annum pending final decree in the divorce action, and child support of 1,000 pounds per annum. A decree of absolute divorce was entered by the English court on 30 March 1978.

In the meantime, on 12 October 1977, plaintiff instituted the present action by complaint in the District Court in Forsyth County alleging that defendant abandoned her in June 1972 by moving out of their residence in Winston-Salem, that he had assaulted her on numerous occasions, and that he failed to provide her and the child with necessary essentials, so that plaintiff was forced to return with the child to her native England. She further alleged that defendant had failed to comply with the order of the English court directing him to pay maintenance and child support, and she sought judgment for the dollar equivalent of the arrearages due under the English decree as well as future alimony and child support.

Defendant answered, denying the material allegations of the complaint and raising the defense that the English court lacked personal jurisdiction to enter a judgment against him. He also defended on the ground that plaintiff had failed to personally verify her complaint.

On 14 July 1978 defendant moved under Rule 12(b)(6) of the Rules of Civil Procedure to dismiss the action. Defendant's motion was denied. On said date plaintiff moved for summary judgment. The trial judge granted plaintiff's motion for summary judgment as to arrearages due under the alimony and child support provisions of the English decree in the dollar equivalent amount of $14,058.56. Plaintiff was ordered to proceed with her claim for future child support. Defendant appeals from the order denying his motion to dismiss and granting summary judgment to plaintiff.

Willie C. Dawson for defendant appellant.

No counsel contra.

PARKER, Judge.

[1] In his first assignment of error, defendant contends that the court improperly denied his motion to dismiss under G.S. 1A-1, Rule 12(b)(6). He relies principally on the claim that plaintiff's failure to verify her complaint deprived the court of subject matter jurisdiction. Although the Order and Judgment of the trial court recites that plaintiff did verify the complaint prior to judgment, there is no evidence of such a verification in the record.

Prior to 1967, G.S. § 50-16 provided in pertinent part:

> "In actions [for alimony without divorce] brought under this section, the wife shall not be required to file the affidavit provided in § 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions."

By virtue of this statute a court was without subject matter jurisdiction to entertain an action for alimony in which the complaint was not verified. *Hodges v. Hodges*, 226 N.C. 570, 39 S.E. 2d 596 (1946). However, former G.S. 50-16 was repealed by 1967 Sessions Laws, ch. 1152, s. 1. Verification of a complaint in an action for alimony without divorce is no longer required. 2 Lee N.C. Family Law § 143 (1976 Supp.). Therefore, defendant's first assignment of error is without merit.

[2] Defendant next assigns error to the trial court's grant of summary judgment to plaintiff as to arrearages due under the English decree. The issue presented is whether the district court in Forsyth County properly gave effect to the judgment of a foreign country entered against a North Carolina resident based on service in North Carolina by uncertified and unregistered mail. Although the Full Faith and Credit Clause of the U.S. Constitution does not apply to decrees of foreign nations, certain foreign decrees may be given effect in our courts under the principle of the comity of nations:

> "Comity", in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation

> allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens . . . .

Hilton v. Guyot, 159 U.S. 113, 163-164, 16 S.Ct. 139, 143, 40 L.Ed. 95, 108 (1895).

However, our courts may enforce a judgment *in personam* only where it was rendered by a foreign court having jurisdiction of the cause and of the parties. *Hilton, supra.* The Matrimonial Causes Act of England, 1973, §§ 22 and 23, grants subject matter jurisdiction to the English courts to resolve issues of ancillary financial relief in divorce actions. Under Rule 14(1) of the Matrimonial Causes Rules, service of process in such actions may be made by personal service or by mail. Although the English judgment rendered against defendant may be enforceable in the English courts under English standards of jurisdiction, the courts of this state may not enforce it unless there is a showing that the exercise of jurisdiction over defendant by the English court satisfied our concepts of due process. *Bank of Montreal v. Kough*, 430 F. Supp. 1243 (N.D. Cal. 1977); *Cherun v. Frishman*, 236 F. Supp. 292 (DDC 1964); *Ross v. Ostrander*, 192 Misc. 140, 79 N.Y.S. 2d 706 (1948). *See also* Wurfel, "Recognition of Foreign Judgments," 50 N.C.L. Rev. 21, 69 (1971); von Mehren, "Enforcement of Foreign Judgments in the U.S.," 17 Virginia Journal of International Law 401 (1977).

Under the law of our state, judgment for alimony and child support are *in personam. Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977); *Fleek v. Fleek*, 270 N.C. 736, 155 S.E. 2d 290 (1967). The due process standard governing the exercise of *in personam* jurisdiction was established by the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945):

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' (Citations omitted).

Recently, in *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed. 2d 132, reh. den. 438 U.S. 908, 98 S.Ct. 3127, 57 L.Ed. 2d 1150 (1978), the Supreme Court addressed the question of constitutional limitations on the judicial exercise of personal jurisdiction over nonresident defendants in actions for child support. In that case, a California resident brought suit in the courts of that state against her divorced husband, a New York resident, seeking an increase in child support. Defendant moved to quash service, contending that the California court lacked personal jurisdiction over him. The motion was denied. On appeal from a decision of the California Supreme Court holding that defendant had rendered himself subject to the jurisdiction of the California courts, the U.S. Supreme Court reversed. Applying the standard of *International Shoe*, the Court held that defendant's acquiescence in his daughter's living in California was clearly an insufficient basis under the due process clause of the fourteenth amendment for the exercise of *in personam* jurisdiction. The Court went on to state:

> "We agree that where two New York domiciliaries, for reasons of convenience, marry in the state of California and thereafter spend their entire married life in New York, the fact of their California marriage by itself cannot support a California court's exercise of jurisdiction over a spouse who remains a New York resident in an action relating to child support."
>
> 436 U.S. at 93, 56 L.Ed. 2d at 142, 98 S.Ct. at 1697.

In the present case, defendant, an American citizen, married plaintiff in London, England. However, there is no indication in the record that England was the parties' martimonial domicile or that there were any contacts other than the marriage itself sufficient to justify imposing upon defendant the burden of defending suit in England. See *Kulko, supra* at 91, 98 S.Ct. at 1697, 56 L.Ed. 2d at 141. In the absence of such contacts, the English court lacked jurisdiction to render a judgment *in personam* against defendant which could be enforced in our courts, and the district court in Forsyth County erred in granting summary judgment to plaintiff as to arrearages due under the English decree.

The award to plaintiff of Judgment for $14,058.56 in arrearages due under the English decree is vacated, and the cause

is remanded to the district court in Forsyth County for further proceedings to determine what payments, if any, defendant should be required to make for future support.

Vacated and remanded.

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

DEBRA SUE EVERS McPHERSON, PLAINTIFF v. HIGH POINT MEMORIAL HOSPITAL, INC., DEFENDANT v. FEDERAL SIGNAL CORPORATION, THIRD-PARTY DEFENDANT

No. 7919SC29

(Filed 2 October 1979)

1. **Negligence § 6.1— res ipsa loquitur—circumstances where inapplicable**

In N. C. the doctrine of *res ipsa loquitur* is not applicable where all the facts are known and testified to, where the evidence establishes that more than one inference can be drawn as to the cause of the injury, where the existence of negligence is not the more reasonable probability, where the matter is purely a question of conjecture, where the accident was due to an act of God or the tortious act of a stranger, where the accident which results in injury is defined by law, and where the injury-producing instrumentality is not under the exclusive control and management of defendant.

2. **Negligence § 6.1— toll bar at hospital entrance—malfunction resulting in injury—res ipsa loquitur applicable**

Plaintiff's evidence supported the application of the doctrine of *res ipsa loquitur* where it tended to show that a toll bar at the entrance to a hospital parking lot rose and then fell immediately, injuring plaintiff; the toll bar was installed and maintained by defendant, who exercised exclusive ownership, management and control over the parking lot and traffic gate; and it is a matter of common human knowledge that a device installed for the specific purpose of regulating the flow of traffic entering and exiting a parking lot does not malfunction in such a manner as to injure those people entering or exiting if such device is properly maintained in a safe condition.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 6 September 1978 in Superior Court, RANDOLPH County. Heard in the Court of Appeals on 20 September 1979.

In this action the plaintiff seeks to recover damages for personal injuries alleged to have been caused by the defendant High

Point Memorial Hospital, Inc., in the maintenance and operation of a "parking toll bar" which controlled the entrance and exit ways of the defendant's parking lot. Plaintiff's injuries were sustained when "the toll bar rose and . . . suddenly fell back down striking . . . the face visor of the plaintiff's [motorcycle] helmet. The plaintiff's helmet visor was knocked off . . . and the plaintiff was hit in the mouth by the toll bar." Plaintiff argues that this movement of the toll bar was evidence of a malfunction which resulted from the negligence of defendant in its operation and maintenance.

Defendant, in its answer, denied plaintiff's material allegations and further alleged that its liability for negligence, if any existed, was barred by plaintiff's contributory negligence. Such contributory negligence, defendant contends, consisted of plaintiff's failure "to move or duck her head or observe the parking lot bar . . . despite the fact that the bar was in the open and clearly visible to her. . . ."

Defendant also filed a third party complaint against Federal Signal Corporation, the manufacturer and seller of the parking lot gate, alleging that any defects in the system were present when manufactured and sold to the hospital. Federal Signal answered, denying any negligence in the design and manufacture of the system and asserting that any defect "was caused and brought about by the defendant Hospital's own personnel in changing, repairing, and tampering with the system. . . ."

The case came on for trial, and plaintiff offered evidence which tended to show the following:

On 20 October 1973 plaintiff and her boyfriend traveled on his 450 Honda motorcycle to the High Point Memorial Hospital to visit his mother. Upon arriving, they turned into the parking lot across from the entrance to the hospital and pulled up to the gate. Plaintiff was riding on the back seat of the motorcycle. Using a diagram prepared by her to illustrate her testimony, plaintiff described the operation of the toll bar and its movement as they approached it thusly:

> As we approached this traffic installation to the defendant's . . . parking lot there, we pulled up—when you pull up

to the board, the board comes up. When I say the board, I am talking about the arm that blocks you as you enter.

. . .

[The] concrete island in the middle is three feet [wide] . . . . There are three electrical installations on this aisle . . . . [T]he one that you meet, the electrical box, it actually controls the exit. The next is the electrical box [that] controls the entrance . . . . [T]hose two electrical boxes . . . have the traffic arms on them . . . . The third electrical box [is the coin box] . . . .

The traffic arm was made of plywood. It was five inches wide . . . . It would be approximately an inch [thick]. It was painted and it had . . . black and white stripes. It had a reflector bar in the middle of it.

. . .

We pulled to the gate and stopped on the entrance side. And then the board came up . . . . There wasn't any obstructions [sic] in the entrance lane as we entered the parking lot. Then [my boyfriend] let out the clutch on his motorcycle and we started rolling and the bar dropped down on his helmet and dropped back and hit me in the mouth. I had a helmet on and a face shield and it knocked the face shield off . . . . [W]hen it hit me . . . the board broke in two.

Plaintiff also offered the testimony of an eyewitness to the accident who stated that she was a patient at the hospital on the day of the accident and that she had been looking out over the parking lot when plaintiff and her boyfriend pulled up to the tollgate. According to this witness, "They stopped as they got inside and I saw the arm go up and . . . it came down between them . . . ." She testified that the gate had been repaired by the next day and that she had not seen the arm go up and come straight back down without stopping at the top on any other occasion.

David W. Lobb, the hospital's executive director, was subpoenaed by plaintiff "to bring all records relating to the installation of the signaling device, names and addresses of them and their specific location of employment." He testified that all he could find was an "equipment depreciation" record which indicated that the system had been installed in December of 1953.

Although the hospital had purchased security services from State Merchant Associate Control since 1971, Lobb said that he did not have the names of the security personnel who were assigned to the lot on the day plaintiff was injured.

Plaintiff concluded her case with extensive medical testimony from the dentist who treated her. At the close of all her evidence, the trial judge granted defendant's motions for directed verdicts. From a judgment directing a verdict for the defendant hospital, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Henson and Donahue, by Perry C. Henson, for defendant appellee High Point Memorial Hospital, Inc.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter, for defendant appellee Federal Signal Corporation.

HEDRICK, Judge.

Although plaintiff does not argue the question in her brief, this case squarely raises the issue of whether the doctrine of *res ipsa loquitur* will apply to carry plaintiff's case to the jury. This evidentiary principle is grounded in the superior logic of ordinary human experience and operates to permit an inference of negligence from the very happening of the incident itself. 2 Stansbury's N. C. Evidence, *Burden of Proof and Presumptions* § 227 (Brandis rev. 1973). In *Newton v. Texas Co.*, 180 N.C. 561, 567, 105 S.E. 433, 436 (1920), our Supreme Court, in what has become a classic statement of the rule, described it this way:

> [W]hen a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

The reason for the rule is one of necessity. That is, when the circumstances logically suggest a probability of negligence, yet the necessary evidence to prove it is absent or unavailable, it is only just that plaintiff be permitted to have a jury decide the question. Obviously, then, if there is concrete evidence, direct or

circumstantial, of defendant's negligence, plaintiff does not need the benefit of the *res ipsa* rule. Thus, it has been held that, when the evidence is sufficient to disclose the cause of the accident, *res ipsa* does not apply, since, in such a case, nothing is left to inference. *Benton v. North Carolina Public-Service Corp.*, 165 N.C. 354, 81 S.E. 448 (1914); *Colclough v. The Great Atlantic & Pacific Tea Co., Inc.*, 2 N.C. App. 504, 163 S.E. 2d 418 (1968). *See also Stansbury, supra;* 58 Am. Jur. 2d, *Negligence* § 477 (1971).

[1] We recognize that the *res ipsa* doctrine is not only difficult to articulate, but, even more frequently, it is troublesome to apply. One analytical aid is to identify those situations in which the rule does not arise. In North Carolina, as elsewhere, the following instances preclude the applicability of *res ipsa:*

(1) Where all the facts are known and testified to;

(2) Where the evidence establishes that more than one inference can be drawn as to the cause of the injury;

(3) Where the existence of negligence is not the more reasonable probability;

(4) Where the matter is purely a question of conjecture;

(5) Where the accident was due to an act of God or the tortious act of a stranger;

(6) Where the accident which results in injury is defined by law;

(7) Where the injury-producing instrumentality is not under the exclusive control and management of the defendant.

9 Strong's N. C. Index 3d, *Negligence* § 6.1 (1977).

We do not believe that the facts of the instant case bring it within any of these categories so as to forthwith rule out the applicability of *res ipsa.* Accordingly, we turn to a consideration of the relevant cases wherein the rule of *res ipsa* has been held properly available to take the case to the jury.

In *Young v. Anchor Co., Inc.*, 239 N.C. 288, 79 S.E. 2d 785 (1954), a case very much on point with the case at bar, plaintiff undertook to use the escalator in defendant's store. Shortly after

the escalator began its ascent, "there was a sudden jerk, a stop, and a quick move forward which . . . threw [plaintiff] on her side and caused her to fall . . . ." *Id.* at 289, 79 S.E. 2d at 786. Defendant's evidence showed that the escalator was in general use in department stores, and that it was "properly constructed, maintained, inspected and operated." *Id.*, 79 S.E. 2d at 787. Nevertheless, our Supreme Court affirmed a jury verdict for plaintiff. After noting that defendant would have been entitled to a directed verdict unless the facts of the case called for the application of *res ipsa*, the Court said:

> The mechanical device known as an escalator, which the defendant furnished to its customers and invitees . . ., was installed by the defendant and was under its exclusive management and control, imposing upon it the continuous duty of inspection and maintenance, and due care in its operation, and the facts as testified by plaintiff of the sudden jerk, stoppage and unusual movement on the occasion alleged was such as to raise the inference that the accident complained of would not have occurred unless there had been negligent failure to inspect and maintain.

Id. at 291, 79 S.E. 2d at 788.

Similarly, in *Page v. Sloan*, 12 N.C. App. 433, 183 S.E. 2d 813 (1971), *aff'd.*, 281 N.C. 697, 190 S.E. 2d 189 (1972), a case in which an electric water heater in a motel exploded and killed a motel guest, it was held that the doctrine of *res ipsa loquitur* precluded summary judgment for defendant where the evidence established that the heater was under the exclusive managment and control of the motel owners and that they had undertaken the maintenance of it. Observing that "[i]t is a matter of common knowledge that electric water heaters . . . [w]hen in a safe condition and properly managed, . . . do not usually explode," *Id.* at 438, 183 S.E. 2d at 816, the court concluded: "[T]herefore, in the absence of explanation, the explosion of an electric hot water heater reasonably warrants an inference of negligence." *Id.*

Another relevant case is *Collins v. Virginia Power and Electric Co.*, 204 N.C. 320, 168 S.E. 500 (1933). In *Collins*, defendant maintained a primary wire charged with electricity along a highway from which secondary wires ran across plaintiff's premises and attached to his warehouse. In an action for damages, the

Court held that evidence tending to show that the plaintiff's warehouse caught fire at the point where defendant's wire was attached to the warehouse by a bracket, and that all wires, poles, brackets and other electrical equipment were installed and maintained by defendant and were under its exclusive control and management, was sufficient to submit the case to the jury under the doctrine of *res ipsa loquitur*.

Apparently anticipating that the *res ipsa* rule is a factor in the present case, the defendant hospital, citing *Watkins v. Taylor Furnishing Co.*, 224 N.C. 674, 31 S.E. 2d 917 (1944), argues that plaintiff offered no proof of any defect in the toll bar. Neither was there any proof, defendant asserts, "as to whether any such incident had ever occurred before or that it had ever malfunctioned on a previous occasion."

First, we point out that the absence of such proof was also true in the above-cited cases of *Young v. Anchor Co.*, *Page v. Sloan* and *Collins v. Virginia Power and Electric Co.* Second, we reiterate that the doctrine of *res ipsa loquitur* is merely a mode of proof, a means of showing that some negligence was the probable cause of the accident. Third, with reference to *Watkins* and other cases where certain equivocal inconsistencies have appeared in the decisions of the North Carolina courts, we quote from Stansbury, *supra*:

> The recognition of the sufficiency of this inference of general negligence is perhaps the most distinctive feature of the *res ipsa* doctrine. Yet, as fundamental as this feature is, it has not always been recognized and followed by the North Carolina Court. The absence of any evidence of specific acts of negligence has been emphasized in a number of decisions in which *res ipsa* was held inapplicable [citing *Warren v. Jeffries*, 263 N.C. 531, 139 S.E. 2d 718 (1965)], and in some of these this emphasis seems to have caused the Court to overlook the possibility that the occurrence itself could permit an inference of general negligence. [Citations omitted.]

Proof in a case need not preclude every inference other than that of the defendant's negligence. If the inference that his negligence caused the injury is more likely than other permissible inferences, the doctrine should apply.

[2] Rather than trying to resolve these conspicuous conflicts in the cases, we choose to follow what we perceive to be the better-reasoned decisions of *Young v. Anchor Co.*, *Page v. Sloan*, and *Collins v. Virginia Power and Electric Co.*, *supra*. Applying the rule of those cases to the facts of this case, we think it plain that plaintiff's evidence supports the application of *res ipsa*. At this stage of the proceedings, the evidence tends to show that the parking lot toll bar was installed and maintained by the defendant, who exercised exclusive ownership, management and control over the parking lot and this traffic gate. Moreover, we believe it a matter of common human knowledge that a device installed for the specific purpose of regulating the flow of traffic entering and exiting a parking lot does not malfunction in such a manner as to injure those people entering or exiting the lot, if such device is properly maintained in a safe condition. In the absence of explanation, therefore, we hold that such an occurrence reasonably sustains an inference of negligence sufficient to submit the case to the jury. It follows that the judgment of the trial court granting the defendant's motion for a directed verdict was error, and the same is hereby reversed.

Reversed and remanded.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. LARRY BAGLEY

No. 7914SC398

(Filed 2 October 1979)

1. Criminal Law § 101— statement by bailiff to juror—no prejudice to defendant

The trial court did not err in denying defendant's motion for mistrial made after learning that the bailiff had engaged in conversation with one of the jurors during the trial of this matter, since there was nothing whatsoever in the conversation that was even remotely related to the case, and the only reference to any case made by the bailiff was to one on which he sat as a juror twenty-five years earlier and in which he felt that he had been instrumental in bringing about an acquittal of defendant in that matter.

2. Burglary and Unlawful Breakings § 5.12— breaking and entering business—possession of store breaking tools—sufficiency of evidence

In a prosecution for felonious breaking and entering and felonious possession of implements of store breaking, evidence was sufficient to be submitted to the jury where it tended to show that a sheriff's deputy went to a store in response to a silent burglar alarm; he saw two black males emerge from the rear of the building; when they did not stop at his verbal command, he fired his shotgun, at which point both individuals dropped to the ground; one of the individuals (later identified as defendant) had entered some bushes and was, for a short period of time, out of the deputy's view, but he emerged from the bushes on the deputy's command; in close physical proximity to the individuals the deputy found several bottles of prescription drugs, two pairs of gloves, as well as a crowbar at the rear of the building; a tire tool was found inside the building at its rear; and the owners of the store and other store employees testified that defendant and his companion had not been given permission to be in the store.

3. Burglary and Unlawful Breakings § 10.3— tire tool as implement of store breaking

In a prosecution for felonious possession of implements of store breaking pursuant to G.S. 14-55, the trial court did not err in permitting the jury to conclude that a tire tool was an implement of store breaking.

APPEAL by defendant from *Battle, Judge.* Judgment entered 1 February 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 30 August 1979.

Defendant was tried, upon indictments proper in form, for felonious breaking and entering and felonious possession of implements of store breaking. He was convicted by the jury on both counts and received concurrent sentences of not less than four nor more than ten years' imprisonment on each count. From judgment on the verdict defendant appeals, assigning error.

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

Bryant, Bryant, Drew and Crill, by Lee A. Patterson, II, for the defendant.

MARTIN (Robert M.), Judge.

[1] Defendant first assigns as error the failure of the trial court to declare a mistrial after learning that the bailiff had engaged in conversation with one of the jurors during the trial of this matter. The trial court held a *voir dire* hearing and determined that

nothing whatsoever in the conversation was even remotely related to the instant case or any other current case on the trial calendar for Durham County. The only reference to a case made by the bailiff was to one on which he sat as a juror twenty-five years earlier, and in which he, the bailiff, felt he had been instrumental in bringing about an acquittal of the defendant in that matter. If any impact could have been made upon the juror by the bailiff, it would necessarily have been favorable to the defendant. Under these facts, it was not error for the trial court to overrule defendant's motion for a mistrial. Mistrials are not granted lightly, and the granting thereof will ordinarily rest in the sound discretion of the trial judge. *See State v. Dollar,* 292 N.C. 344, 233 S.E. 2d 521 (1977). Defendant has failed to show any abuse of discretion and the cases dealing with this issue do not support his contentions. *See, e.g., State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Clemmons,* 35 N.C. App. 192, 241 S.E. 2d 116 (1978). Although we do not countenance with approval *any* unauthorized conversation between court officials and jurors, we do not find it necessary to order the expense and inconvenience of a new trial where the content of the conversation was as innocuous and nonprejudicial to defendant as the record before us indicates. *See, e.g., Lewis v. Fountain,* 168 N.C. 277, 84 S.E. 278 (1915). Defendant's assignment of error is overruled.

We also overrule defendant's assignment of error to the trial court's failure to question the jurors in regard to this conversation. All of the evidence concerning the conversation showed that the conversation was decidedly nonprejudicial in character, and we do not see what purpose would have been achieved by extending the inquiry further. We note that the trial court properly instructed the jury as to what evidence they could and should consider, and conclude that any error here would be harmless.

[2] Defendant next assigns as error the failure of the trial court to allow his motion for nonsuit at the close of State's evidence. We find this assignment of error to be wholly without merit. On a motion for nonsuit, the evidence for the State is to be viewed by the trial court as true, with any conflicts or discrepancies in the evidence being resolved, for the purposes of the motion, in favor of the State. *See State v. Cooper,* 286 N.C. 549, 213 S.E. 2d 305 (1975). Evidence for the State tended to show that a deputy of the Durham County Sheriff's Department (having gone with another

deputy to the store which had been broken and entered in response to a silent burglar alarm) saw two black males emerge from the rear of the building in question. When they did not stop at his verbal command, he fired his shotgun, at which point both individuals dropped to the ground. One of the individuals (later identified as defendant) had entered some bushes and was, for a short period of time, out of the deputy's view, but he emerged from the bushes on the deputy's command. In close physical proximity to the individuals, the deputy found several bottles of prescription drugs, two pairs of gloves, as well as a crowbar at the rear of the building. A tire tool was found inside the building at its rear. The owners of the store and other store employees testified that defendant and his companion had not been given permission to be in the store. We find this evidence to be abundantly sufficient to survive defendant's motion for nonsuit. *See State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). The assignment of error is overruled.

[3] Defendant further assigns as error the trial court's submission to the jury of the issue regarding possession of implements of housebreaking, an offense under N.C. Gen. Stats. § 14-55. State's evidence, as noted above, tended to show that both a tire tool and a crowbar were found in close proximity to defendant and his partner at the scene of the offense. Defendant contends, on the authority of *State v. Garrett*, 263 N.C. 773, 140 S.E. 2d 315 (1965) and *State v. Godwin*, 3 N.C. App. 55, 164 S.E. 2d 86 (1968) (*Godwin* following the rationale and holding of *Garrett*), that it was error for the trial court to permit the jury to consider whether a tire tool could be an implement of house- (or store-) breaking.

The decided cases display a less than uniform degree of consistency in approach to the question what is or is not an "other implement of housebreaking" within the purview of N.C. Gen. Stats. § 14-55. The decisions, at least on first consideration, would appear to be oriented towards reaching particular results in particular cases, rather than in refining and applying a uniform rule of law. *See generally* Annot. 33 A.L.R. 3rd 798. It is by this *ad hoc* procedure that we came to the result whereby a crowbar, which is a tool well-suited for prying and forcing, is susceptible to adjudication as being an implement of housebreaking as a matter of law (even though many crafts and trades legitimately employ

this tool for lawful purposes) (*see, e.g., State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966)) and yet a tire tool, which is equally well-suited for prying and forcing (a conclusion which we may safely reach by observing the frequency with which both implements figure prominently in breaking cases), is held not to be an implement of housebreaking by *Garrett* and its sole offspring.

The analysis employed by the Supreme Court in *Garrett*, whereby it concluded that a tire tool was not an "other implement of housebreaking" within the contemplation of N.C. Gen. Stats. § 14-55, appears to be essentially quantitative: virtually every motorist possesses a tire tool, and, indeed, should possess one for safe travel upon the highways. Therefore, because the opportunities for lawful possession vastly outweigh numerically the instances where the tire tool may be used for some felonious purpose, it is concluded that the Legislature, under the *ejusdem generis* rule, did not intend to include the tire tool in the catch-all phrase "other implement of housebreaking."

A different type of analysis was foreshadowed in *State v. Vick*, 213 N.C. 235, 195 S.E. 779 (1935) and is employed in the line of decisions beginning with *State v. Boyd*, 223 N.C. 79, 25 S.E. 2d 456 (1943) and continuing with *State v. Baldwin*, 226 N.C. 295, 37 S.E. 2d 898 (1946), *State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966), and *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1967). In *Boyd*, Justice Winborne, writing for the Court, discussed at length and in detail the history of the statute (now N.C. Gen. Stats. § 14-55, then C.S. 4236) and its interpretation both in England and in this country. He relied upon a Connecticut case, *State v. Ferrone*, 97 Conn. 258, 116 A. 336 (1922), in formulating a qualitative analytic approach to the question. Two classes of implements were described: those which were designed specifically for housebreaking (and presumably including those specifically enumerated in the statute) and those which become implements of housebreaking "temporarily and for a particular purpose." In determining whether a particular tool fits into the second class, a two-prong test was employed: (1) was the tool in question reasonably adapted for use in housebreaking; and, (2) was the tool in question at the time intended or actually used for that purpose.

The advantages of this second approach to classifying objects as implements of housebreaking are obvious. It enables the trial

court to view the total circumstances surrounding the possession and use of an object to make a determination about it. It also avoids having to engage in counting exercises to see if legitimate uses for a tool outnumber potentially criminal uses. By considering the manner in which an object *can* be used in conjunction with considering how that same object actually *was* used (or was intended for use), a greater uniformity of decisions may be reached in this area than is possible under any *ad hoc* approach. The sureness of the equal application of the law is enhanced, and all persons who might be affected by the application or administration of this statute can receive meaningful notice of what constitutes an offense under its provisions.

The analysis employed in *Boyd* had yielded determinations that, in a proper case with supporting evidence, the following implements may be found to be "other implements of housebreaking" within the contemplation of N.C. Gen. Stats. § 14-55: a crowbar (Morgan); screwdrivers (*Morgan, Lovelace*); ball peen hammers and wrenches (*State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967)). All of these tools have commonly occurring legitimate uses in ordinary occupations. Nonetheless, any of them may be used (and they are well adapted for use) in housebreaking under particular circumstances, and, if the cases are to be accorded credibility, have been so used. We fail to see what distinguishes a tire tool from these other implements. We are disinclined to indulge in metaphysical speculation as to what intrinsic qualities or properties inhere to a tire tool which would make it immune to the analysis applied to the other enumerated implements by virtue of *Boyd* as listed above. Accordingly, we decline to follow *Garrett* and *Godwin* as we find them to be inconsistent with the preponderant and better-reasoned authority. For the reasons stated, we find no error in the trial court's permitting the jury to conclude that a tire tool was an implement of storebreaking. There is abundant evidence to show that the tire tool was used in the breaking. No explanation appears of record which would justify the presence of the tire tool inside the store after the breaking. No suggestion appears of record that any automobile tire was in need of or receiving repair on the premises in question at the time defendant and his companion were apprehended. The jury was properly instructed on the principles of actual and contructive possession, and no reason has been argued

which would require disturbing their verdict. Even were we to follow *Garrett*, it must be noted that there was ample evidence that defendant, either himself or acting in concert with his partner, actually or constructively possessed the crowbar which was also used in the breaking and which was found outside the store in close physical proximity to defendant. Under the principles enunciated in *Lovelace* concerning common criminal purpose (a case with facts bearing marked similarity to those of the instant case) defendant would be still guilty of the offense of possessing an "other implement of housebreaking" in violation of N.C. Gen. Stats. § 14-55 on the authority of *Morgan*. Defendant's assignments of error on these points are overruled.

We conclude that defendant has had a fair trial, free from prejudicial error.

No error.

Judges WEBB and ERWIN concur.

STATE OF NORTH CAROLINA v. WILBERT JUNIOR ROGERS

No. 7915SC68

(Filed 2 October 1979)

1. Criminal Law § 101.3— denial of jury view

In this prosecution for murder allegedly committed by throwing the victim from a bridge into the water below, the trial court did not abuse its discretion in the denial of defendant's motion for a jury view of the bridge where there was evidence that the automobile from which defendant pulled the victim was only eight feet from the end of the bridge and the first 36 feet of the bridge were over dry land, since the jury could make a judgment on this evidence without a view of the bridge.

2. Criminal Law § 89.5— slight variances in corroborating testimony

A witness's testimony was not so different from the testimony of another witness that it could not be considered in corroboration of the testimony of the other witness.

3. Homicide § 21.7— second degree murder—throwing victim from bridge

The State's evidence was sufficient to sustain a conviction of second degree murder where it tended to show that defendant forcibly kept the vic-

tim in his automobile late one night, drove him to a bridge, pulled him from the automobile and forced him over the side of the bridge into the cold water below.

4. **Homicide § 27.1— erroneous instruction on heat of passion—harmless error**

Defendant was not prejudiced by the court's erroneous instruction that the jury could not convict defendant of second degree murder if the State proved that defendant's passion had cooled, since the instruction was more favorable to defendant than he was entitled to receive, and any prejudice was cured when the court, at the jury's request, thereafter properly defined second degree murder and voluntary manslaughter and properly placed the burden of proof on the State.

5. **Criminal Law § 114.3— instructions—no assumption that fact proven**

The trial court in a homicide case did not assume that it had been proven that defendant pushed the victim off a bridge by an instruction that the jury should not return a verdict of guilty of second degree murder if it had a reasonable doubt that defendant "threw [the victim] over intentionally."

6. **Homicide § 24.2— instructions—burden of proof of malice**

The trial court's instruction in its final mandate that the jury should return a verdict of guilty of voluntary manslaughter if the State "has not satisfied you" that defendant acted with malice could not have misled the jury as to the State's burden of proof for second degree murder where the court had already properly charged the jury that it must be satisfied "beyond a reasonable doubt" that defendant acted with malice in order to find him guilty of second degree murder.

7. **Homicide § 23.2— failure to instruct on foreseeability as element of proximate cause**

Failure of the trial court in a murder case to charge the jury that foreseeability is an element of proximate cause did not constitute prejudicial error where foreseeability was not seriously in issue.

Judge MITCHELL concurs in the result.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 24 August 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 6 April 1979.

The defendant was tried for second degree murder. The State's evidence tended to show that on the night of 24 December 1977 the defendant agreed for a price to carry Ray Yancey and several other persons to a certain place in Alamance County known as the Zodiac. On the way to the Zodiac, a fight occurred between the defendant and several passengers in the automobile. Several persons left the automobile and defendant then took on more passengers. After driving a short distance, defendant then

ordered one Charles Elbert Snipes to get out of the automobile. Mr. Snipes asked to be allowed to remove his friend Ray Yancey from the automobile, which request was refused by defendant. As Mr. Snipes got out of the automobile, defendant struck him twice in the face with his fist. As Mr. Snipes was fleeing from the vehicle, he heard what was either a firecracker or a gunshot. Robert Moore then testified for the State that he rode further with defendant and several other persons, including Ray Yancey, to a bridge on Highway 62. He testified he saw defendant pull Ray Yancey, who was asleep, from the automobile. He saw defendant go to the edge of the bridge with Ray Yancey and he heard someone say, "Man, don't throw that boy in that cold-ass water," and then he heard the water splash. Daniel Qualls, a deputy sheriff of Alamance County, testified that the body of Talmadge Ray Yancey was found under the Stoney Creek Bridge on 5 January 1978.

The defendant did not offer any evidence. He was convicted of second degree murder.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

Hemric and Hemric, by H. Clay Hemric, Jr., for defendant appellant.

WEBB, Judge.

[1] Defendant's first assignment of error deals with the court's denial of his motion that the jury be allowed to view the scene at the bridge. The trial judge has discretionary power to grant or refuse a request for a jury view of the premises. *State v. Ross*, 273 N.C. 498, 160 S.E. 2d 465 (1968); *State v. Smith*, 13 N.C. App. 583, 186 S.E. 2d 600 (1972). The defendant argues that the court abused its discretion in that the evidence showed the automobile was only eight feet from the end of the bridge when the deceased was thrown from the bridge and the evidence also showed the first 36 feet 3 inches of the bridge was over dry land. Since this was in evidence, the jury was able to make a judgment on this evidence without a view of the bridge. The defendant's first assignment of error is overruled.

[2] The defendant next assigns as error the admission of the testimony of Daniel Qualls, a detective with the Alamance County Sheriff's Department, offered to corroborate other witnesses. Defendant contends it did not corroborate other witnesses. Defendant specifically objects to the following testimony of Mr. Qualls:

> "[Robert Moore] relates this. Says that they stop the vehicle, that the defendant, Wilbert Rogers, gets out, goes around in front of the vehicle, opens the passenger's door on the car, takes the defendant—correction, takes the victim, Talmadge Yancey, out, takes him over to the side of the bridge and throws him over. He hears the man hit the water, hears the splash."

Robert Moore actually testified as follows:

> "Well, he—he—he pulled him out and went to the bridge with him. I heard Charlie say, 'Man,' say, 'don't throw that boy in that cold-ass water,' and about this time I heard the water splash."

We hold that this testimony of Mr. Qualls as to what Robert Moore told him was not so different from the testimony of Robert Moore that it could not be considered in corroboration of Robert Moore's testimony.

The defendant's next assignment of error deals with the sustaining of an objection to a question asked on cross-examination of Daniel Qualls. Mr. Qualls testified on cross-examination that Robert Moore told him everything that happened on the bridge consumed ten to fifteen seconds and that he heard Robert Moore testify in court that it took five seconds. The following colloquy then took place.

> "Q. Is there—has there been any other change in his statement like that?
>
> MR. JOHNSON: Objection, your Honor.
>
> COURT: Sustained."

The answer which Mr. Moore would have given is not in the record. The defendant has not shown how he was prejudiced by the sustaining of this objection. In the absence of such a showing

we cannot say the court abused its discretion by sustaining this objection. *See State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970).

[3] The defendant next assigns as error the refusal of the court to grant his motion for a verdict of acquittal to the charge of second degree murder. There is substantial evidence that late one night the defendant forcibly kept the deceased in the automobile, drove him to a bridge, pulled him from the automobile and forced him over the side of the bridge into cold water. This is evidence which sustains a verdict of second degree murder. *See State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971).

[4] The defendant's remaining assignments of error pertain to the charge. He says first the following portion of the charge was in error:

> "If the State does not prove beyond a reasonable doubt . . . that his action was so soon after the provocation that the passion of a person of average mind and disposition would not have cooled, then you may not find the defendant guilty of second degree murder, but he would at most be guilty of voluntary manslaughter."

By using the two negatives as it did, the court gave to the defendant a charge more favorable than he was entitled to receive. The court in effect charged the jury that if the State proved the passion of the defendant had cooled, they could not convict him of second degree murder. Whatever prejudice the defendant may have suffered was cured when the jury returned to the courtroom and asked the court to explain to them the crimes with which the defendant was charged. At this time the court properly defined second degree murder and voluntary manslaughter and properly placed the burden of proof on the State. If there were any confusion in the minds of the jury, it should have been eliminated when this happened. Defendant relies on *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976). In that case our Supreme Court reversed the superior court for charging that in order to convict the defendant of voluntary manslaughter, the State had to prove beyond a reasonable doubt "that the killing occurred sufficiently long after the occurrence of such provocations may have existed that the passion of a person of average mind and disposition may have cooled." The Court in that case did not discuss the possibility that this charge may have been too favorable to the defendant.

There was in that case no correcting instruction which could have eliminated any confusion in the jury's mind. We hold that *Cousins* is distinguishable from the case sub judice. This assignment of error is overruled.

[5] The defendant next says the court in its charge assumed as proven beyond a reasonable doubt the fact that defendant pushed deceased off the bridge. He argues this is so because in his final mandate Judge McLelland said:

> "If, however, you . . . have a reasonable doubt that the facts are that he threw Yancey over intentionally, . . . you will not return a verdict that he's guilty of second degree murder . . . ."

We do not agree that this statement shows Judge McLelland assumed that it was proven beyond a reasonable doubt that defendant pushed the deceased off the bridge. Judge McLelland, by this statement, left it to the jury to determine if deceased was thrown from the bridge. This assignment of error is overruled.

The defendant next assigns as error what he says is a misstatement by the court when recapitulating the evidence. We cannot find in the record that the defendant called this to the court's attention before the case went to the jury. However, we do not base our decision on this point. Defendant contends the court misstated the evidence when it said the following:

> "[T]hat as Robert Moore, one of the passengers, testified the defendant stopped the car on a bridge on Highway 62 north of Burlington called, as I recall it, the Stoney Creek Bridge or the Mine Creek Bridge, pulled Yancey, Talmadge Ray Yancey, out of the car and pushed him over the bridge producing a splash . . . ."

We hold that this summary of the evidence was in accord with the testimony of Robert Moore.

[6] The defendant next contends the court erred in its charge by not requiring the State to prove beyond a reasonable doubt that defendant acted with malice in order to convict him of second degree murder. The defendant quotes the following portion of the charge in support of this contention:

> "[B]ut [if] the State has not satisfied you that he acted with malice in so doing or has not satisfied you that he did not act in the heat of passion upon adequate provocation, then it would be your duty to return a verdict that he is guilty of voluntary manslaughter."

This portion of the charge came from the final mandate of the court and dealt with the charge of voluntary manslaughter. Judge McLelland had already properly charged the jury that it must be satisfied beyond a reasonable doubt that the defendant had acted with malice in order to find him guilty of second degree murder. As this questioned portion of the charge dealt with voluntary manslaughter, we do not believe it misled the jury as to second degree murder.

[7] The defendant's last assignment of error deals with the court's definition of proximate cause. The court did not tell the jury that foreseeability is a part of proximate cause. The defendant relies on *State v. Mizelle,* 13 N.C. App. 206, 185 S.E. 2d 317 (1971) which states that foreseeability is an essential element of proximate cause. In *State v. Pope,* 24 N.C. App. 217, 210 S.E. 2d 267 (1974) this Court interpreted *Mizelle.* In *Mizelle,* the defendant was charged with involuntary manslaughter. In *Pope,* as in the case sub judice, the defendant was charged with first degree murder and convicted of second degree murder. In *Pope,* this Court held that if foreseeability was not seriously in issue, it was not reversible error in a murder case not to charge the jury that foreseeability is an element of proximate cause. In the case sub judice it is hard to believe that anyone could argue death or some similar injurious result is not foreseeable when a person is pushed off a bridge on a cold winter night. We hold that foreseeability was not seriously in issue in this case. *State v. Pope, supra,* governs. The defendant's last assignment of error is overruled.

No error.

Judge MARTIN (Robert M.) concurs.

Judge MITCHELL concurs in the result.

STATE OF NORTH CAROLINA v. HILBERT WALTER HARRIS, JR.

No. 791SC355

(Filed 2 October 1979)

Searches and Seizures § 24— validity of warrant—probable cause—identified informant—credibility

Evidence before a magistrate was sufficient for him to find probable cause to issue a search warrant where the magistrate was told that the basis of the informant's knowledge was his own purchase of one-half pound marijuana which he alleged occurred at the house owned by defendant's parents and in which defendant lived; and the magistrate had before him facts from which he could reasonably conclude that the informant was credible and his information reliable, including (1) statements by the informant admitting his own guilt of dealing in contraband and telling officers where his supplier could be found and thus where additional evidence against him might be uncovered, (2) a great degree of detail which the informant revealed with respect to defendant, who was his supplier, defendant's home, and defendant's vehicle which observations were later corroborated by police, and (3) the informant's willingness to be identified by name in the affidavit and not to remain a confidential informant.

APPEAL by defendant from *Small* and *Strickland, Judges.* Order entered 7 November 1978, and judgment entered 1 March 1979 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 21 August 1979.

Defendant was charged with felonious possession of marijuana in violation of G.S. 90-95(a)(3). Pursuant to G.S. 15A-974 defendant moved the trial court to suppress evidence seized on 7 October 1978 during a search by the police of the dwelling in which he resided. The motion was based on defendant's contention that the search violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. Upon the trial court's denial of the motion, defendant excepted, entered a plea of guilty to the offense charged, and gave notice of appeal. The appeal, under the provisions of G.S. 15A-979(b), raises the single question of the validity of the search warrant.

Attorney General Edmisten by Associate Attorney Sarah C. Young, for the State.

Twiford, Trimpi & Thompson, by C. Everett Thompson, for defendant appellant.

MORRIS, Chief Judge.

The sole issue presented on appeal is whether there was sufficient evidence before the magistrate from which he could find probable cause to issue the search warrant challenged in this case. "Probable cause, as used in the Fourth Amendment and G.S. 15-25(a) [*now see* G.S. 15A-244(2) and G.S. 15A-245], means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v Campbell,* 282 N.C. 125, 128-129, 191 S.E. 2d 752, 755 (1972).

A judicial determination upholding the constitutional validity of a search warrant will be sustained so long as a substantial basis exists for the issuing magistrate to conclude contraband is probably present. *Jones v. United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725, 78 A.L.R. 2d 233 (1960). In the case before us the issuing magistrate had the following affidavit of Elizabeth City police officers Curtis Moore and J. C. Spear before him when he authorized the search of defendant's residence.

> Affiants Curtis Moore and J. C. Spear have this date, 10/6/78 arrested Vinton B. Turnburke, a white male, age 17, who resides with his parents at 1504 Rochelle Drive, Elizabeth City, N.C., upon charges of possession of marijuana and sale of marijuana; after advising said Turnburke of his rights under the Miranda decision, affiants asked Turnburke where he had obtained the marijuana which they had just confiscated during a search of his home and vehicle and Turnburke replied that on Monday, October 2, 1978, at approximately 3:30 p.m. he (Turnburke) went to the residence of "Hank" Harris, at 1707 Crescent Drive, and met "Hank" inside of the house, going in through the garage entrance; Turnburke further stated that he at that time purchased a ½ pound quantity of marijuana from "Hank" Harris for a price of $220.00, with "Hank" leaving Turnburke standing in one of the front or living rooms of the house while "Hank" went to another room of the house and shortly returned with the marijuana contained in a brown paper bag in a loose fashion; Turnburke delivered to affiants the brown paper bag which contained the marijuana delivered to him by "Hank"; Turn-

burke further stated that he had previously purchased marijuana from "Hank" Harris on 3 or 4 prior occasions in smaller quanties [sic]; Turnburke described "Hank" Harris as a young white male who is a student at the College of the Albemarle; affiant Spears talked with Elizabeth City Police Officer, W. G. Williams, Jr., who said that he is personally acquainted with "Hank" Harris and that his full and correct name is Hilbert Walter Harris, Jr.; Moore is acquainted with "Hank's" father, Hilbert W. Harris, Sr., who is employed as a postman; both Turnburke and Officer Williams independently told affiant Spears that "Hank" customarily drove a 1976 or 1977 baige [sic] or light tan Jeep; Vinton B. Turnburke also gave affaints information concerning 6 marijuana sales which Turnburke had made to other people out of the ½ pound of marijuana purchased at the Harris house on 10/2/78, with your affaint's being unaware of these transactions until Turnburke told them about same; that affaint Spears has caused a "PIN" computer check run on "Hank" Harris and found that N.C. driver's license #5147583 was issued on 1/30/76 to Hilbert Walter Harris, Jr., with a residence of 1707 Crescent Drive in Elizabeth City, N. C., and a date of birth of 10/28/59.

Defendant argues that the information before the magistrate was insufficient to satisfy the two-pronged test expounded by the United States Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 114, 12 L.Ed. 2d 723, 729, 84 S.Ct. 1509, 1514 (1964):

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable".

Accord, State v. Hayes, 291 N.C. 293, 230 S.E. 2d 146 (1976). *See also Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969).

There is no question in the present case that the first prong of the *Aguilar* test has been met. The magistrate was told that

the basis of informant Turnburke's knowledge was Turnburke's own purchase of one-half pound of marijuana which Turnburke alleged occurred at the house owned by defendant's parents and in which defendant lived.

Here, the informant was identified, so there is not the "confidential informant" situation of *Aguilar* and *Spinelli*. Even so, the magistrate in the case at bar had before him circumstances from which he could reasonably conclude that the informant was credible and his information reliable. The statements of Turnburke admitting his own guilt and telling police officers where his supplier could be found and thus where additional evidence against him might be uncovered were against Turnburke's penal interest. The statements of Turnburke which implicate defendant involve the same crimes or transactions adversely affecting Turnburke's penal interest.

The Supreme Court of the United States recognized the value of such statements in determining the credibility and reliability of their source:

> These statements were against the informant's penal interest, for he thereby admitted major elements of an offense. . . .
>
> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.

United States v. Harris, 403 U.S. 573, 583, 29 L.Ed. 2d 723, 734, 91 S.Ct. 2075, 2082 (1971). *Accord, State v. Beddard*, 35 N.C. App. 212, 241 S.E. 2d 83 (1978). Defendant points out that hearsay statements against penal interest, as opposed to proprietary interest, are inadmissible in evidence, and urges that they should also be held to be too unreliable to serve as a basis for finding probable cause to issue a search warrant. The fact that the defendant's out-of-court declarations against penal interest may not be admissible at trial where the State must prove the guilt of the

defendant beyond a reasonable doubt, does not preclude magistrates from considering such declarations in determining whether there is probable cause to believe contraband is present. *U.S. v. Harris*, 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 (1971).

The degree of detail with which an informant reports illegal activities may also be telling about the informant's reliability. *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *State v. Ellington*, 18 N.C. App. 273, 196 S.E. 2d 629 (1973), *aff'd*, 284 N.C. 198, 200 S.E. 2d 177 (1973). The informant's ability to recall detail is an indication that he actually has first-hand information about the crimes or transactions of which he claims knowledge, particularly where there is police corroboration of at least some of the informant's statements.

In the present case the affidavit revealed that informant Turnburke had stated he knew defendant was a young white male who lived at 1707 Crescent Drive in Elizabeth City, who was a student at the College of the Albemarle, and who customarily drove a 1976 or 1977 beige or light tan Jeep. The police later corroborated these observations. Turnburke also stated the details of purchasing marijuana from the defendant at the defendant's residence in the afternoon of 2 October 1978, stating the quantity and purchase price of the contraband and describing the container in which it was packaged. Turnburke knew that the house had a garage entrance. It must be concluded that a "magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." *Spinelli v. United States*, 393 U.S. 410, 417, 21 L.Ed. 2d 637, 644, 89 S.Ct. 584, 589 (1969).

An additional fact which could have been relied upon by the magistrate in evaluating the credibility of Turnburke's statements was that Turnburke was identified by name in the affidavit and was not a confidential informer. *Andresen v. Maryland*, 427 U.S. 463, 478, 49 L.Ed. 2d 627, 641, 96 S.Ct. 2737, 2747, n. 9 (1976). The general rule in other jurisdictions is that an affidavit for a search warrant based on information furnished by a named individual is ordinarily sufficient to support the warrant. Annot., 14 A.L.R. 2d 605, 608 (1950); *See Edwards v. Commonwealth of Kentucky*, 573 S.W. 2d 640 (Ky. Sup. Ct. 1978). That an informant is willing to give his name on the face of the af-

fidavit demonstrates his willingness to stand behind his story, thus raising the probability his information is correct.

The importance of protecting the homes of citizens of our State from the unauthorized and arbitrary intrusion of illegal searches cannot be overstressed. However, we are satisfied that in the case before us the magistrate had sufficient information before him reasonably to conclude that the informant's information was reliable and, based on this information, to issue a search warrant. This would be true even had the informant been a confidential informant.

No error.

Judges MARTIN (Robert M.) and WEBB concur.

EQUITABLE FACTORS COMPANY, PLAINTIFF v. CHAPMAN-HARKEY COMPANY, DEFENDANT

No. 7826SC1092

(Filed 2 October 1979)

1. **Uniform Commercial Code §§ 8, 9— "guaranteed sales basis"—compliance with statute of frauds—admissibility of parol evidence**

In an action to recover the purchase price of goods sold to defendant, a letter from the agent of plaintiff's assignor which identified it as an agent and which stated that at the time of the sale it was agreed by the assignor that the goods were sold on a "guaranteed sales basis" was sufficient to comply with the statute of frauds and to make evidence of the guaranteed sales agreement admissible under the parol evidence rule; furthermore, under G.S. 25-9-318 defendant could use the "guaranteed sales basis" term as a defense even though the defense did not become available until after notification that the account had been assigned. G.S. 25-2-201; G.S. 25-2-202; G.S. 25-2-326(4).

2. **Uniform Commercial Code § 22— action to recover cost of goods—cost of television advertising—buyer's right to set off**

In an action to recover the purchase price of goods sold to defendant, the trial court erred in entering summary judgment for plaintiff where there was a genuine issue as to whether defendant was entitled to set off the cost of television advertising against the sales price.

APPEAL by defendant from *Johnson, Judge.* Judgment entered 21 September 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1979.

This is an action for the purchase price of goods sold to the defendant. On 20 April 1976 defendant signed an order for the purchase from A. G. Bond Company of a quantity of "hang-ups" at a total cost of $13,378.56. On the face of the purchase order were the words "Please confirm all t.v. before shipping order." The "hang-ups" were shipped to defendant on 11 May 1976. By an invoice received by defendant on 17 May 1976, A. G. Bond Company notified defendant it had assigned the account for this sale to Equitable Factors Company. In May 1976, the defendant received the following letter:

May 19, 1976

Chapman Harkey Company, Inc.
1300 South Boulevard
Charlotte, N.C. 28203

Attn: Mr. Thomas R. Davis

Gentlemen:

On or about April 20, 1976, acting as sales representative for A. G. Bond Company, I sold merchandise to your company. This toy merchandise is known as Hang-Ups.

At the time of the sale it was agreed by Mr. Ron Richard, Vice President of Marketing of the A. G. Bond Company, and myself, that the merchandise was being sold to you on a guaranteed sale basis.

In addition, it was agreed by Mr. Ron Richards and me, that proceeds from the sales of "Hang Ups" could be used to pay for television advertising cost. The orders for the television time was placed by the A. G. Bond Company through R. & W. Advertising Agency of Charlotte, North Carolina.

If we can assist you further in this matter, please let me know.

Very truly yours,

MAZO & MILLER, INC.

/s/ Gene Miller
Gene W. Miller

Defendant pleaded that it had ordered the "hang-ups" on a "guaranteed sales basis," that is, that defendant would return to Bond for credit all "hang-ups" which it did not sell. The defendant pleaded further that A. G. Bond Company had agreed that up to $9,000.00 would be paid from the purchase price toward television promotional time. Defendant alleged that it had in its possession "hang-ups" worth $5,753.28 and that it had expended $9,060.00 on television advertising.

Plaintiff made a motion for summary judgment and relied on the pleadings and discovery which it had made. In opposition to the motion, defendant relied on its answer, answers to discovery, which included the letter signed by Gene Miller, and an affidavit.

The court granted summary judgment for the plaintiff, reciting that "evidence concerning an alleged guaranteed sale provision would not be admissible in that it is not in writing."

Defendant appealed.

Fairley, Hamrick, Monteith and Cobb, by Laurence A. Cobb, for plaintiff appellee.

Joseph L. Barrier for defendant appellant.

WEBB, Judge.

We hold that the papers relied on by the parties in this case show that there is a genuine issue of a material fact. The pleadings of defendant raise two defenses to the claim of plaintiff. They are (1) the goods were sold on a "guaranteed sales basis" and (2) certain advertising bills were to be paid from the proceeds of the sale.

[1] We discuss first the "guaranteed sale basis." Under the Uniform Commercial Code there is a statute of frauds, G.S. 25-2-201, and a parol evidence rule, G.S. 25-2-202, which are made applicable to the case sub judice by G.S. 25-2-326(4) which provides:

> Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this article (§ 25-2-201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (§ 25-2-202).

It seems clear that the letter from Gene Miller to defendant in which Mr. Miller identified his company as the agent of A. G. Bond Company and stated that at the time of the sale it was agreed by A. G. Bond Company that the "hang-ups" were sold on a "guaranteed sales basis" is enough to comply with the statute of frauds and to make evidence of the guaranteed sales agreement admissible under the parol evidence rule.

The question then becomes whether defendant is barred from offering evidence as to the "guaranteed sales basis" by G.S. 25-9-318 which provides:

> (1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in G.S. 25-9-206 the rights of an assignee are subject to
>
> (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and
>
> (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

The question is whether, under G.S. 25-9-318, the defendant may use the "guaranteed sales basis" term as a defense when the defense did not become available until after notification that the account had been assigned. This is a case of first impression. We hold that the purchase order constitutes part of the terms of the contract and the letter of Gene Miller contains the rest. The defense of a "guaranteed sale" arises from the part of the contract represented by the letter. It may be used as a defense under G.S. 25-9-318(1)(a) although defendant was notified of the assignment before it received the letter from Gene Miller. *See* 4 Anderson, Uniform Commercial Code 2d, § 9-318.1 (1971). It is true that G.S. 25-2-326 states an "or return" term is to be treated as a separate contract of sale under the statute of frauds section, G.S. 25-2-201. It could be argued that since the "guaranteed sales basis" is considered a separate contract, it cannot be one of the terms of the contract under G.S. 25-9-318(1)(a). It is one thing to be considered a separate contract for purposes of the statute of frauds and yet another to be considered a separate contract for

other purposes—including those enumerated in G.S. 25-9-318. To meet the requirements of the statute of frauds, and thus to satisfy G.S. 25-2-326, the "or return" provision must be in writing to be enforceable. The letter from Gene Miller satisfies these provisions. G.S. 25-9-318 does not require that the letter of Gene Miller be treated as a separate contract. For purposes of a defense under that section, it is a part of the contract between A. G. Bond Company and the defendant.

[2] The defendant has also pleaded that it is entitled to set off the cost of television advertising against the sales price. For the same reasons we have held there is a genuine issue as to the "guaranteed sales" agreement, there is also a genuine issue as to the payment for television time. In addition to this, there was written on the face of the purchase order "Please confirm all t.v. before shipping order." Parol evidence is admissible to explain the meaning of this statement. *Williams and Associates v. Ramsey Products Corp.*, 19 N.C. App. 1, 198 S.E. 2d 67 (1973). If the evidence as to the payment for television time is what the defendant contends it will be, it will not contradict the written contract.

For another case interpreting G.S. 25-2-326(4), *see Recreatives, Inc. v. Motorcycles Co., Inc.*, 29 N.C. App. 727, 225 S.E. 2d 637 (1976).

The appellant also assigns as error the denial of its motion to dismiss the action on the ground of improper service of the summons and complaint. This assignment of error is overruled.

Reversed and remanded.

Judges MARTIN (Robert M.) and CLARK concur.

RUBY L. TAYLOR v. LUTZ-YELTON HEATING & AIR CONDITIONING CORP.

No. 7827SC1114

(Filed 2 October 1979)

Negligence § 29.1— furnace workmen—leaving unguarded hole in floor—evidence sufficient for jury

In an action to recover for injuries sustained by plaintiff when she fell through an unguarded opening in the floor of the hallway of her home created when defendant's employees removed a furnace grille from the floor, the trial court erred in entering summary judgment for defendant where plaintiff's evidence raised a genuine issue as to whether defendant breached its duty of care by leaving an open hole in the darkened hallway without warning plaintiff thereof and by directing her attention away from the hole when an employee of defendant called her to find out if the placement of the wall register in the bathroom was satisfactory, and whether such negligence, if any, was a proximate cause of plaintiff's injuries.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 14 September 1978 in Superior Court, CLEVELAND County. Heard in the Court of Appeals on 30 August 1979.

In this action for damages for personal injuries, plaintiff charges that the negligence of defendant's employees proximately caused her fall through an unguarded opening in the floor of the hallway of her home. Her complaint asserts they were negligent in that they:

(a) Failed to inform or otherwise notify plaintiff, prior to removing the metal furnace grille from over the space or hole in the central hallway of her residence, of their intention to remove the same, when they knew, or in the exercise of reasonable care, should have known that plaintiff would likely pass through said hallway as she moved about her house;

(b) Failed to inform or otherwise notify or warn plaintiff of the fact that they had removed the metal furnace grille from over the space or hole in the floor of said hallway, when they knew or should have known, in the exercise of reasonable care, that plaintiff was not informed or aware of such fact and that she would likely pass through said hallway as she moved about her house;

(c) Failed to place any guard rail or other protective barrier or warning device, sign or signal around the open space

or hole in the floor of the hallway, after removing the grille therefrom, when they knew, or should have known by the exercise of reasonable care, that plaintiff would likely pass through said hallway as she moved about her house;

(d) Failed to notify or otherwise warn plaintiff about the aforesaid dangerous condition created by them in the hallway, prior to requesting that she follow one of defendant's said employees from the kitchen through the living room and central hallway to the bathroom, to advise him about the location of the furnace ducts in that room;

(e) Diverted plaintiff's attention from the aforesaid dangerous condition created by them by passing through said hallway ahead of her and calling out to her to come to the bathroom and to assist with the location of the ducts in that room, without first informing her of such condition, when they knew or should have known, in the exercise of reasonable care, that plaintiff was not informed or aware thereof.

(f) Otherwise failed to exercise the care and caution for plaintiff's safety that a reasonable and prudent person would and should have exercised under the same or similar circumstances.

Defendant answered, denying the material allegations in plaintiff's complaint, and pleaded contributory negligence on her part in that:

(a) Although she was aware that work was going on around the area of her floor furnace, she entered that area without looking at the floor, without watching what she was doing and where she was going, and without regard for what was plainly visible in front of her.

(b) She failed to heed or pay attention to the warning that she had been given and the knowledge that she had that the grille had been removed from an opening in the floor of her home; or

(c) She failed to maintain her balance while standing beside an opening in the floor of her home, which opening was plainly visible and of which opening she was well aware; and

(d) She failed to exercise the care and caution for her own safety that a reasonable and prudent person would and should have exercised under the same or similar circumstances.

Defendant then moved for summary judgment and supported its motion with the pleadings and depositions of plaintiff and its employees Leroy Melton and Bill Wray, who were present on the job when plaintiff fell. Subsequent to its motion, defendant filed the affidavit of Wray to "supplement" his deposition.

In opposition, plaintiff filed her affidavit. The court allowed defendant's motion and, from judgment entered for defendant, plaintiff appealed.

Caudle, Underwood & Kinsey, by Lloyd C. Caudle and Scott C. Gayle, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for defendant appellee.

HEDRICK, Judge.

The sole question presented on this appeal is whether the court erred in entering summary judgment for defendant. We hold that it did.

The plaintiff alleged and, through her deposition and affidavit, offered evidence tending to prove that she and her husband entered into a contract with the Lutz-Yelton Company in July 1974 whereby Lutz-Yelton was to replace the plaintiff's "old type furnace" with a forced-air central heating system. The work involved removing the old furnace from underneath the house and installing a "larger, more horizontal furnace", which, in turn, required the workmen to go down through an opening in plaintiff's hallway. The opening measured two feet by three feet and was normally covered by a grille. Wall registers through which the heated air would be released were to be installed in each room, but "[t]he same grille was going to be used for the new furnace as a cold air return as it had been used earlier as a place where the heat came out." The living room, bathroom, and two bedrooms opened into the hallway.

On 26 August 1974 three of defendant's employees, including Bill Wray and Leroy Melton, arrived at plaintiff's house to begin the work. Plaintiff said that she "was sewing and doing my work in other rooms of our house and had no occasion to go into either the central hall or bathroom" that morning. By noon, the old furnace had been removed, and one of the workmen had begun digging under the house to enlarge the space for the new furnace. At that time, all three workmen took an hour's break for lunch, during which time plaintiff went to the bathroom and observed that "[t]he floor grille was in place in the hall as usual."

The workmen returned from lunch and resumed work about one o'clock. Plaintiff was in the kitchen with her sister "fixing and eating lunch." Sometime between 3:00 and 3:30 p.m., Wray came to the kitchen door and called her. Plaintiff described the ensuing events as follows:

> Mr. Wray asked me to come and show him where I wanted the register put in the bathroom. He did not say anything about the grille being off the floor opening in the central hall. I got up to walk from the kitchen to the bathroom, following Mr. Wray. It was necessary to go through a door into the living room, and then turn left through a door leading into the central hall. From the kitchen one cannot see into the central hall and bathroom even with doors open.
>
> . . .
>
> [W]hen I turned into the hallway, [Wray] spoke to me and said, "Right here is where we had planned to put the register." When he spoke to me he got my full attention, and the next thing I knew I was standing . . . under the floor—up to my breasts was where I was standing. . . . I don't even remember walking in no hole. I was in there before I knew it. I was looking him in the face the last thing I remember before I found myself in the hole.

Plaintiff further alleged that the hall light was not on and that "[t]he doors leading into the bedrooms from either side of the small hall were closed and without the electric light being on, the hall area is fairly dark." The evidence showed that Wray was standing just inside the bathroom door, "pointing to the spot

where we were going to put the register at the bottom of the wall where it joins the floor."

Summary judgment is recognized as a "drastic remedy" whose use must be accompanied by due regard for its purposes and cautious attention to its requirements so that no one shall be deprived of a trial on a genuine issue of material fact. *Haddock v. Smithson*, 30 N.C. App. 228, 226 S.E. 2d 411, *cert. denied*, 290 N.C. 776, 229 S.E. 2d 32 (1976); *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971). When passing on the motion, the pleadings, depositions, and affidavits of the moving party are to be strictly scrutinized, while those of the opposing party are indulgently regarded. *Emanuel v. Colonial Life and Accident Insurance Co.*, 35 N.C. App. 435, 242 S.E. 2d 381 (1978); *Miller v. Snipes, supra.* Only when the papers supporting the movant demonstrate beyond doubt that no triable issue of fact exists, and that the movant is entitled to judgment as a matter of law, will summary judgment be the appropriate remedy. G.S. § 1A-1, Rule 56(c); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

This Court has observed time and again that summary judgment, though not precluded, is especially inappropriate in negligence cases where the standard of the reasonable man must be applied.

> It is only in the exceptional negligence case that the rule should be invoked . . . because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, . . . to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries.

Robinson v. McMahan, 11 N.C. App. 275, 280, 181 S.E. 2d 147, 150 (1971). *See also Forte v. Dillard Paper Co. of Raleigh, Inc.*, 35 N.C. App. 340, 241 S.E. 2d 394 (1978), and authorities cited therein.

Defendant does not dispute—as, indeed, it seriously could not—that it owed a duty of care to plaintiff. *See, e.g.*, 41 Am. Jur. 2d, *Independent Contractors*, § 48 (1968), where it is said:

> An independent contractor's general undertaking to perform a job carries with it a promise, implied in fact, that the opera-

> tion will be conducted in a safe, skilfull, and generally workmanlike manner. . . . Thus, an independent contractor hired by an owner of lands to do work thereon is under a legal duty to exercise ordinary care to render the premises safe for persons lawfully on the premises . . . and is responsible to an occupant of a building who is rightfully on the premises . . . for any wrongful acts that may be committed by the contractor or his employees while the stipulated work is in progress and that result in injury to such occupant. The ground upon which this liability is based is the implied duty which the law casts upon the independent contractor, as the person in charge and in control of the work, to see that the rights of other persons rightfully on the premises are not injuriously affected by the performance of the work.

The pertinent inquiry, then, in the case before us, is whether there is any evidence that defendant was negligent in its activities in plaintiff's home and whether such negligence was a proximate cause of plaintiff's injuries. In our opinion, the record clearly raises a genuine issue as to whether defendant breached its duty of care by leaving an open hole in the darkened hallway without warning plaintiff thereof; by directing her attention away from the hole when Wray called her to find out if the placement of the wall register was satisfactory; and whether such negligence, if any, was a proximate cause of plaintiff's injuries.

We hold that summary judgment for defendant in this negligence case was inappropriate.

Reversed.

Judges VAUGHN and ARNOLD concur.

SPAULDIN ALLISON v. IOWA MUTUAL INSURANCE COMPANY

No. 7929SC7

(Filed 2 October 1979)

Insurance § 71— comprehensive vehicle policy—exclusion of collision coverage—collapse of bridge

The collapse of a bridge upon which insured's truck was being operated, resulting in the truck's sliding down into the water underneath the bridge and thereby being damaged, did not constitute a "collision" within the meaning of a comprehensive policy providing coverage for losses to the insured's vehicles arising from all causes except collision.

APPEAL by defendant from *Howell, Judge.* Judgment entered 16 August 1978 in Superior Court, HENDERSON County. Heard in the Court of Appeals on 18 September 1979.

This is a civil action wherein plaintiff seeks to recover $8,500.00 under a "general automobile liability" insurance policy for damages resulting to his dump truck when the bridge upon which the truck was traveling collapsed. Defendant answered, admitting that the policy was in effect on the date of the accident, but denying that it provided coverage for the type accident that occurred. A stipulation entered into between the parties, except where quoted, is summarized as follows:

Defendant issued an insurance policy, numbered G2075509, to plaintiff on 10 February 1975, which provided comprehensive insurance coverage on certain personal property owned by plaintiff, but did not extend collision coverage. On 31 October 1975 the plaintiff was the owner of a 1970 white, two-ton dump truck, Serial No. 735485, which was included in the personal property covered by the policy, and which was "being operated across the South Mills River Bridge No. 185 on Highlander Camp Road . . . transporting a load of gravel." As the truck was being driven across the bridge, "said bridge collapsed and the plaintiff's truck slid into the river or creek running under said bridge and turned on its right side, therein damaging said vehicle." The truck was subsequently repaired at a cost of $8,500.00. Plaintiff in due time submitted a claim to defendant for the total repair of the truck, but, except for paying $111.00 to repair the windshield, defendant "has refused to pay said claim taking the position that said

damage was caused by collision and was not covered under . . . the aforesaid policy. . . ."

After considering the above stipulation, the trial judge made findings of fact in accordance therewith, drew separate conclusions of law, and entered judgment for plaintiff in the amount of $8,500.00. Defendant appealed.

Lee Atkins for plaintiff appellee.

Morris, Golding, Blue and Phillips, by James N. Young and Jim Golding, for defendant appellant.

HEDRICK, Judge.

Defendant's exceptions to each of the trial judge's conclusions of law present for review the single question of whether the court erred in entering judgment for plaintiff. The question is not whether plaintiff's truck was covered under the policy. It was. Rather, the question is whether the event which gave rise to the damage is excluded from the kind of loss for which the policy provides protection.

Defendant argues that the collapse of the bridge resulting in damage to plaintiff's truck was an accident by collision and that the occurrence was therefore excluded from coverage since the plaintiff had not insured this vehicle against loss by collision. Plaintiff, on the other hand, contends that the collapse of the bridge did not constitute a collision and asserts that the policy includes such an occurrence under its provisions for comprehensive coverage. The relevant inquiry for this Court is thus refined into determining whether the trial judge erred in concluding that the accident occasioned by the collapse of the bridge was not a "collision" within the meaning of the policy which provides in pertinent part as follows:

> 1. The company will pay for loss to covered automobiles: COVERAGE O—COMPREHENSIVE—*from any cause except collision;* but, for the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, windstorm, hail, earthquake, explosion, riot or civil commotion, malicious mischief or vandalism, water, flood, or (as to a covered automobile of the private passenger type)

> colliding with a bird or animal, shall not be deemed loss caused by collision. . . . [Emphasis added.]

Elsewhere the policy defines "collision" to mean "(i) collision of a covered automobile with another object or with a vehicle to which it is attached, or (ii) upset of such covered automobile. . . ."

The principles of law with respect to the interpretation and construction of insurance policies are firmly established. As with any contract, the ultimate goal is to divine the parties' intentions at the time the policy was issued. *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978). Where the policy defines a term, that definition must be used. Conversely, nontechnical words which are not defined "are to be given the same meaning they usually receive in ordinary speech, unless the context requires otherwise." *Grant v. Emmco Insurance Co.*, 295 N.C. 39, 42, 243 S.E. 2d 894, 897 (1978) [citing *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E. 2d 518 (1970); *Insurance Co. v. Shaffer*, 250 N.C. 45, 108 S.E. 2d 49 (1959); *Powers v. Insurance Co.*, 186 N.C. 336, 119 S.E. 481 (1923)]. Moreover, if the meaning of the language "*or the effect of provisions* is uncertain or capable of several reasonable interpretations," *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. at 506, 246 S.E. 2d at 777 [emphasis added], such ambiguity will be resolved in favor of the insured and against the insurance company since, as it is said, the company chose the language. *Grant v. Emmco Insurance Co., supra.*

In the instant case, although the policy sets out three types of occurrences that are deemed to constitute a collision, the term itself is not defined. The word is popularly understood, however, to mean a striking together of two objects. "The term denotes the act of colliding; striking together; violent contact. . . .[It] implies an impact or sudden contact of a moving body with an obstruction in its line of motion, whether both bodies are in motion or one stationary . . . ." Black's Law Dictionary 330 (4th ed. 1968). *See also Morton v. Blue Ridge Insurance Co.*, 255 N.C. 360, 121 S.E. 2d 716 (1961).

In 7 Am. Jur. 2d, *Automobile Insurance* § 65 (1963), it is said:

> While the ground of a highway is considered an "object" within the meaning of a collision insurance policy, it is

> generally held that contact of an automobile with the roadbed itself does not constitute a "collision" with an object within the meaning of the term as used in a collision insurance policy.

Furthermore, in a case which presents strikingly similar facts to the case at bar, the Florida Supreme Court held that the giving way of the roadbed over which the plaintiff's car was traveling, resulting in the car's sliding down into the soft sand under the road and getting stuck, was not a collision within the popular and usual meaning of the term. *Aetna Casualty & Surety Co. v. Cartmel*, 87 Fla. 495, 100 So. 802 (1924).

With reference to defendant's contention that the event giving rise to the damage in this case was a "collision", we have carefully considered each case upon which defendant purports to rely and find only one of them to be worthy of comment. Our Supreme Court held, in *Morton v. Blue Ridge Insurance Co., supra*, that a collision, within the meaning of that term as used in the policy being construed there, resulted when the plaintiff's automobile suddenly rolled backwards into a canal. The car had been backed down a launching ramp to launch a boat from a trailer hooked to the rear of the car. While the driver and passengers were lowering the boat into the water, the unattended and previously stationary car suddenly rolled into the water. When the insurance company refused to honor his claim, plaintiff brought suit, and the Court held that the car's striking of the water in the canal and of the bottom of the canal was a collision, entitling plaintiff to recover under the collision provisions of the policy.

We find this case to be readily distinguishable on its facts. The impetus for the accident in *Morton* was obviously occasioned by the manner in which the vehicle was being used. Although there was no evidence regarding what caused the car to suddenly roll backwards, the driver had driven it onto and parked it on the ramp, thereby initiating the chain of events that culminated in the collision of his car with the bottom of the canal. Conversely, in the present case, there is plainly no element of driver control. Nothing the operator of the truck did can be said to have set in force the succeeding events. The collapse of the bridge, and that occurrence only, engendered the consequent accident and damage.

We think the cases are clearly distinguishable and find that *Morton* case to be inapposite.

In the case at bar, we hold that the collapse of the bridge upon which plaintiff's truck was being operated, resulting in the truck's sliding down into the river or creek underneath the bridge and thereby being damaged, was not a "collision" either within the usual meaning of the term or as contemplated by the policy and the parties. Since it is not disputed that the policy provides coverage for losses arising from all causes except collision, it follows that the losses suffered under the circumstances here are covered, and the company is liable on plaintiff's claim. Thus, in the conclusions and judgment of the trial judge, we find no error.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. LEROY R. DALE LINVILLE

No. 7917SC476

(Filed 2 October 1979)

1. **Criminal Law § 63.1— exclusion of evidence bearing on insanity—subsequent admission of similar evidence**

In this prosecution for armed robbery in which defendant relied on the defense of insanity, defendant was not prejudiced by the court's exclusion of his sister's testimony that defendant told her on the day of the robbery that he was "sick," "feeling dizzy," feeling "funny" and "smothering" where the sister thereafter testified that on that date defendant "talked funny" and said he was feeling "woozy and funny."

2. **Criminal Law §§ 5.1, 123— submission of insanity as first issue**

In an armed robbery prosecution in which defendant pleaded not guilty and not guilty by reason of insanity, the trial court did not err in submitting insanity as the first issue to be determined by the jury.

3. **Criminal Law § 114.3— instructions—omission of "alleged"—no expression of opinion**

The trial court's instruction to the jury that "if you are satisfied that the defendant was insane at the time of the robbery with a firearm he would not be guilty by reason of insanity and that would end the case" did not constitute an expression of opinion on a question of fact because of the omission of the word "alleged" before "robbery with a firearm."

State v. Linville

APPEAL by defendant from *Albright, Judge.* Judgment entered 5 January 1979 in Superior Court, SURRY County. Heard in the Court of Appeals 12 September 1979.

Defendant was indicted for armed robbery. He pleaded not guilty and not guilty by reason of insanity.

The State presented evidence that on the afternoon of 11 July 1978 defendant robbed two employees of The Dollar General Store by threatening them with a gun.

Defendant called Dr. Billy Royal, a psychiatrist, to testify in his behalf. Dr. Royal testified that he had examined defendant twice during the month of August 1978 and had diagnosed him as a schizoid personality, meaning that he had an active fantasy life and difficulty in separating reality from fantasy. Defendant was not psychotic at the time Dr. Royal examined him but could have had psychotic episodes in the past, and in the opinion of Dr. Royal defendant could have been experiencing a psychotic episode at the time of the alleged robbery. Dr. Royal had no opinion as to whether or not defendant knew right from wrong at that time.

Defendant's sister was called to testify regarding defendant's mental state on the day of the robbery, but, following an offer of proof, the court ruled that although she could testify about her visual observations of defendant on that day, she could not testify about her conversations with him, consisting of defendant's statements on the morning of the robbery that he was "sick;" "feeling dizzy in [his] head," feeling "funny" and "smothering." Defendant's sister then testified to the jury that defendant had been sick in bed for eight days prior to the robbery and had come to her house on the morning of 11 July 1978 to borrow her car to go to the doctor. Defendant told her at that time that he was "feeling woozy and funny," and he did not appear to know what he was doing. When defendant returned to her house that afternoon he was laughing and he "talked funny," and in her opinion defendant could not distinguish right from wrong on the day of the robbery. Two other witnesses testified that two or three days before the robbery defendant was sick in bed and in their opinions was unable to distinguish between right and wrong.

The jury rejected defendant's insanity defense and found him guilty of armed robbery, for which he was sentenced to 20-30 years. Defendant appeals.

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

Oliver and Royster, by Stephen G. Royster, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that the trial court committed prejudicial error in excluding portions of his sister's testimony. In the jury's absence, Corinne Sechrest testified that the morning before the robbery defendant came to borrow her car and "he said I am sick and I am feeling dizzy in my head and said I feel funny." He said that he was "smothering." Defendant offered this testimony as evidence of his mental state on the day of the crime. The trial court ruled that Ms. Sechrest could testify to what she observed that day, but not to what defendant told her. Before the jury, Ms. Sechrest then testified that when defendant came to borrow her car he "talked funny," and he said he was feeling "woozy and funny." We find no prejudicial error in the court's ruling, since Ms. Sechrest in fact testified to essentially all of defendant's declarations to her. "The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import . . . ." 1 Strong's N.C. Index 3d, Appeal & Error § 49.2 at 315.

[2] Defendant also assigns error to the charge to the jury on the issue of insanity. He contends that the issue of insanity was improperly submitted first, and that the trial court expressed an opinion on a question of fact, in violation of G.S. 15A-1222 and -1232.

The trial court began the instruction on insanity as a defense as follows:

> Now members of the jury, as your first order of business in the course of your deliberation you will take up the issue of insanity and will consider that issue first. The issues have been reduced to a written form and the insanity issue reads as follows, the issue being separated into two parts. "1-A" reads as follows: Was the defendant on July 11, 1978, by reason of a defect of reason or disease of the mind incapable of knowing the nature and the quality of the acts which he is

> charged with committing or if he did know this was he by reason of such defect or disease incapable of distinguishing between right and wrong in relation to such an act? "1-B" is, If so, is the defendant not guilty by reason of insanity?
>
> As the Court indicated, members of the jury, you will consider this issue first. Now in regard to this issue, members of the jury, you must answer two questions. First, did the defendant rob Christine Brown and Charmele Slater with a firearm. The State must prove beyond a reasonable doubt that the defendant robbed Christine Brown and Charmele Slater with a firearm. If you are not convinced of this beyond a reasonable doubt the case is ended and the defendant would not be guilty.
>
> Secondly, if you find that the defendant robbed Christine Brown and Charmele Slater with a firearm you must determine if the defendant was insane when the robbery with a firearm occurred.

He charged further: (1) if the jury was satisfied that defendant was insane at the time of the robbery, he would not be guilty and that would end the case; (2) if the jury answered issue 1-A "Yes" it must as a matter of law find the defendant not guilty and answer 1-B "Yes"; and (3) if the jury answered issue 1-A "No" it must skip issue 1-B and proceed to decide whether defendant was guilty or innocent of robbery with a firearm.

We find no error in the order in which the points were presented in this instruction. The Supreme Court in *State v. Cooper*, 286 N.C. 549, 571, 213 S.E. 2d 305, 320 (1975), indicated:

> Where, as here, there is evidence justifying the submission to the jury of the question of insanity as a defense to the charge, we believe a better procedure would be to submit to the jury as the first issue for their consideration, "Was the defendant (at the time of the alleged offense), by reason of a defect of reason or disease of the mind, incapable of knowing the nature and quality of the act which he is charged with having committed, or if he did know this, was he, by reason of such defect or disease, incapable of distinguishing between right and wrong in relation to such act?" An affirmative answer to that issue would end the case. If the jury answers

that issue in the negative, it should then proceed to determine the defendant's guilt or innocence of the offense charged just as if the defendant were a person of normal mental capacity.

This is exactly what the trial court did. Furthermore, the trial court followed the suggestion made in *State v. Hammonds*, 290 N.C. 1, 15, 224 S.E. 2d 595, 604 (1976), that "in the absence of a judicial admission that defendant committed the [crime], it would be appropriate to submit as the first issue an issue worded substantially as follows: 'Did the defendant [commit the crime]?' " The trial court's instruction complies with the guidelines of the North Carolina Pattern Jury Instructions, Criminal 304.10. We find no merit in this assignment of error.

[3] Defendant argues further that the trial court expressed an opinion in violation of G.S. 15A-1222, pointing to one sentence in the charge on insanity. The trial court instructed: "So members of the jury, I charge that if you are satisfied that the defendant was insane at the time of the robbery with a firearm he would be not guilty by reason of insanity and that would end the case." We find that this one omission of the word "alleged" before "robbery with a firearm," taken in the context of the charge as a whole, does not constitute prejudicial error.

No error.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. JAY B. DANCY

No. 7923SC485

(Filed 2 October 1979)

1. Narcotics § 4.2— sale of marijuana—insufficiency of evidence of entrapment

In a prosecution for possession and sale of marijuana, evidence did not disclose entrapment as a matter of law where it tended to show that defendant did not have an innocent mind but let it be known to an undercover SBI agent that he sold marijuana; the agent did not implant the intent to sell marijuana in defendant's mind but defendant offered to sell marijuana to the agent when he was unable to supply her with LSD; and the agent did not lure defendant into committing the crimes charged but defendant willingly sold marijuana to the agent without any inducement or persuasion on her part.

2. Narcotics § 3.1; Criminal Law § 34.6— sale of marijuana charged—subsequent sale of LSD—admissibility to show defendant's state of mind

In a prosecution for possession and sale of marijuana where the innocence of defendant's mind was at issue by virtue of his plea of entrapment, the sale of LSD within a month of the sale with which he was charged did have some relevancy as to the state of defendant's mind at the time of the offense charged.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 16 February 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 12 September 1979.

Defendant was indicted for possession of a controlled substance (marijuana) with intent to sell and the sale and delivery of a controlled substance (marijuana). He pleaded not guilty to both charges.

At trial Mary Ellen Scheppf testified for the State that she is a Special Agent for the North Carolina State Bureau of Investigation and was so employed in an undercover capacity in June 1978; that she first met defendant about one week prior to 28 June 1978, and he let it be known to her that he sold marijuana and that on 28 June 1978, after some negotiation, she bought three bags of marijuana from him. Chemical analysis of the contents of the three bags of green material sold to Agent Scheppf by defendant revealed it to consist of 74.3 grams of marijuana.

At the close of the State's evidence, defendant moved for a directed verdict alleging entrapment as a matter of law. This motion was denied.

Defendant testified that at no time did he offer to sell LSD or marijuana to Agent Scheppf prior to her asking him to sell some of his own marijuana; that she did ask him several times to sell her some LSD, but he told her that he had none to sell; that he made three phone calls attempting to procure some marijuana for her and finally sold her three of the four ounces of marijuana which he possessed for his own use after she asked him for it; that during the month of July, Agent Scheppf contacted defendant about twice a week attempting to purchase drugs from him and on each occasion defendant told her that he did not have any drugs to sell, and that defendant met Agent William Wolak during the month of July when he was with Agent Scheppf, but defendant did not sell any drugs to him.

On rebuttal, the State called William E. Wolak, a Special Agent with the State Bureau of Investigation, who testified that he met defendant in July 1978 through Agent Scheppf; that defendant told him that he could sell him any drugs that he might want to buy, and that Agent Wolak subsequently purchased LSD from defendant on 18, 19 and 25 July 1978.

At the close of the evidence, defendant renewed his motion for a directed verdict on grounds of entrapment. Defendant also moved for a mistrial on the ground that the evidence concerning subsequent drug sales by him was inadmissible. Both motions were denied. The court charged the jury on the defense of entrapment, but the jury found defendant guilty of both charges. Defendant was sentenced to consecutive terms of 3 to 5 years for possession with intent to sell and 1 to 5 years for sale and delivery.

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

Franklin Smith for defendant appellant.

WEBB, Judge.

[1] Defendant first contends that the trial court should have directed a verdict in his favor because the evidence tended to show entrapment as a matter of law. We disagree.

Upon a motion for directed verdict, all of the evidence admitted must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, *death sentence vacated*, 429 U.S. 809 (1976); 4 Strong, N.C. Index 3d, Criminal Law, §§ 104 and 109. The defendant's evidence is not to be taken into consideration unless it is favorable to the State or does not conflict with the State's evidence and may be used to explain or make clear the State's evidence. *State v. Bryant*, 235 N.C. 420, 70 S.E. 2d 186 (1952).

For the State's evidence to have required a directed verdict on grounds of entrapment, it must have shown without contradiction "that the criminal intent started in the mind of the officer or agent of the State and by him was implanted in the innocent mind of the accused, luring him into commission of an offense which he

would not otherwise have committed." *State v. Salame*, 24 N.C. App. 1, 7, 210 S.E. 2d 77, 81 (1974). The evidence in the light most favorable to the State does not establish that the criminal intent to sell marijuana was implanted in defendant's innocent mind by Agent Scheppf who then lured defendant into committing the offenses charged. It tends to show instead that defendant did not have an innocent mind but let it be known to Agent Scheppf that he sold marijuana; that Agent Scheppf did not implant the intent to sell marijuana in defendant's mind but that defendant offered to sell marijuana to Agent Scheppf when he was unable to supply her with LSD, and that Agent Scheppf did not lure defendant into committing the crimes charged but that defendant willingly sold marijuana to Agent Scheppf without any inducement or persuasion on her part. The evidence in the light most favorable to the State did not show entrapment as a matter of law, and defendant's motion for directed verdict on that ground was properly denied.

[2] Defendant also contends that the testimony of Agent Wolak with regard to sales of narcotics by defendant 21 days subsequent to the date of the crime charged was erroneous. The rule is as stated in 1 Stansbury, N.C. Evidence (Brandis Rev. 1973), § 91:

> "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."

In this case the defendant relied on entrapment as a defense. An element of entrapment is the innocent mind of the defendant. Evidence of other drug sales is relevant to the state of mind of the defendant when he sold drugs to Mary Ellen Scheppf. In *State v. Richardson*, 36 N.C. App. 373, 243 S.E. 2d 918 (1978) evidence was admitted of a drug sale ten days before the offense with which the defendant was charged. This Court held the evidence was properly admitted. Judge Clark, writing for the Court, said: "In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs." The appellant argues that *Richardson* is distinguishable from this case in that the evidence

in *Richardson* was that defendant had sold drugs ten days before the offense with which he was charged, while the evidence in this case is that the separate drug sale occurred 21 days after the offense with which the defendant is charged. We hold this is a distinction without a difference. Appellant relies on *State v. Little*, 27 N.C. App. 211, 218 S.E. 2d 486 (1975). In that case the defendant was convicted of possession of heroin. This Court reversed because evidence of possession of heroin by the defendant six months later was admitted. This Court said, "Evidence of possession of heroin in January 1975, nothing else appearing, does not tend to establish mental state or guilty knowledge of the defendant in June 1974, nor does it tend to prove a common scheme or plan or a series of crimes so as to connect the accused with the commission of the act with which he is charged." In the case sub judice, in which the innocence of the defendant's mind is at issue by virtue of his plea of entrapment, we hold the sale of LSD within a month of the sale with which he was charged does have some relevancy as to the state of the defendant's mind at the time of the offense charged.

No error.

Judges ARNOLD and WELLS concur.

JAMES CALEB BASS v. EVY JEAN BASS

No. 7925DC112

(Filed 2 October 1979)

1. Divorce and Alimony § 23.3— jurisdiction of child custody and support proceedings after divorce

Catawba County was the proper venue for child custody and support proceedings, although none of the parties are now residents of Catawba County, where plaintiff filed an action for divorce and for a determination of child custody and support in Catawba County; the divorce decree included provisions for child custody and support; and the court expressly retained jurisdiction of the child custody and support proceedings in the divorce decree.

2. Venue § 1— waiver of objection to venue

Plaintiff waived any objection to venue in child support proceedings where he appeared and participated in a hearing on child support; he did not

object to the venue or move for change of venue; and he stipulated that the court could enter an order concerning his visitation privileges with the children.

APPEAL by plaintiff from *Tate, Judge.* Order entered 19 December 1978 in District Court, CATAWBA County. Heard in the Court of Apeals 18 September 1979.

In 1974 plaintiff began a lawsuit in Catawba County, seeking a judgment of absolute divorce and an adjudication of custody of the three minor children of the parties. Plaintiff alleged the defendant was a fit and proper person to have custody and requested the court to award custody to defendant by its judgment. Plaintiff agreed to pay $450 a month for support of the three children. Plaintiff alleged he was a citizen and resident of Catawba County when the suit was instituted.

Defendant, although served, did not answer and judgment was entered 21 February 1974 granting the divorce. The judgment further found defendant to be a fit and proper person to have custody of the children, awarded their custody to defendant until the further order of the court and ordered plaintiff to pay $450 per month as child support.

On 25 October 1976 defendant filed a motion in the cause requesting an increase in the child support payments by plaintiff. This motion was served on plaintiff. The district court on 27 June 1977 held a hearing on defendant's motion and entered order increasing the child support payments by $150 per month. During the hearing the parties stipulated the court could enter a "further Order with regard to plaintiff's right to visit with the minor children." Plaintiff made no objection to the 27 June 1977 hearing and did not move for change of venue.

On 18 October 1978 defendant filed motion alleging plaintiff had failed to comply with the prior support order of the court and requesting an increase in child support and that plaintiff be punished as for contempt.

Citation to plaintiff for contempt was issued 19 October 1978 and on 10 November 1978 plaintiff filed a motion for change of venue. In his motion plaintiff alleges that when he began the suit he was a citizen and resident of Catawba County and defendant a resident of Mecklenburg County. He alleges he now lives in For-

syth County, that there was a final judgment in the divorce action in 1974, that Catawba County is not the proper venue and that the case be moved to Forsyth County.

Defendant filed answer to plaintiff's motion and after hearing the motion on 16 November 1978, the court entered order finding facts and denying plaintiff's motion to change venue. Plaintiff appeals.

Morrow, Fraser and Reavis, by John F. Morrow and N. Lawrence Hudspeth III, for plaintiff appellant.

Rudisill & Brackett, by J. Richardson Rudisill, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Plaintiff argues the district court erred in denying his motion for change of venue. We find no merit in this assignment of error. Plaintiff began this litigation. He chose Catawba County as the forum although he could have elected to proceed in Mecklenburg County, the defendant and children living there at that time. N.C. Gen. Stat. 50-3 and 50-13.5(f). Plaintiff invoked the jurisdiction of the court to decide the question of custody of the children born of the marriage. It is true that a final judgment of absolute divorce was entered in the case in 1974, but the divorce decree was by no means a final judgment with respect to the custody and support of the children. The court expressly retained jurisdiction of the child custody and support proceedings in its divorce decree. N.C.G.S. 50-13.5(f) requires that when a divorce case is pending any motion for custody or support must be made in the divorce case. It does not prevent further custody and support hearings after the divorce is granted. The court in which the suit for divorce is pending has exclusive jurisdiction of proceedings for custody and child support, and once they are commenced, maintains it after the divorce decree is entered. *In re Custody of Sauls*, 270 N.C. 180, 154 S.E. 2d 327 (1967); *Murphy v. Murphy*, 261 N.C. 95, 134 S.E. 2d 148 (1964). Where custody or support has been brought to issue in a divorce case, there can be no final judgment in the case as to the custody and support issues, as they remain *in fieri* until the children are emancipated. *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E. 2d 215 (1976). We hold

Catawba County is the proper venue for the custody and child support proceedings.

[2] It is elementary law that the residence of the parties at the time of the institution of the action is controlling, and venue is not affected by a subsequent change of residence of the parties. *Brendle v. Stafford,* 246 N.C. 218, 97 S.E. 2d 843 (1957). Venue may be waived by any party. *Teer Co. v. Hitchcock Corp.,* 235 N.C. 741, 71 S.E. 2d 54 (1952). Plaintiff voluntarily appeared and participated in the 27 June 1977 hearing on child support. He did not object to the venue or move for change of venue. He stipulated the court could enter an order concerning his visitation privileges with the children. If plaintiff had any objection to the venue, he waived it.

Because plaintiff waived any objection he may have had to the venue, his motion was addressed to the discretion of the court. Ordinarily, rulings as to venue made in the discretion of the court are not reviewable except for abuse of discretion. *Cooperative Exchange v. Trull,* 255 N.C. 202, 120 S.E. 2d 438 (1961). Plaintiff's appeal was subject to dismissal; however, in the absence of such a motion, we have considered it upon the merits.

In bringing this appeal to the appellate division, plaintiff has effectively postponed all proceedings in the case, including his citation for contempt, for eleven months so far. Meanwhile the question of what is proper support for his three children languishes without determination. The economic pressure thus brought to bear upon the children is unconscionable.

This case is a prime example why the method of appellate review should be studied and the use of review by petition for certiorari considered in certain cases to avoid unnecessary delay and expense. Had this case been presented to this Court by petition for certiorari, it could have been promptly decided within days after it was filed on 1 February 1979. The rights of the children could have been promptly protected and the waste of time and money for printing and filing of record and briefs prevented.

Affirmed.

Judges HEDRICK and CLARK concur.

LUCY WOOD TAYLOR, PLAINTIFF, EMPLOYEE v. J. P. STEVENS AND COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7810IC1052

(Filed 2 October 1979)

Master and Servant § 94.1— workmen's compensation—byssinosis—time of disablement—finding required

Plaintiff's claim for disability allegedly resulting from exposure to cotton dust at her place of employment is remanded for further evidentiary hearings to determine the date upon which plaintiff's disablement became sufficiently extensive to prevent her from pursuing employment, and upon such a finding to determine which statutory provisions are applicable.

Judge VAUGHN concurs in the result.

APPEAL by plaintiff from award of the Industrial Commission. Award of the Full Commission affirming the opinion and award of Deputy Commissioner Conely entered 9 May 1978. Heard in the Court of Appeals 23 August 1979.

Plaintiff in this case is a female, 65 years of age, who, during the period of time between 1928 and 1 August 1963 was employed a total of 32 years by various cotton mills in the Roanoke Rapids area. In the course of her employment she was, on a continuing basis, exposed to heavy concentrations of cotton dust. She began to experience respiratory difficulties about 1939, noticing tightness in her chest on Monday mornings entering the mill, shortness of breath, wheezing and coughing. These symptoms abated somewhat between 1953 and 1955, during which period she was not working. Upon the resumption of her employment in the cotton mills, her symptoms worsened. After 1958, plaintiff experienced increasing difficulty with her breathing, ultimately taking a medical leave of absence as of 7 August 1963, at which time she was hospitalized for treatment of her symptoms. She never thereafter returned to work, although she was placed in an "on-call" status by defendant.

Plaintiff smoked 5 to 6 cigarettes a day for a period of 32 years, beginning at the age of 19 and discontinuing her smoking at the age of 51. She had had a productive cough for a period of 20 years. Her last place of employment was located approximately one and one-half blocks from her home. Plaintiff testified that it

was necessary for her to pay someone to drive her to work, as she was too weak to walk there and then do her job. Plaintiff has been hospitalized on several occasions, for respiratory problems and other unrelated conditions.

The physicians who examined her in regard to her claim noted that she displayed a somewhat atypical history for byssinosis. Nonetheless, it was contended that exposure to cotton dust had been a significant contributing factor in her respiratory problems and disability. One doctor was of the opinion that her condition could and would respond favorably to a sustained and properly adjusted bronchodilation regimen.

The hearing officer concluded that plaintiff is presently disabled, ". . . in part, as a result of an occupational chronic obstructive lung disease contracted as a result of her exposure to cotton dust in her employment." However, she was not entitled to compensation because she ". . . failed to carry the burden of proof that she was disabled as a result of such exposure within one year from the last exposure thereto." The opinion of the hearing officer cited N.C. Gen. Stats. § 97-58 and *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951) in support of his conclusion that, because plaintiff could not adduce any *medical* evidence that she was disabled as a result of her exposure to cotton dust within one year of her last exposure, she could not receive compensation. The hearing officer also found that plaintiff's testimony concerning her inability to walk from home to her last place of employment was not credible and, by so finding, eliminated the only evidence presented by plaintiff pertinent to her being disabled within one year of her last exposure to cotton dust. On appeal to the full Commission, plaintiff sought by motion to bring additional evidence before the Commission on this point, but the motion was denied. From the award denying her compensation and from the denial of her motion, plaintiff appeals, assigning error.

Davis, Hassell, Hudson & Broadwell, by Charles R. Hassell, Jr., for the plaintiff.

Teague, Campbell, Conely & Dennis by George W. Dennis III, for the defendants.

MARTIN (Robert M.), Judge.

The hearing officer and the full Commission have decided plaintiff's claim upon an erroneous theory of law. The dictum in *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1957), upon which the denial of plaintiff's claim was predicated is apparently no longer valid. *See Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). This cause is remanded for further evidentiary hearings to receive sufficient pertinent evidence so as to enable the hearing officer to make a factual finding as to the date upon which plaintiff's disablement became sufficiently extensive to prevent her from pursuing her employment, and upon such a finding to determine which statutory provisions are applicable, *Woods v. Stevens Co., supra.* The Commission is bound on remand by its findings and conclusions in the present record that plaintiff *is* disabled, and that the disablement is the result of an occupational chronic obstructive lung disease contracted as a result of her exposure to cotton dust in her employment. We need not consider whether the full Commission abused its discretion in failing to receive additional evidence upon motion from plaintiff; new hearings will in any event be required to make the determination we find to be required under *Wood v. Stevens Co., supra.*

The award of the full Industrial Commission affirming the hearing officer's denial of plaintiff's claim for compensation is vacated. The cause is remanded for further proceedings not inconsistent with this opinion and consistent with the cases cited above.

Vacated and remanded.

Judge WEBB concurs.

Judge VAUGHN concurs in the result.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, NORTH CAROLINA NATURAL GAS, APPLICANT, AND THE PUBLIC STAFF, INTERVENOR, APPELLEES v. CF INDUSTRIES, INC., INTERVENOR, APPELLANT

No. 7810UC695

(Filed 2 October 1979)

Gas § 1; Utilities Commission § 24— curtailment tracking rate— roll forward of undercollection

The Utilities Commission could properly permit a gas supplier to roll forward an undercollection produced by a curtailment tracking rate for one entitlement year for collection in the next entitlement year.

Judge MITCHELL concurred in the result.

Judge MARTIN (Robert M.) dissents.

APPEAL by intervenor from order of North Carolina Utilities Commission entered 4 April 1978. Heard in the Court of Appeals 6 April 1979.

This is an appeal by CF Industries from an order in regard to a Curtailment Tracking Rate (CTR). On 21 January 1975, the North Carolina Utilities Commission entered an order putting into effect a CTR for North Carolina Natural Gas (NCNG). The CTR was not the result of a general rate case, but was allowed in order for NCNG to protect its profit margin during a period of curtailment of natural gas. It provided that NCNG could increase the price of natural gas based on the projected shortage. The entitlement period for NCNG ran from 1 November to 31 October of the following year and NCNG was required to true-up every six months, that is, NCNG was required, based on actual sales, to refund any overcollections or adjust the CTR to recover undercollections. As part of the formula for the CTR, a base period margin of $10,232,649.00 was set.

On 22 September 1976 the Commission entered an order in which it ordered that the base period margin for all future filing be $11,549,778. On 15 February 1977 an order was entered by the Commission approving a revised CTR based on a Federal Power Commission order. This order did not change the base period margin. The Commission also ordered that true-ups be done annually. On 30 January 1978, the Commission approved a new CTR. CF Industries petitioned for a rehearing. This petition was based

in part on the filing of NCNG which had been approved by the Commission and showed that as a result of the approval of the change in the base period margin as allowed by the order of 22 September 1976 there had been an undercollection of $518,610 during the entitlement period ending 31 October 1976 which NCNG had rolled forward in the entitlement period 1 November 1976 to 31 October 1977. NCNG had deducted the $518,610 from overcollections in the entitlement period ending 31 October 1977 in calculating the true-up. CF Industries objected to this. After a rehearing the Commission on 4 April 1978 entered an order approving this roll forward. CF Industries appealed. CF Industries was a party to all proceedings which resulted in the orders set forth above.

Sanford, Adams, McCullough and Beard, by William H. McCullough and Charles C. Meeker, for CF Industries, Inc., appellant.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Donald W. McCoy, for North Carolina Natural Gas Corporation, appellee.

Robert F. Page, for Hugh A. Wells, Executive Director, Public Staff, North Carolina Utilities Commission, appellee.

WEBB, Judge.

The question posed by this appeal is whether the North Carolina Utilities Commission was legally correct in allowing North Carolina Natural Gas to roll forward an undercollection produced by the CTR for the entitlement period ending 31 October 1976 so that it was collected in the entitlement period ending 31 October 1977. The appellee contends that the order of the Commission of 15 February 1977 from which no appeal was taken should determine this case. That order provided:

> "4. That 'true-up' of the proposed annual CTR will be necessary at the end of the entitlement year with over or undercollections rolled forward in the next annual CTR."

The order also provided:

> "Any over or undercollections computed at the end of the annual entitlement period will be distributed equitably among the company's customers through the next annual rate."

The appellee contends that since NCNG did not apeal from this order, it is bound by it and cannot now appeal from a later order which approves a true-up based on the order of 15 February 1977. We do not put our decision on that ground.

We hold that under the CTR approved for NCNG in this case, undercollections in one entitlement year can be rolled forward for collection in the next entitlement year. If this is not done, there is no way the profit margin of NCNG may be protected if the annual true-up at the end of an entitlement period shows there was an undercollection. *Utilities Commission v. Public Service Co.*, 35 N.C. App. 156, 241 S.E. 2d 79 (1978) involved what was called a volume variation adjustment factor (VVAF) which worked in a manner similar to the CTR in the case sub judice. In that case the utility was required to make cash refunds of overcollections during an entitlement period. If it is proper to require a refund, we believe undercollections should be rolled forward so that a utility may recoup them.

The appellant contends this case is governed by *Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977) and *Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977) which prohibit retroactive rate-making. Those were cases involving general rate-making. In the case sub judice, a general rate is not involved.

Affirmed.

Judge MITCHELL concurred in the result.

Judge MARTIN (Robert M.) dissents.

IN THE MATTER OF TAMMY WEAVER

No. 7928DC219

(Filed 2 October 1979)

1. Infants § 17— juvenile proceeding—admissibility of confession to social worker

Miranda warnings were not required to render admissible statements made by a juvenile to a social worker; however, in order to be admissible in a juvenile proceeding, such statements must have been made voluntarily and understandingly, and the court's overruling of an objection to the admission of such statements constitutes an implied finding that the statements were voluntarily and understandingly made when there is no conflict in the evidence as to the circumstances under which the statements were made.

2. Infants § 20— commitment of juvenile to training school

There was ample evidence in the record to support a conclusion that a 13-year-old juvenile delinquent was committed to a training school because the court felt that the threat to the safety of property in the community required that she be sent to a training school and not because the county department of social services could not find an appropriate placement for her. G.S. 7A-286(4).

APPEAL by respondent from *Israel, Judge.* Judgment entered 11 January 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals 21 May 1979.

This case was begun by the filing of a petition on 2 January 1979 by Pat Webb, a social worker for the Buncombe County Department of Social Services, alleging that respondent, a 13-year-old child, is a delinquent. Ms. Webb testified at the hearing that she saw respondent in the Social Services Building sometime after 5 November 1978. At that time, respondent told Pat Webb she had taken $60.00 from a Mr. Roberts. Ms. Webb testified further that she waited until January 1979 to file the petition because she was trying to work with respondent. The court found the child was delinquent and ordered her committed to the North Carolina Department of Human Resources, Youth Services Division, for a indeterminate period of time not to exceed her 18th birthdate. Respondent has appealed.

Attorney General Edmisten, by Associate Attorney Steven Mansfield Shaber, for the State.

Public Defender Peter L. Roda for respondent appellant.

WEBB, Judge.

[1] The respondent's first assignment of error is to the admission of the testimony of Pat Webb that the respondent told her she had taken $60.00 from Mr. Roberts. Respondent contends that this testimony should have been excluded because she was not given a Miranda warning. Ms. Webb is not a law enforcement officer, and she was not required to warn respondent of her constitutional right against self-incrimination. However, to be admissible against respondent, the statement she made to Ms. Webb must have been voluntarily and understandingly made. *In re Ingram*, 8 N.C. App. 266, 174 S.E. 2d 89 (1970). In this case the respondent objected to the admission of her confession but offered no evidence relating to the admission of her extra-judicial confession. This Court held in *In re Simmons*, 24 N.C. App. 28, 210 S.E. 2d 84 (1974) that when an objection is made at a juvenile hearing to the admission of an extra-judicial confession on the ground that it was not made voluntarily and understandingly, and there is no conflict in the evidence as it bears upon the circumstances under which the confession was made, the overruling of the objection to the admission of the testimony amounts to an implied finding that the confession was voluntarily and understandingly made. The respondent's first assignment of error is overruled.

[2] The respondent next assigns as error her commitment to the Youth Services Division of the Department of Human Resources. She contends this violates G.S. 7A-286(4) which provides:

> In the case of any child who is delinquent or undisciplined, the court shall consider the following summary of State policy in relation to such child in order to design an appropriate disposition to meet the needs of the child and to achieve the objective of the State in exercising these two categories of juvenile jurisdiction: . . . A commitment to training school or to any State institution is generally appropriate only for a child over 10 years of age whose offense would be a crime if committed by an adult and where the child's behavior constitutes some threat to the safety of persons or property in the community so that the child needs to be removed from the community for the protection of the community.

The respondent argues that she was sent to training school because the Buncombe County Department of Social Services could not find appropriate placement for her and not because she was a threat to the safety of persons or property in the community. Apparently respondent bases this argument on the testimony of Pat Webb in which Ms. Webb said that she waited two months to sign the petition because she was trying to work with respondent. We do not base our decision on whether the provisions of the statute are mandatory. Conceding for purpose of argument that Ms. Webb's reason for filing the petition two months after the theft was because she could not find a place for respondent, the court could have felt that the threat to the safety of property in the community required the respondent to be sent to a training school. There was ample evidence for the court to so conclude. We cannot disturb its judgment.

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

FANNIE KARRIKER, PLAINTIFF v. ROBERT ODELL SIGMON, DEFENDANT

No. 7919SC18

(Filed 2 October 1979)

Compromise and Settlement § 6; Trial § 11.1 — jury argument — matters outside record — attempt to compromise claim

In an action to recover for personal injuries sustained in an automobile accident plaintiff is entitled to a new trial where defendant's attorney, in his argument to the jury, made statements concerning the lack of damage to plaintiff's car and defendant's attempts to settle the case outside court, since the pleadings did not raise an issue with reference to damage to plaintiff's car and the attorney's argument was therefore outside the record, and since counsel may not argue efforts to compromise a claim to the jury.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 11 August 1978 in Superior Court, ROWAN County. Heard in the Court of Appeals 20 September 1979.

This civil action was instituted by plaintiff against defendant to recover for personal injuries allegedly sustained in an

automobile accident. The material allegations of plaintiff's complaint were denied by defendant. The case was tried with two issues submitted to the jury. Issue No. 1 was answered in favor of defendant, and the trial court denied plaintiff's motion for judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50, of the Rules of Civil Procedure. Plaintiff appealed.

Robert M. Davis, for plaintiff appellant.

Hartsell, Hartsell & Mills, for defendant appellee.

ERWIN, Judge.

The record reveals that the attorney for defendant, in his argument to the jury, made the following statements over the objection of plaintiff:

> " 'The plaintiff was not hurt. The auto was in her name and she did not sue for damage to her car. This shows you there was little or no damage to the car. She would have sued for the damage if there had been any.'
>
> He also argued:
>
> 'This is a case that should not be here. The defendant made an effort to dispose of the matter, but plaintiff would not be reasonable.' "

Plaintiff contends that the argument was improper and prejudicial to her. We agree and award the plaintiff a new trial.

We are aware of the general rule in this State that the comments of counsel during argument to the jury must be left, ordinarily, to the sound discretion of the judge who tries the case; and this Court will not review his discretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury. *Lamborn v. Hollingsworth*, 195 N.C. 350, 142 S.E. 19 (1928).

Plaintiff relies on *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E. 2d 855, 857, *reh. denied*, 285 N.C. 597 (1974), wherein our Supreme Court stated:

> "The general rule is that counsel may argue all the evidence to the jury, with such inferences as may be drawn

therefrom; but he may not 'travel outside of the record' and inject into his argument facts of his own knowledge or other facts not included in the evidence. *Cuthrell v. Greene*, 229 N.C. 475, 50 S.E. 2d 525; *State v. Little*, 228 N.C. 417, 45 S.E. 2d 542; and *Perry v. Western North Carolina R. Co.*, 128 N.C. 471, 39 S.E. 27."

Crutcher, supra, controls the issue before us.

The pleadings did not raise an issue with reference to the damage to plaintiff's car or whether or not plaintiff should have sued for damages to her car. This argument was outside the record before the court and did not relate to any reasonable inference arising from the evidence.

By case law, plaintiff may not show efforts made by her to settle or compromise her case during the trial of it. *Hughes v. Enterprises*, 245 N.C. 131, 95 S.E. 2d 577 (1956); *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953); *Dixie Lines v. Grannick*, 238 N.C. 552, 78 S.E. 2d 410 (1953); *Merchant v. Lassiter*, 224 N.C. 343, 30 S.E. 2d 217 (1944); *Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978); 3 Strong's N. C. Index 3d, Compromise and Settlement, § 6, p. 139. Suffice it to say, this rule applies equally to plaintiff and defendant. Since such evidence may not be properly introduced at trial, it clearly follows that neither counsel for plaintiff nor defendant may argue such to the jury.

When counsel makes an improper argument, it is the duty of the trial court, upon objection as here, or *ex mero moto*, to correct the transgression by clear instructions. If timely done, such action will often remove prejudicial effect of improper argument. *Crutcher v. Noel, supra*. By overruling plaintiff's objection, the jury may have considered the argument to be proper to the prejudice of plaintiff. We are compelled to award plaintiff a new trial in this case where there were no other errors.

New trial.

Judges VAUGHN and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 SEPTEMBER 1979

BLOUNT v. BOARD OF ALCOHOLIC CONTROL No. 7910SC4	Wake (78CVS1829)	Affirmed
COLE v. MOUTOS No. 7828SC1093	Buncombe (75CVS251)	Affirmed
FARMER v. SPRINKLE No. 7827DC1124	Gaston (76CVD1909)	Affirmed
HYDE & JOHNSON v. STACY No. 7819DC1036	Cabarrus (78CVM804)	Affirmed
LANGDON v. POWER & LIGHT CO. No. 7811SC1095	Johnston (76CVS0657)	Affirmed
PANDOLFI v. PETERS No. 7810SC955	Wake (78CVS1521)	Affirmed
STATE v. GODLEY No. 792SC471	Beaufort (78CRS6153)	Affirmed
STATE v. GREEN No. 7930SC459	Cherokee (75CRS2000)	Affirmed
STATE v. PORTER No. 7918SC383	Guilford (77CRS52683)	No Error
TISON v. TISON No. 7813DC1138	Columbus (78CVD372)	Affirmed

FILED 2 OCTOBER 1979

BOARD OF TRANSPORTATION v. LOPER No. 7828SC1081	Buncombe (75CVS2473)	Affirmed
DOUGLASS v. CANNON No. 793DC96	Carteret (78CVD190)	Affirmed
DUDLEY v. SHUFFLE CLUB No. 7829SC1136	Henderson (76CVS481) (77CVS330) (77CVS348)	Affirmed
ENGLISH v. CREWS No. 794DC92	Onslow (77CVD871)	Affirmed
FUNGAROLI v. FUNGAROLI No. 7821DC1109	Forsyth (77CVD4340)	Affirmed

IN RE MARTIN No. 795DC31	New Hanover (78J0164)	Affirmed
STATE v. CHILTON No. 7917SC401	Rockingham (74CR5338)	No Error
STATE v. HUNTER No. 7926SC435	Mecklenburg (78CRS99541)	No Error
STATE v. JOHNSON No. 7912SC439	Cumberland (78CRS50309)	No Error
STATE v. McDUFFIE No. 798SC403	Wayne (78CR19727)	No Error
STATE v. WARD No. 792SC455	Beaufort (78CRS9542)	Dismissed
WILLETTS v. INSURANCE CO. No. 793SC55	Craven (78CVS701)	Affirmed

EDWARD G. HOLLEY v. COGGIN PONTIAC, INC.

No. 7815SC1102

(Filed 16 October 1979)

1. **Accord and Satisfaction § 1— sale of automobile—fraudulent misrepresentations—whether agreement was accord and satisfaction**

In an action to recover damages for fraud and unfair trade practices in the sale of a demonstrator automobile to plaintiffs, the trial court erred in entering summary judgment for defendant dealer on the ground of accord and satisfaction since there was a genuine issue of material fact as to whether an agreement between plaintiffs, defendant dealer and the automobile manufacturer pertained only to the resolution of particular mechanical problems or whether a potential suit for fraud and unfair trade practices was contemplated in the alleged accord.

2. **Accord and Satisfaction § 1— sale of automobile—fraudulent misrepresentations—cashing of check after knowledge—no accord and satisfaction**

The fact that plaintiffs cashed a check from defendant for $113.90 subsequent to the time plaintiffs learned of alleged misrepresentations by defendant in the sale of an automobile to plaintiffs did not constitute satisfaction of an accord between the parties as to plaintiffs' claim for damages based upon such misrepresentations where there was no indication that the check was tendered by defendant in full satisfaction of all claims plaintiffs might have arising out of the sale of the automobile. Furthermore, even if an accord had been reached as to the totality of the transaction, the accord would be voidable by plaintiffs if the fact of the initial representations were not known to them when the accord was made.

3. **Penalties § 1; Unfair Competition § 1— unfair trade practice—action for treble damages—statute of limitations**

An action under G.S. 75-16 to recover treble damages for a violation of the unfair trade practices statute, G.S. 75-1.1, instituted prior to the enactment of the four-year statute of limitations of G.S. 75-16.2 on 21 March 1979, is governed by the three-year limitation of G.S. 1-52(2), not the one-year limitation of G.S. 1-54(2) applicable to actions to recover a statutory penalty.

4. **Penalties § 1— when one-year statute of limitations applies**

The one-year statute of limitations provided by G.S. 1-54(2) for an action to recover a statutory penalty applies only when the penalty is expressly provided in the statute.

APPEAL by plaintiff from *Battle, Judge*. Judgment entered 21 September 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 29 August 1979.

On 28 October 1978 plaintiff commenced this action for actual damages, punitive damages and treble damages, alleging that de-

fendant's agents intentionally made misrepresentations and committed deceptive trade practices when, on 11 November 1975, defendant sold plaintiff a demonstrator Volvo for $6,500, following representations by defendant's agent that the automobile was in excellent mechanical condition and that same model car was good for 200,000 miles of trouble-free driving without major repairs. The complaint also alleges that several of defendant's salesmen had used the automobile as a demonstrator and knew that the automobile had serious mechanical problems. The complaint further alleges that following the sale the Volvo required extensive repair work for a missing heat plate, burned interior fixtures, a defective air conditioner, a defective brake rotor, a defective flywheel, and broken motor mounts.

Later uncontroverted affidavits submitted by the plaintiff indicated that in addition to the above problems, repairs or replacements had to be made in or for the rear windshield wiper motor, the electrical system, the roof, the receiver dryer, the exhaust clamp, the steering wheel and the starter.

In January 1978 defendant filed an answer setting forth specific denials and two affirmative defenses of accord and satisfaction and the one-year statute of limitations, N.C. Gen. Stat. § 1-54(2). On 7 September 1978 defendant moved for summary judgment.

Affidavits in opposition to the motion for summary judgment were then submitted by Mr. and Mrs. Holley and Robert Lawrence of Yates Motor Company in Chapel Hill. Lawrence's affidavit stated that in July of 1977 he had been approached by the Holleys who sought to trade the Volvo in on a new automobile. Lawrence further stated that he took the vehicle to defendant Coggin Pontiac, the only Volvo dealer in the area, in order to ascertain the resale value of the car, at which time Lawrence was told by defendant's salesmen: (1) that the vehicle had been used by six different salesmen as a demonstrator; (2) that each of the salesmen had asked to be relieved of the vehicle because of its problems; (3) that the vehicle was worth substantially less than the fair market value for similar vehicles; (4) that the entire sales force considered the vehicle to be a joke; and (5) that one of defendant's salesmen thought the vehicle was unbearable and felt sorry for anyone who purchased it.

On 21 September 1978 the trial court granted summary judgment in favor of defendant on the grounds that the aforementioned accord and satisfaction and statute of limitations left no genuine issue of material fact.

Other necessary facts are stated in the opinion.

Winston & Blue by J. William Blue, Jr., for plaintiff appellant.

Powe, Porter, Alphin & Whichard by N. A. Ciompi for defendant appellee.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State of North Carolina as amicus curiae.

CLARK, Judge.

This appeal presents the questions of whether the trial court's action was proper in awarding summary judgment based upon defendant's defenses of accord and satisfaction and the one-year statute of limitations set forth in N.C. Gen. Stat. § 1-54(2). We now hold that with respect to both of these defenses, summary judgment was inappropriately granted.

I.

ACCORD AND SATISFACTION

[1] This aspect of the dispute between the parties involves the scope of an agreement or accord made between the parties in 1977. Defendant, Coggin Pontiac, Inc., argues that plaintiff, Edward Holley, both orally and in writing proposed a full and complete resolution of whatever claims he might have had against defendant. Plaintiff Holley, on the other hand, contends that the agreements reached among himself, defendant and Volvo Corporation of America, (hereinafter "Volvo Corporation") only pertained to resolution of particular mechanical problems. The trial judge, in granting summary judgment, found the accord to be a complete bar to this action.

Summary judgment under N.C.R. Civ. P. 56 serves the ends of judicial economy but the remedy is a drastic one, *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). For

this reason the party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists and the court should review the verified pleading or supporting affidavits in a light most favorable to the opposing party. *Id.*

The crux of our holding on the question of accord and satisfaction is that, at the very least, we find a genuine issue of material fact as to whether the scope of the accord, between plaintiff on one side and defendant and Volvo Corporation on the other, went so far as to supplant the tort claims of fraudulent misrepresentation and unfair trade practices which plaintiff brings in this action. While parties may certainly reach an accord as to matters of tort as well as contract, if the accord at issue does not reach the torts of fraud and misrepresentation, the accord cannot be a defense to this action. On the record before us there is little, if any, indication that a claim against Coggin Pontiac for fraudulent misrepresentations was ever considered by either party to be an element of the accord.

It is not for this Court to usurp the jury as the trier of fact on the question of the scope of the accord among Coggin Pontiac, Volvo Corporation and the Holleys. However, there is sufficient evidence favorable to the plaintiff to send this case to the jury. Each item of correspondence from Holley to Coggin Pontiac and Volvo Corporation specifically requested reimbursement for sums expended to remedy particular mechanical problems, as opposed to compensating plaintiff for his loss of market value, his loss of use of his vehicle, his loss of time and aggravation in continually pursuing repairs, and, most important, his right to recover in tort for fraud in the inducement of sale. For example, the letter of 17 January 1977 from plaintiff to Volvo, demands $334.06 in reimbursement for repairs to the flywheel and starter as well as for the cost of renting a car while these repairs were being made. Similarly, the second letter from plaintiff to Volvo Corporation dated 1 May 1977, requested $361.49 in reimbursement for the aforementioned flywheel repairs ($280.06) and an additional sum for replacing the motor mounts ($81.43). The third letter of 11 July 1977, in which Holley asked to bring "this matter to a prompt conclusion" so that the parties could "be rid of each other once and for all," specifically referred to the "long ordeal of waiting, discussing, [and] pleading" which occurred over the six months that "passed since the problem of the flywheel just after

Christmas, 1976." Finally, Holley's letter of 15 July 1977 to Coggin Pontiac explained that Coggin Pontiac still owed Holley $113.90 for towing service and repairs to the flywheel for which Holley had not been fully reimbursed. Nowhere in these letters is there mentioned any prospect of a suit for fraud or unfair trade practice.

The timing of the discovery of the alleged fraud also bears heavily upon the factual issue involving the scope of the accord. It is true that Mrs. Holley stated in her affidavit, "I began to suspect at a very early date that we had not been told the accurate mechanical condition of the vehicle at the time of its purchase." Nonetheless, the Holleys contend that the actual misrepresentations were not revealed until July, 1977, after a long tedious process of repairs and delays in reimbursement had transpired and the frustrated Holleys had begun to talk with Robert Lawrence at Yates Motor Company about trading in their Volvo. In contrast, the negotiations and the correspondence concerning the flywheel, motor mounts, and starter problems began almost seven months before the alleged bad faith of Coggin Pontiac's salesmen was discovered by Lawrence. Indeed, throughout the nineteen-month period in which the Holleys had owned the Volvo, they were in a situation similar to that of a man who drops one grain of sand upon another and then must determine when a pile has been created; only at the culmination of the long period of incremental disappointments did the Holleys have good reason to believe they had been defrauded. We therefore find a genuine issue of material fact as to whether the Holleys even knew they had been defrauded when the accord was made, must less whether a potential suit for fraud and unfair trade practice was contemplated in the accord.

[2] Defendant also contends that plaintiff cashed a check for $113.90 in August, 1977, subsequent to the time in July when plaintiff learned of the alleged misrepresentations, and therefore complete satisfaction, by way of full performance of the settlement accord, was achieved. We do not agree.

It is well settled that an "accord" is an agreement in which one of the parties undertakes a performance in satisfaction of a liquidated or disputed claim arising from either tort of contract, and the other party agrees to accept the performance even

though the performance is otherwise than that to which the accepting party considered himself entitled. "Satisfaction," on the other hand, is the completion or execution of the agreed performance. *Allgood v. Wilmington Savings & Trust Company*, 242 N.C. 506, 515, 88 S.E. 2d 825 (1955); *Dobias v. White*, 239 N.C. 409, 413, 80 S.E. 2d 23, 27 (1954). Normally, however, the accord must be accompanied by actions manifesting a condition that if the offer of performance is accepted, the performance will be tendered in full satisfaction of the obligations owed to the accepting party. *Allgood v. Wilmington Savings & Trust Company, supra. See also*, 1 Am. Jur. 2d Accord and Satisfaction § 1 (1962). In the case *sub judice*, however, there is no language in any correspondence which indicates that the check for $113.90 from defendant was tendered in full satisfaction of all claims, for mechanical repair or otherwise, which plaintiff might have had arising out of the sale of the Volvo; similarly, there was no need for plaintiff to endorse the check for $113.90 "with reservation of rights," as prescribed by N.C. Gen. Stat. § 25-1-207 (1965), in order to preserve his right to bring this suit.

Even if an accord had been reached as to the totality of the transaction, the accord would be voidable at the behest of the plaintiff if, when the accord was purportedly made, the fact of the initial misrepresentation were not known to the Holleys. The taint of the fraud in the inducement of the sale carries over to the accord which arose out of the sale, and for this same reason the accord lacks the element of mutuality which is necessary to enforce any contract. *See* 1 Am. Jur. 2d Accord and Satisfaction § 24 (1962). We therefore hold that the award of summary judgment based upon the defense of accord and satisfaction was improper.

II.

STATUTE OF LIMITATIONS

[3] The second issue presented concerns the appropriate statute of limitations for the North Carolina Unfair Trade Practices Statute, N.C. Gen. Stat. 75-1.1 (hereinafter "G.S.") in the decade between 1969 and 1979. This question is one of first impression; its answer does not appear in black and white, and its resolution depends on a sensitive analysis of the statutory scheme by which North Carolina regulates unfair trade practices. We now hold that

the statute of limitations for G.S. 75-1.1 during the period between 12 June 1969, the date of enactment of G.S. 75-1.1 (1969 N.C. Sess. Laws, c. 833, sec. 3), and 21 March 1979, the date of amendment by the North Carolina General Assembly (1979 N.C. Adv. Leg. Serv., § 169, sec. 2, to be codified as G.S. § 75-16.2), is three years.

In 1969 the North Carolina Legislature adopted the language of G.S. 75-1.1(a) from Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1969), and incorporated it within Chapter 75, the North Carolina antitrust statute. The prohibitions and purposes of the unfair and deceptive trade practice statute are herein provided in relevant part:

> "§ 75-1.1. *Methods of competition, acts and practices regulated; legislative policy.*—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil 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."

G.S. 75-1.1(a), (b) (1969). North Carolina, however, did not follow the enforcement scheme in the Federal Trade Commission Act. Instead of creating a new agency with the sole authority to enforce the act, such as the Federal Trade Commission, the General Assembly placed partial enforcement authority in the Attorney General and amended the treble damages provision of the North Carolina antitrust statute to encourage enforcement of the act by private individuals injured by unfair trade practices. *State ex rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 320, 233 S.E. 2d 895, 901 (1977). *See generally*, Aycock, Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared, 50 N.C.L. Rev. 199 (1972); Morgan, The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection, 6 Wake Forest Intra. L. Rev. 1 (1969) (hereinafter, "Morgan"); Comment, Trade Regulation—The North Carolina Consumer Protection Act of 1977, 56

N.C.L. Rev. 547 (1978); Comment, Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation, 48 N.C.L. Rev. 896 (1970); Note, Trade Regulation—G.S. § 75-1.1—Unfair or Deceptive Acts or Practices in the Conduct of Trade or Commerce, 12 Wake Forest L. Rev. 484 (1976); Note, Consumer Protection—*Hardy v. Toler*: Applying the North Carolina Deceptive Trade Practices Legislation, 54 N.C.L. Rev. 963 (1976); Note, Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation, 48 N.C.L. Rev. 896 (1970).

The defendant now correctly cites: *Williams v. Gibson*, 232 N.C. 133, 59 S.E. 2d 602 (1950); *Smoke Mount Industries, Inc. v. Fisher*, 224 N.C. 72, 29 S.E. 2d 128 (1944); *Waters v. Telegraph Company*, 194 N.C. 188, 138 S.E. 608 (1927); *Dozier v. Bray*, 9 N.C. (2 Hawks) 57 (1822), for the proposition that throughout the entire body of North Carolina law, there runs the concept that an action to recover more than a plaintiff's actual damages is a penalty. From this authority the defendant argues that the treble damages provision of G.S. 75-16 constitutes a penalty and that therefore the following one-year statute of limitations of G.S. 1-54(2) applies to the present action:

> "§ 1-54. *One year.*—Within one year an action or proceeding—. . . .
>
> (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation."

The defendant's argument, however, does not convince us that the answer is so simple.

First, it does not necessarily follow that because other multiple damages statutes have been found to involve penalties, all multiple damages provisions must therefore be penalties. Indeed, to adopt this reasoning, without more, would be to wander aimlessly through the annals of *stare decisis*. Quite simply, it may be inappropriate to select limitations by analogy from one subject to another, 53 C.J.S. Limitations of Actions § 33 (1948), especially if to do so would run against the policy and intent of the Legislature enacting the act in question, or if to do so would disregard the nature of the right involved.

We are hesitant to make such an analogy in this case, for in none of the *Dozier, Waters, Williams,* or *Smoke Mount Industries* cases, *supra,* cited by defendant, did the court address any question of application of a statute of limitations or was there in existence a complex scheme of public and private enforcement at the state level that resembles the North Carolina unfair trade practice statute. These distinctions require further elaboration.

A statutory provision may have punitive elements and still not constitute a "penalty." As has been explained by our Supreme Court, the distinguishing characteristic of a penal statute is that it is " 'prosecuted for the *sole* purpose of punishment, and to deter others from acting in a like manner.' " (Emphasis supplied). *Edmisten v. J. C. Penney, Inc.*, 292 N.C. at 319, 233 S.E. 2d at 900. However, the unfair trade practice treble damages provision, G.S. 75-16, does not manifest such a singularity of purpose; rather, the statute is a "hybrid," *Edmisten v. J. C. Penney Co., supra,* with at least three major purposes: (1) to serve as an incentive for injured private individuals to ferret out fraudulent and deceptive trade practices, and by so doing, to assist the State in enforcing the act's prohibitions; (2) to provide a remedy for those injured by way of unfair and deceptive trade practices; and (3) to serve as a deterrent against future violations of the statute. Only the latter of these purposes is at all punitive in nature, and we note that actions for punitive damages are not covered by the one-year statute of limitations, *Reid v. Holden,* 242 N.C. 408, 88 S.E. 2d 125 (1955). Having multiple objectives of which some are not penal in nature, the statute cannot be deemed a penal statute, *see, Huntington v. Attrill,* 146 U.S. 657, 667, 13 S.Ct. 224, 227, 36 L.Ed. 1123, 1127-28 (1892), and for this same reason it would not be appropriate to construe and apply G.S. 1-54(2) to the exclusion of the remedial and private enforcement objectives of G.S. 75-16.

Moreover, in 1977, the Legislature specifically created a "civil penalty" for violations of G.S. 75-1.1:

> "§ 75-15.2. *Civil Penalty.*—In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute, the court may, in its discretion, impose a *civil penalty* against

> the defendant five thousand dollars ($5,000) for each violation. In determining the amount of the *civil penalty*, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so assessed shall be paid to the General Fund of the State of North Carolina." (Emphasis supplied.)

1977 N.C. Sess. Laws, c. 747, sec. 3. It would not be proper for this Court to strain to infer that the General Assembly meant the treble damages provision of Chapter 75 to be a penalty where, in the preceding statutory section, the General Assembly has expressly created a "penalty" denominated as such and reserved the authority to enforce the "penalty" to the State's chief law enforcement officer. The language of G.S. 75-15.2 is sufficiently particular for us to conclude that had the General Assembly intended its sister provision, G.S. 75-16, also to be a "penalty," the General Assembly would have expressly provided for a second "penalty."

All of the above is consistent with the statement of Mr. Justice Gray, in *Huntington v. Attrill, supra*, that "[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual . . . ." 146 U.S. at 668, 13 S.Ct. at 228, 36 L.Ed. at 1128. We therefore think that with respect to Chapter 75, the treble damages provision addresses individual grievances and the civil penalty provided addresses the harm against the public welfare. We stress that the former may be brought only by the person injured, the latter only by the Attorney General.

In addition, in *State ex rel. Edmisten v. J. C. Penney Co., supra*, our Supreme Court expressly rejected the argument that the treble damages provision, G.S. 75-16, is penal:

> "The State and the defendant both call our attention to various rules of construction that they deem controlling. *Defendant contends the statute is penal in nature* and, thus, must be strictly construed. *Chadwick v. Salter*, 254 N.C. 389,

119 S.E. 2d 158 (1961). The State, on the other hand, insists the statute is remedial and must, therefore, be broadly construed. *Morris v. Staton*, 44 N.C. 464 (1853). *We find neither of these views persuasive.*" (Emphasis supplied.) 292 N.C. at 319, 233 S.E. 2d at 900.

Earlier this year the North Carolina General Assembly addressed the question before us by providing that "[a]ny civil action brought under [Chapter 75] to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." 1979 N.C. Adv. Legis. Serv., c. 169, sec. 1, to be codified as G.S. 75-16.2. However, during the legislative process language in section 2 of House Bill 238, later enacted and ratified as the aforementioned Section of Chapter 75, was changed from the following:

> "This act is effective upon ratification and shall apply to all civil actions pending and claims accrued as of that date."

to the following:

> "This act is effective upon ratification but shall not apply to any pending civil action."

Thus we agree with the defendant that the new enactment does not apply to the case at bar.

Defendant, however, argues that since the transmittal memorandum[1] from the Attorney General's Office cited this particular case as a reason for the bill, and since the Legislature decided not to make the legislation effective as to pending litigation, the one-year statute of limitations embodied in G.S. 1-54(2) is therefore applicable. We disagree. The question of whether a one-year or a three-year statute should apply to G.S. 75-16 prior to the enactment of G.S. 75-16.2 has never been addressed by the General Assembly or the North Carolina Appellate Courts. By changing the law for future actions under G.S. 75-16 the Legislature did not determine, as we must do now, what the prior law was. We think that by acting prospectively the Legislature did not thereby ratify the application of the one-year rule to G.S. 75-16 prior to the date of the amendment, but rather merely made

1. Memorandum from Leigh Emerson Koman, Assistant Attorney General, to Representative William H. McMillan, concerning H. B. 238, Statute of Limitations Under Chapter 75, February 13, 1979. This memorandum was not in the record but was submitted by defendant as an addendum to his brief on appeal.

it clear that the one-year rule was inappropriate for the treble damages provisions. The very same transmittal memorandum which defendant presents to this Court emphasizes this point:

> ". . . In addition, it appears that the provisions in § 75-16 for treble damages and in § 75-16.1 for attorney's fees were intended by the General Assembly to serve as an incentive to injured parties to pursue their rights under that chapter. The nature of the violations of Chapter 75 is such that a one year statute of limitations makes it next to impossible to effectuate the policy behind Chapter 75. . . ."

This memorandum further noted, and correctly so, that G.S. 1-52(2), hereinafter quoted, was a possible alternative to the one-year statute:

> "§ 1-52. *Three years.*—Within three years an action—
>
> * * * *
>
> (2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it."

1975 Sess. Laws, c. 252, sec. 2. Consequently, we do not glean from the transmittal memorandum, by negative implication, that by enacting the four-year limitations period in G.S. 75-16.2 the General Assembly meant this case to be bound by the one-year rule. Even though the four-year limitations amendment does not apply to the instant case, the underlying policy reasons do, and given the choice between the one-year rule in G.S. 1-54(2) and the three-year rule in G.S. 1-52(2), we find the latter more appropriate. We do not find it inconsistent herewith that the General Assembly has subsequently extended this period to four years in conformity with limitations for treble damages suits under federal antitrust legislation. 15 U.S.C. § 15b (1979). *Cf.* 15 U.S.C. § 57d (1979) (the three-year limitations period for unfair trade practice actions brought by the Federal Trade Commission).

Our holding today is in conformity with the rules of construction that, " 'a statute of limitations should not be applied to cases not clearly within its provisions,' " *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E. 2d 363, 370 (1968), and that where there is doubt as to which statute of

limitations should apply, the longer statute should be chosen. 51 Am. Jur. 2d Limitation of Actions § 63 (1970).

There is still another more substantive reason why the three-year period is more appropriate. It has long been a general rule that in determining the applicable statute of limitations, the focus should be upon the nature of the right which has been injured and not the remedy therefor. *New Amsterdam Casualty Co. v. Waller*, 301 F. 2d 839 (4th Cir. 1962) (interpreting G.S. 1-52(9)). *See also*, 51 Am. Jur. 2d Limitation of Actions § 62. Indeed, to let the limitations be determined by the remedy would be to have the tail wag the dog.

Similarly, " '[i]t is well settled that when there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizen.' " *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. at 372, 163 S.E. 2d at 370, quoting 34 Am. Jur. Limitation of Actions § 37.

In this case the gravamen of the alleged offense is fraud in the inducement of sale of an automobile effected by misrepresentations of a salesman. *See, e.g., Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 392 (1975), with facts similar to those in the case at bar, in which such fraudulent behavior was found to be a violation of the prohibition against unfair and deceptive trade acts. The North Carolina unfair and deceptive trade practice legislation, even though modeled after a federal statute, is itself a statutory amalgam and expansion of the common-law torts of fraud and unfair competition. *See, e.g., Irwin v. Sherrill*, 1 N.C. (1 Tay.) 99 (1799) (deceit in the inducement of sale of a wasted mare). *See also, Morgan, supra*, at p. 20. Although it is not necessarily true that all unfair trade practices constitute fraud, *Hardy v. Toler, supra*, it would be inconsistent, where, as in the instant case, fraud is the gist of the unfair trade practice, to construe the limitations for G.S. 75-1.1 and G.S. 75-16 to be one year when the statute of limitations for fraud is three years. G.S. 1-52(9). Without a specific mandate from the Legislature, we will not construe the remedy so as to cut off the very right which the remedy is designed to protect.

[4] We must now ask: if the right and not the remedy is to determine the appropriate statute of limitations, when, if ever, is

the one-year statute of limitations for penalties to apply? The answer is that the one-year rule applies when a penalty is provided "upon a . . . statute," G.S. 1-54(2), and since penal statutes are to be construed strictly, *Chadwick v. Salter*, 254 N.C. 389, 397, 119 S.E. 2d 158, 164 (1961), we take this to mean that the "penalty" must be spelled out and not implied. With respect to unfair trade practices, such a "penalty" is expressly provided in G.S. 75-15.2; no penalty, however, is provided in G.S. 75-16, the treble damages provision. In this regard we note that in the only North Carolina case in which it was held that the one-year statute of limitations for actions for penalties applied, the penalty at issue was specifically prescribed in the revenue statute. *Hewlett v. Nutt*, 79 N.C. 263 (1878). All other North Carolina cases mentioning G.S. 1-54(2) either did not reach the issue, *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922), or held that a statute of limitations other than G.S. 1-54(2) applied, *Williams v. Adams*, 288 N.C. 501, 219 S.E. 2d 198 (1975).

To say that the legislative intent to create a penalty must be spelled out is also consistent with the prevailing rule in North Carolina that a penalty must be for a sum certain. *State v. Maultsby*, 139 N.C. 583, 51 S.E. 956 (1905); *Commissioners v. Harris*, 52 N.C. 281 (1859); *State v. Crenshaw*, 94 N.C. 877 (1886). *Contra: Dowd v. Seawell*, 14 N.C. 185 (1831); *Dozier v. Bray, supra.* We do not go so far as to say in this case that multiple damages can never be sums certain and therefore can never be penalties, but rather we stress that all penalties must be expressly provided and that this requirement will almost always be met where a penalty for a sum certain is created. However, by providing for a civil penalty with a sum certain of $5,000 in G.S. 75-15.2, and by not enacting a similar provision for a sum certain in G.S. 75-16, we think that the Legislature meant the former to be a penalty and the latter not to be a penalty. This reasoning is no more than a variation of the general rule of *ejusdem generis*, that where there are general words (the treble damages provision, G.S. 75-16) following particular and specific words (the $5,000 "civil penalty" provision, G.S. 75-15.2), the meaning of the general words must be restricted by the particular designation. 51 Am. Jur. 2d Limitations of Actions § 53 (1970); Annot., Application of the Rule of Ejusdem Generis to Statutes of Limitations, 39 A.L.R. 1404 (1925).

We turn now to the federal cases which have held that the one-year statute of limitations found in G.S. 1-54(2) applies to treble damages actions under G.S. 75-1.1. *Harris v. Atlantic-Richfield Company*, 469 F. Supp. 759 (E.D.N.C. 1978); *C.F. Industries v. Transcontinental Gas Pipeline*, 448 F. Supp. 475 (W.D.N.C. 1978); *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808 (M.D.N.C. 1977). The North Carolina Supreme Court has stated that while federal decisions construing the Federal Trade Commission Act may furnish some guidance to the meaning of G.S. 75-1.1, *Hardy v. Toler, supra*, the federal court decisions are not controlling in construing the North Carolina Act. *State ex rel. Edmisten v. J. C. Penney Co., supra*. After careful consideration we do not find a sufficient foundation to support these holdings.

The *Harris, C.F. Industries* and *Thomas* cases, *supra*, all rely upon the decision of the Fourth Circuit in *North Carolina Theatres, Inc. v. Thompson*, 277 F. 2d 673 (4th Cir. 1960). The *North Carolina Theatres* decision, however, was applying the North Carolina statute of limitations to the *federal* antitrust laws under the doctrine of *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906), that where the federal statute is silent the limitations period prescribed by state law will be applied. The *North Carolina Theatres* decision did not interpret Chapter 75 of the North Carolina General Statutes.

In addition, the *North Carolina Theatres* opinion was written nine years prior to the enactment of G.S. 75-1.1 and does not take into account the unique North Carolina statutory scheme of enforcement, the existence of the "civil penalty" expressly provided in the statute, the nature of the particular rights invaded, and the spirit of the antifraud provisions of the Act. The application of the one-year rule in *North Carolina Theatres* was unnecessarily grudging. We find that, in contrast to the one-year rule, a three-year statute of limitations for G.S. 75-1.1 and 75-16 provides a reasonable period of time in which to ferret out and investigate unfair trade practices, especially where, as in the instant case, elements of deceit or misrepresentations by silence may have been involved.

Moreover, the action in *North Carolina Theatres* was filed in 1952. In 1955 Congress amended the Clayton Act to provide a

four-year statute of limitations for private antitrust actions and thereby rendered the decision in *North Carolina Theatres* obsolete. 15 U.S.C. § 15b, 69 Stat. 283 (1955), amended in part 90 Stat. 1396 (1976).

Similarly, prior to the enactment of the federal four-year statutory limitations period, the United States Supreme Court in *Chattanooga Foundry, supra,* rejected the argument that the treble damages provision of the federal antitrust laws was a penalty:

> "The limitation of five years in Rev. Stat. § 1047, U.S. Comp. Stat. 1901, p. 727, to any 'suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States,' does not apply. The construction of the phrase 'suit for a penalty,' and the reasons for that construction, have been stated so fully by this court that it is not necessary to repeat them. . . ."

203 U.S. at 397, 27 S.Ct. at 66, 51 L.Ed. at 244. Similarly, our holding today is in conformity with a substantial majority of states in which the rule was stated that the private action treble damages provision of the federal antitrust statute did not constitute a penalty for purposes of the local statutes of limitations. 3 Trade Reg. Rep. (C.C.H.) § 9132 (1971). (Limitations rule for an action upon a statute *other than* a penalty or forfeiture applied: Colorado, 2 years; Florida, 3 years; Kansas, 3 years; Montana, 2 years; New York, 6 years; Ohio, 6 years; Oklahoma, 3 years; Utah, 3 years. Limitations rule for penalties rejected and tort or catch-all rules applied: Connecticut, 3 years; Delaware, 3 years; Georgia, 4 years; Maryland, 3 years; Massachusetts, 2 years; Michigan, 6 years; Minnesota, 2 years; New Hampshire, 6 years; New Mexico, 4 years; Pennsylvania, 6 years; Tennessee, 10 years; Texas, 2 years; Virginia, 5 years. Even when called a "penalty," longer statutory periods were involved: Illinois, 2 years; Indiana, 2 years; Missouri, 3 years; New Jersey, 2 years; Washington, 3 years; Wisconsin, 2 years. Only in a few instances where the treble damages provision was found to be a penalty was there a one-year period of limitations: Alabama, California, Kentucky, Louisiana, Puerto Rico.)

The order of the trial court granting summary judgment to defendant is reversed and this case is remanded for further proceedings consistent herewith.

Reversed and Remanded.

Judges ERWIN and WELLS concur.

STATE OF NORTH CAROLINA v. RODNEY E. HENDRICKS

No. 7915SC358

(Filed 16 October 1979)

1. **Searches and Seizures §§ 4, 23— use of beeper as search—reasonableness—warrant issued by federal magistrate**

The State, by monitoring an electric homing device commonly called a "beeper" placed in a container of a substance lawfully owned but known to be a precursor chemical used in the illegal manufacture of methamphetamine, a controlled substance, conducted a "search" under the Fourth Amendment of the U. S. Constitution, but such search was not unreasonable, though officials continued to monitor the beeper when the container and the device were carried by a third party suspected of criminal activity from Connecticut to N. C. and finally into defendant's home, since a federal magistrate approved the initial warrant for the installation of the beeper, and the validity of that warrant was not challenged other than by the general assertion that defendant's Fourth Amendment rights had been violated.

2. **Searches and Seizures § 4— electronic beeper in automobile—search**

Though an individual's expectation of privacy with regard to movement in an automobile is less than that, for example, which he would have in his home, automobiles are not devoid of Fourth Amendment protection; consequently, the installation and monitoring of a beeper located in or on a motor vehicle constitutes a Fourth Amendment search.

3. **Searches and Seizures §§ 28, 29— use of electronic beeper—search warrant—showing required—scope of warrant**

Where electronic beepers are involved, a search warrant should be based upon facts sufficient to show probable cause and particularity, and these requirements will be met if the following facts are shown: (1) that a crime has been, is being or is about to be committed; (2) that tracking of the persons or property specified in the application is likely to reveal evidence of the crime, or the location of the criminals; (3) that the persons or property to be tracked are directly involved in the crime; (4) that alternative methods of investigations are likely to be burdensome or ineffective; (5) that existing exigent circumstances justify withholding notice of the search; and (6) that the persons or property to be traced are sufficiently identified. Similarly, the order issued by the magistrate should be no more intrusive than is necessary and should insure: (1) that the purpose of the search is narrowly defined; (2) that the identity of the object on which and the method by which the beeper is attached are

articulated; (3) that the time period during which the search may be conducted is limited; (4) that the conditions requiring termination of the search in advance of the specified time limit are stated; (5) that a return report on search activities will be submitted; and (6) that subsequent notice to the parties searched will be provided.

4. Searches and Seizures § 23— search of house—probable cause for issuance of warrant

Evidence obtained from an electronic beeper along with other statements in an officer's affidavit established sufficient probable cause to justify a warrant for the search of defendant's private residence where the affidavit revealed (1) statements by an informer concerning the existence of a clandestine laboratory operation, and such statements were made against his penal interest and were thereby inherently reliable; (2) the manner of purchase and the nature of the chemicals purchased was highly probative, since the chemicals were ordered in the name of a business, but university and residential addresses were given, and an individual drove 800 miles and paid $3000 in cash in order to purchase the 70 kg of chemicals, as opposed to paying by check and having the chemicals shipped; (3) that officers visually observed the person who picked up the chemicals and observed his furtive movements in transporting the chemicals to N. C.; (4) the person who picked up the chemicals went to defendant's home three times and thereafter left the cannister containing chemicals and an electronic beeper within defendant's curtilage; (5) the original informant, an admitted participant in an illegal methamphetamine laboratory, visited defendant's house; and (6) officers on several occasions observed someone in defendant's house wearing a white smock resembling a chemist's garb.

APPEAL by defendant from *McLelland* and *Martin, Judges.* Order denying Motion to suppress entered 11 December 1978. Judgment entered 8 January 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 22 August 1979.

By indictment proper in form defendant was charged with felonious possession of hashish and felonious possession of marijuana with intent to sell. Prior to trial, the defendant moved to suppress all controlled substances and any other tangible evidence seized pursuant to a search warrant from defendant's home on 12 June 1978. A pretrial hearing on the motion to suppress was denied by Judge McLelland. Thereafter, defendant appeared in open court and entered a plea of guilty of possession of hashish and misdemeanor possession of marijuana. Pursuant to G.S. 15A-979, he appealed from the judgment consolidating the two counts and imposing a sentence of three to five years, suspended upon payment of a $1,000 fine and probation for five years.

Other facts necessary to decision are cited in the opinion.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

Bircher & Connerat by Richard Bircher for defendant appellant.

CLARK, Judge.

The substance of this case involves the Fourth Amendment implications of the use of electronic tracking devices, an issue of first impression in this State.

Defendant challenges the trial court's denial of its motion to suppress evidence on the grounds that the affidavit in support of the search warrant which was the sole authority for the search of defendant's home, was not sufficient to establish probable cause and that the search of the defendant's home was unreasonable and violated defendant's rights under the United States Constitution and applicable North Carolina law. After careful consideration, we find no merit in defendant's challenge to the trial judge's ruling on the motion to suppress.

Defendant generally asserts that his rights of privacy have been violated, although he does not specifically articulate the question of whether the electronic "beeper" has violated his rights. Nonetheless, the security and protection of persons and property provided by the Fourth Amendment are fundamental values. *Alderman v. United States*, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed. 2d 176, 187, *reh. denied*, 394 U.S. 939, 89 S.Ct. 1177, 22 L.Ed. 2d 475 (1969), which ". . . are to be regarded as of the very essence of constitutional liberty; and . . . the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen, . . ." *Gouled v. United States*, 255 U.S. 298, 304, 41 S.Ct. 261, 263, 65 L.Ed. 647, 650 (1921). Consequently, the increasing use of electronic tracking devices by law enforcement agencies, the novelty of this question in North Carolina, and the potential for disrupting the privacy of those in the situation of defendant, compel us to give careful attention to the questions raised by the use of the electronic beeper in the instant case.

The search warrant *sub judice* was supported by the affidavit of Timothy L. Morgan, Special Agent for the Drug Enforcement Administration, which affidavit is herein summarized or quoted.

1. On 9 March 1978, John Nelson was arrested by the Chapel Hill Police Department on charges of possession of controlled substances. Nelson thereafter stated that he was a chemist in a clandestine drug laboratory which illegally manufactured methamphetamine, that the lab was temporarily out of operation due to the need for precursor chemicals and that upon the receipt of the new chemicals the lab would be moved to a new location where additional quantities of Controlled Substances would be manufactured. Nelson further advised the officers that he worked in the lab for William Douglas Johnson, to whom he had been introduced by James Guy Parks, Nelson's roommate.

2. On 2 June 1978, Special Agent Richard B. Broughton contacted Mr. Gene Huller, an official of Fisher Scientific Chemical Company in Raleigh, North Carolina. Mr. Huller advised Agent Broughton that his firm, on 27 July 1977, 2 February 1978, and 1 March 1978, had received orders from J. G. Parks, doing business as Southeastern Tank and Steel Service, Chapel Hill, North Carolina, for chemicals and supplies including methylamine, ethyl ether anhydrous, formic acid, sodium hydroxide, funnels, tube adapters, graduated cylinders, flasks, stirring rods, cork rings and rubber stoppers. Similarly, Mr. Huller also advised the officers that Mr. William Johnson, also doing business as Southeastern Tank and Steel Service, contacted Fisher Scientific Company on 27 January 1978 to order a flask, filter paper, rubber tubing, beakers, funnels, and connectors. All items ordered were either picked up by or delivered to Parks, Johnson or their designated recipients.

3. Similarly, Ms. Jose Roth, Office Manager of Pflatz and Bauer Chemical Company, Stamford, Connecticut, contacted Special Agent Timothy L. Morgan, Greensboro, North Carolina, on 23 May 1978, and informed the officer that J. G. Parks, doing business as Southeastern Tank and Steel Service, presented orders for benzelmethylketone, ethylbutylketone, and isopropyl benzene, the latter order of which was to be picked up by Mr. Parks on 31 May 1978.

4. On 30 May 1978, Special Agent T. W. Sprankle of the Hartford, Connecticut District Office of the Drug Enforcement Agency, appeared before U. S. Chief District Judge T. Emmett Clarie with an affidavit requesting the installation of a radio-tracking device in the container containing a quantity of the phenyl 2 proponone (benzelmethylketone). The warrant was issued.

5. "On the following day, 5/31/78, Mr. PARKS arrived at the PFALTZ AND BAUER CHEMICAL COMPANY, at which time he paid cash, $3,837.50 for the above items and received them. Surveillance was then conducted on PARKS and his vehicle, a 1977 Ford truck, North Carolina license BJ-6203, and the container containing the chemicals/radio-tracking device by surveilling DEA agents Sprankle, Joe Barett, Richard Keckler, Chris Bradley and other agents, [sic] PARKS was observed driving from the Stamford, Connecticut area to the Raleigh/Chapel Hill, North Carolina area on this date by the above officers and others. During the drive from Stamford, Connecticut on numerous occasions, PARKS was observed operating the vehicle in a very erratic manner. PARKS frequently would go through a toll booth, paying, and immediately pull over to the side, watching other vehicles come through. PARKS additionally was observed parking in rest areas and appearing to be watching other vehicles to see if they stopped along with him."

6. "On the following date of 6/1/78 PARKS was observed going to the residence of Rodney Eugene HENDRICKS, Route 2, Box 387A, Graham, North Carolina, [*sic*] PARKS was observed remaining in the Graham/Pittsboro, North Carolina area until 6/2/68 [sic] at which time he was observed by surveilling agents operating his above described vehicle; proceeding to the Boone/Todd, North Carolina area. Agents C. D. Holbrook, Chris Bradley as well as other agents monitored the signal from the container of Phenyl 2 Proponone and determined PARKS maintained possession of the container in the vehicle he operated at all times."

7. "On Tuesday, 6/6/78 surveilling agents and radio monitors observed PARKS return to Route 2, Box 387A, Graham, North Carolina. During the entire time, Agents observed PARKS to operate his vehicle in a very erratic manner. He made numerous u-turns and would frequently stop on the side of the road apparently watching for vehicles following him."

8. "On Wednesday, 6/7/78, PARKS was again observed at Route 2, Box 387A, Graham, North Carolina. However, during the early AM hours of Friday, 6/9/78 surveilling agents, I. L. Allcox and Robert H. Clark determined that PARKS' vehicle was no longer at the residence yet monitoring of the radio transmitter reflected the container had been removed from the vehicle and apparently placed in the residence or in adjacent out building on the property."

9. "On the evening of Friday, 6/10/78 Special Agents Clark and Allcox observed from a distance, through a side window of the house, an individual putting on a white smock, typical of that used by chemist [sic]. The Agents observed the individual putting on the smock on approximately five (5) different occasions as he walked from the front of the residence to the rear of the residence."

10. "On the evening of Saturday, 6/11/78, Special Agents Timothy L. Morgan and Robert H. Clark observed a vehicle (white panel GMC truck) known to be utilized by John NELSON, departing from the above residence. Additionally, surveilling Agent Larry Rawlings observed the operator of the above vehicle and it appeared to be John NELSON."

11. "On 6/2/78 Special Agent Richard B. Broughton advised DEA Forensic Chemist Ron Pyles and North Carolina State Bureau of Investigation Forensic Chemist Dr. Charles McDonald of the above lists of chemicals and equipment purchased by James G. PARKS and others doing business as SOUTHEASTERN TANK AND STEEL SERVICE. Both Chemists stated they knew of no way these chemicals and equipment could be used in cleaning or painting steel tanks. Both Chemists further stated that with the above chemicals the only product known to them which could be manufactured was the Schedule II Controlled Substance, Amphetamine."

12. "During the past seven (7) years, while employed as a Special Agent with the Drug Enforcement Administration, I have been directly involved in no less than ten clandestine laboratory investigations leading to the arrest and convictions of at least 40 defendants. It has been my experience through being involved in these investigations that the activities of James Guy PARKS and

others during the past three weeks is typical of persons being involved in clandestine laboratory operations."

I.

THE ELECTRONIC BEEPER AND DEFENDANT'S FOURTH AMENDMENT RIGHTS

[1] The threshold question in this case is whether the State, by monitoring an electronic homing device commonly called a "beeper" placed in a container of a substance lawfully owned but known to be a precursor chemical used in the illegal manufacture of methamphetamine, a controlled substance, conducted an unreasonable search which violated defendant's rights under the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution, when the canister and device were carried by a third party suspected of criminal activity, from Connecticut to North Carolina and finally into defendant's home. If, in fact, the monitoring of the beeper and its entry into defendant's home constituted an unlawful search, and if the subsequent warrant for the search of defendant's house were issued primarily on the basis of information obtained via the unlawful beeper, then the subsequent warrant may be invalid by application of the exclusionary rule, *Alderman v. United States*, 394 U.S. at 177, 89 S.Ct. at 968-69, 22 L.Ed. 2d at 189, or for want of sufficient probable cause to implicate defendant or his home.

The landmark case, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, *reh. denied*, 368 U.S. 871, 82 S.Ct. 23, 7 L.Ed. 2d 72 (1961), viewed the exclusionary rule as necessary to the existence of the Fourth Amendment guarantees against unreasonable searches and seizures. In *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963), it was held that the states still had the general power to determine what a reasonable search, seizure or arrest was, but the finding of reasonableness could be "respected only insofar as consistent with federal constitutional guarantees." 374 U.S. at 33, 83 S.Ct. at 1630, 10 L.Ed. 2d at 738. Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the re-

quirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. *State v. Vestal*, 278 NC. 561, 577, 180 S.E. 2d 755, 766 (1971), *appeal after remand*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114 (1973). *See also* N. C. Gen. Stat. Ch. 15A, Subch. II. Consequently, even though we are also construing North Carolina law, we will confine our discussion to the application of the federal cases dealing with electronic tracking devices.

A "beeper," a "beacon" or a "transponder" is a "small radio transmitter that broadcasts a signal; it does not record any sounds or transmit conversations. The signal that the beeper emits can be monitored by directional finders, thereby enabling officers to determine the beeper's location." Carr, Electronic Beepers, 4 Search & Seizure L. Rep., No. 4 (April, 1977). *See generally*, Note, Tracking Devices and the Fourth Amendment, 13 U.S.F. L. Rev. 203 (1978); Note, Tracking *Katz:* Beepers, Privacy and the Fourth Amendment, 86 Yale L.J. 1461 (1977); Note, Fourth Amendment Implications of Electronic Tracking Devices, 46 U. Cin. L. Rev. 243 (1977); Note, Does Installation of an Electronic Tracking Device Constitute a Search Subject to the Fourth Amendment? 22 Vill. L. Rev. 1067 (1977); Bumper Beepers, 13 Crim. L. Bull. 266 (1977); Note, Electronic Tracking Devices and Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses, 9 Loy. Chi. L.J. 227 (1977).

Beepers are without the scope of the federal wiretap statute, 18 U.S.C. §§ 2510-2520 (1979), because they do not "intercept" the contents of any wire or aural communication. 18 U.S.C. § 2510(4). Consequently, if the installation of a beeper were held not to be a "search," no significant restrictions on this area of government surveillance would exist. No warrants would be required. We view this contingency with great concern.

"A beeper . . . *is* as indiscriminate as its nature permits. Once placed on a vehicle, it permits agents to trace the private movements of any person who happens to ride in it, regardless of his relation to the primary investigation." *United States v. Bobisink*, 415 F. Supp. 1334, 1338 (1976) at fn. 6, *aff'd sub nom. United States v. Moore*, 562 F. 2d 106 (1st Cir. 1977). In addition, we are apprehensive of the technological ease by which beepers might be affixed to one's clothing or personal effects. We stress

that the presence of a beeper on one's person, in one's personal effects, in one's vehicle, or in one's home, is not a minimal intrusion. The presence of a beeper, in effect, transforms private property into an instrument of surveillance, a surrogate police presence, a use unintended by the original owner. Moreover, the continuing presence of the beeper is not a mere technical trespass, but an extended physical intrusion: they continually broadcast the message, "Here I am." In sum, these "uninvited shadowers" pierce one's privacy of location and movement, as well as one's rights to protection of property against physical invasion.

The Fourth Amendment, however, only addresses "searches" and "seizures." Whether a "search" is involved is determined, not by whether a physical trespass under local property law has been effected, but rather, whether the person invoking the protection of the Fourth Amendment can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by the State. *Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed. 2d 576, 583 (1967). We hold that a "search" occurred when: (1) Parks purchased a canister containing a lawful substance with an electronic beacon installed therein; (2) when the radio-tracking device was used in monitoring the movements of Parks as he drove from Connecticut to North Carolina; (3) when Parks carried the canister and the beacon into defendant's home; and (4) while the beeper, once located within the defendant's curtilage, was continuously monitored. We feel compelled to expound upon this aspect of our holding because the United States Supreme Court has never directly addressed the Fourth Amendment ramifications of electronic tracking devices, and because the decisions in the Federal Circuit Courts are conflicting.

A number of cases involving electronic beepers have sprung up in the last three years. All except one involved drug investigations. These cases, however, fall into several subcategories. The first class includes those cases which have held that there can be no legitimate expectation of privacy in contraband hence the placement of a beeper in contraband is not a "search": *United States v. Dubrofsky,* 581 F. 2d 208 (9th Cir. 1978); *United States v. Botero,* 589 F. 2d 430 (9th Cir. 1978), *cert. denied,* 99 S.Ct. 2162 (1979); *United States v. Pringle,* 576 F. 2d 1114, 1119 (5th Cir. 1978); *United States v. Emery,* 541 F. 2d 887, 890 (1st Cir. 1976);

United States v. Perez, 526 F. 2d 859, 863, *cert. denied*, 429 U.S. 846, 97 S.Ct. 129, 50 L.Ed. 2d 118 (1976), (television with electronic beeper was bartered for heroin by agents); *United States v. French*, 414 F. Supp. 800, 803-04 (W.D. Okla. 1976); *United States v. Carpenter*, 403 F. Supp. 361, 364-65 (D. Mass. 1975). We note that the container of phenyl 2 proponone in the instant case was not an unlawful substance and that these cases are therefore inapposite.

A second class of cases involved attachment of beepers to airplanes with the consent of the owner of the airplane. In several of these cases the court assumed or the prosecutor stipulated that a "search" occurred. Nonetheless, the courts generally held either that the attachment of the beepers came within the third-party consent exception to the warrant requirement or that the monitoring of an airplane's movements did not intrude upon any reasonable expectation of privacy: *United States v. Miroyan*, 577 F. 2d 489 (9th Cir. 1978), *application for stay denied*, 99 S.Ct. 18 (1978), *cert. denied*, 99 S.Ct. 258 (1979); *United States v. Curtis*, 562 F. 2d 1153 (9th Cir. 1977), *cert. denied*, 99 S.Ct. 279 (1979); *United States v. Pretzinger*, 542 F. 2d 517, 520 (9th Cir. 1976); *United States v. Cheshire*, 569 F. 2d 887 (5th Cir. 1978), *cert. denied*, 437 U.S. 907, 98 S.Ct. 3097, 57 L.Ed. 2d 1138 (1978); *United States v. Bruneau*, 594 F. 2d 1190 (8th Cir. 1979); *United States v. Abel*, 548 F. 2d 591 (5th Cir.), *cert. denied*, 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed. 2d 273 (1977); *United States v. Trussell*, 441 F. Supp. 1092, 1102-06 (M.D. Pa. 1977). Again, even if we were to agree with the holdings in these cases, each would be distinguishable on the facts involved.

A third class of beeper cases also did not address the question of whether a "search" occurred because they found sufficient probable cause and exigent circumstances to attach the beeper without first acquiring a court order: *United States v. Shovea*, 580 F. 2d 1382 (10th Cir. 1978), *cert. denied*, 99 S.Ct. 1216 (1979); *United States v. Frazier*, 538 F. 2d 1322 (8th Cir. 1976); *United States v. French*, *supra*. Similar exigent circumstances do not exist in the instant case.

The last class of cases actually dealt with the "search" question. Three of these cases found use of the beeper to be a search, and although the third of these cases was reversed on appeal, we

endorse the opinion of the lower court: *United States v. Holmes*, 521 F. 2d 859, 864-67 (5th Cir. 1975), *aff'd by an equally divided court sitting en banc*, 537 F. 2d 227 (1976); *United States v. Bobisink, supra; United States v. Martyniuk*, 395 F. Supp. 42 (D. Or. 1975), *rev'd in part sub nom. United States v. Hufford*, 539 F. 2d 32 (9th Cir.) *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L. Ed. 2d 614 (1976).

In contrast, the Ninth Circuit, in Hufford, *supra*, held that installation of a beeper in two drums of caffeine believed to be used in the illegal manufacture of amphetamines was not a Fourth Amendment search because the beepers were installed while the drums remained in the possession of the chemical company, and defendant, as he drove with the canister in his automobile on a public road, did not have a reasonable expectation of privacy. The Ninth Circuit also did not see any Fourth Amendment problems inherent in monitoring the beeper while the canister was located in defendant's garage. Similarly, in *United States v. Clayborne*, 584 F. 2d 346 (10th Cir. 1978), the court found that the monitoring of a container of ethyl ether believed to be used in the illegal manufacture of methamphetamine did not violate any reasonable expectation of privacy when the canister found its way into commercial premises, as opposed to a home. *See, also, United States v. Dubrofsky*, 581 F. 2d at 211. These courts reasoned that the beeper is but an aid to visual observation, that it presents only a minimal intrusion, and that its use is no different than use of binoculars, dogs, fluorescent powders, automobiles, burglar alarms, radar devices and bait money. We cannot agree.

In a free and democratic society in which the rights of privacy are cherished, it is reasonable for an individual to expect that he may purchase a lawful good without having that good contaminated with surreptitiously installed governmental surveillance devices. As the court stated in *United States v. Bobisink, supra*:

> "There is nothing in the nature of these beepers which limits their use to automobiles and large packages. Presumably, no technological problem prevents agents from placing such devices on, for example, a person's clothing. Thus, an individual could be traced on a moment to moment basis as he went about his daily activities. It offends common sense to

> suggest that such a continuous electronic surveillance would not violate any reasonable expectation of privacy. To allow such indiscriminate monitoring could conceivably be the prelude to sanctioning a '1984' net work of such beepers connected to a master monitoring station which would keep track of each of our movements for the benefit of the powers that be. Certainly the average, reasonable citizen, with his reasonable expectation of privacy, would take little solace in the fact that, while his every movement was recorded, his conversations were not."

415 F. Supp. at 1339.

[2] Moreover, even though we recognize that an individual's expectation of privacy with regard to movement in an automobile is lesser than that, for example, which he would have in his home, *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53 L.Ed. 2d 538, 549 (1977), we do not find that automobiles are devoid of Fourth Amendment protection. Indeed, in a very recent opinion, Mr. Justice White, for the United States Supreme Court, has stated:

> ". . . Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day travelling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in travelling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed . . . ."

Delaware v. Prouse, 99 S.Ct. 1391, 1401 (1979). Consequently, we agree with the Fifth Circuit in *United States v. Holmes*, *supra*, that the installation and monitoring of a beeper located in or on a motor vehicle constitutes a Fourth Amendment search. *Cf. United States v. Moore*, 562 F. 2d at 112-13 (probable cause necessary to justify use of beepers to track vehicles without a warrant).

[1] Finally, we follow the First Circuit in *United States v. Moore*, *supra*, in holding, in a fact situation similar to the instant

case, that the installation of a beeper in a container of lawful chemicals, constituted a search when the device entered defendant's home and was used to determine the continued presence of the chemical in defendant's residence. The court's reasoning is important:

> ". . . When defendants withdrew from the public view, taking the box of chemicals inside with them, they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government. Doubtless the limited data transmitted by a beeper was far less revealing than the conversation recorded in *Katz*; the level of intrusion was less severe. Still, as the chemicals containing the transmitter were not contraband or otherwise wrongfully in appellees' possession, the Government had no right to determine their continued presence in the house by use of warrantless electronic surveillance."

562 F. 2d at 113.

We note that this case is distinguishable from *Smith v. Maryland*, 99 S.Ct. 2577 (1979), in which the Supreme Court held that a phone company's installation and use, at police request, of electronic "pen register" to record telephone numbers dialed from a suspected robber's home phone, was not a "search" requiring a warrant under the Fourth Amendment. There the Court recognized that it is commonly expected that phone companies have and utilize facilities which record telephone numbers for purposes of checking billing operations and detecting fraud. There is no similar expectation in the instant case that people expect their automobiles, effects and homes will have electronic shadows secretly affixed by government agents.

Having found that a search occurred at each stage of the installation and monitoring of the beeper, we do not need to address the question of whether defendant had standing to challenge the search at each stage. Defendant, at the very least, has standing resulting from his possessory interest in his home. *Mancusi v. Deforte*, 392 U.S. 364, 369, 88 S.Ct. 2120, 2124, 20 L.Ed. 2d 1154, 1160 (1968).

[3] The remaining question, then, is whether the "search" was "unreasonable" in contravention of the Fourth Amendment. *Terry*

v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). Unless, when viewed with practicality and common sense, the facts disclose exigencies constituting an exception, a search is unreasonable if it is not preceded by a warrant issued by an independent magistrate. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Where electronic beepers are involved, such a warrant should be based upon facts sufficient to show probable cause and particularity, and these requirements will be met if the following facts are shown: (1) that a crime has been, is being or is about to be committed; (2) that tracking of the persons or property specified in the application is likely to reveal evidence of the crime, or the location of the criminals; (3) that the persons or property to be tracked are directly involved in the crime; (4) that alternative methods of investigations are likely to be burdensome or ineffective; (5) that existing exigent circumstances justify withholding notice of the search; and (6) that the persons or property to be traced are sufficiently identified. Similarly, the order issued by the magistrate should be no more intrusive than is necessary and should insure: (1) that the purpose of the search is narrowly defined; (2) that the identity of the object on which and the method by which the beeper is attached is articulated; (3) that the time period during which the search may be conducted is limited; (4) that the conditions requiring termination of the search in advance of the specified time limit are stated; (5) that a return report on search activities will be submitted; and (6) that subsequent notice to the parties searched will be provided. Tracking *Katz*: Beepers, Privacy and the Fourth Amendment, 86 Yale L.J. at 1507.

[1] In the case *sub judice*, a Federal Magistrate approved the initial warrant for the installation of the beeper and the validity of that warrant is not challenged other than by the general assertion that defendant's Fourth Amendment rights have been violated. Consequently, we do not now pass upon the validity of the initial warrant. The record does not disclose the scope of the initial warrant or the affidavits upon which such warrant was issued. We do not know, for example, if the initial warrant extended only to possession of the canister by Parks or Johnson. It is unlikely that the initial warrant went so far as to specifically authorize the entry of the beeper into defendant's home, but we can only assume that, as the purpose of the device was apparent-

ly to locate a clandestine laboratory, that the initial warrant allowed the drug enforcement officers to follow the beeper to its ultimate destination. We note that the primary protection of the Fourth Amendment was afforded by the intervention of a neutral and detached magistrate in deciding whether a search may properly occur, *Johnson v. United States, supra*, and that, without more information, we must find that the beeper search which consisted of the entry into and monitoring of the beeper within defendant's home, was reasonable.

II.

PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT

[4] Having found that the monitoring of the beeper in defendant's house was not unlawful, we now address the question of whether the information obtained from the beeper along with other statements in Officer Morgan's affidavit established sufficient probable cause to justify a warrant for the search of defendant's private residence. *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). We hold that the warrant for the search of defendant's home was properly issued.

A lesser standard of proof is required to determine probable cause to arrest or search than would be required to establish guilt at trial. The quantum and value of the information in the affidavit must only establish a probability that criminal activity has occurred or is about to occur on the described premises. *Brinegar v. United States*, 338 U.S. 160, 172-75, 69 S.Ct. 1302, 93 L.Ed. 1879, 1888-90 (1949). In addition, the source of the information must be reliable and such reliability will be enhanced if corroborated and supported by other facts and underlying circumstances. *Draper v. Illinois*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959).

In the case *sub judice*, the statements by John Nelson revealing the existence of a clandestine laboratory operation were made against his penal interest and were thereby inherently reliable. *United States v. Harris*, 403 U.S 573, 583, 91 S.Ct. 2075, 29 L.Ed. 2d 723, 734 (1971). Moreover, Nelson's statements were not stale because they were corroborated by the subsequent chain of activity by both Johnson and Parks.

The manner of purchase and the nature of the chemicals purchased are also highly probative. Southeastern Tank and Steel Service gave university and residential addresses, not a commercial address. Further, common sense would suggest that it is not a customary business practice for an individual to drive 800 miles and to pay three thousand dollars in cash, in order to purchase 70 kilograms of chemicals, as opposed to payment by check and shipment through the normal channels of commerce. These activities are not illegal, but when coupled with the statements of the S.B.I. chemists that the only use of phenyl 2 proponone known to them was for the manufacture of amphetamines, these activities make it likely that criminal activity is afoot. Similarly, the officers visually observed Parks' furtive movements in his automobile, and even though this questionable elusive behavior would by itself be insufficient to establish probable cause, *United States v. Long*, 439 F. 2d 628, 630 (D.C. Cir. 1971), it is consistent with and serves to revive Nelson's earlier statements that Parks was involved in a clandestine drug laboratory operation and that the laboratory was to obtain a new situs as soon as the principals procured more supplies.

None of these factors alone implicates defendant or his home. However, other data in the affidavit serve to link defendant's home to this activity: (1) the three visits to defendant's home by Parks; (2) the indication from the beeper that Parks went to defendant's home with the canister and beeper and thereafter left the canister within defendant's curtilage; (3) the visit by Nelson, the original informant and an admitted participant in an illegal methamphetamine laboratory, to defendant's house; and (4) the observance by the officers on several occasions of someone in defendant's house wearing a white smock resembling a chemist's garb. Together these statements are sufficient to raise a reasonable probability that activity related to a clandestine drug laboratory was being conducted in defendant's house. *See, United States v. Moore*, 562 F. 2d at 109-10.

We find no merit in defendant's contentions as to conclusory language in the affidavit because sufficient probative facts were alleged to establish probable cause, thereby rendering any conclusory language to be without prejudicial effect.

The decision of the trial court in denying the motion to suppress evidence is

Affirmed.

Judges ERWIN and WELLS concur.

ELIZABETH B. COOPER, ADMINISTRATRIX OF THE ESTATE OF GARY WAYNE COOPER, DECEASED v. H. B. OWSLEY & SON, INC., BARON BROWN RUSSELL, JR., POTAIN, INC., AND KING-HUNTER INC.

No. 7726SC986

(Filed 16 October 1979)

1. **Indemnity § 1— indemnity provision in equipment lease—validity—public policy**

A provision in a lease of a crane in which the lessee agreed to indemnify and hold the lessor harmless from all liabilities "for damages or losses of any kind whatsoever, whether to persons or property or for any other loss arising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatever cause arising" is not void as against public policy.

2. **Indemnity § 2.2— indemnity provision in equipment lease—negligence by indemnitee**

An agreement by the lessee of a crane to indemnify the lessor for liability incurred by the lessor for injuries sustained by third persons "arising from the use of, transportation of, or in any way connected with" the leased crane "from whatsoever cause arising" included liability arising from the negligence of the lessor or one of its employees for whose acts it was derivatively liable.

3. **Indemnity § 2.1— indemnity provision in equipment lease—negligence by lessor's employee—absence of lessee's employees from scene**

The lessee of a crane was not released from its obligation to indemnify the lessor for liability incurred by the lessor for the death of a person when a portion of the leased crane fell on him while being dismantled by the fact that a technician provided by the lessor for the dismantling process may have exceeded the limits of the functions he was supposed to perform in the dismantling process or by the fact that the lessor delegated its responsibility to dismantle the crane to another company and removed its own employees from the scene.

4. Indemnity § 2.1— indemnity provision—attorney fees and expenses of defending suit not covered

An agreement by the lessee of a crane to indemnify the lessor for liability incurred by the lessor for injuries to persons or property "arising from the use of, transportation of, or in any way connected with" the leased crane "from whatsoever cause arising" did not cover attorney fees and other expenses incurred by the lessor in the defense of an action to recover for the death of a person who was killed when a portion of the crane fell on him.

APPEAL by the defendants, King-Hunter, Inc., and cross-appeal by H. B. Owsley & Son, Inc., from *Griffin, Judge.* Judgment signed 7 July 1977 as of 5 June 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 31 August 1978.

This is a wrongful death action. Plaintiff's decedent, an employee of Carolina Crane and Rigging Corporation (Carolina), was killed on 23 June 1975 when the top portion of a large tower crane then being dismantled fell upon and crushed him. The crane was owned by the defendant H. B. Owsley & Son, Inc. (Owsley), and was leased by it to the defendant King-Hunter, Inc. (King-Hunter). The defendant Baron Brown Russell, Jr. (Russell) was an employee of Owsley. Plaintiff alleged that the death of her decedent was proximately caused by the joint and several negligence of the defendants.

Owsley, denying it was negligent, filed a cross-claim against King-Hunter for indemnity, alleging that in event plaintiff should be adjudged entitled to recover any amount from it, it was entitled to be indemnified by King-Hunter under the provisions of the equipment rental contract by which it had leased the crane to King-Hunter. A partial summary judgment was entered on the cross-claim. From this judgment both Owsley and King-Hunter have appealed, the trial court having determined pursuant to G.S. 1A-1 Rule 54(b) that there was no just reason for delay of appeal. This appeal, therefore, involves only the questions whether, under their equipment rental agreement, Owsley has the right to be indemnified by King-Hunter for losses Owsley may sustain by reason of plaintiff's wrongful death action and, if so, what the extent of such indemnification should be.

Admissions in the pleadings and materials filed in connection with Owsley's motion for summary judgment on its cross-claim

against King-Hunter for indemnity show that there is no genuine issue as to the following material facts:

On and prior to 23 June 1975 King-Hunter was the general contractor building a new United States Courthouse in Winston-Salem. For use on that project, King-Hunter leased from Owsley a large tower crane under a written equipment rental contract dated 15 May 1974. This agreement provided that the rental period should begin on the date of the bill of lading under which the crane was shipped to the Lessee and should end on the date of return of the crane to the Lessor's siding. The agreement also contained, among others, the following provisions:

> 6. *Operating personnel:* Lessee will furnish, at its own expense, all operating and maintenance personnel employed on leased equipment, and shall employ none who are incompetent to perform their duties in a careful and diligent manner.
>
> * * *
>
> 11. *Liability of Lessee:* It is expressly understood and agreed that, during the rental period, Lessor shall not be liable for damages or losses of any kind whatsoever, whether to persons or property or for any other loss arising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatsoever cause arising, and Lessee agrees to indemnify and hold Lessor harmless from all such liabilities. . . .
>
> * * *
>
> 16. *Responsibility of Lessee:* Freight charges, unloading, erection, rigging, and servicing of the equipment will be the responsibility of the Lessee, as well as dismantling and loading for shipping out at the completion of the contract.
>
> The agreement also provided:
>
> Technician furnished [by Owsley] free for five (5) days during erection and five (5) days during dismantling.

Pursuant to this equipment rental contract the tower crane was shipped to Winston-Salem. To fulfill its responsibility for erection and dismantling of the crane as imposed on it by paragraph 16 of the equipment rental contract, King-Hunter contract-

ed with Carolina Crane and Rigging Corporation for Carolina to furnish men and equipment to erect and dismantle the crane at the job site. This contract between King-Hunter and Carolina also contained the statement: "Erector from H. B. Owsley to be on job during erection and dismantling." In June 1975 King-Hunter completed its use of the tower crane in connection with its construction project and accordingly notified Carolina to dismantle and remove the crane from the job site. Owsley was also notified and requested to send its technician. For this purpose Owsley assigned its employee, Russell, to serve as technician during the dismantling process.

Russell reported to the job site on 18 June 1978 and on that date dismantling of the crane began. Initially, the dismantling was accomplished by the "de-telescoping" process in which sections of the tower mast are removed one-by-one, the crane itself being utilized to lower these to the ground. During this process the crane is supported by a cage, the top portion of which is attached to the bottom of the crane and the bottom portion of which is temporarily attached to the tower mast at a point below the section of the mast being removed. The cage is equipped with a hydraulic ram which permits the raising of the crane for removal of the intervening tower mast section and then lowering of the crane for temporary attachment to the next tower section until the cage itself can be lowered and then reattached to the tower mast, after which the whole process can be repeated. This de-telescoping process took place during the three days beginning Wednesday, 18 June 1975, and ending Friday, 20 June 1975. During this de-telescoping period the crane was operated by a King-Hunter employee. At the end of the day on Friday, the height of the hook of the crane from the ground had been reduced from approximately 170 feet to 40 feet, and the crane had been lowered as far as it could be by the de-telescoping process. The next step in the dismantling process was to have a mobile crane come to the site and remove the top portion of the tower crane.

On Monday morning, 23 June 1975, plaintiff's decedent, Gary Wayne Cooper, an employee of Carolina, came to the job site with a mobile crane to be used in removing the remaining portions of the tower crane. On that date no employee of King-Hunter was present, the only persons present being the employees of Carolina, and Russell, the technician furnished by Owsley. The

process of dismantling the tower crane continued, for this purpose the mobile crane being first utilized to remove the main boom and the counterweights from the counterboom. After this was done, the next step was to use the mobile crane to remove the counterboom itself from the tower crane. At this point the counterboom was "up against the building," and to bring it into position where it could be reached by the mobile crane it was necessary to swing it around by rotation of the turntable. For this purpose Russell entered the cabin of the tower crane and began to operate the controls to rotate the counterboom. As he did so, the tower crane began to tilt, the bolts temporarily attaching the top portion of the crane to the tower sheared, and the crane fell upon and killed Gary Wayne Cooper, who was operating the mobile crane below.

The court allowed Owsley's motion for summary judgment on its cross-claim for indemnity against King-Hunter to the extent of ordering that Owsley recover of King-Hunter indemnity in full for any amount the plaintiff is adjudged entitled to recover of Owsley in this action. From this order both Owsley and King-Hunter have appealed.

Womble, Carlyle, Sandridge & Rice by H. Grady Barnhill, Jr., and W. G. Champion Mitchell for King-Hunter, Inc.

Daniel W. Donahue and Ronald G. Baker for H. B. Owsley & Son, Inc.

PARKER, Judge.

APPEAL OF KING-HUNTER, INC.

[1] King-Hunter first contends that the summary judgment in favor of Owsley on its cross-claim for indemnity against King-Hunter was in error because the indemnity agreement embodied in paragraph 11 of the equipment rental contract between Owsley and King-Hunter is void as against public policy. In support of this contention, King-Hunter points out that plaintiff alleged in her amended complaint that Owlsey's negligence was one of the proximate causes of her decedent's death. Specifically, she alleged both that Owsley was independently negligent in furnishing an unqualified technician, Russell, who was not adequately trained to dismantle the crane in a safe manner, and that Owsley was

derivatively liable for Russell's negligence in dismantling the crane in an unsafe manner in that, in the dismantling process which was followed, one of the crane's connecting parts was left too weak to support the top of the crane and in that Russell negligently rotated the crane while it was in this weakened condition. King-Hunter contends that it is against public policy to permit Owsley to be indemnified against its own negligence or against that of its employee for which it is responsible. We perceive, however, no sound reason why this must be so. In this connection we find the following statement from the opinion of our Supreme Court in *Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393 (1965) particularly applicable:

> There is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract in the instant case is of the latter class and is more favored in law.

265 N.C. at 467, 144 S.E. 2d at 400.

Paragraph 11 of the equipment rental contract did not exempt Owsley from liability to third persons resulting from its negligence or that of its employees, nor did the summary judgment here appealed from have that effect. On the contrary, Owsley remains a party defendant in this action and may ultimately be found liable to plaintiff should plaintiff prevail against it at the trial. By paragraph 11 King-Hunter, as Lessee, did agree, as part of the consideration for the lease of the crane to it by Owsley, to indemnify and hold Owsley harmless from all liabilities "for damages or losses of any kind whatsoever, whether to persons or property or for any other loss arising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatsoever cause arising." We see no reason of public policy why King-Hunter should be excused from honoring this agreement. Agreements achieving much the same result made by insurance companies writing policies of liability insurance have long been enforced by the courts. Enforcement of an indemnity agreement such as is now before us would have no greater tendency to promote carelessness on the part of the indemnitee than would enforcement against the insurer of a

policy of liability insurance. "And, although there is some earlier authority to the contrary, it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract." 41 Am. Jur. 2d, Indemnity, § 9, pp. 693-94. This is particularly true where, as here, the parties presumably dealt at arms length and without the exercise of superior bargaining power. *See* Annot., 68 A.L.R. 3rd 7 (1976) § 3, pp. 29-34. We hold that the indemnity agreement in paragraph 11 of the equipment rental agreement between Owsley and King-Hunter is not void as against public policy.

[2] King-Hunter next contends that, even if not void as against public policy, the indemnity agreement in paragraph 11 was not intended by the parties to be operative under the circumstances of this case. In support of this contention King-Hunter asserts in its brief that "[t]he clear intent of the indemnity provision is to protect Owsley from liability arising from its ownership of the crane, not from negligent acts of its agents or of itself." We do not agree with this assertion. Initially, we note that the language employed by the parties in paragraph 11 of their agreement does not lend itself to so narrow a construction. As already noted, by paragraph 11 King-Hunter agreed to indemnify and hold Owsley harmless from all liabilities "for damages or losses of any kind whatsoever, whether to persons or property or for any other loss *arising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatsoever cause arising.*" (Emphasis added.) This language is hardly compatible with the construction for which King-Hunter contends. More importantly, to construe the language of paragraph 11 as King-Hunter contends renders it largely purposeless and deprives it of nearly all meaning. The occasions on which Owsley could be found liable for some claim arising from its ownership of the crane when neither it nor one of its employees was at fault would be rare indeed. What was said in *Beachboard v. Railway Co.*, 16 N.C. App. 671, 193 S.E. 2d 577 (1972) is applicable here:

> By inserting the provision in their contract the parties obviously contemplated that there might be claims for indemnity, and they must have been cognizant of the fact that in the ordinary case the occasion for [the indemnitee] seeking in-

demnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it.

Beachboard v. Railway Co., supra, at 679, 193 S.E. 2d at 583; *accord, Gibbs v. Light Co., supra; Hargrove v. Plumbing and Heating Service,* 31 N.C. App. 1, 228 S.E. 2d 461 (1976). We hold that the language of paragraph 11 does require King-Hunter to indemnify Owsley for liability incurred by Owsley for injuries sustained by third persons "arising from the use of, transportation of, or in any way connected with" the leased crane, "from whatsoever cause arising," including the negligence of Owsley or of one of its employees for whose acts it is derivatively liable.

[3] Finally, King-Hunter contends that even if the indemnity agreement contained in paragraph 11 can properly be construed to protect Owsley against the consequences of its own or its employee's negligence in general, it should not be applicable under the peculiar circumstances of this case. In this connection, King-Hunter asserts that Russell, Owsley's technician, was supposed only to give technical advice during the dismantling of the crane and was not to actively operate it, and that King-Hunter was given no notice that the technician claimed the right or would undertake personally to operate the crane. King-Hunter contends that it was not contemplated by the parties that the indemnity provision should be applicable to make King-Hunter liable for the consequences of the completely unforeeseable intervention of a technician whose qualifications it did not know. This contention ignores the facts that paragraph 16 of the equipment rental contract expressly provides that dismantling the crane is the responsibility of King-Hunter, that King-Hunter chose to delegate this responsibility to Carolina Crane and Rigging Corporation, and that, although no King-Hunter employee was present when the fatal accident occurred, the foreman and employees of Carolina were then present and were actively participating with Russell in the dismantling process. Therefore, even if Russell exceeded the limits of the functions he was supposed to perform as the technician furnished by Owsley, a matter which is far from clear and which we do not decide, we perceive no legitimate reason on that score for releasing King-Hunter from its obligation to indemnify Owsley as provided in paragraph 11 of the contract. Delegating its responsibility under paragraph 16 and

removing its own employees from the scene would not have that effect. Nor, as we have already noted, would negligence on the part of Russell, if any should be proved, render the indemnity agreement inoperable in this case.

On King-Hunter's appeal we find no error in the summary judgment entered in favor of Owsley.

CROSS APPEAL OF H. B. OWSLEY & SON, INC.

[4] In the judgment appealed from the court directed that Owsley shall have and recover of King-Hunter "indemnity in full for any amount the plaintiff Elizabeth B. Cooper, Administratrix of the Estate of Gary Wayne Cooper, Deceased, is adjudged entitled to recover of the defendant H. B. Owsley & Son, Inc., in this action." In its cross appeal, Owsley contends that the court erred in failing to go further and order that Owsley is entitled to be indemnified by King-Hunter for attorney fees and other expenses incurred by Owsley in connection with the defense of this action. We do not agree. Although broadly written, the indemnity agreement in paragraph 11 does not, in our opinion, extend so far as to cover attorney fees and other expenses incurred by Owsley in the defense of this action.

The judgment appealed from is

Affirmed.

Judges CLARK and ERWIN concur.

LIZZIE SMITH, ADMINISTRATRIX OF THE ESTATE OF SHIRLEY HUDSON, PLAINTIFF v. INDEPENDENT LIFE INSURANCE COMPANY AND JOHN RAY, THE ADMINISTRATOR OF THE ESTATE OF WILLIAM EARL WILLIAM AKA WILLIAM EARL HUDSON, DEFENDANTS

No. 7826SC1100

(Filed 16 October 1979)

1. Appeal and Error § 2; Rules of Civil Procedure § 12— appeal from each part of order required—defense merged with summary judgment motion

An appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order

for the appellate court to be vested with jurisdiction to determine such matters; however, because defendants' G.S. 1A-1, Rule 12(b)(6) defense was converted and merged automatically into their Rule 56 motion, plaintiff's failure to mention specifically in her notice of appeal that portion of the trial court's order sustaining defendants' defense under Rule 12(b)(6) did not deprive the Court of Appeals of jurisdiction to hear plaintiff's appeal.

2. Appeal and Error § 14— notice of appeal—sufficiency

A notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised.

3. Insurance § 35; Evidence § 28.1— life insurance—automobile collision—insured driver and insured passenger killed—driver not disqualified from collecting proceeds

The evidence on motion for summary judgment did not present a genuine issue of fact as to whether an automobile driver was barred from receiving the proceeds of policies insuring the life of a passenger on the ground that the passenger's death was caused by the driver's culpable negligence where the materials presented by defendants tended to show that the driver did not intentionally cause the collision in which the insured passenger was killed but simply lost control of his car, and the unsworn report of the investigating officer which plaintiff offered to show culpable negligence was hearsay and could not be considered on motion for summary judgment.

APPEAL by plaintiff from *Hasty, Judge*. Order entered 6 July 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 August 1979.

The plaintiff Lizzie Smith (Smith), Administratrix of the Estate of Shirley Hudson (Hudson) instituted this action against the defendants Independent Life Insurance Company (Independent) and John Ray (Ray), Administrator of the Estate of William Earl William, aka William Earl Hudson (William) for the proceeds of life insurance policies. In her verified complaint plaintiff alleged, *inter alia*, that Hudson was the beneficiary of three policies of life insurance on the life of William, each policy providing a $1,000 death benefit with a double indemnity clause in case of death by accidental means; that William was the beneficiary of three life insurance policies on the life of Hudson with the same death benefit and double indemnity provision; that on 27 September 1975 Hudson was riding in an automobile owned and operated by William and both were killed when their car crossed the center line of the road and struck another vehicle; that In-

dependent paid the estate of William the sum of $6,000 on the policies naming William the beneficiary of Hudson's policies, and $6,000 on the policies naming Hudson the beneficiary of William's policies; that since William caused the death of Hudson and Hudson predeceased William the proceeds of all the policies should have been paid to Hudson's estate; and that Independent dealt with plaintiff in bad faith and was thereby liable to the plaintiff for punitive damages. Plaintiff demanded $12,000 on the insurance policies and $12,000 punitive damages.

Defendant Independent answered admitting the existence and terms of the insurance policies; that an accident occurred in a car owned and driven by William in which Hudson was a passenger; and that both Hudson and William were killed in this accident. Independent denied William caused the accident, but admitted it had paid the proceeds of all the policies to the estate of William. Independent further defended that it had properly made payment to the administrator of William's estate; that William was not a "slayer" within the provisions of Article 3 of Chapter 31A of the North Carolina General Statutes and even if William should be determined to be a "slayer" under G.S. 31A-11 its payment to William's estate should not subject it to additional liability since payment was made according to the policy and without notice of the circumstances tending to bring payment within the provisions of Chapter 31A. Additionally, Independent defended on grounds plaintiff's complaint failed to state a claim upon which relief could be granted under G.S. 1A-1, Rule 12(b)(6). Independent cross-claimed against the defendant estate of Hudson for the insurance proceeds it had paid that estate on grounds of unjust enrichment and the estate of William admitted receiving $12,000 in insurance proceeds, but denied it was liable to Independent for any amount Independent might be found liable to Hudson's estate. The defendant estate of William answered plaintiff's complaint, additionally defending on grounds that it failed to state a claim upon which relief could be granted.

Pursuant to G.S. 1A-1, Rule 56 both defendants moved for summary judgment and supported the motion with affidavits of the driver of the vehicle which collided with the car in which Hudson and William were driving and the affidavit of an officer in the claims department of Independent. Plaintiff submitted her own affidavit in opposition to the motion. Based on the pleadings,

affidavits and discovery, the trial court, by order of 6 July 1978, granted the motions of both defendants for summary judgment and sustained the defense of both defendants that plaintiff's complaint failed to state a claim upon which relief could be granted. On 7 July 1978 plaintiff gave notice of appeal to this Court from Judge Hasty's order of the previous day, although the notice mentioned only "Defendants' Motions for Summary Judgment," without reference to the trial court's action sustaining the defense of both defendants that the complaint failed to state a claim upon which relief could be granted.

William D. McNaull, Jr., Patricia E. King, and Reginald L. Yates, for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by Joseph B. C. Kluttz and William C. Livingston, for defendant appellee The Independent Life and Accident Insurance Company.

Myers, Ray and Myers, by Charles T. Myers, for defendant appellee John Ray.

WELLS, Judge.

We deal first with the defendants' contention that the failure of plaintiff to specifically mention in her notice of appeal that specific portion of Judge Hasty's order of 6 July 1978 sustaining defendants' defense under G.S. 1A-1, Rule 12(b)(6), deprives this Court of jurisdiction to hear plaintiff's appeal from this part of the order. Plaintiff's appeal would be meaningless if we were to agree with defendants' arguments since the trial court's granting of defendants' Rule 12(b)(6) motion would be sufficient in itself to terminate plaintiff's action.

[1] We acknowledge that the appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. N.C. Rules of Appellate Procedure, Rule 3(d). However, in the instant case, defendants' Rule 12(b)(6) defense was converted and merged automatically into their Rule 56 motion. The last sentence of Rule 12(b) states:

> If, on a motion asserting the defense, numbered (6), to dismiss for failure of a pleading to state a claim upon which

> relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

This last sentence is identical to the last sentence of Rule 12(b) of the Federal Rules of Civil Procedure. The courts of both this State as well as those in the Federal system have determined that Rule 12(b)(6) motions are automatically converted into Rule 56 motions if matters outside the pleadings are presented to and not excluded by the trial court. *Carter v. Stanton*, 405 U.S. 669, 31 L.Ed. 2d 569, 92 S.Ct. 1232 (1972); *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E. 2d 46 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E. 2d 360 (1978); *In re Will of Edgerton*, 26 N.C. App. 471, 216 S.E. 2d 476 (1975); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1366, p. 679 (1969); Shuford, N.C. Civil Practice and Procedure § 12-10, pp. 108-109 (1975). The fact that the trial court labeled the defense in the order as one for failure to state a claim does not prevent us from regarding it as one for summary judgment. *Dorado v. Kerr*, 454 F. 2d 892 (9th Cir. 1972), *cert. denied*, 409 U.S. 934, 34 L.Ed. 2d 188, 93 S.Ct. 244 (1972).

Since in the present case the order of the trial court clearly stated it had considered affidavits and discovery in addition to the pleadings, we treat the defendants' Rule 12(b)(6) defense which that court sustained as having been converted and merged into defendants' motion for summary judgment. Plaintiff gave sufficient notice of appeal to vest the Court of Appeals with jurisdiction to consider the summary judgment issue.

Moreover, even if there had not been a merger of defendants' Rule 12(b)(6) and 56 defense and motions, plaintiff's notice of appeal gave defendants sufficient notice to confer this Court with jurisdiction over the entire cause. Rule 3(d) of the N.C. Rules of Appellate Procedure requires merely that the notice of appeal, "designate the judgment or order from which appeal is taken. . . ." The Drafting Committee's commentary to subdivision (d) makes specific reference to Rule 3(c) of the Federal Rules of Appellate Procedure and states:

> Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal. See, e.g., *Higginson v. U.S.*, 384 F. 2d 504 (6th Cir. 1967) (wrong order designated; deemed corrected by correct identification in brief); *Graves v. General Insurance Corp.*, 381 F. 2d 517 (10th Cir. 1967) (designation of wrong court harmless under circumstances).

The Federal Rule 3(c) requires designation in the notice of appeal of "the judgment, order or part thereof appealed from. . . ."

[2] It is apparent that a notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised:

> [T]he [Federal] courts of appeals have in the main consistently given a liberal interpretation to the requirement of Rule 3(c) that the notice of appeal designate the judgment or part thereof appealed from. The rule is now well settled that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. Decisions to the contrary can no longer be regarded as authoritative.

9 Moore's Federal Practice ¶ 203.18, pp. 754-755 (2d ed. 1975). *See also, Forman v. Davis*, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962). In the case at bar plaintiff specified the particular order appealed, and this order granted both of the defendants' motions. Plaintiff's obvious intent could not have been to challenge only part of this order where the portion not challenged was sufficient to dismiss her entire claim. Defendants do not and cannot allege plaintiff's notice of appeal did not put them on notice plaintiff was appealing the entire order entered by Judge Hasty on 6 July 1978.

[3] Having determined that defendants' Rule 12(b)(6) defense was converted and merged into their Rule 56 motion for summary judgment, we proceed to examine whether summary judgment was properly granted by the trial court. In support of defendants'

motion the defendants submitted the deposition of Phillip M. Hughes, the driver of the car with which the William vehicle collided. The affidavit stated in pertinent part:

> When I first observed the approaching automobile, it was near the center line. The driver appeared to steer the approaching automobile back towards its right, and then the rear end of the approaching automobile began to "fishtail" at a time when we were only some 150 feet apart. The approaching car then went to its left, and in front of me.
>
> The driver of the approaching car appeared to be fighting the steering wheel, attempting to get his car under control.
>
> I drove as far to the right as I could, and the front of my car collided with the right hand side of the approaching vehicle.
>
> I did not observe anything which would indicate that there was any intention on the part of the driver of the approaching automobile to cause a collision. On the other hand, it appeared that for some reason he simply lost control of it and the car crossed the center line and got into my lane of travel.
>
> I would estimate the speed of the approaching car when I first observed it as being 55 or 60 mph.

The observations of witness Hughes that he observed nothing which would indicate William intentionally caused the collision and that William simply lost control of his vehicle present a prima facie case that William was guilty of simple negligence only, and was not guilty of the culpable negligence required to bar him and his estate from receiving the controverted insurance proceeds. Since Hughes had no apparent interest in minimizing the negligence of William and plaintiff fails to raise Rule 56(f) as a defense, summary judgment would be proper if plaintiff failed to come forth with papers showing a material issue of fact existed. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Having presented such a prima facie case, it then became incumbent on the plaintiff to show, by a forecast of evidence, that a material issue of fact remained. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Plaintiff in her brief abandons any contention William was a "slayer" pursuant to G.S. 31A-3(3). Plaintiff only alleges that William was culpably negligent under our common law. Our Supreme Court has held that Chapter 31A did not wholly supplant the common law in barring a beneficiary from receiving the proceeds of insurance contracts where the beneficiary was culpably negligent in bringing about the death of the insured. *Quick v. Insurance Co.*, 287 N.C. 47, 213 S.E. 2d 563 (1975). The Court in *Quick* defined "culpable negligence" as conduct incompatible with a proper regard for human life. *Id.*, 287 N.C. at 59, 213 S.E. 2d at 570-571. *See also*, Note, "Decedants' Estates—Forfeitures of Property Rights by Slayers," 12 Wake Forest L. Rev. 448 (1976).

In support of her position that plaintiff presented a sufficient forecast of evidence of William's culpable negligence, plaintiff points to portions of the affidavits of Hughes and V. Roger duPont, both of which were submitted by the defendants. We note in general that a material issue of fact need not be found in the papers of the party opposing a motion for summary judgment, but may be shown in the papers of the movant himself. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). Attached to duPont's affidavit is the accident report of the investigating police officer stating that William had been intoxicated to the point where his driving ability was impaired; that the vehicle was traveling sixty miles per hour in a fifty-five zone; and that the William vehicle left 210 feet of skid marks and traveled fifty feet after the collision. However, the unsworn accident report of an investigating officer is hearsay, and as such could not be considered by the trial court on motion for summary judgment. G.S. 1A-1, Rule 56(e); *Peace v. Broadcasting Corp.*, 22 N.C. App. 631, 207 S.E. 2d 288 (1974); *Lineberger v. Insurance Co.*, 12 N.C. App. 135, 182 S.E. 2d 643 (1971).

Plaintiff also refers to those portions of the Hughes affidavit stating that the William vehicle fishtailed as the vehicles approached 150 feet of one another; that the William vehicle then veered to its right and then across the center line in front of the Hughes vehicle; that William appeared to be fighting the steering wheel to bring the vehicle under control; that despite Hughes' efforts to avoid the collision by pulling as far to the right of the road as he could the collision nonetheless occurred; that it ap-

peared as if William had lost complete control over his vehicle; and that the speed of the approaching William vehicle was between fifty-five and sixty miles per hour.

A survey of the North Carolina case law regarding the elements of culpable negligence reveals no case finding culpable negligence in the absence of either wilful or wanton conduct. *See e.g., Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967). We do not read *Quick v. Insurance Co.*, 287 N.C. 47, 213 S.E. 2d 563 (1975), cited by both plaintiff and defendants, as stating anything to the contrary. In *Quick* our Supreme Court held that an insurance contract beneficiary convicted of involuntary manslaughter could be disqualified from receiving the proceeds of the decedant's policy. While involuntary manslaughter may result from unintentional conduct, the decedant's death ordinarily results from wanton or reckless conduct. In determining that the offense of involuntary manslaughter was not a "slaying" under G.S. 31A-3(3)a, Justice Copeland, writing for the Court, commented, 287 N.C. at 53, 213 S.E. 2d at 563:

> In many cases, the crime arises when the evidence tends to show that the actor's unlawful killing of the victim was caused by his unjustified and wanton or reckless use of a weapon in such a manner as to jeopardize the decedant's safety.

The Supreme Court held in *Quick* that, under the circumstances surrounding the killing in that case, the trial court was justified in disqualifying the insurance contract beneficiary. None of the cases plaintiff brings to our attention has held that culpable negligence requires less than wanton or wilful conduct.

We do not see where the portions of Hughes' affidavit highlighted by plaintiff present a forecast of evidence tending to show conduct of William incompatible with a proper regard for human life. Even if William had exceeded the speed limit by five miles, fishtailed his vehicle just prior to the collision, fought the steering wheel to gain control of his vehicle but nonetheless lost such control, it cannot logically be inferred from these actions, individually or collectively, that William was guilty of culpable negligence.

Affirmed.

Judges CLARK and ERWIN concur.

HOYLE D. RYDER v. PERRY BENFIELD T/A GREEN PARK CABINET CENTER; EDDIE HUFFMAN T/A CAROLINA LANDSCAPING AND PAVING COMPANY; AND HOWARD LAFFON

No. 7925SC43

(Filed 16 October 1979)

1. **Negligence § 57.10— fall of wall on workman—sufficiency of evidence of negligence—no contributory negligence as matter of law**

In an action to recover for personal injuries sustained by plaintiff when a cinder block wall in defendant's basement collapsed on him, evidence presented a question for the jury to decide whether defendant's failure to brace the wall and warn plaintiff of the danger constituted actionable negligence and whether such negligence was a proximate cause of plaintiff's injuries and such evidence did not disclose contributory negligence as a matter of law where it tended to show that defendant was informed on at least two occasions by at least two different individuals that a retaining wall behind which fill dirt was to be poured should be braced; it could be inferred that defendant was aware that failure to brace such a wall would create a dangerous or unsafe condition; that defendant knew the wall had not been braced could reasonably be inferred since he owned the premises, planned the renovations to the basement and hired all the work done; and there was no indication that plaintiff was warned of the absence of bracing in the wall.

2. **Evidence § 49.1— hypothetical question—essential facts contained in question**

In an action to recover for personal injuries sustained by plaintiff when a cinder block wall in defendant's basement collapsed on him, the trial court did not err in allowing plaintiff's expert witness to answer a hypothetical question regarding his opinion as to what caused the wall to fall, since the question contained every essential fact brought out at trial and plainly enabled the witness to form a reliable and intelligent opinion as to whether the retaining wall was or was not properly constructed.

3. **Torts § 7.1— settlement with one tort feasor—judgment against other tort feasor reduced**

Where plaintiff settled with one tort feasor for $2000 before trial, defendant was entitled to have the judgment reduced by the amount of that settlement.

Ryder v. Benfield

APPEAL by defendant from *Graham, Judge.* Judgment entered 30 September 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 20 September 1979.

In this civil action plaintiff sued defendant Perry Benfield, trading as Green Park Cabinet Center; defendant Eddie Huffman, owner and operator of Carolina Landscaping and Paving Co.; and defendant Howard Laffon, a brick mason, to recover damages for injuries he received when a cinder block wall in the basement of Benfield's shop collapsed and fell on him. Plaintiff charged that his injuries proximately resulted from the negligence of Benfield "in the manner in which [he] . . . erected or caused to be erected the cinder block wall and in negligently maintaining and supervising said wall to see if said wall was securely in place and in permitting the same to break loose and fall." Additionally, plaintiff claimed that the defendant Laffon was negligent in erecting the wall without bracing it; that the defendant Huffman was negligent in backfilling behind the wall with sand when he "knew or in the exercise of reasonable care should have known that the wall constructed by Howard Laffon was improperly constructed and erected and would not support the weight of the sand placed therein"; and that the "independent, separate and concurring negligent conduct" of these defendants was the direct and proximate result of his injuries.

In their respective answers, defendants denied the essential allegations of plaintiff's complaint and pleaded contributory negligence on his part in bar of his claim. Each crossclaimed against the other for contribution and indemnification.

Before the case was called for trial, plaintiff took a voluntary dismissal as to the defendant Huffman, for which this defendant paid plaintiff $2,000.00. The cause then came on for trial on 20 September 1978, and plaintiff introduced evidence tending to establish the following:

Plaintiff is the sole owner of a concrete finishing company, a business in which he has been engaged for approximately thirteen years. His son, Anthony, has been working with the company since April 1971, and their work involves "grading driveways, basements and patios and pouring and finishing concrete."

About three weeks prior to the accident, plaintiff entered into a contract with the defendant Benfield to pour a concrete slab over the entire basement area of Benfield's cabinet shop. Plaintiff and his son performed the job, getting the dirt floor ready one day and pouring the slab the next, and then further negotiated with Benfield to come back and pour a concrete cap or shelf on top of a cinder block retaining wall which the defendant intended to have erected in the basement. The testimony of both plaintiff and his son was to the effect that plaintiff told Benfield the wall would need to be braced "and he said that he would have it braced."

On 18 September 1975 plaintiff, along with his son and two other workers, returned to the cabinet shop to pour the shelf. Upon arriving, they found that the wall had been built, but that employees of the defendant Huffman were still in the process of backfilling. The wall itself, according to plaintiff and his son, was approximately six to seven feet in height, "about three to four feet away from the dirt bank or old wall", and about four feet from the ceiling. Plaintiff's son testified that the wall had been backfilled all the way around to within a foot or a foot and a half of its top. A tractor operator from the defendant Huffman's company was "hauling sand into the basement and dumping it over behind the wall. . . . [He] lacked a little of having the wall backfilled." Plaintiff told his son "to go ahead and help the tractor operator finish so that we could get our job done", so his son stood up on the sand behind the wall and helped to level it out. Within one to two hours of plaintiff's arrival, the backfilling was finished, and plaintiff proceeded with his job. First,

> we had to put a four inch board around the top of the block wall for forming the concrete and to keep it from running over the wall. We used a regular forming board, four inches wide and three-quarters of an inch thick. We attached the boards to the block wall with [two-and-a-half-inch long] concrete nails which were driven into the joints [with a normal-sized hammer]. The boards were located at the top of the wall and extended about two inches above the wall. Their purpose was to hold the concrete and to keep it from coming out over the edge of the blocks. It took us about forty-five minutes to put up the forming boards.

At the suggestion of the defendant Benfield, plaintiff enlisted the aid of the tractor operator to haul the wet concrete in the tractor's front-end loader bucket. While plaintiff "was watching out for the tractor operator to see that he didn't hit the wall", since the operator "didn't have much room to operate in", plaintiff's son and another worker (Steve Causby) were on top of the wall, raking the concrete out of the bucket. On cross-examination, his son described the procedure as follows:

> Steve Causby had one foot on the wall and one foot on the sand and was raking concrete. I was doing the same. I would rake the concrete and then step to one side to let Steve float it down. When I stepped to one side, I stepped onto the wall. Then I would step back from the wall to let Steve pass in front of me. He walked on the dirt and sand to do that. He could possibly have had his feet placed on the wall at the same time mine were. It is possible that both of us could have been standing on the wall at the same time.

The thickness of the shelf they were pouring varied from two to four inches. According to Anthony Ryder, "[t]he concrete that we were pouring was pretty heavy . . . wet enough to run down but not wet enough to run over the wall, but it was not too dry so that it put pressure on the wall." He and Causby were about halfway through the job when the wall caved in, pinning his father underneath. Ryder initially denied that the part of the wall on which he was standing fell first; but, after being reminded of his earlier deposition testimony, he indicated that the wall " 'started falling where we were at. It went back to the corner and then the other side came down.' "

As noted above, plaintiff testified that he had mentioned to the defendant Benfield some three weeks before he undertook to pour the concrete shelf that the wall would need to be braced. He did not, however, at any time ask Benfield whether the wall actually had been braced, nor did he check the wall to determine for himself if it contained bracing. Instead, plaintiff stated that he "assumed" the wall had been braced.

> I did not make [the bracing] a precondition of coming out there to pour the cap on the wall. I did not tell him that I would not work on the wall unless it was braced. My telling

Mr. Benfield that the wall needed to be braced was only a suggestion.

On the other hand, plaintiff also said that he would not have attempted to pour the shelf had he known in advance that the wall had not been braced.

Both plaintiff and his son testified concerning various methods used to brace retaining walls. Of the four ways with which they were generally familiar, three of the methods would have been visible from the outside of the wall. Plaintiff testified that he knew the three obvious methods had not been used. Plaintiff's son testified that, when he inspected the wall prior to pouring the cap, he "could see that there were no braces on the front of the wall, but I do not know about bracing behind it . . . because of the backfilling." He stated further that, of the four methods of bracing that could have been employed, he knew when he checked the wall that neither of two methods had been used. Moreover, a third method could not have been used since the braces, of necessity, would have been put in before his father poured the concrete floor. On cross-examination, Ryder admitted that the wall itself seemed to be in good condition and that he did not notice any obvious defects. He also conceded that he could have checked to see if there was bracing in the wall that would not have been obvious, but he did not do so.

Plaintiff also offered the testimony of the defendant Laffon, called as an adverse witness, who testified in substance that he had been hired by the defendant Benfield to build the retaining wall; that he had told Benfield "to brace the wall from the outside if he was going to backfill"; that Benfield knew he, Laffon, was not bracing the wall, but didn't say anything about it; that he had been laying bricks for ten years and had never braced a wall because "[s]omebody other than the brick mason does it"; that he built the wall in accordance with Benfield's instructions; and that the wall was not of a uniform height all the way around and reached only five and a half to six feet at its highest point.

Plaintiff next called Howard Rowe, who was qualified as an "expert in the field of masonry construction and as a brick and block mason." Rowe was permitted to testify, over objection, as to his opinion that retaining walls should be braced; that the cinder block wall in the defendant's basement was not properly

constructed because it was not braced; and that the wall fell due to "pressure from that backfilling of sand, the weight of the sand, the weight of the concrete, wet concrete, and possibly that tractor moving in and out of there could have vibrated the floor so that could set it off." Rowe added, on cross-examination, that "any subcontractor should make sure for his own safety . . . [by] checking to see whether the wall is braced or not. . . ."

Following the plaintiff's medical testimony, with which he concluded his case, the court allowed the defendant Laffon's motion for a directed verdict. The following issues were submitted to and answered by the jury as indicated:

1. Was the plaintiff, Hoyle Ryder, injured by the negligence of the defendant, Perry Benfield?

Answer: Yes.

2. Did the plaintiff, Hoyle Ryder, by his own negligence, contribute to his injury?

Answer: No.

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

Answer: $18,000.00.

From judgment entered on the verdict, defendant appealed.

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

Helms, Mulliss & Johnston, by Robert B. Cordle and N. K. Dickerson III, for defendant appellant.

HEDRICK, Judge.

First, defendant assigns error to the denial of his timely motions for a directed verdict and for judgment notwithstanding the verdict. Defendant argues that the evidence fails to disclose any breach of duty on his part. To the contrary, he asserts, the evidence shows contributory negligence as a matter of law "because [plaintiff] was or should have been aware of the condition which he alleged resulted in his injury."

In ruling on defendant's motions for a directed verdict and for judgment notwithstanding the verdict, the test is whether the evidence was sufficient to entitle plaintiff to have the jury consider it. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). To determine this question, "all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor." *Maness v. Fowler-Jones Construction Co.*, 10 N.C. App. 592, 595, 179 S.E. 2d 816, 818, *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610 (1971). The issues thus framed for our resolution in this case are: Did plaintiff offer any evidence which, when considered in accordance with the above test, tends to prove that his injuries were proximately caused by the negligence of the defendant Benfield, and does the evidence establish as a matter of law that the plaintiff failed to exercise the requisite degree of ordinary care for his own safety? We are of the opinion that the evidence was such as to permit different inferences reasonably to be drawn therefrom, and, therefore, both questions were properly submitted to the jury.

The parties stipulated before trial to the fact that plaintiff was an independent contractor. When he came onto the defendant's premises to pour the concrete shelf, he was also an invitee to whom defendant owed a duty of "due care under all the circumstances." *Spivey v. Babcock & Wilcox Co.*, 264 N.C. 387, 388, 141 S.E. 2d 808, 810 (1965). Specifically, the duty owed by the defendant contractee has been described as follows:

> One going upon another's property as an independent contractor . . . is an invitee to whom the property owner is liable for an injury occasioned by an unsafe condition of the premises encountered in the work, which was known to the property owner but unknown to the injured person. Generally speaking, an employer owes a duty to an independent contractor . . . to turn over a reasonably safe place to work, or to give warning of dangers.

41 Am. Jur. 2d, *Independent Contractors* § 27 (1968). *See also Deaton v. Board of Trustees of Elon College*, 226 N.C. 433, 38 S.E. 2d 561 (1946).

[1] Viewing the evidence in the instant case in the light most favorable to the plaintiff, it appears that defendant was informed on at least two occasions by at least two different individuals that a retaining wall behind which fill dirt was to be poured should be braced. Reasonable men could draw a logical inference therefrom that the defendant was aware that failure to brace such a wall would create a dangerous or unsafe condition. Moreover, that defendant knew the wall had not been braced could also reasonably be inferred since he owned the premises, conducted his business there, planned the renovations to the basement, and hired all the work done. There is no indication in plaintiff's evidence, and defendant has not come forward with any proof, from which one could conclude that plaintiff was warned of the absence of bracing in the wall. Thus, one justifiable conclusion to make is that plaintiff reasonably "assumed" the wall had been braced, especially in light of the evidence that defendant told plaintiff he would have the wall braced. We believe this evidence presented a question for the jury to decide whether defendant's failure to brace and to warn constituted actionable negligence and, further, whether such negligence, if any, was a proximate cause of the plaintiff's injuries.

We next consider the defendant's contention that, regardless of whether he failed to exercise ordinary care, the plaintiff is barred from any recovery because plaintiff was contributorily negligent as a matter of law. Only when no other than this one conclusion reasonably can be drawn from the evidence is contributory negligence properly held proved as a matter of law. *Spivey v. Babcock & Wilcox Co., supra.* Although we agree that some evidence was introduced from which the jury could have concluded that the plaintiff failed to exercise ordinary care for his own safety, we are not persuaded that the evidence was sufficient to compel that conclusion as a matter of law. Thus, we hold that the court did not err in refusing to grant the defendant's motions for directed verdict and judgment notwithstanding the verdict.

By assignments of error numbers 4, 5 and 6, based on numerous exceptions noted in the record, defendant contends that the court erred in allowing plaintiff's expert witness, Rowe, to answer certain hypothetical questions regarding his opinion as to what caused the wall to fall. Defendant first argues that the question itself was "seriously deficient" for the reason that it did

not contain all the essential facts. The hypothetical question complained of in essence sought the witness' opinion of whether the wall was "properly constructed" if the jury should find by the greater weight of the evidence that a wall made of eight-inch cinder blocks and approximately six to seven feet high was constructed in the defendant's basement; that the wall was backfilled, but not braced; that the backfilled space between the old dirt wall and the new concrete wall was two to four feet wide, and the space between the top of the wall and the first floor joist was about four feet; that the wall was not tied to the floor; and that the wall fell while a concrete cap was being poured on its top. Over objections and motions to strike, the witness testified that, in his opinion, the wall was not properly constructed because it lacked bracing of any kind.

The rule with respect to the form of hypothetical questions is that the question must contain all the material facts necessary to enable the expert to express an intelligent and reliable opinion. "Although it is not necessary to incorporate *all* of the facts, the trial judge may properly exclude the witness's answer if the question presents a picture so incomplete that an opinion based upon it would obviously be unreliable." 1 Stansbury's N.C. Evidence, *Opinion* § 137 (Brandis rev. 1973). [Emphasis in original.] Moreover, the question should not include extraneous facts, nor should it assume those facts sought to be established. And where the evidence is conflicting as to any essential fact, the assumption of one version over another is not prejudicial. 6 Strong's N.C. Index 3d, *Evidence* §§ 49.1, 49.2 (1977).

[2] In this case the witness Rowe was qualified as an expert "in the field of masonry construction and as a brick and block mason." Judging from the evidence in the record, we are satisfied that the question contained every essential fact brought out at trial and plainly enabled this witness, who was an expert in the field, to form a safe, reliable and intelligent opinion as to whether the retaining wall in this case was or was not properly constructed. We note, furthermore, that much of which defendant now complains was rendered inconsequential, if not moot, by counsel's rephrasing of the question to take care of defendant's objections, and that many of defendant's suggestions on appeal concerning "facts" which should have been included in the question would have produced error had they been so incorporated,

since there was no evidence regarding, for instance, the type of mortar used or the make-up of the sand. *See* Stansbury, *supra.* We hold, therefore, that the question was sufficiently composed, and no error flowed from its admission.

Second, defendant charges that this expert witness "was not qualified to testify about causation." It suffices to say that the qualification of experts is a matter "ordinarily within the exclusive province of the trial judge", Stansbury, *supra* at § 133, and that, once the court decides the witness is an expert, he is properly allowed to give his opinion as to causation. Indeed, provided the question is correctly formed—which is not and could not be disputed here—the expert's foremost function is to enlighten the jury as to the appropriate inferences to be drawn from what happened, including what probably caused the incident to happen. We find this assignment of error wholly meritless.

[3] Finally, defendant contends that he was entitled to a credit against the judgment in the amount of $2,000, the sum paid by the "joint-tort-feasor" Huffman. We agree. Where one tort-feasor has settled with the injured party, the other tort-feasor, who has gone to trial, is entitled to have the judgment reduced by the amount of the settlement. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970).

We do not find it necessary to discuss the question of whether the trial judge had jurisdiction to amend the judgment once notice of appeal had been given. While the record indicates that the trial judge was aware at one time of the fact that plaintiff had taken a voluntary dismissal as to the defendant Huffman upon the payment of $2,000, it does not appear that this fact was called to his attention when he signed the judgment for the full $18,000.00. Regardless, the law is clear that

> [w]hen a release or a covenant not to sue . . . is given in good faith to one of two or more persons liable in tort for the same injury . . .: (1) . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it. . . .

G.S. § 1B-4. We think the ends of justice require that the amendment be made at this time. For that reason, this cause is remand-

ed to the superior court so that court may amend the judgment to reflect the fact that $2,000.00 has been paid.

The result is: In the trial we find no error. The cause is remanded to the suprior court for the entry of a judgment in accordance with this opinion.

No error. Cause remanded.

Judges CLARK and MARTIN (Harry C.) concur.

HATTIE ANGEL v. ROBERT L. WARD, INDIVIDUALLY AND AS A PARTNER, AND STRAND, SKEES, JONES & COMPANY, A GENERAL PARTNERSHIP ORGANIZED UNDER THE LAWS OF THE STATE OF NORTH CAROLINA

No. 7821SC1073

(Filed 16 October 1979)

1. **Libel and Slander § 14.3— absolute and qualified privilege—pleadings**

The defendants in a libel action sufficiently pleaded the affirmative defenses of absolute and qualified privilege.

2. **Libel and Slander § 5.2— letter questioning competence in profession—libel per se**

A letter from a CPA to the Internal Revenue Service which complained about plaintiff Internal Revenue Service agent's treatment of the CPA's clients and the agent's competence to conduct examinations of tax returns was libelous *per se*.

3. **Libel and Slander § 9— qualified privilege—Internal Revenue Service agent as public official**

An Internal Revenue Service agent is a public official within the meaning of the rule that a public official may not recover in a suit for libel based upon defamatory criticism of his official conduct without proof that the defendant acted with actual malice.

4. **Libel and Slander § 11— absolute privilege—letter sent to Internal Revenue Service—quasi-judicial proceeding**

A letter sent by defendant CPA to the Internal Revenue Service at the request of plaintiff Internal Revenue Service agent's immediate supervisor, who was putting together an evidentiary file to support his superior's decision to terminate plaintiff's employment with the Internal Revenue Service, was absolutely privileged as a communication submitted in a quasi-judicial administrative proceeding.

5. Contracts § 34; Master and Servant § 13— malicious interference with employment contract—summary judgment

The trial court properly entered summary judgment for defendants in plaintiff's action for malicious interference with her contract of employment by a letter sent by defendants to her employer where plaintiff's own evidence showed that the letter was solicited by plaintiff's employer in contemplation of terminating plaintiff's employment and that the letter did not induce plaintiff's employer to terminate her employment.

APPEAL by plaintiff from *McConnell, Judge.* Judgment entered 28 April 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 August 1979.

Plaintiff, a former Internal Revenue Service agent, filed suit against defendants alleging libel and malicious interference with her employment contract with the Internal Revenue Service.

Defendants, Robert L. Ward, individually, and as a partner in Strand, Skees, Jones and Company, a certified public accounting firm, and Strand, Skees, Jones and Company filed an answer asserting as affirmative defenses truth, absolute privilege, and qualified privilege.

Defendant Ward had telephoned Mr. William Temple Allen, plaintiff's immediate supervisor, to complain about the manner in which plaintiff treated his firm's clients and her competence to conduct examinations of tax returns. Mr. Allen had requested Ward to place his complaints in writing, and he did. Plaintiff's job was subsequently terminated, and she filed suit.

After filing of answers to interrogatories and the taking of depositions, defendants moved for summary judgment. From the entry of summary judgment, plaintiff appeals.

Stephens, Peed & Brown, by Charles O. Peed, for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by William F. Maready and Robert J. Lawing, for defendant appellees.

ERWIN, Judge.

[1] Appellant contends that appellees failed to plead the affirmative defenses of privilege and thereby lose the right to claim such affirmative defenses. We disagree.

In Count II of their answer, defendants alleged:

> "Any statements or publications of any materials made by the defendants, or any of them, with respect to the plaintiff were made on a confidential basis, were made in good faith, were made in connection with a quasi-judicial proceeding, and were pertinent and relevant thereto. . . . and the defendants plead absolute privilege in bar of the plaintiff's right to recover in this action.
>
> . . .
>
> Even if any such statements or publications of the defendants, or any of them, were not absolutely privileged, which is denied, then such statements were qualifiedly privileged and justified, being made concerning a public official in connection with her official capacity and being made in good faith on a matter in which the defendants had an interest, and the defendants plead qualified privilege in bar of the plaintiff's right to recover in this action."

All that G.S. 1A-1, Rule 8(c), of the Rules of Civil Procedure requires is that the pleading of an affirmative defense contain "a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved." G.S. 1A-1, Rule 8(c), of the Rules of Civil Procedure. Plaintiff was made well aware of the essence of defendants' answer. If not, their remedy was to move for a more definite statement of facts. *See Redevelopment Comm. v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971). We hold that the appellees have properly alleged the affirmative defenses of absolute and qualified privilege.

[2] In his letter, defendant Ward alleged:

> "Mr. Bill Allen
> Internal Revenue Service
> Greensboro, N. C.
>
> Dear Bill:
>
> It is not my usual manner to make a formal presentation of the inadequacies of a person's work. . . .

Ms. Angel has examined the tax returns of several of our clients in Greensboro and in Reidsville. Our Reidsville manager complained of the manner in which she conducted her examination. He expressed concern for the harrassment [sic] of the client whose tax return was under review. Another partner in our Greensboro office expressed similar concern with respect to his client's treatment at the hands of Ms. Angel. She may not have intended to harrass [sic] the client, but the vindictive way the questions were expressed certainly caused adverse reactions on the part of these respective clients and the partners in charge. The Greensboro partner pointed out Ms. Angel's inability to grasp certain fundamental accounting practices.

. . . Throughout the examination she exhibited an inability to draw an issue to any conclusion that gave any weight to the merits of the client's arguments. This trait, coupled with accusative comments, suggests a type of fear that she would be tricked and that any comments on my part were made only to defer her attention from the questions she had raised. Frequently I found myself trying to explain to Ms. Angel *routine* accounting entries and the related tax treatment of certain transactions which revealed at least a level of expertise below what one should expect of an Internal Revenue Agent.
. . .

The professionalism exhibited by the great majority of Internal Revenue Agents suggests that an exception to the rule should be called to your attention.

Very truly yours,
STRAND, SKEES, JONES & COMPANY
s / ROBERT L. WARD
CPA, Partner"

These remarks were libelous *per se*. A written publication is libelous *per se*, if when considered alone without innuendo, it tends to subject one to ridicule, public hatred, contempt, or disgrace, or tends to impeach one in his trade or profession. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660 (1954). Defendants' communication falls into the latter category. It tends to impeach plaintiff in her trade or profession and is libelous *per se*. *See*

Kindley v. Privette, supra; *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616 (1927); *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891).

[3] Normally, a private citizen interested in the proper and efficient administration of public service has the right to criticize public officers and to communicate such criticism to the official's superiors unless the criticism is made (1) with knowledge at the time that the words are false, or (2) without probable cause or without checking for truth by the means at hand. *Ponder v. Cobb*, 257 N.C. 281, 126 S.E. 2d 67 (1962); *Ramsey v. Cheek, supra*; *Dellinger v. Belk*, 34 N.C. App. 488, 238 S.E. 2d 788 (1977), *dis. rev. denied*, 294 N.C. 182, 241 S.E. 2d 517 (1978).

Appellant contends that an Internal Revenue Service agent is not a public official, and thus, the rule set out in *Ponder v. Cobb, supra*, is inapplicable. This argument is without merit.

As an Internal Revenue Service agent, plaintiff acted on behalf of the government in an official capacity. In *Cline v. Brown*, 24 N.C. App. 209, 210 S.E. 2d 446 (1974), *cert. denied*, 286 N.C. 412, 211 S.E. 2d 793 (1975), we held that a deputy sheriff was a public official within the meaning of the rule established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964), that a public official could not recover in a suit for libel based upon defamatory criticism of his official conduct without proof that the defendant acted with actual malice. In doing so, we noted:

> "The Court in *Sullivan* did not specify how far down the governmental hierarchy the privilege of comment on governmental conduct would go. . . .
>
> > 'Criticism of those responsibe [sic] for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the publice [sic] to have, substantial responsibility for or control over the conduct of governmental affairs.' "

Id. at 214, 210 S.E. 2d at 448-49. An Internal Revenue Service agent falls within the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. Insofar as

the average taxpayer is concerned, the Internal Revenue Service agent is the federal government for tax assessment purposes. No constitutional difference exists between "police work" entailed in the assessment and collection of taxes and that involved in the enforcement of other governmental laws.

[4] Had defendants merely mailed the letter to plaintiff's superiors, the communication would have been entitled to a qualified privilege. *Ponder v. Cobb, supra*; *Ramsey v. Cheek, supra*; *Cline v. Brown, supra*; 50 Am. Jur. 2d, Libel and Slander, § 219, pp. 730-31. However, in the instant case, defendants admittedly submitted their letter upon the request of plaintiff's immediate supervisor, who was putting together an evidentiary file to support his superior's decision to terminate plaintiff's employment with the Internal Revenue Service. Defendants contend that this circumstance raises their privilege to the status of an absolute privilege. We agree.

A defamatory statement made in the due course of a judicial proceeding is absolutely privileged. *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860 (1957); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954). The privilege attending communications made in the course of judicial proceedings has been extended to protect communications in an administrative proceeding only where the administrative officer or agency in the proceeding in question is exercising a judicial or quasi-judicial function. *Mazzucco v. Board of Medical Examiners*, 31 N.C. App. 47, 228 S.E. 2d 529, *appeal dismissed*, 291 N.C. 323, 230 S.E. 2d 676 (1976); Annot. 45 A.L.R. 2d 1298 (1956).

In Black's Law Dictionary (4th ed. rev. 1968), quasi-judicial is defined as "[a] term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Id.* at 1411. Mr. Allen in his solicitation of defendants' letter was acting for and on behalf of the Internal Revenue Service in a governmental matter. He was in the process of evaluating plaintiff in connection with her employment. The agency had decided to terminate plaintiff's employment, and Mr. Allen was preparing an evidentiary file to support the termination decision. The proceeding was quasi-judicial in nature, and defendants'

communications were absolutely privileged. *Cf. Holmes v. Eddy*, 341 F. 2d 477 (4th Cir. 1965), *cert. denied*, 382 U.S. 892, 15 L.Ed. 2d 149, 86 S.Ct. 185 (1965), *reh. denied*, 383 U.S. 922, 15 L.Ed. 2d 678, 86 S.Ct. 881 (1966). *Foltz v. Moore McCormack Lines*, 189 F. 2d 537 (2d Cir. 1951), *cert. denied*, 342 U.S. 871, 96 L.Ed. 655 (1951).

In *Holmes v. Eddy, supra*, the Fourth Circuit Court of Appeals held that an affidavit filed by a private citizen at the request of the Securities Exchange Commission during an investigation of plaintiffs for fraudulent practices was an absolutely privileged communication. As in the instant case, the private citizen had initiated communication with the governmental agency. Notwithstanding this fact, the Fourth Circuit Court of Appeals held that the communication was privileged as a communication made in a judicial proceeding. *Contra, Toker v. Pollak*, 44 N.Y. 2d 211, 376 N.E. 2d 163, 405 N.Y.S. 2d 1 (1978) (affidavit filed by private citizen at request of district attorney in lieu of testifying before grand jury only qualifiedly privileged). Although the Internal Revenue Service administrative procedure for termination or promotion of an employee is quasi-judicial, the quantum of the privilege is the same—an absolute one. *Bailey v. McGill, supra*; *Jarman v. Offutt, supra*; *Mazzucco v. Board of Medical Examiners, supra*. We hold that the trial court properly entered summary judgment on plaintiff's libel claim.

[5] In her complaint, plaintiff also alleged defendants maliciously interfered with her contractual rights resulting in her discharge. Malicious interference with contractual rights is a common law wrong and may constitute a claim for relief where defamatory statements are the alleged means of interference. *Presnell v. Pell*, 39 N.C. App. 538, 251 S.E. 2d 692 (1979). Thus, a plaintiff may properly sue on claims for relief for malicious interference with contractual rights resulting from defamatory statements and for libel or slander. *Presnell v. Pell, supra*; 45 Am. Jur. 2d, Interference, § 15, p. 292-93.

Appellant contends the trial court's entry of summary judgment on her claim for malicious interference with contractual rights was error. We disagree.

Entry of summary judgment is proper where (1) there is no genuine issue as to any material fact and (2) the moving party is

entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c), of the Rules of Civil Procedure; *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Mr. Allen, plaintiff's immediate supervisor, stated in his deposition:

> "The termination proceedings evolved from the promotion appraisal. I got instructions from my branch chief, Gene Morrow, to prepare an evidence file in support of proposed charges and specifications against Mrs. Angel. After I turned the appraisal in, as to the four unsatisfactory ratings one of them had to do with 'meet and deal' qualities in dealing with the public and I don't know exactly what happened, but I do know my branch chief indicated that based upon what I had represented in the performance appraisal, that there may be a basis for a rule of conduct violation here.
>
> * * *
>
> I was acting in my capacity as group manager for the Internal Revenue Service in requesting these letters."

In her own deposition, plaintiff stated:

> "Paragraphs 9G and 9H allege that the Internal Revenue Service solicited derogatory information about me from sources outside the Internal Revenue Service. It is specifically my contention that the letter previously referred to as Plaintiff's Exhibit A in the lawsuit against Strand, Skees, Jones and Company, was some of the information solicited by the Internal Revenue Service. I believe that Mr. William Temple Allen solicited this information. The lawsuit entitled *HATTIE ANGEL v. MR. ALEXANDER*, as Commissioner of Internal Revenue Service, does allege that I was dismissed on the basis of sexual discrimination."

Defendants did not offer any evidence to contradict plaintiff's evidence.

In order to establish the tort of malicious interference with a contract right, the plaintiff had to prove:

"'. . . *First*, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. *Third*, that the outsider intentionally *induced the third person* not to perform his contract with the plaintiff. *Fourth*, that in so doing the outsider acted without justification. *Fifth*, that the outsider's act caused the plaintiff actual damages.' (Citations omitted.)" (Emphasis added.)

Smith v. Ford Motor Co., 289 N.C. 71, 84-85, 221 S.E. 2d 282, 290 (1976), quoting *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E. 2d 176, 181-82 (1954), *petition for reh. dismissed*, 242 N.C. 123, 86 S.E. 2d 916 (1955); *Fitzgerald v. Wolf*, 40 N.C. App. 197, 252 S.E. 2d 523 (1979).

One of the elements essential to establish the tort is the *inducement* of a third person not to perform his contract with the plaintiff. The uncontroverted evidence presented by plaintiff is that the Internal Revenue Service was the *inducer* not the *inducee* in the termination of plaintiff's employment. By her own evidence, the plaintiff has established the non-existence of an essential element of her claim. In such a circumstance, entry of summary judgment is proper. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

The judgment entered by the trial court is

Affirmed.

Judges CLARK and WELLS concur.

WADE LAPSLEY EDWARDS v. JO MEREDITH SHELTON EDWARDS

No. 7821DC1144

(Filed 16 October 1979)

1. Divorce and Alimony § 5— defense of recrimination no longer available

The defense of recrimination cannot be asserted in actions for absolute divorce based on separation of the parties instituted after 31 July 1977 even if alleged acts of adultery by plaintiff occurred after the separation of the parties.

2. Divorce and Alimony § 5— fraud in procurement of separation agreement—recrimination

Defendant's allegations that plaintiff procured a separation agreement from her by fraudulently misrepresenting that he had not been seeing another woman during their marriage did not state a counterclaim for alimony or child custody or support, which may be asserted in an action for absolute divorce, but fell within the doctrine of recrimination, which may not be asserted in such an action.

3. Husband and Wife § 24; Parent and Child § 4.1— alienation of affections of child—no right of action

One parent may not recover from the other parent for alienating the affections of their child.

APPEAL by defendant from *Kieger, Judge.* Order entered 9 October 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 24 August 1979.

In this action, filed 10 July 1978 in the Forsyth County District Court, plaintiff husband sued the defendant wife for an absolute divorce on grounds of one year separation of the parties. On 12 October 1977 the plaintiff and defendant entered into a Deed of Separation dividing the property of the parties. The defendant answered plaintiff's complaint admitting the separation but alleging that plaintiff abandoned her when the parties separated in July 1977; that plaintiff had committed adultery on many occasions both before and after the separation of the parties; and that plaintiff had procured the Deed of Separation by fraud. By way of a third defense and counterclaim defendant claimed that the plaintiff had alienated the affections of the parties' adopted son, Gary Wade Edwards. Plaintiff replied to defendant's answer and counterclaim alleging recrimination was no defense to an absolute divorce under G.S. 50-6; denying that the Deed of Separation was procured by fraud and alleging his compliance with the provisions of that Deed; denying that he alienated the affections of the parties' son; and alleging that the defendant's third cause of action failed to state a claim upon which relief could be granted.

Plaintiff moved under G.S. 1A-1, Rule 12(c) for judgment on the pleadings and under Rule 56 for summary judgment. In support of his motions plaintiff offered the affidavit of his adopted son stating that his affections toward the defendant had not been alienated. Defendant offered the affidavits of a witness to circumstances supporting defendant's allegation of adultery and of

defendant herself alleging specific examples of her son's hostile conduct towards her which occurred under the plaintiff's influence. At a hearing on plaintiff's motions defendant orally moved to amend her pleadings, and this motion was denied by the trial court. From the trial court's order denying defendant's motion to amend her pleadings and granting plaintiff's motion to strike defendant's answer on grounds it failed to state a claim upon which relief could be granted, defendant appeals.

Morrow, Fraser and Reavis, by John F. Morrow, for plaintiff appellee.

Page and Greeson, by Michael R. Greeson, Jr., for defendant appellant.

WELLS, Judge.

Defendant assigns as error the trial court's refusal to grant her oral motion to amend her pleadings. Under G.S. 1A-1, Rule 15(a), after the time permitted for unrestricted unilateral amendment of pleadings has expired, a party "may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." While the burden is on the party objecting to the amendment to show that he would be prejudiced thereby, *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977), a motion under Rule 15(a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979). Since the record before us fails to indicate the content of defendant's proposed amendment and the circumstances surrounding the court's denial of her motion, we cannot say that the trial court has abused its discretion.

Defendant argues that the trial court erred in dismissing defendant's first and second defenses and her third defense and counterclaim. Defendant argues that her first defense, alleging plaintiff committed adultery after as well as before the separation of the parties, constitutes a valid defense to an action for absolute divorce based on a one year separation.

Prior to 1977, it was the settled law of this State that recrimination was available as a defense in bar of an action for absolute divorce based on the separation of the parties.

> This jurisdiction recognizes the doctrine of recrimination, which allows a defendant in a divorce action to set up a defense in bar of the plaintiff's action that plaintiff was guilty of misconduct which in itself would be a ground for divorce.

Hicks v. Hicks, 275 N.C. 370, 373, 167 S.E. 2d 761, 763 (1969). *See also, Harrington v. Harrington*, 286 N.C. 260, 210 S.E. 2d 190 (1974); *Pharr v. Pharr*, 223 N.C. 115, 25 S.E. 2d 471 (1943); *Byers v. Byers*, 223 N.C. 85, 25 S.E. 2d 466 (1943); 1 Lee, N.C. Family Law § 88, p. 338 (1963).

The 1977 General Assembly amended G.S. 50-6 to specifically deny recrimination as a defense to an action for absolute divorce based on the separation of the parties.

> Section 1. G.S. 50-6, as it appears in the 1976 Replacement of Volume 2A, is amended by adding the following sentences at the end thereof:
>
> "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. . . ."
>
> Sec. 2. This act shall become effective August 1, 1977, and shall not affect pending litigation.

1977 N.C. Sess. Laws, ch. 817.

We note that in the 1977 Second Session, the General Assembly again amended G.S. 50-6 to include actions brought pursuant to the provisions of G.S. 50-7 within the new rule. 1977 N.C. Sess. Laws, 2d Sess., ch. 1190.

[1] We hold that the defense of recrimination cannot be asserted in actions for absolute divorce instituted in this State after 31 July 1977. Since the present action was filed on 10 July 1978, the defense of recrimination was not available to defendant. *Smith v. Smith*, 42 N.C. App. 246, 256 S.E. 2d 282 (1979). Defendant in the case before us has argued that since some of the alleged adulterous acts on the part of the plaintiff occurred after the separation, those acts do not fall within the provisions of G.S. 50-6, as amended. We disagree. The 1977 amendment eliminates the *defense* of recrimination, and makes no distinction as the factual circumstances under which such a defense might be asserted.

[2] Defendant in her brief argues that her second defense, although not labeled a counterclaim, did in fact state a valid counterclaim against the plaintiff; that this counterclaim was compulsory or at least permissive pursuant to Rule 13(b) of the Rules of Civil Procedure; and that it was error for the trial court to strike it, either in context of a motion to dismiss or a motion for summary judgment. We cannot agree. The "defense" or "counterclaim" is set forth in defendant's answer, as follows:

> BY WAY OF FURTHER ANSWER AND DEFENSE, the defendant alleges that the plaintiff secured a Deed of Separation from the defendant by fraud by misrepresentation to his wife that he had not been seeing another woman during the course of their marriage when in fact he was regularly committing adultery with another woman. This misrepresentation of material fact caused the defendant to enter a Deed of Separation which she would not otherwise have entered into.

These allegations, considered in the most favorable possible light, do not state or constitute an action for alimony or for child custody or support. Such rights defendant may have asserted in a "counterclaim" or in a cross-action for divorce from bed and board, alimony without divorce, or for absolute divorce pursuant to the appropriate respective provisions of Chapter 50 of the General Statutes. There is no basis set forth in defendant's second defense for relief of any form provided under our statutes governing divorce, alimony, and child support. Moreover, defendant did not pray for any such relief, but prayed for damages, actual and punitive.

The alleged misconduct set forth in defendant's second defense falls clearly within the doctrine of recrimination discussed earlier in this opinion, and therefore was not available to defendant as a defense to plaintiff's action for divorce.

[3] Defendant also argues that the trial court erred in dismissing her counterclaim based on the plaintiff's alleged alienation of the affections of their son, Gary Wade Edwards. We note that the question whether a parent may recover from another parent for alienating the affections of their child is a matter of first impression in this State. The general rule is that, absent allegations of seduction or abduction, no such action will lie:

> It has so far been generally held in this country that the relation of parent and child, unlike that of husband and wife, will not support an action by the parent for the mere alienation of the affections of his child.

3 Lee, N.C. Family Law § 244, p. 132 (1963). *See also,* Annot., 60 A.L.R. 3d 931 (1974); 59 Am. Jur. 2d, Parent and Child § 107, p. 206; Prosser, Torts § 124, p. 883 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 699, p. 504 (1977).

The asserted cause of action was not known to the common law. *See, Pyle v. Waechter,* 202 Iowa 695, 210 N.W. 926 (1926). Nor has any provision been made for it under the statutory law of our State. In *Henson v. Thomas,* 231 N.C. 173, 56 S.E. 2d 432 (1949) our Supreme Court held that the children of a marriage have no cause of action against a third party for alienating the affections of their mother. We find the reasoning of the Court in *Henson* controlling in the instant case:

> The mutual rights and privileges of home life grow out of the marital status. Affection, guidance, companionship, loving care, and domestic service constitute, in part, the mother's contribution to the happiness and well-being of the family circle. Such obligations on her part are not legal in nature and may not be made the subject of commerce and bartered at the counter. [Citation omitted.]
>
> * * *
>
> The problem here, in its last analysis, is sociological rather than legal. No one would question the fact that a child has an interest in all the benefits of the family circle. Nor may it be denied that the legislative branch of the government may give this interest such legal sanction as would make the invasion or destruction thereof a legal wrong. So far, it has not deemed it wise to do so.
>
> It is contended, however, that there is no statutory prohibition against this type of action; that the integrity of the relations and social considerations demand judicial recognition of defendant's liability for enticing plaintiffs' mother from the family home. But the social considerations and the alleged necessity or advisability of protecting the family relation by upholding the action here contended for are

> arguments more properly addressed to the legislative branch of the government.

Id., 231 N.C. at 175-176, 56 S.E. 2d at 433-434.

Although a cause of action exists for one spouse to recover for the alienation of the affections of the other spouse it does not necessarily follow that a parent may recover for the lost companionship of a child. As recognized by the Supreme Court of Iowa in *Pyle v. Waechter, supra*, 202 Iowa at 701, 210 N.W. at 929, the right of action for alienation of a spouse's affections:

> is based on the loss of the *consortium*, the conjugal society, and assistance of the spouse. It is a right which exists by virtue of the marriage relation, and is peculiar to it.

This Court has also recognized that the gravamen of the action for alienation of affections is a spouse's loss of the protected marital right of the affection, society, companionship and assistance of the other spouse. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104 (1969). The relation of parent and child supports no legal right similar to that of consortium.

The trial court correctly dismissed defendant's third defense and counterclaim.

Affirmed.

Judges CLARK and ERWIN concur.

SANDRA N. HAGA v. WILBERT L. CHILDRESS

No. 7821SC1077

(Filed 16 October 1979)

Landlord and Tenant § 8.5— landlord's repair of faucet handle—injury to tenant's child—no reliance on landlord's assurances of repair

In an action to recover for personal injuries sustained by plaintiff as a result of the alleged negligence of defendant in making repairs to a hot water faucet handle in premises leased by defendant to plaintiff's parents, the trial court properly entered summary judgment for defendant, even if defendant was negligent in his repair of the faucet handle, since plaintiff's sworn state-

ment showed that she knew that the handle had not been repaired and that she did not act in reliance on defendant's assurances that repair was properly made, and, in the absence of such reliance, there was no basis on which liability on the part of defendant could be premised.

APPEAL by plaintiff from *Lupton, Judge.* Judgment entered 14 July 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 August 1979.

In this civil action plaintiff seeks to recover damages for personal injuries suffered by her as a result of the alleged negligence of the defendant in making repairs to a hot water faucet handle in premises leased by defendant to plaintiff's parents. In her complaint plaintiff alleged: She lived with her parents, who leased their house from defendant. On or about 1 July 1976, defendant undertook to repair the hot water faucet in the bathroom of the leased premises. In so doing, defendant negligently failed to repair the faucet properly in that he failed to secure the faucet handle to the faucet stem, thus allowing the handle to come loose easily and fall from the stem. When, on or about 26 July 1976, plaintiff undertook to bathe in the bathroom of the leased premises, and while she was turning on the hot water, the handle to the hot water faucet came loose and fell from the faucet stem. Because there was no functioning thermostat on the hot water heater on the leased premises, the water pouring forth was extremely hot. After several attempts to replace the hot water faucet handle, plaintiff underwent an epileptic seizure, fell into the bathtub, and was severely burned. Plaintiff alleged that her injuries were the proximate result of defendant's negligence in failing to repair properly the hot water faucet handle which he undertook to repair while leasing a house containing a hot water heater with no functioning thermostat.

In his answer defendant admitted that plaintiff's parents leased premises owned by him. He denied all allegations of negligence on his part and pleaded plaintiff's contributory negligence in bar of any recovery.

After taking depositions of plaintiff and of her father, William B. Haga, defendant moved for summary judgment. In her deposition plaintiff testified to the following: Plaintiff was living with her parents in a house which they rented from defendant. On or about 1 July 1976, defendant-lessor came to repair the hot

water faucet handle on the bathtub in the house. Defendant took the faucet with him and returned on 15 July to put the handle back on. At that time he told plaintiff that the handle was fixed. Between 15 July and 23 July plaintiff did not use the bathtub in her parent's house; however, she remembered that during that period the hot water faucet handle had fallen off while her father was using it. On 23 July plaintiff sat on the edge of the tub in the bathroom and turned the hot and cold water handles to regulate the temperature of the water. The hot water handle fell off, and she tried several times to put it back on, but she was unable to do so. At that moment plaintiff panicked and suddenly experienced an epileptic seizure. She had suffered seizures since the age of four and regularly took medication to control her condition. On 23 July she had taken her medication both in the morning and in the afternoon. As a result of her seizure, plaintiff became unconscious, and her right hip and her hand were severely scalded by the hot water. She only regained consciousness after she was out of the tub and was walking down the hallway. In his deposition plaintiff's father stated that his daughter apparently fell into the hot water after her epileptic seizure. In an affidavit, plaintiff stated that she had told defendant she was subject to epileptic seizures and that the matter of her epilepsy had been discussed in defendant's presence on numerous occasions prior to the time of her injuries complained of in this action.

The trial judge granted defendant's motion for summary judgment. From this judgment, plaintiff appeals.

Pfefferkorn & Cooley, by David Pishko for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Allen R. Gitter and Frederick J. Murrell for defendant appellee.

PARKER, Judge.

The sole question presented on this appeal is whether the trial court properly granted summary judgment for defendant-lessor. We hold that he did.

Upon a motion for summary judgment, the moving party bears the burden of establishing that there is no genuine issue of material fact remaining for determination, and that he is entitled to judgment as a matter of law. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972).

Plaintiff's right of recovery in this action depends upon the existence of some duty of care owed to her by defendant. The general rule governing a lessor's liability for personal injuries suffered by his tenant or by a member of the tenant's family by reason of some defective condition on the leased premises has been stated by our Supreme Court as follows: "In the absence of an express covenant to repair or keep in repair, a landlord is not ordinarily held liable for personal injuries to the tenant or his family by reason of defective conditions of the premises. And even with a covenant to repair, the general rule is that such liability will not usually be imputed." *Hudson v. Silk Co.*, 185 N.C. 342, 343, 117 S.E. 165 (1923); *see also, Moss v. Hicks*, 240 N.C. 788, 83 S.E. 2d 890 (1954); *Fields v. Ogburn*, 178 N.C. 407, 100 S.E. 583 (1919). An exception to this general rule is recognized in a case where the landlord gratuitously undertakes to make repairs. In such a case the lessor assumes the duty to exercise reasonable care in making the repairs, and proof of a breach of that duty which proximately causes injury will support a finding of liability on the part of the lessor. *Carson v. Cloninger*, 23 N.C. App. 699, 209 S.E. 2d 522 (1974). Although not articulated in *Cloninger*, it has often been stated that the basis for imposing liability upon a lessor for injury proximately caused by his negligence in gratuitously making repairs is the reliance which the tenant or a member of his family places on the lessor's assurances that the repairs have been properly made. *See generally*, Annot. 150 A.L.R. 1373, 1379 (1944). For example, in *Rubin v. Girard Trust Co.*, 154 Pa. Super. 257, 35 A. 2d 601 (1944), a case in which the court held a lessor liable for personal injuries suffered as the result of repairs negligently made to a porch, the court stated:

> The basis of the liability of a landlord who gratuitously undertakes to make repairs performed negligently is the representation—that the repairs have been properly made—upon which the tenant relies to his injury. In the present case, the landlord impliedly represented to the tenant that all necessary repairs had been made . . . . When the work was done, the tenant had a right to assume that the necessary work had been ascertained and performed. *Her injury resulted from her reliance on that assumption.* (Citations omitted.) Id. at 260, 35 A. 2d at 602. (Emphasis added.)

Thus, where the lessor or the member of his family who suffers injuries knows that repairs have not been properly made, the necessary element of reliance is missing, and there is no basis for recovery in tort. *See*, e.g. *Parrish v. Witt*, 171 Mont. 101, 555 P. 2d 741 (1976); *Rhoades v. Seidel*, 139 Mich. 608, 102 N.W. 1025 (1905).

Applying these principles to the present case, plaintiff's own deposition establishes as a matter of law that she is not entitled to recover. In her deposition plaintiff testified that defendant had attempted to repair the hot water faucet handle and that when he came to her father's house on 15 July to put the handle back on, defendant told her that it was repaired. However, plaintiff also testified as follows:

> Q. All right. Now I'm addressing your attention to the period of time between July 15 and July 23, do you understand that?
>
> A. Yes, sir.
>
> Q. Fine. During that period of time, do you know whether or not the hot water handle on the water control device ever fell off prior to the time when you say it fell off when you were using it?
>
> A. I—I don't remember, but seems like it did one time when my father was using it.
>
> Q. Do you remember how many days that was either after Mr. Childress brought it back or before your occurrence?
>
> A. Oh, I'd say maybe about—uh—about two days before.
>
> Q. Did you speak with your father about that that same day?
>
> A. Yes I—I told him it looked like it wasn't fixed.
>
> Q. And what did he say to you?
>
> A. Well—uh—I don't remember, really.
>
> Q. But you do remember telling him it looked like to you it wasn't fixed?

A. That's right.

Q. And this was about two days before you fell into the tub?

A. Yes, sir.

Assuming arguendo that defendant was negligent in his repair of the hot water faucet handle, plaintiff's sworn statement shows that she knew that the handle had not been repaired and that she did not act in reliance on defendant's assurances that repair was properly made. In the absence of such reliance, there is no basis on which liability on the part of the defendant can be premised in this case.

We note in passing that in 1977 the General Assembly enacted the Residential Rental Agreements Act, Ch. 770, 1977 Sess. Laws, now codified as G.S. §§ 42-38 to 44. That act imposes new duties upon a lessor of a dwelling unit to provide and maintain the leased premises in a fit and habitable condition. It became effective on 1 October 1977, applicable to all rental agreements entered into, extended, or renewed automatically or by the parties after that date. Thus, the Act is not applicable in the present case. We express no opinion as to whether, if applicable, the Act would give rise to liability for personal injuries caused by a lessor's breach of statutorily imposed duties. *See generally*, Fillette, *North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations*, 50 N.C.L. Rev. 785 (1978). Decision of that question must await a case in which the Act is applicable. Decision of the present case is controlled by the law as it existed prior to the effective date of the Act.

Affirmed.

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

DUKE POWER COMPANY v. MOM 'N' POPS HAM HOUSE, INC.; JOHN W. ERVIN, JR., TRUSTEE FOR NORTHWESTERN BANK; AND NORTHWESTERN BANK

No. 7825SC1146

(Filed 16 October 1979)

1. **Eminent Domain § 5.6— plans for future use—motion in limine**

In an action to condemn a power line easement, the trial court did not abuse its discretion in the denial of petitioner's motion *in limine* to prohibit the landowner from introducing evidence that it had plans for future expansion of its office and warehouse building which would be precluded by the imposition of petitioner's easement where the court stated that it would rule on such evidence at the trial, and no impermissible evidence of future plans was heard by the jury.

2. **Eminent Domain § 6.5— condemnation of easement—opinion testimony as to damages—failure to include elements which remain constant**

In an action to condemn a power line easement in which the evidence showed that respondent's damages resulted from the value of the land actually taken and severance of an office building in the southwest corner of the tract from the remainder of the tract, and it was undisputed that a smokehouse in the northeast corner of the tract will not be affected by the easement, the trial court erred in refusing to permit petitioner's expert appraisers to give opinion testimony as to damages to the lower part of the tract without including in their computations the value of the land and smokehouse in the northeast portion of the tract.

3. **Eminent Domain § 13.5— condemnation of easement—instructions on use of condemned land by landowner**

In an action to condemn a power line easement, the trial court erred in instructing the jury that "the landowner is limited in the use of the property to parking, crossing, raising of crops and the land cannot be used for building," since the court should have instructed only that the landowner retained the right to use the condemned land for all lawful purposes not inconsistent with the rights acquired by the petitioner.

APPEAL by the petitioner from *Graham, Judge*. Judgment entered 22 September 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 19 September 1979.

Duke Power Company seeks to impose an easement over lands owned by Mom 'n' Pops Ham House, Inc. (respondent). The property of the respondent is divided in a north-south direction by Spring Street and terminates at a right of way belonging to Southern Railway which traverses the property along the south-

ern boundary. The railroad right of way extends 100 feet from the center line of its track.

Two buildings are located on the respondent's property: a smokehouse (ham curing facility) east of Spring Street, and the home office and warehouse located on the west side of Spring Street.

The easement imposed by the petitioner extends in an east-west direction along a creek bed south of the smokehouse, and north of the main office building and warehouse, and is 68 feet in width east of Spring Street and 81 feet in width west of it.

The parties stipulated that the property was encumbered by deeds of trust to Northwestern Bank and the proceeds of any recovery would be paid to the bank. Parties further stipulated that a commissioners hearing would be waived and that the petitioner had the right to condemn the easement. Hence, the proceeding was docketed in the superior court on the issue of damages alone.

Prior to the trial, the petitioner filed a motion *in limine* stating, among other things, that it believed that the respondent, Mom 'n' Pops, intended to offer to the jury evidence of its plans for future uses and development of the subject property and asking that evidence not be admitted; that any tender of evidence be made outside the presence of the jury. After argument of counsel to the court, the judge stated that he would rule on the matter as the evidence came out in the case.

At trial, respondents' evidence demonstrated that damages resulted principally (1) from the severance by the power line of the home office and the lands on which the same was located from the remainder of the tract, and (2) damages to the land within the actual right of way.

The parties stipulated that three witnesses tendered by the petitioner were experts. Only one was permitted to testify as to damages.

Jerry Hewitt testified that he was familiar with the property and land values in the area; that he had formed an opinion as to the fair market value of the total land area and the buildings on the southwest corner of the tract before and after the taking.

However, he had not at the time of his original appraisal attempted to place any value on the smokehouse building on the northeast corner of the property. Hewitt felt, as had the witnesses for the respondents, that it was not in any manner affected by the taking. Hewitt then offered to testify that a value of $430,000 put on the building by one of the respondents' witnesses was a fair one—based on his knowledge of the smokehouse building from inspection of the exterior and the square footage thereof and a knowledge of commercial property in the Claremont area. In the absence of the jury, the witness testified that he did not appraise the entire property before the taking, nor did he after the taking. The court ruled that the witness was incompetent to give an opinion regarding the value of the entire tract.

Ralph Warlick testified that he was familiar with the property in question—its characteristics and construction, and of property values in the area. Warlick had seen the interior of the smokehouse when only 40% complete, but not since total completion. The court refused his offer to give an opinion as to the "before" and "after" values of the land and the smokehouse when 100% complete.

Patrick, Harper & Dixon, by Stephen M. Thomas and William I. Ward, Jr., for petitioner appellant.

Simpson, Baker & Aycock, by Samuel E. Aycock and Dan R. Simpson, for respondent appellees.

HILL, Judge.

Three questions are presented for review by this Court as follows:

[1] 1. Did the trial court's rulings on the petitioner's motion *in limine* and the respondents' offer of evidence allow the jury improperly to consider possible specific further uses of the respondents' property in reaching its verdict?

In condemnation proceedings, the determinative question is: In its condition on the day of taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom and adequate means? The owner's actual plans or hopes for the future are completely irrelevant. Such aspirations are regarded as too remote and speculative

to merit consideration. *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972); *State Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965); *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N.C. 503, 78 S.E. 299 (1913). The respondents in this cause wanted to introduce testimony that they had future plans for the expansion of their office and warehouse building to the north and that northward was the only direction in which they could expand the building, and further, that the imposition of the petitioner's easement had precluded that expansion. Petitioner had filed its motion *in limine* in an effort to keep this evidence from being put before the jury directly or indirectly. The trial judge was not in error in denying petitioner's motion *in limine*. Granting of the motion is discretionary with the trial judge. The judge did not abuse his discretion, and as is apparent from the record, no impermissible evidence of future plans was heard by the jury.

[2] 2. Did the trial court improperly exclude the value testimony of the petitioner's expert witnesses?

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking . . . .
>
> G.S. 136-112(1).

The judge is required to instruct the jury to use the above standard—and that standard only—in computing damages. *Board of Transportation v. Jones*, 297 N.C. 436, 255 S.E. 2d 185 (1979).

However, the real issue is whether expert real estate appraisers must use the before and after formula in determining damages. They do not. Duke Power's easement is situated so that the damage to respondents' land will result from two things. Respondents will suffer loss to the extent of the value of land actually taken. In addition, the easement will isolate the warehouse in the southwest corner of the lot between Southern Railway and Duke Power easements. The northeast corner upon which the smokehouse sits will not be affected.

Petitioner's experts should have been permitted to testify from first-hand knowledge as to their opinion of the damage to

the lower part of the tract. Such testimony was allowed in *Clancy v. State*, 185 A. 2d 261, 104 N.H. 314 (1962).

In *Clancy*, several utility company easements had been taken on the rear part of plaintiff's property. The easements covered three of the total nine acres and came within 35 feet of plaintiff's buildings which were located on the front part of plaintiff's lot. Plaintiff's expert stated that the value of the existing buildings was not affected by the easement. The expert came to his figure by estimating the value of the remainder of the tract of land before the taking and after the taking.

The New Hampshire Court instructed the jury to arrive at a figure for damages by determining the difference,

> 'between the fair value of [the plaintiff's] whole property' before the taking, and 'the fair value of what was left' after the taking. *Clancy*, at p. 263.

It should be noted that this is the same measure used by juries in North Carolina.

The judge in *Clancy* continued to say,

> The value of the buildings remaining constant, the difference between the value of the whole property before and after the taking would necessarily be the same, whether the value of the buildings was omitted from both figures used in computing the difference, or was included in both.

Here, there is no dispute that the value of the smokehouse in the northeast corner is not affected by the easement. Just as in *Clancy*, the value of that building remains constant. The value of the smokehouse could be one dollar or one million dollars. What is important is the loss to the "before taking" value of the land. This can be determined by adding the value of the land actually taken to the loss in value of the warehouse because of its isolation. This sum can be subtracted from any "before taking" value that may be pulled out of the air to arrive at respondents' damage.

It is clear that a judge must instruct the jury to base its verdict on the difference between the value of land before the taking and afterwards. However, expert real estate appraisers should be given latitude in determining the value of property.

> It is important to note that the statute (G.S. 136-112) speaks only to the exclusive measure of damages to be employed by the 'commissioners, jury or judge.' It in no way attempts to restrict *expert real estate appraisers* to any particular method of determining the fair market value of property either before or after condemnation. *Board of Transportation v. Jones*, 297 N.C. 436, 438, 255 S.E. 2d 185, 187 (1979).

In situations where elements of the property, such as the smokehouse here, will remain constant in value despite the taking, expert appraisers will not have to include that value in their computations in order for their testimony to be competent.

[3] 3. Did the trial court err in failing to properly instruct the jury as to the meaning of the term "easement" and the rights of the respondents in the areas covered by the Duke Power easement?

The court correctly charged the jury that the landowner had the right "to make use of the land condemned in any manner which does not conflict with the rights of Duke Power Company."

The court then limited its definition of an easement by saying, "In this case, the landowner is limited in the use of the property to parking, crossing, raising of crops and the land cannot be used for building."

The court should not have elaborated on its definition of an easement. By limiting the definition, the court may have confused the jury and given them an improper view of the landowner's rights to the encumbered land. The jury should have been told simply that the landowner retained the right to use the land for all lawful purposes not inconsistent with the rights acquired by the petitioner. *North Asheboro Sanitary District v. Canoy*, 252 N.C. 749, 114 S.E. 2d 577 (1960); *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 51 S.E. 2d 191 (1949). An almost infinite number of uses other than those mentioned by the presiding judge can be established.

Hence, for the reasons set out above, the petitioner is awarded a new trial.

New trial.

Judges VAUGHN and ERWIN concur.

JAMES TURNER AND RAY MURRAY v. L. L. MURPHREY HOG COMPANY

No. 798SC99

(Filed 16 October 1979)

Trial § 40.1— confusing issue submitted to jury—new trial

In an action to recover the purchase price of pigs delivered by plaintiff to defendant, defendant is entitled to a new trial where one issue submitted to the jury was so confusing that the jury was unable to determine whether any pigs weighing less than forty pounds were delivered to defendant, and such determination was necessary in order to arrive at the amount owed plaintiff by defendant.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 1 September 1978 in Superior Court, LENOIR County. Heard in the Court of Appeals on 27 September 1979.

Plaintiffs in this civil action are partners engaged in raising feeder pigs for market. For the past several years, they have been selling their pigs to defendant on a regular basis. In their complaint, plaintiffs alleged that, on 23 July 1976, they sold defendant "three loads of feeder pigs weighing 9,220 pounds for a price of $70.38 per hundred pounds"; that defendant accepted delivery of the pigs and "immediately mixed the said pigs with other stock belonging to the corporation"; and that defendant has refused to pay the $6,489.04 they contend is due them. Answering the complaint, defendant admitted delivery and acceptance of the pigs, but contended that it "tendered to the Plaintiff, Ray Murray, the sum of [$5,704.56], being the market price of said pigs; and, therefore, Plaintiffs have been fully paid and satisfied."

On 31 August 1978, a final pretrial conference was held at which the parties stipulated that the three weight certificates (numbers 10173, 10156, and 10157) prepared by defendant when the pigs were delivered on 23 July 1976 would be admissible by both plaintiff and defendant. At trial plaintiff offered the testimony of Ray Murray which tended to show the following:

Plaintiffs Murray and Turner have been partners since 1970 and have been delivering pigs once or twice a month to defendant since "the latter part of 1970 or the first part of 1971." The amount of money due plaintiff was determined by averaging the weight of all pigs delivered in a week's time and calculating the

price according to the Wallace-Chadbourn Market scale. Murray testified that he weighed the pigs in a group—"probably . . . 35 or 40 hogs at each time"—before delivery and then defendant would weigh them again at his [defendant's] place of business. Plaintiff would receive a weight certificate for each load of pigs when delivered. Sometimes he was paid on the spot; other times defendant mailed him a check a few days later.

On 23 July 1976 Murray said he delivered three loads of pigs to defendant's company. The first load contained 60 pigs and, according to both plaintiff and defendant, totalled 2,960 pounds for an average weight of 49.33 pounds. Sixty pigs were delivered in the second load, weighing a total of 3,050 pounds for an average weight of 50.83 pounds. Weight certificates numbers 10156 and 10157, introduced by plaintiff, show these figures for the first two loads.

The third load of pigs delivered on that day contained sixty-nine pigs, totaling 3,210 pounds. Some of the pigs in this load were smaller, and plaintiff had separated them by putting a division in the trailer he used to haul them. When plaintiff arrived with this load at defendant's operation near Maury, defendant's son-in-law and employee Larry Barrow "asked me to wait and let him keep [the smaller pigs] separate so that he would not have to separate them later." Thus, plaintiff "ran those off on the platform first . . . and then we unloaded the rest."

Plaintiff was not paid at the time. According to his calculations, however, the total weight of the three loads of pigs (which were all the pigs he delivered that week) was 9,220 pounds; the average weight was 48.78 pounds. The Wallace-Chadbourn Market for that week quoted a price of "$70.83 per hundred weight for the 40 to 50 pound category. . . ." Thus, plaintiff calculated that he was due $6,489.04. He received a check five days later for $5,704.56.

Plaintiff also received a copy of the weight certificates prepared by Barrow for each load. Number 10173 showed the total weight for the third load to be 3,210 pounds, and the number of pigs to be 69. However, "[t]here are some figures on . . . number 10173 but I did not make them. Mr. Murphrey told me that those figures represented that they had pulled out 34 pigs and reweighed them."

Plaintiff refused to cash the check. Instead, he returned it to defendant and asked for the rest of the money. Defendant told him that "he could not [pay any more] because there was too much weight difference in the pigs . . . that 34 of the pigs were too light, that is below 40 pounds." Plaintiff asserted that "[n]one of the pigs in the third load was under 40 pounds."

Both plaintiff and defendant testified that it was not an acceptable practice either between them or in the business to sell pigs weighing less than forty pounds, and that there is no market quotation for pigs under forty pounds.

Defendant offered the testimony of three witnesses who testified in substance as follows:

Pigs weighing less than forty pounds are not sold on the regular market "because they are too light to take the stress of moving and buyers do not demand them." Such pigs would be sold separately and would bring five-to-ten cents less per hundred weight than pigs in the forty-to-fifty pound category.

Barrow testified that the first thing he observed about the third load of pigs delivered on 23 July 1976 was the divider in the trailer, and then "I noticed that there was a large difference in looking at the pigs. . . . The pigs in the first division were heavier, even heavier than the individual hogs in the first two loads . . . [and] much larger than those in the second division." He kept the two groups separated and, after plaintiff left, called Murphrey to ask "if he had any special agreement with Mr. Murray . . . and he said that he did not." Murphrey came out to look at the pigs, and they reweighed the smaller group. According to Barrow and Murphrey, the thirty-four smaller pigs in the third load weighed 1,280 pounds and averaged 37.65 pounds. The remaining thirty-five pigs totaled 1,930 pounds for an average of 55.14 pounds.

Murphrey testified that, in calculating the amount due plaintiffs for the three loads of pigs delivered that day he, "treated the first two loads and the half of the third load, that is the 35 pigs, together. That is, I averaged them together and then treated the 34 pigs . . . separately." Accordingly, he paid $60.50 per hundred weight for the two and a half loads whose average weight fell into the fifty-to-sixty-pound category. For the thirty-four pigs for

which no market price was quoted on the Wallace-Chadbourn scale, he paid the price for pigs in the forty-to-fifty-pound bracket, although he had "never agreed with Mr. Murray to buy or accept pigs under 40 pounds." Thus, "[w]e actually overpriced the pigs", arriving at a total amount of $5,704.56. Murphrey said that he offered to return the smaller pigs or, alternatively, all 189 pigs delivered on July 23, but that plaintiff would not agree to settle the dispute in such a manner.

At the close of the evidence, the following issues were submitted to and answered by the jury as indicated:

1. Did the plaintiffs and the defendant intend that no pigs weighing less than 40 pounds would be included in the sale on July 23, 1976?

ANSWER: Yes.

2. Were 34 pigs weighing less than 40 pounds delivered in the third lot of pigs on July 23, 1976?

ANSWER: No.

3. Did the defendant give notice of rejection of the third lot of pigs for failure to conform to the Contract within a reasonable time after delivery of the pigs on July 23, 1976?

[NO ANSWER. The third issue was not reached because of the jury's negative answer to the second issue.]

In accordance therewith, the trial judge calculated that the defendant was indebted to the plaintiff in the amount of $6,489.04. From a judgment that plaintiff have and recover such sum of the defendant, defendant appealed.

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

Lewis, Lewis and Lewis, by John M. Martin, for defendant appellant.

HEDRICK, Judge.

By assignments of error numbers 3, 5 and 7, defendant asserts that the court erred in the issues submitted to the jury and the instructions given thereon. We focus our attention on the

second issue submitted. Defendant argues that this issue is confusing, and that the jury was confused by the judge's confusing instructions. We agree.

John Milton in *Paradise Lost* described Hell as, "Confusion worse confounded." The "hellish" position in which the participants to this comedy of errors found themselves is manifest in the colloquy between the jury and the judge when it returned to inquire:

> FOREMAN: A point has arisen on issue no. 2. Was there an average of 34 pigs weighing less or did each pig weigh less than 40 pounds?
>
> COURT: The question is: Were 34 pigs weighing less than 40 pounds delivered in the third lot of pigs on July 23, 1976?
>
> FOREMAN: Was it average or each?
>
> COURT: Each has nothing to do with average.
>
> The attorney has specified that 32 pounds, if that serves me right.
>
> That would mean that some were over 40 pounds to bring it down to 37 pounds. You have got to go on what your recollection is of the evidence and use your own logic and common sense. It doesn't make sense unless you rely on each.

Much of the confusion experienced by the judge and jury lies in the wording of the second issue. There is no evidence in this record that the plaintiff delivered thirty-four pigs to the defendant weighing less than forty pounds. Yet, an affirmative answer to the second issue would yield the absurd conclusion that the plaintiff delivered thirty-four pigs each averaging 1.176 pounds. The issue as stated by the court required the jury, if it was to make any sense whatsoever, to return a negative answer to the issue. Thus, the defendant was deprived of having the jury consider its evidence tending to show that at least some of the thirty-four pigs weighed less than forty pounds, for which there was no market.

The evidence of the plaintiff tends to show that not one pig weighing less than forty pounds was delivered to defendant. The evidence of the defendant, to the contrary, tends to show that

thirty-four of the pigs in the third load on July 23 had an average weight of 37.65 pounds. It is obvious therefore that at least one pig delivered that day weighed less than forty pounds. Since all of the evidence tends to show that no pigs weighing less than forty pounds were bought and sold as "feeder pigs" on the regular market, a genuine issue of material fact raised by the evidence, therefore, is whether the plaintiff on 23 July 1976 delivered any pigs weighing less than forty pounds to the defendant. A negative answer to this issue would resolve the controversy between the parties and enable the court to enter a judgment on the verdict for the plaintiff in an amount that could be calculated mathematically from known and uncontroverted facts. An affirmative answer, on the other hand, would bring into play other facts and other principles of law not discussed herein.

Since there must be a new trial, it is unnecessary to discuss other assignments of error brought forward and argued in defendant's brief.

New trial.

Judges CLARK and MARTIN (Harry C.) concur.

NORMAN A. ASHE AND RUTH E. ASHE v. TUDOR N. HALL ASSOCIATES, INC.

No. 7930DC74

(Filed 16 October 1979)

Contracts § 27.2— contract to build house—shifting of chimney—insufficiency of evidence of breach

In an action to recover for damages to plaintiffs' house which occurred when the chimney shifted and settled and which allegedly resulted from defendant's breach of contract, the trial court erred in denying defendant's motion for directed verdict, since there was no showing that defendant failed to follow the foundation specifications enumerated in the parties' contract.

APPEAL by defendant from *McDarris, Judge*. Judgment entered 15 September 1978 in District Court, JACKSON County. Heard in the Court of Appeals 26 September 1979.

The plaintiffs allege that they contracted with defendant to build a dwelling, including a chimney and fireplace, on their property in Jackson County, and that after its completion the chimney shifted and settled, damaging the house. They claim that defendant performed the construction negligently and, in the alternative, that defendant breached an implied warranty to construct a dwelling free from major defects.

Plaintiffs were allowed to amend their complaint to allege breach of the construction contract and express warranty. Defendant answered and moved for summary judgment which was granted on the issue of negligence and denied as to breach of contract.

At trial before a jury the male plaintiff testified that the plaintiffs contracted with defendant in June 1972 to construct a "pre-cut" home on plaintiffs' property. Defendant was to add a fireplace which was not supplied by the manufacturer of the home. The house was to be built on a steep slope, with the fireplace resting on land and the rest of the house to be supported by pillars nineteen to twenty feet high.

Plaintiffs, who were living in Florida at the time, saw the house only once while it was under construction. The house was completed in late 1972 or early 1973, and the plaintiffs lived in it for two weeks in the spring and two weeks in the fall during each of the years 1973-76. When plaintiffs arrived in the spring of 1976, "one of the windows on the house was broken and the sliding glass doors were falling out of their enclosure and there was a buckling or tilting in the floor of the house." Plaintiff thought that the house was settling. It did not occur to him that the fireplace could be settling because defendant had told him that he had put it on solid rock and it could not settle. Eventually the roof separated from the walls three-quarters of an inch or so, and the deck tore loose from its pillars.

In the fall of 1976 plaintiffs contracted with a Mr. Pell to tear out and rebuild the fireplace. After Mr. Pell had torn down the fireplace he told them it had been built just on topsoil. Plaintiffs did not attempt to contact defendant about their problem with the house.

Mr. Pell testified that he tore out the chimney, dug three feet down to solid rock, and drilled the rock, put in steel anchors and poured a footer before rebuilding the fireplace. He had been in the building business all his life, and it was his opinion that being built on loose dirt was what had caused the chimney to shift. In addition to replacing the fireplace, Mr. Pell repaired various types of damage to the house that had resulted from the shifting.

The female plaintiff testified that after Mr. Pell looked at the house she went to defendant about the problem, but John Hall in defendant's office told her that defendant had no further responsibility toward the house. He suggested that they contact the man who built the fireplace, but they did not.

Defendant presented the testimony of its vice-president, John Hall, and its secretary-treasurer, Tudor Hall. Both men testified that they had not participated in the building of the house, but that they had inspected it during and after construction, and that in their opinions the house was built to contract specifications. John Hall did not recall the female plaintiff telling him at any time that the fireplace appeared to be sinking, and he did not recall saying that they were no longer responsible for the house. The fireplace was not built on solid rock and he did not recall ever telling the male plaintiff that it was.

Morris Wilson, who had worked for defendant in constructing the house, testified that the foundation of the house was placed on "solid earth" at least 16 inches below ground level. The foundation for the fireplace was concrete with steel rods running through it. The house was built in accordance with the contract specifications.

The jury found that defendant had breached the contract and awarded plaintiffs $4750. Defendant appeals.

Holt, Haire & Bridgers, by R. Phillip Haire, for plaintiff appellees.

Rodgers, Cabler & Henson, by J. Edwin Henson, for defendant appellant.

ARNOLD, Judge.

Issues submitted to the jury in this case were as follows:

(1) Did the plaintiff and defendant enter into a building contract as alleged in complaint?

ANSWER: Yes

(2) Did the defendant breach this contract as alleged in complaint?

ANSWER: Yes

(3) What amount of damages, if any, are the plaintiffs entitled to recover of defendant?

ANSWER: $4,750

The crucial question we face on this appeal is whether the evidence, considered in the light most favorable to the plaintiffs, shows a breach of contract.

The contract includes the following specifications: "Foundation: 1. Concrete pier on concrete footings 2. Below frost line 3. Steel reinforcing rod in piers and footings." Defendant's employee who supervised the construction testified that "[t]he foundation was dug to below the frost line. The piers were made of cement blocks and were poured solid with steel rods reinforced." This testimony is uncontradicted, and it is defendant's position that this showing of compliance with the contract specifications settles the matter. Plaintiffs contend, however, that Paragraph Seven of the contract indicates that something more was required. That paragraph reads, in pertinent part: "This agreement covers construction of the above described residence on a clear and level lot. Should the slope or elevation of the lot be such as to require extra foundation block or fill dirt under the slab, pool deck, patio, drives or walks, over and above that which would be required for the normal two course foundation specified in the plans, the expense of same will be borne by the Owners."

It is undisputed that plaintiffs' house was constructed on a steep slope, and that both parties were aware of this before the contract was executed. We find that the ordinary meaning of the quoted portion of Paragraph Seven simply requires plaintiffs to pay for any extra fill dirt or foundation block that might be required during construction. Paragraph Seven does not affect the foundation specifications enumerated in the contract.

Moreover, there is neither allegation nor proof that the lack of fill or blocks in any way related to the defect in the chimney. The uncontradicted evidence shows that the problem with the chimney resulted because it was built on loose dirt. The question of whether defendant was negligent is not before us since plaintiffs did not appeal from the summary judgment entered in favor of defendant on the issue of negligence. (The possibility of tort liability for the negligent performance of a contract was discussed by this court in *Ports Authority v. Roofing Co.*, 32 N.C. App. 400, 232 S.E. 2d 846 (1977), but rejected by our Supreme Court on appeal of that decision, 294 N.C. 73, 240 S.E. 2d 345 (1978).)

This action was for breach of a contract. We conclude that no evidence was presented to show a breach of contract. Therefore, denial of defendant's motion for directed verdict was error. It is unnecessary to discuss defendant's remaining assignments of error.

Reversed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. T. C. STEPHENSON

No. 796SC430

(Filed 16 October 1979)

1. **Assault and Battery § 15.7— defense of another—instruction not required**

The trial court in a felonious assault case did not err in failing to charge the jury on the right of defendant to act in defense of another where defendant's evidence related solely to self-defense and there was no evidence to support defendant's contention that he had reasonable grounds to believe that the victim had committed a felonious assault on a third person.

2. **Assault and Battery § 16.1— felonious assault case—instruction on lesser degree not required**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court was not required to submit the lesser included offense of assault with a deadly weapon where the evidence tended to show that defendant shot the victim in the right thigh and in the left wrist; the victim's wounds bled extensively, he endured pain and suffering, and he received treatment for his wounds; the victim was out of work for a week; and the bullet is still embedded in his wrist.

3. Criminal Law § 142.3— restitution as probation condition—supporting evidence

The evidence supported the court's order requiring defendant, as a condition of his probation for assault with a deadly weapon inflicting serious injury, to pay certain amounts to the victim as restitution for medical expenses, lost wages, and clothing damage.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 19 October 1978 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 19 September 1979.

Defendant was charged in a bill of indictment, proper in form, with the offense of assault with a deadly weapon, to wit, a handgun, with the felonious intent to kill and murder one William Grant, inflicting serious injuries, not resulting in death. Defendant was convicted of the offense of assault with a deadly weapon inflicting serious injury, a violation of G.S. 14-32(b), and was sentenced as follows:

> "[I]t is ORDERED that the defendant shall serve an active sentence of SIX (6) MONTHS in the Northampton County Jail as hereinafter set forth and the remainder of the sentence shall be suspended and the defendant placed on supervised probation for FOUR and ONE-HALF (4½) YEARS under the following special conditions:
>
> . . .
>
> (2) That the defendant shall pay into the Office of the Clerk of Superior Court of Northampton County the court costs and the following amounts: $53.00 for Dr. J. A. Fleetwood, Jr.; $78.50 for Roanoke-Chowan Hospital; $19.80 for Roanoke-Chowan Radiology Associates, Inc.; $100.00 for William Grant as restitution for lost wages; and $50.00 to William Grant for damage to his clothing. The defendant further shall pay all reasonable expenses in connection with any operation that is required to remove the bullet from Mr. William Grant's wrist shall this operation take place during the period of probation. Any of the medical expenses paid by Mr. William Grant shall be reimbursed to him."

The State's evidence tended to show that on 2 April 1978, defendant, William Grant, and Helen Parker were at Katy Nazarath's Poolroom. Later, all visited the home of Mrs. Parker.

They listened to music, had a drink or two, and danced. After Mrs. Parker had left the room, defendant grabbed Grant and accused him of pulling Mrs. Parker and twisting her arm. Defendant then shot Grant in his right thigh and left wrist. Grant testified that he did not have a weapon at any time.

On rebuttal, Deputy Sumner testified that on 3 April 1978, defendant told him and Officer Lassiter that someone had stolen the pistol; minutes later, he told them the pistol was in his truck and turned the gun over to Officer Lassiter. Defendant appealed.

Attorney General Edmisten, by Associate Attorney David Gordon, for the State.

Satisky & Silverstein, by John M. Silverstein, for defendant appellant.

ERWIN, Judge.

Defendant contends that the trial court committed prejudicial error warranting a new trial in three events: (1) by failing to charge the jury on the right of defendant to act in defense of another when the evidence presented at trial warranted such instruction; (2) by failing to charge the jury on the lesser included offense of assault with a deadly weapon when the evidence presented at trial warranted such instruction; and (3) by imposing an invalid condition of probation on defendant, in that he was required to make restoration for amounts unsupported by the evidence. After careful consideration of the record, we find no prejudicial error in defendant's trial.

Defense of Another

[1] Our Supreme Court held in the case of *State v. Hornbuckle*, 265 N.C. 312, 315, 144 S.E. 2d 12, 14 (1965):

> "The law with respect to the right of a private citizen to interfere with another to prevent a felonious assault upon a third person is well stated in *S. v. Robinson*, 213 N.C. 273, 195 S.E. 824, where Winborne, J., later C.J., said: 'If the defendant * * * had a well-grounded belief that a felonious assault was about to be committed on * * * (another), he had the right and it was his duty as a private citizen to interfere to prevent the supposed crime. The principal of law is well

settled in this State. *S. v. Rutherford*, 8 N.C. 457; *S. v. Roane*, 13 N.C. 58; *S. v. Clark*, 134 N.C. 698, 47 S.E. 36.

'The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. *S. v. Merrick*, 171 N.C. 788, 88 S.E. 501; *S. v. Bost, supra* (189 N.C. 639, 127 S.E. 689); *S. v. Thornton, supra* (211 N.C. 413, 190 S.E. 758); *School Dist. v. Alamance County*, 211 N.C. 213, 189 S.E. 873.'"

The question becomes: Does the evidence in the record show that Grant committed a felonious assault on Mrs. Parker or that defendant had reasonable grounds to believe that he would commit such an assault? We do not find such evidence.

Defendant testified:

"Mr. Grant had grabbed Mrs. Parker, was trying to get her inside the bedroom. He reached up at the top of her blouse and just pulled all of it down. When he tore the blouse off, I went there and told him to come out and go on home. He cursed me and started pushing on me. He told me he wasn't going home and wasn't going to do this and that and ran his hand in his pocket and pulled out his knife. I grabbed him by his right hand and reached back in the drawer and pulled out the gun and shot him through the wrist. *I did that in self-defense to keep him from cutting me.* I shot him again because after I shot the first time he dropped his hand and didn't even know the shot was fired. He didn't act like he was paying any attention at all and he kind of eased back a little bit and said that he would fix me. Then I just shot him the second time. After I shot him the second time, he said everything was all right and he left and went out to his car." (Emphasis added.)

In the instant case, there is not any evidence to support defendant's contention that he had reasonable grounds to believe that a felonious assault had been committed on Mrs. Parker. His testimony relates solely to self-defense. The trial court was not required to instruct the jury on the issue of defense of a third person. *State v. Moses*, 17 N.C. App. 115, 193 S.E. 2d 288 (1972). We find this assignment of error to be without merit.

Lesser Included Offense

[2] Defendant contends that the trial court must declare and explain the law arising on the evidence.

The evidence shows: that defendant shot the prosecuting witness twice, once in the right thigh and once in the left wrist; that the victim's wounds bled extensively; that he endured pain and suffering; that he received treatment for his wounds; that he was out of work for a week; and that the bullet is still embedded in his wrist. We hold the instructions given were correct and proper. The necessity for instructing the jury as to an included offense of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included lesser offense was committed. The presence of such evidence is the determinative factor. In the case *sub judice,* we do not find sufficient evidence to warrant a charge on the offense of assault with a deadly weapon. *See State v. Williams,* 31 N.C. App. 111, 228 S.E. 2d 668, *dis. rev. denied,* 291 N.C. 450, 230 S.E. 2d 767 (1976); *State v. Turner,* 21 N.C. App. 608, 205 S.E. 2d 628, *appeal dismissed,* 285 N.C. 668, 207 S.E. 2d 751 (1974).

Condition of Probation

[3] G.S. 15A-1343(b)(6) provides in pertinent part:

> "(b) Appropriate Conditions.—When placing a defendant on probation, the court may, as a condition of the probation, require that during the period of probation the defendant comply with one or more of the following conditions:
>
> * * *
>
> (6) Make restitution or reparation for loss or injury resulting from the crime for which the defendant is convicted. When restitution or reparation is a condition of the sentence, the amount must be limited to that supported by the evidence."

Defendant contends there was no documentation introduced in evidence as to the loss to Grant resulting from the offense for which defendant was convicted. The statutes do not require the amount in question to be documented. The record shows that the exhibits relating to Grant's bill were marked for identification during the course of the trial. These exhibits were available for

the judge to consider in sentencing defendant. The amount in question appears to be reasonable. The record does not show that defendant objected to the entry of this portion of the judgment nor did he question the amount, but in preparing his record on appeal, he entered an exception in the record. This Court held as follows in *State v. Killian*, 37 N.C. App. 234, 238, 245 S.E. 2d 812, 815-16 (1978):

> "Together the two statutes require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence. The purpose of the provisions is rehabilitation and not additional penalty or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred. If the trial evidence does not support the amount ordered or recommended, then supporting evidence should be required in the sentencing hearing. In the case *sub judice*, there was evidence that the Anderson Dula home was 'totally ransacked', dresser drawers were broken, and a gun and hunting knife were not recovered. We find that the evidence supports the restitution amount of $500.00 as found by the court."

We find no prejudicial error in the trial of the defendant, and the judgment entered was proper in all respects.

No error.

Judges VAUGHN and HILL concur.

DAVID W. WELLS AND WIFE, NANCY WELLS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 793SC25

(Filed 16 October 1979)

Insurance § 128— fire insurance policy—vacancy of rental property—vacancy clause in policy waived

A rental house owned by plaintiffs and insured by defendant was vacant, and a violation of the sixty and ninety-day unoccupancy/vacancy clauses of the insurance policy existed on the date of the fire destroying the house, even though the house had been occupied for three months during the period of the

policy and had been used one night for a party approximately seven weeks before the fire, but defendant waived the unoccupancy/vacancy clauses where the house was unoccupied at the time of issuance of the policy and insurer's agent was so advised; occasional occupancy and consecutive occasional vacancies did not destroy the right to recover, although no notice of such vacancies was given by the insured to the insurer; the insurance agent received premiums from the insured from out of state; and when the insurer's agent visited the premises during the year that the policy was last renewed, he could find no one occupying the building.

APPEAL by defendant from *Reid, Judge.* Judgment entered 5 September 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals 20 September 1979.

Plaintiffs, who are husband and wife, purchased a dwelling near their residence for the acknowledged purpose of renting the house and insured the dwelling with the defendant in 1970 for a three-year term. The policy contained the usual sixty and, in addition, a ninety-day unoccupancy/vacancy clause. Coverage was renewed for an additional three-year term with the same defendant in 1973.

Plaintiffs presented evidence that the defendant through its agent, Mr. Barfield, was informed at the time the 1973 policy was issued that the building was vacant. Mrs. Wells, one of the plaintiffs, testified that she told Mr. Barfield that she would be joining her husband while he was out of state; that the house would be vacant for long periods of time; that she asked Mr. Barfield if her insurance would be good without anyone living in the house, seeing as how it was empty at that time; and that Mr. Barfield told her that as long as she had someone to ride by once a month and check the insured premises, the insurance would be good.

While the plaintiffs were out of state, the house had been rented. There were times when the premium notices were mailed by the defendant to the plaintiffs out of state.

In 1976, insurance on the house was again renewed by the defendant for a three-year period. Shortly thereafter, the plaintiffs moved into the house and remained there for approximately three months. Likewise, a daughter of the plaintiffs had a pajama party in the house on 13 August 1977.

The insured dwelling was destroyed by fire on 7 October 1977. Defendant pleaded as a defense violations of the sixty and

ninety-day unoccupancy/vacancy provisions of the policy. Plaintiffs contended (a) that the unoccupancy/vacancy provisions of the policy had not been violated; and, (b) if violated, which plaintiffs denied, the defendant had waived those policy provisions and was estopped from asserting the same.

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

1. On 29 May 1976, the date of renewal of the policy, was the defendant insurance company on notice that the insured dwelling house was unoccupied?

   Answer: Yes.

2. Was the tenant house unoccupied for more than ninety days immediately prior to 7 October 1977, the day of the fire?

   Answer: No.

Judgment was entered for the plaintiffs, and defendant appealed.

Nelson W. Taylor III, for plaintiff appellees.

Hamilton, Bailey & Coyne, by H. Buckmaster Coyne, Jr., for defendant appellant.

HILL, Judge.

Although 21 exceptions were taken by the defendant, only six questions were brought forward. Of these, the principal question is whether or not the defendant had waived the sixty and ninety-day unoccupancy/vacancy clauses of the policy. The jury, by its verdict, so found, and we must decide if the matter as a matter of law should have been permitted to go to the jury.

In looking to the questions of whether or not the unoccupancy vacancy clauses—both sixty and ninety days—were violated, it appears that a violation was in existence at the date of the fire.

In the case of *Firefighters Club v. Casualty Co.*, 259 N.C. 582, 131 S.E. 2d 430 (1963), it is said that "occupancy" must be construed with reference to the type of property insured and the use intended. "The term 'occupied' implies a continuing tenure for a

period of greater or less duration, and does not embrace a mere transient or trivial use. *Society of Cincinnati v. Exeter*, 92 N.H. 348, 31 A. 2d 52 (1943); *Lacy v. Green*, 84 Pa. 514 (1877). A building is occupied when it is put to a practical and substantial use for the purposes for which it is designed. See 67 C.J.S. 84." *Firefighters Club v. Casualty Co., supra*, at p. 589.

This property was purchased as a tenant house and as rental property. Thus, the use contemplated by the plaintiffs was habitation by tenants or certainly more than a mere transient or trivial use such as when the premises were used for a pajama party, or even a casual inspection of the house.

The question then arises as to whether or not the company by the information received through its agent and actions on its part waived the unoccupancy/vacancy clauses. We hold so.

Firefighters Club v. Casualty Co., supra, points out three theories among the courts as to waivers of unoccupancy/vacancy clauses:

1. Some courts hold that a vacancy known to the insurer when it issues the policy constitutes the waiver of the policy provision with respect to that vacancy. *Bledsoe v. Farm Bureau Mutual Insurance Company*, 341 S.W. 2d 626 (1960).

2. A few cases hold that a waiver created by knowledge of an existing vacancy is not limited to that vacancy, but to any subsequent vacancy which may occur during the life of the policy. See *McKinney v. Providence Washington Insurance Company*, 144 W.V. 559, 109 S.E. 2d 480 (1959).

3. Other courts, recognizing the recent change in policy provisions which merely suspend the insurance during a non-permitted vacancy, hold that a vacancy existing at the time that the insurance issues is not a waiver of the policy provisions. The insured has such time as may be fixed by the policy and endorsements in which to occupy the property. *Conley v. Queen Insurance Company*, 76 S.W. 2d 906, 256 Ky. 602, 96 A.L.R. 1255 (1934).

The *Conley* case goes on to say that where the policy is issued on vacant property with the expectation that the property is to remain vacant, the clause against vacancy is deemed waived.

In the instant case, the agent clearly had knowledge of the vacancy of the property prior to issuance of the policy in 1973. There is no question but that the knowledge of the agent is imputed to the company and is a waiver of the vacancy or unoccupancy provision at that time.

> If the insurer or its agent has knowledge at the time the contract of insurance is effected that the premises are vacant or unoccupied, the issuance of the policy waives any provisions or conditions as to the vacancy or unoccupancy. 8 Couch on Insurance 2d § 37:876. (Citing many authorities.)

Admittedly, since the issuance of the policy in 1973, the premises were occupied from time to time and unoccupied at other times. Does this fact waive or revoke the waiver? The law seems to be that where the property was insured at the time it was vacant, occasional occupancy and consecutive occasional vacancies do not destroy the right to recover, although no notice of such vacancies was given by the insured to the insurer. *Maxwell v. York Mutual Fire Insurance Co.*, 114 Me. 170, 95 A. 877 (1915).

Likewise, "Accepting unearned premiums with the knowledge of a breach of a vacancy clause waives the breach." 8 Couch on Insurance 2d § 37:877. Such acceptance and retention of the premiums with the knowledge that the policy was issued at the time that the premises were vacant is waiver by conduct. *Continental Insurance Company v. Ruckman*, 127 Ill. 364, 20 N.E. 77, 11 Am. St. Rep. 121 (1889).

In the instant case, the insurance agent received premiums from the insured from out of the state. Furthermore, when the insurer's agent, Mr. Barfield, visited the premises in 1976, he could find no one occupying the building.

The agent was advised that the building was vacant in 1973, and there is no evidence that the company was ever informed of any change in occupancy thereafter. As a matter of fact, in May 1976 when the policy was renewed, the cottage was vacant. Having been put on notice concerning the vacancy in 1973, the burden then would remain with the company to ascertain the status of the property if it desired not to renew such policy. See *Stuart v. Insurance Company*, 18 N.C. App. 518, 197 S.E. 2d 250 (1973). Fur-

thermore, the *Stuart* case indicates that if the insurance company had accepted premiums (as is the case here) after notice of non-occupancy, the company would have been estopped to deny coverage. See also, *Williams v. Insurance Company,* 209 N.C. 765, 185 S.E. 21 (1936). The jury in the light of conflicting testimony between the agent Barfield and Mrs. Wells decided the same in favor of the plaintiffs Wells, and the defendant is bound by the rules of law set out above.

We have examined the other objections and exceptions brought forth by the appellants in their brief and have concluded that they are not material to the disposition of this case. Therefore, in the opinion of this Court, the judgment entered in the trial court is without error.

No error.

Judges VAUGHN and ERWIN concur.

IN THE MATTER OF ROBERT RANDOLPH CUSSON

No. 7814DC1126

(Filed 16 October 1979)

1. Infants § 4; Parent and Child § 6.3— neglected child—sufficiency of evidence

In a proceeding instituted by a county department of social services to obtain custody of a child from its mother, the evidence was sufficient to support a finding that the child was a "neglected child" within the meaning of G.S. 7A-278(4), *i.e.*, that he did not receive proper care or discipline from his mother, or lived in an environment injurious to his welfare, or was not provided necessary medical care, where it tended to show that the mother would not let a caseworker come to her home; her home was cluttered and dirty; she said she sometimes carried a knife or gun; she sometimes kept the child from therapeutic daycare, saying he was ill; she permitted the child to stay up so late that he was too tired to go to daycare in the morning; she talked about being involved with the CIA and Mafia in front of the child and often called the police with unfounded complaints; she cancelled many appointments with her psychiatric therapist; the child was emotionally disturbed; and most of the child's problems were the result of his environment.

2. Parent and Child § 6.3— proceeding to determine if child neglected—guardian ad litem—continuance for tests

In a proceeding instituted by a county department of social services to obtain custody of a child from its mother on the ground that the child is a "neglected" child, the trial court did not err in appointing a guardian ad litem for the child after G.S. 7A-283 became effective or in allowing a continuance of the hearing for the purpose of obtaining additional tests of the child and his relationship with his mother.

3. Parent and Child § 6— overcoming presumption of parent's right to custody

The presumption that parents have a natural and legal right to the custody, control, companionship, and upbringing of their children is overcome when the evidence shows by convincing proof that the best interest of the child would be served by removing it from its parents.

APPEAL by respondent from *Read, Judge*. Order entered 28 June 1978 in District Court, Durham County. Heard in the Court of Appeals 30 August 1979.

On 31 October 1975, District Court Judge Read entered an order awarding the custody of Robert Randolph Cusson, aged two, to his mother, Susan Zehmer Cusson. This order also required that a plan of evaluation, counselling and treatment be established and carried out for the child and his mother. The medical doctors, psychologists, psychiatrists and counsellors involved in the program were to make periodic reports in writing to the court. The Durham County Department of Social Services was ordered to monitor the care and development of the child, perform necessary inspections, investigations, supervision and counselling, and make reports to the court every three months. The cause was retained for further orders.

The Department of Social Services filed a petition for custody of the child on 31 May 1977, alleging the child was neglected and endangered because of the psychotic state of his mother. The court issued an immediate custody order placing Robert with the Department of Social Services pending a hearing.

A hearing on the petition was commenced on 3 June 1977 and at the close of petitioner's evidence, respondent moved to dismiss the proceeding and that she be granted custody of Robert. This was denied and after all parties presented evidence, an order was entered 9 June 1977 continuing the matter until 16 June 1977 and ordering that Ronald Y. Cusson, Robert's father, be made a party.

Custody was continued with the Department of Social Services. After further hearing commencing on 16 June 1977, the court entered an ex parte order 27 September 1977 appointing John Woodson, attorney, as guardian ad litem for Robert pursuant to N.C.G.S. 7A-283.

On 4 November 1977 Woodson moved for additional testing of Robert to provide information concerning the present relationships between Robert and his mother and his foster parent. This motion was allowed over Susan Cusson's objection and custody was continued with the Department of Social Services.

Hearings were resumed 9 March 1978 and at the conclusion the court denied Susan Cusson's motion for dismissal of the proceeding and for custody of her child and entered an order finding facts, making conclusions of law and continuing custody with the Department of Social Services of Durham County. Respondent, Susan Cusson, appeals.

Thomas Russell Odom for petitioner appellee.

North Central Legal Assistance Program, by Charles A. Bentley, Jr., for respondent appellant.

MARTIN (Harry C.), Judge.

[1] Respondent first contends the court erred in denying her motion to dismiss the proceeding at the close of petitioner's evidence at the 3 June 1977 hearing. The present controversy was commenced by the filing of a juvenile petition pursuant to N.C.G.S. 7A-281. A hearing on such petition shall be a "simple judicial process" to determine whether the conditions alleged exist and to make an appropriate disposition to achieve the purposes of the statute. N.C. Gen. Stat. 7A-285.

In testing the sufficiency of the evidence at the close of petitioner's evidence, the standard is whether there is substantial evidence to support the allegations of the petition, viewing the evidence in the light most favorable to petitioner, and giving petitioner the benefit of every reasonable inference to be drawn from the evidence. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969); *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968).

Upon review of the evidence in the light of this standard, it shows: Mrs. Cusson would not let the caseworker come to her home; her home was cluttered and dirty; she said she sometimes carried a gun or knife; she sometimes kept Robert from therapeutic daycare, saying he was ill; she lets Robert stay up so late he is too tired to go to daycare in the morning; she talks about being involved with the CIA and Mafia in front of the child. Dr. Frothingham, professor of pediatrics at Duke Medical Center, testified Robert was perhaps emotionally unhealthy; Mrs. Cusson's behavior was bizarre, she talked in many different foreign languages, she came to his office dressed in a "romper suit." She cancelled many appointments with her psychiatric therapist; she often called the police about unfounded complaints. In the opinion of Dr. Anderson, a child psychologist, Robert has not developed emotionally beyond the first two years and is a very disturbed child; he needs a structured, consistent environment. Dr. Harris, a child psychiatrist, testified ninety percent of Robert's problems were the result of his environment and that he needed to be removed from his mother's custody on a permanent basis.

We hold this evidence was sufficient to overcome the motion to dismiss. At that stage of the trial, the evidence would support a finding that Robert was a "neglected child" within the meaning of N.C.G.S. 7A-278(4), *i.e.*, that he did not receive proper care or discipline from his mother, or lived in an environment injurious to his welfare, or was not provided necessary medical care.

[2] The trial court did not err in appointing the guardian ad litem for Robert or in allowing a continuance of the hearing for the purpose of obtaining additional tests of Robert and his relationship with his mother. The statute requires the court to appoint a guardian ad litem for the child where it is alleged he is a "neglected child." N.C. Gen. Stat. 7A-283. Although this provision of the law was passed effective 26 September 1977, after this proceeding was instituted, the order was entered on 27 September 1977 and was clearly within the authority of the court. In order for the guardian ad litem to carry out his duties under the statute, it was necessary that the court continue the hearing. The granting of the guardian ad litem's motion for additional tests was within the sound discretion of the court. N.C. Gen. Stat. 7A-286(6). After all, the court was attempting to determine what

is in the best interest of the child. It is the duty of the court to give each child before it such attention, control and oversight as is in the best interest of the child and the state. *In re Eldridge*, 9 N.C. App. 723, 177 S.E. 2d 313 (1970).

[3] Last, respondent argues the court erred in concluding she was not a fit and proper person to have custody of her son. In North Carolina the law recognizes a presumption that parents have a natural and legal right to the custody, control, companionship and bringing up of their children. *Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975); *In re McMillan*, 30 N.C. App. 235, 226 S.E. 2d 693 (1976). *See Quilloin v. Walcott*, 434 U.S. 246, 54 L.Ed. 2d 511 (1978). This presumption is not conclusive and absolute. *Tucker v. Tucker, supra*; *In re McMillan, supra*. Where the evidence shows by convincing proof that the best interest of the child would be served by removing it from the custody of its parents, the presumption is overcome. *Thomas v. Pickard*, 18 N.C. App. 1, 195 S.E. 2d 339 (1973). The North Carolina Supreme Court in 1895 adopted this writing of Chancellor Kent:

> "The father, and on his death, the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But courts of justice may in their sound discretion and when the morals or safety of interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere."

Latham v. Ellis, 116 N.C. 30, 33, 20 S.E. 1012, 1013 (1895). We hold the evidence in this case rises to the standards required to remove the child from the custody of respondent. *Tucker v. Tucker, supra*; *Latham v. Ellis, supra*; *Thomas v. Pickard, supra*.

The welfare and best interest of the child is always to be treated as the paramount consideration, to which even parental love must yield. *Wilson v. Wilson*, 269 N.C. 676, 153 S.E. 2d 349 (1967). Although the evidence is in part conflicting, we find there is substantial, convincing evidence to support the court's findings of fact and conclusions of law. The court, guided by the "polar star" of the best interest and welfare of Robert, ordered, in its discretion, that he be removed from the custody of respondent. That action by the patient and able trial judge is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

SYBIL McGINNIS SMITH v. HAROLD WAYNE SMITH

No. 7918DC101

(Filed 16 October 1979)

Appeal and Error § 14— notice of appeal to opposing party—timeliness

Rule 26(b) of the Rules of Appellate Procedure which prescribes the proper procedure for service of notice of appeal should be interpreted as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of filing; therefore, service of notice of appeal on plaintiff's counsel was timely where it was made by depositing the notice in the mail on the same day, though at least two hours later, that notice was filed with the clerk of court.

APPEAL by defendant from *Alexander (Elreta M.), Judge.* Order entered 30 August 1978 dismissing defendant's appeal from order of 11 August 1978 entered in District Court, GUILFORD County. Heard in the Court of Appeals 17 September 1979.

This is an action for custody and support of a minor child. On 15 July 1976 plaintiff filed an action in Superior Court in Guilford County against defendant seeking custody of the parties' minor child. By consent order dated 4 August 1976 custody of the minor child was awarded to plaintiff-mother. Two further orders were entered on 29 July 1977 and 5 August 1977 making minor changes in the visitation privileges originally granted. On 27 July 1978 defendant filed a motion in the cause in district court seeking a change in custody or, in the alternative, increased visitation privileges. By order dated 11 August 1978 the district court granted those privileges and increased child support payments, but denied the motion to change custody. On 21 August 1978 defendant filed a written notice of appeal from the order of 11 August along with a certificate of service on plaintiff's attorney. On 23 August 1978 plaintiff filed a motion to dismiss the appeal, alleging a defect in service of defendant's notice of appeal. A supporting affidavit signed by plaintiff's attorney stated that he re-

ceived the Notice of Appeal on 23 August 1978 in an envelope bearing a postmark of 22 August 1978. On 30 August 1978, after a hearing on plaintiff's motion to dismiss the appeal for failure to comply with the provisions of Rules 3 and 26 of the North Carolina Rules of Appellate Procedure, the district court judge entered an order dismissing the appeal. Defendant appeals from this order.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Joseph W. Moss for plaintiff appellee.

Henderson & Jennings, by Neill A. Jennings, Jr. for defendant appellant.

PARKER, Judge.

Defendant assigns error to the conclusion of the trial court that he failed to comply with the provisions of Rule 3 and Rule 26 of the Rules of Appellate Procedure. Under App. R. 3 and G.S. 1-279, appeal from a judgment or order in a civil action must be taken within ten days from its entry. The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both G.S. 1-279 and the Rules of Appellate Procedure are met, the appeal must be dismissed. *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E. 2d 46 (1976). Rule 3(a) of the Rules of Appellate Procedure provides in pertinent part:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by . . .
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within [ten days after the entry of the judgment or order].

App. R. 26 prescribes the proper procedure for service of the notice of appeal:

> (b) *Service of All Papers Required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, *at or before the time of filing,* be served on all other parties to the appeal. (emphasis added).

> (c) *Manner of Service* . . . Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address . . . . Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

In its findings of fact, the trial court found that notice of appeal was filed in the Office of the Clerk of Superior Court of Guilford County on 21 August 1978 at 3:58 p.m. and that defendant's attorney placed a properly addressed envelope containing the Notice of Appeal and Certificate of Service in an official depository under the exclusive care and custody of the U.S. Post Office department at some time after 6:00 p.m. on 21 August 1978. Based on this finding of fact, the trial court concluded that defendant had failed to comply with the provisions of App. R. 3 and App. R. 26 because service of notice of appeal on plaintiff's counsel was not made "at or before the time of filing" of the Notice of Appeal within the meaning of those words as they appear in App. R. 26(b). We hold that this conclusion was erroneous. Service upon plaintiff's counsel on 21 August was complete upon deposit in the mail. Although App. R. 26(b) requires that copies of papers be served upon the opposing party *at or before* the time of filing, the phrase "at or before" must be given a logical construction. If the word "at" is strictly construed to mean "simultaneously with," it is mere surplusage in the context of App. R. 26, since service of papers simultaneously with filing of notice with the clerk of the court would, under all normal circumstances, be physically impossible. A more reasonable construction of the word "at," as that word appears in the phrase "at or before the time of filing" in App. R. 26(b), and one which permits the word to attain some significance rather than to be merely surplusage, would be to construe it to mean "on the same day as." The same result obtains if attention is focused on the word "time" in the phrase "time of filing" as that phrase appears in App. R. 26(b). Throughout the N.C. Rules of Appellate Procedure wherever time periods are specified for the doing of some act, the time is stated in terms of days, never in fractions of days. We see no compelling reason, either in the language or purpose of App. R. 26(b), why that Rule should be interpreted to require, contrary to all other Rules, that

a fraction of a day be considered. A more reasonable construction of the Rule, and one which makes it consistent with the other Rules of Appellate Procedure, is to interpret Rule 26(b) as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of filing. We adopt that construction. So construing the rule, we hold that service of the notice of appeal in the present case, which was accomplished on the same day the notice was filed in the clerk's office, was timely.

The order appealed from is

Reversed.

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

STATE OF NORTH CAROLINA v. JIMMY RAY O'BRIANT

No. 7810SC552

(Filed 16 October 1979)

1. **Assault and Battery § 4— two methods of assault**

In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by the "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed.

2. **Assault and Battery § 14.2— assault with deadly weapon—"show of violence" rule**

The State's evidence was sufficient to sustain a verdict of guilty of assault with a deadly weapon under the "show of violence" rule where it tended to show that defendant, armed with a loaded shotgun, went searching for his estranged wife with the avowed intent to "blow her head off"; when he saw her walking along a public road, he stopped his car, picked up the shotgun, and thrust the barrel of the gun out of the car window; the shotgun was fired; and defendant's wife fled across the road to seek the shelter of a nearby store, it being immaterial that the shotgun may never have been actually pointed at defendant's wife, that the pellets may not have traveled in her direction or whether the gun was fired at all.

State v. O'Briant

APPEAL by defendant from *Preston, Judge.* Judgment entered 23 January 1978. Heard in the Court of Appeals 17 October 1978.

Defendant was indicted for feloniously assaulting Nina O'Briant "with a certain deadly weapon, to wit: a double-barrel shot gun with the felonious intent to kill and murder the said Nina O'Briant inflicting serious injury." At trial the State elected to proceed only on a charge of assault with a deadly weapon with intent to kill. Defendant pled not guilty.

The State's evidence tended to show: Defendant and Nina O'Briant were formerly married but had been separated about three and one-half years. Defendant lived in Angier, and Nina O'Briant lived in Raleigh. On the afternoon of 11 June 1977, defendant appeared at the doorway of Nina O'Briant's home carrying a double-barrel shot gun and wanting to know where she was. When an occupant of the house told him that he had no idea where Nina O'Briant was, defendant said "something about papers, something about child support," and said "he was going to find Mrs. O'Briant and blow her head off." Defendant placed the shotgun in the back seat of a green Pontiac and drove away. He was accompanied by a Miss Frances Dunn, who was seated next to him in the car.

Nina O'Briant testified that on the afternoon of 11 June 1977 she was at the corner of Winton and New Hope Church Roads, a few blocks from her home in Raleigh. As she walked on the left-hand side of the road, a car came up from behind and stopped on the right-hand side of the road about thirty-five feet from her. She heard someone scream and turned around to see who or what it was. She saw a green Pontiac, and as she stepped toward it she saw a gun barrel come out of the window on the left hand or driver's side of the car, being the side closest to her. She recognized the gun as a shotgun. She heard someone scream, "Nina Lou, run," and saw Miss Dunn "with her head out the left-hand side of the car window." She turned to run and "had taken maybe one step" when she heard a shot. No pellets struck her, and she did not see in what direction the gun was fired. She ran across the street into a grocery store and asked them to call the police. She testified that when she heard the gun, she was terrified.

R. H. Westbrook, a passing motorist, testified for the State that he heard the shot and then "saw Miss O'Briant run across the road just as fast as anybody I seen run in a long time." He also testified that he saw a cloud of dust on the right-hand side of the road, being the same side of the road that the Pontiac was sitting on; that he did a lot of hunting and so knew what the shot pattern made by a shotgun looked like; and that that is what the dust pattern looked like to him.

Defendant did not testify. Frances Dunn testified for the defendant as follows:

> I was with the defendant on the 11th of June, 1977. On that day I saw Nina O'Briant. We were coming down New Hope Church Road across the train track by Corning Glass and he stopped the car about twenty feet from the train track. I wondered why he stopped the car and I looked down and I saw Miss O'Briant going down the street, on the left side of the highway. He reached down to pick up the gun. I was in the front seat and when he did, I grabbed the gun away from him and screamed for him to leave the gun alone and was up on top trying to get the gun to put it back in the backseat, and when I did the gun went off in the car, knocked me back against the seat of the car and I had a bruise up under my chin. I grabbed the gun, then he grabbed it. We were sort of struggling for it. I was laying on the gun when the gun went off. I was up in his lap.
>
> . . . The gun was mostly on Mr. O'Briant and on the window. It shot out the window. If it hadn't, it probably would have killed me or him. It was pointed out the driver's side of the window. We had been at Nina's house earlier and he went in the house with the shotgun. He had gone to see his son. He was mad about some letter from the court. He came back outside in just a few minutes. . . . I never heard him say that he was going to blow Nina's brains out. This is the first time I have heard about that and I was standing there . . . . I saw Nina on the street after the gun went off. I don't know if she was running. We were a hundred and fifty yards from where she was walking at the time the gun discharged. I never hollered at her to run . . . . The gun went off and here I was, knocked back against the car. We were not closer than a hundred and fifty yards. I can't say that I pulled the trig-

ger. I might have. We were both struggling for it. I had my hands down there where the trigger was and when you are struggling with something, you don't know. I might have shot it. I don't know.

The jury found defendant guilty of assault with a deadly weapon. From judgment on the verdict sentencing him to prison for a term of 12 months, defendant appealed.

Attorney General Edmisten by Associate Attorney Jane Rankin Thompson for the State.

Purser and Barrett by George R. Barrett for defendant appellant.

PARKER, Judge.

Appellant's sole contention is that the court erred in entering judgment against him because as a matter of law the evidence was insufficient to sustain the verdict. We do not agree.

At the outset we note that the appellant is entitled to present for appellate review the question of whether the evidence was sufficient as a matter of law to sustain the verdict even though at trial he failed to renew at the close of all of the evidence the motion for nonsuit which he made at the close of the State's evidence. G.S. 15A-1446(d)(5), which replaced former G.S. 15-173.1, expressly so provides, and the contention to the contrary in the State's brief is not sustained.

[1] Viewing the evidence in the light most favorable to the State, we find it sufficient to sustain the verdict. In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by the "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967); *State v. Lassiter*, 18 N.C. App. 208, 196 S.E. 2d 592 (1973); *State v. Hill*, 6 N.C. App. 365, 170 S.E. 2d 99 (1969). Thus, in North Carolina, there are two rules, either or both of which may be applied in prosecuting a person accused of an assault. The first places em-

phasis on the intent or state of mind of the person accused. Under the second, which is sometimes referred to as the "show of violence" rule, emphasis is shifted to a consideration of the apprehension of the person assailed and the reasonableness of that apprehension. *State v. Roberts, supra; See* Note, *"Show of Violence" Rule in North Carolina,* 36 N.C.L. Rev. 198 (1958). While the evidence in the present case would probably support a jury verdict finding defendant guilty of assault with a deadly weapon no matter which of the above rules is applied, *see State v. Sawyer,* 29 N.C. App. 505, 225 S.E. 2d 328 (1976), we find it unnecessary so to decide. In our opinion the evidence was clearly sufficient under the second, or "show of violence," rule.

[2] The evidence in this case, when viewed in the light most favorable to the State, would support a jury finding that defendant, armed with a loaded shotgun, went searching for his estranged wife with the avowed intent to "blow her head off;" while so engaged he came upon her while she was walking along a public road; on seeing her, he stopped the automobile in which he was driving, picked up the shotgun, and thrust the barrel of the gun out of the car window; the shotgun was fired, and defendant's wife, in reasonable apprehension for her safety, fled across the road to seek the shelter of a nearby store. On these facts, defendant would be guilty of committing an assault with a deadly weapon, a misdemeanor under G.S. 14-33(b)(1) which is a lesser included offense of the felony charged in the bill of indictment. It is immaterial that the shotgun may never have been actually pointed at defendant's wife or that when discharged the pellets may not have traveled in her direction. It is even immaterial whether the gun was fired at all. Under the circumstances disclosed by the evidence in this case, the assault with use of a deadly weapon was complete when defendant thrust the barrel of the shotgun out of the car window. On this evidence a rational finder of the facts could reasonably have found defendant guilty beyond a reasonable doubt of the offense of which the jury found him guilty. *See, Jackson v. Virginia,* --- U.S. ---, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979).

Appellant did not except to any portion of the court's charge to the jury. As above noted, his sole contention is that the evidence was insufficient to support the verdict.

We find

No error.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. THOMAS ALLEN HARRIS

No. 7917SC450

(Filed 16 October 1979)

1. **Searches and Seizures § 12— investigatory stop—probable cause not required**

An officer did not need "probable cause" to make an investigatory stop of defendant to question him about a shooting, and the stop was lawful where it was based on reasonable suspicion of the commission of a crime.

2. **Criminal Law § 84; Searches and Seizures § 12— investigatory stop outside officer's jurisdiction—admissibility of seized evidence**

Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion of a pistol seized during the stop. Furthermore, the stop was not a substantial violation of G.S. Ch. 15A which would require exclusion of the pistol. G.S. 15A-974.

3. **Criminal Law § 75.6— sufficiency of constitutional warnings**

Warnings given to defendant, including a warning that "if you answer any questions now, you may stop at anytime and ask for a lawyer," substantially complied with the requirements of the *Miranda* decision.

4. **Criminal Law § 89.3— testimony that statements made to others—foundation for testimony by others—corroboration**

A witness's testimony that he had told two deputies and the prosecutor that defendant had approached him about killing the deceased was competent either as laying a foundation for the testimony of the deputies or possibly as corroboration even though he had not yet been impeached.

5. **Homicide § 21.7— second degree murder—sufficiency of evidence**

The State's evidence was sufficient for the jury in a second degree murder prosecution where it tended to show that defendant and deceased were seen together getting into the same car some five days before the badly decomposed body of deceased was found; death was caused by a gunshot wound in the back; the fatal bullet was fired from a pistol found in defendant's possession; and defendant had approached a witness about killing deceased because of something deceased had done to defendant's girl friend.

6. Homicide § 26— second degree murder—instructions on intent

The trial court's instructions adequately explained to the jury that while an intent to kill is not a necessary element of second degree murder, an intentional act which shows malice and proximate cause of death is an essential part of the crime.

7. Homicide § 28.1— self-defense—misadventure—instructions not required

The evidence in a second degree murder prosecution did not require the court to instruct on self-defense or misadventure.

APPEAL by defendant from *Albright, Judge.* Judgment entered 2 February 1979 in Superior Court, STOKES County. Heard in the Court of Appeals 20 September 1979.

Defendant was charged with the second degree murder of Donnie Wayne Martin. Defendant and deceased were seen together getting into the same car on 18 July 1978. The badly decomposed body of deceased was found five days later. The pathologist who performed an autopsy the next day was of the opinion that death occurred as many as ten days but at least two days before the body was discovered. Death was caused by a gunshot wound in the back. The fatal bullet was recovered from the body. Opinion evidence was presented that the bullet was fired from a pistol found in the possession of defendant on 30 July. The pistol was seized when a Stokes County deputy sheriff stopped defendant to question him about the shooting. It was observed by the deputy on the front seat of defendant's car. Charles Bullins testified that defendant approached him about killing deceased for something he had done to defendant's girl friend.

Defendant took the stand in his own behalf and denied killing the deceased or asking Charles Bullins to help him kill the deceased. Defendant testified that Charles Bullins approached him on 28 June, borrowed his pistol and did not return it until about a month later. Defendant produced several witnesses who testified to the effect that Bullins was in possession of the pistol during the time period when it was used to kill deceased. The State offered rebuttal evidence to the effect that defendant had approached another person to get him to testify he saw defendant lend the pistol to Charles Bullins on 28 June even though he was not present when the gun was allegedly lent. Defendant appeals from his conviction for second degree murder.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

Ronald M. Price, for defendant appellant.

VAUGHN, Judge.

Defendant presents ten questions for our consideration, the first of which is alleged error in the denial of his motion to suppress the evidence of the pistol. The trial judge conducted a *voir dire* and made findings summarized as follows. Stokes County Deputy Sheriff Ray V. Collins was informed by the local assistant district attorney that defendant had been implicated in the murder of deceased by an informer. Deputy Collins had not been given the name of the informer but was given defendant's name, description, address and make of car along with other details including the fact defendant was carrying the weapon used to kill deceased. Deputy Collins began verifying this information. In conducting this investigation, he saw defendant driving an automobile just across the Stokes County line in Forsyth. Using his blue light, he stopped defendant and asked him to produce his license and to step out of the car. On being asked for the registration papers, defendant went to the passenger side door. Deputy Collins followed and observed for the first time the butt of a pistol on the seat in plain view. He stepped between defendant and the car and took possession of the pistol. He advised that he was investigating defendant's involvement in the murder of deceased and further advised him of his *Miranda* rights. Deputy Collins asked if he could take the pistol and have it examined in the SBI laboratory and defendant consented. A State Highway Patrolman witnessed the consent of defendant to the surrender of the pistol. Deputy Collins took it and defendant was then allowed to proceed on his way. Defendant testified on *voir dire* that he surrendered the gun under threat of deadly force and prosecutions for carrying a concealed weapon and motor vehicle registration violations. However, the State's evidence rebutted, this and the trial judge found defendant was not threatened, coerced nor intimidated neither by any show of violence nor threat of arrest. These findings of fact are supported by the evidence in the record and are, therefore, conclusive on appeal. *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979).

[1, 2] Defendant argues that this event constituted a violation of his constitutional rights and an unlawful arrest. He maintains that Deputy Collins lacked probable cause to arrest him because of insufficient reliability of the informant upon whose information the stop was made and that Deputy Collins was outside his territorial jurisdiction in violation of G.S. 15A-402(b). This encounter was an investigatory stop based on reasonable suspicion of the commission of a crime. To make the stop, Deputy Collins did not need "probable cause" which is a stricter standard than is required in such investigatory situations. *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3210, 49 L.Ed. 2d 1210 (1976). Defendant contends Deputy Collins acted illegally because G.S. 15A-402(b) limits his jurisdiction to Stokes County and not Forsyth County where he made the stop. The statute speaks in terms of "arrest" and, without reaching the question of whether these events blossomed from an investigatory stop into an "arrest" in terms of the statute, we note that the stop was constitutional under *Adams v. Williams*, *supra*. Even if an "arrest" in terms of the statute, this is not a "substantial" violation of Chapter 15A which would require exclusion of the evidence. G.S. 15A-974; *see also State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706, *reh. den.*, 285 N.C. 597 (1973); *State v. Matthews*, 40 N.C. App. 41, 251 S.E. 2d 897 (1979); *State v. Mangum*, 30 N.C. App. 311, 226 S.E. 2d 852 (1976).

The deputy's taking possession of the gun was permissible and justified. As he followed defendant to the passenger's side of the car and first observed the gun, it came into plain view inadvertently as he continued his investigation of defendant's involvement in the murder. Deputy Collins had a right to be where he was doing what he was doing and did have reason to believe the pistol was the murder weapon. He also had reason to protect his own safety. Thus, his observance and initial taking of the gun was lawful. *Adams v. Williams, supra; Terry v. Ohio, supra.* His taking of the gun for further investigation was with defendant's uncoerced consent. *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. den.*, 404 U.S. 840, 92 S.Ct. 133, 30 L.Ed. 2d 74 (1971).

Defendant assigns error in the scope of the State's cross-examination of him in the *voir dire* hearing on the motion to

suppress. He contends the cross-examination was improperly extended into matters irrelevant to the issue of suppression of evidence. A presiding trial judge has wide discretion in controlling the scope of cross-examination and we see no abuse of that discretion in this case. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). Further, it is presumed that a judge hearing a matter without a jury disregards any improper evidence unless it affirmatively appears, which is not shown here, that he was influenced by the evidence. *State v. Sneed*, 14 N.C. App. 468, 188 S.E. 2d 537 (1972).

[3] In his third assignment of error, defendant argues that the trial judge erroneously found that he had waived his constitutional rights. Deputy Collins read defendant his rights after he observed and took into his possession what he thought to be the murder weapon. Defendant signed a written waiver of his rights after they were explained to him. The trial court's finding that defendant affirmatively and knowingly waived his rights is supported by competent evidence in the record and is therefore conclusive on appeal. *State v. Stinson, supra.* Defendant contends that the wording of the waiver was wrong in part where it provided:

> "You can talk with a lawyer for advice and have a lawyer present before and during this or any other interview. If you cannot afford a lawyer, one can be appointed by the State of North Carolina to represent and advise you. If you answer any questions now, you may stop at anytime and ask for a lawyer."

These words convey the substance and required information of the *Miranda* warning on these rights. This substantial conformity with *Miranda* is sufficient. *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971).

[4] As the prosecutor was closing his direct examination of Charles Bullins who testified about a proposition defendant had made to him to kill deceased, he questioned Bullins about when and to whom he first related this information. Bullins answered that he had told the same story to two deputies and the prosecutor. Defendant maintains this was error. No objection was raised at trial and any possible error was thereby waived. Moreover, there was no error in admitting the testimony, either

as laying a foundation for the testimony of the deputies he told of the murder solicitation or possibly as corroboration even though he had not yet been impeached. *State v. Carter*, 293 N.C. 532, 238 S.E. 2d 493 (1977).

Defendant has grouped all other objections to evidentiary admissions under a separate assignment of error without any argument or citation of authority. This assignment is, therefore, overruled.

[5] Defendant's fifth assignment of error brings to us the denial of his motions for dismissal at the close of State's evidence and at the close of all the evidence. Considered in a light most favorable to the State, the evidence was sufficient to take the case to the jury. *See, e.g., State v. Williams*, 269 N.C. 376, 152 S.E. 2d 478 (1967).

[6] Defendant's last four arguments deal with the trial judge's instruction to the jury. Two deal with the manner in which the trial judge instructed on the law of second degree murder. Defendant contends error in the instruction on the type of intent required for the crime. When the charge is considered as a whole and those portions attacked by defendant are considered contextually, the jury instruction was without error. The instruction adequately explains the law on second degree murder to the effect that while intent to kill is not a necessary element of second degree murder, an intentional act which shows malice and proximate cause of death is an essential part of the crime. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

Defendant excepts to the trial judge's instruction on the presumptions arising from the intentional infliction of a wound proximately causing death. The very words objected to by defendant were recently approved by the Supreme Court on the same argument and similar facts in *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979).

[7] In his final assignment of error, defendant contends the trial judge erred in giving no instruction concerning the effect of self-defense or misadventure. To be entitled to this instruction, there must be some evidence that these matters are part of the case. *State v. Brooks*, 37 N.C. App. 206, 245 S.E. 2d 564 (1978). No such

evidence was presented by this case. The burden was properly placed on the State to prove beyond a reasonable doubt all the elements of the crime and negate any defenses offered by defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975).

No error.

Judges ERWIN and HILL concur.

W. P. COKER, D/B/A COKER HEATING AND AIR CONDITIONING COMPANY v. TERRY E. STEVENS AND WIFE, MARTHA C. STEVENS

No. 7828DC1134

(Filed 16 October 1979)

Rules of Civil Procedure §§ 8.1, 15.2; Laborers' and Materialmen's Liens § 8.1—theory of case—change by court on own motion—no notice—pleadings not amended by consent—action to enforce lien—no finding of debt

In an action to recover the cost of a furnace installed in defendants' home by plaintiff where the case proceeded to trial on the theory that a general contractor was acting as agent for defendants and that plaintiff installed the furnace in question in defendants' home by agreement with their agent, the trial court erred in changing the theory of the case on its own motion to that of an alleged lien on funds in possession of defendants due to the general contractor after notice of a debt owed to plaintiff, one of the general contractor's subcontractors, who had not been paid, since defendants were not given notice of this change of theory and did not litigate it by consent; furthermore, the case must be reversed, even under the new theory, since the court made no finding that there was a debt owed by the general contractor to plaintiff subcontractor.

APPEAL by defendants from *Styles, Judge*. Judgment entered 18 August 1978 in District Court, BUNCOMBE County. Heard in the Court of Appeals 31 August 1979.

Plaintiff seeks to recover $950, the contract price for the cost of a furnace to be installed in defendants' newly constructed home. The complaint alleged that plaintiff contracted with one O. L. Walker, who was acting as agent for defendants, and that plaintiff, after installing the furnace in accordance with the provisions of the contract, had demanded payment from defendants but had not been paid.

Defendants answered, denying that O. L. Walker had ever acted as their agent or that they had agreed to pay any sum to plaintiff. Defendants alleged that O. L. Walker was an independent contractor who had no real or apparent authority to act as agent for defendants.

Defendants submitted interrogatories to plaintiff who answered asserting that on 15 November 1976, at O. L. Walker's request, he came to the job site where defendants' house was being built, that Stevens personally agreed on the contract price of $950, and that "at his direction Walker authorized the contract."

Plaintiff and defendants filed motions for summary judgment and affidavits in support thereof. Defendant Terry E. Stevens' affidavit asserted, as grounds for summary judgment, that he had employed O. L. Walker as general contractor; that it was in such capacity that Walker had dealt with plaintiff; and that Stevens had never made any agreement with plaintiff regarding installation of or payment for the furnace, but had indicated that the price quoted by plaintiff to Walker seemed fair. Prior to trial, defendants moved to dismiss the action or to grant summary judgment on behalf of defendant Martha Stevens on the ground that nothing in the pleadings, responses to interrogatories, or affidavits indicated that she had authorized or ratified any contract with plaintiff. Defendants also moved for summary judgment on the grounds that the uncontradicted affidavit of Stevens showed that Walker had dealt with plaintiff in his capacity as a general contractor, and that the complaint, therefore, did not state a cause of action against defendants. All motions were denied.

Plaintiff testified that he was aware at the times in question that O. L. Walker was a general contractor and that he was his subcontractor; that defendant Terry Stevens called him after the furnace was installed and complained, because it did not work properly; that he informed Stevens that Walker had not paid him for the furnace; and that Stevens responded that as soon as he and Walker straightened out their own contractual difficulties, he was sure that he would be paid.

Over objections of plaintiff, Walker testified that he was a general contractor on the job and that he had employed plaintiff to serve as a subcontractor. He further testified that he had no specific agreement with defendants to install a furnace, but that

he had agreed to install any "extras" at cost. The contract price of the house, without extras, was $26,690. The court, after determining that neither counsel had any further questions, asked Walker if he had been paid the contract price and how much of it remained unpaid. Walker replied that $5,000 was unpaid.

Defendant Terry Stevens, who was examined as an adverse witness, testified that he had not paid plaintiff for the furnace, but that he had paid Walker, his contractor. Stevens testified that he did not make a direct agreement with Coker to pay him. Since Coker demanded payment, he had made no further payments to Walker.

Defendants' motions for directed verdict were denied. The court entered judgment for plaintiff for $950. Defendants' motion for a new trial on the grounds of surprise in the court's permitting recovery on an unpleaded theory was denied. Defendants appealed.

Bruce J. Brown, for plaintiff appellee.

Dameron & Burgin, by E. Penn Dameron, Jr., for defendant appellants.

ERWIN, Judge.

Defendants assign as error: "The trial court committed prejudicial error by finding facts, making conclusions of law, and entering judgment against defendants on the unpleaded theory that the defendants had wrongfully retained funds which were owed to their general contractor." Defendants contend that plaintiff alleged in his complaint and proceeded to trial only on the theory of agency. Plaintiff did not move to amend his complaint during the course of the proceedings. We agree with defendants that prejudicial error occurred and award them a new trial.

The court, on its own motion, questioned witness O. L. Walker:

> "THE COURT: Mr. Walker, in November of 1976 had all of the contract price been paid to you?
>
> DEFENDANTS' EXCEPTION NO. 5
>
> MR. WALKER: No, sir.

THE COURT: How much of it remained unpaid?

DEFENDANTS' EXCEPTION NO. 6

MR. WALKER: The way I have it, I'm close to Five Thousand Dollars ($5,000.00), something in that neighborhood, with the changes.

THE COURT: Do you gentlemen have any further questions?

MR. DAMERON: Your Honor, I don't particularly want to get into the question of disputes outside this contract, so I don't have any further questions."

At the close of the evidence, the court stated the following:

"THE COURT: I think you're entitled to recover, Mr. Brown, but on the theory that in November the contract price had not been paid. I find that from the conversations between Mr. and Mrs. Stevens and Mr. Coker, with regard to getting the furnace put in operation, that notice was given that he had not been paid and that according to Mr. Stevens at that time, final settlement had not been made and that Mr. Coker would be paid when that was done."

The record reveals that this is not a case wherein the doctrine of litigation by consent applies pursuant to G.S. 1A-1, Rule 15(b), of the Rules of Civil Procedure. Defendants objected to the introduction of the evidence as set out above and further indicated to the court that such was outside the scope of the pleadings. Plaintiff failed to move to amend his complaint to conform with the evidence as required by Rule 15(b). *See Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

The case proceeded to trial on the theory that O. L. Walker was acting as agent for defendants and that plaintiff installed the furnace in question in defendants' home by agreement with their agent. The court, on its own motion, changed the theory of the case to that of an alleged lien on funds in possession of defendants due to O. L. Walker, general contractor, after notice of a debt owed to plaintiff, one of Walker's subcontractors, who had not been paid. This change of theory was prejudicial to defendants due to lack of notice. Defendants were not prepared to defend on the lien theory, which required certain records of pay-

ment to Walker. It appears that they would have met such defense had they had time to get certain records available to them.

This case must be reversed, even under the new theory. In order for the plaintiff to recover, the court must find that there is a debt owed by Walker to plaintiff. A debt is the foundation upon which a lien depends. *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 253 S.E. 2d 494 (1979). The trial court failed to find that plaintiff is entitled to money judgment against Walker. The lack of the necessary finding of fact and conclusion of law required us to reverse the judgment entered in addition to the reason set out above.

For errors found in the trial, defendants are awarded a new trial.

New trial.

Judges CLARK and WELLS concur.

IN RE ADOPTION OF LAURA NORWOOD

IN RE ADOPTION OF AMANDA KAY HAIGLER

No. 7920SC110

(Filed 16 October 1979)

1. **Adoption § 2.1— county department of social services—withholding of consent to adoption**

A county department of social services did not unreasonably and unjustly withhold consent to petitioners' adoption of a child which had been placed with petitioners under a foster home program.

2. **Adoption § 2— clerk's transfer of adoption petition to superior court**

A clerk of superior court properly transferred an adoption petition to the superior court for hearing where there were issues of law and fact to be determined. G.S. 1-273.

APPEAL by Tommy Wilson Norwood and Barbara Simpson Norwood from *Smith (David I.), Judge.* Judgment entered 7

November 1978 in Superior Court, UNION County. Heard in the Court of Appeals 19 September 1979.

This is an action for the adoption of an unnamed child. At the hearing in the Superior Court of Union County, the judge presiding made the following findings of fact, conclusions of law and entered judgment substantially as follows:

1. That the petitioners Norwood on 11 May 1978 signed an Agency-Foster Parents Agreement in which they agreed, among other things:

(a) that the supervising agency has the final authority to make and carry out case work plans for a child, such as adoption;

(b) to initiate no proceeding for the adoption or custody of a child without the written permission of the supervising agency.

2. That the policy of the Department of Social Services is not to encourage adoption by foster parents.

3. That an unnamed baby girl (hereinafter referred to as child) was born 10 May 1978; that the child's natural mother executed a Parent's Release, Surrender and Consent to Adoption in favor of the Union County Department of Social Services on 12 May 1978, and the child's natural father executed a like instrument on 19 May 1978.

4. That the child was placed with the petitioners Norwood on 19 May 1978 pursuant to the Agency-Foster Parents Agreement mentioned aforesaid.

5. That the adoptive board of the Department met 28 July 1978 for consideration of adoption of the child; that ten couples were considered for the adoption of two infants, including the child in this action; that the petitioners Norwood and the petitioners Haigler were considered for such adoptive parents; that the adoptive board studied case histories for each couple under consideration and as a result, selected the petitioners Haigler for the adoption of the child in this case; that the Department of Social Services reviewed the decision of the adoptive board and approved the selection of the petitioners Haigler as the adoptive parents.

6. That the petitioners Norwood refused to release the child, and on 14 August 1978 filed a petition in this cause alleging that the Department of Social Services had wrongfully and unlawfully withheld its consent to the adoption of the child.

7. That the Department of Social Services contends that the reason for withholding a consent is that it has determined there is a more suitable adoptive home for this child and it is in the best interest of the child that such child be adopted by the other family.

8. That petitioners Haigler filed a petition for the adoption of the child on 24 August 1978.

9. That the clerk of superior court transferred these matters to the superior court pursuant to G.S. 1-173, and the matters were consolidated for trial.

10. That on 4 November 1978 the District Court of Union County entered an order placing custody of the child with the petitioners Norwood and divesting the Department of Social Services of such custody.

11. That the petitioners Norwood are fit and proper persons to have the care, custody and control of the child in this action and are financially able to adequately provide for the child.

12. That petitioners Haigler are fit and proper persons to have the care, custody and control of the child and are financially able to adequately provide for such child.

13. That the welfare of the minor child is the primary concern of the court. That the consent of the Department of Social Services to the adoption sought by the petitioners Norwood is required by G.S. 48-9(b) unless otherwise ordered by a court of competent jurisdiction as provided in G.S. 48-9.1(1). That such Department has latitude and discretion concerning whether it should give or withhold its consent to the adoption, and a court of competent jurisdiction should not dispense with said consent or permit an adoption proceeding to continue without said consent unless it clearly appears that the withholding of consent is unreasonable.

14. That the Department of Social Services has in all respects properly withheld its consent to the adoption by peti-

tioners Norwood, and its refusal has not been shown to be clearly unreasonable but is based upon reason and the best interest of all parties concerned.

15. That the welfare of said infant child will best be served by dismissing the petition for adoption filed by the Norwoods and the petition and consent for adoption filed by petitioners Haigler be approved pursuant to law.

To the signing of the foregoing order entered in this cause, petitioners Norwood gave notice of appeal.

Harry B. Crow, Jr., for plaintiff appellant.

Griffin, Caldwell & Helder, by H. Ligon Bundy, for defendant appellee, D.S.S.

Smith, Smith, Perry & Helms, by Donald C. Perry, for defendant appellees Haigler.

HILL, Judge.

[1] In order to prevail in this cause, the Norwoods must show on appeal that the D.S.S. unreasonably and unjustly withheld consent to adoption by them of the child in question. *See In re Daughtridge*, 25 N.C. App. 141, 212 S.E. 2d 519 (1975). The findings of fact by the superior court judge do not substantiate the Norwoods' position.

It is a basic principle of law that the County Department of Social Services, which the director represents, or the child placing agency, to which the child has been surrendered and consent has been given, shall have legal custody of the child to be adopted. The Department or the child placing agency also possess all rights of the consenting parties, except for inheritance rights, upon surrender of the child. The department or agency retains custody as well as the consenting parties' rights until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered if the interlocutory decree is waived by the court in accordance with G.S. 48-21, or until consent is revoked within the time permitted by law, or unless otherwise ordered by a court of competent jurisdiction. G.S. 48-9.1(1).

[2] The appellants contend that the clerk erred in entering the order transferring the petition of the Norwoods, the appellants, to the superior court for hearing. There was no error.

An adoption proceeding is a special proceeding before the clerk of superior court.

G.S. 1-272 provides as follows:

> Appeals lie to the judge of the superior court having jurisdiction, either in session or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference.

G.S. 1-273 provides as follows:

> If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. *In the Matter of Wallace*, 267 N.C. 204, 147 S.E. 2d 922 (1966).

See generally, also, G.S. 48-12, G.S. 48-21 and G.S. 48-27. From the findings of fact the trial court makes it clear that there were such issues. The clerk properly transferred the petition to the superior court for hearing.

We fail to see how the appellants were prejudiced by consolidating the hearing on the Haigler and the Norwood petitions. A trial court has the discretionary power to consolidate actions for trial, and the order will not be disturbed on appeal in the absence of showing injury or prejudice to the appealing party. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968).

In this case the trial judge was correct in all respects in ruling that the Norwoods had the burden of proof to show that the hearing should proceed without a consent for adoption. It appears that the trial judge spent considerable time, both on the bench and in chambers, and also recalled one witness before making his judgment on this point. The Department of Social Services is an administrative body charged with the responsibility of making thorough and critical investigations of all prospective adopting parents, and the findings of fact in the judgment indicate this was done. The Department reports, while subject to review by the

courts, must be presumed to have been made in good faith and accepted as such until overturned or rebutted.

For the reasons stated herein, we conclude that the order entered by Judge Smith should be, and is

Affirmed.

Judges VAUGHN and ERWIN concur.

ANNETTE LOFTIN CHAMBERS v. SAMUEL C. CHAMBERS

No. 798DC180

(Filed 16 October 1979)

1. **Bastards § 13— acknowledgment that husband not father of wife's child—legitimation statute—husband not reputed father**

In an action for child custody and support, the parties' acknowledgment that defendant husband was not the natural father of plaintiff wife's child, who was born before the parties married, negated any inference that defendant was the "reputed" father within the meaning of G.S. 49-12.

2. **Bastards § 13— husband not father of wife's child—issuance of new birth certificate—ineffective method of legitimation**

Where a child, who is born prior to the mother's marriage, is known to have been fathered by one other than the husband, G.S. 49-13, providing for issuance of a new birth certificate upon legitimation by subsequent marriage of the mother and reputed father, is inapplicable, adoption being the only mode available for legally recognizing the husband as the father.

3. **Bastards § 13; Divorce and Alimony § 24— new birth certificate—false affidavit of paternity—estoppel to deny paternity in support proceeding**

Despite the fact that defendant husband apparently made a false affidavit of paternity in obtaining a new birth certificate for plaintiff wife's child under G.S. 49-13, he was estopped from collaterally attacking his admission of paternity in this proceeding for child support.

APPEAL by defendant from *Jones (Arnold O.), Judge.* Judgment entered 6 December 1978 in District Court, LENOIR County. Heard in the Court of Appeals 26 September 1979.

Plaintiff wife instituted this civil action seeking alimony *pendente lite*, child custody and support, permanent alimony and

attorney's fees. Plaintiff alleged in her complaint that defendant had abandoned her and had failed to provide her or the child born of their marriage with any support following the abandonment. Defendant's answer denied the essential allegations of the complaint, including that he was the father of plaintiff's infant child, and alleged that the child was born prior to the marriage of plaintiff and defendant and that the child had not been adopted by defendant. Judgment was ordered dismissing the plaintiff's alimony action, but ordering the defendant to pay $25.00 a week for the support of the infant child and $150.00 in attorney's fees for the plaintiff. Defendant appealed.

Gerrans and Spence, by William D. Spence, for plaintiff appellee.

Joseph C. Olschner for defendant appellant.

WELLS, Judge.

The principal issue before us for decision in this case is to be found in the following conclusion of law made by Judge Jones:

> That by virtue of the marriage of plaintiff and defendant, the infant child Terrica Laverne Chambers, became legitimate pursuant to NC GS 49-12 and the defendant therefore became liable for her support.

G.S. 49-12 reads as follows:

> *Legitimation by subsequent marriage.*—When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate . . . .

The evidence before Judge Jones shows that the plaintiff was the mother of the infant child, Terrica Laverne Chambers, and that child was born on 20 October 1974 prior to the marriage of plaintiff and defendant on 19 April 1975; that following the marriage of plaintiff and defendant, defendant accepted the infant child as his own and held himself out generally to be the father of said child, and that in October 1975 defendant signed a request for a new certificate of birth for said child in which he

acknowledged that he was the child's natural father. Based on that request, a new birth certificate was issued showing the defendant to be the father of Terrica Laverne Chambers. The evidence also showed that the infant child had always known the defendant to be her father and had always called him "Daddy".

G.S. 49-13 reads:

> *New birth certificate on legitimation.*—A certified copy of the order of legitimation when issued under the provisions of G.S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.
>
> When a child is legitimated under the provisions of G.S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the certificate of marriage of the father and the mother and change the surname of the child so that it will be the same as the surname of the father.

In *Carter v. Carter,* 232 N.C. 614, 616, 61 S.E. 2d 711, 713 (1950), our Supreme Court held that G.S. 49-12 and G.S. 49-13 regulate the family circle and define the rights and responsibilities of members of the circle, and that these two sections of our statutes must be construed *in pari materia.*

> From and after the marriage of the mother and the reputed father of an illegitimate child, such child shall be deemed and held to be legitimate just as if it had been born in lawful wedlock. In a divorce action the father of a child of the marriage may be required to support such child.

The plaintiff argues that even though the parties in this case had stipulated that defendant was not the *biological* father of the child, the defendant was nonetheless the "reputed" father of the child within the meaning of G.S. 49-12. Our Supreme Court, quoting from *Bowman v. Howard,* 182 N.C. 662, 666, 110 S.E. 98, 100 (1921), stated in *Carter v. Carter, supra,* 232 N.C. at 617, 61 S.E. 2d at 713:

> The use of the word "reputed" rather than "putative" in G.S. 49-12 "was intended merely to dispense with absolute proof of paternity, so that, if the child is 'regarded,' 'deemed,' 'considered,' or 'held in thought' by the parents themselves, as their child, either before or after marriage, it is legitimate."

[1] If the husband reasonably believes he is the natural father of the child, the statute permits legitimation without the need to resort to a formal judicial determination of paternity. In *Carter*, however, the trial court had made a finding of fact that the defendant was the *putative* as well as the reputed father of the child in need of support. In the case *sub judice* the stipulation by the parties that defendant was not the biological father negates any contention that defendant is the natural father whether or not the couple had represented to the community or the child herself that he was. That the parties themselves acknowledged defendant is not the natural father likewise negates any inference defendant is the "reputed" father within the meaning of G.S. 49-12.

[2] Clearly, the procedure for the legitimation under G.S. 49-12 and issuance of a new birth certificate under G.S. 49-13 is not meant to circumvent the provisions for adoption under Chapter 48 of the General Statutes. Legitimation changes the legal relationship of the father and child, creating certain responsibilities and privileges, and allowing the father to inherit from the child and vice versa. Where the husband may reasonably believe he is the natural father, adoption is unnecessary and upon marriage to the child's mother he may proceed under G.S. 49-13 to have a new birth certificate issued to the child indicating he is the natural father. However, where the child is known to have been fathered by an individual other than the husband G.S. 49-13 is inapplicable, adoption being the only mode available for legally recognizing the husband as the father. Upon adoption, application can be made for a new birth certificate under G.S. 48-29. "Adoption is the establishment of the relation of parent and child between persons not so related by nature." 3 Lee, N.C. Family Law § 255, p. 205 (1963).

[3] In any event, despite the fact that defendant apparently made a false affidavit of paternity in obtaining a new birth certifi-

cate for the child under G.S. 49-13, we hold that he was estopped from collaterally attacking his admission of paternity in this proceeding for support. In *Myers v. Myers,* 39 N.C. App. 201, 249 S.E. 2d 853 (1978), *disc. rev. denied,* 296 N.C. 736, 254 S.E. 2d 178 (1979), this Court held that a defendant in an action for support who had sought and received a revised birth certificate under G.S. 49-13 in which he, under oath, represented himself to be the natural father of the child in need of support, was estopped from collaterally attacking the child's legitimation. We noted in *Myers* that the record contained no evidence to show that the defendant did not know what he was doing or that he did not know the consequences of his acts when he filed his affidavit stating he was the natural father of the child. The same is true in the case at bar.

Defendant has challenged the portions of the order awarding child support and attorney's fees. The trial court made sufficient findings with respect to the dependence of the child and the ability of the defendant to provide support. The record also indicates that the trial court made sufficient findings to justify the awarding of counsel fees pursuant to G.S. 50-13.6.

The judgment of the trial court is

Affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. HUBERT CHURCH

No. 7924SC469

(Filed 16 October 1979)

1. Homicide § 21.9— involuntary manslaughter—culpable negligence—sufficiency of evidence

A jury question was presented as to whether defendant acted in a culpably negligent manner and was thus guilty of involuntary manslaughter where the evidence tended to show that deceased struck defendant with a wrench while at defendant's home and defendant forced deceased to leave the home by use of a shotgun; deceased threatened to kill defendant and later returned with a bow and some arrows; while defendant was sitting on his

porch, deceased shot a steel-tipped arrow which grazed defendant's cheek and struck the door; defendant got the arrow and broke it; deceased put another arrow in his bow and pulled the string back; defendant picked up his shotgun and pulled the trigger without aiming; and the shot struck deceased.

2. **Homicide § 28.4— self-defense—instructions—right to stand ground on own premises**

Where evidence in a homicide case tended to show that defendant was attacked by deceased on his own premises and was without fault in bringing on the difficulty, the trial court erred in failing to instruct the jury on defendant's right to stand his ground without retreating.

APPEAL by defendant from *Howell, Judge*. Judgment entered 1 December 1978 in Superior Court, MADISON County. Heard in the Court of Appeals 26 September 1979.

Defendant was indicted for the murder of D. A. Keener. The State presented evidence that Keener and the defendant had been friends for many years. On the day of his death Keener went to defendant's home right after breakfast, and returned in the afternoon to the house where he was boarding. He "was mumbling something" as he passed by his landlady, Mrs. Caldwell. He walked back down the driveway toward defendant's house with a bow and arrows in his hand. Mrs. Caldwell looked up and saw defendant "bring a long gun up"; she heard it fire and saw Keener bleeding. Four arrows were found by Keener's body, and a fifth arrow, broken, was given to the police by defendant's niece Leona Thomas.

Defendant testified that on the morning of the killing he and Keener had been working on defendant's house and drinking a pint of liquor and a quart of wine. Keener went home after lunch, and when he returned he came into defendant's house without knocking and hit defendant over the head with a 6- or 8-inch adjustable wrench, knocking him to the floor. Defendant got his gun and "run him off," and Keener left saying, "Well, I'll kill you, you damn son of a bitch." Defendant "had not done or said anything out of the way to him." Keener went up to his house, got the bow and arrows, and came back down. Defendant and his niece were sitting on the porch, and Keener didn't say anything, just shot a steel-tipped arrow, which grazed defendant's cheek and hit the door. Defendant got the arrow and broke it. He told Keener to quit, that he wanted no trouble with him. Keener put another arrow in his bow and pulled back the string, and defendant picked

up his shotgun from where it was leaning against the wall and pulled the trigger without aiming. He did not bring the gun up to his shoulder and did not intend to hit Keener, but only to scare him away. Defendant thought Keener was going to shoot him with the arrow, since he had already shot one time.

Leona Thomas' testimony about the events was the same as defendant's. Henry Sharp, who was talking with Mrs. Caldwell just before the killing, testified that Keener said he was going down to see defendant, that he was gone about five minutes and came back up the road saying, "I'll kill the son of a bitch," and that he went into the Caldwell house and came back out with a bow and arrows in his hand. Keener also had a wrench sticking out of his pocket.

Defendant was found guilty of involuntary manslaughter and sentenced to 3-5 years. He appeals.

Attorney General Edmisten, by Assistant Attorneys General Norma S. Harrell and Douglas Johnston, for the State.

Huff & Huff, by Joseph B. Huff and Stephen E. Huff, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the court erred in denying his motion to dismiss, made at the close of the State's evidence and renewed at the close of defendant's evidence as required by G.S. 15-173. The test on such a motion is whether sufficient evidence has been presented to support a finding by the jury that defendant committed an offense with which he is charged. *See State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234, *death sentence vacated* 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976). In ruling on the motion the court must consider the evidence in the light most favorable to the State, and may consider the defendant's evidence only if it is favorable to the State or if it serves to explain the State's evidence without conflicting with it. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971).

[1] To withstand defendant's motion, the State must have presented evidence of every essential element of the crime. *State v. Allred*, 279 N.C. 398, 183 S.E. 2d 553 (1971). Involuntary manslaughter is an unintentional killing without malice, resulting

from "(1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). Considering all the evidence, in which there is essentially no conflict, we cannot say as a matter of law that defendant did not act in a culpably negligent manner. This is a question for the jury. There was no error in the denial of defendant's motion.

As the State points out, defendant's exceptions to the charge to the jury fail to comply with the requirements of Appellate Rule 10(b)(2). In the interest of justice, however, we have considered defendant's assignment of error number three, *cf. State v. Crews*, 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Robinson*, 272 N.C. 271, 158 S.E. 2d 23 (1967), and we find that it has merit.

[2] When a person who is without fault in bringing on the difficulty is attacked upon his own premises, he has no duty to retreat before he can act in self-defense. *State v. Browning*, 28 N.C. App. 376, 221 S.E. 2d 375 (1976). And where there is evidence to this effect, it is reversible error for the court to fail to instruct the jury on the defendant's right to stand his ground. *Id.* Such is the case here. We need not discuss defendant's remaining assignments of error, as they are unlikely to occur at a

New trial.

Judges WEBB and WELLS concur.

JAMES M. ROBERTS, PLAINTIFF v. ROGER BUFFALOE, T/A BUFFALOE'S NEW AND USED CARS AND DONALD W. ROBERTSON, DEFENDANTS v. JAMES L. KENNEDY AND JAMES W. DURHAM, A/K/A "WHITEY" DURHAM, PARTNERS T/A KENNEDY MOTOR SALES, THIRD-PARTY DEFENDANTS

No. 785DC1097

(Filed 16 October 1979)

Automobiles § 6.5— odometer changed—directed verdict for seller improper—no punitive damages

Where plaintiff alleged that defendant car dealer sold him a car with an odometer reading of 32,821 miles but knew that the true mileage was in excess of 77,000 miles, the trial court erred in directing verdict for defendant where

plaintiff's evidence tended to show that defendant knew that the odometer had been replaced but failed to affix the notice required by G.S. 20-346; the evidence also tended to show that defendant failed to deliver to plaintiff the statements concerning unknown mileage and alterations to the odometer reading required by G.S. 20-347(a)(5) and (6); and if such evidence was believed, it should have been determined by the jury whether defendant's violations of the requirements of the statute were made with the intent to defraud. However, even if the jury found for plaintiff, his prayer for punitive damages could not be sustained, since G.S. 20-348(a)(1) limits the liability imposed to three times the amount of actual damages or $1500, whichever is greater.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 13 July 1978 in District Court, NEW HANOVER County.

Plaintiff filed a complaint seeking relief in the amount of $6,000 as treble damages, punitive damages in the amount of $10,000, costs and attorneys fees. He alleged that Roger Buffaloe and Donald W. Robertson sold him a 1974 Cadillac and represented that the odometer reading of 32,821 miles was accurate when defendants knew that the true mileage was in excess of 77,000 miles.

Buffaloe and Robertson answered, admitting that the vehicle was sold to the plaintiff through Buffaloe's business and that Robertson was an employee of the business at the time. They alleged, however, that the sale and false representation was by another employee, and that they had no knowledge of the falsity. Defendants alleged that they had relied upon representations made to them by the third-party defendants (Kennedy and Durham), and any altering of the odometer had been done by Kennedy and Durham without the knowledge of Buffaloe and Robertson.

James Durham testified that he was in the wholesale automobile business with Kennedy in January of 1977 and bought the Cadillac for the business. The vehicle had fire and smoke damage. Durham replaced the dashboard and odometer with used equipment showing about thirty thousand miles. The original odometer showed approximately seventy thousand miles. Ray Williams worked as the sales manager for Bufflaoe in January, 1977. Durham offered to sell the Cadillac to Williams and told him about the replaced dashboard and the incorrect mileage. Williams purchased the vehicle by writing a draft on the Buffaloe account. In Buffaloe's presence, Durham mentioned that the mileage shown

on the vehicle was not correct. Durham and Williams told Buffaloe about it several times. Durham prepared an odometer mileage statement indicating that 45,000 miles had been removed from the odometer and he gave that statement along with the bill of sale to Kennedy for processing.

James Kennedy testified that he processed the documents received both from Durham and from the people from whom Kennedy purchased the vehicle. Kennedy and Buffaloe agreed to alter their original purchasing agreement and the steps they followed were such that Kennedy could not say whether Buffaloe had ever examined the odometer statement.

Plaintiff testified that he negotiated with Williams concerning purchase of the Cadillac and that both Williams and Buffaloe told him that the mileage shown was correct. He further testified that he dealt with Robertson after sale had been agreed upon with Williams, but he and Robertson had never discussed the mileage. The disclosure statement he was given at the time of the transfer contained an odometer reading of 32,821.

Defendant Robertson testified that he was present when Durham first offered to sell the car to Williams, representing that the car had low mileage. Robertson stated that at the time of the transfer of the vehicle to the plaintiff, Robertson had no idea that the vehicle had actually traveled 77,000 miles. Buffaloe testified that Durham had represented to him that the Cadillac was a nice car and that the mileage was quite low, thirty-two or thirty-three thousand miles, and he had no knowledge to the contrary until after the sale to plaintiff. As soon as he learned of the incorrect mileage, he went to plaintiff and offered to rescind the sale. He told plaintiff that he would do almost anything to satisfy him. Plaintiff wanted to keep the car but would not even discuss what it would take to satisfy him.

At the close of the evidence Buffaloe and Robertson moved for a directed verdict. Plaintiff appeals from the order allowing those motions.

Crossley & Johnson, by Robert W. Johnson, for plaintiff appellant.

No appearance on behalf of defendants.

VAUGHN, Judge.

The court should not have directed a verdict in favor of defendant Buffaloe.

A section of the Vehicle Mileage Act requires that if an odometer is replaced, it must either reflect the correct mileage or a statement must be affixed to the left door frame specifying the mileage prior to replacement and the date of replacement. G.S. 20-346. The same act requires that the transferor of a motor vehicle deliver to the transferee:

> "(5) A statement that the mileage is unknown if the transferor knows the odometer reading differs from the number of miles the vehicle has actually traveled, and that the difference is greater than that caused by odometer calibration error;
>
> (6) A statement describing each known alteration of the odometer reading, including date, person making the alteration, and approximate number of miles removed by the alteration . . . ." G.S. 20-347(a)(5) and (6).

A private civil action is provided against one who "with intent to defraud" violates any of the requirements of the Vehicle Mileage Act. G.S. 20-348. The liability imposed is an amount equal to the sum of:

> "(1) Three times the amount of actual damages sustained or one thousand five hundred dollars ($1,500), whichever is the greater; and
>
> (2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court." G.S. 20-348(a)(1) and (2).

Plaintiff's evidence, if believed, tends to show that Buffaloe knew that the odometer had been replaced but failed to affix the notice required by G.S. 20-346. It also tends to show that he failed to deliver to plaintiff the statements required by G.S. 20-347(a)(5) and (6). If that evidence is believed, it must then be determined whether defendants' violations of the requirements of the statute were made with the intent to defraud. The weight to be given to

the testimony and the inferences to be drawn from the evidence are matters for the jury, however, and not for the court.

Even if the jury answers the liability issue in favor of plaintiff, however, his prayer for punitive damages cannot be sustained. Such rights as he might have had in this regard in the common law have now been supplanted by legislation with regard to the particular fraud in question. Plaintiff's recovery, if any, will be the greater of three times his actual damages or $1500.00, costs and reasonable attorneys fees as determined by the court.

The evidence was insufficient to take the case against Robertson to the jury, and the directed verdict in his favor is affirmed.

The judgment as to Buffaloe is reversed, and the case is remanded.

The judgment in favor of Robertson is affirmed.

Judges ERWIN and HILL concur.

LINDA R. BETHEA v. ELVIN L. BETHEA

No. 7918DC228

(Filed 16 October 1979)

1. **Appeal and Error § 42.2— evidence not in record—presumption that findings supported by evidence**

The trial court's findings of fact are deemed to be supported by competent evidence and are conclusive on appeal where appellant did not bring forth in the record any of the testimony or evidence in the case.

2. **Abatement § 4— prior action pending is not jurisdictional**

A motion to dismiss on the basis of a prior action pending is a plea in abatement and not a challenge to the jurisdiction of the court.

3. **Abatement § 4— waiver of objection on basis of prior action pending**

Defendant waived objection to an action to increase child support on the ground of a prior action pending where he appeared at a hearing and failed to move in abatement or raise the question of a prior action pending but instead made motions in the case, including a motion to continue, and entered into agreements to produce certain documentary evidence before trial.

4. Divorce and Alimony § 24.7— modification of child support—changed circumstances

The court's order requiring defendant father to pay an increased amount for child support based on changed circumstances was supported by its findings that plaintiff mother no longer receives alimony from defendant; plaintiff has gone to work and must have help in tending to the minor child; the child is now in the public schools and requires additional funds for lunches, clothes and medical attention; defendant's income has increased from $38,000 in 1974 to $135,000 in 1977; plaintiff has been required to accept money from her family and to borrow money to support the child; and defendant has refused plaintiff's requests that defendant increase the amount of his child support payments.

5. Divorce and Alimony § 27— action to modify child support—attorney fees

The court's findings supported its order that defendant pay counsel fees for plaintiff in an action to require defendant to pay increased child support.

APPEAL by defendant from *Alexander (Elreta M.), Judge.* Judgment entered 21 November 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 27 September 1979.

This is an action brought by the mother of the minor child of plaintiff and defendant, seeking an increase in the amount of child support to be paid by defendant. Defendant has not filed an answer or other response. After service on defendant, he appeared through counsel on 16 October 1978 and made requests of the trial judge, including a motion for continuance, which was granted to 30 October 1978.

At the 30 October 1978 hearing, defendant's counsel moved to dismiss for the reason that there was a prior action pending in the same court and county between the parties seeking the identical relief. The court denied the motion. After hearing evidence of both parties, the court entered an order finding facts, making conclusions of law and ordering the defendant to pay an increased amount of child support and also counsel fees to plaintiff's attorney. Defendant appealed.

E. S. Schlosser, Jr. for plaintiff appellee.

Malone, Johnson, DeJarmon & Spaulding, by C. C. Malone, Jr. and Albert L. Willis, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] There are no exceptions in the record other than the following:

> NOW COMES the Defendant, Elvin L. Bethea in apt time, and objects and excepts to the findings of fact and the conclusion of law entered in the above-entitled cause on the 21st day of November, 1978, and from the judgment entered thereon, the defendant objects and gives Notice of Appeal to the Court of Appeals of North Carolina.

Assuming *arguendo* that the above constitutes an effective exception to the court's findings of fact and conclusions of law, defendant did not bring forth in the record any of the testimony or evidence in the case. Therefore, the findings of fact are deemed to be supported by competent evidence and are conclusive on appeal. *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761 (1951); *Carter v. Carter,* 232 NC. 614, 61 S.E. 2d 711 (1950); *Christie v. Powell,* 15 N.C. App. 508, 190 S.E. 2d 367, *cert. denied,* 281 N.C. 756, 191 S.E. 2d 361 (1972).

The appeal does raise for consideration whether the judgment is supported by the findings of fact and conclusions of law and whether the court had jurisdiction of the subject matter. Rule 10(a), North Carolina Rules of Appellate Procedure.

[2, 3] Defendant's motion to dismiss on the basis of a prior action pending is a plea in abatement and not a challenge to the jurisdiction of the court. *Houghton v. Harris,* 243 N.C. 92, 89 S.E. 2d 860 (1955); *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641 (1949). The objection may be waived. *Flynt v. Flynt,* 237 N.C. 754, 75 S.E. 2d 901 (1953). Here, defendant appeared at the 16 October hearing and failed to object to the proceeding. He did not move in abatement or raise the question of prior action pending; instead, he made motions in the case, including a motion to continue, and entered into agreements to produce certain documentary evidence before trial. The case was continued on defendant's motion. Defendant waived any objection he had by reason of a prior action pending. *Id.; Rhoney v. Sigmon,* 43 N.C. App. 11, 257 S.E. 2d 691 (1979); *Bass v. Bass,* 43 N.C. App. 212, 258 S.E. 2d 391 (1979). Additionally, defendant failed to include the pleadings in the prior case as a part of the record on appeal, so this Court is unable to determine whether it raises the same issues as the case at bar. The court properly denied this motion.

[4] In reviewing the order we find that it is supported by findings of fact and conclusions of law. Orders for child support are

not permanent and may be modified upon proof of a substantial change in circumstances. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967); *Searl v. Searl*, 34 N.C. App. 583, 239 S.E. 2d 305 (1977). The facts found showed a substantial change in the condition of the parties since the prior order of 9 June 1975. Plaintiff no longer receives alimony from defendant; plaintiff has gone to work and must have help in tending to the minor child; the child is now in the public schools and requires additional funds for lunches, clothes and medical attention; defendant's income has increased from $38,000 in 1974 to $135,000 in 1977; defendant is remarried and has another child; plaintiff has been required to accept money from her family and to borrow money to properly support the child. Plaintiff has requested the defendant to increase the support payment several times and he has refused.

The facts found are sufficient to justify conclusions of law as to the reasonable needs of the child, the ability of defendant to pay and the prior expenditures on behalf of the child. *Crosby v. Crosby, supra; Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978); *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). The amount ordered as child support is commensurate with the needs of the child and the ability of the defendant to meet those needs. *Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976).

The amount ordered is in the discretion of the court and will not be disturbed absent manifest abuse of discretion. *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964); *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977). What constitutes necessities depends upon the facts and circumstances of the particular case. They include food, clothing, lodging, medical care and proper education. They are not limited to those things which are absolutely necessary to sustain life, but extend to articles that are reasonably necessary for the proper and suitable maintenance of the child in view of his social station in life, the customs of the social circle in which he lives or is likely to live and the fortune possessed by him and his parents. *Barger v. Finance Corp.*, 221 N.C. 64, 18 S.E. 2d 826 (1942). *See* N.C. Trial Judges' Bench Book, Child Support, IV. 2C.1 (1979). Here the child is the son of a highly successful professional football star, who plays with the Houston Oilers. The amount awarded was reasonable and well

within the proper exercise of the court's discretion. We find no error in the order for increased child support.

[5] Appellant contends the evidence does not support the findings of fact supporting the order for counsel fees. Appellant failed to bring forward the evidence in the record. The findings are deemed to be supported by sufficient competent evidence. *In re Housing Authority, supra.*

The court's findings support the conclusions that plaintiff is an interested party acting in good faith who has insufficient means to defray the expense of the suit. It is not necessary that plaintiff be substantially dependent as in alimony cases. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975). Defendant refused to provide adequate support after demand. *Id.* The amount awarded as counsel fees is in the discretion of the court and will not be disturbed in the absence of a showing of abuse of discretion. *Wyche v. Wyche*, 29 N.C. App. 685, 225 S.E. 2d 626, *disc. rev. denied*, 290 N.C. 668, 228 S.E. 2d 459 (1976). The facts found, deemed to be supported by competent evidence, are sufficient to establish that the fee is reasonable. The order complies with N.C.G.S. 50-13.6 and the holding in *Wyatt, supra.*

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. ESTHER NAOMI SMITH

No. 7925SC445

(Filed 16 October 1979)

1. **Larceny § 4.2— records taken from store—allegation and proof of ownership—no variance**

There was no fatal variance in a larceny prosecution between the allegation in the warrant that the property was stolen from "K-Mart Stores, Inc." and proof at trial that the correct corporate name was "K-Mart Corporation."

2. **Larceny § 4.1— warrant—taking of four record albums alleged—sufficiency of description**

The warrant in a larceny prosecution which alleged the theft of "4 L.P. Stereo Record Albums," with no reference to the names of the albums, their

producers or other information, was nevertheless sufficiently specific to allow defendant to prepare her defense and to plead a conviction or acquittal as a bar to subsequent prosecution.

3. **Criminal Law § 113— jury instructions—requirements for finding of guilty—no statement of contentions**

The trial court's summary of what the jury must find in order to return a verdict of guilty did not amount to stating the contentions of the State and thus did not require that the court state defendant's contentions.

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

Where defendant was eighteen years old at the time of her trial, her sentence of seven months' imprisonment must be vacated, since the trial court did not include in the record a finding that he had considered the committed youthful offender option and determined that defendant would not benefit from it.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 14 December 1978 in Superior Court, CALDWELL County. Heard in the Court of Appeals 19 September 1979.

Defendant was charged with the theft of "4 L.P. Stereo Record Albums," the property of "K-Mart Stores, Inc., Lenoir, N. C." Horace Harshaw was similarly charged, and the cases were consolidated for trial. The State presented evidence that on 1 May 1978, Peggy Hammond, an employee of the Lenoir K-Mart store, saw defendant, who was with Harshaw, remove four record albums from their covers, place them all in one cover, and conceal it under her jacket. As defendant walked away, Ms. Hammond could see the outline of the album cover under her jacket. Defendant walked past the check-out without paying for the albums, left the store and went to a car. Ms. Hammond saw defendant remove the album cover from her jacket and throw it into the back seat of the car. After they drove away Ms. Hammond went back to the record display and found five empty album covers.

At the close of the State's evidence, defendant moved to dismiss for a fatal variance between pleading and proof regarding the ownership of the property and the failure of the indictment to show with sufficient specificity what items were stolen. The motion was denied.

The 18-year-old defendant testified that she went to the K-Mart store on 1 May, but that she concealed no record albums on her person while she was there. Defendant was found guilty of

misdemeanor larceny and sentenced to seven months. She appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick, for the State.

Beal & Beal, by Beverly T. Beal, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that the charges against her should have been dismissed because there was a fatal variance between the allegation of ownership of the property in the arrest warrant and the proof of ownership at trial. This argument is without merit. The warrant in this case charged defendant with stealing the property of "K-Mart Stores, Inc., Lenoir, N. C." Peggy Hammond, an employee of the store, testified that the name of the store is "K-Mart, Inc." or "K-Mart Corporation." Defendant's witness H. F. Kirk, manager of the Lenoir K-Mart, testified that the correct corporate name is "K-Mart Corporation." The cases cited by defendant are clearly distinguishable. In *State v. Vawter*, 33 N.C. App. 131, 234 S.E. 2d 438, *cert. denied* 293 N.C. 257, 237 S.E. 2d 539 (1977), this court found a fatal variance where the indictment charged that the property stolen belonged to "E. L. Kiser (sic) & Company, Inc." but the evidence showed the property belonged to "the Kiger family," with no evidence of corporate ownership. In *State v. McKoy*, 265 N.C. 380, 144 S.E. 2d 46 (1965), the bill of indictment completely failed to allege the ownership of the property stolen. No fatal variance appears in the case *sub judice*.

[2] Defendant also argues that the case should have been dismissed because the indictment did not sufficiently identify the goods stolen. The warrant alleged the theft of "4 L.P. Stereo Record Albums," with no reference to the names of the albums, their producers, etc. The strongest support for defendant's argument appears to be *State v. Nugent*, 243 N.C. 100, 89 S.E. 2d 781 (1955), where the court held that "meat" was an insufficient description of the goods stolen, and that defendant had a constitutional right to have the indictment state the *kind* of meat. It appears from that case that a description such as "pork" or "bacon" would have been acceptable. In the present case, we find that the

description "4 L.P. Stereo Record Albums" is analogous to "pork" or "bacon." Where, as here, the issue is not which of a number of stolen records defendant may have taken, but whether she stole any at all, we find that the description in the warrant is sufficiently specific to allow defendant to prepare her defense and to plead a conviction or acquittal as a bar to subsequent prosecution. See *id.*

[3] Moreover, we find no error in the charge to the jury. The trial court's summary of what the jury must find in order to return a verdict of guilty did not amount to stating the contentions of the State, and thus did not require that the court state defendant's contentions. See *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). Nor do we find that the trial court committed the error of charging that the jury must convict both defendants if it found one guilty. See *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970). As in *State v. Tomblin, id.* the court here made clear that the guilt or innocence of each defendant must be considered separately, and, as we instructed in *State v. Lockamy*, 31 N.C. App. 713, 716, 230 S.E. 2d 565, 568 (1976), the judge gave "a separate final mandate as to each defendant."

[4] It is undisputed that defendant was eighteen years old at the time of her trial. G.S. 148-49.14 provides that "when a person under 21 years of age is convicted of an offense punishable by imprisonment . . . the court may sentence such person to the custody of the Secretary of Correction for treatment and supervision as a committed youthful offender. . . . If the court shall find that a person under 21 years of age should not obtain the benefit of release under G.S. 148-49.15, it shall make such 'no benefit' finding on the record." This court has held that the trial court must make a finding showing clearly that he considered the "committed youthful offender" option and determined that the defendant would not benefit from it. *Matter of Tuttle*, 36 N.C. App. 222, 243 S.E. 2d 434 (1978); *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975). No such finding appears in the record before us. Accordingly, defendant's sentence is vacated and the case is remanded for resentencing. *See State v. Mitchell, id.*

Remanded for resentencing.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES DAVID THOMPSON

No. 798SC416

(Filed 16 October 1979)

Homicide § 21.2— proximate cause of death—sufficiency of evidence

The State's evidence of causation was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder and to sustain his conviction of voluntary manslaughter where it tended to show that defendant struck deceased in the left side of the face, knocking him to the ground, and that deceased died two days later from brain stem hemorrhage caused by a trauma to the left side of the head, the defendant's evidence of a possible preexisting condition which may have been a contributing factor to the death being insufficient to exculpate defendant.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 14 December 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 19 September 1979.

Defendant was charged with the second degree murder of Emery DeLane Fountain. The jury returned a verdict of guilty of voluntary manslaughter. Defendant's motion for a directed verdict was denied.

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

Kornegay and Rice, by John P. Edwards, Jr., for defendant appellant.

VAUGHN, Judge.

The denial of defendant's motion for a directed verdict is his principal assignment of error on appeal. Whether termed in a criminal case as motion for directed verdict, motion of nonsuit, motion to dismiss or motion pursuant to G.S. 15A-1227, the test is as follows:

> "the evidence must be considered in the light most favorable to the State and the State is entitled to every favorable inference reasonably to be drawn from it. The evidence offered by the State must be taken to be true and any contradictions and discrepancies therein must be resolved in its favor. For

> the purpose of such motion, the evidence of the defendant is considered only to the extent that it is favorable to the State or for the purpose of explaining or making clear the State's evidence, insofar as it is not in conflict therewith. There must be substantial evidence of all material elements of the offense charged in order to withstand a motion for judgment of nonsuit. If . . . the evidence is sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused by the evidence is strong."

State v. Evans, 279 N.C. 447, 452-53, 183 S.E. 2d 540, 544 (1971) (citations omitted). The crime of which defendant stands convicted is voluntary manslaughter—the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971). That the defendant's actions proximately caused the death is an element of the crime. *State v. Sherrill*, 28 N.C. App. 311, 220 S.E. 2d 822 (1976). It is in this particular element that defendant maintains the State's evidence is not above "a suspicion or conjecture." Taking the evidence under the proper standard, we hold the case was properly submitted to the jury.

Taken in a light most favorable to the State, the evidence for the State tended to show defendant struck the deceased in the left side of the face knocking him to the ground. The blow and the impact with the ground rendered the deceased bloody and unconscious. He died from brain stem hemorrhage, without regaining consciousness, two days later. In the opinion of the examining pathologist, a trauma to the left side of the head resulted in damage to the brain that caused the brain stem hemorrhage. The deceased was not in a weakened condition prior to this trauma in the opinion of the pathologist. This was sufficient evidence to get to the jury on the issue of whether defendant proximately caused the death.

The conflicting evidence of defendant is not to be considered on the motion for directed verdict. His evidence tends to show that the deceased was not hit by defendant but fell. It further tends to show that he fell out of a car the night before the event in question and was taken to a hospital and that he had been seen with severe bruises and swelling about his face a week before the

event. At most, these were facts to be weighed by the jury on the issue of causation. Thus, the motion for directed verdict of not guilty of the charged offense and the lesser included offense was properly denied. *State v. Lawson*, 6 N.C. App. 1, 169 S.E. 2d 265 (1969).

Defendant's evidence of a possible preexisting condition which may have been a contributing factor to the death certainly does not exculpate him.

> "The rule is well settled that the consequences of an assault which is the efficient cause of the death of another are not excused, nor is the criminal responsibility for causing death lessened, by the preexisting physical condition which made the person killed unable to withstand the shock of the assault and without which predisposed condition the blow would not have been fatal." *State v. Luther*, 285 N.C. 570, 575, 206 S.E. 2d 238, 241-42 (1974); *see also State v. Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976).

We have also examined defendant's assignment of error in the jury's return of the verdict. We find no error and overrule the assignment.

No error.

Judges ERWIN and HILL concur.

IN THE MATTER OF THE APPEAL FROM THE DENIAL OF THE APPLICATION TO EXCAVATE AND/OR FILL OF A. E. MILLIKEN

No. 7813SC1025

(Filed 16 October 1979)

Waters and Watercourses § 7— excavation and filling projects in tidelands and marshes—permit required—"after the fact" application—no finding as to prospective activity

Applications for permits for excavation, dredging, or filling in projects in estuarine waters, tidelands, marshlands, or state-owned lakes must be reviewed prospectively, taking into consideration work already completed; therefore, the Marine Fisheries Commission erred in requesting petitioner to file an "after the fact" application for a permit, in making findings only with

respect to construction of a causeway which had already been completed, and in failing to make any finding whatsoever as to whether petitioner proposed to carry out or engage in any activity covered by G.S. 113-229.

APPEAL by petitioner from *Herring, Judge*. Judgment entered 8 June 1978 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 22 August 1979.

Petitioner, owner of real property on both sides of Shallotte River, also known as Shallotte Creek, wished to develop his property and started to construct a causeway and a bridge across the river without permits. A Marine Fisheries inspector discovered the project after the roadbed was nearly complete. Petitioner was requested to make an "after-the-fact" application for his permit. The application was considered by various state agencies and was rejected by the Department of Natural and Economic Resources (Department), because the causeway destroyed about three acres of marshland. The Marine Fisheries Commission (Commission) affirmed the action of the Department. Judge Herring affirmed the decision of the Commission and granted the State's motion for summary judgment on those issues not decided by the Commission. Petitioner appealed.

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

Frink, Foy & Gainey, by Henry G. Foy, for petitioner appellant.

ERWIN, Judge.

Appellant brought forth five assignments of error. For the reasons stated below, it is not necessary to consider the first three assignments of error.

The statutory authority under which the Department and the Commission have acted is set forth in G.S. 113-229. A careful reading of the statute makes it clear that permits of the type involved in this case are for excavation, dredging, or filling in projects in estuarine waters, tidelands, marshlands, or state-owned lakes. The word "bridge" does not appear in the statute. Let us examine the history of the case as it appears from the record before us.

Appellant began the construction of a causeway in Little Shallotte Creek in 1971; he completed said construction—or at least ceased all such activity in 1973. Appellant now proposes to build a bridge from the causeway across Little Shallotte Creek to a point on adjoining property owned by him. Appellant has apparently completed all contemplated excavation, dredge, or fill activity and does not seek or propose to engage in any further such activity. Nevertheless, certain persons in the Department solicited from appellant an "after-the-fact" permit application. Following the receipt of said application in September 1976, administrative proceedings, including a hearing before the Commission, took place. The ultimate result was that the Department recommended that appellant's permit be denied, and the Commission upheld the Department.

In the hearing process, the Commission considered proposed findings of fact submitted by the appellant and the Department and made extensive findings in substantial agreement with those submitted by the Department. The Commission's conclusions of law, denying the permit, were based on its findings of fact. The Commission's findings of fact are fatally deficient in at least one respect. The pertinent portion of G.S. 113-229(m) reads as follows:

> "(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and state-owned lakes within the State . . ."

It does not appear that the Commission made any finding whatsoever as to whether appellant now proposes to carry out or engage in any activity covered by the statute. On the contrary, the Commission's own findings seem to make it clear that all activity covered under the provisions of G.S. 113-229 are an accomplished fact.

G.S. 113-229 grants to the Department regulatory authority over excavation or filling projects in any estuarine water, tideland, and marshland. The purpose is to serve the overall purpose of the public interest in the preservation of the natural resources and to protect the rights of owners of riparian property that may be affected by such project. The statutory scheme enacted to effect this purpose is future-oriented. Subsection (a) states that "before any excavation or filling project is begun," a permit application must be filed. Similarly, Subsection (b) refers

to the areas within which "the proposed work will take place." In addition, Subsection (m) provides that "[t]his section shall apply to all persons . . . proposing excavation or filling work . . . and the work to be performed by the State government or local governments." The statutory purpose, then, can only be effected by reviewing a project prior to its completion.

In the instant case, however, the Department requested the applicant to file an "after-the-fact" application for a permit. This process defies the logic and purpose of the statute. We hold that permit applications must be reviewed prospectively, taking into consideration the work already completed.

If the application for the project had been made, as it should have been, before work began on the project, there may have been support for the conclusion of the Department that the project would destroy three acres of marshland and that the permit should be denied. On the contrary, there is some evidence in the record that any attempted restoration by removing the elevated roadway and filling in the parallel canals would result in substantially more damage to the marine life and the environment than would with maintenance of the project in its completed state.

The Department has the authority under G.S. 113-229 to condition its permit so as to require the applicant to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in G.S. 113-229(e). On remand, the Department should consider whether the public interest may best be served by the issuance of such a conditional permit for the completion of the remainder of the project.

The judgment entered is reversed; the case is remanded to the trial court to be further remanded to the Commission for proceedings consistent with this opinion.

Reversed and remanded.

Judges CLARK and WELLS concur.

ORA LEE CAMERON v. CLARENCE P. CAMERON

No. 7811SC605

(Filed 16 October 1979)

Reformation of Instruments § 1.2— reformation for mistake of draftsman

Defendant husband's evidence on motion for summary judgment was sufficient to support a claim for reformation of a note and deed of trust for mutual mistake by striking the name of plaintiff wife therefrom where defendant's affidavit stated that, although an option to purchase land owned only by defendant stated that the consideration for the sale would be paid to plaintiff and defendant, plaintiff agreed that the note and deed of trust would be drawn so that the full purchase price would be paid only to defendant, and the note and deed of trust were drawn in favor of both plaintiff and defendant because of a mistake of the draftsman.

APPEAL by defendant from *Canaday, Judge*. Judgment entered 17 April 1978 in Superior Court, HARNETT County. Heard in the Court of Appeals 23 April 1979.

The defendant owned a 49.42-acre tract of land acquired before his marriage. On 17 March 1977 the defendant and his wife, the plaintiff, entered into an option agreement with A. C. Morrison, Jr. to convey this property in exchange for a deed and note payable to the plaintiff and defendant. On 1 April 1977, A. C. Morrison, Jr. exercised his option by executing a note payable jointly to the parties and secured by a deed of trust executed to them. On 11 April 1977, the plaintiff and defendant separated.

The plaintiff initiated this action on 30 January 1978 seeking a one-half interest in the sale proceeds from this transaction. The defendant counterclaimed alleging that the plaintiff's name was mistakenly included on the note and deed contrary to instructions given the drafting attorney. The plaintiff made a motion for summary judgment. She filed her own affidavit in support of the motion. She alleged in the affidavit that there was not a mistake on her part in the execution of the option or the deed, and that she signed the option and the deed in exchange for her right to receive one-half the proceeds of the sale. The defendant filed an affidavit in which he alleged that notwithstanding the terms set out in the option, the attorney who prepared the note and deed of trust was instructed with the full consent and approval of the plaintiff to prepare the note and deed of trust in favor of the

defendant only. The court granted summary judgment for plaintiff from which defendant appealed.

Bryan, Jones, Johnson, Hunter and Greene, by Robert C. Bryan, for plaintiff appellee.

Neill McK. Ross for defendant appellant.

WEBB, Judge.

The defendant does not contend there was a mistake in the option which provided that the consideration for the sale would be paid to plaintiff and defendant. He does contend that in spite of the option's terms the plaintiff agreed that the note and deed of trust would be drawn so that the full purchase price would be paid to the defendant, and it was a mistake on the part of the draftsman that the note and deed of trust were not so drawn. The question raised by this appeal is whether this contention of the defendant presents a genuine issue of material fact. G.S. 1A-1, Rule 56; *Executive Leasing Associates v. Rowland*, 30 N.C. App. 590, 227 S.E. 2d 642 (1976).

Based on the defendant's affidavit, it appears that when the option was made, which provided the note would be payable to plaintiff and defendant, the defendant gave plaintiff one-half the proceeds of the proposed sale. A gift is presumed when a husband has the title to personal property placed in his and his wife's joint names. *Underwood v. Otwell*, 269 N.C. 571, 153 S.E. 2d 40 (1967). Defendant by his affidavit offers nothing that would rebut this presumption of gift. He does contend that at the time the note and deed of trust were executed, the draftsman was told, with the consent of the plaintiff, to make the note payable to defendant. He does not state there was any consideration for this transfer by the wife of her share of the note to him. Plaintiff, relying on *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972), contends there must be consideration to support the transfer by plaintiff to defendant of her interest in the note. That case involved an executory contract. The defendant in the case sub judice has offered evidence by way of affidavit that the plaintiff consented to his instruction to the draftsman to make the note payable to him. No consideration would be required for this fully executed agreement. 17 Am. Jur. 2d, Contracts, § 86, p. 429. The defendant in effect says by his affidavit

that the parties agreed the note would be made payable to defendant and through an error on the part of the draftsman, this was not done. This is enough to support a claim for reformation for mutual mistake. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976).

We hold it was error for the court to enter a summary judgment for plaintiff.

Reversed and remanded.

Chief Judge MORRIS and Judge HEDRICK concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR UNDER THE WILL OF HOWARD A. MARVILL v. VIRGINIA BAKER, MIRIAM SIMPSON AND LILLIAN B. KASPER

No. 7928SC52

(Filed 16 October 1979)

Wills § 28.6— "cash in my possession"—money in bank not included in bequest

The words "Cash, travelers checks, . . . in my possession" as used in deceased's will did not include money in a bank or savings and loan association, since the words were found in a section of the will which disposed of household and personal effects, and all other items disposed of by this section would be found on the premises of deceased or in his safety deposit box.

APPEAL by defendant Virginia Baker from *Lewis, Judge*. Judgment entered 7 December 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 21 September 1979.

This is an action to construe the will of Howard A. Marvill, deceased. Mr. Marvill died on 24 December 1976. The plaintiff qualified as executor of his will. Parts of the will pertinent to this decision are as follows:

ITEM SEVEN

I give, devise and bequeath unto the following persons and beneficiaries all of my personal, mixed, tangible, intangible and real property as itemized and specified below:

* * *

(b) To my sister, Virginia (Mrs. William Baker):

All items of personal clothing

Household effects such as furniture, appliances, table and cookware, silverware and ornaments (except oil paintings on loan to me which are the property of Mr. Alexander Key)

Musical instruments and luggage

Any real property of which I may be possessed

Records of my military service, papers and photographs* pertain to my personal and family matters.

Masonic jewelry and any items pertaining to my membership in fraternal, military or patriotic organizations.

Cash, travelers checks, watches and jewelry in my possession.

My automobile and automotive equipment

* * *

(f) All of the rest, residue and remainder of my estate I bequesth [sic] unto my sisters who are named below. Should any of my sisters named in this paragraph predecease me, then, in that event, the bequest she would have received, if living at the time of my death, shall lapse and the amount thereof shall be divided equally among [sic] my surviving sisters:

To my sister Virginia (Mrs. William Baker 33⅓%

To my sister Miriam (Mrs. Henry K. Simpson) 33⅓%

To my sister Lilliam [sic] B. Kasper 33⅓%

*which
H.A.M.

At the time of his death, the testator had in his home and in his safety deposit box a certain amount of cash. He also had in checking and savings accounts a total of more than $43,000.00. He gave by specific bequests $5,000.00 to other legatees. The superior court held that by the use of the words "Cash . . . in my possession," in Item Seven (b) of his will, the deceased gave to defendant Virginia Baker the cash that was in his home and in his safety deposit box, and that the money on deposit in savings and checking accounts passed under Item Seven (f) of the will. Virginia Baker appealed.

McGuire, Wood, Erwin and Crow, by Charles R. Worley, for plaintiff appellee.

George W. Moore for defendant appellant Virginia Baker.

Redmond, Stevens, Loftin and Currie, by John S. Stevens, for defendant appellees Miriam Simpson and Dorothy J. Kasper, Administratrix of the Estate of Lillian B. Kasper.

WEBB, Judge.

We affirm the judgment of the superior court. In construing a will it is elementary that the intent of the testator is to be determined by examining the entire will in light of all the surrounding circumstances known to the testator and the intent is to be gathered from the four corners of the will. *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973) and *McWirter v. Downs*, 8 N.C. App. 50, 173 S.E. 2d 587 (1970). This case turns upon the meaning of the words "Cash, travelers checks, watches and jewelry in my possession." The words are found in a section of the will which disposed of household and personal effects. It also refers to real property, but the deceased had no real property. All the other items disposed of by this section would be found on the premises of deceased or in his safety deposit box. We infer from this that the phrase "in my possession" referred to articles on his premises or in his safety deposit box. This would not include money in a bank or savings and loan association.

Appellant has cited several cases from other jurisdictions which interpret the words "cash" or "cash on hand" to include money on deposit with a bank. *See In re Feist's Will*, 170 Misc. 497, 10 N.Y.S. 2d 506 (1939); *Re Banfield's Estate*, 137 Or. 256, 3 P.

2d 116 (1931); *Re Estate of Morris*, 15 Ariz. App. 378, 488 P. 2d 1015 (1971). In *Feist* the term "cash on hand" was used. The Court held this included money in a savings account. If it had not used this interpretation, one of the beneficiaries under the will would have received virtually nothing. In *Banfield* the testatrix bequeathed all "cash on hand" to her husband. This was held to include money in the bank. In *Morris* if the word "cash" had not been interpreted to include money deposited in the bank, the testatrix would have died intestate as to this portion of her estate. We do not find these cases persuasive. Our Supreme Court has said: "little or no aid can be derived by a court in construing a will from prior decisions in other will cases." *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E. 2d 465, 468 (1960).

We hold that in this case Judge Lewis properly construed the will of Howard A. Marvill.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. CARL OXENDINE

No. 7912SC428

(Filed 16 October 1979)

Criminal Law § 156.1— certiorari granted—filing of record on appeal not timely

Defendant's appeal is dismissed where he did not file the record on appeal until almost five months after the Court of Appeals entered an order of certiorari.

ON writ of certiorari to review proceedings before *Godwin, Judge.* Judgment entered in Superior Court, HOKE County.

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

Philip A. Diehl, for defendant appellant.

ERWIN, Judge.

Defendant was tried and convicted for the offense of murder in the second degree at the 24 April 1978 Session of the Superior Court of Hoke County. Defendant appealed as a matter of right. The appeal was dismissed as provided for by law when the defendant did not file or serve his proposed record on appeal within the time allowed.

Defendant, through counsel, applied to this Court for a writ of certiorari which we allowed on 14 December 1978. Our writ of certiorari provided in part: "The defendant shall cause the record on appeal to be settled and certified as provided in Rule 11 of the Rules of Appellate Procedure, the appeal being considered as taken on the date of this order." The date of the order is the 14th day of December, 1978. The record in the case *sub judice* was filed in this Court on 9 May 1979 without any extension of time granted by the Superior Court.

Rule 11 of the Rules of Appellate Procedure provides in part:

"SETTLING THE RECORD ON APPEAL; CERTIFICATION

(a) *By Agreement.* Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 30 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal."

This Court stated in *State v. Gillespie*, 31 N.C. App. 520, 521, 230 S.E. 2d 154, 155 (1976), *dis. rev. denied*, 291 N.C. 713, 232 S.E. 2d 205 (1977):

> "The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.
>
> The North Carolina Rules of Appellate Procedure are mandatory. 'These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . .' App. R. 1(a).
>
> For violation of the rules this appeal is subject to dismissal."

Defendant does not explain why so much time was taken to prepare this record on appeal in violation of our order.

Appeal dismissed.

Judges VAUGHN and HILL concur.

CARL D. GOLDEN, JR. v. VERA E. GOLDEN

No. 7825DC1129

(Filed 16 October 1979)

Appeal and Error § 6.2— denial of summary judgment—no immediate appeal

Ordinarily, the denial of a motion for summary judgment is not immediately appealable because it affects no substantial right, the movant being allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment.

APPEAL by plaintiff from *Tate, Judge*. Judgment entered 20 July 1978 in District Court, CATAWBA County.

Plaintiff and defendant were divorced in 1974, and plaintiff was ordered pursuant to a consent judgment to pay to defendant

alimony and child support for the two minor children of the marriage whose custody was awarded to defendant. At the time the consent judgment was entered, plaintiff was earning $27,700 per year.

In June 1976, a judgment was entered by Judge Beach vacating the 1974 consent judgment upon a finding that plaintiff had become totally disabled by disease and had been unable to work or earn any money since June 1975.

On 9 December 1976, defendant filed a motion in the cause pursuant to G.S. 50-16.9 for an increase in alimony on the ground that a substantial change of circumstances had occurred since entry of the June 1976 judgment. Plaintiff filed his motion to dismiss for failure to state a claim upon which relief can be granted pursuant to G.S. 1A-1, Rule 12(b)(6).

Plaintiff's motion was heard on 11 August 1977 before Judge Samuel Tate. Plaintiff made an oral motion for summary judgment on the ground that there could be no modification of a prior alimony award pursuant to G.S. 50-16.9, because the prior alimony award had been vacated. A copy of such judgment was admitted into evidence, and defendant stipulated that the judgment vacated the 1974 consent judgment. The motion for summary judgment was denied, and plaintiff appealed.

Rudisill & Brackett, by J. Richardson Rudisill, Jr., for plaintiff appellant.

Hovey, Carter & Robbins, by Sherwood J. Carter, Jr., for defendant appellee.

ERWIN, Judge.

We find it was proper for Judge Tate to consider plaintiff's motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure as one for summary judgment and to consider matters off the face of the record after giving the parties reasonable opportunity to present all material pertinent to the disposition of the case by summary judgment. *Smith v. Smith*, 17 N.C. App. 416, 194 S.E. 2d 568 (1973); G.S. 1A-1, Rule 12(b), of the Rules of Civil Procedure.

Plaintiff contends that denial of the motion for summary judgment is immediately appealable, because it affects a substantial right, namely, plaintiff's ability to litigate further the question of whether the order entered by Judge Beach in 1976 terminated forever plaintiff's obligation to pay alimony to defendant.

Ordinarily the denial of a motion for summary judgment is not immediately appealable, because it affects no substantial right, the movant being allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970).

The appeal is

Dismissed.

Judges VAUGHN and HILL concur.

JOSHUA M. DILLON BY HIS GUARDIAN AD LITEM THOMAS H. DILLON v. CONSOLIDATED DELIVERY, INC. AND YARVIN SYLVESTER CARTER

No. 7926SC51

(Filed 16 October 1979)

Attorneys at Law § 7.1— charging lien filed by attorney—judgment not rendered —fund recovered after withdrawal or discharge

An attorney retained to represent the plaintiffs in a personal injury action could not attach a charging lien before any judgment was rendered, since the lien attaches only to a judgment and not to a cause of action. Furthermore, the attorney could not attach a charging lien to a fund recovered after his discharge or withdrawal, since the fund would not be "recovered by his aid."

APPEAL by plaintiff from *Thornburg, Judge.* Order entered 16 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 September 1979.

Petitioner Richard Cohan, a Charlotte attorney, was retained by the minor plaintiff to bring this personal injury action, and by the plaintiff's mother to bring a companion case on her behalf. Apparently there was a written contingent fee contract by which Cohan was to receive 25% of any recovery if the cases were settled without suit, 33⅓% if suit was filed, and 40% if an appeal was taken. After suit was filed there was a settlement offer of $17,000 for both cases, which the plaintiffs apparently did not accept. Subsequently, Cohan moved to withdraw as counsel, alleging that he had been advised that the plaintiffs wished to discharge him. At the same time, Cohan declared an attorney's lien in the amount of $5,666.67 (one-third of the amount of the settlement offer) on any recovery by the plaintiff in the personal injury actions. The court ordered that the lien attach, and plaintiff appeals.

Bailey, Brackett and Brackett, by Martin L. Brackett, Jr. and William L. Sitton, Jr., for plaintiff appellant.

Lacy W. Blue for appellee.

ARNOLD, Judge.

Subsequent to the entry of the trial court's order in this case, we filed our opinion in the case of *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E. 2d 305 (1978), *cert. denied* 296 N.C. 410, 251 S.E. 2d 468 (1979). There we dealt with the subject of attorneys' charging liens in a fact situation much like the one now before us, and our holding in that case controls the present appeal.

Here, as in *Covington*, the attorney attempted to attach a lien before any judgment was entered. This he cannot do, since a charging lien attaches only to a judgment, not to a cause of action. *Id.* Furthermore, an attorney cannot attach a lien to a fund recovered after his discharge or withdrawal, since at that time the fund would not be " 'recovered by his aid.' (Cite omitted.)" *Id.* at 67, 247 S.E. 2d 309.

The trial court's declaration of a lien in Cohan's favor was error. We note, however, that under our holding in *Covington*, Cohan may seek to recover the reasonable value of his services to the plaintiffs through the time his employment ended.

Reversed.

Judges WEBB and WELLS concur.

IN THE MATTER OF: THE CUSTODY OF THEODORE DAVIS ROOKER AND TAMMY JO ROOKER, MINORS

No. 799DC121

(Filed 16 October 1979)

Infants § 6.3— father's signing of consent to adoption—subsequent effort to obtain custody

Where petitioner signed consent to the adoption of his children by their grandparents, petitioner was rendered a stranger to the blood, but this in no way precluded his right to claim custody as an "other person" within the meaning of G.S. 50-13.1, and the trial court erred in dismissing the custody proceeding for failure of petitioner to state a cause of action for which relief could be granted.

APPEAL by petitioner, Theodore A. Davis, from judgment entered by *Allen (Claude W.), Judge*, on 27 November 1978 in District Court, WARREN County. Heard in the Court of Appeals 20 September 1979.

Petitioner alleges that he is a resident of Virginia and the natural father of Theodore Davis Rooker, age 12, and Tammy Jo Rooker, age 10. Several years ago the petitioner divorced his wife and consented that his two children set out above be adopted by the natural grandparents, both of whom are now dead. The minor children are now residing with Janet Rooker Cleaton, the respondent herein.

Petitioner further alleges that he is now married, has a good and proper home in which to rear the children; that he is a fit and proper person to have the care, custody and control of his minor children; that he verily believes that it would be for the best interest of said minor children that they live with their natural parent, the petitioner. There is no allegation that the children are not being adequately cared for, and no collateral attack is being made on the adoption.

The trial judge entered an order dismissing the action for failure of the petitioner to state a cause of action for which relief can be granted, and petitioner appealed.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn II, for petitioner appellant.

Banzet & Banzet, by Julius Banzet III, for respondent appellee.

HILL, Judge.

"A final decree of adoption for life terminates the relationship between the natural parents and the child, and the natural parents are divested of *all* rights with respect to the child." (Emphasis added.) G.S. 48-23. *Rhodes v. Henderson*, 14 N.C. App. 404, 188 S.E. 2d 565 (1972).

Hence, the position of the petitioner is no greater than that of a stranger to the child. *Rhodes v. Henderson, supra.*

What right does a stranger have under the provisions of G.S. 50-13.1? This statute states substantially as follows:

> Any parent, relative, or *other person*, . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of a minor child as herein provided. (Emphasis added.)

The determining factor under North Carolina decisions as to the proper custody of minor children is not that of claim of entitlement by the parties but the welfare of the child. *Mathews v. Mathews*, 24 N.C. App. 551, 211 S.E. 2d 513 (1975). In this case, the children are not living with the original adopting parents (the grandparents), but are living with another person, a stranger in effect. By signing consent to the adoption by the grandparents, the petitioner was rendered a stranger to the blood, but this in no way precludes his right as an "other person" to claim custody.

This is a matter for the lower court to decide based on all the evidence before the court at that time. Therefore, the judgment entered by the court below is vacated and the case is

Remanded.

Judges VAUGHN and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 OCTOBER 1979

CAROLINA COACH CO. v. RABY No. 7810SC1070	Wake (74CVS6568)	Affirmed
CITY OF CHARLOTTE v. WAGNER No. 7926DC70	Mecklenburg (78CVD4626)	Affirmed
HAROLD v. GRAHAM No. 7928DC9	Buncombe (77CVD2291)	Affirmed
SMITH v. WINN-DIXIE STORES No. 798SC127	Lenoir (77CVS437)	No Error
STATE v. BROWN No. 7926SC468	Mecklenburg (71CR59355)	No Error
STATE v. ESTEP No. 7910SC402	Wake (78CRS47993)	No Error
STATE v. GARNETT No. 7926SC483	Mecklenburg (78CR105401) (78CR105403)	 Reversed No Error
STATE v. HAYNES No. 7910SC465	Wake (78CR28314)	No Error
STATE v. SIMMONS No. 795SC480	New Hanover (78CR26935) (78CR26936)	No Error
THOMPSON v. JORDAN No. 7920SC540	Stanly (78CVS346)	Reversed and Remanded

LONNIE A. GRINER v. DALLAS W. SMITH AND WIFE, WILMA SMITH, D/B/A SANDY HILL FARM

No. 7819SC978

(Filed 6 November 1979)

1. **Animals § 2.2— horse injured by another horse—vicious propensities—owner's negligence**

Knowledge by the owner of the vicious propensities of his animal is not always essential to a recovery in an action for injuries alleged to have been caused by the owner's negligence; rather, the owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and he must exercise due care to prevent injury from reasonably anticipated conduct. Therefore, in an action to recover for the loss of plaintiff's horse which was destroyed after being seriously injured by another horse while both horses were in defendant's care, the trial court did not err in failing to require the jury to find that the horse which kicked plaintiff's horse had a vicious propensity and that defendants knew or should have known of this propensity.

2. **Evidence § 34.2— offer to compromise—evidence not prejudicial**

In an action to recover for the loss of plaintiff's horse which was in defendant's care, the prejudicial effect of testimony concerning an offer to compromise was sufficiently dissipated by the trial court's prompt dismissal of the jury and subsequent instruction not to consider that testimony; furthermore, defendants cannot complain since their counsel failed properly to move to strike the incompetent testimony.

3. **Damages § 13— death of horse—expense of training another horse—evidence not prejudicial**

In an action to recover for the loss of plaintiff's horse which was in defendant's care, evidence concerning the expense of training a horse to do those things which plaintiff's horse was able to do, though only remotely relevant to the value of the horse before its death, was not sufficiently prejudicial to require a new trial.

APPEAL by defendants from *Lupton, Judge.* Judgment entered 19 May 1978 in Superior Court, ROWAN County. Heard in the Court of Appeals 27 June 1979.

Plaintiff initiated this action to recover for the loss of his American Quarter Horse mare, Black Lake Bars. Black Lake Bars suffered an injured leg and had to be "put down" on 19 May 1977. Defendants are the proprietors of a horse breeding business in Davie County called Sandy Hill Farm. Black Lake Bars was injured while at Sandy Hill Farm for siring by defendants' American Quarter Horse stallion, Mr. Rocket Chick.

Plaintiff alleges that defendants impliedly agreed, as part of the arrangement for the breeding of Black Lake Bars, that they would use due care and skill in caring for Black Lake Bars while she was in their care and that they would redeliver the horse to plaintiff. They further agreed to return the $200 stud fee in the event the mare did not produce a live foal. He alleges defendants failed to redeliver the mare as contemplated by the agreement and failed to return the stud fee, resulting in his suffering damages in the amount of $10,200. In the alternative, plaintiff alleges that defendants impliedly promised to care for the mare in a careful and reasonable manner, but failed to do so in that they: placed the mare in a paddock with another mare whose nature and disposition were unknown to them; knew or should have known of the debilitating and destructive nature of the other mare; and after learning of the other mare's destructive nature, failed to separate the mares. Plaintiff alleges that as a proximate result of defendants' negligence, Black Lake Bars was kicked by the other mare and received a broken leg which required that Black Lake Bars be destroyed and which prevented her from producing a live foal, resulting in damages to defendant in the amount of $10,200.

Defendants answered averring that, consistent with the established practice in the trade, they are not responsible for accident, sickness, or death to the plaintiff's mare. Furthermore, they aver that plaintiff elected the pasture care program for his mare rather than the more expensive stall care program which would have segregated plaintiff's mare from the other mares. Defendants allege that at all times they used reasonable care while boarding plaintiff's mare. In the alternative, defendants allege that plaintiff was contributorily negligent in the following respects: he failed to request that Black Lake Bars be moved to stall care; he knew or should have known of the vicious and aggressive tendencies of Black Lake Bars yet negligently failed to so inform defendants; and prior to the incident resulting in the necessity of having Black Lake Bars "put down", services to the mare had been completed, but plaintiff refused to pick up the mare despite defendants' request that he do so. Defendants allege by way of counterclaim that plaintiff and defendant contracted orally for the transportation of plaintiff's mares. The reasonable value of those services, for which plaintiff allegedly is indebted to

defendants, is $183. Defendants also allege that plaintiff owes defendants a veterinary fee of $15 for a cervical culture of Black Lake Bars for which defendants paid.

Plaintiff testified at trial that Black Lake Bars was returned to Sandy Hill Farm in May of 1977 after an unsuccessful breeding with Mr. Rocket Chick during her foaling heat in early May of 1976. He stated that the stud fee was $200 per mare including transportation and that the boarding fee was $2 per day per mare. Another of plaintiff's mares, Black Friday, was also transported to Sandy Hill Farm for breeding in May of 1977. Neither mare had a foal at that time. On a Sunday in May of 1977, plaintiff visited defendants' farm and observed Black Lake Bars, Black Friday, and another outside mare, Dana's April, in a corral together. On that visit, plaintiff noticed an injury on the side of Black Lake Bars which he described as "bulging out the size of a football". He called to Mr. Smith's attention the fact that Dana's April had shoes. Smith responded, "Yes, that's dangerous." Smith also allegedly commented, "Well, they are having a time getting used to each other." He testified that Mr. Smith had told him that he couldn't keep Dana's April in a box stall because she would tear it up. He testified that defendants did not keep Black Lake Bars in a separate box stall as they had in May of 1976 when she had a foal by her side. He assumed she would receive the same accommodations when she was returned for breeding. The next Thursday, 19 May 1977, plaintiff was called by Mrs. Smith and told to come to the farm, that his horse had been involved in a terrible accident. Mrs. Smith already had contacted a veterinarian. When plaintiff arrived at the farm, Mrs. Smith told him that Dana's April had kicked Black Lake Bars and broken her leg. One of her back legs was broken just below the hollow. All three bones were broken, and the leg was dangling by the skin only. The veterinarian was of the opinion that the leg would never heal and suggested that Black Lake Bars be put to sleep, and this was done. Plaintiff expressed his opinion that immediately prior to the injury in 1977, Black Lake Bars was worth $8,000 to $10,000.

The plaintiff testified extensively concerning his experience with breeding and raising horses and explained the terminology involved in horse breeding. He testified that he purchased Black Lake Bars in 1975 at an auction sale for $400. At that time she

was in foal and suffering from the mange. She stood 14-2 hands and was a registered quarter horse. He testified that at other quarter horse farms the brood mares were commonly kept in separate stalls even when they did not have a colt by their side. He stated that Sandy Hill Farm offered the box stall plan and asserted that he had never heard of Sandy Hill Farm offering any other plan. He denied observing any incidents of fighting among the three mares which were pastured together.

Defendant Wilma Smith testified that her farm offers stall or pasture care for mares. A mare with a foal is automatically placed in a stall to protect the foal. The stall care is more expensive. Other mares are pastured together. She denied that Dana's April was an aggressive mare. Dana's April also was boarded at defendant's farm in April of 1976, and at that time showed no aggressive behavior. Mrs. Smith stated that she did not recall a knot on Black Lake Bars the Sunday of plaintiff's visit, and she did not overhear any conversation concerning an injury to plaintiff's horse.

Mrs. Smith described the events leading up to her discovery of Black Lake Bars' injury. The three mares were placed into a six-acre pasture. They peacefully were standing parallel to the fence close to where Wilma Smith was tending to some foals and mares—Black Lake Bars was in the middle, Black Friday behind, and Dana's April ahead of her six to eight feet away. Wilma Smith turned away and started into the barn when she heard a squeal. She went back through the barn and opened the door onto the horses' pasture when she observed the injured horse about 20 feet from where she was last seen standing. The veterinarian and the plaintiff were called immediately.

Dallas Smith denied observing any aggressive behavior among the horses. He also denied that plaintiff had mentioned there being any knots on Black Lake Bars the Sunday he visited. He also denies stating that Dana's April could not be kept in a box stall. With regard to the expense of transporting plaintiff's mares, Dallas Smith testified that plaintiff promised to pay for hauling the horses. When the first breeding was unsuccessful, plaintiff offered to pay, but defendants refused to take any money. After the May 1977 incident, plaintiff did not again offer to pay for the transportation, and defendants decided that since a

lawsuit had been filed they should seek compensation for the transportation.

The veterinarian who treated Black Lake Bars described the injury and explained that the arteries in the lower leg were so damaged that blood circulation had been destroyed, and surgery might be unsuccessful. He had the horse "put down" at plaintiff's direction. He further testified that it was not unusual to keep outside mares pastured together. Joan Backhaus, part owner of an established breeding farm, testified that the custom of the trade is to put brood mares in pastures together with other such mares. Lawrence Ross, a National Director of the American Quarter Horse Association, testified that brood mares are kept in pastures and that mares with foals are often also kept in pasture with other mares which have foals. John Shoaf, the owner of Dana's April, denied that she was an aggressive or vicious mare. He stated that she had often been around strange horses and to his knowledge never had kicked any of them. He denied that she could not be kept in a stall.

The case was sent to the jury upon instructions by the trial court on two issues: (1) "Was the plaintiff's horse, Black Lake Bars, injured by the negligence of the defendants?" (2) "What amount of damages, if any, is the plaintiff entitled to recover?" The jury answered the first issue in the affirmative and awarded plaintiff $3,225 in damages. Defendants appeal from the entry of judgment on the verdict, assigning error to rulings and instructions by the trial court.

Burke, Donaldson & Holshouser, by Arthur J. Donaldson and William D. Kenerly, for plaintiff appellee.

Hudson, Petree, Stockton, Stockton & Robinson, by W. Thompson Comerford, Jr., and John F. Mitchell, for defendant appellants.

MORRIS, Chief Judge.

[1] The primary question presented by defendants' appeal concerns the application of the North Carolina rule with respect to the liability of the keeper of domestic animals. Defendants contend that the trial court's instructions were erroneous because they failed to require the jury to find that Dana's April had a

vicious propensity and that defendants knew or should have known of this propensity. We reject defendants' contention for the reasons explained below.

The notion that a party must show the dangerous propensity of a domestic animal before establishing a basis for recovery arose originally in what were essentially strict liability cases. *See generally* Prosser, Law of Torts § 76 (4th Ed. 1971). The basis of the action was the neglect or failure of the owner to restrain the domestic animal known to be vicious and thus liable to do harm. *See generally* 3A C.J.S., Animals § 177; 4 Am. Jur. 2d, Animals § 86. *See also* Restatement, Second, Torts § 509, comment d. The early North Carolina decision of *Cockerham v. Nixon*, 33 N.C. 269 (1850), was expressed in language which smacks of such strict liability. The Court reasoned that the "fact [of a bull's viciousness and dangerousness] coming to the knowledge of the owner, is notice sufficient to put him in the wrong and make him liable for the consequences of his neglect to keep the animal confined." *Id.* at 270. The Court further stated:

> "When the owner knows or has reason to believe that an animal is dangerous, on account of a vicious propensity in him, from nature or habit (a term used to denote an acquired as distinguished from a natural vice), it becomes his duty to take care that no injury is done; and he is liable for any injury which is likely to be the result of this known vicious propensity." *Id.* at 271.

Although there may be argument to the contrary, we do not believe our Courts have ever authoritatively determined whether the strict liability rule as applied at common law now applies in North Carolina. The Court in *Hill v. Moseley*, 220 N.C. 485, 17 S.E. 2d 676 (1941), raised the issue but concluded that it was unnecessary to resolve the question in that action based upon negligence. Some other decisions applying the rule do not specify whether the action was brought in negligence. *See e.g., Sellers v. Morris*, 233 N.C. 560, 64 S.E. 2d 662 (1951); *Plumides v. Smith*, 222 N.C. 326, 22 S.E. 2d 713 (1942); *Harris v. Fisher*, 115 N.C. 318, 20 S.E. 461 (1894).

Recent decisions of the Supreme Court and this Court rendered in negligence actions suggest that the gravamen of the action is not negligence, yet nevertheless apply the standard of a

reasonable person. *See e.g., Sink v. Moore* and *Hall v. Moore*, 267 N.C. 344, 148 S.E. 2d 265 (1966); *Sanders v. Davis*, 25 N.C. App. 186, 212 S.E. 2d 554 (1975); *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270 (1971), *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971). All of these cases involved negligence actions. To the extent that those cases applied the reasonable person standard in the context of negligence actions seeking to recover for injury caused by the dangerous propensity of the animal, the decisions are no doubt correct. To the extent the language in those decisions might by implication affect other actions, it is dictum.

Our brief summary of the history of the North Carolina vicious propensity rule indicates that often times decisions are rendered without distinguishing between traditional negligence actions and actions which at common law might amount to actions involving strict liability. The reported decisions most often applying the vicious propensity rule arise in what is clearly a negligence context. *See e.g., Swain v. Tillett*, 269 N.C. 46, 152 S.E. 2d 297 (1967); *Sink v. Moore and Hall v. Moore, supra; Hill v. Moseley, supra; Hallyburton v. Fair Association*, 119 N.C. 526, 26 S.E. 114 (1896); *Pharo v. Pearson*, 28 N.C. App. 171, 220 S.E. 2d 359 (1975); *Sanders v. Davis, supra; Miller v. Snipes, supra; Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970). Into these decisions has been infused precedent from decisions such as *Cockerham v. Nixon, supra*, which presented facts which at common law would have supported a strict liability action upon proof of vicious propensity and knowledge by the owner. We consider this observation pertinent because it explains the origin of the rule as has been stated in negligence cases. What has evolved therefrom is not actually a hybrid cause of action but a line of cases enunciating a rule encompassing a specific application of the traditional standard of reasonable care in negligence actions. The rule correctly requires the keepers of domestic animals to guard against injury or damage from reasonably anticipated conduct of these animals. *See generally* Prosser, Law of Torts § 33 at 170 (4th ed. 1971). The line of cases beginning with *Rector v. Coal Co.*, 192 N.C. 804, 136 S.E. 113 (1926), state the rule as follows:

> "The liability of an owner for injuries committed by domestic animals, such as dogs, horses and mules, depends upon two essential facts:

1. The animal inflicting the injury must be dangerous, vicious, mischievous or ferocious, or one termed in the law as possessing a 'vicious propensity.'

2. The owner must have actual or constructive knowledge of the vicious propensity, character and habits of the animal." 192 N.C. at 807, 136 S.E. at 115.

This statement of the rule is accurate insofar as it is applied in cases wherein the damages are caused by the vicious propensity of the animal which is or should be known to the keeper. *Compare* Restatement, Second, Torts § 509(2); *see also* Prosser, Law of Torts § 79 at 517-18. These cases should not, however, be read as restricting the rights of action against the keeper of a domestic animal when injury is caused by conduct other than viciousness of an animal. For example, in *Lloyd v. Bowen,* 170 N.C. 216, 86 S.E. 797 (1915), the Court specifically rejected the contention raised by defendants that whenever an owner is sued for damage or injury caused by a domestic animal he must prove a vicious propensity and knowledge:

"[K]nowledge by the owner of the vicious propensities of his horse is not always essential to a recovery in an action for injuries alleged to have been caused by the owner's negligence. There may be negligence apart from this, but if the owner is not otherwise negligent and the injury is caused by the viciousness of the horse, then knowledge must be shown in order to charge the owner . . . ." 170 N.C. at 221, 86 S.E. at 799.

This is the accepted rule. The owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and he must exercise due care to prevent injury from reasonably anticipated conduct. *See generally* 4 Am. Jur. 2d, Animals § 89, 3A C.J.S., Animals § 178; Prosser, *id.* Therefore, not all actions seeking recovery for damage caused by a domestic animal need involve the vicious propensity rule.

The language of the Court in *Lloyd v. Bowen, supra,* is uniquely appropriate here. In response to a challenge to the sufficiency of instructions in a case where plaintiff was injured by defendant's horse, the Court concluded:

"The court correctly defined negligence and proximate cause, and also properly applied the rule of the prudent man to the facts as the jury might find them to be. The question of negligence in regard to the horse did not depend, in this case, solely upon defendant's previous knowledge of his vicious or unruly habits. It would be a circumstance to be weighed with others disclosed by the evidence." 170 N.C. at 220, 86 S.E. at 798.

Defendants next assign error to the trial court's denial of their motions for directed verdict on the specific grounds that "there was insufficient evidence of vicious propensity or of defendants' knowledge of any vicious propensity of Dana's April for the case to be submitted to the jury." In light of our previous discussion, it is clear that defendants' negligence does not depend solely upon their knowledge of Dana's April's vicious propensity. There was sufficient evidence of other bases of negligence to go to the jury.

[2] Defendants' third assignment of error asserts prejudicial error in the admission of testimony concerning an offer of compromise. The testimony arose during direct examination of the plaintiff:

"Q. At the time when Mr. Smith brought Black Friday back to your acreage, did you have any conversation with him about Black Lake Bars?

A. Yes, I did.

Q. Do you recall who started that conversation? Who initiated it?

A. He did.

Q. How did that conversation start?

A. Well, he said he would like to make restitution.

MR. VAN HOY: OBJECTION.

COURT: OVERRULED.

EXCEPTION NO. 2

Q. What did he say?

A. He said that he would like to make restitution.

MR. VAN HOY: Your Honor, I would like to be heard on that, please.

COURT: All right, Members of the jury, go to the jury room."

A *voir dire* was conducted after which the trial court instructed the jury as follows:

"COURT: Members of the jury, the court instructs you not to consider that part of Mr. Griner's testimony in which he stated that Mr. Smith said that he would like to make restitution."

In our opinion, the prejudicial effect of the testimony concerning the offer of compromise was sufficiently dissipated by the trial court's prompt dismissal of the jury and subsequent instruction not to consider that testimony. Furthermore, it is clear from the record that the defendants' counsel failed properly to move to strike the incompetent testimony. *See generally* 1 Stansbury, N.C. Evidence § 27 (Brandis rev. 1973).

[3] Finally, defendants argue that certain testimony elicited on redirect examination of plaintiff concerning the training of a new horse so that it could work like Black Lake Bars did before her death was incompetent. Defendants' counsel interposed a timely objection and motion to strike the testimony. The appropriate measure of damages for the loss of livestock is the value of the animal alive just prior to its loss, minus the value, if any, of the carcass when there is evidence of the value of the carcass. *See e.g., Godwin v. R.R.*, 104 N.C. 146, 10 S.E. 136 (1889); *Boing v. R.R.*, 91 N.C. 199 (1884); *Roberts v. R.R.*, 88 N.C. 560 (1883); *see also Rippey v. Miller*, 46 N.C. 479 (1854) (horse killed by defendant). *See generally Annot.*, 79 A.L.R. 2d 677 (1961). Evidence concerning the expense of training a horse to do those things which Black Lake Bars was able to do is only remotely relevant to the value of the horse before its death, in light of plaintiff's specific testimony as to the fair market value of the horse. Although the remoteness of the probative value of evidence is often grounds for its exclusion, in our opinion the testimony was not of sufficient prejudicial character to render its admission prejudicial error requiring a new trial.

For the reasons stated, we find in the trial court proceedings.

No error.

Judges PARKER and MARTIN (Harry C.) concur.

C. THOMAS WOOD, J. P. RIDDLE, AS OWNERS AND LESSEES UNDER LONG-TERM LEASE, AND DONALD CRAIG HARRIS, TENANT, ON BEHALF OF THEMSELVES AND ALL OTHER PROPERTY OWNERS AND TENANTS OF THE CAMBRIDGE ARMS APARTMENTS, COUNTY OF CUMBERLAND, STATE OF NORTH CAROLINA, SIMILARLY SITUATED, PLAINTIFFS v. CITY OF FAYETTEVILLE, NORTH CAROLINA, AND THE CITY COUNCIL OF SAID CITY, SAID COUNCIL CONSISTING OF BETH D. FINCH, MAYOR, AND J. L. DAWKINS, VINCENT H. SHIELDS, STEVEN R. SATISKY, L. EUGENE PLUMMER, MARION C. GEORGE, JR. AND MARIE W. BEARD, COUNCIL, DEFENDANTS JOHN M. MONAGHAN, JR. AND THOMAS M. McCOY INDIVIDUALLY, AND JOHN M. MONAGHAN, JR. AND THOMAS M. McCOY ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS, RESIDENTS, AND TAXPAYERS OF THE CITY OF FAYETTEVILLE, CUMBERLAND COUNTY AND STATE OF NORTH CAROLINA, SIMILARLY SITUATED, INTERVENORS, DEFENDANTS

No. 7912SC14

(Filed 6 November 1979)

1. Constitutional Law §§ 4, 4.1; Municipal Corporations § 2.4— act limiting power to annex—standing to attack constitutionality—citizens and taxpayers

Intervenors do not have the right as taxpayers of the City of Fayetteville to challenge the constitutionality of an act of the General Assembly which prohibits the annexation of any area in Cumberland County if a majority of the registered voters residing in the area sought to be annexed sign a petition opposing the annexation where intervenors have failed to show that their rights have been directly affected by the act; nor do intervenors have standing to challenge the act as citizens of the City of Fayetteville where they have failed to allege and show some interest other than that "general interest as a citizen in good government in accordance with the provisions of the Constitution."

2. Municipal Corporations § 2.4— petition in opposition to annexation—invalidity of annexation ordinance

The evidence supported the trial court's determination that a petition in opposition to annexation signed by a majority of the voters in an area sought to be annexed by the City of Fayetteville was valid and that the Fayetteville City Council adopted an ordinance annexing the area in violation of 1969 N.C. Session Laws, Ch. 1058, § 2.

3. Municipal Corporations § 2— attack on limitation of power to annex—no standing by city

The City of Fayetteville had no standing to contest the validity of an act of the legislature prohibiting the annexation of any area in Cumberland County if a majority of the registered voters residing in the area sought to be annexed sign a petition opposing the annexation, since the City of Fayetteville is a creature of the legislature, has no inherent power to annex, and cannot question a limitation placed by the legislature on its power to annex.

APPEALS by original defendants and Intervenor-Defendants from *Herring, Judge*. Judgment entered 23 August 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 September 1979.

This is a civil action for injunctive and declaratory relief brought by plaintiffs, who are citizens and taxpayers of Cumberland County, and residents of Cambridge Arms Apartments located in Cumberland County. It arose out of an annexation proceeding instituted by the City of Fayetteville pursuant to the provisions of G.S. § 160A-45 through § 160A-56. Prior to 1969, Cumberland County was one of twelve counties exempt from the general annexation provisions of G.S. § 160A, Parts 2 and 3. In 1969 the General Assembly, by 1969 N.C. Session Laws, Ch. 1058, § 1, removed Cumberland County from the list of exempt counties. Section 2 of the Act provided in part as follows:

> Provided, that the municipality shall not annex an area if, within 30 days after publication of the notice of intent has been completed, a petition signed by a majority of the registered voters residing in the area to be annexed is filed with the governing body stating that the signers are opposed to annexation.

As a result of the passage of that Act, the annexation procedure for Cumberland County is now that applicable to other areas in the state, with the exception that the option of opposing annexation by petition is available under 1969 N.C. Sess. Laws, Ch. 1058, § 2 to the registered voters who reside in the area sought to be annexed. *See Armento v. City of Fayetteville*, 32 N.C. App. 256, 231 S.E. 2d 689 (1977); petition for disc. rev. denied, 292 N.C. 466, 233 S.E. 2d 921 (1977).

In a verified complaint filed 4 June 1976 plaintiffs alleged that on 26 May 1976 the City Council of Fayetteville adopted an-

nexation ordinance number 173 extending the corporate limits of the City of Fayetteville to include the area known as Cambridge Arms Apartments; that on 5 May 1976, pursuant to the provisions of 1969 N.C. Sess. Laws, Ch. 1058, § 2, applicable to Cumberland County, the residents of the apartments who constituted a majority of the registered voters there located signed a petition in opposition to the proposed annexation; that the petition was timely filed within 30 days of the last date of publication of the Notice of Intent to Annex; and that the City Council, in disregard of the petition, unlawfully adopted annexation ordinance number 173 in violation of § 2 of Ch. 1058, 1969 Sess. Laws. Plaintiffs prayed for a declaratory judgment that annexation ordinance number 173 was unlawful, invalid and void, and that the City be permanently enjoined from enforcement thereof.

In its answer the City admitted that, pursuant to annexation ordinance number 173, it had annexed the area known as Cambridge Arms Apartments, but denied that in so doing it had acted unlawfully. The City raised the defense that 1969 N.C. Sess. Laws, Ch. 1058, § 2 is unconstitutional in that it is an unlawful delegation of legislative power in violation of Article II, Section 1 of the North Carolina Constitution; that it is a local act relating to health, sanitation, and the abatement of nuisances in violation of Article II, Section 24 of the constitution; and that it grants special emoluments to the registered voters of Cumberland County in violation of Article I, Section 32 of the state constitution. Additionally, defendant city alleged that Section 2 deprives it of the equal protection of the laws in violation of the state and federal constitutions.

On 13 July 1976 two individual residents of the City of Fayetteville, John M. Monaghan, Jr. and Thomas M. McCoy, filed a motion on behalf of themselves and all other citizens, residents and taxpayers of the City of Fayetteville, seeking to intervene in the action. They alleged in their motion that G.S. § 160A-45 through § 160A-56 were for their benefit as citizens and that the limitation on the City of Fayetteville's right to annex territory adversely affected intervenors' economic and other interests. They sought either intervention as a matter of right under Rule 24(a)(2) of the Rules of Civil Procedure or permissive intervention under Rule 24(b)(2). In their proposed answer filed with the motion to intervene, the intervenors raised the defense that Section

2 of Chapter 1058 of the 1969 Session Laws is unconstitutional. After a hearing on the motion to intervene, the trial court entered an order on 19 October 1976, permitting intervention under both Rule 24(a)(2) and Rule 24(b)(2). Plaintiffs appealed from the order granting intervention. On the same date, the court granted a motion filed by plaintiffs to strike the constitutional defenses of the city defendant and the City Council on the ground that they lacked standing to raise the constitutional defense.

On 23 May 1977 plaintiffs moved for summary judgment against the defendant. They offered in support of their motion their verified complaint, along with the affidavits of several persons who had signed the petition opposing annexation. The court ruled that it was without jurisdiction to rule on the motion because of plaintiffs' pending appeal from the order granting intervention. On 4 April 1978, this Court issued its opinion in *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E. 2d 640 (1978), in which it was held that no immediate appeal lay from the order permitting intervention by the citizens, residents and taxpayers of Fayetteville because the plaintiffs had failed to show that the order affected any substantial right. Plaintiffs' petition for discretionary review was denied by our Supreme Court on 6 June 1978. 295 N.C. 264, 245 S.E. 2d 781.

On 19 May 1978 plaintiffs moved to strike the defense of unconstitutionality from the intervenor-defendants' answer, contending that the intervenors lacked standing to challenge the validity of the statute. That motion was denied on 23 August 1978.

At trial before the court without a jury, plaintiffs offered into evidence portions of the minutes of several meetings of the City Council of the City of Fayetteville held in May 1976 at which the annexation ordinance was discussed and finally adopted. They also offered the testimony of several witnesses tending to show that the petition was circulated by the resident manager of Cambridge Apartments, that the manager explained to the residents the meaning of the petition, and that the majority of registered voters in the apartments did sign the petition.

Defendant-City offered no evidence. The intervenors' evidence tended to show that the petition was drawn up by the attorney of a nonresident of the area to be annexed, and that cer-

tain persons signed the petition because they feared increased rent and taxes. The intervenors attempted to offer two documents into evidence relating to population and housing in Cumberland County. These documents were offered on the issue of the constitutionality of the statute. However, on plaintiffs' objection as to their relevance, they were excluded.

At the close of all of the evidence, the court refused to hear arguments on the issue of the constitutionality of 1969 N.C. Sess. Laws, Ch. 1058, § 2, on the ground that the constitutional issue was not presented by the pleadings. Leave to amend intervenors' answer was denied.

In its judgment entered 23 August 1978, the court found as a matter of fact that 25 of the 31 registered voters then residing in the area to be annexed voluntarily signed a valid petition in opposition to annexation in compliance with the requirements of 1969 N.C. Sess. Laws, Ch. 1058, § 2. The court concluded as a matter of law that annexation ordinance number 173, annexing Cambridge Arms Apartments, was adopted in violation of that statute and, therefore, was void. The City of Fayetteville was enjoined from enforcing or proceeding under the ordinance and was also ordered to rescind it.

Original defendants appeal from the order striking the constitutional defenses and from judgment in favor of plaintiffs. Intervenor-defendants appeal from judgment in favor of plaintiffs.

Rose, Thorp, Rand & Ray, by Ronald E. Winfrey for plaintiff appellees.

MacRae, MacRae, Perry & Pechmann, by James C. MacRae for defendant-city appellant.

Clark, Shaw, Clark & Bartelt, by John G. Shaw for Intervenor-defendants-appellants.

PARKER, Judge.

INTERVENOR-DEFENDANTS' APPEAL

[1] On this appeal the intervening defendants have sought to raise several questions concerning the trial court's rulings which resulted in its refusal to hear argument on or to pass on the con-

stitutionality of Section 2 of Chapter 1058 of the 1969 Session Laws. Because we find that the intervenors lack standing to challenge the constitutionality of that statute, we do not consider the merits of these contentions.

A court of this State has no inherent power to review acts of our General Assembly and to declare invalid those which the court disapproves or, upon its own initiative, finds to be in conflict with the Constitution. *In re Partin*, 37 N.C. App. 302, 246 S.E. 2d 519 (1978); *Green v. Eure*, 27 N.C. App. 605, 220 S.E. 2d 102 (1975) *cert denied, appeal dismissed*, 289 N.C. 297, 222 S.E. 2d 696 (1976). "Only those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights." *Canteen Service v. Johnson, Com'r of Revenue*, 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962); *See Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969); *Carringer v. Alverson*, 254 N.C. 204, 118 S.E. 2d 408 (1961). "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E. 2d 641, 650 (1973) [quoting from *Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968).]

In their verified motion to intervene the individual intervenors alleged that they either owned real property on which city taxes were paid or that they were city residents who paid city taxes on personal property. They further alleged in general terms that "any purported limitation [on the city's right to annex] would adversely affect the Intervenors' economic interest," and that the question of constitutionality involved a "question of concern and general interest to all citizens, residents, and taxpayers of the City of Fayetteville." At the hearing on the motion to intervene, one of the intervenors testified only that he was a property owner in Fayetteville. He further stated:

> . . . I do not own any property contiguous to the proposed area of annexation, nor do I own any property within three miles of the proposed area.

> I have no other interests, other than those of a citizen and taxpayer, that might be directly related to or harmed by the resolution of the lawsuit between the Plaintiffs and Defendant City of Fayetteville.

John M. Monaghan, Jr., the other individual intervenor, testified:

> *I feel* that my interests as a resident, citizen and taxpayer are affected by the annexation provision. As a taxpayer *I feel* I am called upon to bear the burden of extraordinary levels of service to serve people who live outside the boundaries of Fayetteville, but who use the various services that are provided by the city. One example of this is police protection for nonresidents who enter the city to do business, and any number of other things, such as use of recreational facilities, city streets, and health care facilities, by county residents. (Emphasis added)

On the basis of the evidence offered by the intervenors and the verified motion to intervene, they were made parties to this suit. Assuming that the evidence offered provided a sufficient basis for intervention, the fact that a party has a right or is permitted to intervene does not establish his standing to raise a constitutional challenge. A taxpayer, as such, has no standing to assert the invalidity of a statute unless he can allege and show that he has been injuriously affected. *Nicholson v. Education Assistance Authority, supra; Wynn v. Trustees*, 255 N.C. 594, 122 S.E. 2d 404 (1961). Taking the record as a whole, we conclude that the defendant-intervenors have failed to allege specific injury or to offer proof of any such injury. The broad reference to "economic injury" in the intervenors' motion to intervene is not a concrete allegation of direct injury. Further, the one reference in the record to such injury consists of the subjective opinion of an individual intervenor that "[a]s a taxpayer *I feel* I am called upon to bear the burden of extraordinary levels of service to people living outside of Fayetteville, but who use the various services that are provided by the city." In the absence of any showing that their rights have been directly affected, intervenors, as taxpayers, may not now seek a resolution of the constitutional issues.

In their position as citizens, the intervenors have also failed to meet the necessary requirements of standing. It was incum-

bent upon them to allege and show some interest other than that "general interest as a citizen in good government in accordance with the provisions of the Constitution." *Nicholson v. Education Assistance Authority, supra* at 448, 168 S.E. 2d at 406. Their interest in the City of Fayetteville's purported "right to annex" is not such an interest as permits them to question the validity of a state statute.

[2] Intervenor defendants also assign error to the trial court's finding of fact on which it based its conclusion that the petition in opposition to annexation was valid and that annexation ordinance number 173 of the City of Fayetteville was unlawful, invalid, void and of no effect. They contend that plaintiffs have failed to prove that a majority of the thirty-one registered voters were actually opposed to the annexation. This contention is without merit. It is significant that the defendants did not except to the court's finding of fact that 25 of the 31 registered voters then residing in the area to be annexed did sign the petition in opposition to annexation. Although the intervenor-defendants did except to the court's finding of fact that the signatures of the registered voters on the petition were voluntary, there was ample evidence to support this finding. It is, therefore, conclusive on this appeal. *Harrelson v. Insurance Company,* 272 N.C. 603, 158 S.E. 2d 812 (1968). Also, the court's conclusion of law that the petition was valid and that the City Council adopted Annexation Ordinance Number 173 in violation of 1969 N.C. Session Laws, Ch. 1058, § 2 is fully supported by the findings of fact.

The assignments of error made by the intervenor-defendants are overruled.

ORIGINAL DEFENDANTS' APPEAL

[3] Defendant-City's only contention on this appeal is that the trial court erred in ruling that the City has no standing to contest the validity of 1969 N.C. Session Laws, Ch. 1058, § 2 and in striking its constitutional defenses. The City of Fayetteville contends that this question is controlled by the decision in *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749 (1953). We do not agree. In that case, the City of Wilmington was permitted to challenge the constitutionality of several local laws which purported to grant it the power to enter into a contract with a

hospital for the hospitalization and medical care of the "indigent sick and afflicted poor" of the city. In its brief the hospital argued that the city was estopped to challenge the constitutionality of the local laws which had purported to give the City that power, and further had waived any right to do so. In answer to that argument, our Supreme Court stated:

> The City cannot be estopped from challenging the constitutionality of laws affecting it in its governmental capacity. "A municipality is not estopped to assert that its policy in a particular matter has been in violation of the Constitution and that it is prohibited from pursuing such course in the future." (citation omitted). "The doctrine of ultra vires is applied with greater strictness to public than to private corporations, and the rule is that a municipality . . . is not estopped by an act or contract which is beyond the scope of its corporate powers. . . ."

237 N.C. at 189, 74 S.E. 2d at 757.

In the *Wilmington* case, the City was permitted to challenge as unconstitutional and to refuse to exercise a purported grant of power to it by the legislature. In the present case, the City of Fayetteville attempts to challenge a *limitation* placed on its power to annex. In a more recent case, *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974), our Supreme Court held that Mecklenburg County had no standing to challenge a state statute which limited its power to tax. The Court stated:

> The question whether a state subdivision has standing to contest the constitutionality of a State statute has produced conflicting decisions in other jurisdictions. (citations omitted). But the prevailing view is that a subdivision of the State does not have standing to raise such a constitutional question. (citation omitted) Likewise, a majority of jurisdictions which have considered whether a city or county may challenge a tax statute on constitutional grounds answer in the negative. (citations omitted). Although these decisions do not articulate a well defined rule of law, much of their reasoning in [sic] persuasive.

286 N.C. at 73-74, 209 S.E. 2d at 772.

In the case now before us, the City of Fayetteville, like Mecklenburg County in *Martin*, seeks to have an act declared void which limits its powers. As our Supreme Court noted in *Martin*, Mecklenburg County is a creature of the General Assembly and an agency of the state and has no inherent power to tax. Similarly, the City of Fayetteville, a municipality, is a creature of the legislature and an agency of the state, see *State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275 (1966), and it has no inherent power to annex. *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961). In light of *Martin*, we hold that the City cannot question the limitations placed by the legislature on its power to annex. Defendant-City's assignment of error is overruled.

The judgment appealed from is

Affirmed.

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

ARIDA ANDERSON YOUNG v. CURTIS YOUNG, GEORGE DEWEY YOUNG AND WIFE, JENNIE MAY YOUNG

No. 7828SC38

(Filed 6 November 1979)

1. Appeal and Error § 6.12— verdict set aside for error of law—order appealable

An order setting aside the verdict in plaintiff's favor was appealable where the court specifically stated that the order was entered because of error in failing to submit two issues to the jury.

2. Equity § 2; Quieting Title § 2.2— laches—insufficiency of evidence

In an action to remove cloud from plaintiff's title where she alleged that defendants conveyed certain property to her and her husband, defendants' son, that defendants subsequently executed a deed to the same property to their son alone, and that the son in turn executed a deed to the same property back to defendants, the trial court erred in determining that an issue of laches should be submitted to the jury where defendants did not plead laches and the evidence was insufficient to show laches where it showed only that plaintiff and her husband moved onto the property after it had been deeded to them in 1961 by defendants; a house was begun on the property; shortly after the deed was executed plaintiff and her husband separated and did not thereafter live on the property; between 1961 and 1968 plaintiff and her husband alternately

separated and lived together; by 1965 the house was completed by the male defendant, and defendants moved in and paid for all taxes and repairs; in 1968 plaintiff and her husband were divorced, and plaintiff recorded the 1961 deed from defendants; plaintiff did not have the right to bring this action until her divorce in 1968, as her husband had the right to control the use of the property prior to that time; and plaintiff's delay from 1968 to 1976 in bringing the action benefited rather than harmed defendants, since they enjoyed the use of the property during that time at the cost only of paying for taxes and repairs.

3. Adverse Possession § 25.2— tenants in common—insufficiency of evidence of adverse possession, ouster

In an action to remove cloud on title, the trial court erred in determining that an issue as to adverse possession should have been submitted to the jury where defendants conveyed the property in question to plaintiff and her then husband; defendants subsequently executed a deed to the same property to the husband; the husband then executed a deed to defendants; at the time plaintiff and her husband were divorced, the deed previously given to defendants by plaintiff's husband without her joinder operated by way of estoppel to vest defendants with ownership of the husband's one-half undivided interest in the property as tenant in common with plaintiff; because defendants were tenants in common with plaintiff, their possession for a period of less than twenty years could not be adverse to plaintiff absent an actual ouster by plaintiff; and plaintiff did not effect an actual outser of defendants nor were they in possession of the property for the twenty years required to raise a presumption of ouster.

APPEAL by plaintiff from *Friday, Judge.* Judgment filed 15 August 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 October 1978.

Plaintiff brought this action on 23 October 1976 seeking judgment declaring her to be the owner as tenant in common of an undivided interest in described real property and seeking an order striking certain deeds from the public records as constituting clouds on her title. She claims by virtue of a deed dated 22 September 1961 and recorded 26 September 1968 from George Dewey Young and wife, Jennie May Young (hereinafter referred to as the defendants), to plaintiff and her then husband, Curtis Young. Plaintiff and Curtis Young were married in 1954 and were divorced in 1968. Plaintiff alleges that two additional deeds, one from the defendants to Curtis Young alone executed 8 October 1962 and recorded 9 October 1962 and the other from Curtis Young alone back to the defendants dated 16 August 1963 and recorded 5 December 1963, constitute clouds on plaintiff's title, and she prays that these deeds be stricken from the public records.

The defendants, who are the parents of Curtis Young, filed answer in which they alleged that they executed the 22 September 1961 deed under which plaintiff claims without consideration and solely in order to effect a gift, and they contend that this deed is void *ab initio* because not registered within two years of the time it was made as is required by law. [G.S. 47-26]. As a further defense the defendants allege that they have continuously possessed the land in question under color of title openly, notoriously, and adversely to the claims of the plaintiff for a period of more than seven years.

Plaintiff originally joined Curtis Young as a co-defendant, but prior to trial this action was dismissed as to him upon the court's finding that he had transferred any interest he might have in the subject matter to the defendants by the deed dated 16 August 1963 from him to them. On trial before a jury of the action as between plaintiff and the defendants, the court submitted one issue, which the jury answered as follows:

> 1. Was the deed dated 22 September, 1961, from George Dewey Young and wife, Jennie May Young, to Curtis R. Young and wife, Arida A. Young, a deed of gift or was it supported by a valuable consideration?
>
> Answer: Valuable Consideration.

After receipt of the verdict, the court on further consideration was of the opinion that as a matter of law the evidence required the court to submit to the jury issues as to laches and adverse possession. Accordingly, the court set aside the verdict and ordered the case returned to the calendar for trial on issues as to laches, adverse possession, and as to whether the deed under which plaintiff claims was a deed of gift or was one for a valuable consideration.

Plaintiff appeals from the order setting aside the verdict and directing a new trial.

George B. Hyler, Jr., attorney for plaintiff-appellant.

John A. Powell, attorney for defendants-appellees.

PARKER, Judge.

[1] "When a verdict is set aside for error or errors in law, committed during the trial, and not as a matter of discretion, the par-

ty thereby aggrieved may appeal, provided the error or errors are specifically designated." *Akin v. Bank*, 227 N.C. 453, 455, 42 S.E. 2d 518, 519 (1947); *accord, Wells v. Bissette*, 266 N.C. 774, 147 S.E. 2d 210 (1966); *McNeill v. McDougald*, 242 N.C. 255, 87 S.E. 2d 502 (1955); *Powers v. City of Wilmington*, 177 N.C. 361, 99 S.E. 102 (1919). Here, the supposed errors which induced the court's action in setting aside the verdict were specifically stated by the court as (1) error in failing to submit to the jury an issue as to whether plaintiff's claim was barred by laches and (2) error in failing to submit an issue as to whether defendants have acquired title by adverse possession under color of title. The order setting aside the verdict in plaintiff's favor is, therefore, appealable.

The question presented for our review on this appeal is whether the court was correct in its determination that there was error in failing to submit either of the two additional issues to the jury. We hold that under the pleadings and evidence in this case neither of the two additional issues was properly raised for jury determination, that the single issue answered by the jury was determinative of the rights of the parties, and that the court erred in setting aside the verdict. Accordingly, we reverse the court's order, reinstate the verdict, and remand the case for entry of judgment on the verdict rendered.

[2] First, we hold that there was no error in failing to submit an issue as to laches. In so holding we find it unnecessary to decide whether the present action is in essence one in ejectment and thus so legal in its nature and origin as to make untenable the equitable defense of laches, *see Poultry Co. v. Oil Co.*, 272 N.C. 16, 157 S.E. 2d 693 (1967); *Coppersmith v. Upton*, 228 N.C. 545, 46 S.E. 2d 565 (1948); or whether it is essentially an action to quiet title and thus sufficiently equitable in nature to make the defense here tenable. *See* 65 Am. Jur. 2d, Quieting Title, § 2, p. 142-43, § 57, p. 188-89. Additionally, we find it unnecessary to inquire how far the rule recognizing laches as a defense only against equitable and not against legal claims has been adhered to in the past, *see McRorie v. Query*, 32 N.C. App. 311, 232 S.E. 2d 312 (1977), or how far such a rule should be enforced in the future. This is so because, even if the present action be recognized as one in equity and thus one in which laches could be an appropriate defense, the defendants, for reasons quite apart from the nature of this action as being either legal or equitable, have not shown

that the defense is available to them under the pleadings or evidence in this case.

Laches is an affirmative defense which must be pleaded, G.S. 1A-1, Rule 8(c), and the party pleading it bears the burden of proof. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976); *Harris & Gurganus v. Williams*, 37 N.C. App. 585, 246 S.E. 2d 791 (1978). G.S. 1A-1, Rule 8(c) expressly provides that "[i]n pleading to a preceding pleading a party shall set forth affirmatively . . . laches . . . . Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." Here, defendants did not raise an issue of laches in their answer. Nothing in their pleadings gives notice of any transactions or occurrences intended to be proved which would present an issue as to whether plaintiff's claim should be barred by laches. Moreover, even had the defense of laches been properly pled, the evidence was insufficient to raise any issue concerning it. In this regard the evidence shows the following:

Prior to 1961 plaintiff and her husband, Curtis Young, lived and worked in Washington, D.C. Curtis's parents lived in Buncombe County. They expressed the desire that Curtis and plaintiff come back to Buncombe County to live and raise their children, and indicated they would give Curtis and plaintiff a portion of defendants' home tract if they would agree to come back, build a home on the property, and live and raise their children there. In 1961 plaintiff and Curtis moved back to Buncombe County, defendants executed and delivered the deed under which plaintiff now claims, and Curtis and his father began building a house on the property. A basement was constructed of block and covered by sub-flooring, and four rooms and a bath were started in the basement. At that time plaintiff and Curtis intended to stay and live on the property, but shortly after the 1961 deed was executed they separated for the first time and did not thereafter again live on the property. Between 1961 and 1968 plaintiff and Curtis alternatively separated and lived together, but not on the property in question, and during that period four children were born of their marriage, their respective birthdates being 25 March 1962, 8 December 1963, 15 September 1965, and 17 May

1967. In 1968 plaintiff and Curtis were divorced. Plaintiff testified that she kept the 1961 deed in a box among her valuable papers from 1963 until 1968 and that she did not record it until the time of her divorce in 1968, when she was advised by a lawyer to do so. Defendant George Dewey Young testified that "Curtis said Arida [plaintiff] had lost it." Following the initial separation between plaintiff and Curtis, the defendant, George Dewey Young, continued to work on the house, finishing the sub-flooring and building a second story, paying for or doing all of this work himself. In 1965, after the upstairs was completed, defendants moved into the house, where they continued to live until the time of the trial, paying all taxes and making all repairs. Plaintiff did not pay any money for the construction of the house. She did not commence this action to establish her interest in the property until 1976.

In our opinion the foregoing facts furnish no basis for a finding that plaintiff's right to assert her claim in this action is barred by laches. " 'Laches' has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar in equity." 27 Am. Jur. 2nd, Equity, § 152, p. 687. Delay which will constitute laches depends upon the facts and circumstances of each case. "The doctrine of laches applies only when circumstances have so changed during the lapse of time it would be inequitable and unjust to permit the prosecution of the action." *Rape v. Lyerly,* 287 N.C. 601, 620, 215 S.E. 2d 737, 749 (1975). In *McRorie v. Query, supra,* Morris, Judge (Now Chief Judge), discussed the relative importance of lapse of time in connection with laches as follows:

> Lapse of time is not, as in the case when a claim is barred by a statute of limitation, the controlling or most important element to be considered in determining whether laches is available as a defense. The question is primarily whether the delay in acting results in an inequity to the one against whom the claim is asserted based upon " . . . some change in the condition or relations of the property or the parties." 27 Am. Jur. 2d, Equity, § 163, p. 703. Also to be considered is whether the one against whom the claim is made had knowledge of the claimant's claim and whether the one asserting the claim had knowledge or notice of the defendant's

claim and had been afforded the opportunity of instituting an action.

Id. at § 162, p. 701.

McRorie v. Query, 32 N.C. App. 311, 323, 232 S.E. 2d 312, 320 (1977).

Applying these principles to the facts disclosed by the evidence in the present case, we find no basis for submitting an issue as to laches. To avail themselves of that defense defendants were required to show not merely that plaintiff unreasonably delayed asserting her claim but that they have been so prejudiced by the delay that it would now be inequitable to permit plaintiff to prosecute her action. This they have failed to show. It is true that defendants expended their labor and money to complete the house, but this was accomplished by 1965. At that time plaintiff remained married to defendants' son, her interest in the property was that of a feme tenant by the entirety, and plaintiff's husband rather than the plaintiff had the right to control the use of the property. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). Manifestly plaintiff could not be guilty of laches for failing to bring an action until she had the right to maintain one. Moreover, defendants completed the house fully aware that they had previously executed and delivered the 1961 deed under which plaintiff claims. That they may have believed, mistakenly as it turned out, that the deed was lost and would never be found, furnishes no basis for holding plaintiff guilty of laches.

Finally, such delay in bringing this action after 1968, when as a result of her divorce plaintiff first acquired the right to maintain an action as a tenant in common, benefited rather than harmed the defendants. During that period they enjoyed the use of the property at the cost only of paying for taxes and repairs.

We hold, therefore, that the trial court erred in ruling that the issue of laches should have been submitted to the jury. *McRorie v. Query, supra*, which the trial court apparently felt required submission of the issue, is distinguishable on its facts.

[3] We also hold that no issue as to adverse possession was raised by the evidence in this case. From the date the 1961 deed was delivered until plaintiff and her husband were divorced in 1968, they owned the property as tenants by the entirety. That

status was not changed by the 1962 deed which defendants gave to plaintiff's husband alone, since at the time the 1962 deed was given the defendants no longer had anything to convey. This brings us to a consideration of the effect of the 1963 deed from plaintiff's husband to defendants in which plaintiff did not join. At the time this deed was given the title was still vested in plaintiff and her husband as tenants by the entirety. The estate by the entirety as it existed at common law remains virtually unchanged in North Carolina to this date. Lee, *Tenancy by the Entirety in North Carolina*, 41 N.C.L.R. 67 (1962). [For minor modifications not here pertinent, see G.S. 39-13.3 and 39-13.5] "an estate by the entirety is an estate where the husband and wife are neither 'joint tenants' nor 'tenants in common', since they are considered one person in law. They cannot take the estate by moities but both are seized *per tout and non per my*, thus neither can dispose of any part without the assent of the other, but the whole must remain in the survivor." *Gas Co. v. Leggett*, 273 N.C. 547, 550, 161 S.E. 2d 23, 26 (1968). Although neither the husband nor the wife can separately deal with the estate so as to affect the survivorship rights of the other, "[d]uring the existence of the tenancy by the entirety, the husband has the absolute and exclusive right to the control, use, possession, rents, income and profits of the lands, and he does not have to account to his wife for the rents and income received from the property." *Board of Architecture v. Lee*, 264 N.C. 602, 610, 142 S.E. 2d 643, 648-49 (1965). "In the exercise of this control, use and possession, he may, without joinder of the wife, lease the property, mortgage the property, grant rights-of-way, convey by way of estoppel—qualified in all these instances by the fact that the wife is entitled to the whole estate unaffected by his acts if she survive him." *Gas Co. v. Leggett, supra*, at p. 551, 161 S.E. 2d at pp. 26-27. Thus, when plaintiff's husband, who was then the sole usufructuary, executed the 1963 deed to the defendants, the deed was effective to transfer his rights to the possession, and it is manifest, that defendants' possession of the property under that deed during the period before plaintiff and her husband were divorced in 1968 could not have been adverse to plaintiff's survivorship rights nor could the 1963 deed serve to defeat those rights. *Harris v. Parker*, 17 N.C. App. 606, 195 S.E. 2d 121 (1973).

Upon their divorce in 1968, the estate by the entirety of plaintiff and her former husband was converted into a tenancy in

common. *Davis v. Bass, supra, McKinnon v. Caulk*, 167 N.C. 411, 83 S.E. 559 (1914). Where the husband conveys the land held by him with his wife as tenants by the entirety by warranty deed without the joinder of the wife, the conveyance may operate by way of estoppel. *Harrell v. Powell*, 251 N.C. 636, 112 S.E. 2d 81 (1960); *Hood v. Mercer*, 150 N.C. 699, 64 S.E. 897 (1909). Therefore, at the time the 1968 divorce was entered, the 1963 deed previously given to defendants by plaintiff's husband without her joinder operated by way of estoppel to vest defendants with ownership of Curtis Young's one-half undivided interest in the property as tenant in common with the plaintiff.

Because defendants were tenants in common with the plaintiff, their possession for a period of less than twenty years could not be adverse to the plaintiff, absent an actual ouster of the plaintiff. This is so because a tenant in common has the right to possess the property and is presumed to be holding under his true title. *Winstead v. Woolard*, 223 N.C. 814, 28 S.E. 2d 507 (1944). The possession of a tenant in common is not considered adverse to his cotenant unless he ousts his cotenant "by some clear, positive, and unequivocal act equivalent to an open denial of his [cotenant's] right." *Dobbins v. Dobbins*, 141 N.C. 210, 214, 53 S.E. 870, 871 (1906). If the tenant in common gives a deed which purports to convey the whole estate, the grantee therein merely steps into his grantor's shoes. As a result, the deed is not color of title as against the grantor's cotenants, and seven years' possession under the deed will not ripen title to the whole estate in the grantee. *Cox v. Wright*, 218 N.C. 342, 11 S.E. 2d 158 (1940). "In the absence of *actual ouster*, the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years . . . ." *Morehead v. Harris*, 262 N.C. 330, 343, 137 S.E. 2d 174, 186 (1964). When these principles are applied in the present case, it can be seen that the evidence presented at trial did not raise the issue of adverse possession. The defendants have not effected an actual ouster of the plaintiff and were in possession of the property less than the twenty years required to raise a presumption of ouster.

The order of the trial court setting aside the verdict is reversed, the verdict is reinstated, and this cause is remanded for

entry of judgment on that verdict declaring plaintiff to be a tenant in common with a one-half undivided interest in the property.

Reversed and remanded.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JAMES FRANKLIN HUNT

No. 7918SC395

(Filed 6 November 1979)

1. **Criminal Law § 52— hypothetical question—no answer given—no prejudice**

A defendant is not prejudiced by the mere asking of an unanswered, hypothetical question, even though the form of the question is objectionable.

2. **Criminal Law § 96— jury instructed to disregard evidence—defendant not prejudiced**

Defendant in a homicide prosecution was not sufficiently prejudiced to require a new trial where a witness testified that defendant had been drinking and that she knew he lost his temper when he had been drinking, since the court immediately and specifically instructed the jury not to consider that testimony; the evidence to be disregarded was not of a highly prejudicial nature; and at the time of the testimony complained of, three other witnesses had testified to substantially the same thing.

3. **Homicide § 21.7— homicide by striking with stick—sufficiency of evidence**

Evidence was sufficient for the jury in a homicide prosecution where it tended to show that the victim died as a result of brain damage caused by a blow from a moving blunt instrument on the top of his head slightly behind the midpoint; defendant and the victim argued on the evening of the crime; defendant had threatened to kill the victim; defendant hit the victim above the shoulders with a stick, though witnesses did not know exactly where the blow landed; and deceased died as the result of a blow to the head rather than as a result of subsequently being run over by a car.

APPEAL by defendant from *Crissman, Judge*. Judgment entered 11 September 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 August 1979.

Defendant was charged in a bill of indictment, proper in form, with the offense of murder of one Ralph Dilldine and was found guilty of the offense of murder in the second degree in

violation of G.S. 14-17. From an active sentence of imprisonment for a term of not less than 15 years nor more than 75 years, defendant appealed.

State's evidence tended to show that on the night of 6 October 1977, defendant, who resided in High Point, had a party at his apartment with several persons present including Ralph Dilldine. Drinks were consumed. An argument developed between defendant and Dilldine. At the conclusion of the argument, defendant and Dilldine shook hands, and Dilldine left. The party continued, and at one point, defendant slapped Betty Allen. Dilldine returned and argued with defendant again. Later, he was seen in an adjacent intersection pretending to be a gorilla, a routine for which he was known in the neighborhood. Dilldine raised up toward defendant as defendant approached with his "stick," which was actually a table leg. Defendant swung his stick and struck Dilldine on the left side of his neck and head. Dilldine went down, and defendant began hitting him about his chest. Defendant then kicked Dilldine around his right ear and told him to get up. Defendant started to leave, and Dilldine began to rise up. A car backed through the intersection over Dilldine; one tire ran over his chest, not his head. Dilldine had been drinking and was intoxicated. Defendant stated to his friends that he had not meant to hit Dilldine so hard and that he wanted to get away. Defendant gave the stick to his cousin, who threw it away. Defendant had recently injured his back and used the stick as an aid when rising from a sitting or reclining position.

Gary Lytch testified that he picked up a friend in his car at 414 Tate Street and decided to back his car (498 feet) down the street to the intersection of Grimes and Tate Streets. There were street lights around the intersection, but it was still dark. Lytch's car was traveling about 15 m.p.h. as he backed it and slowed to five m.p.h. as it entered the intersection. Lytch further testified that he felt a bump, as if he had run over something, and he drove his car forward before he opened his door to look. He then saw a man lying in the road. Lytch's car was inspected later on the night of the events on a lift, and no hair or other human tissue was found.

An autopsy was performed on Dilldine by Dr. Page Hudson in Chapel Hill. Dr. Hudson testified that he observed a variety of

wounds on Dilldine's body including fractured ribs, bruised chest muscles, a small tear on the right ear, scrapes on the left and right shoulders, a skull fracture along the top of the head with blood on the surface of the brain, and swelling of the brain. Dr. Hudson attributed death to the head wound and felt that it had been inflicted by a blunt instrument. Dr. Hudson also felt the wound was more consistent with being struck by a swinging object than with falling and hitting the head. Dr. Hudson did not think that being struck on the left side of the head, struck in the chest, and kicked on the right side of the head would cause the injury that led to death. He felt that a blow to the left side of the head, which knocked Dilldine down but which did not leave a mark, would have had to be delivered by a large, soft object unless Dilldine was intoxicated.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Rebecca R. Bevacqua, for the State.

Public Defender Wallace C. Harrelson, Eighteenth Judicial District, by Assistant Public Defender Thomas F. Kastner, for defendant appellant.

ERWIN, Judge.

The record reveals that the following occurred on redirect examination at the time Dr. Hudson was being questioned by Assistant District Attorney Greeson for the State:

> "Q. Well, assuming then, Dr. Hudson, that the jury found as a fact that on October the 6th, 1977, Ralph Dilldine was hit with a stick—approximately twenty-four inches, I believe, is the width as he stated—to the left side of the neck and face area, do you have an opinion satisfactory to yourself as to what type of weapon was used?
>
> A. If I understand your question, it is what sort of weapon could have hit him on the left side of the head?
>
> Q. Yeah. Assume the jury found as a fact that he was struck, let's just say, without the stick—just assuming that he was struck to the left side of his face on October the 6th, 1977, with a force sufficient enough to knock him down, do

you have an opinion as to what type of weapon that would be—and I mean and not leave any marks.

MR. KASTNER: Well, objection, your Honor.

A. Yes, in general terms.

COURT: Go ahead. Overruled.

A. It would have to be something very big and very soft like a sack of feathers."

Defendant assigns error contending the witness, Dr. Hudson, expressed an improper opinion prejudicial to defendant.

On recross-examination pursuant to questions asked by Mr. Kastner, Dr. Hudson testified without objections as follows:

"The only kind of instrument that I know of that could have struck the left side of the head or neck and could have knocked him down and it left no mark would have been a large, fairly soft instrument. I am assuming that the blow was delivered by this instrument to a person who was completely stable and that the force of the blow provided all of the impetus for him falling. I am responding to the question as asked me. My response to the question was of a man who was more or less—not anchored—but steady on his feet and was driven off his feet by the force of some blow. A man who was intoxicated and might have been off balance because that sort of person could have fallen without any blow. None of us took a hair sample from Ralph Dilldine's body in the area of this hematoma that I've talked about at the top of the head. I was not requested to do so by Detective Brown or any other officer to the best of my knowledge. I took no hair sample."

[1] The first hypothetical question propounded by Mr. Greeson was not answered by the witness. A defendant is not prejudiced by the mere asking of an unanswered, hypothetical question, even though the form of the question is objectionable. *State v. Courtney*, 25 N.C. App. 351, 213 S.E. 2d 403, *cert. denied*, 288 N.C. 245, 217 S.E. 2d 668 (1975).

In *State v. Horton*, 275 N.C. 651, 658, 170 S.E. 2d 466, 471 (1969), *cert. denied*, 398 U.S. 959, 26 L.Ed. 2d 545, 90 S.Ct. 2175, *reh. denied*, 400 U.S. 857, 27 L.Ed. 2d 97, 91 S.Ct. 25 (1970), our Supreme Court stated:

"It is well established in this jurisdiction that a party cannot introduce testimony to impeach or discredit the character of his witness, and when in a criminal action a complete defense is established by the State's evidence, a defendant may avail himself of such defense by a motion for judgment as of nonsuit. Yet, if the witness testifies to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testified to by the witness. *State v. Jarrell*, 233 N.C. 741, 65 S.E. 2d 304; *State v. Todd*, 222 N.C. 346, 23 S.E. 2d 47; *State v. Cohoon*, 206 N.C. 388, 174 S.E. 91; *Smith v. R. R.*, 147 N.C. 603, 61 S.E. 575."

In the case *sub judice*, the State was attempting to show the facts to be other than those testified to by the witnesses. In light of the additional testimony at defendant's behest, we find no merit in defendant's claim of prejudice resulting from Dr. Hudson's response to the second hypothetical question.

[2] During the course of the trial, Betty Allen testified for the State in part as follows:

"A. And we sat around in there and talked some more. And Faye, the lady that was in there with us, she jumped on Mr. Hunt about slapping me and she told him that he shouldn't have done it.

* * *

A. Anyway, she told him that he should not have done it and that there was no real reason for him slapping me and losing his temper at me. So Mr. Hunt apologized to me and I accepted it because—well, he was drinking and I know how he loses his temper when he's drinking.

MR. KASTNER: OBJECTION and MOVE TO STRIKE, your Honor. Ask that the jury be instructed.

COURT: Members of the jury, you'll not consider what she knows about how he is when he loses his temper when he's drinking.

Q. Then what happened?

A. Okay—

MR. KASTNER: Like to MOVE FOR A MISTRIAL, your Honor.

COURT: MOTION DENIED and exception."

Defendant contends that the trial court committed error in admission of the testimony and in the failure of the court to declare a mistrial. Defendant contends that the withdrawal and subsequent instructions were not sufficient to cure the prejudicial effect of the elicited testimony. We do not agree.

Whether instructions can cure the prejudicial effect of incompetent statements depends primarily on the nature of the evidence and the particular circumstances of the individual case. *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975); *State v. Aldridge*, 254 N.C. 297, 118 S.E. 2d 766 (1961). In the case *sub judice*, the trial court's instructions were prompt and specific. The evidence to be disregarded was not of a highly prejudicial nature. At the time the evidence complained of was admitted, three other witnesses had testified without objections that defendant had been drinking and that he and Dilldine had gotten into an argument earlier in the evening. George Dobbins testified that defendant had threatened to kill Dilldine. Edward Lee Hunt had testified that defendant came in the house and got his stick before he went out to where Dilldine was in the street. From the evidence, a jury could infer that the defendant had been drinking and had lost his temper before going out into the street. Defendant's reliance on *State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59 (1967), is misplaced. *Aycoth, supra*, held that in cross-examination of a codefendant in the prosecution of defendants for armed robbery where the codefendant made an unresponsive answer disclosing that defendant had been indicted for murder, the unresponsive answer was of sufficient prejudicial nature to award defendant a new trial, although the court instructed the jury not to consider such evidence. Here, the reference to defendant's prior loss of temper was not so prejudicial as to warrant a new trial. We find no merit in this assignment of error.

[3] Defendant's third assignment of error reads: "Did the court err in denying the defendant's motions for judgment as of nonsuit at the close of the State's evidence and renewed at the close of all the evidence?"

Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the

State the benefit of every reasonable inference to be drawn therefrom. When there is sufficient evidence, direct or circumstantial, by which the jury could find the defendant had committed the offense charged, then the motion should be denied. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *see generally* 4 Strong's N.C. Index 3d, Criminal Law, § 106, pp. 547-50.

In applying the above rule, we hold this assignment of error to be without merit. The evidence tends to show Dilldine died as a result of brain damage caused by a blow from a moving blunt instrument on the top of his head slightly behind the midpoint. Four witnesses testified that defendant and Dilldine had been arguing on the evening in question. Dobbins testified that he heard defendant threaten to kill Dilldine. Edward Lee Hunt testified that defendant went in the house and got a stick before going out into the street where Dilldine was. Both Dobbins and Hunt testified that they saw defendant hit Dilldine with the stick and knock him down, then continued to kick him. While it is true that neither Dobbins nor Hunt testified that defendant's blows or kicks were to the top of Dilldine's head, Dobbins stated that the blow with the stick was above Dilldine's shoulder and that he did not actually see where it landed. Barbara Morgan's testimony that she heard defendant say he had not meant to hit Dilldine "that hard" and Hunt's testimony that the defendant's blow with the stick knocked Dilldine down led to a reasonable inference that defendant's blow did considerable damage to Dilldine's head or neck.

That the fatal blow came from defendant's stick rather than the subsequent car accident was established by the State's case. Lytch stated that his car was traveling approximately five m.p.h. when he backed over Dilldine who was lying in the street. Edward Lee Hunt testified that the car ran over Dilldine's chest, not his head. Dr. Hudson testified that the blow to the head was the cause of death, not Dilldine's being run over. The evidence presented by the State was sufficient to overcome defendant's motion for judgment as of nonsuit and was sufficient for the jury to find defendant guilty of murder in the second degree. We find no merit in this assignment of error.

Defendant contends that the trial court erred in "failing to adequately or sufficiently review defendant's evidence or contentions after having undertaken to do so." We do not agree.

The State introduced considerable evidence, while defendant did not offer any evidence. The trial court, at the request of defendant, gave further contentions of the defendant arising from the evidence which were adequate. *See State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971), *modified*, 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972).

Defendant, in his next assignment of error, contends that the trial court did not adequately instruct the jury as requested by him on the issues of foreseeability, proximate cause, and intervening cause. The court instructed the jury:

> "[D]o the facts constitute a succession of events so linked together as to make a natural whole or was there some new and independent cause intervening between the wrong and the injury. Was there any intermediate cause disconnected from the primary fault and self-operating which produced the injury.
>
> Proximate cause is that cause which produced the result in continuous sequence and without which it would not have occurred and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed."

These court instructions were in substance as those requested. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). We hold the above to be sufficient on the issues complained of. There was not any evidence presented to require the court to instruct on the contention of intervening cause. Dr. Hudson testified that Dilldine's death was caused by a blow to his head. All of the testimony was that defendant struck the deceased above his shoulders.

From our study of the complete charge of the trial court, we find that the State was required to prove all the elements of the offense charged beyond a reasonable doubt. The charge was clear and, as a whole, was free from prejudicial error. *See State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972).

In the trial of defendant, we find

No error.

Judges CLARK and WELLS concur.

THOMAS J. HAWTHORNE, AND WIFE CHARLOTTE M. HAWTHORNE, JEROME MILTON, AND WIFE MARY SUE MOCK MILTON, C. CARL WARREN, JR., AND WIFE JOSEPHINE L. WARREN v. REALTY SYNDICATE, INC., MARSH REALTY COMPANY, AND MARSH FOUNDATION, INC.

No. 7826SC1106

(Filed 6 November 1979)

1. Deeds § 20.7— action to enforce restrictive covenant—statute of limitations

An action to enforce a restrictive covenant is governed by the six-year statute of limitations of G.S. 1-50(3) applicable to actions for injury to an incorporeal hereditament, and plaintiffs' action was clearly brought within this period.

2. Deeds § 20.6— restrictive covenants—intent for enforcement by all lot owners

Grantors intended that restrictive covenents would be enforceable by all lot owners in the subdivision, not just by adjoining lot owners, where some of the deeds provided that the restrictive covenants are "substantially similar to those contained in deeds to adjoining lot owners and are for the mutual protection of such lot owners," and some deeds provided that it is agreed that the restrictive covenants, "which are for the protection and general welfare of the community, shall be covenants running with the land."

3. Deeds § 20— restrictive covenants—treatment of two blocks as single unit

Blocks 7 and 9 of a subdivision were treated by the developers and purchasers as one single unit, and lot owners in Block 9 are proper parties to enforce restrictive covenants against lot owners in Block 7, where Blocks 7 and 9 were platted together; the restrictions were for the mutual protection of nearby lot owners and for the protection and general welfare of the community; and the restrictions contained in the deeds in Blocks 7 and 9 were substantially similar although not identical.

4. Deeds § 20.1— restrictive covenants—racial restriction—separability of residential restriction

Where a restrictive covenant stated that "the property shall be used for residential purposes only and shall be occupied and owned by only people of the white race," the racial restriction was invalid but the restriction to residential purposes remained valid and enforceable.

5. Deeds § 20.1— residential restrictive covenant—fundamental change in neighborhood—public library—apartments

The construction of a public library on a subdivision lot did not constitute such a radical and fundamental change in the neighborhood as to preclude the enforcement of a restrictive covenant *limiting* use of lots in the subdivision to residential purposes. Nor did the construction of apartment buildings on lots in the subdivision constitute such a change since the apartments did not violate the residential restrictive covenant.

6. Deeds § 20.6— restrictive covenants—waiver against one lot—no estoppel to enforce against other lots

Plaintiffs' waiver of their right to enforce restrictive covenants against one subdivision lot did not estop them from enforcing the restrictive covenants against the other lots in the subdivision.

APPEAL by plaintiffs and defendants from *Smith (David I.), Judge.* Judgment entered 27 April 1978. Heard in the Court of Appeals 29 August 1979.

Plaintiffs, owners of lots in Blocks 7 and 9 of the Myers Park Development, filed suit to enjoin defendant Realty Syndicate, Inc. from utilizing Lots 6 and 7 of Block 7 for commercial purposes. The use allegedly violated the terms of a restrictive covenant limiting the land to residential use.

Defendants Marsh Foundation, Inc. and Marsh Realty Company, subsequent purchasers of interests in Lots 6 and 7, were joined as additional defendants.

After considering the evidence and relevant documents, the trial court made the following pertinent findings of fact:

> "10. That the property is bounded by Providence Road, Hermitage Road, Granville Road and Hopedale Avenue, but the two blocks are separated by Queens Road;
>
> 11. That this area was subdivided into numerous lots fronting on the streets named and many of them were sold and are now owned or occupied by a great number of persons including the defendants in this action;
>
> 12. That the deeds conveying all lots in Blocks 7 and 9 contain restrictions that that [sic] they should be used only for residential purposes and the defendants in this action and other owners and occupants, either directly or through mense conveyances, hold their lots upon this condition;

13. That the restrictions in the various deeds differ only slightly with some deeds having ten paragraphs, some eleven, some twelve;

14. That some of the deeds provide that the restrictions 'Are for the protection and general welfare of the community and shall be covenants running with the land'; some of the deeds provide that the restriction shall be a covenant running with the land only; other deeds provide 'that the foregoing restrictions and covenants are substantially similar to those contained in deeds to adjoining lot owners and are for the mutual protection of such lot owners;'

15. That the deeds contain the following paragraph: 'The property shall be used for residential purposes only and shall be occupied and owned by only people of the white race';

16. That most of the lots in Blocks 7 and 9 are used for single-family residences;

17. That sometime during the period of 1954 the owners of lots in Block 7 acquiesced in the construction of a public library on Lot 10-A of Block 7, said library being illustrated by plaintiff's Exhibit 47 and Defendants' Exhibit Troutman 32, 33 and 34. Sometime during the period of 1969 and 1970 multi-family apartments, at least four stories in height, were constructed on Lots 8 and 9 of Block 7; construction of the apartments are illustrated in defendants Exhibits Troutman 24, 20, 18, 17, 16, 10, 32 through 37;

18. That the defendant began using the structure on Lot 6 September 1, 1974 (Sic: '1974' should be '1969') for office purposes; that plaintiff Thomas Hawthorne and wife, Charlotte M. Hawthorne executed documents entitled 'Release and Covenant Not to Sue' on the 29th day of October, 1975, allowing the use of Lot 4 Block 7 for a branch office of Mutual Savings and Loan Association subject to certain conditions on the part of Mutual Savings and Loan Association as set out in Defendants' Exhibit 1."

Based on its findings of fact, the court made the following conclusions of law:

"1. That the action was brought within three years after the first non-residential use of the defendants' property, i.e., Lot 6 of Block 7 and that the Statute of Limitations is not applicable;

2. That the conjunction of the racial restriction and the residential restriction in the deed of the defendant's property are separable, the racial restriction being unenforceable and moot, and the general intent of this paragraph, from a reading of the four corners of the document, indicates the intention of the grantor to be the establishment of a residential restriction;

3. That from a reading of the deeds from George Stevens [sic] and the Stevens [sic] Company conveying the lots in Blocks 7 and 9 of Myers Park and from the four corners of each and every deed, it was the intent of George Stevens [sic] and Stevens [sic] Company to develop the lots in Blocks 7 and 9 in accordance with a general plan or uniform scheme of restrictions and that plan or scheme being for the establishment of single-family residences;

4. That the construction of the public library on Lot 10-A of Block 7, the construction of the apartments on Lots 8 and 9 of Block 7 were both deviations from the general plan and scheme for the development and improvement of Blocks 7 and 9 and that these deviations or changes are of a substantial, fundamental and radical nature from the intent of the restrictions, and that such deviations or changes destroy the purposes of said restriction;

5. The documents signed by plaintiffs Hawthorne in 1975 constitute a waiver of their respective rights;

6. That Block 9 of the subject subdivision is separable from Block 7 and as such is not included or covered in this judgment."

From entry of judgment denying their prayer for injunctive relief, plaintiffs appealed, and defendants cross-appealed.

Ruff, Bond, Cobb, Wade & McNair, by Hamlin L. Wade, for plaintiff appellants.

Helms, Mulliss & Johnston, by Fred B. Helms and Robert B. Cordle, for defendant appellees.

ERWIN, Judge.

[1] Defendants' contention that plaintiffs' action is barred by the applicable statute of limitations is without merit. Plaintiffs filed suit to enforce a restrictive covenant. A restrictive covenant is a servitude, commonly referred to as a negative easement, *Craven County v. Trust Co.*, 237 N.C. 502, 75 S.E. 2d 620 (1953), and an easement is an incorporeal hereditament. *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925). G.S. 1-50(3) requires that an action for injury to any incorporeal hereditament be brought within six years. Plaintiffs' action was clearly brought within this period.

[2] Defendants' contention that plaintiffs are barred from enforcing the restrictive covenant, regardless of the existence of a general scheme of development, because they are not adjoining lot owners is without merit.

In ascertaining the enforceability of restrictive covenants by persons not party thereto, it must be determined whether the grantor intended to create a negative easement for their benefit. *See Lamica v. Gerdes*, 270 N.C. 85, 153 S.E. 2d 814 (1967); *Property Owners' Assoc. v. Current and Property Owners' Assoc. v. Moore*, 35 N.C. App. 135, 240 S.E. 2d 503 (1978).

In a deed executed on 23 November 1911, the Stephens Company conveyed Lot 5 of Block 7 with the following convenant: "The foregoing restrictions and covenants are substantially similar to those contained in deeds to adjoining lot owners and are for the mutal [sic] protection of such lot owners." Defendants' deed to Lot 6 of Block 7 from George Stephens was executed on 1 January 1912 and contained the same covenant. Their deed to Lot 7 of Block 7 recited: "It is expressly understood and agreed by the parties hereto that all of the foregoing covenants, conditions and restrictions, which are for the protection and general welfare of the community, shall be covenants running with the land." When Block 9 of the subdivision was developed, the deeds retained the same covenant stated in defendants' deed to Lot 7 of Block 7.

From the various language stated in the respective deeds, it is clear that the grantors intended the covenants to be enforceable by all the lot owners in Blocks 7 and 9, not just the adjoining lot owners. To find otherwise would run counter to the interest of the court and the developers in the orderly development of land. Here, the respective grantors inaccurately used the word *adjoining* to mean *nearby*. The covenant was for the mutual protection of those lot owners nearby.

[3] Defendants argue that the lot owners in Block 9 should not be allowed to enforce restrictive covenants in Block 7. Whether lot owners in Block 9 are entitled to enforce restrictive covenants on lot owners in Block 7 is dependent largely upon whether the developers of the property treated and dealt with the two areas as a single unit and intended the restrictive covenants, easements, to cover both tracts, or whether the two blocks were treated and dealt with as separate, independent units, with intent of the developers and purchasers that the restrictions be limited to each block. *Craven County v. Trust Co., supra.*

Four factors of central importance in determining whether divisional or single unit development was intended are: (1) the way in which the land in question is platted; (2) the scope of any provision for altering the restrictions imposed; (3) the express limitations on the extent of the restrictions imposed by the conveyance; and (4) the similarity of restrictions between subdivisions. 52 Cornell Law Quarterly 611, 613 (1967).

Blocks 7 and 9 are platted together. The restrictions are said to be "for the mutual protection" of *adjoining*—nearby lot owners, and "for the protection and general welfare of the community." The restrictions contained in the deeds in Blocks 7 and 9 are substantially similar, although not identical. These crucial factors impel us to hold that Blocks 7 and 9 were treated and dealt with by the developers and purchasers as one single unit. We hold that lot owners in Block 9 are proper parties to enforce the restrictive covenant.

[4] Defendants contend that plaintiffs are barred from enforcing the restrictive covenants, because: (1) the racial restriction in the covenant limiting the properties—Lots 6 and 7 to occupancy and ownership by whites only makes the limitation to residential use unenforceable; (2) a radical and fundamental change in the neigh-

borhood has occurred; (3) rezoning of the neighborhood makes enforcement of the covenant inequitable; and (4) plaintiffs have waived their rights to enforce the covenant. We disagree.

Racial restrictive covenants prohibiting the sale or use of real property by a particular racial group are unenforceable today either in equity, *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R. 2d 441 (1948), or at law in an action for damages. *Barrows v. Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953). Similarly, all racial discrimination, private as well as public, in the sale or rental of property is forbidden. *Jones v. Mayer Co.*, 392 U.S. 409, 20 L.Ed. 2d 1189, 88 S.Ct. 2186 (1968). Nevertheless, the limitation to residential use is valid. The proper remedy, when a conveyance is made which contains such void covenants, is to give full effect to the conveyance but read out the invalid restriction. *See Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969); J. Webster, Real Estate Law in North Carolina § 346 (1971).

Defendants' contention that a radical and fundamental change in the neighborhood precludes the enforcement of the restrictive covenant is meritless.

The only changes that the trial court found had occurred in the neighborhood were the construction of a branch of the Charlotte-Mecklenburg County Public Library and the construction of some multi-unit apartment buildings. We note that the record reveals that plaintiffs, the Hawthornes and Warrens, had also waived enforcement of the restrictions as to another lot in Block 7.

[5, 6] In *Cotton Mills v. Vaughan*, 24 N.C. App. 696, 212 S.E. 2d 199 (1975), we held that the use of four of sixty-two lots subject to residential covenants for a snack bar, automobile repair shop, used-car lot, and a fabric shop did not constitute such a radical or fundamental change in the character of the community as to warrant removal of the residential restrictions. In the case at hand, practically all the residents of Blocks 7 and 9 joined in waiving enforcement restrictions to allow for construction of the public library, including defendants' predecessors in interest. The construction of the apartment buildings was not in violation of the covenant restricting the land to residential use. *Huntington v. Dennis*, 195 N.C. 759, 143 S.E. 521 (1928); *Delaney v. VanNess*, 193

N.C. 721, 138 S.E. 28 (1927). Although the Hawthornes and Warrens waived their right to enforce the restrictive covenants as to Lot 4 of Block 7, they expressly reserved the right to enforce the restrictions as to other lots in Block 7. Their waiver of rights was a matter of contract. The construction of the public library and the waiver of enforcement of the restrictions were not such a radical and substantial change in the neighborhood so as to defeat the purpose of the restriction, *see Building Co. v. Peacock*, 7 N.C. App. 77, 171 S.E. 2d 193 (1969), and the Hawthornes' and Warrens' execution of the waiver agreement did not estop them from enforcing the covenant against defendants.

Defendants' contention that the change in zoning makes it inequitable to enforce the restrictive covenant is without merit. Suffice it to say that a mere change in a zoning ordinance does not nullify or supersede a valid restriction on the use of real property, *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 120 S.E. 2d 817 (1961); *Mills v. Enterprises, Inc.*, 36 N.C. App. 410, 244 S.E. 2d 469, *dis. rev. denied*, 295 N.C. 551, 248 S.E. 2d 727 (1978); *Building Co. v. Peacock, supra*, and the trial court properly excluded evidence of changes occurring outside the community. *Brenizer v. Stephens*, 220 N.C. 395, 17 S.E. 2d 471 (1941); *Mills v. Enterprises, Inc., supra.*

In its conclusions of law, the trial court found a substantial, fundamental, and radical change in the community, a waiver of the Hawthornes' rights, and that Block 9 of the subject subdivision was separable from Block 7. Based on the foregoing text of our opinion and the trial court's own findings of fact, we hold that issuance of injunctive relief was appropriate. We need not consider plaintiffs' other assignments of error.

The judgment entered below is

Reversed and remanded.

Judges CLARK and WELLS concur.

CAROLINA BUILDERS CORPORATION v. AAA DRY WALL, INC.; DWC CONTRACTORS, INC.; AND THE HOUSING AUTHORITY OF THE CITY OF RALEIGH

No. 7910SC115

(Filed 6 November 1979)

1. **Contracts § 14.2— contract requiring bonds—plaintiff as incidental beneficiary—no recovery under contract**

In an action to recover the cost of building materials from a subcontractor where plaintiff alleged that a contract between defendant housing authority and defendant general contractor required the general contractor to guarantee the faithful performance of its contract with the housing authority by first obtaining from each of its subcontractors a performance bond and labor and materials payment bond covering its work on the project, plaintiff was not entitled to recover from the housing authority or the general contractor for their breach in failing to require defendant subcontractor to obtain a payment bond since plaintiff was a mere incidental beneficiary and not a third party beneficiary of defendants' contract.

2. **Principal and Surety § 9.1— public housing authority—failure to take bond—material supplier's remedy**

No civil liability attaches to either a municipal corporation or its officers for failure to provide a labor and material payment bond; therefore only by way of indictment of the officials of defendant housing authority whose responsibility it was to follow the statutory mandate could an action predicated on G.S. 44-14 be maintained, and consequently plaintiff failed to state a claim for relief in its action against defendant housing authority and defendant general contractor alleging that it was entitled to recover directly from them by virtue of the statute.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 9 October 1978 in Superior Court, WAKE County. Heard in the Court of Appeals on 27 September 1979.

This suit involves the alleged failure of a subcontractor to pay its material supplier. In its complaint plaintiff, a building supply company, claimed that it "opened an account" on 1 August 1974 with the defendant AAA Drywall, Inc. (AAA), whereby plaintiff was to sell sheetrock to AAA to be used in a "low-rent public housing project" for which AAA had subcontracted to erect the "dry wall" (or sheetrock) for the general contractor, defendant DWC Contractors, Inc., (DWC). The account provided that plaintiff would sell the building materials on credit and bill AAA at the end of each month. AAA agreed to pay the bill

within ten days "to earn a discount" or at least within thirty days to avoid carrying charges. Plaintiff alleged that it agreed to these terms "upon assurances given by an officer and agent of AAA that . . . this project was a 'bonded job' . . . ." Accordingly, plaintiff supplied sheetrock and, prior to 12 December 1974, was paid by AAA for all materials supplied. However, "[f]rom that date through February 25, 1975, [plaintiff] sold building materials for use on said project having a price of $7309.30 without receiving any payments. . . . " Carrying charges on that sum, contends plaintiff, have brought the total amount due it to $8,601.48 as of 1 January 1976.

Upon repeated requests to AAA to pay the account and AAA's continuing failure to do so, plaintiff "notified . . . DWC, and the defendant, Housing Authority, [of the City of Raleigh] to have said account balance paid by their bonding companies. . . ." It was plaintiff's understanding, and plaintiff so alleged, that the defendant Housing Authority, having acquired through the power of eminent domain certain real property within the City of Raleigh, entered into a contract with the defendant DWC to construct 80 low-rent housing units for which plaintiff was providing the sheetrock. The Housing Authority would own and lease the units, but, in order to get them built, it conveyed the land to DWC under a "Turnkey Contract" whose terms provided that DWC would build the units according to plans and specifications prepared by the Housing Authority, and that, upon completing the units, DWC would reconvey the tract to the Authority. Plaintiff alleged that it "is informed and believes that the Turnkey Contract . . . required DWC to guarantee the faithful performance of its contract with Housing Authority by first obtaining from each of its subcontractors a Performance Bond and Labor and Material Payment Bond covering its work on said project." Moreover, the contract entered into between DWC and AAA stipulated that "AAA would provide DWC with a . . . Labor and Material Payment Bond guaranteeing that all materials and building supplies delivered to said subcontractor . . . would be paid in full . . . ." Yet, when plaintiff notified these defendants of AAA's failure to pay for materials supplied it, they informed plaintiff "for the first time that there had been no such bond written for this project, and that [plaintiff] would have to look solely to AAA for payment."

Plaintiff asserted as a first cause of action that it was a "third party beneficiary" of the contract between DWC and the Housing Authority; that it was entitled to rely on that contract's provisions requiring payment bonds when it sold building materials on credit to AAA; and that both DWC and the Housing Authority were liable on its claim for their respective breaches in failing to enforce the contractual provisions. Alternatively, and as a second cause of action, plaintiff claimed that the Housing Authority, in neglecting to require DWC to provide a labor and material payment bond, thereby violated the statutory mandates of then-controlling G.S. § 44-14, and was thus rendered civilly liable for plaintiff's losses.

Although plaintiff names AAA as a defendant in this suit, the record does not disclose what, if anything, has transpired as to that defendant since the action was commenced. Both DWC and the Housing Authority, however, filed answers, contending that plaintiff had failed, with respect to both causes of action, to state a claim for which relief could be granted. The trial judge agreed and, on 9 October 1978 entered orders dismissing both claims for relief as set out in the complaint. From judgment entered thereon, plaintiff appealed.

Joslin, Culbertson, Sedberry & Houck, by William Joslin, for plaintiff appellant.

Nance, Collier, Singleton, Kirkman & Herndon, by Rudolph G. Singleton, Jr., for defendant appellee DWC Contractors, Inc.

Allen, Steed & Allen, by Thomas W. Steed, Jr., for defendant appellee Housing Authority of the City of Raleigh.

HEDRICK, Judge.

Plaintiff assigns as error the order dismissing, pursuant to Rule 12(b)(6), G.S. § 1A-1, both its claims for relief. The sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. If it appears to a certainty that no state of facts which could be proved in support of the claim would so entitle plaintiff, the complaint should be dismissed. 2A Moore's Federal Practice § 12.08 (1979). *Accord, Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *see also Kelly*

v. Briles, 35 N.C. App. 714, 242 S.E. 2d 883 (1978). Reviewing the instant case in light of this standard, we find, for the following reasons, that the plaintiff has failed to demonstrate any conceivable factual basis to support either of its claims and, therefore, the complaint was properly dismissed.

[1] Plaintiff has argued, first, that it was a "third-party beneficiary" of the "Turnkey" contract between the Housing Authority and DWC, and, as such, that it is entitled to recover from both these parties for their breach in failing to require AAA to obtain a payment bond. Relying upon the New York case of *Strong v. American Fence Construction Co.*, 245 N.Y. 48, 156 N.E. 92 (1927), plaintiff bases this argument upon its conviction that the bond requirement was written into this contract for the direct benefit of this plaintiff. Although we find plaintiff's position persuasive, we must reject its argument since we are convinced, to the contrary, that plaintiff was a "mere incidental beneficiary" of the contract between the Housing Authority and DWC. 3 Strong's N.C. Index 3d, *Contracts* § 14 (1976).

The primary premise behind third-party beneficiary law is simply stated: if two parties enter into a contract *with the intention*, express or implied, of benefitting a third party, such party may maintain an action to enforce the contract, and may recover for its breach, even though the third party is not a party to the contract. Strong's N.C. Index, *supra; see also* 4 Corbin, *Contracts* § 774 (1951). Application of the principle, however, is not so simple. Thus, to aid analysis of a given factual situation, these third parties have been described as being either donee or creditor beneficiaries, and, "it is possible to say that the only third parties who have legal rights are the donees and the creditors of the promisee." Corbin, *supra* at § 779C. *Accord, Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). Little, if any, discussion is merited in pointing out that plaintiff could not prevail as a "donee" beneficiary since, in order to so qualify, the promisee (here the Housing Authority) must express an intention and purpose "to confer a benefit upon [the third party] as a *gift* in the shape of the promised performance." Corbin, *supra* at § 774. [Emphasis added.] Even plaintiff does not contend that such was the case here.

On the other hand, for plaintiff to qualify as a "creditor" beneficiary, it must appear that the promisee has contemplated

"the present or future existence of a duty or liability to a third party and [has entered] into the contract with the expressed intent that the performance contracted for is to satisfy and discharge that duty or liability. . . ." Corbin, *supra* at § 787. Without doubt, had a bond been obtained in the case at bar, plaintiff would have been a creditor beneficiary of the promise given by the surety to the general contractor (promisee), DWC, and would have been entitled to maintain an action against and recover from the surety (promisor). *Id.* at §§ 798-803; 10 Strong's N.C. Index 3d, *Principal and Surety*, §§ 9, 9.1 (1977); *RGK, Inc. v. United States Fidelity & Guaranty Co.*, 292 N.C. 668, 235 S.E. 2d 234 (1977). A different question is presented, however, when the "promise" alleged to ensure such a result is merely a bald contractual provision that such a surety undertaking be secured. In other words, the performance of the contract between the Housing Authority and DWC was to be rendered exclusively in fulfillment of DWC's obligations to the Housing Authority. Moreover, DWC's performance could take place in full without plaintiff's receiving any benefit whatsoever. *See* Corbin, *supra* at § 779D. Nothing in the record before us suggests that the promisee-Housing Authority exacted from DWC the promise to obtain bonds with the expressed intent to directly benefit third parties such as plaintiff. Contrarily, any benefit derived therefrom would necessarily accrue indirectly, that is, through the subsequent undertaking of the general contractor when it either purchased bonds itself from a surety or contracted with its subcontractors to do so. We hold that the plaintiff herein was a mere incidental beneficiary of the contract at issue and, therefore, could not recover for its breach. Thus, the trial court properly dismissed plaintiff's claim predicated on this theory.

[2] By way of a second claim for relief, plaintiff argues that it is entitled to recover directly from both the Housing Authority and DWC by virtue of former G.S. § 44-14 (repealed by N.C. Session Laws, c. 1194, s. 6, 1973, effective 1 September 1974) which provided materially as follows:

> Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work . . . to execute bond with one or more solvent sureties before beginning any work under said con-

> tract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work under a contract or agreement made directly with the principal contractor or subcontractor. . . . If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor. . . .

Since laborers and material furnishers can acquire no liens on public construction projects, *Griffin Manufacturing Co. v. Bray*, 193 N.C. 350, 137 S.E. 151 (1927); *Robinson Manufacturing Co. v. Blaylock*, 192 N.C. 407, 135 S.E. 136 (1926), the purpose of the statute was to give such laborers and materialmen "a substantial equivalent to the lien given laborers and materialmen engaged in private construction. The surety on the bond [was], for practical purposes, the substitute for the lien." *American Bridge Division United States Steel Corp. v. Brinkley*, 255 N.C. 162, 164, 120 S.E. 2d 529, 531 (1961). Plaintiff advances an appealing argument that, because the statute's intended purpose was to protect laborers and material suppliers on public works projects, *Owsley v. Henderson*, 228 N.C. 224, 45 S.E. 2d 263 (1947), then "our courts *should* permit recovery by a material supplier injured" when the municipal corporation violates the statute by failing to enforce the contractor to obtain the requisite bonds. [Our emphasis.] However attractive the argument, we feel bound by the decisions of our Supreme Court holding that no civil liability attaches to either the municipal corporation or its officers for their failure to take the bond. *Noland Co. v. Board of Trustees of Southern Pines School*, 190 N.C. 250, 129 S.E. 577 (1925); *Warner v. Halyburton*, 187 N.C. 414, 121 S.E. 756 (1924). The sole remedy is prescribed by the statute itself: "If the official . . . whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor." Thus, only by way of indictment of the officials of the Housing Authority whose responsibility it was to follow the statutory mandate may an action predicated on G.S. § 44-14 be maintained. *Warner v. Halyburton, supra.* Although we must agree with plaintiff's assertion that the remedy thereby afforded "would accomplish nothing toward compensating an unpaid materialman on an unbonded job", we must

hold that plaintiff failed to state a claim for relief in its second cause of action. Furthermore, we point out that plaintiff was obligated to protect itself by determining, in advance of opening an account with AAA, whether the required bonds had, in fact, been given. *See Noland Co. v. Board of Trustees of Southern Pines School, supra.* All plaintiff had to do to avoid its present predicament was to demand to see the bond upon which it alleges it relied.

We hold that the trial court correctly dismissed the plaintiff's claims against the Housing Authority and DWC.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA V. GAITHER DEAN PREVETTE, WILLIAM NORMAN STAFFORD, WALTER LEE ST. JOHN, RANDY MARYLON GRIMES, PHILLIP MARK SUTTON, AND FRANCIS EARL WOOD

No. 788SC753

(Filed 6 November 1979)

1. Searches and Seizures § 33— seizure of evidence in plain view

Police may seize evidence in plain view without a search warrant when (1) the officer has a right to be where he is when the evidence comes into view, (2) the officer inadvertently discovers the incriminating evidence, and (3) exigent circumstances exist to justify a warrantless entry in order to seize the evidence.

2. Searches and Seizures § 33— seizure of marijuana in plain view

Officers who had received a telephone call from an unknown tipster that a house near a certain dairy farm was full of marijuana lawfully seized marijuana from defendants' premises without a warrant under the plain view doctrine where the evidence supported the court's determinations that officers were lawfully on defendants' premises in that they went to the area in which the dairy farm was located to conduct a general inquiry and investigation; discovery of the marijuana was inadvertent in that the officers, while standing on the porch of defendants' house, could see through the screen door and observed marijuana inside the house; and the officers were confronted with exigent circumstances which required an immediate search of the premises for suspects and more contraband because the officers had reasonable grounds to believe that the possessors of the marijuana were aware that the police had

discovered it, and that such persons might present a danger to the officers, escape or destroy the evidence.

3. Searches and Seizures § 41— exigent circumstances— excusal from knock and announce requirements

The exigent circumstances which justified a warrantless search of defendants' house under the plain view doctrine also excused officers from the knock and announce requirement before entering the house.

APPEAL by defendants from *Cowper, Judge.* Judgments entered 23 March 1978 in Superior Court, LENOIR County. Heard in the Court of Appeals 5 December 1978.

Defendants were charged with felonious possession of marijuana with intent to manufacture, sell, and deliver, a violation of the North Carolina Controlled Substances Act. Each defendant tendered a plea of not guilty, and the six cases were consolidated for trial. All defendants moved to suppress the evidence, approximately eight tons of marijuana, seized by officers. After a hearing pursuant to Section 979(b) of Chapter 15A of the General Statutes of North Carolina, the trial court found facts, made conclusions of law, and denied the motions. Each defendant then entered a plea of guilty, judgments were entered, and defendants appealed. Such facts as are necessary to this opinion appear below.

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

Gerrans & Spence, by C. E. Gerrans, for defendants Gaither D. Prevette, William N. Stafford, Walter L. St. John, and Randy M. Grimes.

White, Allen, Hooten, Hodges & Hines, by Thomas J. White and W. H. Paramore III, for defendants Phillip M. Sutton and Francis E. Wood.

MARTIN (Harry C.), Judge.

In *State v. Prevette*, 39 N.C. App. 470, 250 S.E. 2d 682, *disc. rev. denied*, 297 N.C. 179, 254 S.E. 2d 38 (1979), this Court held the stipulation by the state and defendants that all defendants had standing to challenge the validity of the searches and seizures was invalid and not binding upon it. We remanded to superior court for a factual determination of whether defendants

or any of them had a protectible interest in the searched premises under the Fourth Amendment of the United States Constitution. A hearing was held 4 September 1979. That court found facts and concluded that all defendants did have standing to challenge the legality of the search. The state did not except to this ruling of the trial judge; therefore, it is not presented to this Court for review.

We now address the question whether defendants have a meritorious challenge to the trial court's denial of their motions to suppress the evidence obtained by search and seizure.

Defendants initially object to certain findings of fact made by the trial judge at the hearing on their motions to suppress. They argue that these four findings are not supported by the evidence and even conflict with it.

The judge found that after receiving a telephone call from an "unknown tipster" who reported that a house near Wood's Dairy Farm in Lenoir County was full of marijuana, Deputy Sheriff Robert Pelletier discussed the tip with Kinston police officers. Having decided that the information was not sufficient to obtain a search warrant, "they decided to go to LaGrange to attempt to get further information about the situation by conducting a general inquiry and investigation of the area by determining whether or not the houses were occupied and then interviewing the occupants, if any; . . .." Defendants' objection to the quoted portion of the finding is based on testimony by four of the officers that their sole purpose in going to that section of the county was to locate the marijuana referred to in the phone call.

When the trial judge's findings of fact are supported by competent evidence they will not be disturbed on appeal, even though the evidence is conflicting. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). We find competent evidence in the record to support this finding. Detective Lt. Smith of the sheriff's department testified: "We just decided to get in the car and go up to Jenny Lind and look for any signs of movement or anything else to give us an indication of where we should be looking primarily. We did not really have a plan." Furthermore, Smith testified: "We saw lights there, we were going to try to find out who was there or whatever. We were going to knock on the door." Other portions

of the record also reflect the fact that the officers intended to conduct a general investigation of the area.

The judge found that the officers proceeded to check out two locations in the Jenny Lind section of Lenoir County, the site of Wood's Dairy Farm. They approached a house at the second location, using a dirt path. They had no search warrant. They encountered a tractor parked across the path. As they walked up to the house they heard a back door slam. One of the defendants ran from the door and attempted to hide in a cornfield. He was apprehended and questioned. He went with the officers to the front of the house. The officers stepped into the light at the front of the house. The front door was open but a screen door barred the entrance. Defendants object to the finding "that the officers standing on the porch could see through this screen door; that they then observed in plain view inside the house green vegetable material scattered on the floor, which, in their opinion appeared to be marijuana; also they smelled an odor from inside which to them smelled like marijuana; . . .." Here again, although Deputy Sheriff Pelletier testified that he did not detect any particular odor and could not see contraband or anything he considered to be contraband from the screen door, two other officers testified that they smelled marijuana and saw it scattered on the floor inside the house. This was competent evidence to support the challenged finding and it is conclusive on appeal.

The judge next found that the officers detected motion in the front room of the house and heard a noise of something or someone moving through the cornfield. They then entered the house searching for other suspects. Defendants object to the finding "that they searched the house finding three other defendants and additional marijuana in plain view; . . .." There is evidence that the pasteboard box of marijuana found in a back room of the house did not have a lid on it. One officer said the marijuana was "stacked in a pile protruding above the level of the box." There was evidence that another officer did not recall seeing anything sticking out above the top of the box. Conflicts in the evidence were for the trial judge to resolve.

Defendants finally object to the finding that in order to look for anyone who might have made the noise in the cornfield, two officers "proceeded outside and began to check the area, in the

process of which, Hollowell discovered in plain view marijuana in some of the out buildings; . . .." There is competent evidence to support this finding that large quantities of marijuana were seen in the barn and other outbuildings during the course of checking the area for other suspects. Officer Harper testified:

> We went outside and began looking around. Sgt. Hollowell and myself. I walked towards the back of the house and made a circle around the house. Sgt. Hollowell had walked out towards the barn. I checked around the house and started towards the barn out where Sgt. Hollowell was when he called me to the area and shined his flashlight up in the loft of the packhouse. And I shined mine there and we discussed the large amount of marijuana.
>
> . . . .
>
> . . . We had already looked in the packhouse and two grain silos. The grain silos contained large amounts of marijuana in bundles.

Defendants argue in their brief that since a constitutional challenge confronts this Court in the case at bar, they are entitled to a careful study of the record. A detailed, careful examination of the record has been made. The findings of fact made at the suppression hearing are supported by competent evidence. Since we so hold, we also find the court did not err in denying and overruling defendants' requests for specific findings of fact.

Judge Cowper made sixteen conclusions of law, thirteen of which are challenged by defendants, either wholly or partially. In addition, defendant Sutton assigned as error conclusion of law number fourteen, but he abandoned this assignment on appeal. Defendants argue generally that the conclusions of law are in the nature of findings of fact and are not supported by the evidence. Specifically, they contend that none of the recognized exceptions to the Fourth Amendment guarantee against unreasonable searches and seizures is present in this case.

[1] In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, *rehearing denied*, 404 U.S. 874 (1971), the United States Supreme Court held that under certain circumstances, police may seize evidence in plain view without a search warrant. Crucial to this plain view doctrine are the necessary circumstances: The officer

must have a right to be where he is when the evidence comes into view, and he must inadvertently discover the incriminating object. A further limitation on the doctrine is dictated under *Coolidge*. Exigent circumstances must exist to justify a warrantless entry in order to seize evidence discovered in plain view.

In North Carolina a similar principle has been announced:

> "When an officer's presence at the scene is lawful (and at least if he did not anticipate finding such evidence), he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime, even though the 'incident to arrest' doctrine would not apply; and such evidence is admissible."

State v. Bagnard, 24 N.C. App. 54, 57, 210 S.E. 2d 93, 95 (1974), *cert. denied*, 286 N.C. 416, 211 S.E. 2d 796 (1975). *See State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979).

[2] Judge Cowper concluded as a matter of law that the officers were lawfully on the premises of Wood's Dairy Farm at the time they approached the house, based on his finding of fact that they went to that particular area to conduct a general inquiry and investigation. Entrance onto private property for the purpose of a general inquiry or interview is proper. *United States v. Brown*, 457 F. 2d 731 (1st Cir. 1972), *cert. denied*, 409 U.S. 843 (1972); *United States v. Knight*, 451 F. 2d 275 (5th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). Furthermore, officers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances. *Ellison v. United States*, 206 F. 2d 476 (D.C. Cir. 1953). It was not erroneous for the judge to conclude that the officers, standing on the porch of defendants' house, were lawfully at the scene.

The judge's conclusion of law that the officers, while standing on the porch, "viewed in plain view and smelled on the inside of the house what appeared to them to be marijuana" is amply supported by his findings of fact and therefore meets the standard of appellate review.

The question remains whether the inadvertency requirement of the discovery of the evidence in plain view is met in this case. This Court recently confirmed the necessity of inadvertent observation of evidence in pointing out that the plain view exception to

the Fourth Amendment has been restricted to "instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view." *State v. Blackwelder*, 34 N.C. App. 352, 355, 238 S.E. 2d 190, 192 (1977). Inadvertent means fortuitous, by chance. In *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968), we find: "If the officers' presence was lawful, the observation and seizure of what was then and there apparent could not in itself be unlawful." *Id.* at 202, 162 S.E. 2d at 506. The judge's finding of fact that the officers could see through the screen door and that they observed marijuana inside the house fulfills the inadvertency requirement of plain view.

This same finding of fact supports the conclusion of law "that this information, for the first time, gave rise to probable cause for the officers to search the residence in a lawful manner; . . .." Keeping in mind the warning in *Coolidge, supra*, that plain view of objects inside a house will furnish probable cause but will not, without exigent circumstances, authorize entry to seize without a warrant, we turn now to a review of the conclusion of law that "officers were confronted with exigent circumstances which required immediate action on their part to search the residence and premises not only for suspects but for more contraband; . . .."

In one of the leading cases which discuss the exigent circumstances or emergency exception, *United States v. Rubin*, 474 F. 2d 262 (3rd Cir. 1973), *cert. denied*, 414 U.S. 833 (1973), it is acknowledged that emergency circumstances may vary from case to case. Therefore, this Court must look to the record to see if, upon the facts of this particular case, the judge was correct in concluding that exigent circumstances were present. Although the judge denominated certain findings as conclusions of law, we read them as findings of fact and hold that they are supported by competent evidence and that they do support the conclusion of law that exigent circumstances were present. The relevant findings are as follows:

> 5. That the quantity of marijuana observed by the officers on the inside of the house was such that it was not improbable that the contraband could be destroyed or secreted by those desiring to do so, by whatever means, be they extreme or not, the possessors might choose;

6. That at the time the officers gained their probable cause, based upon the sounds that they heard in the area and the impressions that they had obtained from the surrounding circumstances, it was probable or reasonable for the officers to conclude that other suspects might be in the area who, under these circumstances, would present a danger to the officers' safety, would escape, or destroy the evidence if not prevented;

7. That at the time probable cause first ripened, the degree of urgency for the officers to act became immediate; that the amount of time it would have taken to get and serve a search warrant was great in that they would have had to have returned to Kinston, write out the affidavit, and return again to Wood's Dairy, taking at least one hour;

8. That the officers had reasonable grounds to believe that the possessors of this contraband were aware that the police were on their trails and in pursuit;

[3] These factual findings must also support Judge Cowper's conclusion of law that the exigent circumstances were sufficient to excuse the officers from the requirement of law to knock and announce prior to entry of the house. Defendants argue that the uncontested failure of the officers to knock on the screen door or to demand admittance before they entered the house should lead to the suppression of all evidence seized or gained by the state as a result of the alleged unconstitutional entry.

In *State v. Watson*, 19 N.C. App. 160, 198 S.E. 2d 185, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 662 (1973), it was recognized that an entry which ordinarily required an announcement of purpose and demand for admittance might be proper without these procedures under special and emergency conditions: "when it reasonably appears that such an announcement and demand by the officer and the delay consequent thereto would provoke the escape of the suspect, place the officer in peril, or cause the destruction of [*sic*] disposition of critical evidence." *Id.* at 165, 198 S.E. 2d at 188. It is important to note that this principle applies when a valid search warrant is the basis for the entry. Five years later, in *State v. Brown*, 35 N.C. App. 634, 242 S.E. 2d 184 (1978), this Court held that officers were not justified in making a forcible, unannounced entry into defendant's home based on their

reasonable belief that notice of their entry would result in the destruction or hiding of evidence. In this case also, the officers acted while executing a valid search warrant. The Court stated: "In so far as *State v. Watson*, 19 N.C. App. 160, 198 S.E. 2d 185 (1973) is inconsistent with this opinion, we believe that it has been overruled by G.S. 15A-251." *Id.* at 637, 242 S.E. 2d at 187. N.C.G.S. 15A-251 governs searches made under warrants; N.C.G.S. 15A-249, which is cited within N.C.G.S. 15A-251, also governs searches under warrants. Our concern is whether in a warrantless search made under the exigent circumstances exception the same exigent circumstances may also justify the failure to knock and announce before entry.

We agree with the state's argument that they may and, in the case *sub judice*, do. It is clear from N.C.G.S. 15A-259 that the requirements of Article 11 of Chapter 15A apply only to searches made under warrants. The statute specifically provides: "Nothing in this Article is intended to alter or affect the emergency search doctrine." In addition, N.C.G.S. 15A-231 states: "Constitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina are not prohibited." The exigent circumstances found by the trial judge, which are adequate to justify the warrantless search made by the officers in this case, are also sufficient to excuse the officers from the knock and announce requirement.

Finally, although defendants concede that Fourth Amendment protection against warrantless searches does not extend to open fields, like the field near defendants' house where marijuana stalks were discovered, *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898 (1924); *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977), they argue that evidence of the marijuana stalks should have been suppressed in accordance with the fruit of the poisonous tree doctrine, established in *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441 (1963). Since we agree with Judge Cowper's conclusion that there was no illegality in the officers' search of defendants' house and premises, we find *Wong Sun* inapplicable in this case.

The denial of defendants' motions to suppress and exclude the incriminating evidence found in and around their house as the result of a warrantless search is

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

IN RE: APPEAL OF AND PETITION FOR JUDICIAL REVIEW BY ARCADIA DAIRY FARMS, INC. OF REGULATION 4 NCAC 7.0505, RULES OF CLASSIFICATION OF THE NORTH CAROLINA MILK COMMISSION AS AMENDED, NOVEMBER 10, 1977

No. 7910SC27

(Filed 6 November 1979)

Agriculture § 16— distribution of "reconstituted" milk—equalization payments for producers—unconstitutionality of statute and administrative rule

The statute authorizing the Milk Commission to "provide for an equalization payment in order that producer milk will not be paid for in a lower class through the combining of water and milk constituents," G.S. 106-266.8(3), and an administrative rule under which a distributor of milk "reconstituted" from Wisconsin milk powder was assessed an equalization payment for the benefit of North Carolina milk producers, violate the Commerce Clause of the U.S. Constitution and the "law of the land" clause of Art. I, § 19 of the N.C. Constitution.

APPEAL by respondent from *Godwin, Judge*. Order entered 20 November 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 20 September 1979.

Petitioner Arcadia Dairy Farms, Inc. (Arcadia), filed a petition in Superior Court appealing from an order of the North Carolina Milk Commission (the Commission) assessing an equalization payment against it and suspending its license as a milk distributor for failure to pay said assessment. Arcadia sought judicial review of the constitutionality of G.S. 106-266.8(3) and Title 4, Section .0505 of Chapter 7 of the North Carolina Administrative Code (hereinafter Rule 7.0505), adopted pursuant thereto and pursuant to which the equalization payment was assessed. Arcadia further alleged that even if the statute were ruled to be constitutional, the equalization payment assessed by the Commission was improper, because it did not take into consideration Arcadia's costs of production and distribution and was, therefore, arbitrary and capricious. The Commission admitted

assessing the equalization payment pursuant to G.S. 106-266.8(3) and Rule 7.0505 but denied that the assessment was invalid.

Rule 7.0505 requires a distributor of Class I recombined or reconstituted milk to pay the difference between the prices of Class I and Class II milk on reconstituted milk obtained from non-state based producers or other unapproved sources. The amount to be paid is determined by a two-step process. First, the total sales of Class I, IA, and IB milk to the distributor are added together, and the total amount of purchases from North Carolina based producers or other approved sources is subtracted. The difference is the volume for which equalization payment is due. Then, the difference between the prices of Class I and Class II milk is multiplied by the volume for which equalization payment is due to yield the total equalization payment assessed. The equalization payment is intended to combat the displacement of the sale of whole and low fat milk of other distributors by the reconstituted milk which is composed of a mixture of lacteal secretion, milk solids, and water. This displacement is caused by the ability of the distributor of reconstituted milk to purchase his raw materials at lower costs and thus sell his products at lower prices.

The Superior Court entered judgment as follows:

"2. That GS 106.266.8(3) [sic] is an unconstitutional delegation of legislative power to the Commission because it fails to establish adequate standards for the guidance of the Commission in providing for an equalization payment, i.e. determining the amount of the said 'equalization payment', and the same is therefore violative of Article II, Section I and Article I, Section 19 of the Constitution of the State of North Carolina.

3. That GS 106-266.8(3) insofar as the same provides that the Commission is vested with the power 'to provide for the pooling on a market-wide or state-wide plan the total utilization of license [sic] distributors, or may assign base and/or milk in order to obtain the highest utilization possible for producers and/or associations of producers supplying milk to the market,' and 4 NCAC 7.0505, insofar as the same provides that 'each distributor shall obtain a supply of packaged milk or fresh fluid milk from producers who hold a North

Carolina base, or from licensed distributors purchasing milk from producers who hold a North Carolina base, or other approved sources equal to its Class I, IA, and IB sales for each month or accounting period,' are unconstitutional, as unlawful burdens upon Interstate Commerce in violation of the Constitution of the United States, Article I, Section 8, Clause 3.

4. That 4 NCAC 7.0505 constitutes an unlawful burden upon Interstate Commerce in violation of the Constitution of the United States Article I, Section 8, Clause 3 as the same penalizes milk and milk products not obtained from North Carolina sources and therefore prevents the free movement of Grade A milk solids in Interstate Commerce (which said Grade A milk solids are not produced within the State of North Carolina).

5. That 4 NCAC 7.0505 is confiscatory and is a tax not enacted by the General Assembly in violation of Article I, Section 8 of the Constitution of North Carolina and further is a tax without adequate guide lines [sic] and standards for exercise of such delegated legislative power to tax.

6. That GS 106-266.8(3) (and 4 NCAC promulgated pursuant thereto) [sic] insofar as the same provide that 'the Commission may provide for an equalization payment in order that producer milk will not be paid for in a lower class through the recombining of water and milk constituents,' is in violation of the 14th Amendment to the Constitution of the United States and of Article I, Section 19 of the Constitution of the State of North Carolina as a deprivation of property without due process of law and in a manner contrary to the law of the land, and constitutes a taking of Arcadia's property without Arcadia's consent for a non-public [sic] use and without payment of just compensation.

7. That NCGS 106-266.8 and 4 NCAC 7.0505, insofar as the same purport to require or provide for equalization payments from a distributor of milk to producers furnishing milk to competing distributors is unconstitutional as the same is in violation of Article I, Section 32 of the Constitution of North Carolina providing that 'no person or set of persons is entitled to exclusive or separate emoluments or

privileges from the community but in consideration of public services.'

8. That NCGS 106-266.8(3) and 4 NCAC 7.0505, insofar as the same purport to provide for or allow the imposition of a [sic] 'equalization payment' are unconstitutional as the same are in violation of Article I, Section 34 of the Constitution of the State of North Carolina providing that 'perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed' as the same has as it [sic] stated and intended purpose as set out in the findings of fact and conclusions of law the prohibition of competition of the reconstituted milk with whole milk furnished by producers within the State of North Carolina.

9. That NCGS 106-266.8(3) and 4 NCAC 7.0505, insofar as the same purport to provide for or allow the imposition of an 'equalization payment' as therein provided are unconstitutional as the same are in violation of Article V, Sections 2(1) and 2(2), as a tax levied in an unjust and inequitable manner and for a private purpose upon classifications established by the Commission rather than the General Assembly and further the same is in violation of Article V, Section 5 of the Constitution of the State of North Carolina.

10. That in addition NCGS 106-266.8(3) and 4 NCAC 7.0505, insofar as the same purport to provide for, or allow the imposition of, an 'equalization payment' are unconstitutional as the same are in violation of Article I, Section 1 of the Constitution of the State of North Carolina providing that citizens of the State of North Carolina are 'endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness' as the same is a penalty upon and a taking of the fruits of the labor of Petitioner with no compensation or benefit whatsoever in return.

UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That GS 106-266.8(3) and 4 NCAC 7.0505, as amended November 10, 1977, insofar as the same purport to authorize

the requirement of equalization payments and to require that licensed distributors in the State of North Carolina first use whole milk obtained from producers holding North Carolina base or from distributors receiving whole milk from producers holding a North Carolina base, are null, void and of no effect.

2. That the North Carolina Milk Commission be and it is hereby permanently enjoined and restrained from enforcing 4 NCAC 7.0505, as amended November 10, 1977, and further said Milk Commission is permanently enjoined and restrained from enacting other rules or regulations requiring an equalization payment pursuant to GS 106-266.8(3).

3. That the Clerk of Superior Court pay the sums now in his possession pursuant to Interlocutory Stay Order previously entered in this cause to the Petitioner and that Petitioner be and it is hereby discharged from any obligation to pay any sums into an equalization fund in the future.

4. That the Commission pay the costs of this action to be taxed by the Clerk of the Superior Court of Wake County, North Carolina.

This the 20 day of November, 1978.

s / A. P. GODWIN, JR.
Judge Presiding"

The Commission appealed.

W. C. Harris, Jr., for the North Carolina Milk Commission, appellant.

Long, McClure, Parker, Hunt & Trull, by Robert B. Long, Jr. and Gary A. Dodd, for Arcadia Dairy Farms, Inc., appellee.

ERWIN, Judge.

The Commission contends that the trial court erred by failing to make any findings of fact in its order to support its conclusions of law. We do not agree.

G.S. 150A-51 provides in part: "If the court reverses or modifies the decision of the agency, the judge shall set out in

writing, which writing shall become a part of the record, the reasons for such reversal or modification." When the judge of the Superior Court sits as an appellate court to review the decision of an administrative agency pursuant to G.S. 150A-50, the judge is not required to make findings of fact and enter a judgment thereon in the same sense as a *trial judge* pursuant to G.S. 1A-1, Rule 52(a), of the Rules of Civil Procedure. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E. 2d 920, *dis. rev. denied*, 290 N.C. 309, 225 S.E. 2d 829, *cert. denied*, 290 N.C. 551, 226 S.E. 2d 510, 429 U.S. 940, 50 L.Ed. 2d 310, 97 S.Ct. 356 (1976). The trial court reviewed the "whole record" which is the proper standard of judicial review as required by G.S. 150A-51. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The order of Judge Godwin was fully adequate to comply with the statute and the case law of our State. We find no merit in this assignment of error.

In the other assignment of error, the Commission contends that the trial court erred in concluding:

> "(a) That N.C.G.S. 106-266.8 violates:
>
> (1) Article I—Section 1, 19, 32, 34; Article II—Section I; and Article V—Sections 2(1), 2(2), 5 of the Constitution of North Carolina, and
>
> (2) Article I—Section 8, Clause 3 of the Constitution of the United States; and
>
> (b) That 4 NCAC 7.0505 violates:
>
> (1) Article I—Sections 1, 8, 19, 32, 34; and Article V—Sections 2(1-2), 5; and
>
> (2) Article I—Section 8, Clause 3 and 14th Amendment of the Constitution of the United States?"

G.S. 106-266.8 and G.S. 106-266.8(3), effective May 1977, provide:

> "§ 106-266.8 *Powers of Commission.*—The Commission is hereby declared to be an instrumentality of the State of North Carolina, vested with power:
>
> * * *

(3) To supervise and regulate the transportation, processing, storage, distribution, delivery and sale of milk for consumption; provided that nothing in this Article shall be interpreted as giving the Commission any power to limit the quantity of milk that any producer can produce nor the power to prohibit or restrict the admission of new producers. *To classify milk on the basis of use or form; to adopt or approve base plans for allocating classes of milk and to provide for the pooling on a market-wide or statewide plan the total utilization of licensed distributors, or may assign base and/or milk in order to obtain the highest utilization possible for producers and/or associations of producers supplying milk to the market; and the Comission may provide for an equalization payment in order that producer milk will not be paid for in a lower class through the recombining of water and milk constituents.*" (Emphasis added.)

Pursuant to the above statute, the Commission adopted its Rule 7.0505.

In *In re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976), our Supreme Court was presented with the exact question which we have before us today. In *In re Dairy Farms, supra*, Arcadia was selling the same product as it is selling in the case *sub judice*. Similarly, the Commission had assessed an amount to be paid as an equalization payment. The only material difference in the two cases is the Legislature's amendment of the statute so as to grant the power now in question. Justice Lake, speaking for the Supreme Court, stated in *In re Dairy Farms, supra* at 469-71, 223 S.E. 2d at 331-32:

"Quite clearly, there is, at least, serious doubt that G.S. 106-266.8, if construed to authorize the Commission to require the distributor of milk, 'reconstituted' from Wisconsin milk powder, to make compensatory payments to North Carolina milk producers, can be reconciled with the Commerce Clause of the Constitution of the United States.

* * *

Arcadia obtains nothing in return for the payment it is required to make by the order of the Commission. It is required to make such payment to its competitor distributors from whom it elected to purchase nothing, for the benefit of producers from whom it purchased nothing. Likewise, the Commission, by this order, has not undertaken to supervise or regulate the processing of 'reconstituted' milk or its sale. Its order has nothing whatever to do with the selection of the ingredients which go into Arcadia's 'reconstituted' milk and nothing whatever to do with Arcadia's method of processing such milk. The order leaves Arcadia free to sell its 'reconstituted' milk. There is no contention that such milk is not wholesome, that Arcadia is representing it to its customers as anything other than that which it is, or that Arcadia, in the sale of its 'reconstituted' milk is engaged in unlawful price cutting or other unfair trade practices. The sole purpose and effect of the Commission's order is to require Arcadia to pay to its competitors, for the benefit of producers with whom Arcadia has no dealings, an amount equal to the difference between the price those producers receive for the milk delivered to those distributors and the price they would have received for such milk had Arcadia purchased from those distributors the milk sold to them by those producers.

We note, in passing, that if Arcadia, instead of distributing 'reconstituted' milk, made from Wisconsin powder and North Carolina water, had elected to expand its own dairy herd and to distribute the natural milk derived therefrom, the effect on other producers supplying the Asheville area would have been the same. By the express language of G.S. 106-266.8(3) the Commission could not restrict Arcadia's right to do so. We find in the statute no indication of a legislative intent to empower the Commission to afford to other producers greater protection against competition from wholesome 'reconstituted' milk.

To interpret G.S. 106-266.8 as conferring upon the Commission power to require a distributor of 'reconstituted' milk to make such payments for the benefit of producers, with whom it has no dealings, would also give rise to serious doubt as to whether such exaction would be a violation of Ar-

ticle I, § 19, of the Constitution of North Carolina, which provides, 'No person shall be * * * in any manner deprived of his * * * property, but by the law of the land.' In *Insurance Co. v. Johnson, Commissioner of Revenue*, 257 N.C. 367, 126 S.E. 2d 92 (1962), this Court held that a tax levied upon fire and lightning insurance premiums to establish a pension fund for firemen was invalid for the reason that it was a tax imposed exclusively upon a particular group of insurance companies for the special benefit of a particular group of public employees. This Court quoted Mr. Justice Roberts, who said in *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936), 'The word [tax] has never been thought to connote the expropriation of money from one group for the benefit of another.' In this respect, there is no distinction between a tax and the payment required by the order of the Commission."

We conclude that the foregoing is not only persuasive but controlling. For the reasons stated in *In re Dairy Farms, supra*, we affirm the order of the trial court.

Affirmed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. WALTER HERMAN BONDS

No. 7916SC563

(Filed 6 November 1979)

1. Homicide § 21.7— second degree murder—shooting—sufficiency of evidence

Evidence was sufficient for the jury in a second degree murder case where it tended to show that defendant, looking for his stepdaughter, entered the house where she was with a loaded .38 caliber pistol in his hand; after a fight with his stepdaughter, he went into the den where she had left the victim a few minutes earlier sitting on the couch asleep; no argument or loud noise was heard from the den; a shot was then heard and defendant left the den with a smile on his face; deceased was found immediately sitting on the couch, head back, shot through the cheek; deceased died of the wound a few days later; and the gun, located in defendant's car, had two fired shells in it.

2. Homicide § 26— second degree murder—elements—instructions improper

Defendant is entitled to a new trial in a second degree murder case where the trial court erred by using the phrase "if anything else appears" rather than "if nothing else appears" during jury instructions and where the court erred during its final jury mandate by giving an instruction from which the jury could have understood that malice was not an essential element of the crime charged.

3. Criminal Law § 134.2— imposition of sentence—absence of defendant

The trial court erred in entering a second judgment changing the period of imprisonment from not less than twenty years nor more than thirty years to an imprisonment term of not less than thirty years, since the judgment was entered in the absence of defendant.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 30 November 1978 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 25 October 1979.

Defendant was tried for murder in the second degree upon a bill of indictment, proper in form.

The state produced evidence tending to show the following: Bunny Sue Bonds is the stepdaughter of the defendant. At the time in question, she had been dating David Rea about two or three months. On 25 September 1977, about midnight, Bunny and David were at Doris Smart's house with Sherill Smart, Susan Smart and Meg Cathcart. Bunny lived with defendant and her mother, and was supposed to be home at midnight, but she went to sleep beside David on the couch in the den. She heard her mother come in and went into the hall to speak to her. Then she saw defendant coming down the hall with a gun in his hand. She began fighting with him and he struck her on the head with the gun, causing injuries to her that required medical treatment. Defendant then went into the den where David was seated on the couch. Bunny and her mother heard a shot and ran into the den where they found David seated on the couch with his head back and a wound in his cheek. They heard no loud voices or argument before the shot. David died a few days later. Officer Leazer testified defendant came to the sheriff's department and said he wanted to give himself up for the shooting on U.S. 401 South. Leazer then got a .38 caliber Colt pistol from defendant's car. It contained two spent shells and three live rounds.

Defendant's evidence indicated he lived with his wife, two stepdaughters, Bunny and Sheila, and a son. Bunny was supposed

to be home by midnight and when she was not there at 12:30, he and his wife drove to Doris Smart's house where they had seen Bunny's car and a black van. He had a pistol with him. His wife went to the door and while he waited a large dog began growling at him. He fired a shot over the dog to scare it away and went into the house to escape the dog. As he entered the hallway, Bunny began fighting him, but he got away and went into the den where he was jumped by David Rea. They scuffled; Rea grabbed the gun which fired, hitting Rea who fell onto the couch. Defendant went to the sheriff and turned himself in after the shooting. He was on good terms with David Rea and his death was accidental.

The jury returned a verdict of guilty of murder in the second degree and Judge Bruce orally sentenced defendant to imprisonment for not less than twenty years nor more than thirty years. The record on appeal then shows additional evidence (presumably offered by the state on the question of punishment) concerning sexual advances by defendant to Bunny over a long period of time. After this testimony, the court signed a written judgment imprisoning defendant for not less than twenty years nor more than thirty years and containing a provision that defendant "be considered for parole not earlier than at such time as he has served five years of his sentence, . . . and that only after having served such five years of said sentence that the defendant be eligible for parole; . . .." From this judgment defendant appealed and the court signed appeal entries on the same day, 30 November 1978.

On 5 December 1978, defendant made a motion for appropriate relief, contending that it was the court's purpose in sentencing defendant that he be eligible for parole at the end of five years, whereas under the sentence imposed he would have to serve twenty years before becoming eligible for parole. Defendant asked that he be resentenced. The state filed written objections to this motion. On 9 December 1978, in Lumberton, Robeson County, Judge Bruce held a hearing on defendant's motion and entered the following order:

> This cause coming on to be heard and being heard before the undersigned Superior Court Judge, who presided at the 27 November 1978 Criminal Session of Superior Court for Scotland County in the Sixteenth Judicial District and being

heard on the Motion for Appropriate Relief filed by the defendant on the 5th day of December, 1978, at 2:10 o'clock p.m. And the Court upon hearing arguments of counsel hereby concludes as follows:

1. That the intent of the Court in sentencing the defendant on November 30, 1978, was through errors committed by the court not carried out by the terms of the sentence as it was imposed on the defendant on the 30th day of November, 1978.

2. That the written judgment and commitment dated the 30th day of November, 1978, is not worded so as to carry out the intent of the court at the time that the sentence was originally imposed.

3. That the State of North Carolina and the Defendant, Walter H. Bonds, are entitled as a matter of fundamental fairness to a judgment that accurately reflects, in terms of the appropriate statutory language, the intent of the court as to the sentence which was imposed on this defendant on November 30, 1978.

4. That for reasons stated above the judgment and commitment dated the 30th day of November, 1978, is therefore invalid as a matter of law.

IT IS THEREFORE ORDERED that the Motion for Appropriate Relief referred to above be and the same is hereby denied insofar as it requests that the defendant be resentenced.

IT IS FURTHER ORDERED that the written judgment and commitment dated the 30th day of November, 1978, be and the same is hereby amended to read as follows: "In open court the defendant appeared for trial upon the charge of second degree murder and thereupon entered a plea of not guilty; that the defendant having being [*sic*] found guilty of the offense of second degree murder, a felony, violating N.C. G.S. Section 14-17, and punishable by imprisonment of not less than two years nor more than life and the court having considered the evidence and arguements [*sic*] of counsel for the State and the Defendant;

IT IS ADJUDGED that the Defendant be imprisoned for the term of not less than thirty years in the custody of the North Carolina Department of Correction. In lieu of imposing a minimum term, the court recommends to the Parole Commission that the defendant serve a minimum of five (5) years before being granted parole, this recommendation being made pursuant to N.C. G.S. Section 15A-1351(d). IT IS ORDERED that the Sheriff commit the defendant effective November 30, 1978, to the custody of the North Carolina Department of Correction, to serve the sentence herein imposed, or until he shall have complied with the conditions for release pending appeal, if any, hereinafter set forth as to restitution, reparation and payment of Court cost. The court recommends that the defendant be required to make restitution to the family of the deceased, David Rea, for medical, hospital and funeral bills proximately caused by the injury to and the subsequent death of said David Rea, and that the defendant be required to pay the cost of this proceeding, all as a condition of attaining work release privileges or as a condition of parole. See the attached order of Restitution dated the 30th day of November, 1978.

DATED this the 30th day of November, 1978."

IT IS FURTHER ORDERED that the Clerk of Court of Scotland County shall pay to the Court Reporter who presided at this hearing the sum of seventy-five ($75.00) dollars and that the said sum of seventy-five ($75.00) [dollars] shall be taxed as a part of the cost of this proceeding.

DATED this the 9th day of December, 1978.

s/ R. MICHAEL BRUCE
R. Michael Bruce
Superior Court Judge Presiding

Judgment was then entered against defendant in accord with the above order. Defendant excepted to the entry of this judgment.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Mason, Williamson, Etheridge and Moser, by James W. Mason, Terry R. Garner and John Wishart Campbell, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant raises twenty assignments of error in his brief; however, we are only required to discuss three in disposing of this appeal.

[1] First, defendant contends his motions to dismiss at the close of the state's case and at the conclusion of all the evidence should have been allowed. We do not agree. Viewing the evidence in the light most favorable to the state as we are required to do, *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967), we find plenary evidence to withstand the motions for dismissal. Defendant, looking for his stepdaughter, entered the Smart house with a loaded .38 caliber pistol in his hand. After a fight with his stepdaughter, he went into the den where Bunny had left David Rea a few minutes earlier sitting on the couch asleep. No argument or loud noise was heard from the den; then a shot was heard and defendant left the den with a smile on his face. David was found immediately, sitting on the couch, head back, shot through the cheek, and died from the wound within a few days. The gun, located in defendant's car, had two fired shells in it. Although defendant is the only surviving eyewitness to the shooting, the evidence is sufficient to submit the case to the jury on the charge of murder in the second degree.

[2] Next, we consider defendant's two exceptions to the charge of the court. Defendant challenges these two portions of the court's charge:

> Now, if the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally assaulted David Rea with the weapon or intentionally inflicted upon David Rea with the deadly weapon, and that the assault was the proximate cause of David Rea's death, you may, but need not infer, first, that the killing was unlawful and second, that it was done with malice. Malice, *and if anything else appears,*

the defendant would be guilty of second degree murder. (Emphasis added.)

. . . .

So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about the 25th of September, 1977, that Walter Bonds intentionally and *without malice* and without justification or excuse assaulted David Rea with a pistol, thereby proximately causing David Rea's death, it would be your duty to return a verdict of guilty of second degree murder. However, if you do not so find or if you have a reasonable doubt as to one or more of those things, it would be your duty to return a verdict of—or you would not return a verdict of guilty of second degree murder. (Emphasis added.)

While it may be speculated that the record is inaccurate, we are bound by it for the purposes of appeal. *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971). Undoubtedly, the trial court intended to say "if *nothing* else appears" rather than "if anything else appears," and at times such a misstatement might well be considered a harmless *lapsus linguae*. However, when this error is considered together with the error in the second quoted portion of the charge, we find the charge contains prejudicial error. It is true the court had at one point correctly stated that murder in the second degree required an unlawful killing with malice. However, here the judge was giving his final mandate to the jury on the charge of murder in the second degree and the jury could have justifiably and reasonably understood from this instruction that malice was not an essential element of the crime charged.

The principal purpose of the charge is to give the jury a clear instruction which applies the law to the evidence in such a manner as to assist the jury in correctly understanding the case and in reaching a correct verdict. *Id.* We hold the charge contains prejudicial error in the challenged portions, requiring a new trial.

[3] As the case is being returned for a new trial, we turn to the question of the validity of the second judgment entered against defendant in the Superior Court of Robeson County on 9 December 1978. Defendant excepted to the entry of this judgment and argues it in his brief. We find this exception meritorious. The

9 December 1978 judgment was entered pursuant to a motion for appropriate relief filed by the defendant. N.C. Gen. Stat. ch. 15A, art. 89. Passing, without deciding, the interesting question whether the court upon a motion for appropriate relief can change a criminal sentence for discretionary reasons, when no error of law appears in the judgment, we hold the 9 December 1978 judgment is void because it was entered in the absence of the defendant. The second judgment changed the period of imprisonment from not less than twenty years nor more than thirty years to an imprisonment term of not less than thirty years.

The right of a defendant to be present at the time sentence is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial. *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). "The accused has the undeniable right to be personally present when sentence is imposed." *Id.* at 334, 126 S.E. 2d at 132. In *State v. Cherry*, 154 N.C. 624, 627, 70 S.E. 294, 295 (1911), we find the following:

> While our decisions have established that in case of waiver the presence of the accused is not necessary to a valid trial and conviction, all of the authorities here and elsewhere, so far as we have examined, are to the effect that when a sentence, either in felonies less than capital or in misdemeanors, involves and includes corporal punishment, the presence of the accused is essential. Thus, in *S. v. Paylor, supra*, Ashe, J., delivering the opinion, said: "But where the punishment is corporal the prisoner must be present, as was held in *Rex v. Duke*, Holt, 399, where the prisoner was convicted of perjury, Holt, C.J., saying: 'Judgment can not be given against any man in his absence for corporal punishment; he must be present when it is done.' "

Other decisions to the same effect are *State v. Brooks*, 211 N.C. 702, 191 S.E. 749 (1937); *State v. Stockton*, 13 N.C. App. 287, 185 S.E. 2d 459 (1971). The 9 December 1978 judgment is void and the same is hereby vacated.

For errors in the charge, defendant is entitled to a new trial. The other errors assigned may not appear in a second trial; therefore, we refrain from discussing them.

New trial.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. DOROTHY HAGWOOD ROGERS

No. 7914SC443

(Filed 6 November 1979)

1. **Searches and Seizures § 47— motion to suppress—voir dire—alleged irrelevant evidence—absence of prejudice**

Defendant was not prejudiced by the court's admission of allegedly irrelevant testimony during the voir dire hearing on defendant's motion to suppress seized evidence where the record fails to show how the trial judge's material findings of fact, conclusions and order were in any way influenced by the challenged testimony.

2. **Criminal Law § 15.1— denial of change of venue**

The trial court did not err in the denial of defendant's motion for a change of venue where the court conducted a full inquiry, examined newspaper articles, and concluded that there were no facts to support a change of venue.

3. **Searches and Seizures § 42— failure to read search warrant—obstruction by defendant's husband**

Officers substantially complied with the requirement of G.S. 15A-252 that a search warrant be read to the person in control of the premises to be searched where an actual reading of the warrant was rendered impossible because of active obstruction by defendant's husband.

4. **Narcotics § 3.3— testimony that substance "looked like" heroin—harmless error**

Any error in the admission of an officer's testimony that a white powdery substance found around the rim of defendant's commode "looked like heroin" was cured when the State's expert identified the substance as heroin.

5. **Narcotics § 3.1— objects commonly used in processing heroin**

In a prosecution for possession and manufacture of heroin, the trial court properly permitted testimony that certain paraphernalia and ingredients found in defendant's house were commonly used in the processing and packaging of heroin.

6. **Narcotics § 3.2; Searches and Seizures § 3— dog trained to detect heroin—safe deposit area of bank—no illegal search**

An officer was properly permitted to testify that he took a dog which was trained to detect heroin to the safe deposit area of a bank and that the dog went to defendant's safe deposit box several times and tired to bite the

handle, although the officer had no search warrant when he took the dog to the safe deposit area, since defendant had no expectation of privacy in an area open to other customers of the bank and to bank employees, and the use of the dog did not constitute a search but constituted only a monitoring of the air in an area open to the public for the purpose of determining the existence of criminal enterprise nearby.

7. **Criminal Law § 42.6; Narcotics § 3.2— chain of identity of substance**

The State's evidence established a clear chain of identity between a substance obtained from defendant's residence and the substance which an SBI chemist testified he tested and found to contain heroin where the evidence showed that a package containing the substance was sealed and turned over to an officer who delivered the sealed package to the SBI laboratory in Raleigh.

8. **Narcotics § 4— possession and manufacture of heroin—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for possession and manufacturing of heroin.

9. **Weapons and Firearms § 2— possession of unregistered pistol—insufficiency of evidence**

The State's evidence was insufficient for the jury in a prosecution for possession of an unregistered pistol in violation of Ch. 157 of the 1935 Local Public Laws where it failed to show that defendant acquired the pistol more than 10 days prior to the date of the charged possession.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 11 December 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 September 1979.

Defendant Dorothy Rogers, together with her husband, was tried on two indictments charging possession and manufacture of heroin. These charges were consolidated with two charges of wilfull possession of a pistol without having first registered it, contrary to Local Public Laws of 1935 (Chapter 157).

State's evidence tended to show that defendant and her husband were owners and occupants of the house at 5110 Peppercorn Street in Durham. On March 27, 1975, at around 3:20 o'clock p.m., the Durham police went to the residence of the defendant and attempted to serve a search warrant on defendant's husband. Defendant's husband engaged in loud yelling and pushing, obstructing the officer who was attempting to serve the warrant. Other officers of the Narcotics Division rushed into the house where defendant was observed flushing the contents of a tin can down the commode. A search of the premises revealed heroin on the bath mat in front of the commode and on the rim of the com-

mode bowl. The officers also found an unopened package of heroin in a napkin in a dresser drawer in the bedroom, together with utility bills made out to defendant, a couple of measuring spoons, and a sifter. A .25 caliber pistol, Serial No. 3866, was also found in the bedroom. In the kitchen the officers found three sifters, numerous measuring spoons, a partial deck of cards, and two plastic bags, one containing sucrose and the other quinine and cornstarch. On the premises were found various other firearms, some televisions, and stereo equipment. A 1975 white Cadillac and a 1975 Continental were parked in the driveway. The 1975 Cadillac was registered in the name of defendant and under its front seat was found a loaded .32 caliber Smith & Wesson pistol. None of the pistols found on the premises was registered with the Durham County Clerk of Court.

The State's evidence further tended to show that on 3 March 1975, the defendant and her husband (under the names of Charles and Dorothy Page) rented a safe deposit box at a Wachovia Bank branch office in Durham. Defendant made numerous trips to the box, her last visit being on 24 March 1975 at 1:49 p.m. Norman Green, an expert narcotics detective, and his dog, Baron, which was trained to detect heroin, visited the safe deposit area on 26 March 1975, and several times Baron went to defendant's box and tried to bite the handle. A search of the box on 27 March 1975 pursuant to a search warrant revealed a substantial sum of money, numerous receipts, but no heroin.

Defendant was found guilty of felonious possession of heroin, manufacturing heroin, and three counts of possession of unregistered pistols. From sentence of imprisonment, defendant appealed.

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

B. Frank Bullock, for the defendant.

MARTIN (Robert M.), Judge.

In her brief, defendant has failed to state the questions and pertinent assignments of error and exceptions at the beginning of each argument as required by Appellate Rule 28(b)(3) which provides: "Immediately following each question [presented in the

brief] shall be a reference to the assignments of error and exceptions pertinent to the question . . ." Appeals are subject to dismissal for failure to comply with the North Carolina Rules of Appellate Procedure. We will, however, consider the appeal on its merits despite the difficulties presented by the appellant's brief.

[1] In her assignments of error one through six, defendant contends that the court erred in permitting irrelevant and prejudicial testimony during *voir dire*. The record does not show how the judge's material findings of fact, conclusions, and order are in any way influenced by the challenged evidence and defendant has failed to demonstrate that hearing of the evidence by the trial judge resulted in any prejudice to her. *State v. Thomas*, 34 N.C. App. 534, 239 S.E. 2d 281 (1977), *rev. denied* 294 N.C. 444, 241 S.E. 2d 846 (1978). Defendant's first six assignments of error are overruled.

[2] Defendant contends by her seventh assignment of error that the court erred in denying defendant's motion for a change of venue. The judge, in hearing the motion, conducted a full inquiry, examined newspaper articles, and concluded that there were no facts to support the motion for a change of venue. The record reveals that no juror objectionable to the defendant was permitted to sit on the jury panel. There was no error in denying the motion for a change of venue. *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969).

[3] By her eighth assignment of error, defendant contends that evidence seized by the officer during his search of defendant's residence should have been excluded. She argues that no search warrant was read to her and that the search violated N.C. Gen. Stat. § 15A-252. This statute, which provides that "[b]efore undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises . . . to be searched . . . ," did not apply to the search in the instant case, which was conducted 27 March 1975. The Criminal Procedure Act (Chapter 15A of the North Carolina General Statutes) became effective 1 July 1975. Moreover, it appears that an actual reading of the search warrant was rendered impossible because of the active obstruction by defendant's husband of the officers in their attempt to read the

warrant. We find that there was substantial compliance with the provisions of the statutes claimed to have been violated. *See State v. Fruitt*, 35 N.C. App. 177, 241 S.E. 2d 125 (1978); *State v. Watson*, 19 N.C. App. 160, 198 S.E. 2d 185, *rev. denied* 284 N.C. 124, 199 S.E. 2d 662 (1973). The evidence was not obtained "as a result" of a violation of any provision of Chapter 15A. Therefore, its exclusion was not required by N.C. Gen. Stat. § 15A-974(2). *See State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978). This assignment of error is overruled.

[4] In her ninth assignment of error, defendant argues that it was prejudicial error for Officer C. E. Britt to testify that the white powdery substance found around the rim of defendant's commode "looked like heroin." Any error in the admission of this evidence was cured when the State's expert subsequently identified the substance as heroin. *See State v. Bagnard*, 24 N.C. App. 54, 210 S.E. 2d 93, *cert. denied* 286 N.C. 416, 211 S.E. 2d 796 (1974). This assignment of error is overruled.

[5] Defendant contends by assignments of error 11 and 16 that the trial court erred in permitting testimony that certain paraphernalia and ingredients found in defendant's house were commonly used in the processing and packaging of the narcotic drug heroin. The questions posed by these assignments of error have been answered by this Court in *State v. Bell*, 33 N.C. App. 607, 235 S.E. 2d 886, *rev. denied* 293 N.C. 254, 237 S.E. 2d 536 (1977). In that case we said:

> The defendant was tried, among other things, for the manufacture of heroin. G.S. 90-87(15) defines the term "manufacture" to include the packaging or repackaging of a controlled substance or the labeling or relabeling of its container. Buchanan's demonstration and testimony concerning the process of cutting, bagging, and mixing heroin was important to help the jury better understand the charges against the defendant and it was helpful in illustrating to the jury how the items contained in the black carrying case could have been used to package heroin.

Id. at 609, 235 S.E. 2d 888.

[6] By defendant's fourteenth assignment of error defendant contends that Officer Fuller's testimony as to the dog Baron's reac-

tion in his search of the bank was incompetent for that no search warrant had been obtained for the safety deposit area. The test of the validity of a search is reasonableness. The test of what constitutes a search has been stated as a governmental intrusion into an area in which a person has a reasonable expectation of privacy. Generally, evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under doctrines of plain view or open view or the equivalent. Odors so detected may furnish evidence of probable cause of most persuasive character. *United States v. Solis*, 536 Fed. 2d 880 (9th Cir. 1976). In determining whether the use of the dog Baron to replace the natural senses of officers constitutes unreasonable search, the court must determine whether the defendant had reasonable expectation of privacy. Privacy could not be expected in an area open to customers of the bank and bank employees who were free to open and shut nearby boxes. We hold that the use of the dog did not constitute a search but rather constituted a monitoring of the air in an area open to the public for determining the existence of criminal enterprise nearby. *U.S. v. Solis*, 536 F. 2d 880 (9th Cir. 1976). We do not find that, on the facts before us, the search was carried out in an unreasonable manner or that the use of the dog itself was unreasonable invasion of defendant's privacy. Accordingly, defendant's assignments of error are overruled.

[7] We disagree with defendant that a chain of custody was not established in the admission of State's exhibits. The State's evidence established a clear chain of identity between the substance which Officer Fuller testified he procured at defendant's residence and that substance which the State's chemist, Jerry Dismukes, testified he tested and found to contain heroin. There was evidence that the package was sealed when turned over to Officer Calvin Smith who delivered the sealed package to the S.B.I. laboratory in Raleigh. *State v. Newcomb*, 36 N.C. App. 137, 243 S.E. 2d 175 (1978); *State v. Jordan*, 14 N.C. App. 453, 188 S.E. 2d 701, *rev. denied* 281 N.C. 626, 190 S.E. 2d 469 (1972). Defendant's seventeenth assignment of error is overruled.

No reason or argument is stated or authority cited in support of appellant's assignments of error 10 and 13, and they are therefore deemed abandoned. Appellate Rule 28(b)(3).

Defendant's assignments of error 12, 15, 18 and 19 raise questions concerning admission of evidence. We have carefully examined these assignments of error and supporting exceptions, and no error of law requiring a new trial has been made to appear.

[8] Defendant contends by assignments of error 21 and 22 that the court erred in refusing to grant defendant's motion for nonsuit. The evidence relative to the charges of possession and manufacturing of heroin was sufficient for jury consideration. *State v. Bell*, 33 N.C. App. 607, 235 S.E. 2d 886, *rev. denied* 293 N.C. 254, 237 S.E. 2d 536 (1977). The authority upon which defendant relies was expressly overruled by this Court in *State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *rev. denied* 298 N.C. 302, 259 S.E. 2d 916 (1979).

[9] One of the elements of the offense of possession of an unregistered pistol, as provided in 1935 Sess. Law Ch. 157, is that "registration of pistols shall be done within 10 days after purchase or transfer thereof where acquisition of the weapon occurred on or after 15 March 1935."

The State failed to establish that the defendant had possession of the pistols 10 days prior to 27 March 1975. The charge of possession of unregistered pistols should have been dismissed, in that no evidence was adduced by the State on this essential element of the offense.

We have examined defendant's assignments of error Nos. 23, 24, 25, 26 and 27 (relating to instructions given by the trial court to the jury) and find they are without merit. Accordingly, they are overruled.

In the charge of possession and manufacturing of heroin we find no prejudicial error. In the charges of possession of unregistered pistols we reverse and remand to the trial court to vacate the convictions.

In No. 75CR8045, no error.

In No. 75CR9401, no error.

In No. 75CR8046, reversed.

In No. 75CR8047, reversed.

Chief Judge MORRIS and Judge PARKER concur.

ROSA CANNADY, EMPLOYEE v. GOLD KIST, EMPLOYER, AETNA LIFE AND CASUALTY INSURANCE COMPANY, CARRIER

No. 7910IC148

(Filed 6 November 1979)

Master and Servant § 68— occupational disease—insufficient findings

Findings by the Industrial Commission were insufficient to support a determination as to whether the calcification of tendons and ligaments in plaintiff's shoulders, resulting in a 10 percent permanent partial disability to both arms, was caused by the performance of her duties as a "draw hand" in a chicken processing plant and was thus an occupational disease within the meaning of G.S. 97-53(13), and the cause is remanded for definitive findings and conclusions based on the evidence in the present record.

APPEAL by defendants from the Industrial Commission. Opinion and Award filed 30 October 1978. Heard in the Court of Appeals on 17 October 1979.

This is a Workmen's Compensation action in which plaintiff claims that the conditions of her employment as a "draw hand" for the defendant Gold Kist caused permanent partial disability in both her arms. In response to her claim for benefits, a hearing in the matter was held on 17 March 1977, at which the following evidence was offered by plaintiff:

In August 1976, when plaintiff's right arm started "bothering" her, she had been regularly employed at Gold Kist for little more than a year, although she had worked for them prior to this particular period of employment. Her job as a "draw hand" consisted of cleaning out the inside of chickens. She described the operation as follows:

> The chickens are coming down on a line at various intervals and my job was to clean the guts out of a chicken with my hand. I could work a little bit with the left hand . . . . I constantly reach and pull. I reach over about shoulder high.

. . .

Your arm is constantly moving all the time.

. . .

I did most of the work with the right arm.

By 8 September 1976, the pain in plaintiff's right arm had worsened to the point that she was no longer able to do her job. Since then, she has worked at only a few odd jobs.

On 19 August 1977, a second hearing was held, and the testimony of Dr. James Urbanik, an orthopedic surgeon at Duke University Medical Center, was taken. Dr. Urbanik examined plaintiff on 3 June 1977 and determined that she had "calcific bursitis and some suggestion of adhesive capsulitis . . . . My impression was that she had bilateral adhesive capsulitis . . . and she also had calcification in . . . the shoulder [tendons and ligaments]." In the doctor's opinion plaintiff had sustained a ten percent permanent partial disability in each arm as a result of the calcification. Moreover, he stated that he believed "the symptoms and x-ray findings and physical findings were caused by the type of work—the use of the arms elevated above the head . . . ." The "chronic repetitive stress" to plaintiff's shoulders from doing her regular work over a period of time caused the condition, Dr. Urbanik found. He further suggested that plaintiff was more susceptible to the condition because "it is not normal to place the arms above the head all the time."

On 15 September 1977 hearing examiner Denson filed her opinion and award, finding, among other things, that the calcification of both plaintiff's arms "was caused by her employment and the rapid, repetitive overhead reaching"; concluding therefrom that plaintiff had sustained a ten percent permanent partial disability in each arm resulting from an occupational disease "caused by her employment . . . and conditions of that employment which were characteristic of and peculiar to her employment"; and awarding plaintiff compensation in the amount of $86.40 per week for the period between 8 September 1976 and 3 June 1977, and $86.40 per week for forty-eight weeks beginning 3 June 1977.

When the matter came on for review before the full commission on 24 February 1978, that body concluded that the evidence

lacked "sufficient clarity to arrive at a decision." Hence, the case was ordered remanded so that testimony could be more fully developed on the following questions:

1. Does plaintiff suffer from bursitis due to intermittent pressure in the employment?

2. What is Dr. Urbanik's opinion, assuming that the hypothetical question recites that plaintiff's work involved raising the arms only to about the shoulder level?

3. Does any physician feel that plaintiff has a disease which has proven to be due to the causes and conditions which are characteristic of and peculiar to her particular trade, occupation or employment?

4. Does plaintiff have an ordinary disease of life to which the general public is equally exposed outside of the employment?

Thus, a third hearing was held on 11 September 1978. Dr. Urbanik testified at length concerning the technical distinctions between bursitis and calcification, and concluded that plaintiff was suffering from calcification "of the ligaments near the bursa . . . caused as the result of the intermittent pressure in her employment." When asked whether his diagnosis would be affected by the fact that plaintiff raised her arms only to shoulder level, as opposed to raising them over her head, Dr. Urbanik answered: "[I]t would be my opinion that her symptoms, x-ray finding and physical findings were caused by her type of work, namely drawing chickens." He indicated, additionally, that plaintiff "could have" an occupational disease and that the disease "could be" due to the peculiar characteristics of her employment. "It would be accurate to say, despite that many people suffer from this disease, the particular characteristics of the plaintiff's employment as a draw-hand ran more of a risk than a member of the general public."

On cross-examination the doctor stated again that, if the "true facts" were that plaintiff did not raise her arms over her head in her job, but raised them only to shoulder level, it would still be his opinion "that such could have been the cause of the condition I found in her shoulder. I do not make any great distinctions."

On 30 October 1978 the full Commission, "[h]aving reviewed the record in its entirety and as expanded," adopted as its own the original opinion and award filed 15 September 1977 by hearing examiner Denson. Being of the belief that the opinion as written was "a correct determination of the rights and liabilities of the parties", the Commission made no substantive changes. Defendants appealed.

Carolyn McAllaster for plaintiff appellee.

Spears, Barnes, Baker & Hoof, by Alexander H. Barnes, for defendants appellants.

HEDRICK, Judge.

It is the duty of the Industrial Commission to make findings of fact and conclusions of law to determine the issues raised by the evidence in a case before it. G.S. § 97-84; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515 (1941). Specific findings covering the crucial questions of fact upon which a plaintiff's right to compensation depends are required, *Morgan v. Thomasville Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968), and the importance of this responsibility cannot be overstated. As our Supreme Court has observed,

> It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of postiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

Morgan v. Thomasville Furniture Industries, Inc., supra at 132, 162 S.E. 2d at 623 [quoting from *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952)].

The critical issue raised by the evidence in the present case is whether the calcification of tendons and ligaments in plaintiff's shoulders, resulting in a ten percent permanent partial disability to both arms, is an occupational disease within the meaning of G.S. § 97-53(13). This issue engenders two distinct findings of fact which must be made: (1) an explicit description of plaintiff's duties in performing her occupation, and (2) a determination of whether such duties caused the calcification and resulting disability to either or both of plaintiff's arms. With respect to the resolution of this issue, the Commission, by adopting as its own the findings and conclusions embodied in Deputy Commissioner Denson's opinion and award, made the following relevant findings:

FINDINGS OF FACT

1. Plaintiff was reemployed by defendant employer in the early part of 1975 as a draw hand. Her job was to reach into chickens which were hanging on a line and pull out the insides. *This involved repetitive reaching overhead,* primarily with her right arm.

2. When plaintiff began her employment, the line on which the chickens moves was not automated. Sometime before Christmas 1975, the line became automated. The machine was supposed to remove the inside of the chickens so the number of employees used as draw hands was reduced. In point of fact, however, the machine often failed to remove all the insides and, in addition, made the line much faster. *The rapidity of plaintiff's repetitive overhead reaching increased.* The situation was aggravated by the fact that plaintiff was training other draw hands and felt responsible for the thoroughness of their work as well. Although using primarily her right arm for the work, *plaintiff also was frequently using her left.*

. . .

9. Plaintiff's calcification of both arms was caused by her employment and the *rapid, repetitive overhead reaching.*

> The reaching plaintiff was required to do in her employment is characteristic of and peculiar to her occupation. [Emphasis added.]

The difficulty with these findings is that the record is devoid of any evidence that plaintiff's duties required "rapid, repetitive overhead reaching." This error is compounded by the fact that the doctor who testified as to causation originally based his opinion on the assumption that the plaintiff, in performing her duties, was required to repeatedly reach overhead. Thus, his opinion as to causation was rendered feckless and accordingly invalidated the deputy commissioner's finding that the calcification of the ligaments and tendons in plaintiff's arms was caused by her performance of her duties as a draw hand.

Apparently aware of the deficiencies in the findings and conclusions made by the hearing officer in the opinion and award dated 15 September 1977, the Commission, when the matter came before it for the first time, remanded the case "for additional testimony" because the evidence before it "lacks sufficient clarity . . . ." Specifically and significantly, the Commission requested a clarification of the evidence regarding the nature of the reaching plaintiff was required to do. At the subsequent hearing, both Dr. Urbanik and the personnel manager of the defendant Gold Kist were examined extensively on that issue. Clearly, the evidence adduced at this final hearing was sufficient to support a finding that the calcification in one or both of plaintiff's arms was caused by the "intermittent pressure" or the "chronic stress" of repeatedly reaching out with her arms.

However, when the matter came back before the full Commission after the hearing it ordered, it inexplicably chose to ignore the plain evidence of how plaintiff performed her job. That evidence is manifest throughout this record; yet, the final opinion and award of the Commission contains the same infirmities as it apparently recognized when it remanded the case for a clarification of the evidence regarding the manner in which the plaintiff did her job. In short, the Commission has failed to make findings and conclusions sufficient to determine the critical issue raised by the evidence.

While there is evidence in this record to support a conclusion that this plaintiff has sustained an occupational disease because of

the calcification in her shoulders, *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979); 3 Larson, Workmen's Compensation Law § 79.52 (1976), it is not for the appellate court to tell the Commission what findings to make upon remand. But, it is for this Court to require the Commission to carry out its duties with respect to making definitive findings required by the statute. For the reasons stated, the opinion and award of the Commission dated 30 October 1978 is vacated, and the cause is remanded for more definitive findings and conclusions based on the evidence in the present record.

Vacated and remanded.

Judges CLARK and MARTIN (Harry C.) concur.

E. T. ROBBINS, SR. v. HELEN C. ROBBINS

No. 7913DC163

(Filed 6 November 1979)

1. **Divorce and Alimony § 18.9— alimony pendente lite—abandonment—sufficiency of evidence**

Evidence was sufficient to support the trial court's finding that plaintiff abandoned defendant where it tended to show that plaintiff had not entered the home of defendant since 15 July 1976; plaintiff was not unable to visit defendant because of his responsibilities in operating a motel, as evidenced by his extensive travel after the motel closed at the end of the summer season; and plaintiff's unwillingness to visit an acknowledged sick wife, even for brief periods, indicated that he intended to abandon her.

2. **Divorce and Alimony § 18.9— alimony pendente lite—sufficiency of evidence**

Evidence was sufficient to support the trial court's conclusions that defendant was a dependent spouse, that plaintiff was financially able to pay alimony, and that defendant did not have sufficient means to subsist during the prosecution of her counterclaim where such evidence tended to show that the only income of defendant was from rentals on property held by the entirety to which plaintiff was entitled as a matter of law; by consenting that defendant could receive the rents and profits from the property, plaintiff acknowledged defendant's dependency upon him; the fact that plaintiff paid the taxes and insurance on that property and the house in which defendant was living indicated that he was aware that defendant did not have sufficient income; the expenses stated in defendant's affidavit were in excess of her income; and plaintiff had sufficient income to travel extensively, owned considerable properties, and was gainfully employed.

Robbins v. Robbins

APPEAL by plaintiff from *Grady, Judge.* Judgment awarding alimony *pendente lite* entered 16 November 1978 in District Court, BRUNSWICK County. Judgment of absolute divorce entered 22 November 1978. Heard in the Court of Appeals 25 September 1979.

This is an action for absolute divorce based on one year separation. Substantially, the complaint alleged that the plaintiff and defendant were married on 29 May 1948, and thereafter lived together as husband and wife until 15 July 1976, when they separated; that since 15 July 1976, the parties have lived continuously separate and apart and at no time have resumed the marital relationship; that there was one child born of the marriage, 23 years of age, and emancipated.

The defendant answered the complaint of the plaintiff by admitting the allegations and filing a counterclaim alleging that on or about 15 July 1976, the plaintiff, without just cause or excuse, abandoned the defendant; that such abandonment was without just cause or adequate provocation; that throughout their married life the defendant had worked toward helping the plaintiff accumulate substantial property and wealth, most of which was placed in the plaintiff's name; that the plaintiff has substantial income and is the supporting spouse.

The counterclaim further sets out that the defendant's health is extremely bad; that she no longer is able to be gainfully employed and has no income except approximately $300 per month from some property owned by the parties as tenants by the entirety which her husband permitted her to keep; that she is the dependent spouse and does not have sufficient means to subsist during the prosecution of her counterclaim nor to defray the expense of this action.

The defendant served notice on the plaintiff that the defendant would move for an order directing the plaintiff to pay alimony and attorney fees pending the trial of the cause. At the hearing the defendant's evidence showed the marriage of the parties on 29 May 1948; that the plaintiff and defendant worked together and used a common bank account; that jointly they had acquired three homes as tenants by the entirety; that the plaintiff had acquired 100 shares of stock, representing a one-half interest in the Oak Island Service Corporation which owned a 33-unit motel; that

they owned an apartment house worth $90,000 and several lots; that the plaintiff also sold cars occasionally and currently was engaged in the sale of lightning rods.

The evidence further showed that Mr. and Mrs. Robbins worked together in the operation of the motel until April 1976 when the defendant, because of illness, was forced to cease work. She subsequently, on her doctor's orders, moved on 15 July 1976 into a house owned by the parties and still resides therein with the adult son born to the parties hereto; that the plaintiff has not visited the defendant in the house but has remained on the job at the motel, when open, since that date.

There was further evidence that the plaintiff owned a Granada, a Lincoln Continental, a Cougar, a pickup truck and an interest in a camper; that after the motel closed, sometime after Labor Day each year, plaintiff traveled extensively.

The defendant testified that she has $1,500, or less, in a bank account; that she had transferred about $15,000 from a joint account owned with her husband into the name of her son, which said money she could have transferred back to herself upon demand. The defendant also testified that she had net income from the two houses owned by the parties as tenants by the entirety, totaling about $300 net per month. She also admitted that she occupied her homeplace rent free and paid no taxes or insurance on the property; that her husband had given her $450 cash and paid the utilities twice since she had lived in the house.

In an affidavit the defendant set out living expenses totaling approximately $6,000 per annum, which on cross-examination the defendant admitted contained cost items that were a little high.

At the conclusion of this evidence, the court entered an order based on the foregoing evidence finding as a fact and concluding as a matter of law that the plaintiff abandoned the defendant; that the plaintiff is the supporting spouse and that the defendant is the dependent spouse; that the defendant did not have sufficient means to subsist on during the prosecution of her counterclaim and that the defendant should be entitled to live in the house mentioned aforesaid and continue to have the rent on the two houses mentioned above; that, in addition, the plaintiff should pay to the defendant for her use and benefit the sum of

$150 per month pending the trial of this case; that, in addition,the plaintiff shall pay the necessary maintenance on the three houses and pay the necessary taxes and insurance. No award was made for attorney fees.

The plaintiff appealed.

Frink, Foy & Gainey, by E. M. Allen III, for plaintiff appellant.

No brief for defendant appellee.

HILL, Judge.

Five questions are raised by the appellant in his brief. All arose out of the findings of fact or the conclusions reached by the court from such findings.

[1] Appellant contends the court erred in concluding that the plaintiff had abandoned the defendant; that such a conclusion is not supported by the findings of fact by the court or the evidence.

Abandonment within the meaning of the statute occurs when one spouse brings cohabitation to an end without justification, without consent, and without any intent of renewing such cohabitation. *Panhorst v. Panhorst,* 277 N.C. 664, 178 S.E. 2d 387 (1971).

The evidence indicates that the plaintiff had not entered the home of the defendant since 15 July 1976. Plaintiff contends that it is admitted by the defendant that he remained at the motel to assist in the operation of the institution; however, there is testimony that the plaintiff was able to travel extensively after the motel closed sometime after Labor Day, and he was also engaged in the sale of used cars and lightning rods. Plaintiff's unwillingness to visit an acknowledged sick wife, even for brief periods, indicates that he intended to abandon her.

[2] The next four exceptions challenge the findings of the court that the defendant is a dependent spouse; the plaintiff's financial ability to pay; that the defendant did not have sufficient means to subsist during the prosecution of her counterclaim and the defense of her suit; and the granting of defendant's motion for alimony *pendente lite* without requisite findings of fact.

The four points are interrelated and will be answered as a class. We believe there is sufficient evidence in the record and sufficient findings of fact to support the conclusions of the trial judge.

In making findings of fact under the provisions of G.S. 50-16.3, it is not necessary that the trial judge make detailed findings as to each allegation and evidentiary fact presented. It is necessary that he find the ultimate facts sufficient to establish that the dependent spouse is entitled to an award of alimony *pendente lite* under the provisions therein.

The trial court must make findings of fact to show three requirements:

(1) the existence of a marital relationship;

(2) the spouse is (a) actually or substantially dependent upon the other spouse for maintenance and support, or (b) is substantially in need of maintenance and support from the other spouse; and

(3) the supporting spouse is capable of making the required payments.

Hampton v. Hampton, 29 N.C. App. 342, 224 S.E. 2d 197 (1976).

The mere fact that a wife has property or means of her own does not prohibit an award of alimony *pendente lite*. *Strother v. Strother*, 29 N.C. App. 223, 223 S.E. 2d 838 (1976).

A dependent spouse is one who actually is substantially dependent upon the other spouse for his or her maintenance or support or one who is substantially in need of such maintenance and support. G.S. 50-16.1(3). The only income of the defendant is from the real estate rentals on property held by the entirety to which the plaintiff is entitled as a matter of law. The plaintiff, by consenting that the defendant could receive the rents and profits therefrom, acknowledged her dependency upon him. The expenses stated in Mrs. Robbins' affidavit are in excess of her stated income. The fact that the plaintiff paid the taxes and insurance on all of the dwellings indicated that he was aware that the defendant did not have sufficient income.

Although the income for the plaintiff is not set out in detail, it is evident that the plaintiff owns considerable properties, is gainfully employed and travels extensively.

For the reasons set forth herein, we hold that the findings of fact are supported by the evidence, and the conclusions of law are supported by the findings of fact. The judgment of the trial court below is

Affirmed.

Judges VAUGHN and ERWIN concur.

IN THE MATTER OF: COMMUNITY SAVINGS & LOAN ASSOCIATION AND FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF HENDERSONVILLE v. NORTH CAROLINA SAVINGS & LOAN COMMISSION, WILBERT W. SEABOCK, CHAIRMAN, WAYNE G. CHURCH, VICE CHAIRMAN, ALGERNON LEE BUTLER, JR., JAMES H. SPEARMAN, WALTER CHURCH, W. FRANK McCRAY, JULIAN RAY SPARROW, MEMBERS, AND W. L. COLE, ADMINISTRATOR

No. 7910SC15

(Filed 6 November 1979)

Administrative Law § 8; Banks § 1.2— review of order of Savings and Loan Commission—erroneous substitution of judgment by court

Where, upon review of an order of the N. C. Savings and Loan Commission permitting petitioner to open a branch office, the superior court determined that the Commission's findings of fact lacked the specificity required by G.S. 150A-36 and were insufficient to enable the court to determine the rights of the parties, the superior court erred in reversing the Commission and in substituting its judgment for that of the Commission but should have remanded the cause for further findings.

APPEAL by respondents from *Smith (David I.), Judge.* Judgment entered 31 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 18 September, 1979.

Attorney General Edmisten by Deputy Attorney General Millard R. Rich, Jr., for respondent-appellant.

Kimzey, Smith & McMillan, by James M. Kimzey, for intervenor-appellant Clyde Savings and Loan Association.

Tharrington, Smith & Hargrove, by J. Harold Tharrington, for petitioner-appellees.

MARTIN (Robert M.), Judge.

Respondent North Carolina Savings and Loan Commission ("Commission") and Clyde Savings and Loan Association ("Clyde") appeal from a ruling of the Wake County Superior Court vacating Commission's order allowing Clyde to open a branch office in Hendersonville, Henderson County. The ruling was in response to a petition filed by Community Savings and Loan Association ("Community") and First Federal Savings and Loan Association of Hendersonville ("First Federal") seeking to have Commission's order set aside. The trial court found, *inter alia*, that Clyde had "failed to carry the responsibility of furnishing evidence that a branch office facility would promote effective and healthy competition in Henderson County without undue damage to another association or associations." This finding was based upon two portions of the Commission's final decision, finding of fact (6) and conclusion (5), as set out below:

> 6. The area to be served, the location of the proposed branch and the competition in the area to be served is as shown in the application.
>
> * * *
>
> (5) The approval of the application of the applicant for the establishment of a branch office in Henderson County, North Carolina would not unduly damage any other association operating in the area and would constitute healthy competition and would promote public convenience and advantage.

The guidelines which the Commission must consider upon receiving an application for the establishment of a savings and loan association branch office are set forth in §§ .0202(1) through (8) of Title 4, Chapter 9, Subchapter 9C of the North Carolina Administrative Code. Section .0202(6) specifically provides:

> It will be the responsibility of the applicant to furnish evidence that such a branch office facility would promote effective and healthy competition without undue damage to another association or associations.

This language is mirrored in conclusion (5) of the Commission.

The Administrative Procedure Act provides, in pertinent part (at N.C. Gen. Stat. § 150A-36), that:

> [A] final decision or order of an agency in a contested case shall be made, after review of the official record as defined in G.S. 150A-37(*a*), in writing and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150A-29(a) or 150A-30 or 150A-31.

N.C. Gen. Stat. § 150A-50 provides that judicial review of agency decisions under the Administrative Procedure Act shall be conducted by the court sitting without a jury. The court shall receive briefs and arguments, but no evidence may be offered that was not offered at the administrative hearing. If a party alleges irregularity in the administrative proceeding, which is not shown in the record, the court may receive pertinent testimony. The court has no discretion to hear the matter *de novo* unless no record was made of the administrative proceeding or the record is inadequate. N.C. Gen. Stat. § 150A-51 defines the scope of judicial review of an administrative proceeding, providing that a court may reverse or modify an agency decision only if the substantial rights of a petitioner

> may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of 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 substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary and capricious.

Petitioners rely upon N.C. Gen. Stat. § 150A-51(5), *supra*, as support for the propriety of the trial court's action in reversing the Commission. They contend that the Commission's finding of fact (6) was insufficient to support its conclusion (5) (quoted at p. ---, *supra*). We agree. However, we find that the trial court erred in substituting its judgment for that of the Commission. The application adverted to in the Commission's finding of fact (6) was the application originally filed by Clyde with the Commission for authorization to open the Hendersonville branch office. It is a part of the record, being admitted as an exhibit. It contains abundant statistical data concerning demographic, financial and growth trends in the Henderson County area. This application presented ample evidence which, if believed, would fully support the Commission's conclusion (5) that the proposed branch office could open without detriment to either Community or First Federal. However, some of the evidence contained in the application is more pertinent to the instant inquiry than other, and the Commission's bare reference to the application does not supply the factual basis upon which to predicate its conclusion of law (5) (which merely quotes language from the Administrative Code). Thus, the first two conclusions of law reached by the trial court with respect to the Commission's final decision are justified and accurate:

1. There is no finding of fact, or any concise and explicit statement of underlying facts, as required by G.S. 150A-36, with respect to whether a branch office facility would promote effective and healthy competition without undue damage to another association or associations in Henderson County, North Carolina.

2. The conclusion of the North Carolina Savings & Loan Commission that "The approval of the application of applicant for the establishment of a branch office in Henderson

> County, North Carolina would not unduly damage any other association operating in the area and would constitute healthy competition and would promote public convenience and advantage" is not supported by findings of fact or any concise and explicit statement of underlying facts.

It is the third conclusion of the trial court, wherein the court states that the Commission's conclusion of law (5) "is not supported by competent, material and substantial evidence," that is erroneous, in that it exceeds the proper scope of review in light of the conclusions previously made and in that it applies an incorrect standard of review to the evidence. Having determined that the findings of fact were not sufficient to enable the court to determine the rights of the parties, and that the findings of fact lacked that specificity impliedly required by N.C. Gen. Stat. § 150A-36, the trial court should have remanded the cause for further findings. *See Bailey v. North Carolina Department of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28 (1968); *Pardue v. Blackburn Bros. Oil & Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963). The Commission's failure to make appropriately detailed findings of fact from the evidence before it does not eliminate that evidence from consideration upon review or entitle petitioners to judgment solely on the basis of the Commission's findings. In determining whether reversal or modification of an administrative decision is appropriate under N.C. Gen. Stat. § 150A-51(5), the test applied to the evidence must be the "whole record" test. *See Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). This 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*. *Id.* Instead, the reviewing court is required to examine all of the competent evidence, pleadings, etc., which comprise the "whole record" to determine if there is substantial evidence *in the record* to support the administrative tribunal's findings and conclusions. The reviewing court, while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusions on the merits. If, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the rul-

ing must stand. In the instant case, the application filed by Clyde was part of the record. The evidence contained therein was competent and substantial, apparently persuading the Commission (even though the Commission did not properly record the basis for that persuasion in the final decision as reduced to writing). The insufficiency of the Commission's findings did not relieve the trial court of the responsibility for considering *all* of the competent evidence in the whole record to determine whether substantial evidence was present to support the Commission's conclusions. Arguably, after determining that the Commission's findings were insufficient, the trial court should never have reached the question of whether reversal under N.C. Gen. Stat. § 150A-51(5) was appropriate. Remand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review. However, so that there may be no confusion on remand, we have employed the above analysis so as to demonstrate that under no applicable theory of law was it appropriate for the trial court to reverse the Commission and substitute its judgment for the Commission's on the record before us.

Petitioners have argued that, because the N.C. Administrative Code allows a party to a hearing before the Savings & Loan Commission to "appeal the decision of the Commission to the Superior Court of Wake County," the requirements of N.C. Gen. Stat. § 150A-43 *et seq.* do not apply and the trial court was free to reverse the Commission without regard to the requirements of N.C. Gen. Stat. § 150A-51. This contention is feckless. The standards for judicial review of an administrative decision, whether on petition under the Administrative Procedure Act or on "appeal" from the agency, are essentially fixed. See generally 1 Strong's N.C. Index 3d *Administrative Law* § 8; 73 C.J.S. *Public Administrative Bodies and Procedures* § 202.

We conclude that the trial court erred in reversing the decision of the Commission. Appellants' assignments of error are well taken. The judgment of the court below is reversed, and the cause is remanded to the Superior Court of Wake County with instructions to remand to the Savings and Loan Commission for further findings and proceedings not inconsistent with this opinion.

Reversed and remanded with instructions.

Chief Judge MORRIS and Judge PARKER concur.

MERCER W. SIMMONS v. W. P. CHERRY AND W. P. CHERRY AND SONS, INC.

No. 7927DC111

(Filed 6 November 1979)

Principal and Agent § 11— agent as party to contract—sufficiency of evidence

In an action to recover for services rendered by plaintiff in investigating and appraising certain real property and in making a subdivision feasibility study for a housing project, evidence was sufficient to support the trial court's conclusion that defendant agent agreed to make himself a party to the contract, and the rule that plaintiff may not hold both the principal and agent liable in one suit was therefore inapplicable.

APPEAL by defendant from *Hamrick, Judge.* Judgment entered 10 October 1978 in District Court, LINCOLN County. Heard in the Court of Appeals 12 September 1979.

The plaintiff in this civil action sued defendant W. P. Cherry (Cherry) personally as well as W. P. Cherry and Sons, Inc. (the corporation) in which plaintiff was president, alleging that in the late fall of 1974, Cherry, on behalf of both himself and the corporation, employed the defendant real estate appraiser to investigate and appraise certain real estate located in Burke County and make a subdivision feasibility study for a housing project. In return for this investigation and appraisal plaintiff averred the defendants agreed to pay plaintiff the sum of $2,500. Plaintiff stated that he fully investigated the real estate in question taking numerous photographs, investigating comparable sales and in doing all things necessary to make a complete and thorough appraisal and subdivision feasibility study, and that he presented the defendants with the appraisal and feasibility study. Plaintiff further alleged that he mailed the defendant a statement for his services in the amount of $2,500, which the defendants failed and refuse to pay. Defendant Cherry answered plaintiff's complaint, admitting that he contacted the plaintiff on behalf of the corporation to perform appraisal work, denying plaintiff's other operative allegations and further defending on grounds that Cherry never agreed with the plaintiff to be personally liable for the corporation's debt.

At trial the plaintiff testified in his own behalf that the contract for services was made with both Cherry individually as well as the corporation and that Cherry said he would guarantee or

see that the debt would be paid. Cherry testified on behalf of himself and the corporation, admitting the corporation's debt to the plaintiff but denying he had personally contracted with plaintiff for plaintiff's services or that he had made any personal guarantee to the plaintiff to cover the corporation's debt. The trial court found that the plaintiff did not know either of the defendants prior to the time of the contract, that the plaintiff intended "to work with the fellow who walked into his office," and that Cherry said that he would guarantee and see to it the bill was paid. The court granted judgment to the plaintiff against both defendants, jointly and severally, in the sum of $2,500. From this judgment defendant Cherry appeals.

Jonas and Jonas, by Harvey A. Jonas, Jr., for plaintiff appellee.

John E. McDonald, Jr., for defendant appellant.

WELLS, Judge.

We find that the evidence was sufficient for the trial court to have found that the defendant Cherry, in addition to the corporation, was a party to the contract with plaintiff. The plaintiff testified:

> In the fall of 1974 W. P. Cherry contacted me by phone and made an appointment and then came to my office in Lincolnton.
>
> I had not known Mr. Cherry prior to that time. I do not recall a statement as to his connection with W. P. Cherry and Sons, Incorporated. Mr. Cherry requested that I make a feasibility study and an appraisal of a proposed residential subdivision in Morganton for him. We agreed on a fee of $2,500.00. I don't recall that there was a specific discussion as to who would pay it, as to him or W. P. Cherry and Sons, Incorporated. To my best recollection, the only time that I was aware of W. P. Cherry and Sons, Incorporated, I think, was as he was leaving the office, he gave me his card which had his corporate name on there. There was the general statement to the effect that the fee would be paid when I completed the report.

* * *

> There were numerous telephone calls in reference to the statement with Mr. Cherry over a period of approximately twelve months, and he assured me that there would be no problem . . . of the statement being paid. He guaranteed that it would be paid, and he would see that it would be paid, [or] words of this nature.

While Cherry testified to the contrary, from the above quoted statements of plaintiff the trial court could reasonably conclude plaintiff had originally contracted with Cherry personally as well as the corporation. We note that this is not a case involving an undisclosed principal. *See, Staley, Inc. v. Realty Co.*, 27 N.C. App. 541, 219 S.E. 2d 654 (1975). We take the trial court's findings as holding that plaintiff contracted with two principals—Cherry and the corporation—and not that Cherry was merely acting as guarantor of the corporation's debt.

Our Supreme Court has held that, "[w]hether the principal is disclosed at the time of the . . . contract or afterwards discovered, the plaintiff cannot hold both principal and agent in one suit, where, as here, the complaint recognizes and alleges agency *and nothing further in support of the theory of personal or individual liability*" [emphasis added]. *Walston v. Whitley & Co.*, 226 N.C. 537, 541, 39 S.E. 2d 375, 377 (1946). Furthermore, ". . . a contract made by a known agent, acting within the scope of his authority for a disclosed principal, nothing else appearing, is the contract of the principal alone [citation omitted], although *the agent of a disclosed principal may by special agreement bind himself to performance of the contract*" [emphasis added]. *Way v. Ramsey*, 192 N.C. 549, 551, 135 S.E. 454, 455 (1926). *See also*, RESTATEMENT (SECOND) OF AGENCY §§ 320-322 (1958).

The question in the present case is whether, by his statements and conduct, Cherry made an agreement with the plaintiff binding himself to performance of the contract and personal liability therefor. Plaintiff testified that Cherry requested that plaintiff, "make a feasibility study and an appraisal of a proposed residential subdivision in Morganton *for him* [Cherry]." [Emphasis added.]

The trial court could reasonably conclude from the evidence that the parties contemplated, at the time the contract was made,

that both defendants would be responsible for the obligation to plaintiff.

The comments to § 320 of the Restatement of Agency (Second) provide:

> c. *Evidence.* * * * [T]he fact that the other party [to the contract with the agent and principal] thereto declared that he did not care who the principal was or that he was satisfied with the credit of the agent is evidence that it was agreed that the agent was a party to the contract. In such cases, it is for the triers of fact to determine what the parties intended.

Findings of fact made by the court in a non-jury trial are conclusive on appeal if supported by any competent evidence, even though there is evidence which might support findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). Our Supreme Court has held that an agent for nonresident bidders for an issue of county bonds was personally liable to the county for a forced resale of the bonds where the agent endorsed the bonds, gave his own note, actively participated in the transaction, and assured and guaranteed to the county commissioners the principals' performance. *Caldwell County v. George*, 176 N.C. 602, 97 S.E. 507 (1918).

Since we conclude that the trial court had sufficient evidence before him to reasonably conclude that agent Cherry agreed to make himself a party to the contract, the rule that the plaintiff may not hold both the principal and agent liable in one suit is inapplicable. *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E. 2d 375 (1946). In view of this holding we need not reach defendant Cherry's argument that any oral guarantee he might have given plaintiff to pay the corporation's debt is not enforceable.

Affirmed.

Judges ARNOLD and WEBB concur.

CYNTHIA MATTIE GRAYSON STANLEY v. CHARLES W. BROWN

No. 7826SC1020

(Filed 6 November 1979)

Physicians, Surgeons and Allied Professions § 13— action for medical malpractice—statute of limitations

The statute of limitations for a personal injury action based on malpractice in surgery performed on plaintiff was three years, and the action accrued on the date defendant performed the surgery on plaintiff, where plaintiff discovered the injury and had corrective surgery within ten months of the alleged negligent operation by defendant. G.S. 1-15(c).

APPEAL by plaintiff from *Ervin, Judge.* Judgment entered 7 June 1978, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 22 August 1979.

Plaintiff, a woman sixty-six years of age, brought an action against defendant, a licensed physician on 14 October 1977, wherein plaintiff sought damages arising out of defendant's alleged professional malpractice in an operation performed on 27 February 1974, by defendant on plaintiff's lower abdomen. In his answer defendant pled the statute of limitations and moved for summary judgment.

Plaintiff's deposition and affidavit, filed in response to defendant's motion, set forth the following statements which have been summarized if not quoted:

(1) That defendant, Dr. Charles W. Brown, a licensed physician, performed an operation on plaintiff's vagina on 27 February 1974; (2) that plaintiff was discharged from the hospital on 9 March 1974 and that within a "few days" of her arrival at home, she inspected herself with a mirror and "discovered something was wrong"; (3) that plaintiff apparently had a bulging or a protrusion from the left side of her vagina known as "pooched intestines"; (4) that on 5 April 1974 and on 12 June 1974 plaintiff visited defendant at which time defendant explained to plaintiff that she should purchase a vaginal cream and should massage the area every night but that "pooched intestines" constituted a condition with which she must live; (5) that plaintiff further stated: "When Dr. Brown told me I was going to have to live with it, I decided he was not going to be my doctor any more, because he

left me in that condition, and I was satisfied that he had done the operation incorrectly, and that he had ruined me. I had already decided in April that I was in bad shape . . ."; (6) that the visit on 12 June 1974 was the last time plaintiff saw defendant in his professional capacity; (7) that on 18 October 1974 plaintiff consulted her daughter's doctor, Dr. Charles G. Bolon, who informed her that the operation by the defendant had been performed incorrectly; and (8) that on 17 November 1974 Dr. Bolon performed an operation to correct a bulging intestine.

Summary judgment for defendant was allowed on the ground that plaintiff's claim for relief was barred by the applicable statute of limitations.

Thomas R. Cannon for the plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray by John G. Golding for defendant appellee.

CLARK, Judge.

Two questions are presented to this Court: What is the appropriate period of limitations for a personal injury action based upon professional malpractice, and when does the statutory period begin to run?

Plaintiff contends that: (1) she was 66 years of age at the time of the operation and she was not skilled enough to perceive that there was an error in defendant's surgical procedure, particularly since she had been told by the defendant that the difficulty she was experiencing was something she was going to have to live with; (2) plaintiff's injury was therefore "not readily apparent" and thus the three-year statute of limitations, N.C. Gen. Stat. § 1-15(b) applies; (3) plaintiff therefore should have had three years from 18 October 1974 within which to file her suit; and (4) plaintiff in fact filed on 14 October 1977 within the three-year period. We do not agree with plaintiff's contentions.

The applicable statute of limitations, N.C. Gen. Stat. § 1-15 provides as follows:

> "*Statute runs from accrual of action.*—(a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death *or one for malpractice arising out of the performance of or failure to perform professional services*, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action." (Emphasis supplied.)

We note that the above-emphasized portion of subsection (b) and all of subsection (c) were added by the North Carolina Legislature in May 1976. The amendments did not apply to any actions pending at the time of enactment but the amendments became effective as to actions filed on or after 1 January 1977. 1975 N.C. Session Laws, 2nd Sess., ch. 977, secs. 1, 2, 8, 9. Consequently, this action falls within the effective date of the 1976 amendments. We also note that the 1979 General Assembly repealed N.C. Gen. Stat. § 1-15(b) altogether. 1979 N.C. Adv. Leg. Serv., ch. 654, sec. 3(a); *Johnson v. Podger*, 43 N.C. App. 20, 257 S.E. 2d 684 (1979).

We hasten to add that the 1976 amendments clearly took professional malpractice cases out of subsection (b) and placed them within the scope of subsection (c). The primary distinction between the two sections, as applied to the case at bar, is that under subsection (b) the limitations clock begins to run when the injury is or should have been discovered by the claimant whereas under subsection (c) the clock starts at the time of the occurrence of the last act of the defendant giving rise to the cause of action. Under either subsection the statutory period is three years. The proviso in subsection (c) involving plaintiff's discovery of a latent injury more than two years after defendant's last act, in which case the statutory period of limitations would be four years, does not apply here because plaintiff discovered the injury and had corrective surgery within ten months of the alleged negligent operation by the defendant.

Even if, as plaintiff asserts, subsection (b) applied and the cause of action accrued at the time the injury was discovered by the claimant, plaintiff still would not have filed within the three-year statutory period. Plaintiff, by her own words, stated that as early as April, 1974, she had examined the intestinal bulges and knew in her mind that defendant had performed the operation incorrectly. Within the meaning of subsection (b) plaintiff would have "discovered" the injury when she inspected herself, not when she was told by Dr. Bolon that the operation by defendant was improperly performed.

Subsection (c), however, is controlling and the action accrues at the time of defendant's last act giving rise to the cause of action. In this case the action accrued on 27 February 1974, the date defendant performed the operation on the plaintiff. Even if we

were to construe the facts liberally and were to find that defendant's last act occurred on 12 June 1974, when plaintiff last visited defendant's office, plaintiff still would not have filed within the statutory period.

We do not ignore the injurious consequences which plaintiff contends arose from a course of treatment by defendant, but it is the duty of this Court to enforce the statute of limitations which the General Assembly has enacted to protect defendants against stale claims. *Shearin v. Lloyd*, 246 N.C. 363, 370-71, 98 S.E. 2d 508 (1957); *Butler v. Bell*, 181 N.C. 85, 90, 106 S.E. 217 (1921); *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870, *cert. denied*, 277 N.C. 110 (1970). Plaintiff failed to file her complaint within the period prescribed by the statute of limitations and her claim is barred thereby. Accordingly, the trial court's grant of summary judgment in favor of defendant is

Affirmed.

Judges ERWIN and WELLS concur.

ROBERT G. AMICK, AND WIFE, MARTHA S. AMICK v. MARTHA M. SHIPLEY, ADMINISTRATRIX OF THE ESTATE OF JIMMY SHIPLEY, SAMUEL McKAREM AND SMB MANAGEMENT CO., INC.

No. 7818SC1128

(Filed 6 November 1979)

Rules of Civil Procedure § 16; Trial § 6— disputed stipulations not signed—judgment based thereon improper

The trial court's judgment is reversed where the court relied in part on the purported stipulation of facts contained in a pretrial order, but the stipulation was not signed by respective counsel and was disputed.

APPEAL by defendants from *Crissman, Judge*. Judgment entered 10 October 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1979.

Richardson Realty, Inc., as lessor, and defendants Jimmy Shipley and Samuel McKarem, as lessees, executed a lease of a parcel of land and building located in Guilford County for opera-

tion as a dry cleaning business. The land was subsequently deeded to plaintiffs' immediate predecessors in interest, Howard and Barbara Covington (hereinafter the Covingtons). Meanwhile, defendants Shipley and McKarem assigned their leasehold interests in the premises to defendant SMB Management Company, Inc. (hereinafter SMB). Subsequently, SMB entered into a lease with plaintiffs Robert and Martha Amick under which the Amicks were to pay an annual base rental of $9,600.24, payable in weekly installments of $184.62 or eight percent of annual gross receipts from operation of the dry cleaners, whichever was greater. As assignee of the original leasehold interest, SMB was obligated to pay the owner of the reversionary interest, the Covingtons, an annual rental of $9,000.00 or seven percent of the annual gross receipts, whichever was greater. Plaintiffs purchased the Covingtons' interests in the property. Their deed contained the following provision: "This conveyance is made subject to easements, rights of way [sic] of record, 1977 taxes and lease agreement between Richardson Realty, Inc. and Jimmie [sic] V. Shipley and Sam McKarem, dated March 5, 1969."

Plaintiffs, for awhile, continued to pay a net difference of $50.00 monthly to defendant SMB under their lease agreement. They then instituted this action, seeking a declaratory judgment that they were owners in fee simple absolute of all interests in the premises.

Defendants, in their answer, admitted that the original lease between Richardson Realty, Inc. and Jimmy Shipley and Samuel McKarem was to extend for more than three years and had not been recorded, but they contended that plaintiffs were estopped to deny the existence of their interests in the land because of the provision in their deed and their subsequent payment of rent. Defendants sought to recover a sum allegedly due for unpaid rental payments and possession of the premises.

The trial court filed a pretrial order containing pertinent stipulations by the parties. Neither the attorneys nor the judge had signed the order. Later, the trial court made the following pertinent findings of fact:

> "8. On August 19, 1970, the owner of the property, Howard W. Covington, consented in writing to a change of

the operation of the premises from a franchise of Master Kleens of America, Inc., to 'A Cleaner World' franchise of SMB.

9. On April 17, 1972, a sublease was executed between SMB, as lessor, and Robert G. Amick, as lessee, subleasing the premises involved in this action (hereinafter 'the sublease').

10. The owner of the premises, Howard W. Covington, fully consented to the assignment of the lease by Jimmy V. Shipley and Samuel S. McKarem to SMB, and fully consented to the sublease by SMB to Robert G. Amick.

11. The plaintiff, Robert G. Amick, did not have full knowledge of the existence of the lease at the time the sublease was entered but was aware of the lease between the then owner of the premises, the Covingtons, and the defendant, SMB. The plaintiff was not a party to the lease nor was he a party at the time the prime lease was entered into by and between Richardson Realty and Shipley and McKarem.

12. On January 7, 1977, Howard W. Covington and wife, Barbara W. Covington, as grantors, conveyed the premises to Robert G. Amick and wife, Martha S. Amick, as grantees, pursuant to a deed containing the following provision:

> This conveyance is made subject to easements, rights-of way [sic] of record, 1977 taxes and lease agreement between Richardson Realty, Inc. and Jimmy V. Shipley and Sam McKarem, dated March 5, 1969.

13. The lease calls for annual base rent of $9,000.00 payable at the rate of $750.00 per month or 7% of the annual gross receipts of the dry-cleaning business located on the premises, whichever shall be greater.

14. The sublease calls for annual base rent of $9,624.00 per year payable in weekly installments of $184.68 or 8% of annual gross receipts, whichever shall be greater.

15. Since January, 1977, when the plaintiffs, Robert G. Amick and wife, Martha S. Amick, acquired title to the property, until September, 1977, the net monthly difference of $50.00 per month was paid by the plaintiffs to the defendant,

SMB, said payments ceasing in September, 1977, when this action was filed; that the defendant has never demanded any payments from the plaintiffs other than the excess payments called for under the sublease but has not made any demand for payments under the prime lease.

16. Neither the Lease nor the Sublease was recorded nor have they been recorded until the present date and are not matters of record."

Based on its findings of fact, the court concluded as a matter of law that:

"1. The plaintiffs have acquired title to the premises free and clear of the lease presently held by SMB Management Company as purchasers for value because of the lack of recordation of any intervening documents which would show any interest in the defendants.

2. The plaintiffs had knowledge of the underlying lease before and after the plaintiffs acquired title to the premises.

3. The plaintiffs hold title to the leased premises free and clear of the unrecorded lease presently held by the defendant, SMB."

Defendants appealed.

Wilson & Redden, by Charles R. Redden, for plaintiff appellees.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, James C. Frenzel, and Chris A. Rallis, for defendant appellants.

ERWIN, Judge.

Defendants contend that the trial court erred in making findings of fact without any evidence introduced by the plaintiffs in support of those findings. We agree for a different reason. In entering its judgment, the trial court relied on the purported stipulation of facts contained in the pretrial order and based its findings of fact thereon. It does not appear of record that the stipulations reduced to writing were signed by respective counsel, and the alleged stipulations appear only in the findings of fact. In a similar instance, our Supreme Court held that the stipulations

as reported were subject to challenge. *See Crowley v. McDougald*, 241 N.C. 404, 85 S.E. 2d 377 (1955). In *Crowley v. McDougald, supra*, the plaintiff had excepted to purported stipulation of facts contained in a referee's report, and it had not been made to appear that the stipulations were reduced to writing and signed by the plaintiff or her counsel.

G.S. 1A-1, Rule 16, of the Rules of Civil Procedure provides in pertinent part:

> "If a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

While the rule allows the court to enter an order reciting action taken at the conference, present custom and better practice require that admissions, agreements, or stipulations entered into by counsel at the pretrial stage be evidenced by a signed writing. *Cf. Crowley v. McDougald, supra.* (Stipulations entered into in reference proceeding should be evidenced by signed writing to be binding.) *See also* 73 Am. Jur. 2d, Stipulations, § 2, p. 536. We are well aware that the pretrial conference is a mechanism intended to resolve those issues which are not genuinely in dispute, but nothing in the rule affords a basis for forcing the parties into admissions or stipulations where there is a genuine dispute.

Had the trial court merely relied on other evidence before it, we would be compelled to uphold its findings of fact. However, in the preface to its judgment, the court stated that it was relying "upon stipulation of facts as contained in the Pretrial Order filed in this proceeding." Thus, the record affirmatively discloses that the trial court's findings of fact were based in part on the disputed stipulation of facts. In such a circumstance, the judgment below must be and is

Reversed and remanded.

Judges CLARK and WELLS concur.

CELESTE G. BROUGHTON v. HARRY DuMONT

No. 7910SC45

(Filed 6 November 1979)

Process § 7; Rules of Civil Procedure § 4— service of process by mail—insufficient service

Service of process was not accomplished by mail as permitted by G.S. 1A-1, Rule 4(j)(1)c where the return receipt was not addressed to the party to be served, was not restricted to delivery to the addressee only, and was not signed by the party to be served. Furthermore, the record failed to support plaintiff's contention that the less demanding type of service allowed under G.S. 1A-1, Rule 4(j)(9)b was justified on the ground that defendant was concealing his whereabouts to avoid service of process.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 12 September 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 21 September 1979.

This action was instituted to recover damages from defendant attorney for breach of contract and professional malpractice. Defendant is a natural person who, at the time the summons was issued, resided in Buncombe County, North Carolina. Plaintiff attempted service of process by certified mail. The return receipt does not indicate any form of restricted delivery and was signed by one R. E. Harrell, as "authorized agent". Defendant answered in apt time, asserting as a first defense a motion to dismiss for insufficiency of service of process; as a second defense, a motion to dismiss on the grounds that plaintiff's claim was barred by the statute of limitations; and as a third defense, a general denial. Defendant's motions to dismiss were heard by the trial judge on 11 September 1978. On 8 September 1978 plaintiff filed affidavits in opposition to defendant's motion to dismiss. The affidavits were not mailed on that day to defendant's counsel, but were hand delivered by plaintiff on the day of the hearing. Following the hearing on 11 September 1978, the trial court entered an order on 12 September 1978 granting both of defendant's motions to dismiss. Plaintiff gave immediate notice of appeal and on the same day, filed a motion to "allow the process or proof of service to be amended as provided under Rule 4(i) of the North Carolina Rules of Civil Procedure." That motion was denied by order of the trial court dated 14 September 1978. Plaintiff appealed from

that order. The trial court's order of 12 September 1978 dismissing plaintiff's action for insufficiency of service of process contained no findings of fact.

Celeste G. Broughton, plaintiff appellant, pro se.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr. & Nigle B. Barrow, Jr., for defendant appellee.

WELLS, Judge.

Plaintiff has brought forward twelve separate assignments of error. We need to deal with but two: 1) whether the trial court committed error in granting defendant's motion to dismiss for insufficiency of process; and 2) whether the trial court abused its discretion in denying plaintiff's motion to amend the summons.

Plaintiff's complaint contains the following allegations with respect to the residence of the defendant:

> 1. The defendant is a resident of 15 Grove Wood Drive, Asheville, North Carolina. He is a licensed, practicing attorney and a partner in the law firm of Uzzell and DuMont, 311 Jackson Building, Asheville, North Carolina 28807.

The summons was directed to:

HARRY DUMONT
Uzzell and DuMont Attorneys
311 Jackson Building
Asheville, N.C. 28807

The return of service on the summons was not filled in. The only indication of service included in the record was a certified mail return receipt signed by one R. E. Harrell. The certified mail return receipt indicated no form of restricted delivery, did not indicate the name or address of the addressee, and disclosed no date of delivery.

On a motion to dismiss for insufficiency of process where the trial court entered an order without making findings of fact, the Court of Appeals will determine as a matter of law if the manner of service of process was correct. *Philpott v. Johnson*, 38 N.C. App. 380, 247 S.E. 2d 781 (1978); *Sherwood v. Sherwood*, 29 N.C.

App. 112, 223 S.E. 2d 509 (1976). It is clear from this record that defendant, at the time of the issuance of the summons in this case, was a natural person domiciled within the State, within the purview of G.S. 1-75.4(1)b and that therefore jurisdiction over his person would obtain only pursuant to Rule 4(j) of the Rules of Civil Procedure. Rule 4(j)(1) provides for service on a natural person by delivery to the person, delivery to an agent, or by mail. The provisions for service by mail are to be found in Rule 4(j)(1) as follows:

> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee only.

We find that plaintiff did not follow the provisions of Rule 4(j)(1)c in that the return receipt was not addressed to the party to be served, was not restricted to delivery to the addressee only, or receipted by the party to be served. Sufficient service was not accomplished pursuant to the above cited Rule.

Plaintiff contends, however, that Rule 4(j)(1)c is not controlling in this case and that under the facts of this case, her attempted service should be found sufficient pursuant to the terms of Rule 4(j)(9)b. She bases this argument on her contention that defendant was concealing his person or whereabouts to avoid service of process. The only basis for such contention on the part of the plaintiff is found in her affidavit of 8 September 1978, executed more than two months after the summons was issued on 6 July 1978, in which appears the following paragraph:

> 2. The plaintiff has received information which caused her to believe defendant was concealing his whereabouts to avoid process . . . . Said information involved the fact that defendant faces several indictments for embracery as well as current civil suits.

We find that there are no facts or information in the record which would justify the less demanding type of service allowed under Rule 4(j)(9)b.

Where a statute provides for service of summons by designated methods, the specified requirements must be complied with or there is no valid service. *Guthrie v. Ray,* 293 N.C. 67, 235

S.E. 2d 146 (1977). Statutory provisions prescribing the manner of service of process must be strictly construed, and the prescribed procedure must be strictly followed; and unless the specified requirements are complied with, there is no valid service. *Id.* Service in this case was insufficient. Since there was no valid service of process, the court acquired no jurisdiction over defendant. *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1974), *rehearing denied*, 285 N.C. 597 (1974).

As indicated previously in this opinion, plaintiff has appealed from the trial court's order denying her motion to amend the "process or proof of service." The fatal flaw in plaintiff's attempted service was not in the wording of the summons, nor in the "proof" of service. Rather, it was in plaintiff's failure to strictly adhere to the statutory method by reason of the manner in which she mailed the process. She does not, in her motion, even attempt to show that she complied with the statutory mailing requirements, but merely alleges that since the defendant had knowledge of the action, justice would be served by finding him bound by her attempted service. She cites no authority for such a proposition and we are aware of none.

The judgment of the trial court dismissing plaintiff's action for insufficiency of service of process was correct. This holding renders all other assignments of error moot.

Affirmed.

Judges VAUGHN and CLARK concur.

IN THE MATTER OF THE CUSTODY OF LAWRENCE HAYES, KIMBERLY HAYES, AND LEROY GLENN HAYES, JR., MINORS

No. 7912DC1

(Filed 6 November 1979)

1. Divorce and Alimony § 23.10— jurisdictional question not raised in trial court—no consideration on appeal

The court on appeal will not consider respondent's jurisdictional question which was not raised in the trial court.

2. Divorce and Alimony § 25.2— child custody order supported by evidence—separation agreement not binding

The trial court's child custody order was supported by ample evidence, and the court was not bound by the child custody provision of the parties' separation agreement.

APPEAL by respondent from *Guy, Judge.* Judgment entered 9 August 1978 in District Court, CUMBERLAND County. Heard in the Court of Appeals 29 August 1979.

This action was commenced by writ of habeas corpus to determine the custody of the three minor children born of the marriage of petitioner, Eugenia Pearl Hayes, and respondent, Leroy Glenn Hayes. Petitioner and respondent entered into a separation agreement on 27 August 1976, which provided for child custody and support, and awarded custody of Lawrence and Kimberly to petitioner and of Leroy, Jr. to respondent. The agreement also provided for child support payments from respondent to petitioner. Petitioner and respondent were divorced in Wilson County on 29 September 1977. The trial court heard evidence from both parties, interviewed the children privately and individually and at the close of the initial hearing, entered an order continuing the determination of custody until the end of the 1977-1978 school year. The hearing was resumed on 9 August 1978, following which, the trial judge entered an order modifying the custody arrangement provided for in the separation agreement—awarding custody of Leroy, Jr. in addition to Kimberly to petitioner, and Lawrence to respondent. No change was made in the level of support payments. Respondent appealed.

Downing, David, Vallery, Maxwell & Hudson, by Harold D. Downing, for petitioner appellee.

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

WELLS, Judge.

Respondent's assignments of error raise two questions: 1) whether the trial court had jurisdiction in the matter; and 2) whether the trial court's order was based upon sufficient evidence to justify a change of custody from that provided for in the separation agreement.

[1] The respondent argues that since the divorce decree was entered in Wilson County, only that court would have jurisdiction to consider a change in custody. This jurisdictional issue was not raised in the trial court. Although this Court may take notice of a jurisdictional question *ex mero motu*, we decline to do so here because the record before us does not contain either the divorce decree or pleadings in that prior action and accordingly, we are unable to determine whether the trial court in the prior divorce action dealt with the issues of child custody and support. We also decline to consider respondent's contention that amendments to G.S. 50-6 made by the 1977 North Carolina General Assembly restrict jurisdiction of custody to the court which hears the divorce action. By the explicit wording of G.S. 50-6, applicability of any such conceivable modifications in jurisdiction would be limited to divorces obtained on grounds of a one year separation of the parties, and the record in the present action is devoid of the grounds upon which the divorce was granted.

[2] We also find that the trial court's custody order was supported by ample evidence. Judge Guy considered the separation agreement, the divorce, the status and condition of the children, and their reasonable needs and best interest. He made appropriate findings of fact with respect to the fitness of petitioner and respondent and the best interest of the children whose custody was awarded. He based his conclusions and order on those findings.

It has been a long-standing rule in this State that the child custody provisions contained in separation agreements are not binding on the courts. *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966); *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E. 2d 849 (1979); *Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449 (1977), *disc. rev. denied*, 292 N.C. 730, 235 S.E. 2d 784 (1977). Judge Guy's order was based on sufficient evidence as to the fitness of petitioner and the best interest of the children, and he made proper findings and conclusions on the pertinent issues. Under such circumstances, the trial court's order should not be disturbed on appeal. *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649 (1967); *King v. Allen*, 25 N.C. App. 90, 212 S.E. 2d 396 (1975), *cert. denied*, 287 N.C. 259, 214 S.E. 2d 431 (1975).

The order of the trial court is

Affirmed.

Judges CLARK and ERWIN concur.

BETTY J. COX v. L. STEPHEN COX

No. 783DC1057

(Filed 6 November 1979)

Judgments § 21 – amendment of consent judgment – legal consequence different from what contemplated

The fact that the legal consequence of a consent judgment for alimony was different than what the parties contemplated is not a sufficient reason to amend the consent judgment without the agreement of both parties.

Judge MITCHELL concurs in the result.

APPEAL by plaintiff from *Phillips (Herbert O. III), Judge.* Judgment entered 26 July 1978 in District Court, PITT County. Heard in the Court of Appeals 26 June 1979.

This is an appeal by the plaintiff from an order of the District Court of Pitt County amending a consent judgment. On 27 August 1975 a final judgment was entered with the consent of both parties providing the defendant would make alimony payments to the plaintiff. Among the provisions of the judgment was the following:

> "4. That as a part of their property settlement agreement and in consideration of the agreement by the defendant to provide and pay alimony to the plaintiff as herein required, the plaintiff, Betty J. Cox, agrees to convey . . . to the defendant, L. Stephen Cox, all her right, title, interest and estate in and to any and all real and personal property now owned and held by the parties . . . except such personal property as is now in the possession of the said plaintiff, Betty J. Cox . . . ."

The North Carolina Department of Revenue and the Internal Revenue Service questioned a deduction under this judgment by the defendant on his income tax returns. On 10 Feburary 1977, the defendant made a motion in the cause to amend the judgment

by deleting from paragraph four the words "and in consideration of the agreement by the Defendant to pay alimony to the Plaintiff as herein required . . . ." After a hearing, the district court allowed the defendant's motion in the cause by deleting the words from the judgment as prayed for by the defendant.

Plaintiff appealed.

James, Hite, Cavendish and Blount, by M. E. Cavendish, for plaintiff appellant.

White, Allen, Hooten, Hodges and Hines, by Thomas J. White, for defendant appellee.

WEBB, Judge.

We hold the district court committed error in amending the consent judgment. There have been many cases in this state dealing with the setting aside or amendment of consent judgments. *See Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99 (1968); *Cranford v. Steed*, 268 N.C. 595, 151 S.E. 2d 206 (1966); *Becker v. Becker*, 262 N.C. 685, 138 S.E. 2d 507 (1964); *Overton v. Overton*, 259 N.C. 31, 129 S.E. 2d 593 (1963); *King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945); *Hazard v. Hazard*, 35 N.C. App. 668, 242 S.E. 2d 196 (1978); *Blankenship v. Price*, 27 N.C. App. 20, 217 S.E. 2d 709 (1975); *Shore v. Shore*, 7 N.C. App. 197, 171 S.E. 2d 798 (1970); *Highway Comm. v. Rowson*, 5 N.C. App. 629, 169 S.E. 2d 132 (1969); *Highway Comm. v. School*, 5 N.C. App. 684, 169 S.E. 2d 193 (1969). From a reading of these cases, we believe the rule is that a consent judgment is not only a judgment of the court but is also a contract between the parties. It cannot be amended without showing fraud or mutual mistake, which showing must be by a separate action, or by showing the judgment as signed was not consented to by a party, which showing may be by motion in the cause. The appellee's argument is that both parties agreed that the payments to the plaintiff would be treated as alimony which the plaintiff would report as income and which defendant would deduct from his income for tax purposes. Whatever the tax consequences would be, each party consented to the judgment as drawn. We hold that the fact that the legal consequence of the signing of the judgment was different than what the parties contemplated is not a sufficient reason to amend a consent judgment unless both parties agree to the change. *See*

King v. King, supra. It was error for the district court to order the amendment to the consent judgment.

Reversed and remanded.

Judge MARTIN (Robert M.) concurs.

Judge MITCHELL concurs in the result.

STATE OF NORTH CAROLINA v. JOSEPH LEVON McMILLIAN

No. 795SC399

(Filed 6 November 1979)

Criminal Law § 60.5; Robbery § 4.7 — armed robbery — insufficiency of fingerprint evidence

The State's evidence was insufficient to establish the identity of defendant as one of the perpetrators of an armed robbery where it tended to show that the three robbers wore slitted pillowcases over their heads; two of the robbers wore white plastic surgical gloves and placed the money in a blue flight bag; ten days after the robbery the police searched an unoccupied house two blocks from the robbery scene and discovered a pair of plastic surgical gloves with defendant's fingerprints on them, a pillowcase with two eyehole slits, and a blue flight bag; defendant did not have permission to enter the unoccupied house; and defendant denied that he had been in the house, since the evidence was insufficient to show that defendant's fingerprints could have been impressed on the surgical gloves only at the time the robbery was committed.

APPEAL by defendant from *Small, Judge.* Judgment entered 9 January 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 31 August 1979.

Defendant was charged with armed robbery of $2,116.65 from North Carolina National Bank in Wilmington (N.C.N.B.) on 14 July 1978. He appeals from the judgment imposing a prison term of not less than 35 nor more than 40 years.

The State's evidence tended to show that three men wearing slitted pillowcases over their heads entered N.C.N.B. at the corner of North 7th and Market Streets at about 6:00 p.m.; that one stood in the lobby with a gun pointing in the direction of the

tellers and customers; that the other two men, both wearing white plastic surgical gloves, jumped over the counter, took money from the cash drawers and put the money in a blue flight bag; and that all three ran out of the bank, turned left, and proceeded north on North 7th Street.

The State's evidence also tended to show that the police found two plastic gloves and a pillowcase near the sidewalk on North 7th Street near the bank. In addition, on 24 July 1978, the police searched an upstairs apartment in an unoccupied house (603 Chestnut Street) at the corner of Chestnut and North 6th Streets, about two blocks from the Bank, where and at which time they found a pillowcase with two eyehole slits, a pair of plastic surgical gloves with defendant's fingerprints and a blue flight bag. The State's evidence further shows that the police then questioned the defendant; that defendant denied knowing anything about the gloves and flight bag; and that defendant denied he had ever been in the unoccupied house.

Defendant was arrested on 30 August 1978. Defendant offered no evidence at trial.

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

George H. Sperry and W. Allen Cobb, Jr., for defendant appellant.

CLARK, Judge.

The question on appeal is whether the evidence was sufficient to establish the identity of the accused as one of the perpetrators of the armed robbery.

It is established that in order to withstand a motion to dismiss where fingerprints of an accused are *found at the scene of the crime*, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been *impressed only at the time the crime was committed. See State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975), and cases compiled therein. However, fingerprints not found at the scene or not impressed at the time of the crime may have probative value and

may be admissible into the evidence if the fingerprints considered with the other evidence have a logical tendency to prove the identity of the accused as a perpetrator.

In the case before us the defendant's fingerprints were found not at the scene of the crime but on gloves discovered ten days after the robbery in an unoccupied house two blocks from the scene of the robbery. The evidence that the gloves were found in combination with the slitted pillowcase and the flight bag tends to show that the gloves on which defendant's fingerprints were found were gloves worn by one of the perpetrators.

Yet, to withstand dismissal on the question of whether defendant was one of the perpetrators, there must be substantial evidence from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed or during flight or at the time of abandoning the gloves after flight. In the instant case, however, there is no logical elimination of other times when the fingerprints could have been impressed in view of the substantial time lapse of ten days between the crime and the discovery of the gloves on which defendant's fingerprints were found. Similarly, the additional evidence that defendant did not have permission to enter the unoccupied house and defendant's denial of entry into the house are not sufficient when considered with the fingerprint evidence to carry to the jury the question of defendant's guilt. The evidence is sufficient only to establish that at some unspecified place and at some unspecified time during the ten-day period between the commission of the crime and the discovery of the gloves defendant impressed his fingerprints on the gloves. If the gloves, pillowcase, and flight bag had been discovered immediately after the commission of the crime and the flight of the perpetrators, there might have been a reasonable inference that defendant was the perpetrator who wore the gloves during the robbery and discarded them after flight. But in view of the time lapse of ten days, this inference, though permissible, is not compelling and is not sufficient to take the case to the jury.

We conclude, in the present case, as did our Supreme Court in *State v. Scott*, 296 N.C. 519, 526, 251 S.E. 2d 414, 419 (1979), and *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967), that the evidence "is sufficient to raise a strong suspicion of the

defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture."

The charge of armed robbery is dismissed and the judgment is

Reversed.

Judges ERWIN and WELLS concur.

ANTHONY MISERO v. TERESA ANN MISERO

No. 7912DC307

(Filed 6 November 1979)

Divorce and Alimony § 23.5 — child custody — modification — child in another state — jurisdiction

The trial court had jurisdiction to consider defendant's motion for a change in child custody, though the child in question was residing in Pennsylvania with plaintiff's parents, since the parties and their child had all been residents of this State at the time of the original custody order, and plaintiff could not deprive the court of jurisdiction by placing the child in the physical care of persons residing outside the State.

APPEAL by plaintiff from *Hair, Judge*. Order entered 26 January 1979 in District Court, CUMBERLAND County. Heard in the Court of Appeals 17 October 1979.

Plaintiff husband and defendant wife were married on 29 October 1976 in Pennsylvania and had one minor child. Plaintiff, on 27 April 1978, filed a custody and support action in Cumberland County, North Carolina. By consent judgment filed on 9 May 1978 the court found that at that time both parties were residents of Cumberland County, plaintiff was a fit and proper person to have custody of the child, and defendant was able-bodied and capable of contributing to the child's support. The court ordered that the child be placed in the custody of the plaintiff, granting reasonable visitation rights to the defendant, and that the defendant pay one-hundred dollars per month for the support of the child.

By motion filed 8 November 1978 defendant moved the trial court for custody and support of the child on grounds of changed circumstances of the parties. On 5 January 1979 plaintiff moved for dismissal of defendant's motion because he had, on his own accord while serving in the armed forces, entrusted physical care and custody of the child to plaintiff's mother and stepfather, who are residents of Pennsylvania over whom plaintiff asserted the court lacked personal jurisdiction. The trial court, by order entered 26 January 1979, denied plaintiff's motion to dismiss and ordered the plaintiff to present the child to the court on 2 April 1979. From this order plaintiff appeals.

Barrington, Jones, Witcover, Carter & Armstrong, P.A., by C. Bruce Armstrong, for plaintiff appellant.

Pope, Reid, Lewis & Deese, by Renny W. Deese, for defendant appellee.

WELLS, Judge.

G.S. 50-13.5(c)(1) and (2) provide as follows:

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.—

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

a. The minor child resides, has his domicile, or is physically present in this State, or

b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control, and custody of the minor child.

Thus it appears that jurisdiction and custody actions may be grounded in either the residence, domicile and physical presence of the child in the State; or the personal jurisdiction over the person having actual care, control and custody of the child. At the

time this action was originated, the child was residing and was physically present in the State and the Court had personal jurisdiction over the parents who then had the actual care, control and custody.

G.S. 50-13.5(c)(4) provides that jurisdiction thus acquired, "shall not be divested by a change in circumstances while the action or proceeding is pending."

In matters of custody and support the action remains pending until the death of one of the parties or the youngest child born of the marriage reaches the age of maturity, whichever event occurs first. *Morris v. Morris*, 42 N.C. App. 222, --- S.E. 2d --- (1979). Since neither event has occurred in the case at bar the North Carolina court retained jurisdiction over the matter.

A parent, however well-intentioned, cannot defeat the jurisdiction of our courts in situations such as this by placing the child in the physical care of persons residing outside this State.

Affirmed.

Judges ARNOLD and WEBB concur.

IN THE MATTER OF: WILLIAM L. LASSITER

No. 7914DC80

(Filed 6 November 1979)

Constitutional Law § 40; Parent and Child § 1— proceeding to terminate parental rights—appointment of counsel for indigent not required

The appointment of counsel to represent an indigent respondent in a proceeding to terminate respondent's parental rights is not constitutionally required.

APPEAL by respondent from *Gantt, Judge.* Judgment entered 8 September 1978 in District Court, DURHAM County. Heard in the Court of Appeals 26 September 1979.

On 26 September 1974, William L. Lassiter, the child who is the subject of this proceeding, was born out-of-wedlock to re-

spondent. On 23 May 1975, the child was adjudicated to be a neglected child in need of protection, and he was placed in the legal custody of the Durham County Department of Social Services. By the offices of that agency, the child was placed in foster care, where he continues at present. The mother of the child, Abby Gail Lassiter (respondent in this matter), is currently serving a sentence for second degree murder at Raleigh Women's Prison, having been convicted and sentenced in July of 1976. She has had no contact with the child since December of 1975. The putative father has offered no support of any type to either mother or child and has taken no action to legitimate the child.

The mother was notified of the hearing in this matter by registered mail and had opportunity to seek counsel in the matter, but did not do so. She took no action to obtain counsel, and appeared at the hearing only because counsel for petitioner caused her to be brought to Durham for the hearing. The trial court heard evidence, found facts, and entered an order terminating her parental rights in the child. From that order respondent appeals, assigning error.

Thomas Russell Odom, for petitioner-appellee.

Benjamin A. Currence, for the respondent-appellant.

MARTIN (Robert M.), Judge.

The sole question presented on appeal is whether the trial court committed reversible error when it did not appoint counsel to represent the indigent respondent in this proceeding to terminate respondent's parental rights in her child. We conclude that the trial court did not commit error.

There is no question but that there is a fundamental right to family integrity protected by the U.S. Constitution. *See Quilloin v. Walcott,* 434 U.S. 246, 54 L.Ed. 2d 511, 98 S.Ct. 549 (1978). At issue is whether due process requires the State to appoint and pay counsel to represent indigents in this situation. The requirements of procedural due process were certainly met in this case. Respondent had ample notice of the hearing, was actually present when it was held, and was allowed to testify and cross-examine petitioner's witnesses. *See State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293 (1965). The requirement of substantive due pro-

cess imposes a "standard of reasonableness and as such it is a limitation upon the exercise of the police power." *In re Moore*, 289 N.C. 95, 101, 221 S.E. 2d 307, 311 (1975). It certainly is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse. Certainly no unreasonableness or arbitrariness appears on the instant record where the evidence brought forward by the Department of Social Services demonstrated a pattern of neglect of her child by respondent substantially predating her present incarceration, and no evidence of any rehabilitation of respondent or amelioration of her attitude towards her child was adduced. The termination of parental rights by the State invokes no criminal sanctions against the parent whose rights are so terminated. While this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated. We agree with the underlying rationale of *In re Moore*, *supra*, in that the legislature might have required and authorized the appointment and payment of counsel for indigents in these circumstances, but apparently it did not choose to do so. There is certainly no bar to its making such a requirement in the future (as N.C. Gen. Stat. § 7A-546.1, effective 1 January 1980, does under specified circumstances) but we decline to impose any such requirement upon the counties and State in the absence of clear legislative direction. Respondent's assignment of error is overruled. The judgment of the court below is affirmed.

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

VIRGINIA B. LALANNE v. JAMES F. LALANNE

No. 7915DC359

(Filed 6 November 1979)

Judgments § 8— memorandum not signed by parties—no consent judgment

The trial court erred in entering a consent judgment based on the parties' agreement dictated four months earlier to the court reporter pending judgment recording the agreement in the presence of the judge, attorneys and parties, since neither party nor the judge signed the memorandum of the agreement; there was no consent by the defendant to the entry of judgment by the judge four months later; and the judge had no authority to enter such judgment.

APPEAL by defendant from *Paschal, Judge.* Judgment entered 26 January 1979 in District Court, ORANGE County. Heard in the Court of Appeals 23 October 1979.

Parties hereto entered into a separation agreement on 30 July 1971 and were divorced 10 December 1971. This action is brought by plaintiff for an alleged violation by the defendant for failure to pay back alimony, proof of the existence of a $100,000 insurance policy on the defendant's life, and seeking approval to have major repairs done on the house owned by the parties. Defendant answered and counterclaimed, alleging breach of the separation agreement by plaintiff for failure to pay the ad valorem taxes on the real estate mentioned herein, contending the agreement was void and unenforceable.

On 5 September 1978 the parties announced in open court that all matters in dispute had been settled, and the terms were dictated to the court reporter pending judgment recording the agreement in the presence of the judge, attorneys and the parties.

The terms of the compromise included the following acts to be done by the defendant as a full and complete compromise and settlement of all claims which the plaintiff had against the defendant.

1. Defendant would pay plaintiff $4,000;

2. Defendant would convey his interest in the house in Chapel Hill to the plaintiff;

3. Defendant would transfer 5500 shares of common stock in Triangle Brick Company to the plaintiff; of this amount 2750 shares would be transferred on or before 10 October 1978, and 2750 shares between 1 January and 15 January 1979.

Judge Paschal was authorized to sign the judgment out of term and out of the district.

During the negotiations leading to the settlement of 5 September 1978, defendant had notified plaintiff that a 25% stock dividend and $.13 cash dividend had been declared. Defendant informed plaintiff's attorneys that the date for the determination of the stockholders who would receive the dividend had passed.

Subsequently, plaintiff received information which made her believe the date had not passed. Plaintiff refused to complete the compromise agreement entered in the court record without participation in the dividend, and further negotiations were not fruitful.

On 5 December 1978, plaintiff filed motion for judgment, praying that the provisions set out in the compromise settlement of 5 September 1978, plus the cash and stock dividend be awarded to her by judgment of the court. A timely answer was filed by the defendant, and judgment was entered by Judge Paschal which made findings of fact, conclusions of law, and awarded plaintiff the property agreed upon in the stipulation dictated to the court reporter on 5 September 1978. Defendant excepted thereto and appealed.

Nichols, Caffrey, Hill, Evans & Murrelle, by William D. Caffrey and Everett B. Saslow, Jr., for plaintiff appellee.

Bryant, Bryant, Drew & Crill, by Victor S. Bryant, Jr., for defendant appellant.

HILL, Judge.

The judgment entered in this cause filed on 29 January 1979 must be revoked. Ordinarily, where a judgment is rendered in open court and some memorandum or minute of the note appears of record showing what the judgment is, formal judgment based thereon may be later entered. This rule does not apply to a con-

sent judgment, which requires the consent of the parties to subsist at the time it is signed in order to give the court jurisdiction. A consent judgment is not, strictly speaking, a judgment of the court, but is merely the contract of the parties entered upon the records of a court of competent jurisdiction with its approval and sanction, and such contract cannot be modified or set aside without the consent of the parties thereto. *Lee v. Rhodes*, 227 N.C. 240, 41 S.E. 2d 747 (1947); *Highway Comm. v. Rowson*, 5 N.C. App. 629, 169 S.E. 2d 132 (1969); *Freedle v. Moorefield*, 17 N.C. App. 331, 194 S.E. 2d 156 (1973).

The agreement dictated to the court on 5 September 1978 did not constitute a consent judgment. Neither party nor the judge signed the memorandum. There was no consent by the defendant to the entry of judgment by the judge in January 1979, and the judge had no authority to enter the same. If the writing entered by the court on that date is a contract between the parties, it must be litigated in another suit on another date.

The judgment is revoked and the case is remanded to the district court of Orange County for trial.

Judgment vacated and cause remanded.

Judges VAUGHN and ERWIN concur.

TEXTILE FABRICATORS, INC. v. C. R. C. INDUSTRIES, INC.

No. 7827SC1086

(Filed 6 November 1979)

Judgments §§ 27.1, 38— judgment in federal court—res judicata—intrinsic fraud—no recovery in independent action

In plaintiff's action to enforce a money judgment given by a U.S. District Court, *res judicata* prevented defendant from attacking, by way of counterclaim, the veracity of plaintiff's testimony in the federal court; moreover, even if defendant were entitled to seek relief from the judgment entered in federal court, it would be unable to prevail, since the rule in this jurisdiction is that where a judgment has been entered, relief from that judgment is not available in an independent action upon facts which amount to intrinsic fraud.

APPEAL by defendant from *Riddle, Judge.* Order entered 6 September 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 28 August 1979.

Plaintiff brings this action to enforce a judgment of $15,900 given by a U.S. District Court in South Carolina. Defendant alleged as both a defense and a counterclaim that plaintiff had testified in federal court that it had completed in a satisfactory manner the textile equipment which was the subject of the earlier lawsuit, while in fact plaintiff delivered to defendant only a heap of unfinished and damaged parts. Defendant contended that it owed plaintiff no money, or that if it did, it was entitled to an offset of at least $10,000. Plaintiff moved to strike this defense and counterclaim, and the motion was granted. Defendant appeals.

Hollowell, Stott & Hollowell, by James C. Windham, Jr., for plaintiff appellee.

Basil L. Whitener and Anne M. Lamm for defendant appellant.

ARNOLD, Judge.

We reject defendant's position that the trial court erred in striking its counterclaim wherein it alleged that plaintiff obtained judgment based on false testimony at the original trial in federal court.

Defendant's counterclaim in the case at bar is an independent action based upon allegations amounting to fraud. Such action would have been more appropriately brought in the federal court since it is the judgment of that court that defendant attacks. The record does not reflect whether defendant filed an independent action in the federal court or moved for relief from that judgment pursuant to Rule 60(b) of the Federal Rules. The doctrine of *res judicata* prevents defendant from now attacking the veracity of plaintiff's testimony in the federal court by means of its counterclaim filed in this action.

Moreover, even if defendant were entitled to seek relief from the judgment entered in federal court it would be unable to prevail. The established rule in this jurisdiction is that where a judgment has been entered relief from that judgment is not available in an independent action upon facts which amount to in-

trinsic fraud. *Stokley v. Stokley*, 30 N.C. App. 351, 227 S.E. 2d 131 (1976). False testimony is intrinsic fraud. *Horne v. Edwards*, 215 N.C. 622, 3 S.E. 2d 1 (1939).

Under Rule 60(b)(3) of our Rules of Civil Procedure where relief is sought from final judgment by *motion* it is irrelevant whether the fraud alleged is "intrinsic" or "extrinsic." The rule states, however, that it does not "limit the power of a court to entertain an *independent action* (emphasis added) to set aside a judgment for fraud." Rule 60(b). This Court, in *Stokley v. Stokley, supra* at 354-55, 227 S.E. 2d at 134, reaffirmed the distinction between intrinsic and extrinsic fraud. The effect of the *Stokley* decision is that whenever the alleged fraud is intrinsic it can only be the subject of a motion under Rule 60(b)(3), and then, of course, it is barred after one year following the judgment. *See* Shuford, N.C. Civ. Prac. & Proc., § 60-8.

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. TROY IVERSON BROWN

No. 7925SC553

(Filed 6 November 1979)

Criminal Law § 155.1 — failure to docket record in apt time — dismissal of appeal

Appeal is dismissed for failure of appellant to docket the record on appeal within 150 days after the notice of appeal as required by Rule of Appellate Procedure 12(a).

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 5 September 1978 in Superior Court, BURKE County. Heard in the Court of Appeals 25 October 1979.

Defendant was charged in a bill of indictment, proper in form, with the offense of murder in the second degree of one John Jackson Whisnant and was found guilty of voluntary manslaughter. From an active sentence of imprisonment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Triggs, Hodges & Mull, by C. Gary Triggs, for defendant appellant.

ERWIN, Judge.

Rule 12(a) of the Rules of Appellate Procedure provides:

> "*Time for Filing Record on Appeal.* Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken."

Notice of appeal was given on 5 September 1978; the record on appeal was filed with our clerk on 18 June 1979, some 285 days after notice of appeal was given. Rule 27(c) of the Rules of Appellate Procedure provides in part: "A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken." The record in the case *sub judice* does not show that time has been extended by this Court. We are, therefore, compelled to dismiss this appeal for failure to docket the record on appeal within the time prescribed by the Rules of Appellate Procedure. This Court stated in *State v. Byrd* and *State v. Porter*, 4 N.C. App. 494, 496, 167 S.E. 2d 95, 96 (1969):

> "It is appropriate here, and therefore, we will reiterate what this Court said in *State v. Farrell*, 3 N.C. App. 196, 164 S.E. 2d 388:
>
> > 'The Rules of Practice in the Appellate Division of The General Court of Justice are mandatory, not directory, and must be uniformly enforced. Neither the judges, nor the solicitors, nor the attorneys, nor the parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed. If the rules are not complied with, this Court may *ex mero motu* dismiss the appeal. *Carter v. Board of Alcoholic Control*, No. 519, Fall Term 1968, N. C. Supreme Court, filed 20 November 1968. And for failure to docket the record on appeal

within the time prescribed by the rules, this appeal should be dismissed *ex mero motu.*' "

Appeal dismissed.

Judges VAUGHN and HILL concur.

BETTER ADVERTISING, INC. v. EVERETT C. PEACE, JR.

No. 798SC61

(Filed 6 November 1979)

1. **Guaranty § 2— absolute guaranty of note—action not barred by statute of limitations**

Plaintiff's suit to recover from the guarantor of a promissory note was not barred by the three year statute of limitations, since the right to sue upon an absolute guaranty accrues immediately upon the failure of the principal debtors to pay their debt at maturity, and plaintiff brought this action within three years both of the last payment made by the principal and of the date declared by plaintiff as the date on which the owed sum was due.

2. **Guaranty § 2— renegotiation of note without guarantor's consent—insufficiency of evidence**

A guarantor may be discharged from his guaranty obligation if there is an alteration of the instrument's terms made between the holder and maker of the instrument without the guarantor's consent; however, defendant guarantor in this action failed to offer specific evidence of a genuine issue of renegotiation, and summary judgment was properly entered for plaintiff.

3. **Rules of Civil Procedure § 56— summary judgment hearing—transcript of receivership hearing—no delay to obtain**

The trial court did not err in entering summary judgment against defendant guarantor without allowing him time to search for a transcript of a receivership hearing which might have been relevant to the question of renegotiation of the note which defendant had guaranteed, since defendant's affidavits did not state that he was unable to find or produce the transcript of the earlier hearing, and at no time did defendant request more time to look for the transcript. G.S. 1A-1, Rule 56(f).

APPEAL by defendant from *Cowper, Judge.* Judgment entered 26 August 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 25 September 1979.

On 27 September 1976 plaintiff brought suit against defendant as guarantor of payment on a promissory note issued to plaintiff on 15 October 1969. Demand was previously made upon defendant-guarantor on 15 September 1976 for payment of $83,532.78, the sum due on the $120,000 note. Payments had been made on the note until 16 May 1974; no further payments were made after that date.

Defendant filed a verified answer and counterclaim, alleging the defense of failure to state a claim upon which relief can be granted, denying that plaintiff was entitled to any proceeds of the note because a material and substantial change had been made in the terms of the note without defendant's knowledge or consent, and requesting a $10,000 recovery from the plaintiff as compensation for his damaged reputation and mental stability. Plaintiff filed a reply to defendant's counterclaim and on 29 June 1978 moved for summary judgment. Defendant filed an affidavit and testified in his behalf at the hearing on plaintiff's summary judgment motion, after which the court granted plaintiff's motion. Defendant excepted and appealed.

Smith, Everett & Womble, by W. Harrell Everett, Jr., for plaintiff appellee.

James, McElroy & Diehl, by William K. Diehl, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant argues that this Court should reverse the order of summary judgment granted to plaintiff and direct entry of judgment in favor of defendant. Defendant contends that plaintiff's suit was barred by the three years statute of limitations, N.C. G.S. 1-52, that a genuine issue of material fact regarding a renegotiation of the note was presented by defendant's verified answer and counterclaim, and that the court should have utilized Rule 56(f) to grant defendant more time to search for a transcript of a hearing relevant to the renegotiation of the note before granting plaintiff's motion for summary judgment. We find no merit in defendant's contentions and affirm the entry of judgment against defendant.

[1] For purposes of this appeal we assume, without deciding the question, that defendant's defense of failure to state a claim includes the defense of the statute of limitations. Defendant's position, however, is not advanced by this assumption because plaintiff's suit is not barred by the three years statute of limitations. In North Carolina a plaintiff's cause of action against a guarantor arises when the principal refuses to make further payments on the promissory note. If the guaranty of payment is absolute, the right to sue upon the guaranty accrues immediately upon the failure of the principal debtors to pay their debt at maturity. *Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334 (1932); *Oil Co. v. Oil Co.*, 34 N.C. App. 295, 237 S.E. 2d 921 (1977). Defendant admitted that he guaranteed payment of the note. The language of the guaranty written on the note is: "I hereby guarantee payment of this note." There is nothing conditional about this language. Payments were made on the note up to 16 May 1974. If that date is taken as the date when the principal refused to make further payments on the note, filing of the complaint by plaintiff on 27 September 1976 brings the action well within the three-year period. Plaintiff uses 31 December 1974 in his complaint as the date on which the owed sum was due. Regardless of which date is used, plaintiff's suit is not barred by the applicable statute of limitations. It is therefore not necessary that we reach the question raised by defendant whether the note involved is a "demand" note.

[2] Defendant's contention that summary judgment should not have been entered in favor of plaintiff because a genuine issue of material fact existed as to renegotiation of the note is not persuasive. We agree with defendant that it is well settled in North Carolina that a guarantor may be discharged from his guaranty obligation if there is an alteration of the instrument's terms made between the holder and maker of the instrument without the guarantor's consent. N.C. Gen. Stat. 25-3-606; *Deal v. Cochran*, 66 N.C. 269 (1872); *Construction Co. v. Ervin Co.*, 33 N.C. App. 472, 235 S.E. 2d 418 (1977). Had there been specific evidence of this genuine issue of renegotiation, summary judgment for plaintiff would have been inappropriate and erroneous in this case. But defendant failed to respond adequately to survive plaintiff's motion for summary judgment.

Defendant attempts to rely upon his verified answer and counterclaim in which he alleged upon information and belief that a "material and substantial change was made in the terms and substance of said Note, ..." Verified answers and counterclaims are to be treated as affidavits on a motion for summary judgment. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972). But unsupported allegations are not enough to create a genuine issue of fact. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970). Rule 56(e) provides that the party opposing the motion for summary judgment must set forth "specific facts" showing a genuine issue for trial. Although defendant alleged in his answer that a material and substantial change was made in the terms of the note, the allegation was made upon information and belief, and the record is devoid of any specific evidence to support this allegation. Defendant filed an affidavit in opposition to plaintiff's motion for summary judgment, but he merely referred to the question of a material change raised in his answer and realleged the matters raised therein. The affidavit does not set forth any specific facts. In the testimony given by defendant at the summary judgment hearing he answered: "The note was renegotiated by Mr. Page and Mr. Hawkins." This is a conclusion unsupported by specific facts. Defendant also stated that testimony regarding this note had been taken at a receivership hearing involving the issuer of the note. He did not know the date of the hearing and no other questions about the prior testimony were asked.

Clearly there are no specific facts to support defendant's allegation of material alteration of the note; his response to plaintiff's motion for summary judgment was inadequate. It was appropriate for the court to enter summary judgment against him.

[3] Defendant's final argument is that under Rule 56(f) the court, before entering summary judgment against defendant, should have given him more time to search for a transcript of the receivership hearing which might have been relevant to the question of the renegotiation of the note. Rule 56(f) requires that it must "appear from the affidavits of a party opposing the motion that he cannot *for reasons stated* present by affidavit facts essential to justify his opposition, ..." (Emphasis ours.) The record clearly reveals that defendant's affidavits do not state that he was unable to find or produce the transcript of the earlier hear-

ing. At no time did defendant request more time to look for the transcript. It was not error for the court to enter summary judgment against defendant without allowing him time to look for the transcript.

There were no genuine issues of material fact. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The order granting summary judgment for plaintiff is

Affirmed.

Judges HEDRICK and CLARK concur.

THE NORTHWESTERN BANK, TRUSTEE UNDER THE WILL OF D. C. DUNCAN, DECEASED v. HAL E. CHURCH

No. 7923DC32

(Filed 6 November 1979)

Frauds, Statute of § 2.1— receipt—sufficiency to meet requirements of statute of frauds

A receipt given by plaintiff to defendant was a sufficient memorandum of the parties' contract to meet the requirements of the statute of frauds where the receipt provided, "Received from Hal Church $10,150.00 representing 29% down payment on 42' x 154' lot located on Main Street, Sparta, N.C. belonging to the D. C. Duncan Estate," and it was dated and signed by a trust officer of plaintiff.

APPEAL by defendant from *Davis, Judge*. Judgment entered 16 October 1978 in District Court, ALLEGHANY County. Heard in the Court of Appeals 20 September 1979.

Plaintiff brings this action seeking a declaratory judgment on the rights of the parties concerning an alleged agreement by plaintiff to sell certain real property in Sparta, Alleghany County, to defendant. Defendant answered, also requesting declaratory relief.

Plaintiff contends that the purported agreement to sell the real property to defendant is barred by the Statute of Frauds, N.C.G.S. 22-2. Both plaintiff and defendant moved for summary judgment.

The evidence shows the plaintiff is trustee under the will of D. C. Duncan, deceased, who died seized of several tracts of land on Main Street, Sparta, that are assets of the trust. One of the tracts of land has 42 feet frontage and a depth of 154 feet. This is the property defendant seeks to buy from plaintiff. Plaintiff had offered the parcel for sale at $35,000 and defendant agreed to pay the price "on a capital gains basis" or 29 percent down and the balance in three annual installments as requested by plaintiff. Bryant, trust officer of plaintiff, computed the 29 percent to be $10,150, and defendant wrote and delivered to him a check in that amount. Bryant thereupon wrote and delivered to defendant a receipt. Later the plaintiff returned the check to defendant and refuses to convey the property.

After hearing, the court denied defendant's motion for summary judgment, allowed plaintiff's motion and entered judgment adjudicating plaintiff was not obligated to convey the property to defendant. Defendant appeals.

McElwee, Hall, McElwee & Cannon, by William C. Warden, Jr. and W. H. McElwee, for plaintiff appellee.

Vannoy & Reeves, by Wade E. Vannoy, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

Counsel for both plaintiff and defendant concur that this appeal turns upon whether the receipt given by plaintiff was a sufficient memorandum of the contract to meet the requirements of the Statute of Frauds. There is no genuine issue of material fact in dispute. The question is the application of law to the facts. We hold that under the facts of this case the receipt was a sufficient memorandum of the contract.

The paperwriting in dispute reads:

> Received from Hal Church $10,150.00 representing 29% down payment on 42' x 154' lot located on Main Street, Sparta, N.C. belonging to the D. C. Duncan Estate.
>
> This the 17th day of January 1978.
>
> The Northwestern Bank, Trustee
>
> by: Lewis H. Bryant

Defendant's check for $10,150, payable to "D. C. Duncan Estate," contained the following: "For Lot 42′ x 154—Sparta."

The Statute of Frauds, N.C.G.S. 22-2, provides all contracts to sell and convey real property "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."

The writing must disclose, at least with sufficient definiteness to be aided by parol, the terms of the contract, the names of the parties, grantor and grantee, and a description of the property. *Elliott v. Owen*, 244 N.C. 684, 94 S.E. 2d 833 (1956); *Searcy v. Logan*, 226 N.C. 562, 39 S.E. 2d 593 (1946). The memorandum may be informal and more than one writing may be relied upon. *Hines v. Tripp*, 263 N.C. 470, 139 S.E. 2d 545 (1965). The description must be certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Searcy v. Logan, supra.*

The application of these rules to the facts in this case leads us to the conclusion that the Statute of Frauds does not bar the contract to convey the property to defendant. The writing identifies the parties to the agreement: Hal Church and The Northwestern Bank, Trustee of the D. C. Duncan Estate. It is signed by the party to be charged, The Northwestern Bank, Trustee. It contains the terms of the contract, sufficient to be completed by parol, by referring to the $10,150 received from Church as representing 29 percent down payment. Where the vendor is the party to be charged it is not necessary that the price be stated in writing. *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750 (1919); *Thornburg v. Masten*, 88 N.C. 293 (1883).

The description of the property is sufficiently definite to be further aided by parol evidence. The property to be conveyed is described as being: (a) 42′ x 154′ lot, (b) located on Main Street, Sparta, N.C., and (c) belonging to the D. C. Duncan Estate. This is enough to allow extrinsic evidence to resolve the possible latent ambiguity that the D. C. Duncan Estate owned another 42′ x 154′ lot on Main Street, Sparta, N.C. The uncontradicted evidence showed the estate owned only one such lot. The writing does not leave the description of the land in a state of absolute uncertainty so as to be patently ambiguous and therefore prevent the use of

parol evidence. *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964). The language of the memorandum is adequate to show there was a meeting of the minds of the parties sufficient to establish the existence of a contract.

We hold the writing is within the reasoning of *Carson v. Ray*, 52 N.C. 609 (1860), and *Hurdle v. White*, 34 N.C. App. 644, 239 S.E. 2d 589 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). The description of the property in *Hurdle* was "rest of Tuttle tract" which the Court held sufficient. In *Carson*, the description was "my house and lot in the town of Jefferson, in Ashe County, North Carolina." The Court upheld the conveyance, saying "my house and lot" imports a particular house and lot, sufficiently definite. Where the writing itself does not show the grantor had more than one house and lot, it will not be presumed that he had more than one and there is no patent ambiguity in the writing.

Here, the writing signed by plaintiff describes the 42' x 154' lot on Main Street, Sparta, owned by the D. C. Duncan Estate, a particular lot. We hold the writing is sufficient to overcome the plea of the Statute of Frauds and the trial court erred in granting summary judgment for the plaintiff and in denying defendant's motion for summary judgment.

The result is: the summary judgment in favor of plaintiff is reversed; the order denying defendant's motion for summary judgment is reversed and the cause remanded to the district court for the entry of summary judgment in favor of defendant.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. PALMER JUNIOR COFFEY

No. 7924SC437

(Filed 6 November 1979)

1. Assault and Battery § 14.1— assault with automobile—intent to injure—inference from culpable or criminal negligence

The State's evidence was sufficient to show the element of intent in a prosecution for assault with a deadly weapon, an automobile, inflicting serious

injury where it tended to show that defendant drove an automobile through a campfire and struck a person who was lying beside the campfire, since intent may be inferred from culpable or criminal negligence, and defendant was guilty of culpable and criminal negligence in that he operated the automobile in a dangerous and reckless manner in complete disregard for the rights and safety of others, and he could reasonably have foreseen that death or bodily injury would be the probable result of his actions.

2. **Criminal Law § 6— assault case—refusal to charge on intoxication as defense**

The trial court in a prosecution for assault with a deadly weapon inflicting serious injury did not err in refusing to instruct the jury that it should find defendant not guilty if it found that defendant was intoxicated to a degree that he was unable to form the specific intent to assault the victim, since intoxication is not a defense unless the crime charged requires a specific intent, and a specific intent is not an element of the assault charged in this case.

3. **Criminal Law § 5.2— defense of unconsciousness—instructions**

In a prosecution for assault with a deadly weapon, an automobile, inflicting serious injury and hit and run after inflicting personal injury, defendant's own testimony was sufficient to support an instruction on the defense of unconsciousness, and it was appropriate for the court to explain to the jury that unconsciousness may be a complete defense but not in cases where the unconsciousness was produced by voluntary, excessive consumption of intoxicants or drugs.

APPEAL by defendant from *Howell, Judge.* Judgment entered 15 December 1978 in Superior Court, WATAUGA County. Heard in the Court of Appeals 18 September 1979.

The indictment charged that on 28 July 1978 defendant (1) assaulted Dennis Miller with a deadly weapon, an automobile, inflicting serious injury, and (2) hit and run after inflicting personal injury.

STATE'S EVIDENCE

Dennis Miller, 21 years of age, and three friends were sitting around a campfire near Raven Rock about 20 feet off the road. They observed a yellow Capri being driven in circles on the hill above the campsite. The car scared the horses loose in a nearby corral. The three friends left the campsite to tie the horses at the corral. Miller lay down beside the campfire.

Defendant drove the car from the hill at a speed of about 25-30 m.p.h. through the campfire, which had a flame about a foot high. Miller, lying near the fire, was run over and permanently paralyzed due to a fractured neck. Miller also suffered a broken

arm and a broken collarbone. His lungs were bruised so that for several weeks he had to be placed on a breathing machine and also on an artificial kidney machine. He was hospitalized for seven weeks and incurred medical expenses in excess of $37,000.

DEFENDANT'S EVIDENCE

Late in the afternoon defendant and several friends went to Raven Rock. They drank beer and intoxicating liquor, and smoked pot. Defendant was staggering around, "just hooting and hollering."

Defendant, 19 years of age, testified that he did not remember anything after drinking alcoholic beverages and smoking "six or seven joints."

In rebuttal, the State offered evidence that at the probable cause hearing in District Court defendant stated to the judge that he did not know that there was a person at the fire when he drove through it.

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

Charlie R. Brown for defendant appellant.

CLARK, Judge.

The defendant groups his assignments of error into three arguments as follows: (1) the essential element of intent is not shown by the evidence in the assault charge; (2) the trial court failed to instruct the jury as requested on his defense of intoxication; and (3) the trial court erred in charging on the defense of unconsciousness.

[1] Clearly, intent is an essential element of the crime of assault, including an assault with an automobile, but intent may be implied from culpable or criminal negligence, *State v. Eason*, 242 N.C. 59, 86 S.E. 2d 774 (1955), if the injury or apprehension thereof is the direct result of intentional acts done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict injury. *See* Annot. 92 A.L.R. 2d 635, 650 (1963); 61A C.J.S. Motor Vehicles § 597 (1970).

The evidence for the State was sufficient to show that defendant was operating the automobile in a dangerous and reckless manner and in complete disregard for the rights and safety of others. The negligence was culpable and criminal. *State v. Weston*, 273 N.C. 275, 159 S.E. 2d 883 (1968). The evidence was also sufficient to show that defendant could have reasonably foreseen that death or bodily injury would be the probable result of his actions. *State v. Agnew*, 202 N.C. 755, 164 S.E. 578 (1932).

Defendant's motion for nonsuit was properly denied. The evidence was sufficient to support the verdict and judgment.

[2] The defendant submitted in writing a request that the court instruct the jury, in part, "that intoxication may negate the existence of such intent; that is if you find that the defendant [was intoxicated] to a degree that he was unable to form the specific intent to assault Dennis Miller . . . then it would be your duty to return a verdict of not guilty."

The requested instructions are erroneous. Generally, voluntary intoxication is no defense to a charge of crime. *State v. Hairston*, 222 N.C. 455, 23 S.E. 2d 885 (1943); *State v. Couch*, 35 N.C. App. 202, 241 S.E. 2d 105 (1978). Intoxication is not a defense unless the crime charged requires a specific intent, such as first-degree murder. *State v. Absher*, 226 N.C. 656, 40 S.E. 2d 26 (1946). *See* 21 Am. Jur. 2d, Crim. Law § 107; Annot. 8 A.L.R. 3d 1236 (1966). A specific intent is not a necessary element of either of the crimes charged in the case before us. There is no merit in this argument.

[3] Defendant next contends that the trial court erred in giving the following instruction on unconsciousness as a defense:

> "Unconsciousness is a complete defense to a criminal charge, but this rule of law does not apply to a case in which the mental state of the person in question is due to insanity or a mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor . . . ."

Defendant's objections are twofold. First, defendant contends that the record is left wanting of any testimony of evidence that the defendant Coffey was unconscious within the legal meaning of that term. However, in his own testimony defendant stated that he and several others went down to the creek and:

"[W]e smoked six or seven joints and that's all I know. I don't know what happen [*sic*] after that.

I felt drunk. I was out of it; drunk enough to be out of it.

The next thing I remember is waking up on the Roby Greene road the next, I guess, it was the next day . . . . I do not remember anything else between the time I was down at the river and the next morning."

We think this evidence is sufficient to support an instruction to the jury on unconsciousness.

Defendant's second contention is that the charge given on unconsciousness tended to equate intoxication with unconsciousness and, in effect, completely eliminated intoxication as a substantial feature of defendant's case. We disagree. We note that the language in the instruction is almost identical to language in *People v. Wilson*, 59 Cal. Rptr. 156, 427 P. 2d 820 (1967), which was quoted by our Supreme Court in *State v. Mercer*, 275 N.C. 108, 118, 165 S.E. 2d 328 (1969). In addition, it is common knowledge that a person may become so intoxicated as to reach a state of unconsciousness. It was entirely appropriate for the trial judge to explain to the jury that unconsciousness may be a complete defense but not in cases where the unconsciousness was produced by voluntary, excessive consumption of intoxicants or drugs. *State v. Williams*, 296 N.C. 693, 252 S.E. 2d 739 (1979). This assignment of error is overruled.

The defendant's post-verdict motions were properly denied.

No error.

Judges HEDRICK and MARTIN (Harry C.), concur.

DAVID SPENCER DANIELSON v. ALAN WALKER CUMMINGS AND WILLIAM SHELBY CUMMINGS, JR.

No. 7918SC126

(Filed 6 November 1979)

Rules of Civil Procedure § 41.1— voluntary dismissal announced in open court— one year to bring new action—when year begins to run

The one year period for commencing another action after the taking of a voluntary dismissal began to run when plaintiff's counsel announced in open court the submission of a voluntary dismissal and not when the written notice of dismissal was thereafter filed.

Judge WEBB dissenting.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 5 December 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 September 1979.

Plaintiff instituted this action on 15 February 1978 alleging he was injured by the negligence of the defendants in an automobile collision in the city of Greensboro. Defendants' answer set up the plea of the statute of limitations, N.C.G.S. 1-52, and thereafter defendants filed motion for summary judgment based on the statute of limitations.

On 27 March 1975 plaintiff had instituted a suit against these defendants alleging the identical cause of action. On 1 February 1977 this previous action came on for trial, and after the jury was selected, plaintiff commenced presenting his evidence. Before resting his case, plaintiff's counsel in open court announced plaintiff had decided to take a voluntary dismissal pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Upon this statement, the presiding judge dismissed the jury in the case and turned to the next business of the court. Thereafter, on 25 April 1977 a written notice of voluntary dismissal was filed with the clerk.

The minutes of the court show that during the course of the trial Robert Cahoon, attorney for plaintiff, stated that a voluntary dismissal would be presented in the case. The courtroom clerk testified plaintiff's attorney stated that the plaintiff was taking a voluntary dismissal as to the action. The court allowed the motion for summary judgment and plaintiff appeals.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Charles A. Lloyd, and Robert S. Cahoon for plaintiff appellant.

Perry C. Henson and Perry C. Henson, Jr. for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff's alleged cause of action accrued on 20 August 1973. The present action was instituted on 15 February 1978; therefore, the action is barred by the three years statute of limitations, N.C.G.S. 1-52, unless it was instituted in accordance with Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

The pertinent provisions of Rule 41(a)(1) are:

> [A]n 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, ... If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . ..

N.C. Gen. Stat. 1A-1, Rule 41(a)(1).

This appeal turns upon the narrow question of when did the one-year period under the rule commence to run: when counsel announced in open court the submission of a voluntary dismissal, the proceedings thereupon being stopped, or when the written notice of dismissal was thereafter filed. The question appears to be one of first impression in North Carolina.

We hold the clock began to run on the one-year period when counsel made his announcement in open court. The rule allows counsel to dismiss his case either during trial (before resting his case) or at any time prior to trial. If the dismissal is taken prior to trial, opposing counsel are entitled to notice of that action. Therefore, the rule requires that a notice of dismissal be filed. Where the dismissal is announced in open court, no written notice of that action is required, as all parties to a civil action are bound to take notice of all proceedings had in the action in open court. *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953); *Hemphill v. Moore*, 104 N.C. 379, 10 S.E. 313 (1889). The

law is not so impractical as to require written notice of legal action to effectuate such action when the parties already have actual notice of the action taken from the proceedings in open court.

Rule 41(a)(1) had the effect of changing our former practice with respect to voluntary nonsuits only to the extent that the plaintiff desiring to take a voluntary dismissal must now act before he rests his case. In other respects our former practice was not expressly changed by Rule 41(a)(1). *McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976). Under our former practice plaintiff could enter a nonsuit, pay the costs, and walk out of court. *See* 2 McIntosh, North Carolina Practice and Procedure (2d ed. 1956), § 1645. No notice or other paperwriting was required to be filed to effectuate the nonsuit.

To adopt plaintiff's contention would result in a plaintiff's being able to set his own statute of limitations by filing a written notice of dismissal whenever he chooses, even though his case has already been dismissed in open court. Surely, the legislature did not intend such a bizarre result when it adopted the rule.

There are no genuine issues of material fact and defendants are entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

The entry of the summary judgment is

Affirmed.

Judge ARNOLD concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent because I believe that, in an attempt to reach what may be a good result, the majority has rewritten Rule 41(a)(1). This we do not have the power to do. Rule 41(a)(1) says the case may be dismissed by "filing a notice of dismissal . . . ." To me this means filing a written paper with the court. This was done on 25 April 1977 and that was the day the action was dismissed. The majority advances some good reasons why it may be better to

allow a dismissal by announcing it in open court. To me the difficulty is that this is not what the General Assembly has said, and we are bound by the statute.

RUTH LEE WILHELM v. RONALD L. WILHELM, SR.

No. 7927DC260

(Filed 6 November 1979)

Divorce and Alimony § 17.2— divorce from bed and board—alimony—effect of absolute divorce decree

Plaintiff's action for divorce from bed and board was a pending action which asserted the rights of a dependent spouse with respect to alimony, and plaintiff's right pursuant to that action were not affected by a decree of absolute divorce granted defendant. G.S. 50-6.

APPEAL by plaintiff from *Carpenter, Judge.* Judgment entered 7 December 1978, nunc pro tunc 9 November 1978, in District Court, GASTON County. Heard in the Court of Appeals 28 September 1979.

Plaintiff brought an action for divorce from bed and board, seeking ancillary relief of alimony pendente lite, and child support and custody. After hearing on plaintiff's motions, with plaintiff and defendant present and offering evidence, the trial court awarded plaintiff alimony pendente lite, child support and custody, and attorney's fees on 2 Feburary 1978. The cause was retained by the court. Defendant filed an action for absolute divorce on 2 August 1978 and thereafter judgment of absolute divorce was entered 6 September 1978. Subsequent to the decree of absolute divorce, defendant stopped making alimony payments.

Plaintiff filed a motion in this action asking that defendant be required to appear and show cause why he should not be held in contempt for failure to make the alimony payments. At the show cause hearing the trial judge ruled that the absolute divorce obtained by defendant barred the plaintiff from further alimony pendente lite and dismissed and denied plaintiff's motion.

Frank Patton Cooke, by R. T. Wilder, Jr., for plaintiff appellant.

Layton & Street, by Nicholas Street, for defendant appellee.

MARTIN (Harry C.), Judge.

This case appears to be of first impression in North Carolina. The determinative question on this appeal is: Is plaintiff's action for divorce from bed and board a pending action asserting a dependent spouse's rights with respect to "alimony," within the meaning of N.C.G.S. 50-6, as amended effective 16 June 1978? We answer yes, and accordingly reverse the trial court's order.

The pertinent portion of the statute in effect when defendant instituted his action for absolute divorce, 2 August 1978, reads:

> 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 a dependent spouse with respect to alimony which have been asserted in the action or any other pending action.

N.C. Gen. Stat. 50-6, 1978 Interim Supp. This amendment to N.C.G.S. 50-6 became effective 16 June 1978.

In resolving the above question, we must look to the meaning of the word "alimony" as used in the 1978 amendment. Prior to the adoption of the 1978 amendment, the General Assembly had defined "alimony" and "alimony pendente lite" as follows:

> "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.
>
> "Alimony pendente lite" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

N.C. Gen. Stat. 50-16.1(1)(2). The legislature is presumed to have acted with knowledge of these definitions when it used the word "alimony" in the 1978 amendment. *State v. Benton*, 276 N.C. 641,

174 S.E. 2d 793 (1970). By the definitions, alimony pendente lite is "alimony" paid during the pendency of the action. Additional evidence of the intent of the General Assembly to consider alimony and alimony pendente lite the same, except for the period of payment, is found in N.C.G.S. 50-16.3(b):

> The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made.

The legislature did not use any limiting words, such as "permanent," to modify "alimony" in the 1978 amendment.

The intent of the legislature controls the interpretation of a statute. *State v. Hart,* 287 N.C. 76, 213 S.E. 2d 291 (1975). Where the terms of the statute are clear, no interpretation is required. *Peele v. Finch,* 284 N.C. 375, 200 S.E. 2d 635 (1973). In considering the intention of the legislature in adopting the 1978 amendment, the spirit of the amendment and what it sought to accomplish, we may look to prior amendments of the same statute.

In the regular 1977 session, the legislature adopted the following amendment to N.C.G.S. 50-6:

> 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.

N.C. Gen. Stat. 50-6, 1977 Supp.

It is apparent in considering the 1977 amendment and its replacement in 1978 that the intent and spirit of the legislature was to allow absolute divorces pursuant to N.C.G.S. 50-6 and still protect the rights of a dependent spouse to alimony raised in actions pending at the time of the divorce judgment. The legislature desired to allow a supporting spouse to obtain a divorce and leave open for later adjudication the rights of the dependent spouse to alimony raised in pending actions. This objective could not be accomplished if the dependent spouse's rights to alimony pendente lite are excluded from the saving provision of the 1978 amendment. We hold the word "alimony" in the 1978 amendment includes "alimony pendente lite."

Defendant argues that plaintiff's action for alimony was not a "pending action" within the purview of N.C.G.S. 50-6, as amended, because in her complaint the plaintiff did not pray for permanent alimony, demanding only a divorce from bed and board. We do not find this argument persuasive. An action for divorce from bed and board will support an award of permanent alimony, child support and counsel fees. That is one of the purposes of the action. *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E. 2d 399 (1955); *Norman v. Norman*, 230 N.C. 61, 51 S.E. 2d 927 (1949); *Cavendish v. Cavendish*, 38 N.C. App. 577, 248 S.E. 2d 340 (1978), *disc. rev. denied*, 296 N.C. 583, 254 S.E. 2d 33 (1979). A dependent spouse may assert a right to alimony in either an action for divorce from bed and board or one for alimony without divorce. As long as the dependent spouse sets forth facts and conditions under which alimony might be awarded pursuant to either of these provisions of the statute, such a complaint would form the basis of an action asserting "rights of a dependent spouse with respect to alimony" as contemplated by the 1978 amendment to N.C.G.S. 50-6. Plaintiff in her complaint prayed for such other and further relief as to the court may seem just and proper. This would support an award of permanent alimony in the event plaintiff is successful upon a trial on the merits.

We hold that the plaintiff's action for divorce from bed and board is a pending action which asserts the rights of a dependent spouse with respect to alimony and that her rights pursuant to that action were not affected by the decree of absolute divorce granted defendant. The judgment of the trial court is accordingly reversed and the case remanded to the District Court of Gaston County.

Judges ARNOLD and WEBB concur.

DAVID L. MAINES v. CITY OF GREENSBORO, NORTH CAROLINA

No. 7918SC53

(Filed 6 November 1979)

1. **Municipal Corporations § 11— discharge of fireman—due process**

Plaintiff was accorded due process in the termination of his employment as a fireman for the City of Greensboro where plaintiff had notice that his employer was contemplating action against him because he had allegedly moved from the City of Greensboro, and plaintiff had notice of the termination hearing and an opportunity to present evidence at that hearing.

2. **Municipal Corporations § 11— discharge of fireman—violation of residency requirement**

A city ordinance requiring permanent city employees to be city residents was not applied arbitrarily and capriciously in the termination of plaintiff's employment as a city fireman where a finding was made upon competent evidence that plaintiff moved from inside the city limits to an address outside the city limits subsequent to the effective date of the ordinance, and there was no evidence that any exceptions have been allowed for other persons in plaintiff's position.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 22 August 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 September 1979.

Plaintiff filed this action seeking a declaration that he had been unlawfully terminated from his employment with defendant's fire department. He asked that he be awarded reinstatement, back pay and all allowances and benefits that otherwise would have accrued in his favor. His employment was terminated upon a finding that he had changed his place of residency from Greensboro to Low Gap in Surry County, North Carolina, in violation of the Greensboro City Ordinance requiring city employees to be residents of the city. This finding was made after a hearing, of which plaintiff had notice and at which he was allowed to offer evidence in his behalf, and the termination of his employment was affirmed on appeal to the city manager. Plaintiff challenged the constitutionality of the ordinance in question (both on its face and as applied to him), in Superior Court. Defendant city contended that plaintiff was an employee at will of the city and so could be dimissed at any time and also, that plaintiff had received his due process rights and protection. The trial court entered summary

judgment in favor of defendant and plaintiff appeals, assigning error.

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., for plaintiff-appellant.

Miles & Daisy, by James W. Miles, Jr., for the defendant-appellee.

MARTIN (Robert M.), Judge.

[1] Plaintiff raises two questions on appeal: the constitutionality of the ordinance under which plaintiff was dismissed, and whether he was vested with certain rights as a "permanent" city employee entitling him to due process before termination, implied tenure, and judicial review of any termination proceeding. We do not need to decide the second question, as it affirmatively appears from the record that plaintiff received all consideration that due process would require no matter what his status as an employee was. The basic requirements of procedural due process in this context (as set forth in *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972) and its progeny), are notice to the employee that some action is to be taken in regard to him pertinent to his employment and that the employee be given an opportunity to be heard before the authority making the decision. These requirements were met in the instant case. Plaintiff had notice that his employers were considering action against him because of his alleged move from the city of Greensboro, and he was allowed to address the body convened to make the decision and present his side of the story. Without regard to his status as an employee, whether permanent or at will, absent extraordinary circumstances (not present here), plaintiff is not entitled to anything more. *See Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976).

[2] It was found as fact from conflicting evidence at the disciplinary hearing that plaintiff had moved from inside the city limits of Greensboro to an address outside the city limits subsequent to the effective date of the city ordinance requiring permanent city employees to be city residents. Although the evidence on the question given by plaintiff was in direct contradiction to the evidence adduced by the city, the hearing body weighed issues of credibility and resolved the question in favor of the city.

As there was competent evidence to support the finding that plaintiff had moved outside the city limits after the ordinance became effective, we are bound by that finding on appeal.

In consequence of this finding, we are unable to conclude that the ordinance has been applied in an unconstitutional or arbitrary and capricious manner. We do not find from the record that any exceptions have been allowed to any persons who have been found to have acted as did plaintiff in this matter. The ordinance in question provides:

> Section 1. That all permanent city employees employed on and after 2 September 1976 shall be required to be permanent residents of the City of Greensboro; provided, that any such employees shall be given ninety (90) days to move their residence inside the city limits of Greensboro from the date of employment.
>
> Section 2. All existing permanent employees employed before 2 September 1976 who are presently living outside the city limits of the City of Greensboro may continue to reside outside the city limits until such time as any such permanent employees either move their residence inside the city limits or their residence is annexed within the city limits. Thereafter, such employees may not move their residence outside the city limits of the City of Greensboro.
>
> Section 3. As of 2 September 1976, all permanent city employees living inside the city limits of the City of Greensboro must continue to reside within the city limits at all times.
>
> Section 4. The City Manager is hereby directed to implement the above mentioned residency requirements within the personnel rules and regulations of the City of Greensboro. In addition, the City Manager may prescribe other reasonable standards with regard to residency requirements as he may determine to be in the best interest of the City of Greensboro which requirements shall be supplemental to and consistent with the standards and criteria set out above.

All of the exceptions to the ordinance were made under Section 2 to persons who either had homes under construction or loan commitments for construction outside the city as of the cutoff date of

2 September 1976. None of the facts concerning those exceptions has been disputed. In plaintiff's case, a binding adjudication has been made that plaintiff did in fact move from inside the city limits to an address outside the city limits after the cutoff date.

Plaintiff argues that the power vested in Section 4 of the ordinance renders the entire ordinance unconstitutional, in that it is an unlawful delegation of power by the City Council to the city manager. In that plaintiff was discharged for a violation of Section 3 of the ordinance, and all exceptions granted have been in accord with Section 2 of the ordinance, we conclude that plaintiff has not been injured by that which he seeks to attack, and therefore has no standing to challenge the constitutionality of the ordinance. *See Flast v. Cohen*, 392 U.S. 83, 20 L.Ed. 2d 947, 88 S.Ct. 1942 (1968); *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 199 S.E. 2d 641 (1973). Plaintiff's assignments of error are overruled. The entry of summary judgment by the trial court is affirmed.

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. EDWARD EARL DANIELS

No. 793SC521

(Filed 6 November 1979)

Larceny § 1; Indictment and Warrant § 17.1— larceny by employee charged—conviction of common law larceny improper

Where defendant was charged with larceny by an employee pursuant to G.S. 14-74, he could not be convicted of common law larceny, since the two offenses are wholly separate offenses, each requiring different evidentiary showings.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 8 December 1978 in Superior Court, PITT County. Heard in the Court of Appeals on 17 October 1979.

Defendant was charged in a bill of indictment as follows:

> [O]n or about the 27th day of July, 1978, in Pitt County Edward Earl Daniels unlawfully and wilfully did feloniously while being an employee of Eastern Lumber and Supply Co., Inc., . . . take, steal and carry away and convert to his own use one hundred (100) CM 7629AE hinges, having a value of $52.40, delivered to him to be kept for the use of . . . his employer.

Upon defendant's plea of not guilty, he was tried before a jury and found guilty of "larceny." From a sentence imposing 18 to 24 months' imprisonment, he appealed.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Willis A. Talton for defendant appellant.

HEDRICK, Judge.

When we consider the record on appeal—the indictment, the verdict and the judgment—we find fatal error. The defendant was charged in the bill of indictment with larceny by an employee, G.S. § 14-74. The jury found him guilty of "larceny," and the judgment recites that he was convicted of "misdemeanor larceny."

It is hornbook law that "an indictment will not support a conviction for a crime all the elements of which crime are not accurately and clearly alleged in the indictment." *State v. Perry*, 291 N.C. 586, 592, 231 S.E. 2d 262, 266 (1977), and cases cited therein. The bill of indictment in the case at bar charged defendant only with the statutory offense of larceny by an employee. The elements of that offense are clearly set out in the statute and include as one essential component that the employee initially possess the goods lawfully by virtue of having been entrusted with their possession by his employer. G.S. § 14-74; *State v. Wilson*, 101 N.C. 730, 7 S.E. 872 (1888). While the evidence adduced at trial in this case was sufficient to support a conviction of the offense charged, the judge instructed the jury that they could return one of three verdicts: "Guilty of larceny by an employee, guilty of larceny, not guilty." Thereafter, he charged as to the elements of larceny, and the jury subsequently returned a verdict of "guilty of larceny." That is, the jury found the defendant guilty of common law larceny.

We first point out that a conviction of the offense of larceny, either at common law or under G.S. § 14-72, requires that a trespass, actual or constructive, be shown. *State v. Bullin*, 34 N.C. App. 589, 239 S.E. 2d 278 (1977); *State v. Babb*, 34 N.C. App. 336, 238 S.E. 2d 308 (1977); *State v. Bailey*, 25 N.C. App. 412, 213 S.E. 2d 400 (1975). Not only is this element different from the essential elements of the offense under G.S. § 14-74, it is completely inconsistent with that statute's requirement that the employee gain possession lawfully. The two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser-included offense of larceny by an employee.

Thus, it is not necessary for us to determine whether the evidence in this case could have adequately supported a conviction of larceny, and we express no opinion as to that question. The resolution of the issue raised by this appeal is governed by a fundamental rule of law which was laid down by our Supreme Court as early as 1792 and which had developed under English law as early as 1470. The defendant herein cannot be found "guilty of larceny" because the offense of larceny is not charged in the indictment. *State v. Higgins*, 1 N.C. 36 (1792). "[I]t is still necessary that the technical words, requisite in the description of the offense . . ., be inserted in the indictment." *Id.* at 47.

Since a fatal variance between the indictment and the verdict thereby appears, this Court, *ex mero motu*, arrests the judgment.

Judgment arrested.

Judges CLARK and MARTIN (Harry C.) concur.

THE CITY OF WILMINGTON v. CAMERA'S EYE, INC.

No. 795SC178

(Filed 6 November 1979)

Appeal and Error § 9— enforcement of zoning ordinance—appellant's vacation of premises—appeal moot

An appeal from an order enjoining appellant from using property in violation of a city zoning ordinance was rendered moot when appellant lost its lease

and vacated the premises in question, and questions concerning costs of the action and appellant's potential liability on a supersedeas bond will not prevent dismissal of the appeal.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 2 October 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals on 18 October 1979.

In this civil action instituted 13 February 1978, the plaintiff City of Wilmington charged that the defendant business, in its use of certain premises within a geographical area designated the "Historic District Zone", was in violation of a city zoning ordinance. Defendant's use of the location for the retail sale of books and other materials was not a use permitted by the ordinance, plaintiff alleged, and no "special use permit" had been issued to defendant. In its answer, the defendant asserted, among several defenses to the action, that "his present use . . . is only a continuation of a prior non-conforming use, or a change of a prior non-conforming use to a use of the same or higher classification as is expressly permitted by . . . the zoning ordinance . . . ." At the ensuing trial without a jury, the evidence disclosed the following:

By an amendment to the City's zoning ordinance on 22 November 1972, the present "Historic District Zone" was created and uses therein restricted to single and multi-family dwellings and accessory buildings; Historic Foundation offices; public facilities of governmental agencies; "[u]ses established prior to 1900 and in continuous operation on the same site to the present day"; and home occupation. A number of uses which ordinarily would not be appropriate in the district are permitted by the issuance of special use permits. In addition, non-conforming uses, that is, "an existing use which is not in compliance with the regulations", were not affected by, and, thus, are allowed under the ordinance so long as such uses were lawful initially.

Prior to the creation of the Historic District, the area in which the defendant's business was eventually located was zoned "C-1, which is a Commercial District." At the time the amendment rezoning the area was passed, the premises in question were occupied by Robert W. Eason, who, from September 1971 until October 1972, had operated therein a "retail office machines and office supply business . . . ." In October he discontinued his business operation, but continued "to use a part of [the building]

to store printing supplies and surplus printing equipment . . . until October of 1977 . . . ." From January through June of 1974, the premises were leased by Wilton K. Allen, who conducted a consignment business known as the Rummage Hut. The defendant Camera's Eye began moving into the building in April 1974 and, thereafter, operated a retail establishment for the sale of adult books and other materials. Testimony by an employee of defendant confirmed that it had neither applied for nor been granted a special use permit.

From a judgment wherein the court found facts and concluded therefrom that defendant's use of the premises was not a nonconforming use and, hence, should be permanently enjoined as being in violation of the City zoning ordinance, defendant appealed.

Assistant City Attorney John C. Wessell III, for plaintiff appellee.

Jones & Wooten, by Everette L. Wooten, Jr., for defendant appellant.

HEDRICK, Judge.

On 9 October 1979 the plaintiff filed in this Court a motion to dismiss this appeal on the grounds that the issue presented by the appeal has been rendered moot. In support of its motion, plaintiff's attorney averred that he had been advised by the defendant's attorney that the defendant "has vacated the premises . . . as a result of loss of the lease of the property . . . ." Defendant filed a response to the motion wherein it admitted that it had lost its lease and had moved from the premises. However, defendant denies that the matter is therefore rendered moot because of the questions of costs of the action and its potential liability on a supersedeas bond.

In determining the question of mootness, the applicable rule has been well stated as follows:

> When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

State ex rel. Utilities Commission v. Southern Bell Telephone & Telegraph Co., 289 N.C. 286, 288, 221 S.E. 2d 322, 324 (1976) [quoting from *Parent-Teacher Association v. Board of Education*, 275 N.C. 675, 679, 170 S.E. 2d 473, 476 (1969)]. *See also Davis v. Zoning Board of Adjudgment of Union County*, 41 N.C. App. 579, 255 S.E. 2d 444 (1979); 1 Strong's N.C. Index 3d, *Appeal and Error* § 9 (1976).

In our opinion the sole question raised by this appeal was indeed rendered moot when the defendant lost its lease and moved from the premises. The issue of defendant's liability on the supersedeas bond is not raised in the appeal, and will not prevent dismissal of this matter because of its mootness. As for the question of costs, the rule is quite clear: "Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court . . . ." Rule 35, N. C. Rules of Appellate Procedure. In this case, costs will be taxed against appellant.

For the reasons stated, the appeal is

Dismissed.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ROBERT LEE ERVIN

No. 7926SC434

(Filed 6 November 1979)

Criminal Law § 113.7— acting in concert—sufficiency of evidence

Evidence in a breaking and entering and larceny prosecution was sufficient from which a reasonable inference could be drawn that defendant entered a school with another person and was acting in concert with him where it tended to show that two suspects were found within the school only a few feet away from each other at a time when no one was supposed to be in the school; both were dressed in athletic clothing; and the only entrance to the school was through a broken window which was near a basketball court.

APPEAL by defendant from *Walker, Judge.* Judgment entered 10 January 1979 in Superior Court, MECKLENBURG County.

Defendant, Robert Lee Ervin, was indicted for felonious breaking and entering a school with intent to commit larceny and felonious larceny of a blank pistol following the entry. The jury found defendant guilty of two offenses—non-felonious breaking or entering, and larceny pursuant to a breaking and entering. Defendant was sentenced to a minimum of two years and a maximum of four years.

Three witnesses testified for the State. Jerome Williams, a security supervisor for the Charlotte-Mecklenburg Schools, testified that he responded to a burglar alarm at the J. T. Williams School at 3:16 a.m. on 20 September 1978. Williams climbed through a broken window in the principal's office and then opened a door to let Charlotte police into the building. Williams then searched the health room, directly across from the principal's office, and found defendant hiding behind a desk. There was evidence that two small fires had been set in the health room.

Officer Thomas G. Smith of the Charlotte police force also testified for the State. Smith stated that after he was admitted into the school, he apprehended Reginald Shepherd. Shepherd was found in a hallway approximately 20 to 25 feet from the principal's office. Shepherd was patted down and a .32 caliber blank pistol was found stuck into the back of his running shorts. Both Shepherd and the defendant were dressed in running shorts, and the State's evidence infers that both suspects might have been playing basketball on courts near the principal's office before the break-in.

Frank Gaston, principal of J. T. Williams School, also testified for the State. Gaston stated that he had left the school around 10:30 the night of the break-in, and that when he had left, his office was in order and the window was unbroken. Gaston testified that when he returned to the school the morning after the break-in, the window in his office was broken and the blank pistol he kept in his desk drawer was missing. Gaston also stated that there were match stems on the floor of his office and that some of his papers had been moved around.

After the State rested its case, the defense moved for a dismissal of the felony counts of breaking and entering with the

intent to commit larceny and the larceny pursuant thereto. The court denied the motions, and the defendant excepted.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Fritz Y. Mercer, Jr., for defendant appellant.

HILL, Judge.

At the close of State's evidence, defendant moved to have the larceny count dismissed. The motion was denied and defendant asserts on appeal that this was error. Defendant asserts that the evidence, taken in the light most favorable to the State, was insufficient to show that Reginald Shepherd and the defendant were acting in concert.

It is clear that the court, on motion to dismiss, must look at the evidence in the light most favorable to the State. *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955). A motion to dismiss is properly denied where there is more than a scintilla of competent evidence to support the allegations of the warrant or bill of indictment. *See Kelly, supra.* The State provided enough evidence so that it was proper for the court to dismiss defendant's motion.

A recent case, *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979), examines the acting in concert principle. Justice Exum states at p. 357 that,

> It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

A reasonable inference can be drawn from State's evidence that the defendant had entered the building with Reginald Shepherd and was acting in concert with him. The two suspects were found only a few feet away from each other at a time when no one was supposed to be in the school. Both were dressed in athletic clothing, and the only entrance to the school was through the broken window—a window that was near a basketball court.

All of the elements of larcency were addressed by State's evidence. There had been a breaking and entering through the window in the principal's office; there had been a taking and carrying away of the pistol kept in the principal's desk without his consent, and because the taking took place in the manner it did, intent to permanently deprive the principal of the pistol was evident. *State v. Bronson*, 10 N.C. App. 638, 641, 179 S.E. 2d 823 (1971).

No error.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. RICKY DONALD THORNTON

No. 794SC501

(Filed 6 November 1979)

1. **Assault and Battery § 15.1; Weapons and Firearms § 3— assault by pointing pistol—intent to point pistol at third party**

In a prosecution for assault by intentionally pointing a pistol at a named victim without legal justification or excuse in violation of G.S. 14-34, the trial court did not err in instructing the jury that if defendant intended to point the pistol at a third party but actually pointed it at the named victim, the legal effect would be the same as if defendant had intended to point the pistol at the named victim.

2. **Criminal Law § 142— split sentence—special probation—maximum active sentence**

Where the maximum period of confinement for the offense for which defendant was convicted was six months, the maximum period which defendant could be required to serve actively under a sentence of special probation was one-fourth of the maximum sentence, or one and one-half months, and the trial court erred in ordering that defendant serve an active sentence of four months and that he be placed on special probation for two months. G.S. 15A-1351(a).

APPEAL by defendant from *Bruce, Judge.* Judgment entered 16 March 1979 in Superior Court, SAMPSON County. Heard in the Court of Appeals 16 October 1979.

Defendant was tried and convicted of the offense of assault on one David M. Aman by intentionally pointing a handgun at him without legal justification in violation of G.S. 14-34.

The State's evidence tended to show that: on 22 December 1978, defendant and his girlfriend, Cindy Herring, were fighting outside the American Legion Hut in Clinton; Truett Warren "interfered" in the fight; defendant would not let Warren go into the disco dance; Cindy Herring stated to Warren that defendant was going to kill him, and he had a gun; defendant and Warren started fighting; Cindy Herring broke up the fight; the Hut was well lighted and crowded with people; David Aman was working at the Hut on the night of these events; minutes later, defendant and Warren got into another fight in the Hut; defendant was knocked to the floor; he got up with a chrome-plated gun in his hand with a three- or four-inch barrel; defendant did not say anything, he waived the gun around at different people and pointed it at David Aman for three or four seconds from a distance of about four feet; Aman did not have a weapon and had not threatened defendant.

Defendant's evidence tended to show that: defendant was outside the Hut when Cindy Herring slapped him, because they had "split up"; defendant, his girlfriend, and Warren were struggling with each other; his girlfriend did not tell Warren that defendant had a gun; later inside the Hut, Warren and defendant started fighting; several boys rushed him, and he landed on the floor; when he got up with a silver-brown, brass type belt buckle in his hand, he did not have a gun in his possession; and defendant did not know David Aman.

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

Timothy W. Howard, for the defendant appellant.

ERWIN, Judge.

[1] Defendant contends that the trial court committed error in its charge to the jury when it instructed as to intent as follows:

> "I further instruct you that if you should find beyond a reasonable doubt that the defendant intended to point the pistol at some third party, that is not David Aman but some

other party who was in the American Legion Hut at the time of the fraycus (sic) but that he actually pointed it at David Aman then the legal effect would be the same as if the defendant had actualy intended to point the pistol at David Aman."

Defendant asserts in his brief:

"The evidence presented to the jury, absent the excepted instruction, could have led the jurors to determine that since the gun was used in self-defense against some third party, or parties, its use was not criminal and therefore any pointing of the gun at David Aman was purely accidental and not intentional."

We do not agree. The evidence does not present a reasonable inference of self-defense. Without such inference, defendant cannot contend that his act of pointing a gun on the occasion in question was justifiable on his part. *See State v. Dial*, 38 N.C. App. 529, 248 S.E. 2d 366 (1978). The record does not support defendant's contention that the jury could have found him legally justified in defending himself by the display and threatened use of a deadly weapon. Defendant's evidence is that he did not have a pistol or handgun on the occasion in question.

The rule is well established that a violation of G.S. 14-34 requires the intentional pointing of a gun without legal justification or excuse. *Lowe v. Dept. of Motor Vehicles*, 244 N.C. 353, 93 S.E. 2d 448 (1956); *State v. Adams*, 2 N.C. App. 282, 163 S.E. 2d 1 (1968). From our study of the charge contextually, we conclude that it presents the law fairly and clearly to the jury and is without prejudicial error. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977).

[2] Defendant was sentenced by the trial court as follows:

"It is ADJUDGED that the defendant be imprisoned for the term of Six (6) Months in the North Carolina Department of Correction, pay a fine of $500, Cost of Court, Attorney Fees, of said sentence, the defendant shall now serve an active sentence of Four (4) Months and that the execution of the remaining Two Months of the sentence is suspended and the defendant is placed on Special Probation. Fine, Cost, and

Attorney Fees are to be paid under the supervision of the Probation Officer and paid in full prior to the termination of probation. The Maximum sentence the defendant could receive is Six Months."

The authority of the trial court to impose split sentences is derived solely from statutory enactment. *See In re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954).

G.S. 15A-1351(a) provides in part:

"[T]he total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction."

The maximum period of confinement for the offense which defendant was convicted is six months. The maximum period to be served actively under special probation would be one and one-half months, which is one-fourth of the maximum six-months' sentence. The sentence entered by the trial court is improper.

In the trial of defendant, we find no prejudicial error.

The sentence entered by the trial court is vacated, and this case is remanded for the entry of a proper sentence in keeping with this opinion.

Judges VAUGHN and HILL concur.

PAUL B. SCHOFIELD v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., SELF-INSURER

No. 7910IC129

(Filed 6 November 1979)

1. Master and Servant § 75— workmen's compensation—emergency—employee's selection of doctor—medical expenses covered

Treatment received by plaintiff following an injury by accident arising out of and within the scope of his employment was of an emergency nature,

though it extended over a period of 17 months, and plaintiff was justified in selecting a doctor of his own choosing and continuing treatment with that doctor where the evidence tended to show that plaintiff was in Reidsville while the doctors who had been treating him were in Charlotte; his knee had swollen to four times its normal size; the knee was exuding pus in a stream the size of a man's finger; the doctor who treated plaintiff testified that plaintiff was about to lose his leg or his life; it was 11:00 p.m. when plaintiff sought treatment; and defendant had notified plaintiff that it would not be responsible for the cost of medical care after a date which had already passed when plaintiff sought treatment, and it was therefore incumbent on the plaintiff to look after himself.

2. **Master and Servant § 75— workmen's compensation—medical expenses—substituted physician—approval by Industrial Commission**

In a workmen's compensation proceeding to recover the costs of medical care, there was no merit to defendant's contention that plaintiff failed to comply with his obligation to notify the Industrial Commission and the employer of his selection of a different physician, since G.S. 97-25, providing that the Industrial Commission must approve of the substitute physician in order for his fees to be covered, does not require that such approval be given in advance, and the Industrial Commission did approve the costs of medical care under the circumstances approximately two and one-half years after they were incurred.

3. **Master and Servant § 85— appeal from Industrial Commission—jurisdiction of Commission**

The Industrial Commission had no jurisdiction over the present action while it was before the Court of Appeals.

Judge VAUGHN dissenting.

APPEAL by defendant from order of North Carolina Industrial Commission entered 8 December 1978. Heard in the Court of Appeals 16 October 1979.

This is the second time this case has been before this Court. *Schofield v. Tea Co.*, 32 N.C. App. 508, 232 S.E. 2d 874 (1977). We will repeat only such facts as required for an understanding of our decision.

The plaintiff was injured in an accident arising out of and within the scope of his employment with the defendant in Statesville on 29 April 1972. The defendant, a self-insurer, provided medical care under the Workmen's Compensation Act, and the plaintiff was treated by Drs. Carr and Wrenn in Charlotte. Treatment up until 5 June 1974 included several operations on plaintiff's knee. Subsequently, plaintiff's entire knee was replaced, and treatment by Drs. Carr and Wrenn continued for nearly two years.

On 3 September 1974, the defendant employer sent a notice to the plaintiff advising him that it would not be responsible for any medical payments after 5 June 1974, and the plaintiff filed claim with the North Carolina Industrial Commission. Thereafter, Deputy Commissioner Shuford on 1 April 1976 made an award holding the defendant liable for the cost of plaintiff's medical care from and after 5 June 1974 which would tend to lessen the plaintiff's disability.

The Full Commission affirmed the results of the deputy commissioner in an award filed on 12 July 1976; and this Court affirmed the award on 16 March 1977. A petition to the Supreme Court for a discretionary review was denied on 3 May 1977.

Thereafter, in an order filed 21 June 1977, the Full Commission noted that the parties were unable to agree on certain unpaid medical costs. Further hearing on the matter was held before Deputy Commissioner John Charles Rush, and an award filed on 12 June 1978. Deputy Commissioner Rush heard the testimony of Dr. Frederick R. Klenner, made findings of fact, conclusions of law, and an award substantially as follows:

1. That the plaintiff sustained a change in condition for the worse on 19 July 1974 and had not reached the end of the healing period or maximum improvement as of the date of hearing; that the defendant employer is responsible for the payment of all medical expenses and additional medical treatment which will tend to lessen the plaintiff's disability.

2. That the defendant employer's appeal of the deputy commissioner's ruling to the Full Commission and then to the Court of Appeals removed the matter from the jurisdiction of the Industrial Commission.

3. That on or about 9 April 1976, the plaintiff was visiting or residing with his sister in Reidsville, North Carolina, when his knee became substantially worse; that the knee was swollen and infected, at which time he saw Dr. Frederick R. Klenner.

4. That Dr. Klenner examined the plaintiff and received a case history from the plaintiff only; that he found the plaintiff's knee swollen four times its normal size and draining pus

"the size of a man's finger"; that in his opinion the plaintiff was about to lose his leg or his life on 9 April 1976.

5. That Dr. Klenner treated the plaintiff's knee with drugs and irrigation almost daily for 17 months in order to control the infection; that he did not have permission of the defendant employer or the Industrial Commission to treat the plaintiff.

(The testimony of Dr. Klenner revealed that he did not file a claim with the Industrial Commission for about 15 months after beginning of treatment.)

Deputy Commissioner Rush concluded that the plaintiff was confronted with an emergency situation with respect to his knee condition due to the defendant employer's failure to provide medical care and due to the defendant employer's series of appeals, and, accordingly, he sought and received treatments from a doctor of his own choosing. The plaintiff therefore was entitled to have the reasonable cost of such medical services paid by the defendant employer as provided by G.S. 97-25.

An award was entered accordingly.

Thereafter, defendant moved that the deputy commissioner's opinion and award be held in abeyance until the testimony of Dr. Frank Bassett of Duke Hospital could be taken and considered, which would tend to show contrary findings and conclusions, particularly to the effect that the treatment by Dr. Klenner over a 17-month period of time was not of an emergency nature and was ineffective.

The plaintiff filed a motion objecting to the defendant's motion. An opinion and award in this matter was issued by Deputy Commissioner Rush denying the defendant's motion, and application for review was then filed with the Full Commission. The Full Commission affirmed.

Defendant employer gave notice of appeal to this Court.

Caudle, Underwood & Kinsey, by Lloyd C. Caudle and John H. Northey III, for defendant appellant.

R. A. Collier, for plaintiff appellee.

HILL, Judge.

The issues raised by the defendant appellant for our determination are:

1. Was the treatment received by the appellee of an emergency nature?

2. Was notice to and approval of the Commission and the defendant required prior to plaintiff's treatment by Dr. Klenner?

3. When an employer notifies an employee of its refusal to pay medical costs incurred after a certain date and continues to appeal award decisions covering liability for surgical procedures made by the Industrial Commission favorable to the employee, is the matter temporarily removed from the jurisdiction of the Industrial Commission?

[1] The answer to the first and third questions is in the affirmative. The second question is answered in the negative.

G.S. 97-25 provides that:

> If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe, and assume the care and charge of his case, subject to the approval of the Industrial Commission.

The defendant contends that an emergency does not exist over a 17-month period. G.S. 97-25 does not define an emergency. What may be an emergency under one set of circumstances may not qualify as such under another.

Look at the record in this case:

1. Plaintiff was in Reidsville, and the physician and surgeon who had been treating him were in Charlotte.

2. The knee had swollen to four times its normal size.

3. The knee was exuding pus in a stream the size of a man's finger.

4. The testimony of Dr. Klenner indicated that the plaintiff was about to lose his leg or his life.

5. It was 11:00 p.m. when plaintiff sought treatment.

6. The defendant had notified the plaintiff that it would not be responsible for the cost of medical care after 5 June 1974. Hence it was incumbent on the plaintiff to look after himself.

The Commission found these facts to constitute an emergency. We agree.

The employer contends that G.S. 97-25 was not intended to include routine day-to-day treatment provided over a long period (17 months in this case). We cannot say at which point there ceased to be an emergency, but the facts indicate that one did exist on 9 April 1976. Accordingly, under the provisions of G.S. 97-25, Dr. Klenner must be reimbursed by defendant for the emergency treatment.

Furthermore, plaintiff was justified in *continuing* his treatment with Dr. Klenner. The last sentence of G.S. 97-25 makes it clear that plaintiff had the right to select a physician of his own choosing, subject to the approval of the Industrial Commission, to "*assume* the care and charge of his case." G.S. 97-25 (Emphasis added.) Considering the facts set out establishing the emergency, the Commission has ruled that plaintiff was justified in going to Dr. Klenner and justified in having the doctor assume the care and charge of his case. We concur.

Further, the employer contends that it was providing treatment for the employee through Dr. Carr and Dr. Wrenn, both of whom were approved by the employer and the Industrial Commission, and it was the plaintiff's failure to return to his approved physicians in Charlotte that precipitated his need for treatment for which he selected Dr. Klenner. We cannot agree. To reiterate what we have already stated, the defendant had notified the plaintiff that it would not be responsible for the costs of medical care after 5 June 1974. The plaintiff had every reason to believe that the defendant would not pay for treatment if he returned to

Charlotte. The defendant's liability was established on 3 May 1977, well over a year after the emergency arose.

During the interim, Dr. Klenner in Reidsville treated the plaintiff with massive doses of antibotics and "soaks" almost daily, and improvement continued. The record reveals that after six months, the plaintiff was ready for surgery, but not amputation; and the tissue was in good health, bone and otherwise, when the plaintiff went to Duke.

[2] The defendant contends the plaintiff failed to comply with his obligation to notify the Industrial Commission and the employer of his selection of a different physician. In order for the defendant to be responsible for the costs of the substitute physician, the Industrial Commission must approve of the change. G.S. 97-25. There is no requirement that such approval must be in advance of the change—only that the change must be approved.

Dr. Klenner made claim, and the deputy commissioner and Full Commission approved the costs of medical care under the circumstances. We do not find an abuse of discretion here.

[3] The third question that must be answered concerns the nature of the Industrial Commission's jurisdiction. When an appeal is made from judgment entered by a trial court, such court loses jurisdiction with limited exceptions during the appeal. *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E. 2d 748 (1977); *West v. Reddick, Inc.*, 38 N.C. App. 370, 248 S.E. 2d 112 (1978).

The Industrial Commission is a quasi-trial court in this case, and lost its jurisdiction while the case was before this Court. However, this Court affirmed the award of the Commission for the payment of any additional medical treatment which will tend to lessen plaintiff's disability. That order still stands.

There was no reason to file claim with the Industrial Commission during appeal to this Court, or to notify such Commission that Dr. Klenner was substituted for the original doctors until further claim was made by him for approval by the Commission after the appeal was concluded.

After the deputy commissioner entered his order directing an award to the plaintiff on 12 June 1978, the employer sought a stay of award on 28 June 1978 so that Dr. Frank Bassett of Duke

University Medical Center could testify as to the ineffectiveness of Dr. Klenner's treatment. The deputy commissioner and Full Commission denied the request. The employer had his day in court. He should have taken action then.

For the reasons set out above, the decision of the Full Commission is

Affirmed.

Judge ERWIN concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I am not satisfied that the questions of "jurisdiction" and "emergency" on which the Commission based its decision are altogether relevant or dispositive of the case. At any rate, I am convinced that the award should be vacated and the matter remanded. The employer first learned that claimant was being seen by Dr. Klenner sixteen months after his treatment began. At the very least the employer should have the opportunity to offer evidence on whether all of the medical services for which they are now called upon to pay, more than $6,000.00, were reasonably required "to effect a cure or give relief and . . . tend to lessen the period of disability" as well as whether the cost for such services is reasonable. G.S. 97-25. As I view the record, they have been deprived of that opportunity. Moreover, the Commission should have made affirmative findings on these questions before entering the award.

MOLETA K. BRILES, PLAINTIFF v. DAVID HAROLD BRILES AND EATON CORPORATION, DEFENDANTS.

AND

CHARLESTON M. BRILES, PLAINTIFF v. DAVID HAROLD BRILES AND EATON CORPORATION, DEFENDANTS

No. 7919SC107

(Filed 6 November 1979)

Negligence § 53.7— invitees—injury in elevator—duty of owner

Plaintiffs who were injured when an elevator in defendant's home fell were invitees and not licensees as determined by the trial court, since defendant had requested that, during his absence from the home, plaintiffs check to see that no one had broken in and to be sure that electricity did not go off and cause his vegetables to spoil in a freezer located in the basement, access to which was had by way of the elevator; furthermore, plaintiffs presented a genuine issue of material fact as to whether defendant was negligent in failing to exercise ordinary care to keep the premises in a reasonably safe condition and in failing to give warning to plaintiffs of hidden perils or unsafe conditions insofar as could be ascertained by reasonable inspection and supervision.

APPEAL by plaintiffs from *Seay, Judge.* Judgment entered 15 January 1979 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 27 September 1979.

Plaintiffs brought suits against defendants for damages, alleging they were injured by an elevator falling in defendant Briles's home. Plaintiffs allege defendant Briles and his family left on a vacation on 27 June 1975 and before leaving requested plaintiffs to check on his home from time to time to see if anyone had broken in and to be sure the electricity did not go off and cause his frozen vegetables to spoil in a deep freezer located in the basement of his home. Plaintiffs are the parents of defendant Briles and on this occasion he had instructed plaintiffs to use the elevator to go to the basement as he had a burglar alarm on the outside basement door. The elevator and the outside door were the only means of entering the basement.

Sometime in 1961 defendant Briles had designed the elevator car, hoist and shaft and supervised the installation of the elevator. Plaintiffs had used the elevator many times before in going to the basement.

As plaintiffs were riding the elevator on 1 July 1975 to the basement to check on the freezer, the elevator hoist chain broke, causing the car to fall to the basement, injuring plaintiffs.

Plaintiffs allege defendant Briles was negligent in his design, installation and maintenance of the elevator.

Defendant Briles answered, denying negligence on his part, and moved for summary judgment in both cases.

The causes were consolidated for hearing, and on 11 December 1978 Judge Thomas Seay heard the motions for summary judgment upon the pleadings, affidavit of William W. Austin, an expert in metallurgy and metallurgical engineering, and depositions of David Briles and Moleta K. Briles. Judge Seay entered summary judgments in favor of defendant Briles. Plaintiffs appeal.

The record does not contain any proceedings concerning the defendant Eaton Corporation and it is not a party to this appeal.

Miller, Beck and O'Briant, by Adam W. Beck, for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and William L. Young, for defendant Briles.

MARTIN (Harry C.), Judge.

In allowing summary judgment, the court made this finding:

> [T]he Court is of the opinion, and so rules, as a matter of law, that the plaintiffs were "licensees" in the home of their son, David Harold Briles, at the time they sustained injuries on July 1, 1975, and that their injuries were not as a result of any willful or wanton negligence on the part of the defendant, David Harold Briles;

Plaintiffs argue the court erred in holding they were "licensees" at the time in question. In order for a licensee to recover, he must prove defendant's negligence was wilful or wanton or that the owner of the premises is affirmatively and actively negligent in the management of his property, as a result of which the licensee is subjected to increased danger causing injury to him. *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959). As

a general rule the owner of property is not liable for injuries to licensees due to the condition of the property, or as it has been expressed, due to passive negligence or acts of omission. *Brigman v. Construction Co.*, 192 N.C. 791, 136 S.E. 125 (1926). The duty imposed is to refrain from doing the licensee wilful injury and from wantonly and recklessly exposing him to danger. *Jones v. R.R.*, 199 N.C. 1, 153 S.E. 637 (1930). A careful review of the record on appeal fails to disclose any evidence that defendant Briles was wilfully or wantonly negligent, or that he was affirmatively and actively negligent thereby increasing the danger to plaintiffs. Plaintiffs do not so allege. Therefore, the summary judgments must be sustained if the court was correct in determining plaintiffs were licensees.

Bearing in mind that this appeal is from the entry of summary judgments, has defendant Briles shown there are no genuine issues of material fact arising upon the materials before the court and that he is entitled to judgment as a matter of law? *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

To constitute one an invitee there must be some mutuality of interest. Usually an invitation will be inferred where the reason for the visit is of mutual advantage to the parties. To be an invitee, the purpose of the visit must be of interest or advantage to the invitor. *Pafford v. Construction Co.*, 217 N.C. 730, 9 S.E. 2d 408 (1940).

In *Thompson v. DeVonde*, 235 N.C. 520, 70 S.E. 2d 424 (1952), the Court held where plaintiff started down the basement steps of the boarding house on a mission for the defendant, he was at least an invitee. Although it can be inferred from the facts in *Thompson* that plaintiff was a paying guest at the boarding house, the opinion does not expressly so state.

An invitee is one who goes upon the property of another by the express or implied invitation of the owner. An invitation implies solicitation, desire or request. *Jones v. R.R., supra.*

The defendant Briles expressly requested plaintiffs to come to his house during his absence to check on the property, especially to see if it had been broken into and if the electricity had been interrupted causing damage to his frozen vegetables. Plaintiffs did not go upon the premises solely for their own purposes; to the

contrary, their only reason to go there was for the benefit of the defendant Briles. Plaintiffs were on a mission for defendant at his express request. They were not there merely for their own interest, convenience or gratification. *Pafford, supra.*

Defendant Briles insists the service to be rendered by plaintiffs was a minor service, incidental to their visit, and relies upon *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717 (1957); *Beaver v. Lefler,* 8 N.C. App. 574, 174 S.E. 2d 806 (1970); and *Jenkins v. Brothers,* 3 N.C. App. 303, 164 S.E. 2d 504 (1968), *cert. denied,* 275 N.C. 137 (1969). These cases are all distinguishable from the case at bar.

In *Murrell* plaintiff regularly spent the summer in the home of defendant in Asheville to avoid the heat of Florida. She came there for her sole benefit and not on behalf of defendant. While there, she heard defendant's wife ask defendant to bring her the scissors; whereupon plaintiff took the scissors to her, slipped on a rug and fell, injuring herself. Defendant did not make any request of plaintiff and she was not on a mission in his behalf when injured. The Court held plaintiff was a licensee and the fact that she voluntarily undertook to perform a minor service for defendant's wife did not change her status to that of an invitee.

In *Beaver,* plaintiff and defendant were neighbors and plaintiff often did small chores or favors for defendant. On this occasion he and defendant picked up a load of meat in defendant's truck and took it to his home. Once there, defendant started carrying it into the house and without any express request by defendant, plaintiff carried in a box and in so doing slipped on some wet leaves in the house and was injured. Plaintiff was nonsuited, the court holding he was a licensee and that the minor service performed by plaintiff did not change his status to an invitee, and finding there was no evidence of negligence to require submission of the case to the jury. On appeal, this Court affirmed, relying on *Murrell v. Handley, supra.*

This Court in *Jenkins* held there was no evidence to carry the case to the jury even if plaintiff was considered an invitee. Again, the plaintiff had been in and out of defendant's house several times the day she was injured and was performing a trifling service for defendant; therefore the Court held she was a licensee.

In all three cases, the landowners were present on the premises at the time the plaintiffs were injured.

In the case *sub judice*, plaintiffs went to defendant's home at his express request to perform a service beneficial to him and not for their own pleasure, interest or benefit. The owner of the premises was not present. Plaintiffs were not there to visit with defendant Briles. The services to be rendered were not minor in nature; the inspection to determine if the home had been broken into was a responsible, serious undertaking and not without its own dangers in these times of alarming crime statistics. Likewise, determining that the electricity was functioning properly was of direct economic benefit to defendant Briles. Although the quantity of frozen vegetables does not appear in the record, human nature would indicate that such a request would not have been made of plaintiffs if there were only a small, insignificant amount of vegetables in the freezer. And at today's inflationary prices, even a small amount of vegetables may represent a large financial investment.

The services defendant Briles requested plaintiffs to perform were not minor services incidental to a visit to defendant's house. We hold from the materials before the court on the motions for summary judgment that plaintiffs were invitees of defendant Briles and that Briles was not entitled to judgment as a matter of law. Those same materials present a genuine issue of material fact whether defendant Briles was negligent in failing to exercise ordinary care to keep the premises in a reasonably safe condition and in failing to give warning to plaintiffs of hidden perils or unsafe conditions insofar as could be ascertained by reasonable inspection and supervision. *Hood v. Coach Co., supra.*

The entry of the summary judgments was error and they are hereby

Reversed.

Judges HEDRICK and ARNOLD concur.

HOLLIS EVERETTE NEWSOME v. EMMA SUTTON NEWSOME

No. 796DC208

(Filed 6 November 1979)

Divorce and Alimony § 7; Rules of Civil Procedure § 52— action for divorce from bed and board—nonjury trial—judgment against plaintiff

The trial court in a nonjury trial did not err in granting defendant's motion at the close of plaintiff's evidence to dismiss plaintiff's action for divorce from bed and board and in rendering judgment on the merits against plaintiff, and plaintiff was not prejudiced by the court's failure to make findings of fact as required by G.S. 1A-1, Rule 52(a) where the court at the close of all the evidence made findings of fact in connection with defendant's counterclaim for alimony without divorce, and these findings decided and settled all of the issues raised in plaintiff's action for divorce from bed and board.

Judge VAUGHN concurring the result.

Judge ERWIN joins in the concurring opinion.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 2 November 1978 in District Court, HERTFORD County. Heard in the Court of Appeals 27 September 1979.

Plaintiff alleged in his complaint for divorce *a mensa et thoro* that he and the defendant were married 25 April 1974 and separated finally on 8 October 1978; that the defendant had abandoned or constructively abandoned the plaintiff, or in the alternative, the defendant had offered such indignities to the person of the plaintiff as to render his life burdensome.

Defendant's unverified answer denied the allegations of the plaintiff's complaint and asserted a cross action for alimony without divorce.

Counsel stipulated that the case be heard by the presiding judge without a jury.

Plaintiff offered testimony which tended to show that the separation was caused by defendant's nagging about money for support; that on one occasion the defendant requested that plaintiff pick up her son; that plaintiff advised defendant there was no gas in the car, whereupon "[s]he just told me she didn't need me then, to get out if I couldn't do what she wanted me to do."

The plaintiff further testified that the defendant without his knowledge or consent took in four nieces and nephews who resided with them for two years without his permission and that he was forced to feed and clothe the children during said period since the natural parents were not providing support.

At the conclusion of the plaintiff's evidence, the defendant made a motion to dismiss, apparently under Rule 41(b) of the Rules of Civil Procedure, which motion was allowed; and the court proceeded to hear the cross action for alimony without divorce brought by the defendant. At the conclusion of the defendant's evidence, the presiding judge found the facts, made conclusions of law, and entered a judgment in the case.

Plaintiff gave notice of appeal.

Rosbon D. B. Whedbee, for plaintiff appellant.

Carter W. Jones and Donnie R. Taylor, for defendant appellee.

HILL, Judge.

Rule 10 of the Rules of Appellate Procedure provides for the taking of exceptions and assignments of error in the record on appeal. Plaintiff, in his grouping, has made twelve assignments of error. Each assignment has been numbered, each exception numbered, and the plaintiff has made reference to the place in the record where his exceptions are taken. However, plaintiff has failed to place the appropriate number of each exception in the record itself.

Rule 10(b) makes it clear that not only must each exception be set out immediately following the record of judicial action to which it is addressed, as plaintiff has done, but must also be numbered consecutively in order of their appearance. Plaintiff did not number the exceptions as they appear in the record.

Rule 10(a) makes it plain that any exception not set out in accordance with the Rule cannot be made the basis of an assignment of error.

Plaintiff's exceptions 5 and 12 are preserved, however. Both refer to the judgment in the cause and a ruling on a motion to

dismiss which is in the nature of a judgment. Both issues were properly raised in plaintiff's brief. Thus, notwithstanding the absence of exceptions that are properly taken, the exceptions are preserved on appeal pursuant to Rule 10(a).

Exception No. 5 reads as follows:

> The Honorable Trial Judge's ruling granting the motion of the defendant to dismiss the plaintiff's action from bed and board.

Such exception is without merit.

Rule 41(b) of the Rules of Civil Procedure provides in part that:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right of relief.

The judge can render judgment against the plaintiff, not only because his proof has failed in some essential aspect to make out a case, but also on the basis of the facts as he may then determine them to be from the evidence before him. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). As trier of the facts, the judge may weigh the evidence, find the facts against the plaintiff and sustain the defendant's motion even though the plaintiff has made a prima facie case which would have precluded a directed verdict for the defendant in a jury case. *Joyner v. Thomas*, 40 N.C. App. 63, 251 S.E. 2d 906 (1979). *Helms v. Rea, supra.*

Here the court by its findings of fact and conclusions of law has adjudged that the plaintiff failed to meet his burden of proof for divorce *a mensa et thoro* and properly dismissed the plaintiff's case.

After the dismissal of the plaintiff's suit, the court proceeded to hear the cross action of the defendant, based upon her complaint which was not verified. Plaintiff contends that the counterclaim—not being verified—was a nullity, and the court was without jurisdiction of the subject matter.

G.S. 50-16.8(b) provides:

Payment of alimony may be ordered:

. . .

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

Under the current Rules of Civil Procedure, unless a statute or rule so provides, no verification is required. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E. 2d 424 (1971).

G.S. 50-8 provides: "In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148."

It appears that under G.S. 50-8 only pleadings praying for divorce require verification.

Old G.S. 50-16 provided that in cases for alimony without divorce the wife shall not be required to file the affidavit provided in G.S. 50-8, but shall verify her complaint as prescribed in ordinary civil actions. *Cunningham v. Cunningham*, 234 N.C. 1, 65 S.E. 2d 375 (1951); *Rowland v. Rowland*, 253 N.C. 328, 116 S.E. 2d 795 (1960). However, G.S. 50-16 has been repealed, and under neither G.S. 50-16.8 nor G.S. 50-16.1 does there appear the requirement that the pleading be verified. The judge heard sworn testimony, based on the application of the defendant, to find the facts and conclusions used in this cause.

An action for permanent alimony is a permissive counterclaim. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978). Hence, the defendant's answer need not have been verified, and the court had jurisdiction to hear the cause and enter its judgment.

The plaintiff further objected to the entry of judgment in this cause for the reason that it was against the weight of the evidence and improperly entered as a matter of law. The trial court found as a fact that the plaintiff was gainfully employed as a skilled mechanic with take home pay of $940.84 per month and had total expenses of $470 per month. The defendant was

employed at a local hospital at $489.60 per month and had expenses totaling $465 per month. The judge further found that the plaintiff was the supporting spouse and that the defendant was the dependent spouse. The court further found that the plaintiff had abandoned the defendant and wilfully failed to provide her with necessary subsistence according to his means and conditions so as to render the condition of the dependent spouse intolerable and the life of the defendant burdensome. Hence, the award of $25 per week to be paid by the plaintiff to the defendant as permanent alimony was reasonable and well within the means and ability of the plaintiff to do so.

"It is the duty of a husband to support and maintain his wife . . . . The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability . . . ." 2 Lee, N.C. Family Law § 128, p. 135 (1963).

The trial judge further found as a fact that the defendant had made the down payment in the sum of $3,000 on the house owned by the plaintiff and the defendant as tenants by the entirety, and had further made all subsequent monthly payments except six. The plaintiff at this time was living elsewhere. Hence, the judge found sufficient facts to conclude the defendant was entitled to the right of possession of all household effects and appliances. G.S. 50-16.7(a) provides that when alimony, temporary or permanent, is awarded, the court may order that possession of real property be transferred.

In this case, Attorney Carter W. Jones had 33 years' experience in the general practice of law. He had rendered reliable service to the defendant by preparing an answer, appearing in court, and had spent 30 hours on the matter. The award by the court of $500 for attorney fees was reasonable. The same findings required to support alimony are required to support an award of counsel fees. *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972). The findings of the trial judge making such an award is binding on appeal in the absence of abuse of discretion. *Roberts v. Roberts*, 38 N.C. App. 295, 248 S.E. 2d 85 (1978). The plaintiff did not object to the findings of fact by the trial judge. His objection was that the evidence did not support such findings. We are of the opinion there is ample evidence to support such findings.

For the reasons set out herein, the judgment by the trial court is

Affirmed.

Judge VAUGHN concurs in the result.

Judge ERWIN joins in the concurring opinion.

Judge VAUGHN concurring.

I concur in the result reached. Plaintiff brings forward only two assignments of error, his fifth and his twelfth.

In his twelfth assignment of error he excepts to the entry of the judgment. There are no exceptions to any of the findings of fact. An exception to the entry of judgment does not present the question of whether there is evidence to support the findings of fact and I, consequently, do not reach that question. On appeal, plaintiff does not argue that the facts as found by the court do not support the conclusions of law and the judgment.

By the fifth assignment of error, defendant contends that the court erred in granting defendant's motion made at the close of plaintiff's evidence to dismiss plaintiff's action for divorce from bed and board. The case was being tried by the court without a jury. Before rendering judgment on the merits against the plaintiff under Rule 41(b) of the Rules of Civil Procedure, the court should have made findings of fact as provided by Rule 52(a). The court's failure to do so in this instance, however, is of little consequence. At the close of all the evidence the court made findings of fact in connection with defendant's counterclaim. These findings of fact decide and settle all of the issues raised in plaintiff's action for divorce from bed and board.

EULA S. BOWES v. MELLIE LEWIS BOWES

No. 7917DC140

(Filed 6 November 1979)

1. **Judgments § 13.2— default judgment—proper notice given defendant**

The trial court did not err in entering a judgment by default against defendant in session upon a motion by plaintiff for judgment following defendant's failure to respond to a request for admissions or to answer interrogatories duly served upon him, since defendant had adequate notice that the motion would be heard and ample time to respond, but failed to do so, and plaintiff was not required to obtain prior entry of default before the clerk.

2. **Divorce and Alimony § 19.6—failure of husband to maintain medical insurance—requirement that husband pay medical expenses proper**

The trial court did not err in ordering defendant to pay $2500 to plaintiff for reimbursement of medical expenses incurred by plaintiff since defendant was obligated under a prior consent order to provide health insurance coverage for plaintiff, which he had failed to do; plaintiff had incurred necessary medical expenses of $3500, $2500 of which would have been paid by insurance had the ordered coverage been in effect; and defendant was reasonably able to pay for the insurance.

3. **Divorce and Alimony § 19.4— alimony increased—changed circumstances—sufficiency of evidence**

The trial court did not err in ordering defendant to increase his alimony payments to plaintiff from $30 to $50 a week, since a spouse may obtain a modification of an order for permanent alimony upon a showing of changed circumstances, even though the order was by consent; the condition, estate and earning capacity of defendant had substantially increased since the time of entry of the consent order while plaintiff's had substantially declined; and defendant was reasonably able to pay and plaintiff was in reasonable need of alimony at the rate of $50 per week.

4. **Divorce and Alimony § 18.16— award of attorney's fees—findings required**

The trial court in an alimony action erred in awarding attorney's fees without making appropriate findings on the issue of a reasonable attorney's fee.

APPEAL by defendant from *McHugh, Judge.* Order entered 30 October 1978 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 21 September 1979.

On 28 February 1971 plaintiff filed a complaint against defendant, her husband, seeking a divorce from bed and board with permanent alimony, alimony *pendente lite,* custody and support of their minor child and attorney's fees. Defendant filed an answer

denying most of the material allegations in the complaint, including abandonment, but admitting that plaintiff was a fit and proper person to have custody. In the pretrial order, the parties agreed that the issue of abandonment would be tried by a jury prior to the consideration of alimony and child support.

The jury determined that the defendant had abandoned the plaintiff. Judgment was entered on 30 August 1972 awarding plaintiff a divorce from bed and board and retaining the matters of child custody, child support, permanent alimony and attorney's fees for determination upon further hearing. The plaintiff and defendant, on 9 September 1975, entered into a consent order under which defendant agreed to pay $30 per week alimony to the plaintiff, and to " . . . continue to provide medical and hospital insurance coverage for the plaintiff under the Blue Cross-Blue Shield hospital and medical insurance policy heretofore in effect."

On 10 May 1978 plaintiff filed and served on defendant a motion requesting that the defendant be ordered to increase the amount of alimony payments and to provide for the plaintiff medical and hospital insurance coverage pursuant to the terms of the consent order and to pay $2,500 in hospital expenses incurred by the plaintiff as a result of the discontinuation of the insurance coverge. Plaintiff, on 15 June 1978, filed a motion requesting the court to order the defendant to answer interrogatories. Approximately a month later the court ordered the defendant to file answers to the interrogatories within thirty days.

On 5 September 1978 a request for admissions was served on the defendant by the plaintiff pursuant to G.S. 1A-1, Rule 36. The admissions requested concerned defendant's employment, salary, residence, improvement in earning capacity and standard of living since 9 September 1975, and plaintiff's decline in earning capacity and standard of living during the same time period.

Plaintiff, on 5 October 1978, filed a motion pursuant to Rule 37(b)(2) for a default judgment against the defendant alleging that the time had expired for defendant to answer and deny plaintiff's request for admissions and therefore the statements in the request should be deemed admitted. Plaintiff served notice on defendant by mail on 5 October 1978 that she was requesting that a hearing on the motion be set for 16 October 1978. The notice in-

dicated that plaintiff would seek "Relief in accordance with the attached Motion." A notice was served on the defendant by mail on 16 October 1978 which stated that the hearing on plaintiff's Rule 37 motion had been continued until 30 October 1978, at defendant's request.

Defendant's counsel, O'Connor, Speckhard & Speckhard, upon request, was permitted to withdraw as counsel during the litigation below and did not represent defendant at the 30 October 1978 hearing. The court, on 30 October 1978, entered an order and among its findings of facts found: that defendant had failed to answer the interrogatories within the time allowed by the court order and had failed to offer reasonable justification for this failure; that defendant had also failed to answer or object to the request for admissions within the time provided by law; that plaintiff did not have sufficient means to subsist; and that defendant was reasonably able to pay plaintiff $750 in attorney's fees which the court determined was a "reasonable attorney [*sic*] fee under the circumstances of this case." The order awarded plaintiff a judgment by default and ordered the defendant to pay the plaintiff $2,500 for medical expenses in lieu of the health insurance that defendant was originally ordered to provide but for which he had made no provision, to increase his alimony payments from $30 to $50 per week and to pay $750 to plaintiff for her counsel fees. Defendant appeals from the entry of this order.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for plaintiff appellee.

O'Connor, Speckhard & Speckhard, by Donald K. Speckhard, for the defendant appellant.

WELLS, Judge.

Defendant presents four assignments of error. We shall deal with them in the order presented.

[1] Defendant assigns as error the trial court's action entering a judgment by default against the defendant. The default judgment was entered by the trial judge, in session, upon a motion by plaintiff for judgment following defendant's failure to respond to a request for admissions or to answer interrogatories duly served

upon him. Defendant was duly served with notice that plaintiff was seeking judgment against him and that the motion was scheduled for hearing on 16 October 1978. The matter was not heard on 16 October 1978 and defendant was duly served with notice that it would be heard on 30 October 1978. The defendant had adequate notice and ample time to respond. He did not. Under such circumstances, plaintiff was not required to obtain prior entry of default before the Clerk. There was no procedural error in the entry of default by the trial judge. *Whitaker v. Whitaker*, 16 N.C. App. 432, 192 S.E. 2d 80 (1972).

[2] The defendant also maintains that the trial court erred in ordering the defendant to pay the sum of $2,500 to plaintiff for reimbursement of medical expenses incurred by plaintiff. The trial judge found as facts: that defendant was obligated under a prior consent order to provide health insurance coverage for plaintiff, which he had failed to do; that plaintiff had incurred necessary medical expenses of $3,500, $2,500 of which would have been paid by insurance had the ordered coverage been in effect; and that defendant was reasonably able to pay for the insurance. During the marriage defendant, as husband, was under the common law duty to support his wife, and such support included the payment of her necessary medical expenses. *Bowen v. Daugherty*, 168 N.C. 242, 84 S.E. 265 (1915). The portion of the order of 19 September 1975 requiring defendant to maintain hospital insurance for plaintiff was in effect an award of alimony—a continuation of support. *See, Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967); *Martin v. Martin*, 26 N.C. App. 506, 216 S.E. 2d 456 (1975). The trial court's order under review here was no more than an enforcement of that award.

[3] Defendant additionally contends that the trial court erred in ordering the defendant to increase his alimony payments to plaintiff from $30 to $50. An order for alimony may be modified at any time upon a motion in the cause and a showing of changed circumstances by either party. G.S. 50-16.9. Under the statute a spouse may obtain a modification of the order for permanent alimony upon a showing of changed circumstances, even though the order was by consent. *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E. 2d 67 (1977). The trial judge found that the condition, estate, and earning capacity of the defendant had substantially increased since the time of the entry of the consent order of 9 Sep-

tember 1975, that defendant's accustomed standard of living was substantially better than that which he enjoyed at the time of said consent order; that plaintiff's estate, earning capacity, condition and accustomed standard of living had steadily declined since the time of said consent order; and that defendant was reasonably able to pay and plaintiff was in reasonable need of alimony at the rate of $50 per week. The record supports these findings of fact.

Plaintiff served on defendant a request for admissions on 5 September 1978, in which the necessary elements of a change in circumstances were set forth. At the time of the hearing of 30 October 1978, the request remained unanswered by defendant and thus was admitted. G.S. 1A-1, Rule 36(a). The amount of alimony awarded by the trial court will be disturbed only upon a showing of abuse of discretion. *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649 (1967); *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E. 2d 701 (1977), *disc. rev. denied*, 294 N.C. 363, 242 S.E. 2d 634 (1978); *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975). Based on the record before us, we cannot say that the trial judge abused his discretion.

[4] Defendant's fourth assignment of error concerns the award of $750 in counsel fees to plaintiff. This court has held in numerous cases that the award of counsel fees in an alimony action must be supported by sufficient findings of fact. *Upchurch v. Upchurch, supra; Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971). The findings in the case before us do not meet the test. The trial judge made no findings of fact, simply concluding that $750 was a "reasonable attorney [*sic*] fee under the circumstances of this case." This matter must, therefore, be remanded for appropriate findings on the issue of a reasonable attorney's fee.

As to defendant's first, second and third assignments of error, we find no error; as to defendant's fourth assignment, reversed and remanded.

Affirmed in part, reversed and remanded in part.

Judges ARNOLD and WEBB concur.

Andrews v. Nu-Woods, Inc.

BETTY W. ANDREWS, WIDOW, AND GUARDIAN AD LITEM OF SYLVIA DENISE ANDREWS, MINOR CHILD, DOLF OTIS ANDREWS, DECEASED, EMPLOYEE v. NU-WOODS, INC., EMPLOYER, AND INTERNATIONAL INSURANCE CO., CARRIER, DEFENDANTS

No. 7810IC854

(Filed 6 November 1979)

Master and Servant § 69— workmen's compensation death benefits—maximum weekly benefit

The amendment to G.S. 97-29 by Ch. 1103 of the 1973 Session Laws, governing the maximum weekly workmen's compensation benefit, applies to G.S. 97-38 so that G.S. 97-38 no longer limits recovery for death claims to $80.00 per week.

Chief Judge MORRIS dissenting.

APPEAL by defendants from order of North Carolina Industrial Commission entered 19 July 1978. Heard in the Court of Appeals 30 May 1979.

This appeal brings to the Court a question involving death benefits under the Workmen's Compensation Act. The facts are not in dispute. It was stipulated and the Hearing Commissioner found that the deceased was injured in an accident arising out of and in the course of his employment with Nu-Woods, Inc. on 20 February 1977. On 26 February 1977, he died as a result of the injuries received. The plaintiffs were the only persons wholly or partially dependent on the deceased who had an average weekly wage of $420.28. At the time of the hearing, the defendants were paying $80.00 per week to Betty W. Andrews for her and Sylvia Denise Andrews' use. The Hearing Commissioner concluded the plaintiffs are entitled to payments of $158.00 per week for a period of 400 weeks commencing 26 February 1977. The defendants were ordered to pay this amount with credit given to the defendants for all payments made at the rate of $80.00 per week. The defendants appealed to the full Commission which affirmed the judgment of the Hearing Commissioner.

Hatcher, Sitton, Powell and Settlemyer, by Steve B. Settlemyer, for plaintiff appellees.

Hedrick, Parham, Helms, Kellam and Feerick, by Hatcher Kincheloe, for defendant appellants.

WEBB, Judge.

The decision in this case depends on the interpretation of certain sections of the Workmen's Compensation Act. G.S. 97-29 provides for compensation rates for total incapacity. This section contains a sentence which says: "If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38." G.S. 97-38 provides that death benefits shall not be more than $80.00 per week for four hundred weeks. The following amendment to G.S. 97-29 was adopted and is found in the 1973 Session Laws, Chap. 1103:

> Section 1. G.S. 97-29 is hereby amended by adding to the end of such section a new paragraph to read as follows: Notwithstanding any other provision of this Article, beginning August 1, 1975, and on August 1 of each year thereafter, a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22) and by rounding such figure to its nearest multiple of two dollars ($2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after November 1 following such computation. Such maximum weekly benefit shall apply to all provisions of this Chapter effective August 1, 1975, and shall be adjusted August 1 and effective October 1 of each year thereafter as herein provided.
>
> Section 2. This act shall become effective October 1, 1975, and shall only apply to cases arising on and after October 1, 1975.

The question posed by this appeal is whether this amendment to G.S. 97-29 governs all provisions of the Chapter so that G.S. 97-38 no longer limits recovery for death claims to $80.00 per week. We hold that the amendment applies to G.S. 97-38 so that the plaintiffs in this case are not limited in their recovery to $80.00 per week. The amendment says it "shall apply to all provisions of this Chapter." This would include G.S. 97-38. To say that G.S. 97-38 is not governed by this amendment would, we believe, be contrary to the will of the General Assembly as expressed in the plain words of the statute. We are strengthened in this conclusion by an amendment to the Act which was adopted by the General

Assembly. As originally introduced, the bill did not include the clause "and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after November 1 following such computation." By adding the phrase which makes the benefits applicable to all claims, we believe the General Assembly again expressed an intention to include death claims.

The appellants contend the amendment to G.S. 97-29 is ambiguous and can be reconciled with G.S. 97-38 so that the $80.00 per week maximum of G.S. 97-38 need not be disturbed. They contend first that in adopting this amendment the General Assembly placed it in a section of the Workmen's Compensation Act headed "Compensation rates for total incapacity." They contend this shows the General Assembly did not intend for it to affect death claims. They also contend the General Assembly was aware the Workmen's Compensation Act provides for separate claims for disabilities and for deaths and by not specifically mentioning death claims, it did not intend to include them in this amendment. In light of the statute which says the benefits shall apply to "all provisions of this Chapter," we believe we would have to ignore the plain words of the statute to accept the argument of appellants.

Affirmed.

Judge ERWIN concurs.

Chief Judge MORRIS dissents.

Chief Judge MORRIS dissenting.

I do not agree that subscribing to appellant's position requires ignoring the plain words of the statute. On the contrary, in my opinion, the plain wording of the statute requires the interpretation for which appellants contend.

G.S. 97-38 is entitled "Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents", and provides, in pertinent part,

> "If death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, the employer shall

pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66⅔%) of the average weekly wages of the deceased employee at the time of the accident, but not more than eighty dollars ($80.00), nor less than twenty dollars ($20.00), per week, and burial expenses not exceeding five hundred dollars ($500.00), to the person or persons entitled thereto as follows:".

G.S. 97-29 is entitled "Compensation rates for total incapacity". It provides for the same maximum compensation—$80.00 per week—as G.S. 97-38. The last paragraph of this statute contains the language which is the subject of this appeal, and provides as follows:

"Notwithstanding any other provision of this Article beginning August 1, 1975, and on August 1 of each year thereafter, a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22) and by rounding such figure to its nearest multiple of two dollars ($2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after November 1 following such computation. Such maximum weekly benefit shall apply to all provisions of this Chapter effective August 1, 1975, and shall be adjusted August 1 and effective October 1 of each year thereafter as herein provided."

It would appear that the Commission's award implies that the maximum amount provided in G.S. 97-38 is in irreconcilable conflict with the provisions of G.S. 97-29 above set out and, therefore, the provision of G.S. 97-38 is repealed by implication. Two cardinal principles of statutory construction should be noted: "Repeal of statutes by implication is not favored in this jurisdiction." *Person v. Garrett, Commissioner of Motor Vehicles*, 280 N.C. 163, 166, 184 S.E. 2d 873, 874 (1971). Where statutes which cover the same subject matter are not absolutely irreconcilable, and where no intent to repeal is clearly indicated, the Court has a duty to give effect to both. *Id.; see Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967).

Obviously G.S. 97-38 is clear and unambiguous on its face. That is not true with respect to the quoted portion of G.S. 97-29. It is ambiguous and subject to interpretation. However, a study of the two statutes and other related statutes necessarily leads to the conclusion that the quoted provisions of G.S. 97-29 were intended to apply to disability claims only. This interpretation resolves any conflict which might exist between the two statutes and allows each to be given meaning.

We note that the 1973 General Assembly changed the maximum benefits of both G.S. 97-29 and G.S. 97-38 from $56.00 to $80.00. In the Act accomplishing that amendment, each statute was amended separately. The quoted portion of G.S. 97-29 was added later by the same session of the General Assembly. Had it been the intent of the General Assembly that that provision be applicable to death benefits, the same language added to G.S. 97-29 could have easily been added to G.S. 97-38 as was done when the maximum benefit provision was amended, with the amending language engrafted on each statute separately.

Additionally, the phraseology used in the quoted portion of G.S. 97-29 clearly refers to compensation for total disability. The phrase "maximum weekly benefits" appears only in the section of the Act dealing with total incapacity and is not defined anywhere in the Act. It is applicable to "all injuries and claims arising on and after November 1 following such computation." A fair interpretation of this language would be that it is applicable to "all injuries and claims therefor". That the provision was not intended to apply to death benefits is also indicated by the specific language of G.S. 97-29: "If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38."

The intent of the General Assembly seems clear. It is our duty to apply the statute in such a manner as to carry out that intent. This, in my opinion, requires that the order of the Commission be reversed.

STATE OF NORTH CAROLINA v. STEVEN ANTHONY PUCKETT

No. 7921SC381

(Filed 6 November 1979)

1. **Burglary and Unlawful Breakings § 9— stepladder—acetylene torch—no housebreaking implements**

A three foot long stepladder and an acetylene torch possessed by defendant were not reasonably adapted for use in housebreaking and did not qualify as implements of housebreaking within the meaning of G.S. 14-55, and the fact that the ladder and torch were possessed and used by defendant in breaking open a window in a building was not determinative of the question.

2. **Escape § 1— juvenile detention center not prison, jail or lockup—aiding in escape—crime not charged**

A juvenile detention home or center is not a "prison, jail or lockup" within the meaning of G.S. 14-256, which provides that escape from such a place is a misdemeanor; therefore, the warrant and the evidence failed to support the verdict and judgment on the charge of aiding and abetting a juvenile to escape from a detention center in violation of G.S. 14-256.

APPEAL by defendant from *Wood, Judge.* Judgment entered 30 November 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 August 1979.

Defendant entered pleas of not guilty to: (1) the misdemeanor charge of breaking into the Forsyth County Youth Detention Center; (2) the misdemeanor charge of aiding and abetting escape in violation of G.S. 14-256; and (3) the felony charge of possession of housebreaking implements, to wit: "an acetylene torch mounted on a wheeled stand, and a stepladder . . . ." Defendant appeals from judgments imposing imprisonment.

STATE'S EVIDENCE

On 18 March 1978 Cathy C., under 16 years of age, was being held at the Forsyth County Detention Center under an order of the District Court. At night she was confined in a small room with a single window covered with a one-fourth inch thick metal screen. The window was seven and one-half to eight feet above ground level. The door to the room was locked from the outside.

During the afternoon of 17 March defendant, 24 years of age, came to the Center and talked through the room window to Cathy C. and two other inmates, telling them that he would return that night and help them escape.

In the early hours of 18 March defendant came to the window of Cathy C.'s room with "a big torch with big tanks on a stand," and a ladder about two and one-half or three feet long. The heavy mesh screen was cut with the torch. Cathy C. climbed out of the window and left with defendant in an automobile. About daylight it was discovered that Cathy C. was missing from her room. The torch stand and ladder were found on the ground under her room window.

DEFENDANT'S EVIDENCE

Defendant offered numerous alibi witnesses. Their testimony tended to show that defendant was at a party at the time of the escape.

Defendant was found guilty as charged. He appeals from the judgment in the felony case (78CR23394) imposing a prison term of ten years and from the consolidated judgment in the misdemeanor cases imposing a sentence of two years to run at the expiration of the felony sentence.

Attorney General Edmisten by Associate Attorney David Gordon for the State.

Stephens, Peed & Brown by Herman L. Stephens for defendant appellant.

CLARK, Judge.

[1] We elect to consider first the defendant's contention that the felony charge should have been dismissed because the acetylene torch and ladder were not "implements of housebreaking" possessed in violation of G.S. 14-55.

This statute, in pertinent part, provides: "If any person . . . shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking . . . such person shall be guilty of a felony . . . ." G.S. 14-55 (1979) (prior to amendment concerning sentencing, 1979 N.C. Sess. Laws, c. 760, sec. 5).

Since neither an acetylene torch nor a ladder is enumerated in the statute, the question is whether the torch or ladder, singly or in combination, are implements of housebreaking within the meaning of G.S. 14-55.

The stepladder was two and one-half to three feet long. The acetylene torch was "a big torch with big tanks on a stand," as described by Deputy Sheriff Young. The indictment alleged that the torch was "mounted on a wheeled stand." The fact that the ladder and torch were possessed and used by the defendant in breaking open a window in a building is not determinative of the question. The use to which a tool or instrument is put is not necessarily controlling in determining whether it is within the intent of the phrase "or other implement of housebreaking" as contained in G.S. 14-55. *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315 (1965); *State v. Godwin,* 3 N.C. App. 55, 58, 164 S.E. 2d 86 (1968).

The defendant contends that the term "other implements of housebreaking" in G.S. 14-55 is unconstitutionally vague. The Supreme Court of North Carolina has established that "other implements of housebreaking" include those made and designed for housebreaking purposes, or those commonly used for housebreaking, or those reasonably adapted for use in housebreaking. *State v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456 (1943). *See generally,* Annot. Validity, Construction, and Application of Statutes Relating to Burglars' Tools, 33 A.L.R. 3d 798 (1970). This interpretation of the somewhat vague statutory language adds little to the certainty of the crime defined in G.S. 14-55. Nor have the appellate courts of the State in applying this law to various tools and implements established a pattern so as to clarify the crime. *See,* 2 Strong's N.C. Index 3d Burglary § 10.3. Some of the apparently conflicting decisions can be reconciled by variances in the evidence relating to possession "without just excuse," another element of the statutory crime. *State v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898 (1946); *State v. Boyd, supra; State v. Stockton,* 13 N.C. App. 287, 185 S.E. 2d 459 (1971); *State v. Shore,* 10 N.C. App. 75, 178 S.E. 2d 22 (1970), *cert. denied,* 278 N.C. 105, 179 S.E. 2d 453 (1971). For an analysis and discussion of the above and other cases see the recent opinion, *State v. Bagley,* No. 7914SC398 (Filed 2 October 1979).

The ladder was unusual in that it was only three feet in length. The acetylene torch was not a small portable hand tool; were it small, the torch might well qualify as a tool reasonably adapted for use in cutting and opening safes or metal boxes used for the safekeeping of money, jewelry, and other valuables. But

the acetylene torch possessed by the defendant was a large torch with tanks mounted on a wheeled stand. Neither the ladder nor the acetylene torch possessed by the defendant was reasonably adapted for use in housebreaking and they do not qualify as implements of housebreaking within the meaning of G.S. 14-55. Having reached this conclusion, we do not reach the question of unconstitutional vagueness.

[2] Defendant next assigns as error the failure to dismiss the charge of aiding and abetting Cathy C.'s escape in violation of G.S. 14-256. This statute provides:

> "If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a misdemeanor."

The Forsyth County Youth Detention Center is a regional detention home. See G.S. 134A-37. Clearly it is the public policy of this State, as expressed in the statutes relating to detention or custodial care of juveniles, that juveniles have a special status apart from adults who are either detained in a jail awaiting trial or confined in a jail or prison pursuant to judgment following conviction. G.S. 7A-286(3) allows temporary detention in a "local jail" only when "no juvenile detention home" is available. G.S. 110-24 makes it unlawful to place a juvenile in "any jail, prison or other penal institution" except a "jail with a holdover facility for juveniles [which has been] approved by the Department of Human Resources." We note that G.S. 7A-286(3) and G.S. 110-24 have been repealed; similar provisions, however, have been provided in sections 7A-507(1)(16), 7A-536, and 7A-541(2), (3) of the New Unified Juvenile Criminal Code, 1979 N.C. Adv. Legis. Serv. c. 815.

It is also significant that there is a separate statute covering the aiding and abetting of a child to escape from such an institution. G.S. 134A-25 provides:

> "It shall be unlawful for any person to aid, harbor, conceal or assist any child escape from an institution or youth services program. Any person who renders said assistance to a child shall be guilty of a misdemeanor."

We conclude that a juvenile detention home or center is not a "prison, jail, or lockup" within the meaning of G.S. 14-256, as the warrant charges in the case *sub judice*. The warrant and the evidence fail to support the verdict and judgment on the charge of aiding and abetting Cathy C. to escape in violation of G.S. 14-256. If the defendant had been charged with a violation of G.S. 134A-25 the evidence would have been sufficient to support a conviction of that offense.

We have carefully examined defendant's other assignments of error and find them to be without merit. We find no error relative to the charge of breaking or entering (78CR23393).

The judgment imposed for possession of housebreaking implements (78CR23394) is vacated. That part of the consolidated judgment for aiding in escape (78CR16781) is also vacated, but the misdemeanor breaking or entering judgment (78CR23393) is upheld and supports said judgment providing imprisonment for two years. However, that part of the judgment providing that the sentence shall begin to run upon the expiration of the sentence imposed in 78CR23394 is deleted, and it is ordered that the term of imprisonment therein imposed begin to run from the date the consolidated judgment was entered.

Reversed in part; no error in part.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. OTIS LEE WHITAKER AND JAMES ALTON WILLIAMS

No. 792SC373

(Filed 6 November 1979)

1. Criminal Law § 15.1— motion for change of venue—community ill will

The trial court did not err in the denial of defendant's motion for a change of venue of his involuntary manslaughter trial where defendant presented nothing more than an allegation of general ill will in the community against him because of the incident in question.

2. Criminal Law § 92.1— involuntary manslaughter—refusal to sever trials of automobile driver and owner

The trial court in an involuntary manslaughter prosecution did not err in refusing to sever defendant automobile owner's trial from that of the codefendant driver on the ground that he would be prevented from using the driver's testimony at a joint trial because additional evidence admissible against the driver in such a joint trial would cause a feeling of ill will toward the driver, since the State would have the right to draw out the same facts on cross-examination in a separate trial that defendant contends would prejudice him in a joint trial.

3. Automobiles § 110— death by motor vehicle—intoxicated driver—responsibility of owner

When a death results from the operation of a motor vehicle by an intoxicated person not the owner of that vehicle, the owner who is present in the vehicle and who knowingly permits the intoxicated driver to operate the vehicle is as guilty as the intoxicated driver.

4. Automobiles § 113.1— involuntary manslaughter—intoxicated driver—owner's guilt as aider and abettor

The trial court properly submitted an issue of defendant automobile owner's guilt of involuntary manslaughter as an aider and abettor where the evidence tended to show that defendant's automobile, while driven by the codefendant, struck a patrol car which was sitting on the shoulder of the road and then struck and killed two young men who were standing beside the patrol car; defendant had stopped the automobile in order to allow the codefendant to drive and was riding in the back seat at the time of the accident; defendant knew the codefendant had had at least two drinks of vodka and one beer; and a test administered to the codefendant driver more than an hour after the accident showed him to have a blood alcohol content of .17.

APPEAL by defendants from *Fountain, Judge*. Judgment entered 18 January 1979 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 24 August 1979.

Defendants Whitaker and Williams were each indicted and subsequently convicted by a jury for two counts of manslaughter in the deaths of two adolescents which resulted from the operation of a motor vehicle owned by defendant Williams and driven by defendant Whitaker. Prior to trial defendant Williams presented motions for severance and change of venue. The trial court denied these motions and granted the State's motion for a joint trial.

The State presented evidence tending to show that at about 3:00 a.m. on 8 July 1978 Trooper T. G. Miller of the North Carolina State Highway Patrol stopped two young males on

bicycles to talk to them about not having lights on their bicycles and to inquire as to why they were out riding around at that time of the morning with a watermelon. The patrol car was two to three feet off the road on the north shoulder of rural paved road 1300, an east-west road. The front of the patrol car was facing east and its headlights and four-way flashers were on. The two young men were standing on the left, or north side, of the patrol car, between the patrol car and the woods. While so positioned the patrol car was struck by defendant's vehicle. Defendant's vehicle thereafter passed between the patrol car and the woods and struck and killed both of the young men.

The State's evidence also tends to show that some odor of intoxicant was detected on the breath of defendant Whitaker and that defendant Whitaker was taken to the Beaufort County Sheriff's Office where certain sobriety tests and a breathalyzer test were administered to him. The results of the sobriety tests indicated that Whitaker was unsteady on his feet, that Whitaker could not touch his nose with either his left or his right hand, and that Whitaker could not walk in a steady position in a heel-to-toe manner. In addition, Whitaker blew a .17 on the brethalyzer test. Furthermore, Officer Swindell testified that he was of the opinion that Whitaker was, to an appreciable degree, under the influence of some alcoholic beverage.

In addition, the State's evidence tended to show that defendant Williams was the owner of the vehicle operated by defendant Whitaker and that neither of the defendants possessed a valid driving permit as of the date of the accident.

Evidence for the defendants tended to show, *inter alia*, that Whitaker operated Williams' vehicle with Williams' knowledge and consent; that defendant Williams was seated in the back seat of the vehicle at the time of the accident; that the patrol car was situated in the middle of the highway without any lights on; that defendants were not able to see the patrol car or the two boys at the time of the collision; that Williams had consumed more alcohol than Whitaker; that Williams did not observe Whitaker to be driving in an unusual or abnormal manner; that Williams did not observe Whitaker to be intoxicated in any respect; that Williams knew that Whitaker did not have a driver's license; and that Williams had on previous occasions allowed Whitaker to drive Williams' car without an operator's permit.

Attorney General Edmisten by Assistant Attorney General Thomas J. Ziko for the State.

Carter & Ross by W. B. Carter and L. H. Ross for defendant appellant Otis Lee Whitaker.

Franklin B. Johnston for defendant appellant James Alton Williams.

CLARK, Judge.

There are fifty-seven assignments of error in the record. Defendant Whitaker argues that there are numerous small prejudicial errors that together call for a new trial. These objections include the lack of a proper identification of exhibits, conclusory statements by witnesses and leading questions. We have carefully reviewed each of the contentions of defendant Whitaker and find them to be without prejudicial effect, and we therefore decline to grant a new trial. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976). For the same reasons we find no merit in the contentions of defendant Whitaker that the trial judge should have dismissed the case either after the close of the State's evidence or after the close of all the evidence, and that the trial judge should have set aside the verdict of the jury.

[1] Defendant Williams presents five arguments. First, Williams contends that the trial judge committed reversible error by denying defendant Williams' motion for a change of venue. Defendant argues that the accounts of the accident and pictures of the accident scene were aired by local radio and television stations and were printed for several days in the local newspaper and that the deaths of the two victims touched off a deep resentment and even outright hatred against the two black defendants. However, no press clippings were presented, there was no showing that the jurors had seen or were affected by the publicity, and there was no showing that defendants' peremptory challenges were exhausted. The standard for review for a ruling on a motion for a change of venue is whether the trial judge abused his discretion, N.C. Gen. Stat. § 15A-957, 958 (1978); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1211 (1976), and where defendant presents nothing more

than an allegation of general ill will in the community, there is no evidence which would support a reversal for abuse of discretion. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed. 2d 1213 (1976).

[2] Defendant Williams next contends that the trial court committed reversible error by denying Williams' motion for severance of the trial of Whitaker and Williams. Here Williams argues that his defense was predicated upon the testimony of Otis Whitaker and that because other evidence against Whitaker would be admitted in a joint trial than would be admitted in a solo trial of Williams, Williams was thereby denied any right to use Whitaker as a witness and to have his case heard without the overwhelming prejudicial feeling of hatred aired at Otis Whitaker. We do not agree with this contention. The rule in North Carolina is clear that whether defendants should be tried separately is to be resolved in the sound discretion of the trial court and absent a showing of substantial prejudice to the defendants amounting to the denial of a fair trial, the exercise of discretion by the trial court will not be disturbed upon appeal. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 45, 50 L.Ed. 2d 69 (1976). Defendant presents no explanation as to how a separate trial would have prevented the alleged prejudice, particularly when the State would have had the right on cross examination to draw out the same facts defendant contends would prejudice the jury against his defense. We therefore uphold the ruling of the trial court in denying defendant Williams' motion for severance.

Defendant Williams next contends that the repeated use of leading questions by the State and the conclusory testimony of the State's witnesses were prejudicial when viewed as a whole. As with the above contentions of defendant Whitaker, we have carefully reviewed each of these challenges and find no prejudice.

[3] Finally, defendant Williams contends that the trial judge committed reversible error by denying the defendant's motion for a directed verdict of not guilty at the end of the State's evidence and upon renewal of the motion at the end of all of the evidence. Defendant argues that there was insufficient evidence to support the instructions by the trial judge as to the element of aiding and

abetting and, in particular, that there was no evidence to support the charge of the trial judge that Williams must have known that Whitaker was in no condition to drive or that Williams was so intoxicated that he did not use the degree of care necessary to determine Whitaker's condition. We disagree. As a general principle, "[w]hen an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway, while in a state of intoxication, he is as guilty as the man at the wheel." *State v. Gibbs*, 227 N.C. 677, 678, 44 S.E. 2d 201, 202 (1947). *See also State v. Nall*, 239 N.C. 60, 79 S.E. 2d 354 (1953), (aiders and abettors guilty as principals). Following these principles, we hold that when a death results from the operation of a motor vehicle by an intoxicated person not the owner of that vehicle, the owner who is present in the vehicle and who with his knowledge and consent permits the intoxicated driver to operate the vehicle, is as guilty as the intoxicated driver. *Story v. United States*, 16 F. 2d 342 (1926), *cert. denied*, 274 U.S. 739, 47 S.Ct. 576, 71 L.Ed. 1318 (1927), (a motor vehicle manslaughter case cited in *Gibbs, supra*). *See also* Annot. 47 A.L.R. 2d 568, 586-88 (1956); Annot. 99 A.L.R. 756, 771 (1935).

[4] In the instant case defendant Williams' own testimony revealed that he stopped the car in order to allow the defendant Whitaker to drive. Defendant Williams knew that defendant Whitaker had had at least two drinks of vodka and one beer. While defendant Williams did not perceive Whitaker to be intoxicated, the test administered by the State more than an hour after the accident showed that Whitaker was under the influence of alcohol to an appreciable degree. Consequently, we hold that the trial judge was correct in his instructions on aiding and abetting the involuntary manslaughter and that the court appropriately sent the case to the jury.

Affirmed.

Judges ERWIN and WELLS concur.

JAMES G. HOOKS v. COLONIAL LIFE & ACCIDENT INSURANCE COMPANY

No. 7817SC1159

(Filed 6 November 1979)

Insurance § 21— disability insurance—incontestability clause

In an action to recover under a policy of disability insurance where defendant claimed that whatever disability plaintiff had was not caused solely by an automobile accident but was caused in part by a lumbar laminectomy performed on plaintiff several years earlier, there was no merit to plaintiff's contention that the incontestable provision of the insurance contract prevented defendant from raising the defense that plaintiff's prior physical condition contributed to his disability, since the provision in question made claims for disability as defined in the policy incontestable; the policy covered disabilities "resulting directly, independently and exclusively of all other causes from bodily injuries effected solely by accident . . ."; and the incontestable clause dealt only with validity of the contract, not construction, and defendant was therefore not barred from raising the issue of whether plaintiff's disability was caused solely by accident as set forth in the policy.

APPEAL by plaintiff from *Kivett, Judge*. Judgment entered 30 June 1978 in Superior Court, CASWELL County. Heard in the Court of Appeals 18 September 1979.

This is an action upon a policy of disability insurance issued by defendant. Plaintiff alleges he is totally disabled because of an automobile accident on 15 September 1973 and thus entitled to payments under the policy, which defendant refuses to make. Plaintiff, by way of amendment, also alleges the actions of defendant constitute violations of Chapter 75 of the General Statutes of North Carolina, the consumer protection law, and that he is entitled to relief under that statute. Defendant denies it is obligated to make any payments to plaintiff under the insurance policy. The insurance company alleges that whatever disability plaintiff has was not caused solely by the automobile accident of September 1973, but was caused, at least in part, by a lumbar laminectomy performed on plaintiff in 1970. Defendant also denies any violations of Chapter 75.

Upon completion of discovery proceedings, defendant moved for summary judgment, which was allowed 30 June 1978. Plaintiff appeals.

Ramsey, Hubbard & Galloway, by Joel H. Brewer, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant appellee.

MARTIN (Harry C.), Judge.

The now familiar rules applicable to summary judgment are stated by Justice Huskins for the Supreme Court in *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469-70, 251 S.E. 2d 419, 421-22 (1979):

> Authoritative decisions, both state and federal, interpreting and applying Rule 56 hold that the party moving for summary judgment has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Pt. 2 Moore's Federal Practice, § 56.15[8], at 642 (2d ed. 1976); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). "This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).
>
> The language of the rule itself conditions the rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court is not authorized by Rule 56 to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists. The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is ex-

posed. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, N.C. Practice and Procedure, § 1660.5 (2d ed. Phillips Supp. 1970). "If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. . . ." 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright ed. 1958).

We now apply these principles to the record before us to determine the propriety of the summary judgment for the defendant.

The one basic fact issue that plaintiff must prove at trial is that the 15 September 1973 automobile accident was the direct, independent and exclusive cause of his disability. The evidence before the court at the hearing showed that the prior physical condition of plaintiff at least contributed to plaintiff's alleged disability. There was no evidence that plaintiff's condition is solely the result of the 15 September 1973 accident. Plaintiff does not argue to the contrary in his brief; nevertheless, plaintiff contends the entry of summary judgment was error because of the incontestability clause in the policy.

The policy contains the following provision:

TIME LIMIT ON CERTAIN DEFENSES: After two years from the effective date of this Policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such Policy shall be used to void the Policy or to deny a claim for loss incurred or disability (as defined in the Policy) commencing after the expiration of such two-year period.

> No claim for loss incurred or disability (as defined in the Policy) commencing after two years from the effective date of this Policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this Policy.

This provision is required by N.C.G.S. 58-251.1(2)a, b.

Plaintiff contends that the incontestable provision of the contract prevents defendant from raising the defense that plaintiff's prior physical condition contributed to his present disability. We do not agree. Plaintiff urges us to adopt the rule announced by the Indiana Court of Appeals for the Second District in *Colonial Life v. Newman*, 152 Ind. App. 554, 284 N.E. 2d 137, *rehearing denied*, 288 N.E. 2d 195 (1972). In *Colonial*, plaintiff Newman brought suit on an accident disability policy. The evidence indicated he had a preexisting arthritic condition that was aggravated and activated by the accident, resulting in his disability. The insurer argued that "the insured's pre-existing arthritis caused him to become symptomatic which excluded the *insured* from coverage, *i.e.*, the injury to the insured was not 'directly, independently, and exclusively' caused by the accident in question." *Id.* at 558, 284 N.E. 2d at 140 (emphasis added). Plaintiff contended the incontestability clause prevented Colonial from raising this defense. In reply to this argument, Colonial took the untenable position that since this provision was required by statute, it did not apply to the issue of liability. The Indiana Court dismissed this argument of Colonial and allowed plaintiff to recover, without addressing the issue of whether plaintiff's disability was solely caused by the accident.

Our research does not disclose any citations in which the Indiana courts, or the courts of any other state, have relied upon this holding in *Colonial*. We find the better reasoned opinion of the meaning of the incontestable clause to be that of then Chief Judge Cardozo:

> The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand,

> unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.

Matter of *Met. Life Ins. Co. v. Conway*, 252 N.Y. 449, 452, 169 N.E. 642, 642 (1930).

In Couch on Insurance 2d, we find:

> The purpose of an incontestable clause is to annul all warranties and conditions that might defeat the right of the insured after the lapse of the stipulated time. But an incontestable clause relates to the validity of the contract and it does not affect the construction of the terms of the contract.
>
> . . . .
>
> An incontestable clause does not bar the insurer from proving that the loss was not covered by the terms of the policy.
>
> Expiration of the period of incontestability does not close the door to the defense that the contingency upon which liability depends has not occurred.
>
> An incontestable clause does not preclude the insurer from asserting that the cause of death was not within the coverage of the policy.

18 Couch on Insurance 2d §§ 72:2, :61 (1968).

In *Mills v. Insurance Co.*, 210 N.C. 439, 187 S.E. 581 (1936), Chief Justice Stacy states the rule in North Carolina concerning incontestable provisions:

> [T]here are numerous decisions to the effect that an incontestable clause cuts off all defenses except those allowed *eo nomine* in the clause itself . . . .
>
> . . . .
>
> . . . incontestable clauses . . . do not preclude the defendant from requiring, as a condition to recovery thereunder, "due proof of such total and permanent disability as entitles him (plaintiff) to the benefits hereof." *Carter v. Ins. Co.*, 208 N.C., 665, 182 S.E., 106.

> We are aware of no decision which would deny to a defendant the right to dispute the genuineness of plaintiff's claim, or to controvert the question of liability under its contracts. *McCabe v. Casualty Co.*, 209 N.C., 577, 183 S.E., 743; *Jolley v. Ins. Co.*, 199 N.C., 269, 154 S.E., 400; *Scarborough v. Ins. Co.*, 171 N.C., 353, 88 S.E., 482. To contend for a limitation of the coverage clause in a policy of insurance is not to contest its validity. . . . Denial of coverage ought not to be confused with the defense of invalidity. *Ins. Co. v. Conway*, 252 N.Y., 447.

Id. at 441-42, 187 S.E. at 582-83.

The clause in the policy under consideration makes claims for disability *as defined in the policy* incontestable. (Emphasis ours.) The policy covers disabilities "resulting directly, independently and exclusively of all other causes from bodily injuries effected solely by accident . . .." The incontestable clause does not bar defendant from raising the issue of whether plaintiff's disability was caused solely by accident as set forth in the policy. Upon consideration of that issue, all the evidence is to the effect that the automobile accident was not the sole cause of plaintiff's disability. The trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges HEDRICK and CLARK concur.

BILLY RAY ANDERSON v. E. L. GOODING, EXECUTOR OF WILL OF ELIZABETH GOODING HARDY, J. W. BREWER, AND GREAT AMERICAN INSURANCE COMPANY

No. 793SC57

(Filed 6 November 1979)

Executors and Administrators §§ 19.1, 21 — personal injury in automobile accident — claim against estate — time for filing

A claim against decedent's estate for personal injuries received in an automobile accident was barred by G.S. 28A-19-3(a) where the claim was received by the executor of the estate more than six months after the general notice to creditors was published.

Judge VAUGHN dissenting.

ON writ of certiorari to review proceedings before *Reid, Judge*. Judgment entered 24 October 1978 in Superior Court, PITT County. Heard in the Court of Appeals 25 September 1979.

Billy Ray Anderson was injured in an automobile collision involving a car driven by himself and another car driven by Elizabeth Gooding Hardy. Mrs. Hardy died within the hour.

E. L. Gooding qualified as the executor of the estate of Elizabeth Gooding Hardy on 20 April 1977 and published the general notice to creditors required by G.S. 28A-14-1 in The Standard Laconic beginning 27 April 1977.

The executor received Anderson's claim against the estate on 16 November 1977—more than six months after the general notice to creditors had been published. The defendant Gooding denied plaintiff's claim relying on the provisions of G.S. 28A-19-3(a), which provides as follows:

> All claims, except contingent claims based on any warranty made in connection with the conveyance of real estate against a decedent's estate which arose before the death of the decedent, including claims of the United States and the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 within six months after the day of the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

On 21 December 1977, the plaintiff filed a complaint in this cause alleging (1) that he was injured as a result of the negligence of Elizabeth Gooding Hardy; and (2) that Great American Insurance Company acting through its agent, J. W. Brewer, committed unfair trade practices by advising the plaintiff that settlement would be made with him by Christmas 1977, well after the date of the six months' limitation for filing claims against the estate. An order was made severing the claims by the plaintiff against J. W. Brewer and Great American Insurance Company, leaving only the

defendant E. L. Gooding, executor of the will of Elizabeth Gooding Hardy, as the defendant in this particular cause.

The defendant pleaded in bar of plaintiff's claim the provisions of G.S. 28A-19-3(a) set out above, and plaintiff filed a motion for partial summary judgment, which motion was allowed. Defendant filed a petition for a writ of certiorari to the Court of Appeals which was allowed.

Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Sumner, for the defendant appellants.

White, Allen, Hooten, Hodges & Hines, by John R. Hooten, for defendant appellants.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for plaintiff appellee.

HILL, Judge.

Did the judge err in allowing the plaintiff's motion for partial summary judgment? We hold that he did under the prevailing statute.

G.S. 28A-19-3(a) provides in clear and unambiguous terms that all claims arising before the death of the decedent with specific exceptions which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 within six months after the day of the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 *are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.* (Emphasis added.)

The 1977 amendments to G.S. 28A-14-3 do not apply, for such amendments are limited to matters beginning 1 September 1977. See Sections 5 and 6, Chapter 446 of the North Carolina Session Laws. The decedent died 25 March 1977. Hence, there was no need for the executor to give notice of disallowance of claim to the claimant by registered or certified mail as provided in the 1977 amendment above.

It is a well settled rule that G.S. 28A-19-3(a) is a statute of limitations which must be complied with by creditors of an estate.

Mallard v. Patterson, 108 N.C. 255, 13 S.E. 93 (1890); *Love v. Ingram*, 104 N.C. 600, 10 S.E. 77 (1888).

The court has no discretion in considering whether a claim is barred by the statute of limitations. It is equally clear that the statute of limitations operates to vest a party with the right to rely on the statute of limitations as a defense, and a judge may not interfere with the vested rights of parties when pleadings are concerned. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870 (1970).

Plaintiff contends that J. W. Brewer made certain representations to him which led him to believe that his claim would be paid, and as a result thereof, it was not necessary for him to present his claim to Mr. Gooding, as executor of the estate; that the estate is estopped to deny the claim.

Insurance companies and their agents like Mr. Brewer do not act as agents for the insured when settling claims. An insurance company, if it admits that its insured is liable, without its insured's knowledge or consent, is acting in its own interest, and not as the agent of the insured. *Lampley v. Bell*, 250 N.C. 713, 110 S.E. 2d 316 (1959); *Foremost Dairies, Inc. v. Campbell Coal Company*, 57 Ga. App. 500, 196 S.E. 279 (1938).

The trial court should have granted summary judgment against the plaintiff since the record shows that this civil action is barred as a matter of law by the provisions of G.S. 28A-19-3(a).

This Court does not decide the merits of any claim by the plaintiff against J. W. Brewer and Great American Insurance Company.

For the reasons set out above, the decision of the trial court is

Reversed and remanded to the trial court with instructions that summary judgment be entered against the plaintiff in favor of the defendant estate.

Reversed and remanded.

Judge ERWIN concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I would hold that plaintiff is entitled to attempt to prove his claim and recover an amount not in excess of that available under the policy of liability insurance issued by Great American Insurance Company.

EUNICE NICHOLSON v. HUGH CHATHAM MEMORIAL HOSPITAL, INC. AND DR. RICHARD B. MERLO, M.D.

No. 7815SC1149

(Filed 6 November 1979)

Husband and Wife § 9— action for loss of conjugal rights

Plaintiff wife has no right to recover for the loss of her conjugal rights through the alleged negligent treatment of her husband by defendant physician and defendant hospital.

APPEAL by plaintiff from *Battle, Judge*. Judgment entered 6 September 1978 in Superior Court, ORANGE County.

Plaintiff seeks recovery for the loss of her conjugal rights as a result of the alleged negligence of the Hugh Chatham Memorial Hospital (Hospital) and Dr. Richard B. Merlo (Merlo) in the preparation of plaintiff's husband, Robert E. Nicholson (Nicholson), for the taking of x-rays, and in the taking of x-rays by the defendants. Plaintiff alleged that Nicholson was admitted to the hospital on 9 March 1975 with a condition involving the presence of kidney stones in his body; that diagnostic x-rays were necessary and were ordered to be made under the direction and supervision of Merlo; that as a result of the negligence of the hospital and Merlo, specifically alleged in the complaint, Nicholson was seriously injured in body and mind; that prior to the admission of Nicholson to the hospital, plaintiff enjoyed the love and affection of her husband and reasonably anticipated many more years of conjugal happiness; that as a result of the negligence of the defendants and the resulting injury to

Nicholson, plaintiff's husband has become forgetful, has been weakened physically, has deteriorated mentally, and no longer functions as head of the household and as a marriage partner of the plaintiff; and that the plaintiff has thereby been deprived of her conjugal rights to enjoy her love for her husband to the fullest extent. Each defendant sought dismissal of the complaint under the provisions of Rule 12 of the Rules of Civil Procedure and plaintiff was served with notice of the hearing on the Rule 12 motion. On 6 September 1978, Judge Battle ordered that the action be dismissed upon the motion of the defendants that the complaint fails to state a claim for which relief can be granted. Plaintiff gave notice of appeal.

Lee W. Settle, by Robert F. Steele; and Latham, Wood and Balog, by Steve A. Balog, for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., and Charles H. Hobgood, for defendant appellee, Hugh Chatham Memorial Hospital.

Henson & Donahue, by Perry C. Henson, for defendant appellee, Dr. Richard B. Merlo.

HILL, Judge.

Appellant's single assignment of error challenges the dismissal of her complaint. Upon examination of the record, it is apparent that no exception to the order is set out. That is not necessary, however. G.S. 1A-1, Rule 46(b), indicates that, ". . . it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court . . . ." Rule 10(a) and (b) of the Rules of Appellate Procedure then makes it clear that the exception, because it was properly preserved for review by action of counsel at trial and properly raised in the brief, may be set out in the record on appeal and made the basis of an assignment of error.

Appellant alleges that she has been deprived of her conjugal rights through the negligent treatment of her husband by the defendants and that her allegation states a claim for relief. Appellant seeks to distinguish an action seeking damages for loss of conjugal rights from an action seeking damages for loss of consortium, acknowledging the authority in this state which bars her

recovery for the loss of consortium or mental anguish. *McDaniel v. Trent Mills*, 197 N.C. 342, 148 S.E. 440 (1929); *Hinnant v. Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925). Appellant also attempts to distinguish her own loss of conjugal rights from that loss described by the plaintiff in *Hinnant, supra.*

It is here that appellant makes her strongest argument. In *Hinnant,* the plaintiff sought to recover for the loss of consortium and mental anguish suffered by her during the period between the fatal injury suffered by her husband and his death less than one day later. The court did not allow a recovery. Appellant seeks to distinguish *Hinnant* from her situation in two ways.

First, appellant says that a recovery would have frustrated the intent of the wrongful death statute then in force. A recovery would have allowed the wife to bring an action, thus raising the danger of a double recovery for a wrongful death. Appellant argues that here she is suffering a continuing injury which will not be compensated by a wrongful death action.

Second, appellant argues that the wrongful death statute in force at the time *Hinnant* was decided did not provide for recovery for loss of consortium. The present statute does. Thus, appellant is presented with the situation where she would have an action if her husband were dead, but not if he is permanently injured. Appellant has pointed out an anomaly in the law. However, it is the duty of this court to say what the law is and not what it should be.

Further, plaintiff argues that to fail to recognize a spouse's right to recover for loss of consortium of a spouse negligently injured by a third party is a denial of equal protection of the laws. We reject the contentions of the plaintiff.

Plaintiff has cited *McDaniel, supra,* for the proposition that a wife, who is living with her husband, can maintain an action in her own right for damages alleged to have been sustained by her on account of the serious and permanent injuries negligently inflicted upon her husband by a third party. *McDaniel* approved a recovery by the wife of the expenditure of funds spent by her from her own estate to assist her husband after his injury. These funds, it was alleged, could not be recovered by the husband or his personal representatives. However, plaintiff's complaint con-

tains no allegation which would bring her claim within the holding of *McDaniel.* Her claim is for a loss of conjugal rights, a claim that is specifically set forth by *McDaniel* as an exception to the general rule that case states. While it is true that *McDaniel* specifically excepts recovery for loss of consortium, and appellant here is seeking recovery for a loss of conjugal rights, this Court is not convinced that appellant has made a distinctive claim. Both Black's Law Dictionary 382 (4th ed. 1951), and *Hinnant, supra,* p. 123, define consortium in such a way that conjugal rights must be considered an element of consortium.

Hinnant, supra, specifically denied the right of the wife to sue for loss of consortium resulting from the negligent injury to her husband by a third party. That decision was reaffirmed in *Helmstetler v. Power Co.,* 224 N.C. 821, 32 S.E. 2d 611 (1945), and in *Cozart v. Chapin,* 35 N.C. App. 254, 241 S.E. 2d 144, *dis. rev. denied,* 294 N.C. 736, 244 S.E. 2d 154 (1978). The principle articulated by the Supreme Court of North Carolina controls the present case. "Where there is no intentional wrong, the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done." *Hinnant, supra,* p. 126.

If plaintiff seeks to have a new right of action created on her behalf, she has addressed the wrong forum. In the attempt to distinguish the present case from the facts in *Hinnant,* plaintiff has failed to demonstrate the kind of cogent reasons necessary to justify this Court in ignoring the doctrine of stare decisis.

Finally, we note that the constitutional challenge offered on appeal was not presented to the trial court for an opportunity to rule upon that question. As a general rule, this Court will not pass upon a constitutional question which has not been raised below. *Brice v. Moore,* 30 N.C. App. 365, 226 S.E. 2d 882 (1976). Plaintiff's assignment of error is overruled.

The judgment below is

Affirmed.

Judges VAUGHN and ERWIN concur in the result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 NOVEMBER 1979

ATTAWAY v. SNIPES No. 7917DC143	Stokes (77CVD13)	Affirmed
DEAL v. DEAL No. 7825DC1164	Burke (75CVD87)	Affirmed
DUFFER v. ROYAL DODGE No. 7812DC965	Cumberland (76CVD2260)	New Trial
FINCHER v. WRENN No. 7810SC1132	Wake (77CVS4938)	No Error
McCOLLUM v. McCOLLUM No. 7926DC377	Mecklenburg (76CVD10407)	Affirmed
PAGITT v. PAGITT No. 798DC351	Wayne (77CVD325)	Affirmed
STATE v. BROWN No. 7913SC334	Columbus (78CRS7768)	Dismissed
STATE v. COBB No. 797SC544	Edgecombe (78CRS10305)	No Error
STATE v. EVERLING No. 7912SC484	Cumberland (78CRS34691) (78CRS34715)	No Error
STATE v. EXUM No. 798SC523	Greene (78CRS582)	No Error
STATE v. HARRELL No. 7917SC499	Surry (78CR2678)	No Error
STATE v. JONES No. 798SC527	Wayne (78CR16568)	No Error
STATE v. LANDRUM No. 7929SC516	Rutherford (77CRS5815) (77CRS5816) (77CRS5818)	No Error
STATE v. LEHMAN No. 7926SC386	Mecklenburg (78CRS7475)	Affirmed
STATE v. PETERSON No. 794SC487	Onslow (78CRS19604)	No Error
STATE v. RICE No. 7926SC496	Mecklenburg (78CR140758)	No Error

STATE V. TILLEY No. 7921SC109	Forsyth (78CR16891)	No error
STEVENS v. STEVENS No. 794DC122	Onslow (78CVD262)	Affirmed in Part and Remanded
SUGGS v. HOAGLIN No. 7926SC174	Mecklenburg (77CVS8534)	Dismissed

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, AMERICAN PROTECTION INSURANCE COMPANY, FEDERAL KEMPER INSURANCE COMPANY, KEMPER SECURITY INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, THE HEALTH CARE LIABILITY REINSURANCE EXCHANGE: THOMAS GRIFFITH AND CO., INC., AND THOMAS C. HAYS, JR., INDIVIDUALLY AND AS REPRESENTATIVES OF THE NORTH CAROLINA AGENCIES AND AGENTS OF THE PLAINTIFFS IN THIS ACTION; DRS. JULIAN T. SUTTON AND G. VANCE BYRUM, P.A., JULIAN T. SUTTON, M.D., G. VANCE BYRUM, M.D., ANDERSON PAGE HARRIS, M.D., WILLIAM RUSSELL GRIFFIN, JR. AND DONALD GEORGE JOYCE, INC., DONALD GEORGE JOYCE, M.D., WILLIAM RUSSELL GRIFFIN, JR. M.D., FORSYTH SURGICAL ASSOCIATES, P.A., ROBERT L. MEANS, M.D., RILEY M. JORDAN, M.D., WILLIAM W. SUTTON, M.D., DAVID ALLYN SCUDDER, M.D., TERESITA J. FERRER ESTOYE, M.D.

No. 7810SC1083

(Filed 20 November 1979)

1. Physicians, Surgeons, and Allied Professions § 11; Statutes § 8.1— medical malpractice insurance binders—insurance pursuant to unconstitutional statute —voidness from inception

A binder for medical malpractice insurance issued by plaintiff insurers to defendant physicians only because they were required to write such insurance by the Health Care Liability Reinsurance Exchange Act, Ch. 427 of the 1975 Session Laws, was null and void from its inception where defendants had knowledge of a Statement of Intent, Notice of Protest and Reservation of Rights in which plaintiffs stated that they issued the binder under protest and not voluntarily, that the constitutionality of the Act was being tested, and that plaintiffs intended to consider the policy null and void as of the inception date should they have the option to do so by reason of a court decision declaring the Act unconstitutional, and where the Act was subsequently declared unconstitutional by the N.C. Supreme Court, since (1) the binder was issued solely as a result of the compulsion of the unconstitutional statute and not voluntarily by plaintiffs acting under a mistaken assumption as to the validity of the statute, and (2) the decision holding the Health Care Liability Reinsurance Exchange Act unconstitutional should be given retroactive effect.

2. Physicians, Surgeons, and Allied Professions § 11— insurance binder—Reservation of Rights not void as against public policy

A Reservation of Rights attached to a binder for medical malpractice insurance making coverage contingent on the constitutionality of the Health Care Liability Reinsurance Exchange Act was not void as against public policy.

3. Declaratory Judgments § 4.3— validity of medical malpractice insurance binders—justiciable controversy

Plaintiffs were entitled to a declaratory judgment as to the validity of binders for medical malpractice issued pursuant to the Health Care Liability Reinsurance Exchange Act to nonappearing defendants, although no litigation is pending as to such defendants which might subject plaintiffs to liability on the binders, since the possibility of such litigation is neither remote nor speculative.

APPEAL by plaintiffs from *Smith (Donald L.), Judge*. Judgment entered 24 July 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 24 September 1979.

This action was brought under the Declaratory Judgment Act by plaintiffs, an affiliated group of Illinois insurance companies authorized to write general liability insurance in North Carolina, against the North Carolina Commissioner of Insurance, the Health Care Liability Reinsurance Exchange, and others, seeking judgment declaring Ch. 427 of the 1975 Session Laws unconstitutional and adjudging all applications for medical malpractice insurance received and binders issued thereunder null, void, and unenforceable.

In 1975 a number of insurance companies which had traditionally provided malpractice insurance to physicians in North Carolina announced their withdrawal from the market. On 28 May 1975 the General Assembly responded to the impending medical malpractice insurance crisis caused by this withdrawal by enacting Ch. 427 of the 1975 Session Laws (hereinafter referred to as the Act), which was subsequently codified as G.S. § 58-173.34 et seq. The Act specified that its purpose was "to provide a *mandatory* program to assure an adequate supply of health care liability insurance coverages" (emphasis added) in this state. As a prerequisite to further engaging in the writing of any general liability insurance within the State of North Carolina, every insurer was required to be a member of the newly created North Carolina Health Care Liability Reinsurance Exchange and to write health care liability insurance for any and all persons who were eligible risks as defined by the Act. The Act defined an eligible risk as "a person who is a resident of this State who holds a valid license to practice or perform in this State a given health care profession as set forth in the license requirements of the statutory board issuing said license, and hospitals as defined in

G.S. 131-126.1(3), including but not limited to the following categories: physicians, surgeons, dentists, nurses, nurse anesthetists, physiotherapists, medical or X-Ray laboratories, chiropractors, chiropodists, optometrists, osteopaths and blood banks." G.S. 58-173.37(4). Under the Act, plaintiffs, along with all other general liability insurance companies in the state, were required to participate in all losses suffered by the Reinsurance Exchange on a pro-rata basis based upon the amounts of general liability insurance written within the State of North Carolina. The Act provided that "[n]o company may withdraw from membership in the Exchange unless it ceases to write general liability insurance in this State or ceases to be licensed to write such insurance." G.S. 58-173.38(a).

As required by the Act, plaintiffs subscribed to the plan of operation for the Reinsurance Exchange on 21 August 1975. Thereafter, on 24 September 1975 plaintiffs mailed a notice to each of their North Carolina agents and enclosed a document entitled "Statement of Intent, Notice of Protest & Reservation of Rights," which stated as follows:

STATEMENT OF INTENT
NOTICE OF PROTEST AND RESERVATION OF RIGHTS

Any policy or binder of physicians and surgeons professional liability insurance issued by the Kemper Insurance Company identified below, hereinafter referred to as the Company, is issued under the mandate of North Carolina House Bill 74, Chapter 427, Session Laws of 1975, (G.S. 58-173.23 et seq.) [sic] and is issued under protest and not as a voluntary act of the Company.

The validity of this statute is being tested in court. The Company intends to reinsure all eligible physicians and surgeons professional liability insurance policies and binders in the North Carolina Health Care Liability Reinsurance Exchange, an entity created by the statute. The Company does not intend to assume any risk on its own account.

Any coverage under this policy or binder may be contingent upon the statute being valid and the ability of the Reinsurance Exchange to adequately reinsure this policy or binder.

> In the event that any court declares, or enters a judgment [sic] the effect of which is to render the provisions of House Bill 74, Chapter 427, Session Laws of 1975 (G.S. 58-173.23 et. seq.) [sic] invalid or unenforceable in whole or in part, or in the event the Reinsurance Exchange is inadequately funded, the Company may have the option to consider this policy as null and void as of the inception date. The Company intends to exercise that option if it is available.

The complaint in this action was filed on 30 September 1975, and at 5:30 p.m. on the same date, a temporary restraining order was issued which restrained the Commissioner of Insurance from enforcing the Act against plaintiffs. However, prior to that time plaintiffs' agents had issued verbal binders for health care liability insurance to 48 physicians and professional associations in North Carolina, and it is the validity of these binders which is the subject of the present appeal. One such binder had been issued on 30 September 1975 by Moore & Johnson Agency of Raleigh to defendant-appellees, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King, and Schick. At that time, defendant-appellees were not yet parties to this action.

On 9 October 1975 this action was consolidated with numerous other actions brought by insurers seeking similar relief, and a preliminary injunction was issued. On 29 October 1975 the court ordered that the claim set forth in plaintiffs' complaint "that all applications received and binders issued under the [Act] are null, void and unenforceable," which claim is the subject of the present appeal, be severed from the other claims and that a separate trial be granted on that claim. On the same date defendant-appellees, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King, and Schick, were joined as additional parties in the action on plaintiffs' severed claim. They were served with summons and copy of the complaint on 31 October 1975.

On 7 November 1975, in the trial in the Superior Court of the consolidated actions challenging the constitutionality of the Act, the Superior Court entered judgment declaring the Act unconstitutional on its face and permanently enjoining the Commissioner of Insurance from proceeding to revoke the licenses of companies failing to comply with the Act. As a result of entry of that judgment, the Health Care Liability Reinsurance Exchange, the entity

created by the Act to serve as the medium through which liability insurers were to cede health care liability insurance risks, ceased to operate from and after 7 November 1975. On appeal to the North Carolina Supreme Court, the judgment of the Superior Court was affirmed. *Indemnity Co. v. Ingram, Com'r of Insurance*, 290 N.C. 457, 226 S.E. 2d 498 (1976).

Trial on the severed claim relating to the validity of the binders which had been issued by plaintiffs' agents prior to plaintiffs' obtaining the temporary restraining order on 30 September 1975 was held before the court without a jury at the 24 April 1978 Session of Superior Court in Wake County. The only defendants who participated in the trial were Wake Anesthesiology Associates, Inc., and its members, Drs. Haynes, King, and Schick. These defendants had been made parties on 6 October 1976 to a civil action which arose out of allegedly negligent acts occurring on 5 October 1975, during the period covered by the binder which had been issued to them by Moore & Johnson Agency on 30 September 1975. Eight other defendants executed formal releases, and plaintiffs agreed to a voluntary dismissal of the action as to them.

In a pretrial order, the parties stipulated to certain facts, including "[T]hat at the time of enactment of the Act, the plaintiffs were writing no health care liability insurance in the State, and had no personnel in the State with expertise regarding said insurance," that "[n]one of the plaintiffs' agents had contractual authority with the plaintiffs to bind or write health care liability insurance," and "[t]hat no premium for health care liability insurance was ever charged by or received by any of the plaintiffs." The court also found as a fact that "[n]o premium for health care liability insurance was ever billed to defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick or received by plaintiffs."

Based on the pleadings, stipulations, interrogatories, depositions and exhibits, the court made detailed findings of fact concerning the matters set forth above and in addition made the following findings of fact as to Wake Anesthesiology Associates, Inc., and Drs. Haynes, King, and Schick:

> 16. Defendants Wake Anesthesiology Associates, Inc., and Drs. Lawrence B. Haynes, J. LeRoy King and Jafar M.

Schick had been provided medical malpractice coverage by the St. Paul Fire and Marine Insurance Company since 1969. During 1975 they were informed that St. Paul would terminate coverage at 12:01 a.m. October 1, 1975.

17. Harry W. Moore and Moore & Johnson Insurance Agency were independent insurance agents and as such had represented the Kemper Group in Raleigh for approximately ten years.

18. Since 1969 defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick had employed Moore & Johnson Insurance Agency in Raleigh, North Carolina, to provide defendants medical malpractice insurance coverage.

19. When defendants were notified that their coverage with St. Paul would expire at 12:01 a.m. on October 1, 1975, Harry W. Moore undertook to obtain other medical malpractice insurance coverage for them.

20. As agent for the Kemper Group, Harry W. Moore and Moore & Johnson Agency received the Statement of Intent, Notice of Protest and Reservation of Rights which was mailed to all of plaintiffs' agents September 24, 1975. Receipt of the Statement of Intent, Notice of Protest and Reservation of Rights was acknowledged by Earl Johnson, President of Moore & Johnson Agency, by letter to Kemper dated September 29, 1975.

21. On September 30, 1975, the Moore & Johnson Agency verbally bound coverage for Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick for the 30 day period October 1, 1975 to November 1, 1975. The binder was issued on behalf of Lumbermens Mutual Casualty Company.

22. Prior to issuance of the verbal binder, defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick had determined to curtail their practice and limit professional services to emergency cases because of the unavailability of medical malpractice insurance. Upon issuance of the verbal binder, defendants continued to perform

professional services in the usual manner without limitation as to the kinds of cases accepted.

23. A written binder for health care liability insurance coverage was issued by plaintiffs and forwarded by Moore & Johnson Agency to defendants on October 17, 1975. Attached to the written binder was a copy of the Statement of Intent, Notice of Protest and Reservation of Rights in the identical form and language previously issued to each of plaintiffs' agents on September 24, 1975.

24. In a letter delivered with the written binder, Harry W. Moore assured defendants that he had conferred with Russ Cossart, manager of the Commercial Lines Underwriting Department of Lumbermens Mutual on the morning of October 17, 1975 and that Mr. Cossart had informed him that notwithstanding the Statement of Intent, Notice of Protest and Reservation of Rights, Lumbermens Mutual was insuring defendants up to $1,000,000.00.

25. The binding memorandum issued by plaintiffs contained the following provision:

> 8. This binder shall expire at the end of the binder period shown in item 3 or it shall terminate (1) immediately on notice of cancellation by the named insured or the company or (2) on its effective date if replaced by a policy as stated herein.

26. On October 17, 1975, Harry W. Moore wrote Russ Cossart, Manager of Lumbermens Mutual Commercial Lines Underwriting Department and requested confirmation of defendants' coverage and clarification of the Statement of Intent attached to the written binders. On October 30, 1975, Russ Cossart wrote Harry W. Moore a response to his letter of October 17, and stated that while the insurance industry and Lumbermens Mutual were in a state of confusion about the future of health care liability insurance, "I think we have to agree that the company is offering binders for malpractice coverage which means that we are the carrier at this point."

27. On October 6, 1976, defendants, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick were made parties defendant in a civil action which allegedly arose

out of negligent acts committed on October 5, 1975, during the period of time covered by the binder, the validity of which is contested in this proceeding. Plaintiffs are participating in defense of this suit.

28. Plaintiffs have never given defendants any notice of cancellation of their coverage except such notice as resulted from service on October 31, 1975, of an Order dated October 29, 1975, joining defendants as additional defendants in the action filed by plaintiffs on September 30, 1975.

Based on its findings of fact, the court made the following

CONCLUSIONS OF LAW

1. Harry W. Moore, in his capacity as an independent insurance agent in Raleigh, North Carolina, was an agent both for the plaintiffs herein and for defendants, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick.

2. Russ Cossart was an agent for the plaintiffs herein.

3. Harry W. Moore had apparent authority to alter the terms of the Statement of Intent, Notice of Protest and Reservation of Rights but neither Harry W. Moore nor any other employee of Moore & Johnson Insurance Agency effectively altered the terms of such Statement of Intent.

4. Russ Cossart had apparent authority to alter the terms of the Statement of Intent, Notice of Protest and Reservation of Rights, but he did not effectively alter such terms.

5. There is an actual presently existing controversy between the plaintiffs and defendants, Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick, and declaratory relief is therefore an appropriate remedy as to those defendants and as to them only. There is no actual presently existing controversy between plaintiffs and the remaining named defendants, and declaratory relief is therefore not an appropriate remedy as to them.

6. Plaintiffs have not effectively cancelled their binder pursuant to the terms of the Statement of Intent, Notice of Protest and Reservation of Rights set forth in paragraph 8. Accordingly, the binder issued by plaintiffs to defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King and Schick for the period October 1, 1975 to November 1, 1975 is still valid and in full force and effect.

The joining of these defendants on October 29, 1975 to these legal proceedings does not constitute notice of cancellation of defendants' coverage or adequate notice that the plaintiffs intend to exercise rights reserved in Statement of Intent, Notice of Protest and Reservation of Rights.

7. The binder and Statement of Intent, Notice of Protest and Reservation of Rights, should be construed strictly against plaintiffs and in favor of the insureds and any ambiguities therein should be resolved in favor of the insured defendants.

On these findings and conclusions, the court adjudged the binder issued by plaintiffs to defendants Wake Anesthesiology Associates, Inc., and Drs. Haynes, King, and Schick to be valid and in full force and effect. Plaintiffs' claim for declaratory relief against all other defendants was dismissed.

From this judgment, plaintiffs appeal.

Jordan, Morris and Hoke by John R. Jordan, Jr. and Robert R. Price for plaintiff appellants.

Tharrington, Smith & Hargrove by Wade M. Smith and Steven L. Evans for defendant appellees.

PARKER, Judge.

Appellants have not excepted to any finding of fact made by the trial court. Their only exceptions and assignments of error are directed to the court's conclusion of law No. 6 and to the conclusion of law contained in the second sentence of conclusion of law No. 5. Therefore, this appeal presents for our review only the questions whether these conclusions of law to which exceptions have been taken are supported by the findings of fact, and whether the judgment rendered is in turn supported by the find-

ings of fact and the conclusions of law made. Rule 10(a), N.C. Rules of Appellate Procedure. We hold that they were not and accordingly reverse the judgment rendered.

[1] We first address the questions presented by appellants' assignment of error to the conclusion of law No. 6 in which the court concluded as a matter of law that the binder issued to defendant-appellees, Wake Anesthesiology Associates, Inc. and Drs. Haynes, King and Schick, for the period 1 October 1975 to 1 November 1975 is still valid and in full force and effect. From the language employed by the trial court in its conclusion of law No. 6, it is apparent that the court based its conclusion that the binder is still valid on its determination that plaintiffs had "not effectively cancelled their binder pursuant to the terms of the Statement of Intent, Notice of Protest and Reservation of Rights," and that "[t]he joining of these defendants on October 29, 1975 to these legal proceedings does not constitute notice of cancellation of defendants' coverage or adequate notice that the plaintiffs intend to exercise rights reserved in Statement of Intent, Notice of Protest and Reservation of Rights." For the reasons hereinafter stated, we find the binder void from its inception. Therefore we do not reach the question whether, had it been valid when issued, plaintiffs took adequate steps to cancel it. Plaintiffs here were careful to maintain that the binder was null and void as of its inception and not that it was no longer valid because it had been effectively cancelled by them. Indeed, had plaintiffs attempted to cancel the binder, they might have waived a ground for avoiding it. "By purporting to cancel a policy rather than avoid it from its inception, the insurer may be deemed to waive a ground for avoiding it from its inception, with the consequences that if the cancellation should not be operative for any reason, the insurer will find itself in the position of having waived the ground on which it could have avoided the policy and having failed to cancel the policy; and the policy would therefore remain in force." 17 Couch on Insurance, 2d, § 67:50; *see also*, 12 Appleman, Insurance Law and Practice, § 7124.

In our opinion, whether the binder is still valid or was void from its inception depends upon the effect which should properly be given to the decision rendered by our Supreme Court in the earlier stage of this litigation, reported in *Indemnity Co. v. Ingram, Com'r of Insurance*, 290 N.C. 457, 226 S.E. 2d 498 (1976),

which held Ch. 427 of the 1975 Session Laws unconstitutional. At one time the view was expressed that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442, 30 L.Ed. 178, 186, 6 S.Ct. 1121, 1125 (1886). Later, the United States Supreme Court receded from this broad statement of absolute retroactive invalidity, saying with reference to it:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 84 L.Ed. 329, 332-33, 60 S.Ct. 317, 318-19 (1940).

Our own Supreme Court adopted this approach in *Roberson v. Penland*, 260 N.C. 502, 133 S.E. 2d 206 (1963), in which it was held that parties who voluntarily signed a consent judgment and executed a deed on the good faith, albeit erroneous, assumption that the statute giving the husband the right to dissent from the will of his wife was valid, had no right to have the consent judgment cancelled and the deed rescinded when it was subsequently determined in other litigation that the statute was unconstitutional. In the opinion in that case, our Supreme Court quoted with approval the following statement from *McLean Coal Co. v. Pittsburgh Terminal Coal Corp.*, 328 Pa. 250, 253, 195 A. 4, 6 (1937):

> The unconstitutionality of a statute is a defense to an action only when the liability is created by the statute in question; the invalidity of an act is of no avail when the liability arises

from acts indicating the assumption of liability by parties who may, it is true, be acting only because the statute was passed, but who are, nevertheless, voluntarily assuming a relationship which creates a liability.

In the present case, unlike the situations presented in *Roberson v. Penland*, and in *McLean Coal Co. v. Pittsburgh Terminal Coal Corp., supra*, plaintiffs did not voluntarily assume any liability. If their liability was not created by the express language of Ch. 427 of the 1975 Session Laws, in a very real sense it was imposed upon them by that statute. True, the statute allowed them a choice, either to issue to any and all applicants declared by the statute to be "eligible", medical malpractice liability insurance (something which they had never previously done, did not wish to do, and which they had insufficient expertise to do successfully), or to surrender their licenses and cease writing any liability insurance in North Carolina. This was, however, a choice which our Supreme Court held the Legislature had no constitutional power to force plaintiffs to make. Clearly, giving them such a choice could not make their actions in issuing binders, rather than immediately going out of business, voluntary in a legal sense. The highwayman traditionally allowed his victim the choice of surrendering his money or his life, but when the victim responded by handing over his purse, no one seriously contended that he did so voluntarily. When the plaintiffs issued the binders here in question, they did so expressly stating that the binders were being issued under the mandate of the statute, under protest, "and not as a voluntary act of the Company." The entire record attests the truth of this statement. Plaintiffs here, unlike the plaintiffs in *Roberson v. Penland, supra*, did not voluntarily enter into a contract under the mistaken assumption that the statute was valid. On the contrary, right from the start plaintiffs here took the position that the statute might be unconstitutional, and they took prompt action to have it declared so. They knew, however, that should they hesitate in rendering prompt compliance with the statute, the Commissioner of Insurance could, and in all probability would, revoke their licenses to do business in North Carolina. At least this was true during the period before they were able to obtain the protection of a court order prohibiting him from doing so, which is precisely the period during which the binders here in question were issued. With their licenses revoked, they would

have been immediately out of business in this State. Thus, even if plaintiffs could have known positively from the start that their view as to the unconstitutionality of the statute would ultimately be sustained by the courts, they were nevertheless under powerful compulsion to comply with the statute until a protective order could be obtained. It was under those circumstances that the binders here in question were issued. We think it beyond question that they were issued solely as result of the compulsion of the unconstitutional statute and not as the voluntary acts of the plaintiffs acting under any mistaken assumption as to the validity of the statute. In view of the extreme compulsion which the statute exerted, we hold that any liability imposed on plaintiffs by issuing the binders was one which should properly be viewed as having been "created by statute." *See McLean Coal Co. v. Pittsburgh Terminal Coal Corp., supra.*

Even viewing the liability as one having been created by statute, however, the question still remains whether the unconstitutionality of Ch. 427, 1975 Sess. Laws, should be given effect retroactively from the date of the Supreme Court's opinion declaring that statute unconstitutional. In *Lemon v. Kurtzman*, 411 U.S. 192, 36 L.Ed. 2d 151, 93 S.Ct. 1463 (1973), the United States Supreme Court recognized that there is no principle which requires absolute retroactive effect to be given in every case to a decision of unconstitutionality, and that courts should consider whether retrospective operation will further or retard the operation of the decision. *See Lemon, supra*, at 199, 36 L.Ed. 2d at 160-161, 93 S.Ct. at 1468-1469. In *Lemon*, plaintiffs sought to restrain payments of public funds under contracts made with church-affiliated schools for services performed prior to a determination by the United States Supreme Court that the scheme for payment of state funds to such schools violated the Establishment Clause of the First Amendment. The Supreme Court affirmed a decision of a three-judge federal district court permitting the state to reimburse non-public sectarian schools because it determined that prospective application of the decision of unconstitutionality would not foster the constitutional infirmity of the payment scheme.

The basis on which our Supreme Court found the act creating the Health Care Liability Reinsurance Exchange unconstitutional in *Indemnity Co. v. Ingram, supra*, was that the State could not,

consistent with the Law of the Land Clause of Article I, § 19, of the State Constitution, or the Due Process Clause of the Fourteenth Amendment, conscript insurers who had never previously written medical malpractice insurance to supply a public need for such insurance at their own risk or expense. The court was concerned with the dilemma facing the insurer previously inexperienced in the field of medical malpractice insurance: "[T]o compel such company, against its will, to write health care liability insurance for whatever health care provider may see fit to apply to it therefor would subject the company to a risk of financial disaster." *Indemnity Co. v. Ingram, supra,* at 468, 226 S.E. 2d at 506. It is significant that the effect of the determination of unconstitutionality was to render the Health Care Liability Reinsurance Exchange, the medium through which the risk of loss could be transferred, nonexistent. To fail to give retroactive effect to our Supreme Court's decision in resolving the present controversy would mean that plaintiffs, who involuntarily issued the binder to defendant-appellees despite their inexperience in the field of malpractice insurance in this state, are now confronted with tremendous potential risk of loss which they are no longer able to cede to the Reinsurance Exchange. Such a result would indeed frustrate the rationale behind the *Indemnity Co.* decision.

Additionally, although defendant-appellees here, like the parochial schools in *Lemon, supra,* relied on the statute and the contract made pursuant to it in continuing to perform services, they, unlike the parochial schools, had notice that the contract was being entered into by the other party under protest and that the constitutionality of the statute was being questioned. On 24 September 1975, six days before the verbal binder to defendant-appellees was issued, plaintiffs mailed to each of their agents in North Carolina, including the Moore & Johnson Insurance Agency, the "Statement of Intent, Notice of Protest and Reservation of Rights," setting forth plaintiffs' position. On 29 September 1975, the day before the verbal binder was issued to defendant-appellees, the president of Moore & Johnson Agency wrote a letter to plaintiffs acknowledging receipt of that statement. Harry W. Moore and the Moore & Johnson Agency were independent insurance agents and as such were agents with respect to issuance of the binders not only for plaintiffs but for defendant-appellees as well. (The trial court expressly so concluded in its Conclusion

of Law No. 1, to which no exception has been taken, and that conclusion is amply supported by the findings of fact and the evidence.) "Where both the insured and the insurer have knowledge of the fact that one arranging insurance is the agent of, and is representing, both parties, he is the agent for both, and his knowledge is the knowledge of both, and the insured is bound by a limitation clause inserted in the policy with the knowledge of such agent." 3 Couch on Insurance 2d, § 25:27, p. 319. Moreover, Harry Moore testified without contradiction as follows:

> I had received a request from Wake Anesthesiology Associates, Inc. and Doctors Haynes, King and Schick for medical malpractice coverage. I had explained to them that the coverage available would be that available through the Act. I explained to them the state that existed here in North Carolina in regard to medical malpractice insurance at that time including the availability of it. I can't exactly recall whether it was during that conversation that I advised them that I had received the Notice and Statement of Intent. It could have been. It could have been actually before that conversation or afterwards. At sometime during the period of time of negotiations for this binder of insurance, they did have notice of the Statement of Intent.

It is clear, therefore, that when the verbal binder was issued on 30 September 1975, defendant-appellees had knowledge of plaintiffs' Statement of Intent, Notice of Protest and Reservation of Rights, and were on notice that plaintiffs issued the binder under protest, not as their voluntary act, and that plaintiffs intended to consider the policy "null and void as of the inception date" should they have the option to do so by reason of a court decision declaring Ch. 427 of the 1975 Session Laws invalid. Thus, defendant-appellees here, unlike the parochial schools in *Lemon, supra*, were at all pertinent times fully informed that the validity of their contract and the constitutionality of the statute under compulsion of which it was made were being attacked.

The United States District Court decision in *Lemon*, 348 F. Supp. 300 (E. D. Penn. 1972), which was affirmed by the United States Supreme Court, focused on the lack of detriment to the State of Pennsylvania in requiring payment to be made under the contracts. Here, it is clear that plaintiffs will suffer substantial

hardship if held to their involuntary contracts. The potential risk which they unwillingly assumed under compulsion of the statute was one which, had the statute been valid, they could have ceded to the Reinsurance Exchange, to be shared ratably among all liability insurers. The risk which they now must face is solely their own. Having given due consideration to the equities on either side as well as to the effect of retroactive application of the decision in *Indemnity Co. v. Ingram, supra*, we conclude that plaintiffs should not be bound by obligations forced upon them by the statute which our Supreme Court subsequently held unconstitutional.

[2] Defendant-appellees contend that the Reservation of Rights attached to their binder is void as against public policy. This contention is without merit. Our Supreme Court has held that "an agreement which violates a provision of a statute or which cannot be performed without a violation of such provision is illegal and void." *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E. 2d 77, 80 (1947). The contract entered into by defendant-appellees here in accepting the binder for insurance coverage is not such an agreement. The Statement of Intent recited that the coverage was only contingent if Ch. 427 of the Sess. Laws was held unconstitutional. There is no indication that plaintiffs would have refused to recognize the insurance binder as valid if the statute had been held constitutional. Because the statute has now been declared void it no longer represents the public policy of this State, and plaintiffs' Statement of Intent, Notice of Protest and Reservation of Rights may be given full force and effect.

[3] Plaintiffs also assign error to the trial court's conclusion that there is no presently existing controversy between plaintiffs and defendants other than defendant-appellees. This action was originally brought by plaintiffs under G.S. § 1-264 to obtain a declaratory judgment that *all* applications received and binders issued under Ch. 427, 1975 Session Laws, were null, void and unenforceable. Plaintiffs alleged in their complaint that they had been bound on applications for health care liability insurance by their agents. Each of the associations and individual physicians to whom binders were issued was made a party to this suit. The Declaratory Judgment Act grants jurisdiction to our courts to adjudicate cases in which it appears from the allegations of the complaint that a real controversy exists between the parties, that the

controversy arises out of opposing contentions of the parties as to the validity or construction of a contract, and that the parties to the action have or may have legal rights or liabilities which are involved in the controversy. *See, Little v. Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689 (1960). "The purpose of the Declaratory Judgment Act is, 'to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations'." *Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E. 2d 654, 657 (1964). Although none of the defendants with respect to whom the lower court found that no actual controversy existed participated at the trial, each was made a party and had notice that an action had been brought to declare their coverage null and void. Their failure to appear at trial did not render the issue of the validity of binders nonjusticiable. There appears to be no reason for denying plaintiffs the declaratory relief which they seek. Although there may be no litigation pending as to the nonappearing defendants which might subject plaintiffs to liability on the binders, the possibility of such litigation is neither remote nor speculative. The policies which were issued provided coverage for 'occurrences', and as plaintiffs have pointed out, their risk on such policies often outlives the termination date of coverage, since the effects of negligent medical treatment occurring during the period of coverage may not become apparent for months or even years. In the meantime, unless declaratory relief is granted, plaintiffs are unable to determine whether premiums should be collected on the binders or whether any reserves should be maintained to provide for future claims based on acts of negligence which may have occurred during the periods of coverage. For this reason, we hold that the trial court erred in concluding that declaratory relief was not an appropriate remedy to determine the validity of the binders issued to defendants other than the appellees.

Judgment in favor of defendant-appellees is reversed. As to that portion of the judgment denying declaratory relief on the issue of the validity of binders issued to other defendants, the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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

GEORGE THOMAS v. SALLY THOMAS

No. 7913DC89

(Filed 20 November 1979)

1. **Appearance § 2; Rules of Civil Procedure § 4— validity of service of process challenged—general appearance**

Where plaintiff husband died prior to a hearing on defendant's motion to set aside a decree of absolute divorce, there was no merit to plaintiff executor's contention that he had not been served with process and was therefore not properly before the court, since the executor made a general appearance and moved for dismissal of defendant's motion, and the trial court therefore properly obtained jurisdiction over the person of the executor in the action.

2. **Rules of Civil Procedure § 19— action to set aside divorce—necessary parties**

The only necessary parties to an action to set aside an absolute divorce decree after the husband's death were the surviving wife and the personal representative of the deceased husband.

3. **Rules of Civil Procedure § 4.1— service by publication—knowledge of defendant's address—service void**

In an action to set aside a decree of absolute divorce where defendant alleged that the complaint in the divorce action was served by publication though plaintiff knew or by the exercise of reasonable diligence could have determined defendant's address, there was no merit to plaintiff's contention that defendant's motion to set aside the divorce contained insufficient allegations of fraud and thus should have been dismissed or denied by the trial court, since service of process by publication is void even in the absence of legal fraud or concealment if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained, and the court made findings supported by evidence as to plaintiff's knowledge of defendant's address; additionally, plaintiff violated the technical requirements of G.S. 1A-1, Rule 4(j)(9)c by failing to mail defendant a copy of the notice of service by publication at her Virginia residence, and this defect in itself was sufficient to render the resulting divorce decree invalid.

APPEAL by plaintiff from *Grady, Judge.* Judgment entered 12 September 1978 in District Court, BLADEN County. Heard in the Court of Appeals 31 August 1979.

George Thomas sued the defendant Sally Thomas for absolute divorce on grounds of one year separation of the parties under G.S. 50-6. George Thomas alleged in his complaint that he was married to defendant in December 1942 and that they had lived separate and apart from one another continually since July

1967. The complaint was served upon the defendant by publication pursuant to G.S. 1A-1, Rule 4(j)(9)c. Following the publication, the attorney for George Thomas filed an affidavit in which he stated that the address of the defendant was unknown and could not be ascertained with due diligence, and that the Sheriff of Bladen County had returned a copy of the complaint and summons with the notation, "not to be found in Bladen County after due and diligent inquiry at the last known address of the defendant." The record contains no answer to the complaint and the parties do not dispute that defendant did not appear to defend the divorce action. A decree of absolute divorce was entered on 21 July 1977.

Defendant, on 1 December 1977, filed a motion in the cause, with supporting affidavits, pursuant to G.S. 1A-1, Rule 60(b)(3), (4) and (6), to have the judgment and decree of absolute divorce set aside on the grounds that George Thomas knew or with due diligence could have determined the address of the defendant at the time the action was instituted. Said motion, with the supporting affidavits, was served on James R. Melvin, as attorney of record for George Thomas, along with notice that the defendant would bring the motion before the court for hearing on 14 December 1977 or as soon thereafter as said motion could be heard. In her motion, defendant contended that George Thomas' resort to service of process by publication was insufficient and fraudulent, thereby depriving the trial court of jurisdiction to hear the cause. On 16 February 1978, James R. Melvin, as executor of the estate of George Thomas, appeared and moved to dismiss defendant's Rule 60(b) motion. In his motion, the executor stated that the motion of the defendant movant should be dismissed by reason of the failure of the defendant movant to comply with G.S. 1A-1, Rule 25, "for lack of having filed a proper [m]otion to order the substitution of James R. Melvin, Executor as the proper party against whom the [m]otion should now be prosecuted, the said George Thomas having died in October, 1977."

At the same session, defendant moved to amend her Rule 60(b) motion to include a deed conveying real property to George Thomas and defendant by the entirety and a document purporting to be George Thomas' will. Defendant also moved to join the children of George Thomas as parties plaintiff, pursuant to G.S. 1A-1, Rule 19(a), and to substitute the executor of the estate of

George Thomas for the deceased pursuant to Rule 25. By order of 15 March 1978, the trial court allowed all of defendant's motions.

At the 30 August 1978 hearing on defendant's Rule 60(b) motion, defendant presented witnesses who testified that they were neighbors and friends of George Thomas and that they had known him and the defendant Sally Thomas for a number of years. They stated that they knew the whereabouts and address of Sally Thomas and shortly before George Thomas instituted the divorce action had informed him that Sally Thomas was in the hospital. Defendant's witnesses testified that they offered to take plaintiff to see her, but that he declined the offer, and that at the time the divorce action was instituted George Thomas knew the whereabouts and address of Sally Thomas. The executor presented a neighbor and friend of George Thomas who testified that he had assisted Thomas in the procuring of his divorce and at that time, George Thomas did not know the whereabouts of Sally Thomas. The executor also offered the deposition of R. Rick Reiss, an attorney practicing in Newport News, Virginia. In his deposition Mr. Reiss testified that he was visited in his office by Eliza Williams, Sally Thomas' daughter on 13 June 1977, and that Eliza Williams informed him of the divorce action pending in Bladen County.

Upon defendant's objection, the trial court excluded testimony of Mr. Reiss to the effect that he was retained at that time to protect the interest of Sally Thomas and the family, that he was not given any instructions as to the pending divorce action, and that he wrote a letter to James R. Melvin, attorney for George Thomas. The letter stated that Reiss was retained by Sally Thomas' family, but was not in a position to object to the divorce proceedings and did not intend to participate in them. He was allowed to testify that at the time he was visited by Eliza Williams, he understood that Sally Thomas was residing with Eliza and that Eliza showed him a copy of the notice of the divorce action published in *The Bladen Journal.*

The additional parties plaintiff joined pursuant to the trial court's order of 15 March 1978 were never served with process. Following the hearing on 30 August 1978, the trial court entered an order on 12 September 1978 setting aside the divorce decree. In the order the trial court found that George Thomas had con-

cealed the address of the defendant Sally Thomas from his attorney and that he had knowingly concealed her address from the court for the purpose of obtaining service of process by publication, thereby preventing personal service on the defendant and depriving her of her right to be personally served, which constituted legal or constructive fraud upon the court. In that same order the trial court found that the additional parties whom he had previously joined as necessary parties plaintiff to the action were not necessary parties for a complete determination of the action, found that the previous order joining them as additional parties was improvidently entered, and the court set aside and rescinded that portion of the previous order.

From the order setting aside the divorce decree the plaintiff executor has appealed.

Moore & Melvin, by James R. Melvin, for plaintiff appellant.

Hester, Hester & Johnson, by W. Leslie Johnson, Jr. and Thomas M. Johnson, for defendant appellee.

WELLS, Judge.

Plaintiff has brought forth numerous assignments of error, but when carefully distilled they reduce to two basic aspects of the trial court's order. The first is the question of whether the parties plaintiff were properly joined and constituted under G.S. 1A-1, Rule 25. The second is whether the divorce decree should have been set aside for insufficient or fraudulent service of process.

[1] The question of parties breaks down into two parts: (1) whether the executor of George Thomas was properly substituted; and (2) whether the heirs of George Thomas are necessary parties. G.S. 1A-1, Rule 25, as amended by the 1977 North Carolina General Assembly, for persons dying after 1 September 1977, provides that:

> (a) *Death.*—No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the presentation of claims in G.S. 28A-19-3, may order the substitution of said party's personal representative or collector and allow the action to be continued by or against the substituted party.

Plaintiff does not raise the question of whether the substitution of the executor was ordered within the time allowed under G.S. 28A-19-3; nor whether the cause of action abated upon the death of George Thomas. He argues that when defendant's motion in the cause came on for hearing on 16 February 1978 the executor had not been served with process and was therefore not properly before the court, that defendant's amendment could not correct the deficiency of service upon the executor as the proper party, and that his motion to dismiss should have been allowed.

We cannot agree. Defendant served her original motion to set the divorce aside on Melvin as attorney for George Thomas. After service of that motion had been made upon him, Melvin, as executor, made a general appearance at the 16 February 1978 session of District Court and moved for dismissal of defendant's motion. As grounds for his motion to dismiss, Melvin argued that the defendant had not taken the proper steps to substitute him, as executor of the estate of George Thomas, as the party plaintiff. His motion to dismiss was based solely on grounds of improper substitution under Rule 25 and he did not raise a jurisdictional issue such as lack of service of process. G.S. 1-75.7 provides that, "A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action . . . ." A party invokes the judgment of the court for any purpose other than to contest service of process makes a general appearance. *Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974). *See also, Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979) (motion to disqualify plaintiff's counsel); *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 243 S.E. 2d 412 (1978), *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978) (giving of notice of appeal and demanding trial by jury). We hold that Melvin's appearance, as executor, was a general appearance and accordingly the trial court properly obtained jurisdiction over the person of Melvin, as executor, in this action.

[2] We now reach the question of whether the heirs of George Thomas were necessary parties to this action.

Plaintiff maintains the trial court erred in setting aside that portion of the court's order of 15 March 1978 joining the children

of George Thomas as necessary parties to the action under G.S. 1A-1, Rule 60(b)(6). Rule 60(b)(6) gives the trial court broad power to vacate judgments whenever such action is appropriate to bring about justice. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E. 2d 446 (1971); *Sides v. Reid*, 35 N.C. App. 235, 241 S.E. 2d 110 (1978). Plaintiff does not argue that the trial court could not, pursuant to defendant's motion under Rule 60(b)(6), correct an error of law urged upon it by defendant. Plaintiff's sole contention is that the children of George Thomas, as heirs under his will, are necessary parties to the action and must be joined and served with process. We do not agree. G.S. 1A-1, Rule 19, sets forth the rules pertaining to the necessary joinder of parties. It provides in pertinent part:

> (a) *Necessary joinder.*—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants . . . .
>
> (b) *Joinder of parties not united in interest.*—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

There have been numerous cases dealing with the question of joinder or nonjoinder of necessary parties, interpreting the former statute, G.S. 1-73, and Rule 19. The enactment of Rule 19 has not changed the essence of the law, as found by our courts in cases decided under the former statute. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979). It seems clear that the heart of the Rule lies in the proposition that all parties should be joined whose presence is necessary to a complete determination of the controversy.

> When a complete determination of the controversy cannot be made without the presence of a party, the court must cause it to be brought in . . . . [Citations omitted.]

* * *

> When a person is so vitally interested in the controvery that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence, such person is a necessary party to the action. [Citations omitted.]

Strickland v. Hughes, 273 N.C. 481, 485, 160 S.E. 2d 313, 316 (1968).

> A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. [Citation omitted.]

Assurance Society v. Basnight, 234 N.C. 347, 352, 67 S.E. 2d 390, 395 (1951). *See also, Wall v. Sneed*, 13 N.C. App. 719, 187 S.E. 2d 454 (1972).

The only persons who may bring an action for absolute divorce are those persons who are lawfully married to one another. Where there are children born to a marriage it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. There are but two necessary parties to an action for divorce: husband and wife. G.S. 50-5 and G.S. 50-6. The rights litigated in an action for divorce are those which arise out of a marriage. "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine . . . ." G.S. 50-11(a).

We have not found a previous decision of our courts dealing with a factual situation on all fours with the case now before us, but the North Carolina cases which we have examined concerning the maintenance of an action to set aside a divorce decree after a spouse's death appear to have been defended by the decedent's executor or administrator. This is true even where the rights of a decedent's heirs to real property held by the decedent and an estranged spouse by the entirety during the marriage would be affected were the divorce decree to be overturned. *See, Weddle v. Weddle*, 246 N.C. 336, 98 S.E. 2d 302 (1957); *Patrick v. Patrick*, 245 N.C. 195, 95 S.E. 2d 585 (1956); *Poole v. Poole*, 210 N.C. 536, 187 S.E. 777 (1936); *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315 (1925).

Guided by the statutes and cases we have cited, we hold that the only necessary parties to this action are the surviving spouse and the personal representative of the deceased spouse.

[3] We deal now with plaintiff's argument that defendant's motion to set aside the divorce contained insufficient allegations of fraud and was supported with insufficient evidence of the essential elements of fraud and should thus have been dismissed or denied by the trial court.

A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1974), *rehearing denied*, 285 N.C. 597 (1974); *In re Phillips*, 18 N.C. App. 65, 196 S.E. 2d 59 (1973); *Edwards v. Edwards*, 13 N.C. App. 166, 185 S.E. 2d 20 (1971). "A divorce granted without proper service of process upon the defendant is void when he does not appear in the action or does not otherwise waive service of process." 1 Lee, N.C. Family Law § 52, p. 215 (1963). Service of process by publication is in derrogation of the common law and accordingly, statutes authorizing it are strictly construed both as grants of authority and in determining whether service has been made in conformity with the statute. *Sink v Easter, supra; Cedar Works v. Mfg. Co. and Edwards v. Chesson*, 41 N.C. App. 233, 254 S.E. 2d 673 (1979).

G.S. 1A-1, Rule 4(j)(9), which provides for alternative service on a party that cannot otherwise be served, states in pertinent part:

> c. Service by publication.—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b . . . of this subsection (9). * * * If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot

> be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10 (2) and the circumstances warranting the use of service by publication.

In *Sink*, a negligence action, the plaintiff attempted personal service on the defendant at his last known residence. The summons was returned unserved with a notation that the defendant was in Amsterdam and his address was unknown. Plaintiff's attorney called the defendant's residence in High Point and was advised by a party at the defendant's residence that the defendant was in Amsterdam. Plaintiff then served the defendant by publication, but failed to send a copy of the notice of service of process by publication to the defendant at his High Point address. The Supreme Court held that the attempted service of process by publication was defective on two separate grounds. First, the Court held that the service was insufficient because the plaintiff could have served the defendant personally, by leaving a copy of the summons with the individual with whom plaintiff's attorney spoke at the defendant's High Point residence. Justice Huskins, writing for a unanimous Court, concluded, 284 N.C. at 558-559, 202 S.E. 2d at 141:

> On these facts, defendant was not subject to service of process by publication under Rule 4(j)(9)c. Therefore, the attempted service of process by means of publication was void. [Citations omitted.]

Second, the Court held plaintiff's attempted service of process by publication invalid because the plaintiff failed to mail defendant a copy of the notice of service of process by publication, as explicitly required by the statute.

In the case at bar plaintiff claims defendant's motion should have been dismissed because of defendant's failure to plead and prove all the essential elements of fraud. *Sink* makes it clear, however, that service of process by publication is void *even in the absence of legal fraud or concealment* if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained. In the present action the trial court made detailed findings of fact as to George Thomas'

knowledge of the defendant's address and such findings on a Rule 60(b) motion, when supported by competent evidence, are conclusive on appeal. *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E. 2d 585 (1979); *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978). In light of our holding we find it unnecessary to reach the issue concerning the sufficiency of defendant's allegations and proof of fraud.

Additionally, as in *Sink*, since the record before us indicates plaintiff failed to mail defendant a copy of the notice of service by publication to the defendant at her Virginia residence, plaintiff violated the technical requirements of Rule 4(j)(9)c and this defect is itself sufficient to render the resulting divorce decree invalid. We have previously voided judgments, even in the absence of any allegation or finding of fraud, where the technical requirements of Rule 4(j)(9)c were not met. *In re Phillips*, 18 N.C. App. 65, 196 S.E. 2d 59 (1973); *Edwards v. Edwards*, 13 N.C. App. 166, 185 S.E. 2d 20 (1971).

Plaintiff has raised two other arguments which require brief discussion.

The trial court excluded a letter of attorney Reiss addressed to plaintiff's counsel and testimony of Reiss' deposition in which Reiss stated he had been retained by defendant's "family", but received no instructions with respect to the divorce, that he was not in a position to defend the divorce action, and did not intend to participate in it. The exclusion of such testimony, if error, was not prejudicial to plaintiff.

Plaintiff argues that it was error for the trial court to allow the will of George Thomas into evidence and "finding that the ownership of real property was relevant to this cause." In his findings of fact, Judge Grady did mention the existence and contents of the will of George Thomas and did find that Sally Thomas had property rights in a certain parcel of land deeded to George and Sally Thomas by the entirety. In his findings as to the invalidity of service by publication, Judge Grady made no references to the will or to the property. In that we have held there was sufficient evidence before him on the issue of invalidity of service of process to justify setting the divorce aside, the references to the will and property are not prejudicial to the plaintiff.

Affirmed.

Judges CLARK and ERWIN concur.

GOLER METROPOLITAN APARTMENTS, INC. v. JUANITA WILLIAMS

No. 7821DC1001

(Filed 20 November 1979)

1. **Landlord and Tenant § 13— federally subsidized housing project—entitlement to continued occupancy—eviction procedure**

A tenant in a federally subsidized low-income housing project has an "entitlement" to continued occupancy and cannot be evicted until certain procedural protections have been afforded him, including notice, confrontation of witnesses, counsel, and a decision by an impartial decision maker based on evidence adduced at a hearing.

2. **Landlord and Tenant § 13— federally subsidized housing project—propriety of month-to-month tenancy**

A month-to-month tenancy after the initial lease period of one year can exist in a federally subsidized low-income housing project, and defendant's month-to-month tenancy continued without interruption where plaintiff landlord failed to evict defendant pursuant to HUD eviction procedures.

3. **Landlord and Tenant § 13— month-to-month tenant—federally subsidized housing—damages for wrongful eviction**

A month-to-month tenant in a federally subsidized housing project who was wrongfully evicted was entitled to recover damages under G.S. 42-36 for the loss of her security deposit, her moving expenses, the cost of transfer and storage of her furniture, and the loss of her entitlement to federal rental subsidy payments from the time of her eviction until she obtained a reversal of the eviction order.

APPEAL by defendant from *Tash, Judge.* Judgment entered 22 September 1978 in District Court, FORSYTH County. Heard in the Court of Appeals 20 August 1979.

On 6 August 1973, defendant Williams entered into a lease agreement with the Goler Metropolitan Apartments (Goler), located in Winston-Salem, North Carolina. Goler operates under contract with the Secretary of Housing and Urban Development (HUD), pursuant to Sections 8 and 236 of the National Housing Act as amended, and is thereby subject to applicable HUD regulations, specifically 24 C.F.R. § 450, Subchapter J governing tenant

eviction procedures. The lease agreement, as approved by HUD, provided that upon expiration of the fixed term of one year, the lease would be "automatically renewed for successive terms of one month each" at the stated monthly rental. The lease also provided that "[e]ither party may terminate this lease at the end of the initial term or any successive term by giving thirty (30) days written notice in advance to the other party."

On 24 February 1977, Goler notified defendant in writing that she had 30 days to vacate her apartment. Another notice to vacate was sent to defendant on 28 March 1977. Upon defendant's continued occupancy, Goler instituted an action in summary ejectment against defendant on 4 April 1977. After hearing, at which defendant appeared, judgment was entered against her, and a writ of possession was issued, putting Goler in possession of the apartment. Defendant appealed to District Court and filed an answer and counterclaim alleging that Goler had not complied with applicable HUD regulations in the eviction process, and asking for damages for wrongful eviction pursuant to G.S. 42-36.

On 4 November 1977, defendant moved for summary judgment. After hearing, the court ruled that, as a matter of law, defendant was wrongfully dispossessed in that Goler failed, in its letters of 24 February 1977 and 28 March 1977, to advise defendant of her right to present a defense, as required by 24 C.F.R. § 450.4(a), and that Goler failed to properly serve notice on defendant pursuant to 24 C.F.R. § 450.4(b). An order of partial summary judgment was thereby issued on behalf of defendant, leaving the issue of damages for trial.

Pursuant to G.S. 42-36, a judgment for defendant was entered on 22 September 1978, awarding defendant recovery for the loss of her security deposit, her moving expenses, the cost of transfer of her furniture into storage, one month's storage fee, and one month's rental subsidy, as provided for by Sections 8 and 236 of the National Housing Act. Award of rental subsidy for one month was based on the Court's ruling that pursuant to the lease agreement entered into by Goler and defendant, defendant held a month-to-month tenancy at the time of her being wrongfully evicted, and therefore her loss of entitlement to federal subsidies was limited to one month.

From entry of judgment limiting defendant's damages for loss of her rental subsidies to one month, defendant appeals.

Wagner and Wagner, by David H. Wagner, for plaintiff appellee.

Paul Sinal, of Legal Aid Society of Northwest North Carolina, Inc., for defendant appellant.

MORRIS, Chief Judge.

The first question on appeal is whether, in light of recent decisions tending to expand a tenant's right of occupancy in public housing, tenancy in a federally subsidized low-income housing project can exist on a month-to-month basis. We hold that such a tenancy is consistent with the federal scheme of providing low-cost housing to qualified persons.

[1] It has been recently established that a tenant in a federally subsidized low-income housing project enjoys substantial procedural due process rights under the Fifth and Fourteenth Amendments. *E.g., Caramico v. Secretary of the Department of HUD,* 509 F. 2d 694 (2d Cir. 1974); *Lopez v. Henry Phipps Plaza South, Inc.,* 498 F. 2d 937 (2d Cir. 1974); *Joy v. Daniels,* 479 F. 2d 1236 (4th Cir. 1973); *Escalera v. New York City Housing Authority,* 425 F. 2d 853 (2d Cir.), *cert. denied,* 400 U.S. 853, 91 S.Ct. 54, 27 L.Ed. 2d 91 (1970). Under these decisions, a tenant in a federally subsidized housing project has an "entitlement" to continued occupancy, and to that extent cannot be evicted unless and until certain procedural protections have been afforded him, including notice, confrontation of witnesses, counsel, and a decision by an impartial decision maker based on evidence adduced at a hearing. *Joy v. Daniels, supra; Caulder v. Durham Housing Authority,* 433 F. 2d 998, (4th Cir. 1970), *cert. denied,* 401 U.S. 1003, 91 S.Ct. 1228, 28 L.Ed. 2d 539 (1971). *See Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). It has become apparent that by enacting the rules and regulations implementing the National Housing Act, 12 U.S.C. § 1701 *et seq.,* Congress contemplated "more occupancy entitlement than limited leasehold terms", *Joy v. Daniels, supra,* at 1241, and at least some degree of permanency. *Id. See* Note, *Procedural Due Process in Government-Subsidized Housing,* 86 Harv. L. Rev. 880 (1973). The

Fourth Circuit, for example, has stated this policy in the following manner.

> "In view of the congressional policies of providing a decent home (with stability and security) for every American family, and of prohibiting arbitrary and discriminatory action, bolstered by the FHA regulations and custom, we find in the scheme of the National Housing Act and the Housing and Urban Development Act of 1965 a property right or entitlement to continue occupancy until there exists a cause to evict other than the mere expiration of the lease." *Joy v. Daniels*, supra, at 1241.

Thus, in their attempt to cure the evils of discriminatory and arbitrary eviction procedures prevalent in federally-subsidized housing, the courts have established a standard of "good cause" as a condition upon which tenancies in public housing may be terminated.

This "good cause" concept is reflected by the recently adopted Housing & Urban Development tenant eviction procedures. 24 Code Federal Regulations §§ 450.1 *et seq.*, Subchapter J (41 Fed. Reg. 43330, 30 September 1976), specifically Section 450.3. These provisions, together with provisions for termination notice in Section 450.4, enumerate the conditions which must be met before a tenancy can be terminated in federally subsidized housing. Given the language cited above, and the strict requirements for termination set out in 24 C.F.R. §§ 450.3 and 450.4, it seems that the obvious intent of HUD was to preserve a tenant's "property interest" in continued occupancy in subsidized housing by restricting the landlord's right to terminate the tenancy held by the tenant.

The lease under consideration in the present case essentially provided for an initial term of one year, and after expiration of the initial term, the lease is to be renewed for successive one-month periods unless either party gives notice of termination. This lease was approved by HUD and was in compliance with the requirement that leases in Section 236 Housing be on forms provided by the FHA. *See* Section 236 Regulatory Agreement ¶ 4(b), Model Form of Lease, U.S. Dept. of Housing and Urban Development, Federal Housing Administration, FHA Form No. 3133, found in INSURED PROJECT MANAGEMENT GUIDE at 243.

Defendant argues that judicial recognition of an "entitlement" to continued occupancy in federal housing abrogates the traditional leasehold estates applicable to rental agreements, and that a "tenancy in a federally subsidized low-income housing project cannot exist on a month-to-month basis." We cannot agree. In *Joy v. Daniels, supra*, the Court held that "the lease provision purporting to give the landlord power to terminate *without cause* at the expiration of a fixed term is invalid." *Id.* at 1241. (Emphasis added.) In that case, the Court held only that a landlord could not terminate at the expiration of a fixed term without good cause. Thus, rather than invalidate the tenancy itself, the Court in *Joy* merely interpreted procedural due process standards as adding an additional condition to those already required before termination of any tenancy is effective.

Furthermore, the federal scheme implicit in the constitutional standards previously discussed, rather than being in opposition to, is consistent with general principles of local property law. It is well settled in North Carolina that a periodic tenancy does not terminate automatically at the end of any particular term. *See generally J. Webster, Real Estate Law in N. C.* §§ 79, 88 (1971); 51C C.J.S. Landlord and Tenant § 146 (1968). Indeed, month-to-month tenancies, like other tenancies from "period to period", continue to renew themselves "indefinitely until they are terminated at the end of one of the periods by a proper notice by either the lessor or the lessee in accordance with the law." *Webster* at § 79, p. 91. Thus, both federal and local lease provisions contemplate continued occupancy until the proper termination requirements are met. In this light, we cannot conclude that the word "tenancy", as used in *Joy* and similar decisions, is to be construed as meaning anything other than the month-to-month tenancy approved by HUD and as used in the lease under consideration.

[2] The similarities are not exact, however. Under local law, there is no protection against arbitrary or capricious decisions regarding the eviction of tenants. As to federally subsidized low-income housing, however, the previously mentioned due process protections apply to prevent such behavior by landlords. These protections, nevertheless, go to preserve the underlying tenancy, and not to destroy it. In addition, under the tenant eviction provisions in 24 C.F.R. § 450.2, the term "eviction" is defined as "the

dispossession of the tenant from the leased unit as a result of the termination of the tenancy, including a termination prior to the end of a term or at the end of a term", 24 C.F.R. § 450.2(a), obviously contemplating the use of lease terms of definite duration, which may be automatically renewed. It follows in this case that because Goler failed to evict defendant pursuant to HUD eviction procedures,[1] defendant's tenancy continued as a month-to-month tenancy without interruption. *See* 24 C.F.R. § 450.3. This result is reasonable in light of the fact that Congress has not heretofore pre-empted the function of state and local laws governing summary ejectment and actions for wrongful eviction. *See Anderson v. Denny,* 365 F. Supp. 1254, 1262 (W.D. Va. 1973).

[3] The remaining issue raised by defendant concerns the amount of damages recoverable for wrongful eviction. The trial court held that, pursuant to G.S. 42-36, the damages of defendant which proximately flowed from Goler's wrongful eviction were the loss of defendant's security deposit, her moving expenses, the cost of transfer and storage of her furniture, and the loss of her entitlement to Section 8 and Section 236 subsidies for one month. Defendant argues that the court erred in concluding the defendant held a month-to-month lease and, therefore erred by limiting the loss of her entitlement to federal subsidies to only one month. Although we hold that the trial court properly concluded that defendant held a month-to-month lease at the time of her wrongful eviction, we conclude that it was error to limit defendant's damages to one month.

G.S. 42-36, which provides for damages for wrongful eviction, provides:

> "If, by order of the magistrate, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal."

In *Burwell v. Brodie,* 134 N.C. 540, 47 S.E. 47 (1904), our Supreme Court held that a tenant "may recover such damages as proximately resulted" from wrongful eviction. 134 N.C. at 543, 47 S.E. at 48. *See generally* 52 C.J.S. *Landlord and Tenant* § 461(4) (1968). In the present case, defendant's loss of deposit, her moving ex-

1. Evidence of plaintiff's failure to comply with the applicable regulations is uncontradicted.

penses, and subsequent costs for storage are all properly includable under this standard of proximate damages. The particular question in this case, however, concerns the period of time after eviction for which the defendant is entitled to recovery, especially with respect to her right to federal subsidy payments. It is not disputed that defendant continued to qualify for rental subsidies after the time of eviction, and it is clear that but for the act of eviction, defendant would have continued to receive those payments. It is also clear that but for her having been evicted, defendant would have continued to reside at the Goler apartments, pursuant to the automatically renewing month-to-month lease. Thus, it is apparent that, given the improper eviction by Goler, defendant's right to occupancy in the Goler Metropolitan Apartments continued on a month-to-month basis, and would continue until proper eviction procedures were followed.

Generally, the tenant's recovery of damages for wrongful eviction is limited to a period of time subsequent to the date of eviction. More specifically, the tenant is entitled to recover damages only for the time he is prevented from using the premises, and for the period of time he is liable to pay rent. 52 C.J.S. *Landlord and Tenant* § 461(4) (1968). In the case of traditional tenant leases for fixed terms, for example, the tenant may recover for the period of dispossession up to the end of the term. And, under G.S. 42-14, if the requisite notice is not given a sufficient length of time prior to the end of the current term, the parties will be bound, and the landlord liable, for at least one additional term. *Simmons v. Jarman*, 122 N.C. 195, 29 S.E. 332 (1898). Although the applicable federal regulations are silent on this point, it is clear that "[n]o termination shall be valid unless it is in accordance with the provisions of § 450.4", and in compliance with the "cause" provisions of § 450.3. *See* 24 C.F.R. §§ 450.3-.4. Thus, in the case before us, the period of time during which defendant was dispossessed, and for which she would have been liable for rental payments, is that period from her eviction until she obtained a reversal of the eviction order; that is, until judgment. In this respect we agree with defendant that defendant's damages should have been measured according to the period for which she was deprived of her right to occupy the premises, which in this case is the period from eviction until entry of partial summary judgment on 19 July 1978.

We, therefore, remand these proceedings to the trial court for the purpose of computing damages in accordance with this decision.

Remanded.

Judges PARKER and MARTIN (Harry C.) concur.

IN THE MATTER OF: HOMER D. PETROU v. DAVIS R. HALE AND HUBERT H. SENTER

No. 789SC1151

(Filed 20 November 1979)

1. **Malicious Prosecution § 13.2— malpractice action—probable cause—sufficiency of evidence**

The trial court in an action for malicious prosecution did not err in entering summary judgment for defendant lawyer where the evidence tended to show that defendant patient and client related to defendant lawyer that plaintiff had failed to remove a gauze packing from his rectum following surgery for the removal of hemorrhoids; defendant lawyer advised the client that he had a cause of action against plaintiff and thereafter filed suit for malpractice at the client's request; the action was terminated favorably for plaintiff doctor; and on the basis of the facts as related by the client, defendant lawyer had probable cause to file suit on behalf of his client.

2. **Abuse of Process § 19— filing of malpractice action—ulterior motive—no abuse of process**

Plaintiff's allegation that defendants' purpose in filing a malpractice action was to coerce plaintiff and his malpractice insurance carrier into making a cash settlement, without any evidence of subsequent misuse of process lawfully issued, did not state a cause of action for abuse of process, an ulterior motive alone not being sufficient.

3. **Attorneys at Law § 5.1— attorney's negligence—obligation to adverse party**

In an action for malicious prosecution, plaintiff doctor's allegation that defendant lawyer breached a duty owed to an opposing party in a malpractice suit to investigate properly the facts and the law, to review hospital records, and to consult medical experts before filing a malpractice suit was insufficient to state a cause of action in negligence.

APPEAL by plaintiff from *Hobgood, Judge.* Judgment entered 20 September 1978 in Superior Court, VANCE County. Heard in the Court of Appeals 19 September 1979.

Defendant Hale employed defendant Senter, a practicing attorney, to file a malpractice suit against plaintiff. A directed verdict was entered against Hale in the malpractice suit, and plaintiff filed suit against Hale and Senter for malicious prosecution and abuse of process. He also filed suit against Senter, individually, alleging negligent violation of a duty of care required of attorneys in the performance of their professional duties.

Defendant Senter had instituted the malpractice suits after interviewing defendant Hale. Based solely on Hale's revelation that plaintiff had failed to remove a gauze packing from his rectum following surgery for the removal of hemorrhoids, Senter had advised Hale that he had a cause of action against plaintiff and had, accordingly, filed suit at Hale's request.

The major thrust of plaintiff's suit against defendant Senter was that Senter should have investigated the facts more thoroughly and consulted a physician or surgeon concerning Hale's allegations prior to filing suit. Plaintiff also alleged that Senter and Hale had filed the malpractice suit knowing that the malpractice action was totally without merit, and without reasonable or any cause to believe that plaintiff had been guilty of malpractice.

Defendant Senter moved for summary judgment, and the trial court granted his motion. Plaintiff appealed.

Hollowell, Silverstein, Rich & Brady, by Ben A. Rich, for plaintiff appellant.

Hubert H. Senter, pro se.

ERWIN, Judge.

[1] Plaintiff contends the trial court erred in entering summary judgment on its claims of malicious prosecution, abuse of process, and negligence. We disagree.

"[T]he party moving for summary judgment has the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court . . . .' " *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469-70, 251 S.E. 2d 419, 421 (1979). One means of meeting this burden is to show that an essential element of the opposing party's claim is nonexistent. *Moore v. Fieldcrest Mills,*

Inc., supra; Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E. 2d 795 (1974).

Want of probable cause is an essential element of a cause of action for malicious prosecution, *Pitts v. Pizza, Inc.,* 296 N.C. 81, 249 S.E. 2d 375 (1978), and whether probable cause exists is a question of law for the court when the facts are admitted or established. *Pitts v. Pizza, Inc., supra,* and *Carson v. Doggett and Ward v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609 (1950).

There is no dispute between the parties as to what was the basis for Senter's filing of the malpractice suit. Defendant Hale had informed Senter that: plaintiff had operated on him to remove hemorrhoids; after not being able to have bowel movements some ten days later, Hale advised plaintiff of his condition for which plaintiff merely prescribed hot baths; when his pain persisted and his stomach and abdomen became swollen, Hale obtained a pair of rubber gloves, inserted his fingers, and removed a rubber or plastic tube and gauze packing from his rectum; afterwards, he was able to have bowel movements. Based on these undisputed revelations of fact, Senter, an attorney, advised Hale that a cause of action for malpractice existed against plaintiff, and Hale employed Senter to represent him. Under these circumstances, we must determine whether, as a matter of law, probable cause existed for Senter to file suit against plaintiff.

Probable cause is:

> " '[T]he existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty. It is a case of apparent guilt as contra-distinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time, as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution; not that he knows the facts necessary to insure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offense.' "

Carson v. Doggett and Ward v. Doggett, 231 N.C. at 633, 58 S.E. 2d at 611-12; *Smith v. Deaver,* 49 N.C. 513, 514-15. Applying this

test, we hold that, under the stated facts before him, defendant Senter had probable cause to file suit on behalf of his client.

An attorney owes a duty to his client to exert his best judgment in the prosecution of the litigation entrusted to him. *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954). In the good faith exercise of his judgment, an attorney cannot be a seer of what the outcome of a suit will be. That is for the court and oftentimes, the jury to resolve. Thus, the mere termination of a lawsuit in favor of an adverse party does not mean that there was a want of probable cause to believe on a set of stated facts that a cause of action did exist. *Fowle v. Fowle*, 263 N.C. 724, 140 S.E. 2d 398 (1965); *Gray v. Gray*, 30 N.C. App. 205, 226 S.E. 2d 417 (1976). Plaintiff would have us impose liability on an attorney when the outcome of his client's suit is not in accord with the facts as related to him by the client. Sound public policy dictates that private litigants have free access to the courts as a means of settling private claims or disputes. *See* N.C. Const. art. 1, § 18; *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E. 2d 685 (1978); *Spencer v. Burglass*, 337 So. 2d 596 (La. Ct. of App. 1976). Senter was merely the instrument through which Hale invoked the judicial determination as to the validity of his claim. *See Spencer v. Burglass, supra.*

We are aware that it has long been the law in our State " 'that advice of counsel, however learned, on a statement of facts, however full, does not of itself and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury' on the issues of probable cause and malice," *Bassinov v. Finkle*, 261 N.C. 109, 112, 134 S.E. 2d 130, 132 (1964); *Bryant v. Murray*, 239 N.C. 18, 24, 79 S.E. 2d 243, 247 (1953), and find no conflict with our decision today. We have merely held that on the statment of facts as related to the attorney in this case, probable cause existed for an institution of a lawsuit for malpractice on behalf of his client. The trial court did not err in entering summary judgment on plaintiff's claim of malicious prosecution.

ABUSE OF PROCESS

" '[T]he test as to whether there is an abuse of process is whether the process has been used to accomplish some end which is without the regular purview of the process, or which

compels the party against whom it is used to do some collateral thing which he could not legally and regularly be compelled to do.' " (Citations omitted.)

Finance Corp. v. Lane, 221 N.C. 189, 196, 19 S.E. 2d 849, 853 (1942). In other words, the gravamen of a cause of action for abuse of process is the improper use of the process after it has been issued. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Benbow v. Caudle*, 250 N.C. 371, 108 S.E. 2d 663 (1959); *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955); *Finance Corp. v. Lane, supra.*

[2] Plaintiff has failed to present any evidence of an abuse of process after defendants instituted the prior malpractice action. Plaintiff's allegation "[t]hat the sole purpose of the Defendants and each of them, in filing and maintaining said action, was to coerce the Plaintiff and his malpractice insurance carrier into making a cash settlement in order to free themselves from said false, malicious, and vexacious [sic] litigation" without any evidence of subsequent misuse of process lawfully issued does not state a cause of action for abuse of process. An ulterior motive alone is not sufficient. *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E. 2d 410 (1958); Byrd, Malicious Prosecution in North Carolina, 47 N.C.L. Rev. 285, 288 (1969). The court's entry of summary judgment on plaintiff's abuse of process claim was proper.

NEGLIGENCE

[3] Plaintiff's third count of his complaint alleges a cause of action in negligence. It alleges that defendant Senter fell below the standard of care required of attorneys in performance of their professional duties and breached a duty owed to an opposing party in a malpractice suit to properly investigate the facts and the law, to review hospital records, and to consult medical experts before filing a malpractice suit.

In *Insurance Co. v. Holt*, 36 N.C. App. 284, 244 S.E. 2d 177 (1978), we held that claims for relief for attorney malpractice are actions sounding in contract and may properly be brought only by those who are in privity of contract with such attorneys by virtue of a contract providing for their employment. In *Insurance Co. v. Holt, supra*, a general contractor who was made a defendant in an indemnity action by a title insurance company filed a third-party complaint against the certifying attorneys in the real estate

transaction for negligent failure to ascertain the existence of property liens of unpaid creditors. Since our decision in *Insurance Co. v. Holt, supra*, we have decided the recent cases of *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580 (1979), and *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50 (1979).

In *Davidson, supra*, we held that an architect who was not in privity of contract with a general contractor or his subcontractors could be held liable to the general contractor and the subcontractors for economic loss resulting from breach of a common law duty of care.

Similarly, in *Industries, Inc., supra*, we held that an architect, notwithstanding the absence of privity of contract, could be held liable to a third party general contractor who could foreseeably be injured or suffer economic loss proximately caused by the negligent performance of a contractual duty by an architect resulting in negligent approval of defective materials and workmanship.

Rejecting the argument of absence of privity of contract, we recognized that:

> "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951); *Stroud v. Transportation Co.*, 215 N.C. 726, 3 S.E. 2d 297 (1939)."

Davidson and Jones, Inc. v. County of New Hanover, 41 N.C. App. at 666, 255 S.E. 2d at 584, *accord, Industries, Inc. v. Construction Co., supra*. In imposing liability, we noted that "[l]iability arises from the negligent breach of common law duty of care flowing from the parties' working relationship." *Davidson and Jones, Inc., Id.* at 667, 255 S.E. 2d at 584. In *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 266, 257 S.E. 2d 50, 55 (1979), quoting from *United States v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958), we explained:

> "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."

The relationship between an attorney and an adverse party in a lawsuit is substantially different from that between an architect and a general contractor or his subcontractors. By its very nature, it is adverse, not symbiotic, and different policy matters must be considered. Thus, while the factors enumerated in *Industries, Inc., supra:* (1) extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that he suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the moral blame attached to such conduct; and (6) the policy of preventing future harm are still to be considered, they are outweighed by the consequences to the community of imposing liability on the attorney. *Weaver v. Superior Court of County of Orange*, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979).

While doctors may have a legitimate interest in reducing the number of frivolous malpractice actions filed against them, their interest does not outweigh the State's interest in having these disputes resolved in a court of law. The means by which this resolution is accomplished is by lawsuits. If an attorney whose primary duty is to promote the cause of his client in a light most favorable to him within the bounds of the law is also required to protect the rights of an adverse party, he will be caught in the midst of a conflict of interest. More importantly, if mere negligence in protecting the rights of an adverse party becomes the standard of liability, attorneys will be fearful of instituting lawsuits on behalf of their clients. The end result would be the limitation of free access to the courts. *See Pantone v. Demos*, 59 Ill. App. 3d 328, 375 N.E. 2d 480 (1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E. 2d 685 (1978); *Spencer v. Burglass, supra.*

Today, the trying of lawsuits is a conventional form of warfare. Ready remedies for the institution of frivolous lawsuits are presently available. While it is true that an attorney has a duty to refrain from instituting frivolous or malicious lawsuits at the behest of his clients, ample means exist to provide appropriate relief for violation of this duty, *i.e.*, institution of disciplinary pro-

ceedings and malicious prosecution actions. *Brody v. Ruby*, 267 N.W. 2d 902 (1978), and *Hill v. Willmot*, 561 S.W. 2d 331 (1978).

The trial court's entry of summary judgment on plaintiff's claims of malicious prosecution, abuse of process, and negligence is

Affirmed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA EX REL., UTILITIES COMMISSION, AND ARLIVE JACKSON SCOGGINS D/B/A AJS TRUCKING COMPANY, APPLICANT v. M. L. HATCHER PICKUP & DELIVERY SERVICES, INC., PROTESTANT

No. 7910UC171

(Filed 20 November 1979)

Carriers § 2.7— contract carrier authority—sufficiency of evidence and findings

The evidence and the findings of the Utilities Commission supported the Commission's order granting an application for contract carrier authority to transport beer and malt liquor products from a brewery in Eden to a distributor in Salisbury.

APPEAL by protestant from the North Carolina Utitlies Commission. Final order entered 18 December 1978. Heard in the Court of Appeals on 18 October 1979.

This proceeding was instituted by the applicant, Arlive Jackson Scoggins, d/b/a AJS Trucking Company [hereinafter referred to as AJS] when it filed with the North Carolina Utilities Commission [the Commission, hereinafter], on 9 March 1978, an application for contract carrier authority to transport by motor vehicle beer and other malt liquor products between precisely designated points in North Carolina. The applicant stated that its specific intent was

> to transport for the benefit of Rowan Distributing Company, Inc., with whom [it] holds a contract to transport beer and malt liquor products manufactured by Miller Brewing Com-

pany, Eden, North Carolina, to one (1) destination, being Salisbury, North Carolina. Applicant will pick up returns, pallets, empties and kegs, returning items back to Miller Brewing Company, with no charge for this service.

Applicant proposed to be the sole owner and to control completely the planned transportation business. Through exhibits, Mr. Scoggins demonstrated that he owned three tractors and six trailers, and, additionally, that he operated four more trailers "on a lease-purchase agreement in which he has substantial equity".

On 21 March 1978 the protestant, M. L. Hatcher Pickup & Delivery Services, Inc. [hereinafter Hatcher], filed a Protest and Motion for Intervention, alleging that it "is an irregular route, common carrier of property by motor vehicle, operating in North Carolina, intrastate commerce," under a certificate issued by the Commission in January, 1977. The operating authority thereby granted was, in pertinent part, as follows:

IRREGULAR ROUTE COMMON CARRIER AUTHORITY

. . .

(2) Transportation of general commodities, except those requiring special equipment . . .

(a) Between all points and places within a radius of 75 miles of Eden.

(b) Between Eden on the one hand and Charlotte on the other.

. . .

The protest further alleged that Hatcher had been granted temporary authority on 27 February 1978 to transport malt beverages from Miller Brewing Company in Eden, and to carry "related materials, supplies, and equipment" back to Miller, from various North Carolina points. Protestant contended that the service proposed by AJS did not meet the requirements of G.S. § 62-262(i); that a grant of authority to AJS would infringe upon the authority already granted it [Hatcher]; and that it was entitled to "protection from unreasonable impairment of its service by contract carriers".

The matter came on for hearing before the Commission on 8 December 1978, and on 18 December 1978 the Commission entered its order granting the applicant a permit to operate as a contract carrier to and from the facilities of Miller Brewing Company in Eden, and Rowan Distributing Company in Salisbury. Protestant appealed.

Kimzey, Smith & McMillan, by James M. Kimzey, for the applicant appellee.

Bailey, Dixon, Wooten, McDonald & Fountain, by Ralph McDonald and Gary S. Parsons, for the protestant appellant.

HEDRICK, Judge.

Relevant evidence presented at the hearing is summarized as follows:

AJS presently is authorized by the Commission to pick up beer and beer products from the Schlitz Brewery in Winston-Salem, North Carolina, and to deliver the same to five North Carolina points: Northwestern Distributors in North Wilkesboro, Proctor Wholesalers in Hickory, Lillard Enterprises in Reidsville, Piedmont Distributors in Salisbury, and Rudisill Enterprises in Gastonia. Its trucks always "end up" in Salisbury since deliveries are made to the most distant points first. Under this operation applicant transports a full load from Winston-Salem to Reidsville, but then must "deadhead", or come back empty, to Salisbury. Thus, its proposal to transport under contract from Miller Brewery in Eden to Rowan Distributors in Salisbury would "enhance" AJS operations in that, after delivering to Reidsville, the AJS trucks could make the ten-mile run over to Eden, pick up a full load at Miller Brewery, and then head to Salisbury.

In addition to benefitting its own operation, Scoggins testified that AJS provides certain specialized services for beer shippers. For instance, "load locks" are used on every trailer, that is, locks are placed across the back of each load to secure it and keep it from shifting. Moreover, AJS has agreed with Rowan Distributing to provide a "double lock key system" so that AJS will be able to make deliveries at times when the plant is unmanned with little risk of loss to Rowan. Under such a system, AJS would maintain a master padlock on its trailers while Rowan

would keep a lock on the fence surrounding its plant. Scoggins described the operation of this system thusly:

> Each party has keys so that we can get in and drop the trailers, and they can unload the trailers at their convenience. We are able to come in and spot trailers at night and be on our way without leaving someone there. We will pick up an empty trailer at the time we drop the loaded trailer. There will be one trailer at the distributor at all times.

A unique service offered by AJS, according to Scoggins, consists of the use of "fillers to separate double-row loads so that they are, in effect, in single rows." The fillers were developed by Scoggins as a means of preventing damage because, in his opinion, "[i]t is a special service when you haul malt beverages, [and] most common carriers don't have knowledge of the way to secure loads to prevent damage."

Finally, Scoggins can offer personalized service to Rowan. He testified that he bases his business in Salisbury and has known the personnel at Rowan Distributing since 1960. He and his employees know a number of the Rowan employees by name and address so that, if an emergency situation arises, it can be readily resolved.

Additional support for the AJS application came from the testimony of William A. Roberts, General Manager of Rowan Distributing and Freida Weisler, Rowan's president. Roberts testified that his company is not involved, and does not wish to be involved, in the business of transporting its malt beverages. None of its present transportation is handled by common carriers, and there have been no common carrier shipments to it from the Miller Brewery in Eden. According to Roberts, Rowan's greatest concern in this matter is finding a carrier "that will give us as much protrection and as good service as we would get if we did it outselves." He stated that their concern regarding security precautions made it desirable for them to know personally "whoever will be driving the rig . . . [and] who will haul our product." AJS meets their needs in that respect since Rowan has been doing business with Scoggins for more than 15 years. Moreover, Roberts asserted that AJS could more adequately meet Rowan's security needs because of its specialized handling of malt liquor products. To the contrary, "[w]e would not be comfortable con-

tracting with somebody who carries primarily some other commodity." The "double lock key system" is especially attractive to Rowan, Roberts testified, because furnishing keys to its padlocked fence to an AJS driver would be reasonable, while handing out "150 keys to satisfy the needs of a common carrier" would put Rowan in an "uncomfortable" security position.

Rowan president, Mrs. Weisler, offered further support for the AJS application, asserting that the specialized security and damage-preventive services available from AJS, as well as the personal contact she had with Scoggins, better fulfilled the shipping needs of her company. She testified that her experience in shipping beer by common carrier had been unpleasant "due to excess damage" to shipments, and that one incident had resulted in a lawsuit which had been pending for 16 months. In her opinion, a common carrier could not meet the needs of Rowan.

In protest to the AJS application, Hatcher offered the testimony of its vice president, Austin Hatcher, Jr., who testified that his company was on the list of approved carriers for Miller Brewing Company; that it had been granted temporary authority from the Commission to transport beer products from Miller Brewery in Eden; and that Hatcher is presently providing service to other Miller distributors in North Carolina in accordance with its grant of temporary authority. With reference to Hatcher's security system, Hatcher admitted that his company did not secure the shipments "with anything." Rather, Miller personnel load the trucks and "seal" the shipments. Furthermore, Hatcher does not provide locks for shipments, "though we can and would, if requested." Hatcher drivers have experience with handling malt beverages, but that experience is limited for the majority of them, since approximately 50 percent of Hatcher's business consists of hauling mail. The remainder is devoted to general commodities.

Hatcher admitted that neither he nor his drivers personally knew any of the Rowan personnel and that, in an emergency situation, they might not be able to get in touch with the appropriate employees. However, it is Hatcher's practice to obtain such information once he starts serving a particular customer. In his opinion,

I do not know of any services that can be provided by Mr. Scoggins that we, as a common carrier, can't provide to Rowan Distributing . . . . Mr. Scoggins' proposed operations would duplicate operations our company is authorized to perform . . . . We can offer the exact service that has been specified by Mr. Scoggins . . . .

The final order of the Commission contains the following findings of fact and conclusions:

FINDINGS OF FACT

1. The Applicant, located in Salisbury, North Carolina, proposes to engage in the transportation of beer and malt beverages from the facilities of Miller Brewing Company, Eden, North Carolina, under a written bilatoral [sic] contract with Rowan Distributing Company, also located in Salisbury, North Carolina.

2. Since 1975 the Applicant has held a contract carrier permit issued by this Commission for the transportation of beer and malt beverages from the Schlitz Brewery in Winston-Salem, North Carolina, to distributors located in North Wilkesboro, Hickory, Gastonia, Salisbury and Reidsville, North Carolina.

3. The Applicant has acquired a special expertise in the transportation of beer and malt beverages and has developed techniques for safe and efficient service.

4. The Applicant was formerly a customer of Rowan Distributing Co. and knows a number of its employees personally.

5. Rowan Distributing Company has determined that its business needs can best be met through the transportation services offered by the Applicant, to wit: security and control of shipments, personal knowledge and trust of the driver, assurance of protection against damage in transit.

6. The sole Protestant to the Application is a common carrier of general commodities and of beer and malt beverage products. Protestant also operates under a contractual arrangement with the U.S. Postal Service which constitutes approximately 50 percent of its business.

7. Protestant currently handles about three loads per day for the distribution of its serving from the Eden plant and expects this to increase to 30 loads per day. Protestant has constructed a large terminal adjacent to the Miller facilities.

8. Output is projected to exceed eight million barrels per day when the Eden plant is at full production. Rowan expects to receive some 30 truckloads of beer a week.

Whereupon the Hearing Examiner reaches the following

CONCLUSIONS

1. That the proposed operations conform with the definition of a contract carrier as set forth in G.S. 62-3(8).

2. That the Applicant is fit, willing and able to properly perform the service proposed as a contract carrier.

3. That the proposed operations will not unreasonably impair the efficient public service of carriers operating under certificates or rail carriers.

4. That the proposed service will not unreasonably impair the use of the highways by the general public.

5. That the proposed operations will be consistent with the public interest and policy declared in Chapter 62 of the General Statutes.

6. That the Applicant has met the burden of proof prescribed by statute and that the application should be granted.

IT IS, THEREFORE, ORDERED as follows:

1. That Arlive Jackson Scoggins, d/b/a AJS Trucking Company, Inc., be, and is hereby, granted additional contract carrier authority in accordance with Exhibit A attached hereto and made a part hereof.

2. That Arlive Jackson Scoggins shall institute operations under the authority herein acquired within thirty (30) days from the date this order becomes final.

3. That this Order, upon becoming final, shall constitute a permit until a formal permit has been issued to the Applicant.

On appeal, the protestant first contends that, in granting contract carrier authority to AJS over its protest, the Commission failed to find sufficient facts to support its conclusion that the applicant's proposed operations conform to the definition of a contract carrier, and, secondly, that the order entered by the Commission is unsupported by competent, material and substantial evidence of record.

Protestant's first argument presents for our consideration G.S. § 62-262(i)(1), which provides in pertinent part:

> If the application is for a permit, the Commission shall give due consideration to:
>
> (1) Whether the proposed operations conform with the definition in this chapter of a contract carrier, . . .

G.S. § 62-3(8) defines a contract carrier as follows:

> [A]ny person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation . . . , by motor vehicle of persons or property in intrastate commerce for compensation, . . .

Pursuant to its rulemaking authority, G.S. § 62-31, the Commission has supplemented these statutory provisions to require, under Rule R2-15(b), that an applicant for contract carrier authority conform to the following standards:

> If the application is for a permit to operate as a contract carrier, proof of a public demand and need for the service is not required; however, proof is required that one or more shippers . . . have a need for a specific type of service not otherwise available by existing means of transportation, . . .

Cf. State ex rel. Utilities Commission v. Petroleum Transportation, Inc., 2 N.C. App. 566, 163 S.E. 2d 526 (1968).

It is a cardinal principle of law that the Commission's findings of fact are conclusive and binding on a reviewing court if they are supported by competent, material and substantial

evidence in view of the entire record. G.S. § 62-94; *State ex rel. Utilities Commission v. Carolina Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461 (1967); *State ex rel. Utilities Commission v. Kenan Transport Co.*, 10 N.C. App. 626, 179 S.E. 2d 799 (1971). In the present case, the Commission, in its order, set forth the evidence adduced at the hearing which showed that the applicant was able to provide specialized services not otherwise available, and that a need existed for such services. Moreover, the Commission found as a fact that such a need existed, specifying in detail the reasons therefor and concluding therefrom that the applicant met the statutory definition of a contract carrier. *Cf. State ex rel. Utilities Commission v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E. 2d 814, *cert. denied*, 277 N.C. 117 (1970).

Reviewing the evidence in the record as a whole, we are of the opinion that it is plenary to support the Commission's findings and conclusions, and that the findings and conclusions are sufficient to resolve all material issues of fact and law. For these reasons, we affirm the order of the Commission granting contract carrier authority to AJS to transport beer and malt liquor products from Miller Brewery in Eden to Rowan Distributing in Salisbury.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

WHITEHEAD COMMUNITY CLUB, WILEY P. MAXWELL, ANDY CLEARY, TALMADGE HAMM, WILLIAM T. HAMM, MABEL S. HAMM, EDITH HAMM, GREG HAMM, KAY HUNT, JAMES M. HUNT, VERSIE COMBS, MARION COMBS, CLARENCE R. CROUSE, MARILYN CROUSE, BENNY LOVE, PATSY LOVE, CHARLES D. CAUDILL, LOUISE M. CAUDILL, THORVAL CAUDILL, ANNIE CAUDILL, PAIGE BILLINGS, GEORGIA D. BILLINGS, BETTY B. JORDAN, J. D. LOVE, VOSCOE EDWARDS, EVA EDWARDS, BOBBY HAMM, HELEN HAMM, JERRY EDWARDS, PAT EDWARDS, RALPH HUFFMAN, ELSIE HUFFMAN, EDWARD K. CAUDILL, DOROTHY W. CAUDILL, TERESA TODD, ERNEST BROOKS, ROGER TODD, WELTER HAM, NEAL HOWELL, DANNY P. BILLINGS, CAROLYN HASH, MAE CLEARY, RAY CROUSE, NORA ISOM, CHARLIE ISOM, JEAN WINKLER, LOUISE HOLLOWAY, TOMMY L. EDWARDS, BARBARA EDWARDS, PERN L. EDWARDS, RETHA EDWARDS, W. LEBRUN EDWARDS, PERCY L. EDWARDS, RANDY W. WALLS, IRENE LOVE, ALLEN WAGNER, KATHY WAGNER, HUBERT JOINES, DALE CAUDILL, ROBERT POLLARD, WILMA R. FOSTER, IRENE R. WAGNER, PAUL J. FOSTER, KATHRYN FOSTER, MICHAEL D. CHOATE, JOE CHOATE, CLIFFORD PRUITT, DANNY C. PRUITT, CLYDE ROYALL, ROXIE ROYALL, HOBERT H. DOWELL, VELTER DOWELL, BLANE WATSON, RALPH CROUSE, GRADY L. PRUITT, EDD ATWOOD, ETTA ATWOOD, JOHN A. DAVIDSON, FAYE DAVIDSON, LOIS MAXWELL, LORETTA J. MAXWELL, WALTER JOINES, TOM PRUITT, MRS. R. J. CROUSE, HOUSTON PERRY, FLOYD PERRY, RAYMOND ELLER, RICHARD ELLER, WADE PRUITT, NINA ELLER, PAULINE DOWELL, ARTHUR NEFF, MICHAEL A. NEFF, REBECCA S. NEFF, DAVID F. RICHARDSON, JOYCE R. SEWARD, J. C. CAUDILL, WILMA CAUDILL, HOWARD L. JOINES, MATILDA JOINES, RICHARD H. JOINES, FRANCES C. JOINES, CARLTON J. WAGONER, PAMELA K. WAGONER, RALPH JOINES, NAN BROWN, GRADY CROUSE, S. C. WATERS, LENA WOOTEN, CLIFFORD J. TOLLIVER, DAN EDWARDS, JOLENE EDWARDS, ROY V. HOUSER, SHIRLEY B. HOUSER, D. A. JOINES, RUBY T. JOINES, JIMMY R. JOINES, BETTY C. JOINES, LEONARD J. HOLLOWAY, EMMA A. HOLLOWAY, MAE BALDWIN, THOMAS RALPH EDWARDS, OPAL EDWARDS, SUSAN EDWARDS, ELVIRA BOBBITT, SCOTT BOBBITT, SUE LOVE, DALE EDWARDS, ROGER PRUITT, JIMMY MILLER, HAROLD CHOATE, ANITA CHOATE, PEGGY CHOATE, JEROLD HORTON, LUCILLE HOWELL, WILLIAM HOWELL, JUNIOR PERRY, LONNIE HAMM, RALPH DOWELL, JAMES PERRY, ELLA PERRY, LARRY PERRY, OPAL MITCHELL, ARNOLD MITCHELL, ZORA WAGONER, BAYNE H. CAUDILL, LOIS AYERS, MARIE BROWN, RUSSELL BROWN, VILAS HAM, MONOBELLE HAM, G. E. HAM, E. C. MITCHELL, LEORA T. MITCHELL, MACK EDWARDS, BESSIE EDWARDS, WADE WADDELL, CLYDE M. CAUDILL, ELLEN H. CHURCH, PAUL E. CHURCH, ROBBIE CHURCH, R. N. JOINES, EDNA JOINES, MURIEL JOINES, RUBY JOINES, ELLA E. RICHARDSON, MARIE CAUDILL, ELBERT TOLIVER, STELLA TOLIVER, F. A. WAGNER, CONLEY BROOKS, EDNA BROOKS, ELVA KENNEDY, STELLA JOINES, CARMEN BARLOW, NANCY CAUDILL, VANCE CAUDILL, LYNN

ANDERSON, ROSA K. ANDERSON, BUDDY CAUDILL, CAROL CAUDILL, ANN W. WYATT, REX M. WYATT, GRACE HORTON, RUTH RICHARDSON, MATTIE RICHARDSON, BARBARA S. RICHARDSON, DOROTHY B. WAGONER, BETTIE ANDREWS, EDSEL C. ANDREWS, BETTY JO ANDREWS, BERNICE EDWARDS, BERT DAVIS, VIRGINIA DAVIS, GEORGE R. ATWOOD, LORENE ATWOOD, MERTIE ATWOOD, FRED ROUPE, BETTY ROUPE, JOY ROUPE, WILLIAM SHELTON, GEORGE TAYLOR, CORA TAYLOR, VAUGHN B. HENDRIX, CLYDE J. HENDRIX, JEAN B. JONES, VIRGINIA BOLLINGER, GERALDINE McMILLAN, RAYMOND McMILLAN, ALBERT S. HAM, RUTH C. HAM, AMMIE H. HOWELL, KELLY D. BARTLEY, JANNIE BARTLEY, IDA A. CROUSE, RUTH M. CAUDILL, SHIRLEY E. WOOTEN, PAUL S. WOOTEN, CALUDE WHITEHEAD, PAULINE WHITEHEAD, TED HOLLOWAY, ROGER CHOATE, MYRTLE HOLLOWAY, FRANK DUNCAN, LILLIE DUNCAN, FLOSSIE HOLLOWAY, KAY HAMM, GWYN B. HAMM, GERTRUDE J. JOINES, DOROTHY J. SMITH, JAMES BILLINGS, KATHY BILLINGS, MARGIE ANDREWS, DWAINE ANDREWS, JOAN E. JOINES, JOHN E. IRWIN, ANN IRWIN, BERTRICE WAGONER, GARNETT WAGONER, ELVIRA CROUSE, O. R. CROUSE, NORA WAGONER, JACKIE EDWARDS, PATRICIA N. EDWARDS, MILDRED TORNEY, GUY R. TORNEY, WILMA WAGONER, THOMAS G. HAM, CARY BROWN, CONLEY CAUDILL, BOARD OF COUNTY COMMISSIONERS OF ALLEGHANY COUNTY, C. T. DOUGHTON, JR., LEO TOMPKINS, GUY PERRY, PLAINTIFFS, v. W. E. HOPPERS, CARRIE HOPPERS, DEFENDANTS

No. 7923SC144

(Filed 20 November 1979)

1. **Highways and Cartways § 11.2— abandoned road—no neighborhood public road**

The abandoned portion of a state road was not a neighborhood public road after the State discontinued its maintenance, since it did not serve as a *necessary* means of ingress to and egress from the dwelling houses of families located on the unabandoned portion of the road, those houses having access by way of two other roads as well as by the unabandoned portion of the road. G.S. 136-67.

2. **Highways and Cartways § 11.2— abandoned road—control by Department of Transportation**

In an action for injunctive relief from defendants' continued closure of an abandoned portion of a road, G.S. 153A-241 was inapplicable and the county was not required to comply with its terms in closing the road, since the statute specifically excluded roads under the control and supervision of the Department of Transportation, and the road in question was under the Department's control.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 22 September 1978 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 17 October 1979.

Until 2 August 1976, NCSR 1193 was a public road, maintained by the state for its entire length and located in Alleghany County. On that date the Alleghany County Board of Commissioners, upon petition by defendants, unanimously agreed to abandon a portion of the road, a 0.23 mile segment which ran through defendants' property exclusively. Defendants owned in fee the property on both sides of the road. Later that month, the District Engineer of the North Carolina Department of Transportation received defendants' petition requesting abandonment of the segment; the resolution of the Alleghany County Board of Commissioners approving the proposed action accompanied the petition. An investigation was made, and on 12 November 1976 the Secondary Roads Council approved the abandonment.

In April 1977, defendants physically closed off the abandoned portion of the unpaved road. They plowed it up and sowed grass on it. The remaining portion of NCSR 1193, a 0.15 mile segment, was not abandoned. This short segment intersects with NCSR 1135 and still is a part of the state highway system, being maintained by the Department of Transportation. Several families reside on this unabandoned portion of NCSR 1193.

On 21 November 1977 plaintiffs brought this action against defendants, seeking injunctive relief from the continued closure of the abandoned portion of the road. They alleged that defendants had closed the road without following the procedures set forth in N.C.G.S. 153A-241. They also alleged that the abandoned portion is a neighborhood public road under the provisions of N.C.G.S. 136-67. Defendants answered and counterclaimed against the Alleghany County Commissioners, who were only a few of the numerous plaintiffs in this case. Subsequently this counterclaim was dismissed and the county commissioners withdrew from the case. The remaining plaintiffs replied, and upon stipulation the action was transferred to superior court for trial without a jury. It was also stipulated that the judge could visit the scene for a viewing.

Both parties presented evidence at the trial, which began 18 September 1978. Judge Rousseau viewed the premises, and after

hearing the evidence and arguments of counsel, he made findings of fact and conclusions of law. On the basis of these, he entered judgment for defendants, denying injunctive relief to plaintiffs. From this judgment plaintiffs appeal.

Arnold L. Young and Richard L. Doughton for plaintiff appellants.

Vannoy & Reeves, by Wade E. Vannoy Jr., for defendant appellees.

MARTIN (Harry C.), Judge.

In arguing that the trial court committed error in denying their prayer for injunctive relief, plaintiffs contend that the findings of fact and conclusions of law are contrary to the statutory and case law of North Carolina and against the greater weight of the evidence. To resolve this case on appeal, we must decide two essential questions. First, when the state discontinued its maintenance of the abandoned road, what then was its status? Was it a neighborhood public road under N.C.G.S. 136-67? Second, should the provisions of N.C.G.S. 153A-241 have been complied with in the abandonment of the 0.23 mile portion of the road?

[1] Based on his factual finding that the three to five occupied residences on the unclosed portion of the road are adequately served by it and by two other roads, NCSR 1135 and a connecting state-maintained road, the judge concluded that the "abandoned portion of NCSR 1193 does not and did not serve as a necessary means of ingress to and egress from any occupied dwelling house and is not a neighborhood public road." We think Judge Rousseau was correct in this conclusion of law.

N.C.G.S. 136-67 provides in pertinent part:

> Neighborhood public roads.—All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, . . . and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated

> city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads . . . Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the Department of Transportation and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby specifically excluded from the definition of neighborhood public roads, ...

There is no doubt that to constitute a neighborhood public road, a road abandoned by the Department of Transportation must serve as a *necessary* means of ingress to and egress from the dwelling house of at least one family.

If there is competent evidence in the record to support the finding of fact that the dwellings on the open, unabandoned portion of the road are adequately served by it and two other roads, the finding will not be disturbed on appeal, even though the evidence may be conflicting. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 254 S.E. 2d 658 (1979). Three plaintiffs who live on the unclosed portion of NCSR 1193 testified at the trial. Nora Isom stated on cross-examination, "You can still drive to my front door." Andy Cleary admitted that he could reach his home by turning off N.C. 18 on the Bledsoe Creek Road; he said, "My driveway goes right down to that road." Bobby Hamm testified that he lived right at the intersection of NCSR 1135 and the unclosed portion of 1193. This testimony, coupled with the viewing made by Judge Rousseau of the scene, amply supports his finding of fact that the dwellings on the open portion of 1193 are adequately served by it and other roads.

This finding in turn supports the conclusion of law that the closed segment of 1193 "does not and did not serve as a necessary means of ingress to and egress from any occupied dwelling house

and is not a neighborhood public road." We hold that the abandoned portion of 1193, after the state discontinued its maintenance, was not a neighborhood public road.

[2] We address now the second important question. Plaintiffs argue in their brief and in oral argument that the road was in fact and in law closed illegally because the procedures set out in N.C.G.S. 153A-241 were not complied with. Indeed, defendants concede that the action was taken "imperfectly and without compliance with the niceties" of the statute; they argue that the commissioners "did it, as best they knew how."

The first sentence of the statute reads: "A county may permanently close any public road or any easement within the county and not within a city, except public roads or easements for public roads under the control and supervision of the Department of Transportation." N.C. Gen. Stat. 153A-241. The statute contains a notice-and-hearing requirement. The record in this case clearly reveals that before 2 August 1976 the road involved was maintained by the state and under the control and supervision of the Department of Transportation. Clearly the road falls into the exception category specifically excluded from the statute's coverage. We hold, therefore, that N.C.G.S. 153A-241 was not applicable to this case and the county was not required to comply with its terms.

Plaintiffs recognize that roads under the control of the Department of Transportation are excepted from the statute, but they argue that the abandonment of the 0.23 mile segment of 1193 by the state in this case merely took the road out of the control of the state Department of Transportation and returned it to the control of the county. We do not find this argument persuasive. On 12 November 1976, the state approved the abandonment of the segment of the road and withdrew it from the public roads system. It is difficult to see how at that time the county regained control of the road when the county commissioners three months earlier had agreed and resolved unanimously to abandon it.

We agree with defendants that N.C.G.S. 136-63 controls the actions taken by the Alleghany County Commissioners in this case to abandon a portion of 1193.

> Change or abandonment of roads.—The board of county commissioners of any county may, on its own motion or on peti-

> tion of a group of citizens, request the Board of Transportation to change or abandon any road in the secondary system when the best interest of the people of the county will be served thereby. The Board of Transportation shall thereupon make inquiry into the proposed change or abandonment, and if in its opinion the public interest demands it, shall make such change or abandonment. . . .

N.C. Gen. Stat. 136-63. This statute was fully complied with.

The result of Judge Rousseau's judgment was to invest the defendants, who owned the land on both sides of the abandoned segment of 1193, with the former easement or right-of-way, pursuant to N.C.G.S. 136-67, and to deny plaintiffs injunctive relief. In appealing from this judgment, plaintiffs place great reliance on *Davis v. Alexander*, 202 N.C. 130, 162 S.E. 372 (1932). They contend that it is "almost identical" to the case *sub judice* and point out that the only difference between the two cases is that the road involved in *Davis* was paved, whereas the road in this case was unpaved. "Otherwise the two cases are on all fours," they say, arguing that *Davis* clearly controls this decision. *Davis* holds that after the State Highway Commission abandons a road, the abutting owners along the abandoned road have an easement therein for ingress and egress. The abandoned road may not be closed by the owner of land through which it lies without the consent of the abutting owners. The abutting owners are entitled to a permanent injunction restraining the owner in fee from closing the road; if the road has already been closed, a mandatory injunction to command its reopening may be appropriate. The crucial distinguishing fact in *Davis*, which plaintiffs apparently overlook, is that rights of abutting property owners along the abandoned road are at stake. Plaintiffs in this case are not abutting owners along the abandoned road. It is uncontroverted that three plaintiffs are abutting owners on the portion of the road which remains open. But only defendants are abutting owners along the abandoned portion of the road. Thus plaintiffs are not brought within the *Davis* decision.

The judgment of the superior court is

Affirmed.

Judges HEDRICK and CLARK concur.

ROSE D. GARDNER v. JONAS MELVIN GARDNER

No. 798DC262

(Filed 20 November 1979)

Divorce and Alimony § 3— plaintiff who becomes nonresident—venue change to county of defendant's residence—applicability of statute

The amendment of G.S. 50-3 providing for the removal of an action for divorce or alimony, upon motion of defendant, to the county in which defendant resides where plaintiff has ceased to be a resident of this State is mandatory and may be applied retroactively to claims which accrued prior to the effective date of the amendment and to pending litigation. However, the amendment was not applicable to an action for divorce from bed and board where it became effective after the trial court had made a decision settling the question of venue.

Judge VAUGHN dissenting.

APPEAL by plaintiff from *Hardy, Judge.* Order entered 16 November 1978 in District Court, WAYNE County. Heard in the Court of Appeals 16 October 1979.

On 12 May 1976, plaintiff, Rose Gardner, filed an action for alimony without divorce in the Wayne County District Court. The complaint was amended 28 June 1976 to state a cause for divorce from bed and board.

Venue for the action was governed by G.S. 1-82 which states that, ". . . the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement . . . ."

Defendant, Jonas Melvin Gardner, filed a motion pursuant to Rule 12(b) on 24 May 1976 to remove for improper venue. Defendant asserted that Rose Gardner was not a resident of Wayne County. On 22 June 1976, judgment was entered in the Wayne County District Court finding venue proper in that county. Defendant appealed, but the Court of Appeals affirmed, without published opinion. *Gardner v. Gardner*, 34 N.C. App. 165 (1977).

On 1 June 1976, defendant filed an action for absolute divorce in Johnston County. Rose Gardner moved to dismiss the action on the ground that the claim was a compulsory counterclaim in her action. Plaintiff's motion was denied on 30 July 1976. On appeal,

the order was reversed. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978).

Meanwhile, on 15 June 1976, defendant had also filed a motion to change venue pursuant to Rule 12(b) and G.S. 1-83(2). This motion was proper in that it preceded defendant's answer on 14 September 1977 in the cause for divorce from bed and board.

Defendant's motion was heard and denied on 15 October 1977. Notice of appeal was given, and on 20 March 1979, the Court of Appeals affirmed the judgment. The defendant did not perfect any appeal as to the denial of his motion to change venue from Wayne County pursuant to G.S. 1-83(2).

Subsequent to the denial of his motion in the Wayne County District Court, but prior to the filing of the Court of Appeals opinion on 12 September 1978, defendant filed another motion, requesting venue of plaintiff's action be moved to Johnston County. Defendant supported his motion with affidavits that showed plaintiff had moved from North Carolina to Vidalia, Georgia, sometime during the early part of 1978, and based his motion on G.S. 50-3. Plaintiff admitted that she had moved from the state.

G.S. 50-3 was amended on 16 June 1978 to state the folowing:

> Section 1. G.S. 50-3 is amended by adding the following:
>
> 'Any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action, and the procedures of G.S. 1-87 shall be followed.'
>
> Sec. 2. This act is effective upon ratification.

The foregoing amendment was enacted into law on 16 June 1978, some eight months after the Wayne County District Court dismissed defendant's motion to change venue pursuant to Rule 12(b) and G.S. 1-83(2).

This court must decide whether or not the amendment will be applied retroactively so as to change venue of plaintiff's action for divorce from bed and board to Johnston County.

Freeman, Edwards & Vinson, by George K. Freeman, Jr., for plaintiff appellant.

Mast, Tew, Nall & Moore, by George B. Mast, for defendant appellee.

Taylor, Warren, Kerr & Walker, by Lindsay C. Warren, Jr., for defendant appellee.

HILL, Judge.

From the outset, it is clear that the language of the amendment is mandatory. If the defendant makes the motion for change of venue, the judge shall grant it.

Furthermore, it is clear that the amendment to G.S. 50-3 is retroactive. "[S]tatutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention." (Citations omitted.) *Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E. 2d 489. G.S. 50-3 contains no such language.

Venue means the place of trial. *Lovegrove v. Lovegrove*, 237 N.C. 307, 74 S.E. 2d 723 (1953). It is the place where the power to adjudicate is to be exercised. Venue is not a jurisdictional question but a procedural one. 77 Am. Jur. 2d, Venue § 1, p. 832. In North Carolina it is clear that, ". . . a change in the statutory method of procedure for the enforcement or exercise of an existent right is not prohibited by any constitutional provision, unless the alteration or modification is so radical as to impair the obligation of contracts or to divest vested rights." *Bateman v. Sterrett*, 201 N.C. 59, 62, 159 S.E. 14 (1931).

The retroactive application of venue statutes to causes of action which accrued prior to the effective date of the statute is proper. No vested right is destroyed, nor does a question of construction arise where a venue statute, by its own provisions, is declared to apply to transactions entered into prior to the passage of the statute. *See* 12 Strong's N.C. Index 3d, Statutes § 8, p. 81; 77 Am. Jur. 2d, Venue § 4, p. 837.

Generally, a statute fixing venue is applicable even to actions *pending* on the effective date of the statute. *United States v. National City Lines*, 80 F. Supp. 734, 738 (S.D. Cal. 1948).

We draw the line there, however. A venue statute is not applicable in determining the rights of parties, where it becomes effective *after the trial court has made a decision* settling the question of venue. 77 Am. Jur. 2d, Venue § 4, p. 837; 41 A.L.R. 2d § 4, p. 805. In this case, the trial court ruled on 15 October 1977 that venue in Wayne County was proper. The amendment became effective on 16 June 1978, and thus is not determinative of venue in this case.

No North Carolina courts have ruled on this matter. We must examine opinions from courts in our sister states to support our conclusion.

Osborn Funeral Home v. State Bd. of Emb., 162 So. 2d 596 (1964), is a case that resembles ours factually. Plaintiff had filed an action in Caddo Parish, in which it did business. Defendant filed a motion to remove to Orleans Parish where it was headquartered. The trial judge granted defendant's motion, but on appeal, was reversed. Defendant subsequently filed answer. On 1 July 1963, an amendment was enacted which set the venue for all actions against defendant in Orleans Parish. Defendant then moved to change venue, but lost again in the Court of Appeal. The court held that its original order refusing the motion to change venue established a vested right in the plaintiff to have the case tried in Caddo Parish.

People v. Pinches, 214 Cal. 177, 4 P. 2d 771 (1931) is also helpful. There, suit was brought by the state in Sacramento County. Upon motion of the defendant, venue was changed to his home county, Mendocino. Subsequently, a statute was passed requiring that such action be tried in Sacramento. The court stated that, "Whatever may be the force and effect of said amendment, it can have no bearing upon the merits of this appeal, as the order appealed from was made long prior to the enactment of the amendment." *Pinches*, at p. 182.

Appellee in his brief and in oral argument has suggested that two Tennessee cases, *Mid-South Milling Co., Inc. v. Loret Farms, Inc.*, 521 S.W. 2d 586 (1975), and *Saylors v. Riggsbee*, 544 S.W. 2d

609 (1976), are authority contrary to the two cases previously cited. Upon close reading, it is clear that the four cases are consistent with each other. *Mid-South* and *Saylors* merely state what this Court agrees the law to be; that is, that venue statutes can be applied retroactively in situations where the cause of action *accrued*, or where suit was *pending* before passage of the statute.

In the instant case, the trial court three times has made a final judgment establishing venue. Each judgment preceded the passage of the amendment mentioned herein. First, the defendant, claiming that plaintiff was not a resident of Wayne County, sought to remove from that county pursuant to Rule 12(b). The trial court denied the motion, and this Court affirmed. Next, defendant filed a motion for absolute divorce in Johnston County. The Supreme Court held that the claim was a compulsory counterclaim in plaintiff's Wayne County action. Finally, defendant moved to change venue pursuant to G.S.1-83(2). The trial court denied the motion, and this Court affirmed. In each case, a final judgment was made establishing venue in Wayne County. In each case, defendant either exercised or abandoned any judicial steps he could take to challenge venue.

Plaintiff must be able to rely on the judicial system's final determination of venue. To hold otherwise would be to throw our legal system into chaos and encourage legal maneuvering in the legislature rather than in the courts where both parties' interests are represented.

For the reasons stated above, the order of 16 November 1978 removing the cause of action to Johnston County is

Reversed.

Judge ERWIN concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I do not find the two foreign cases relied on by the majority either authoritative or persuasive. In the first place, neither case applies a statute as explicit as the one in question. Moreover, in

People v. Pinches, supra, the California Court was considering a trial court order respecting venue that had been entered prior to the enactment of the venue amendment. As the Court pointed out, it is perfectly obvious that the amendment could have no bearing on the merits of the appeal from that order. Here, of course, the appeal is from an order entered after the enactment of the amendment and obeying its mandate. In *Osborn Funeral Home v. Louisiana State Board of Embalmers, supra*, a decision of an intermediate appeals court in Louisiana, the Court based its decision on its understanding of the Louisiana Constitution and statutes. Among other things, the Court said that under its statute the venue motion was not timely because it was not filed until after answer on the merits had been filed.

I respectfully suggest that the judgment in the case should be affirmed. In her response to defendant's motion for a change of venue, plaintiff asserted only that she could not have a fair trial in Johnston County. No questions conerning the constitutionality of the statute were raised or passed upon in the trial court. I assume it is for that reason that the majority does not discuss the constitutional questions appellant seeks to argue on appeal. "Since the constitutionality of the statute in question was not passed upon in the trial court, it was not properly before the Court of Appeals and is not now properly before us." *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E. 2d 662, 664 (1974).

The majority, correctly I believe, concludes that the statute is mandatory, that it is procedural and that it may be applied retrospectively to pending litigation. The majority holds, nevertheless, that it does not apply to this case. It is here that we disagree. It seems to me that the amendment was tailor-made for the case at bar, and I do not understand the majority to say that it was beyond the power of the General Assembly to enact the amendment. At the time the action was commenced, the applicable statute, G.S. 50-3, provided that the summons was returnable to the county in which either plaintiff or defendant resided. Defendant resided in Johnston. Plaintiff alleged that she was a resident of Wayne and the summons was returned there. The 1978 amendment to G.S. 50-3 made no changes in this procedure so long as plaintiff remained a resident of the State. It does provide a procedure, however, for a change of venue to the county of

defendant's residence of plaintiff thereafter becomes a nonresident. The parties stipulated that plaintiff became a nonresident. The act expressly provides that "the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action . . . ." G.S. 50-3.

I do not agree that the earlier decisions on venue take the case out of the operation of the statute. All that the first venue hearing determined was that Wayne County was the county in which plaintiff then resided. That decision is not under attack here. The other venue hearing determined that the convenience of witnesses and ends of justice did not require a change of venue to Johnston. That decision is not under attack here. The statute has not been changed with respect to where a summons may be returned. It only provides a procedure for a change in venue when a plaintiff changes her or his status from that of a resident to a nonresident. I believe that the late Judge Hardy correctly followed the mandate of the statute and would affirm his judgment.

LARRY WAYNE HONEYCUTT v. STEVEN TED BESS AND UNITED PARCEL SERVICE, INC.

No. 7919SC241

(Filed 20 November 1979)

1. **Automobiles § 59.1— entering highway—stalled vehicle—speeding oncoming vehicle—sufficiency of evidence of negligence**

In an action to recover for injuries sustained in an automobile accident, evidence that plaintiff's truck was stalled in an intersection for 8 to 10 seconds before it was hit by defendant's van, testimony that the gearshift lever of plaintiff's truck was in park immediately after the accident, and testimony that defendant was speeding was competent evidence of actionable negligence, and the trial court did not err in denying a directed verdict for defendant.

2. **Automobiles § 89.1— intersection accident—last clear chance—sufficiency of evidence**

Evidence was sufficient to submit an issue of last clear chance to the jury where it tended to show that defendant's van was some 1500 feet away when plaintiff's truck began to cross the intersection; there were no obstructions to

defendant's view of the truck; plaintiff was stalled in defendant's lane for 8 to 10 seconds before the collision; and there was no traffic coming toward defendant in the other lane.

3. Automobiles § 90.15— last clear chance—instructions adequate

The trial court's omission of the phrase "from which he could not remove himself by the exercise of reasonable care" in the reiteration of the elements of the doctrine of last clear chance, after a correct and complete enumeration of the elements initially, was not sufficiently prejudicial to require a new trial.

APPEAL by defendants from *Davis, Judge.* Judgment entered 27 October 1978 in Superior Court, CABARRUS County. Heard in the Court of Appeals 26 October 1979.

Plaintiff seeks to recover for injuries he received in a collision between his pickup truck and defendant's van. The accident occurred at the intersection of Old Charlotte Road, which runs north and south, and Highway 49, which runs east and west. The road is controlled by stop signs and a blinking red light, and the highway by a blinking yellow light. Some distance before the intersection on the highway there are intersection warning signs recommending a speed of 45 m.p.h. Highway Patrolman Morton, who was called to the accident scene, testified that the intersection was visible from the east for approximately two- to three-tenths of a mile. When Morton arrived at the accident location he found the two vehicles on the western edge of the intersection, the plaintiff's pickup truck in the side ditch facing north and the front of defendant's UPS van against the pickup truck and facing generally west, diagonally across the intersection. The front end of the UPS van had struck the pickup truck at the back of the cab. The van had made 38 feet of skid marks east of the intersection. These marks ended before they got to the center of the intersection, and were entirely in the westbound lane in a straight line.

The plaintiff testified that at about 5:45 p.m. on the day of the accident he approached the intersection traveling north on Old Charlotte Road. He stopped at the stop sign and saw defendant's truck headed toward him about 1500 feet east of the intersection. Plaintiff stepped on the gas to cross the highway, and his truck backfired and cut off. The truck continued rolling until it was completely blocking the westbound lane of the highway. Plaintiff put the truck in park and after 8 to 10 seconds managed

to restart it. The last thing he can remember is reaching for the gearshift to put the truck in drive.

Harry Boone, who was following plaintiff in another pickup, testified that he saw the plaintiff's vehicle coast out into the highway and stop. The UPS van was 900 yards away when plaintiff's vehicle stopped, and in Boone's opinion the van was traveling around 60 m.p.h. Plaintiff was stopped in the highway for 8 to 10 seconds before the collision occurred. Ira Shoe, who went to the scene of the accident after plaintiff was removed from his vehicle, testified over objection that the gearshift of plaintiff's automatic transmission truck was in park. Boone also saw, after plaintiff had been removed, that the gearshift was in park. Plaintiff's wife testified that defendant came up to her at the hospital and said, "I'm sorry, the sun was in my eyes." At the close of plaintiff's evidence defendants moved for a directed verdict, which was denied.

Defendant presented the deposition of Eddie Rowe, who at the time of the accident was stopped at the intersection on Old Charlotte Road, heading south. He saw plaintiff's truck coming across the highway very slowly, and from the time it began to cross the highway until the accident happened the truck did not stop at any time.

Defendant testified that on the day of the accident he was traveling west on Highway 49. He was first able to see the intersection about two-tenths of a mile before he got to it, and he saw plaintiff pull up to the stop sign. When defendant was 400 or 500 feet from the intersection he was traveling 45 m.p.h. He had just shifted into high gear, which was possible in the van at 41-43 m.p.h. When defendant was 100 feet from the intersection, traveling at 45 m.p.h., plaintiff started to pull out in front of him. Defendant immediately applied his brakes, but could not avoid the collision. After plaintiff's truck began to enter the intersection it did not stop at any time; it just moved at a slow rate of speed. As defendant approached the intersection the sun was low in the sky and was partially blocked by trees, so it did not affect his ability to see. He did not talk with plaintiff's wife at the hospital or elsewhere.

At the close of the evidence defendants renewed their motion for a directed verdict, which again was denied. The jury found

that defendant was negligent, that plaintiff was contributorily negligent, and that defendant had the last clear chance to avoid the accident. Plaintiff was awarded $8,000 and defendants appealed.

Thomas M. Grady and M. Slate Tuttle, Jr., for plaintiff appellee.

James P. Crews and Robert L. Burchette for defendant appellants.

ARNOLD, Judge.

[1] Defendants first argue that they were entitled to a directed verdict because plaintiff presented no competent evidence of actionable negligence. It is their opinion that the only evidence of negligence was the testimony of plaintiff and Harry Boone that plaintiff's truck was stalled in the intersection for some 8 to 10 seconds before it was hit and Boone's testimony that defendant was speeding, and defendant argues that this testimony is "without probative value." We are unpersuaded, however, by defendants' argument that the "physical facts and the immutable laws of physics" show that the pickup truck had to have been in motion from the van's left to its right at the moment of impact. A number of other explanations are possible for the fact that the two vehicles, having collided, did not proceed in a straight line but veered off to the right. This is a distinctly different situation from those in the cases cited by defendants for the proposition that "physical facts speak louder than words." See *Mayberry v. Allred*, 263 N.C. 780, 140 S.E. 2d 406 (1965); *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327 (1955); *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337 (1945).

Defendants argue further that there is no probative value in the testimony of Boone and Ira Shoe that after plaintiff was removed from his wrecked truck they observed that the gearshift lever was in park, since, defendants argue, many people had access to the lever and ample reason to move it in trying to extricate plaintiff before the witnesses observed it. We find that this affects only the weight to be given the testimony, and not its admissibility. Moreover, there is other evidence that plaintiff's truck was stopped at the intersection at the time of the collision.

Nor is there merit in defendants' argument that Boone had insufficient opportunity to observe the speed of the oncoming van to make his opinion as to its speed competent. The cases relied upon by defendants are distinguishable upon their facts. See *Key v. Woodlief*, 258 N.C. 291, 128 S.E. 2d 567 (1962); *Fleming v. Twiggs*, 244 N.C. 666, 94 S.E. 2d 821 (1956); *Johnson v. Douglas*, 6 N.C. App. 109, 169 S.E. 2d 505 (1969).

[2] Defendants next argue that they were entitled to a directed verdict because plaintiff's testimony showed that he was contributorily negligent as a matter of law, and upon the evidence the doctrine of last clear chance did not apply. (See *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968) for an analysis of the doctrine.) Defendants attempt to distinguish the case of *Cockrell v. Cromartie Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978), but we find that that case is not distinguishable, and that it controls our decision on this point.

In *Cockrell* the Supreme Court found reversible error in the court's refusal to give a jury instruction upon the doctrine of last clear change. The evidence in *Cockrell*, viewed in the light most favorable to the plaintiff there, showed that plaintiff's intestate was driving north on Highway 421, and that when she attempted to make a left turn across the highway her car's engine stalled and the left front of the car drifted across into the southbound lane, where it was struck by a truck driven by defendant. Defendant had been traveling south on Highway 421, and the configuration of the road was such that the deceased's vehicle would have been visible to him 1300 or 1400 feet away. A passenger in deceased's car testified that defendant had not yet come into view when deceased began to make her turn. On these facts the court held that the jury, properly instructed, could have found that the defendant could have avoided the collision by stopping or driving around the car, or that he could have avoided the car if he had not failed to maintain a proper lookout. In the present case the evidence taken in the light most favorable to the plaintiff is very similar: defendant's van was some 1500 feet away when plaintiff's truck began to cross the intersection, and there were no obstructions to defendant's view of the truck. Plaintiff was stalled in defendant's lane for 8 to 10 seconds before the collision. There was no traffic coming toward defendant in the other lane. Upon these facts we find that a jury instruction on last clear chance

was proper. Defendants have argued vehemently that the plaintiff had ample opportunity to escape from his peril, but it is a question for the jury whether the plaintiff could have escaped from his peril by the exercise of reasonable care.

[3] This brings us to defendants' argument that the trial court instructed incorrectly on last clear chance. As defendants point out, one element of a finding that a defendant had the last clear chance to avoid an accident is that the plaintiff was in a position of peril from which he could not escape by the exercise of reasonable care. *Wade v. Jones Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150 (1954). The trial court here charged the jury on last clear chance as follows:

> The burden of proof on this issue is on the plaintiff and to justify an answer in his favor, the plaintiff must prove by the greater weight of the evidence, the following three things: First, that the plaintiff was in a position of peril from which he could not remove himself by the exercise of reasonable care. Second, that thereafter, the defendant discovered or became aware of plaintiff's position and peril of the plaintiff's incapacity to escape and the defendant had time and means to avoid injury to the plaintiff by the exercise of reasonable care after he discovered or should have discovered the plaintiff's perilous position, and the plaintiff's incapacity to escape from it or in the exercise of reasonable care should have done so, and had the time and means to avoid the injury, but negligently failed to exercise ordinary care to do so. Third, that such failure proximately caused the plaintiff's injury; that the defendant negligently failed to use the available time and means to avoid injury to the endangered plaintiff, for that reason, struck and injured the plaintiff. Finally, as to this last clear chance issue, I instruct you that if the plaintiff has proved and by the greater weight of the evidence, that the plaintiff was in a position of peril, that the defendant Steven Bess, thereafter, discovered or became aware of or in the exercise of reasonable care should have discovered or became aware of plaintiff's position of peril and had or by the exercise of reasonable care, should have had the time and means to avoid the plaintiff's injury, but negligently failed to do so, and that such failure proximately caused the plaintiff's

injury, then it would be your duty to answer this issue, yes, in favor of the plaintiff.

We do not find that the trial court's omission of the phrase "from which he could not remove himself by the exercise of reasonable care" in the reiteration of the elements of the doctrine, after a correct and complete enumeration of the elements initially, was sufficiently prejudicial to require a new trial.

Defendants' motions for directed verdict were properly denied, and no prejudicial error occurred in the trial.

No error.

Judges WEBB and WELLS concur.

PEARCE YOUNG ANGEL COMPANY v. DON BECKER ENTERPRISES, INC., D/B/A HARBOR VIEW RESTAURANT. DONALD E. BECKER AND TED SEAWELL

No. 795DC225

(Filed 20 November 1979)

1. **Rules of Civil Procedure § 56.3— exclusion of oral testimony at summary judgment hearing—failure to place testimony in record**

The trial court did not abuse its discretion in excluding a witness's oral testimony on motion for summary judgment where there was no showing that the witness's testimony could not have been presented by affidavit. Nor did the court commit prejudicial error in refusing to place the witness's testimony in the record. G.S. 1A-1, Rule 43(e).

2. **Guaranty § 2— action on guaranty—summary judgment for plaintiff**

In an action to recover upon defendant's guaranty of an account for food sold to a restaurant, plaintiff's evidence on motion for summary judgment showing a guaranty signed by defendant and itemized invoices and credit memos showing that the restaurant owed plaintiff a certain amount on the guaranteed account, if presented at trial, would entitle plaintiff to a directed verdict and shifted to defendant the burden of showing that a genuine issue of material fact existed, and defendant failed to carry his burden where he presented only his affidavit in which he denied knowledge of having executed the guaranty and stated that he had no knowledge of the sales to the restaurant or of credits or payments.

3. **Guaranty § 1— guaranty signed by two guarantors—no joint guaranty—termination of guaranty by one guarantor**

Where a guaranty of payment of supplies purchased by a restaurant took the form of one contract with two signatures but did not bind the two guaran-

tors to be jointly responsible for a particular amount and instead made each of them liable to a maximum of $10,000, just as if a separate guaranty had been signed by each of them, one guarantor's termination of his guaranty, clearly worded to affect his liability alone, did not terminate the second guarantor's liability on his guaranty.

Judge WELLS dissenting in part and concurring in part.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 21 November 1978 in District Court, NEW HANOVER County. Heard in the Court of Appeals 24 October 1979.

Plaintiff, a food wholesaler, alleges that during the period from 6 July 1977 to 15 August 1977 it delivered food at the request of the corporate defendant to that defendant's Harbor View Restaurant on credit, and that that defendant is indebted to plaintiff in the amount of $11,606.36 for the food. Plaintiff further alleges that each of the individual defendants guaranteed the payment of such account purchases to a maximum of $10,000.

Plaintiff took a voluntary dismissal as to defendant Seawell. The corporate defendant failed to answer, and a default judgment was entered against it. Defendant Becker (hereinafter defendant) answered, and subsequently both parties moved for summary judgment. Plaintiff supported its motion with affidavits and exhibits which indicated that the Harbor View account was opened in February 1976, with Becker and Seawell guaranteeing purchases to a maximum of $10,000 each. The account was kept current until 6 July 1977, and all amounts alleged to be presently due were charged to the account between 6 July and 15 August 1977. On 12 September 1976, Seawell gave written notice as permitted by the guarantee that he would be responsible for no charges incurred after that date. Seawell did not intend to include Becker in the termination notice, and Becker was not informed that it had been sent. Plaintiff did not acknowledge the notice, or take any action upon it.

In support of his motion, defendant presented his affidavit, attesting that he had no knowledge of ever executing a guarantee, and that he had no notice of Seawell's termination. Defendant's motion was granted, and plaintiff appeals.

Carter & Carter, by James Oliver Carter, for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff supported its motion for summary judgment with two affidavits and three exhibits. At the hearing on the parties' summary judgment motions plaintiff then offered the testimony of its salesman Carl Dawsey to prove that defendant had been notified by plaintiff of Seawell's termination of guarantee and that defendant had agreed to continue to be bound. Without directly ruling on the admissibility of this testimony, the court gave summary judgment for defendant. He also refused counsel's request to place Dawsey's testimony in the record, saying that "plaintiff's counsel had already stated to the Court what the witness would have testified to." Plaintiff argues that Dawsey's testimony should have been admitted. However, as plaintiff concedes, while oral testimony is permissible on a motion for summary judgment, G.S. 1A-1, Rule 43(e); *Chandler v. Cleveland Savings & Loan Assn.*, 24 N.C. App. 455, 211 S.E. 2d 484 (1975), the admission of such testimony is in the court's discretion. G.S. 1A-1, Rule 43(e); *Insurance Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974) (dictum). Plaintiff has shown us no reason why Dawsey's testimony could not have been presented by affidavit, giving defendant the opportunity to rebut. See *Chandler v. Cleveland Savings & Loan Assn., supra.* We find no abuse of discretion in the exclusion of the testimony here. Nor do we find prejudical error in the court's refusal to place Dawsey's testimony in the record.

[2] Plaintiff also contends that the granting of summary judgment for defendant was improper, and that plaintiff was in fact entitled to summary judgment. In support of its motion plaintiff presented a guarantee signed by both Seawell and Becker, and itemized invoices and credit memos showing that the corporate defendant owed plaintiff $11,606.36 on the guaranteed account. This evidence, if presented at trial without more, would entitle plaintiff to a directed verdict, and so shifted to defendant the burden of showing that a genuine issue of material fact existed.

See Matter of Will of Edgerton, 29 N.C. App. 60, 223 S.E. 2d 524, *cert. denied* 290 N.C. 308, 225 S.E. 2d 832 (1976). Defendant did not carry this burden. He presented only his affidavit, in which he denied "having any knowledge of ever having executed such a guarantee" and stated further that he had no knowledge of sales to the Harbor View Restaurant, or of credits or payments. This was insufficient to meet the requirement of G.S. 1A-1, Rule 56(e) that defendant set forth "specific facts" showing that there was a genuine issue for trial. *Cf. United States Steel Corp. v. Lassiter*, 28 N.C. App. 406, 221 S.E. 2d 92 (1976).

[3] Plaintiff also presented with its motion a letter from Seawell terminating his guarantee. Defendant argues that this termination on Seawell's part released defendant from liability also.

The guarantee signed by Seawell and Becker reads as follows:

> Gentlemen:
>
> In consideration of your granting to my business, *ten thousand and 00/100*—a line of credit upon restaurant supplies and related items to be purchased from time to time from you on open account, I (we) hereby personally guarantee the payment of such open account purchases, subject to the following limitations:
>
> (1) This guarantee shall be subject to the maximum sum of *$10,000* for each of the undersigned.
>
> (2) I (we) may at any time terminate this guarantee by written notice to you. Upon such notice of termination of this guarantee, this guarantee shall remain in full force and effect as to all open account purchases, within the limit above set out, which have heretofore been purchased by the Company, *Harbor View Rest.*, and are still unpaid at the time of such notice; but shall not apply to any open account purchases subsequent to the receipt by you of such notice.

Seawell's letter to the plaintiff indicates: "As of Sept. 12, 1976 neither my wife Anne nor I will have any interest in the operation of the Harbor View Restaurant . . . or Don Becker Enterprises, Inc. . . . [W]e hereby cancel our credit backing and will as-

sume no financial responsibility for bills or charges incurred after September 11, 1976. . . ."

Defendant first argues that Seawell's letter terminated the entire guarantee, but we find that this is not the case. The rights of a creditor against a guarantor arise out of the guaranty contract, and must be determined by reference to that contract. See *EAC Credit Corp. v. Wilson*, 281 N.C. 140, 187 S.E. 2d 752 (1972); 38 Am. Jur. 2d, Guaranty § 115. The language of paragraph (1) of the guaranty here reveals that while the guaranty took the form of one contract with two signatures, it did not bind Seawell and Becker to be jointly responsible for a particular amount of credit extended to the corporation, but instead made each of them liable to a maximum of $10,000, just as if a separate guaranty had been signed by each of them. Accordingly, Seawell's termination of his guarantee, clearly worded to affect his liability alone, did not terminate defendant's guaranty as well.

Nor do we find that the rules applicable to releases apply to terminate defendant's liability. It is uncontradicted that plaintiff did nothing in response to Seawell's letter that would have consituted a release of either Seawell or defendant. Furthermore, defendant has not been injured by this termination without notice, as is often the case with a release, see 38 Am. Jur. 2d, Guaranty §§ 128 and 91, since by the terms of the guaranty contract he has made himself liable to a maximum of $10,000, without regard to the presence or absence of other guarantors.

Defendant has failed to establish that there exists any genuine issue of material fact, and upon the law plaintiff is entitled to summary judgment against defendant in the amount of $10,000. The order of the trial court is

Reversed.

Judge WEBB concurs.

Judge WELLS dissents in part and concurs in part.

Judge WELLS dissenting in part and concurring in part:

I do not read the requirements of G.S. 1A-1, Rule 56(e) to place the burden on the defendant to set forth specific facts with

respect to his contention that he did not have any knowledge of having executed the guaranty agreement. His affidavit contains the following statement:

> As to the guarantee which purports to bear my signature, I deny having any knowledge of ever having executed such a guarantee. Based upon the copies which I have seen, I am unable to state that it is my signature and, therefore, I deny it.

Defendant's affidavit also contains a denial of the sales to the corporate defendant and a lack of knowledge of payments and credits.

It seems to me that the defendant, in his affidavit, has set forth a sufficient basis to raise genuine issues for trial as to whether he in fact signed the guaranty agreement or whether it was signed by someone else with his permission and on his behalf; and whether the sales detailed in plaintiff's affidavit were in fact made and not paid for.

I concur with the majority that summary judgment for defendant was not appropriate; but it is my opinion that neither is summary judgment for plaintiff appropriate, and that the cause should be remanded for trial on the issues of fact I have enumerated above.

STATE OF NORTH CAROLINA v. CLAUDE O. McLAWHORN

No. 793SC481

(Filed 20 November 1979)

1. Constitutional Law § 50— Speedy Trial Act—inapplicability

The Speedy Trial Act which became effective 1 October 1978 was inapplicable where defendant was arrested on 19 August 1978 and tried on 5 September 1978.

2. Criminal Law § 162— breathalyzer test—necessity for objection

Defendant waived any error in admission of the results of a breathalyzer test where he failed to object at trial.

3. Criminal Law § 163— instructions—necessity of bringing errors to court's attention

Errors of the trial court in recapitulating the evidence must be brought to the trial judge's attention in time for correction, or appellate review is waived.

4. Automobiles §§ 126.6, 129— driving under the influence—driving while license revoked—evidence of prior offenses—no prejudice

In a prosecution of defendant for driving under the influence, second offense, and driving while his license was revoked, fourth offense, where defendant stipulated to previous convictions for those crimes, the trial court did not err in instructing the jury with respect to defendant's prior convictions, since the harm was in the fact that evidence of the prior convictions was before the jury and not in the instructions concerning them and since the judge properly limited consideration of the prior offenses to impeachment purposes.

5. Automobiles § 129— driving under the influence—lesser offense—failure to instruct—no error

In a prosecution of defendant for driving under the influence of intoxicating liquor, second offense, and driving while his license was revoked, fourth offense, the trial court's failure to instruct on operating a vehicle on a public highway when blood alcohol content is .10 percent or more by weight in violation of G.S. 20-138(b) was beneficial to defendant, since the State would not have had to prove that defendant was under the influence of intoxicating liquor in order to obtain a conviction under that statute, and the State was thus put to a greater burden to convict defendant under G.S. 20-138(a); nor did the court err in failing to instruct on reckless driving pursuant to G.S. 20-140(c), since the evidence did not show defendant's consumption of intoxicating liquor directly and visibly affected his operation of his vehicle.

6. Criminal Law § 119— oral request for instructions—timeliness

The trial court could properly refuse to give an instruction on the definition of proof beyond a reasonable doubt where defendant's request therefor was neither timely nor in writing.

7. Automobiles § 127.2— driving under the influence—defendant as driver—sufficiency of evidence

In a prosecution of defendant for driving under the influence, second offense, and driving while his license was revoked, fourth offense, evidence was sufficient for the jury to consider whether defendant was driving the vehicle in question where it consisted of testimony by the arresting officer that he stopped the truck and observed a female on the right-hand side in the cab of the truck; as he approached the truck, he heard a shuffling noise and, on reaching the truck, observed the woman on the left side under the steering wheel; defendant was on the right side where the woman had been; and no other persons were in the vehicle.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 10 January 1979 in Superior Court, PITT County. Heard in the Court of Appeals 27 September 1979.

Defendant was placed on trial for driving under the influence of intoxicating liquor, second offense, and driving while his license was revoked, fourth offense.

The evidence tends to show the following. On 19 August 1978, defendant and a female were traveling in defendant's truck on Highway 264 near Greenville at a speed of 70 m.p.h. in a 55 m.p.h. zone. The speeding truck was stopped by a highway patrolman. As the patrolman walked toward the truck, he shined his flashlight in the rear window of the truck and observed the female sitting on the right-hand side looking back at him. He heard a shuffling noise as he drew nearer the cab and, upon reaching the truck door, found the female on the left under the steering wheel. Defendant was sitting in the passenger seat. The patrolman, thinking the two people in the truck had switched places, went to the passenger side and asked defendant to step out and produce his operator's license. Defendant produced a Texas operator's license. A records check revealed that defendant's license was revoked in North Carolina. In the opinion of the officer, defendant was under the influence of alcohol. The arresting patrolman and the patrolman who administered a breathalyzer test testified as to defendant's appearance and conduct. He alternated between cooperativeness and stubbornness. He had trouble understanding the instruction for the balance tests as well as trouble with the actual performance of the tests. His eyes were bloodshot, glassy and watery. The results of a breathalyzer test showed defendant's blood alcohol content to be 0.11 percent.

Defendant and the woman with him testified they had not switched places and that defendant was not the driver that evening. He was found guilty as charged and judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Dixon and Horne, by Phillip R. Dixon, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion for dismissal under the Speedy Trial Act. G.S. 15A-701 to

-704. He was arrested 19 August 1978 and tried in district court on 5 September 1978, at which time notice of appeal to superior court was given. In enacting the Speedy Trial Act, the Legislature expressly provided "This act shall apply to any person who is arrested . . . on or after October 1, 1978." 1977 N.C. Sess. Laws c. 787, s. 2. Defendant was arrested before this effective date. The Act's provisions, therefore, do not apply.

[2] Defendant's second and third assignments of error deal with the admission of the results of defendant's breathalyzer test. Defendant contends it was error to admit the evidence because the State failed to prove compliance with the statutory requirements for admission of evidence of a chemical analysis and failed to show defendant was advised of his breathalyzer rights set out in G.S. 20-16.2(a). Defendant, however, waived any error by failure to object at trial to the breathalyzer evidence or the lack of proper foundation for such evidence.

[3] The fourth assignment of error involves the trial judge's recapitulation of the evidence. Defendant contends the trial judge misstated some evidence and in one instance stated as a fact something which was not in evidence. The trial judge at one point said the lady with defendant "was seated on the *left* side of the seat, in the passenger side" and at several points referred to defendant by using the last name of the arresting officer which was not defendant's last name. He also misplaced the time of arrest as being when the officer went around to the passenger side of the truck when the officer's testimony was to the effect that he arrested defendant later when they were both seated in the patrol car. These misstatements were not brought to the trial judge's attention. Errors in the restatement of the evidence must be brought to the trial judge's attention in time for correction or appellate review is waived. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977). These were not substantial errors. When considered in context, a reasonable person could not have been confused.

Defendant also contends no evidence was presented that Ms. Warren was seated on the *right* side of the seat in the passenger side. The arresting officer testified:

> "I took my light and shined it in this area that would shine into the cab and I observed a white female blonde headed,

> curly headed (woman) sitting on the right-hand side looking back at me over her shoulder . . . . As I got there, the lady who had been on the right side was then under the steering wheel and the white male . . . was over on the passenger side of the vehicle. . . ."

The trial judge's summary to the effect that Ms. Warren "was seated on the *left* side of the seat, in the passenger side" was in substantial compliance with the trial testimony except for the confusion of left and right. "The law has never required verbatim recitation of the evidence by the court." *State v. Goss*, 293 N.C. 147, 157, 235 S.E. 2d 844, 851 (1977). In any event, the trial judge cautioned the jury to be governed by their own recollection and disregard his summary if there was a conflict.

[4] In his fifth and sixth assignments of error, defendant argues error in the trial judge's instruction on the law as it applies to the facts of the case. Defendant had stipulated to previous convictions of driving under the influence and driving while license was revoked. This was done by defendant pursuant to G.S. 15A-928 because the offenses he stood charged with—driving under the influence, second offense, and driving while license revoked, fourth offense—were more severe because of the past convictions. The prior convictions were essential elements of the charged crimes. The statute provides:

> "If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense."

G.S. 15A-928(c)(1); *see State v. Smith*, 291 N.C. 438, 230 S.E. 2d 644 (1976). The trial judge, however, instructed the jury that defendant was charged with drunk driving, second offense, and driving while license was revoked, fourth offense. He instructed the jury that the prior convictions were essential elements of the crime of which defendant was to be found either guilty or not guilty and that it was the State's burden to prove beyond a reasonable doubt these prior convictions. Although it was error to so instruct, an error must be prejudicial to warrant a new trial. *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968). On the facts

and circumstances of this case, defendant was not harmed by the trial judge's error in the instruction.

The harm was in the fact that evidence of these prior convictions was before the jury and not in the instructions concerning them. The arresting officer testified that defendant, when asked for his license, produced a Texas license. The officer testified he then ran a Police Information Network check and learned defendant's license was revoked in North Carolina. Defendant made no objection to this evidence at trial nor is any exception set out on appeal. Any error is thereby waived. When defendant testified in his own behalf, the prosecutor questioned him concerning prior convictions. He admitted his license was currently in a state of revocation, that he had three previous convictions of driving while his license was revoked and that he had been in court right many times before for drinking and driving. It was not error to cross-examine defendant on these prior convictions for impeachment purposes in spite of the stipulation pursuant to G.S. 15A-928. *State v. Guinn*, 32 N.C. App. 595, 233 S.E. 2d 73 (1977); *see also* G.S. 15A-928(c)(2). The judge charged, "However, if you find that he was previously convicted, and he has so stipulated, you shall not consider such conviction in passing on his guilt or innocence. . . ." This instruction was proper to put the evidence of prior convictions in the proper context of being considered for impeachment purposes only and not as substantive evidence. 1 Stansbury, N.C. Evidence § 112 (Brandis rev. 1973). Because evidence of the prior convictions was before the jury, we see no prejudice to defendant in putting an additional burden on the State to prove beyond a reasonable doubt that defendant was in fact convicted of the same offenses previously.

[5] In his seventh and eighth assignments of error, defendant argues the jury should have been instructed on the offenses of operating a vehicle on a public highway when blood alcohol content is 0.10 percent or more by weight in violation of G.S. 20-138(b) and the offense of reckless driving in violation of G.S. 20-140(c). He maintains instruction on these crimes was proper as lesser included offenses of the charged offense of driving under the influence, second offense. The trial court could have instructed on driving a vehicle upon a highway within the State when the amount of alcohol in the driver's blood is 0.10 percent or more by weight as provided for in G.S. 20-138(b). "An offense under this

subsection *shall be treated as* a lesser included offense of the offense of driving under the influence." *Id.* (Emphasis added). The wording is not that it *shall be* a lesser included offense but that it "*shall be treated as* a lesser included offense." Thus, the Legislature did not mandate that the offense defined in G.S. 20-138(b) be instructed on everytime there is an offense charged pursuant to G.S. 20-138(a). *See State v. Basinger*, 30 N.C. App. 45, 226 S.E. 2d 216 (1976). Evidence was introduced which indicated that a breathalyzer test revealed 0.11 percent alcohol by blood weight in defendant. Although the instruction could have been given, the omission of the instruction was to defendant's benefit. While driving with 0.10 percent by weight alcohol in the blood is by statute to "be treated as" a lesser included offense of driving under the influence, it, in reality, is not a lesser offense. The effect of G.S. 20-138(b) is to allow the court to impose the punishment it could impose for a conviction under subsection (a) of the same statute without the State having to prove that the defendant was under the influence of intoxicating liquor. For both offenses, the State must prove (1) defendant was driving a vehicle and (2) defendant was driving upon a public highway or public vehicular area within the State. As a third element of G.S. 20-138(a), the State must prove beyond a reasonable doubt defendant was under the influence of intoxicating liquor. For a conviction under subsection (b) the State need only prove that the amount of alcohol in defendant's blood was 0.10 percent or more by weight. The punishment range for both offenses under G.S. 20-138 is identical. *See* G.S. 20-179(a). By not instructing on the latter motor vehicle violation, the trial judge benefited defendant and handicapped the State. The State had the verdict options of only driving under the influence or not guilty. The State was thus put to a greater burden than it would have under G.S. 20-138(b). An error which was not harmful or prejudicial to defendant does not warrant a new trial. *State v. Paige, supra.* There is even less merit to defendant's contention that an instruction pursuant to G.S. 20-140(c) should have been given. That subsection of the reckless driving statute provides:

> "Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such of-

fense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended."

The evidence does not show defendant's consumption of intoxicating liquor directly and visibly affected his operation of his vehicle. The instruction was correctly omitted. *State v. Davis*, 37 N.C. App. 735, 247 S.E. 2d 14 (1978); *State v. Pate*, 29 N.C. App. 35, 222 S.E. 2d 741 (1976).

[6] Defendant's final assigned error in the jury instruction involves the failure and then refusal of the trial judge to instruct on the definition of proof beyond a reasonable doubt. Defendant orally requested an instruction on reasonable doubt after the judge completed his charge. The court was not required to define the term absent a timely request. *State v. Edwards*, 286 N.C. 140, 209 S.E. 2d 789 (1974). Defendant's request was neither timely nor in writing, and the judge could decline to give the instruction. G.S. 1-181.

[7] Defendant's tenth and eleventh assignments of error involve the sufficiency of the evidence to take the case to the jury. Defendant argues there is no evidence that he was driving. We have set out some of the evidence on this point in our discussion of defendant's fourth assignment of error. The arresting officer testified that on stopping the truck, he observed a female on the right-hand side in the cab of the truck. As he approached the truck, he heard a shuffling noise and, on reaching the truck, observed the woman on the left side under the steering wheel. Defendant was on the right side where the woman had been. No other persons were in the vehicle. This was sufficient evidence for the jury to consider on whether defendant was driving. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978).

We have considered all of defendant's assignments of error and conclude that no error, so prejudicial as to require a new trial, has been shown.

No error.

Judges ERWIN and HILL concur.

Nugent v. Beckham

ALFRED S. NUGENT, JR. AND REGINA M. NUGENT v. WALLACE BECKHAM AND ANN L. BECKHAM

No. 781SC160

(Filed 20 November 1979)

1. **Vendor and Purchaser § 5— specific performance of contract to convey—bank interest on deposited purchase money**

Where the court entered partial summary judgment that plaintiffs are entitled to specific performance of a contract to convey, that trial should be had on issues of the amount of abatement of the purchase price for violation of setback restrictions and the amount of rents and profits due plaintiffs, and that plaintiffs place the purchase money in an interest bearing account, the trial court properly ordered that defendants were entitled to the interest paid by the bank on the deposited purchase money after the date judgment was entered on the issue of abatement.

2. **Vendor and Purchaser § 5— specific performance of contract to convey—deeds of trust on the property—satisfaction out of deposited purchase money**

Even if outstanding deeds of trust can be matters of abatement in an action for specific performance of a contract to convey by warranty deed free from all encumbrances, the record shows that the only matter of abatement presented to the jury in this case was the violation of setback restrictions, and the right of plaintiffs to have defendant sellers satisfy the deeds of trust was not lost when an issue of abatement was submitted to the jury. Furthermore, it was proper for the trial court to order that notes secured by the deeds of trust be satisfied out of the purchase money on deposit with the clerk of superior court.

APPEAL by plaintiffs and defendants from *Small, Judge.* Order entered 26 October 1978 in Superior Court, DARE County. Heard in the Court of Appeals 18 September 1979.

Plaintiffs commenced this action in November 1973 seeking specific performance of a contract by which defendants were obligated to convey to plaintiffs a certain lot and house in Dare County. After hearing on plaintiffs' motion for partial summary judgment, on 15 April 1977, Judge Robert A. Collier, Jr. ordered that plaintiffs were entitled to specific performance of the contract and that trial should be had upon the issues of the amount of abatement of the purchase price for violation of setback restrictions and rents and profit due the plaintiffs since 1973, that plaintiffs place the purchase money in an interest bearing account, with interest to go to plaintiffs, and that defendant-sellers were entitled to the balance of the purchase price less the amount of

the abatement of the purchase price and the rents and profits since October 12, 1973.

At trial in April 1977 before Judge Tillery, the jury awarded plaintiffs $5,500.00 in abatement of the purchase price of the property and $9,000.00 for rents and profits with a set-off of $6,800.00 in defendant's favor. Plaintiffs were thereby entitled to a net reduction of the purchase price in the amount of $7,700.00. Judgment was entered on 25 May 1977.

On appeal to this Court it was held that the summary judgment was properly granted and that Judge Tillery was correct in denying interest to both parties. *Nugent v. Beckham*, 37 N.C. App. 557, 246 S.E. 2d 541 (1978).

On 6 July 1977 defendants had not conveyed the subject property to plaintiffs, and plaintiffs caused to be recorded in the Office of the Register of Deeds of Dare County Judge Collier's order of 15 April 1977, thereby transferring title to the property from defendants to plaintiffs. On 12 July 1977, on motion of plaintiffs' counsel, Resident Judge Herbert Small directed the Dare County Clerk of Superior Court to disburse to plaintiffs the $7,700.00 awarded by the jury.

On 16 September 1978, plaintiffs took possession of the subject property after being advised by defendants that defendants had vacated the premises.

On 10 October 1978, plaintiffs filed a motion alleging that the subject property was encumbered with two deeds of trust in contravention of the covenant against encumbrances in the contract of sale; that a warranty deed had not been tendered by defendants to plaintiffs; that defendants had refused to pay the sellers' prorated portion of property taxes on the subject property; that the construction of the house on the subject property had not been completed; and that the sellers had allowed the property to suffer injury beyond ordinary wear and tear. Plaintiffs then moved that the Clerk of Superior Court disburse sums sufficient to satisfy the two deeds of trust, sellers' prorated share of 1978 property taxes, plaintiffs' expenses in completing construction of the cottage, compensation for damage to the subject property beyond ordinary wear and tear, all interest accruing on the monies being held by the Clerk of Superior Court, and the balance due sellers under the contract.

On 26 October 1978, Judge Small entered an order compelling defendants to execute a general warranty deed to plaintiffs and directing the Clerk of Superior Court to disburse funds to satisfy the two deeds of trust, to pay interest on the account from the date of deposit to 25 May 1977 to plaintiffs, to pay interest accruing on the account after 25 May 1977 to defendants, and to pay the balance of the money on deposit to defendants. Both plaintiffs and defendants now appeal from this last order of Judge Small.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin by Roy A. Archbell, Jr. and Norman W. Shearin, Jr. for plaintiffs.

Aldridge, Seawell & Khoury by Christopher L. Seawell for defendants.

CLARK, Judge.

I. APPEAL BY PLAINTIFF-BUYERS

[1] The plaintiffs present one question on appeal and assert that Judge Small erred in granting the defendants interest on the balance of the purchase price which had accrued since 25 May 1977, the date at which Judge Tillery entered judgment on the issue of abatement. This issue is complicated by the fact that three different determinations were made by three different trial judges as to what the proper award of interest should be. We now undertake to reconcile these three orders with each other and with the former decision on this issue in this case as set forth in *Nugent v. Beckham*, 37 N.C. App. 557, 246 S.E. 2d 541 (1978).

The following actions and dates are pertinent to this issue:

(1) On 15 April 1977, Judge Collier granted summary judgment in plaintiffs' favor and ordered that "[p]rior to the coming on for trial of the issues as to abatement of purchase price and an accounting of rents and profits, plaintiffs shall deposit with the Clerk of Superior Court of Dare County the balance of the purchase price required by the aforesaid contract . . . which amount shall be placed in an interest bearing account . . . with interest from said account being paid to the plaintiffs";

(2) Following the trial on the issue of abatement of the purchase price, Judge Tillery, on 25 May 1977, ordered the Clerk to pay to plaintiffs $7,700.00 out of the funds held in the aforemen-

tioned account and ordered that all interest for both the plaintiffs and defendants be denied;

(3) In the former appeal by defendants, Judge Mitchell for the Court, stated:

> ". . . It is true that the general rule is that the buyer is entitled to rents and profits during the period in which the seller has refused to convey and wrongfully kept the buyer out of possession, while the seller is entitled to interest on the purchase price. *Harper v. Battle*, 180 N.C. 375, 104 S.E. 658 (1920); *Stern v. Benbow*, 151 N.C. 460, 666 S.E. 445 (1909). We do not think, however, that the seller's right to interest on the purchase price in such cases is absolute as a matter of law. *See*, 81A C.J.S., Specific Performance, § 198, pp. 169-70.
>
> Here, the interest sought on the purchase price would exceed the amount awarded the plaintiffs by the jury and would result in a net gain to the defendants in the form of a reward for their failure or refusal to comply with the terms of their contract. We do not feel the general rule is so inflexible as to require a court of equity to reach such results. Rather, we find the denial of interest to all parties in the discretion of the trial court to have been proper in this case."

37 N.C. App. 557, 562-63, 246 S.E. 2d 541, 545-46 (1978);

(4) On 26 October 1978 Judge Small entered an order, pursuant to plaintiffs' motion to compel execution of the deed, requiring, *inter alia*, that the Clerk of Court pay plaintiffs all interest which accrued in the account prior to 25 May 1977 and to pay the interest to defendants after that date.

We can find only one interpretation which renders all of the above actions both consistent and equitable. First, it is apparent that the orders of Judges Collier and Small refer to disposition of the interest paid by the *bank* on the purchase money which had been deposited, whereas the order of Judge Tillery and the former appeal to this Court address the question of whether one of the *parties* must pay interest to the other. Consequently, we must only reconcile the orders of Judge Small and Judge Collier concerning the disposition of the interest paid by the bank, and to this end the opinion of Judge Tillery and the former appeal are not relevant.

Second, the order of Judge Collier was not limited in time, and it would be frivolous to assume that the plaintiff-buyers would forever be entitled to the benefit of the funds in the account. We hold that plaintiffs' rights in the account terminated when Judge Tillery entered the judgment of 25 May 1977 directing that the plaintiffs recover $7,700.00 from the account. Prior to 25 May 1977 the net amount due the defendant-sellers had not been established, *see Teich & Co., Inc. v. LeCompte*, 222 N.C. 602, 24 S.E. 2d 253 (1943) (interest not awarded on undetermined or unliquidated sums), and it would have been appropriate to allow the plaintiffs, who had been deprived of the use and enjoyment of their money, to recover the interest paid by the bank up to 25 May 1977, the point at which the parties' respective rights to the purchase money were determined. Consequently, we affirm the order of Judge Small with respect to the interest paid by the bank on the purchase price.

Possession, however, was not delivered until 16 September 1978, over a year after Judge Tillery's order. The period between May 1977 and September 1978 closely approximates the period in which the earlier appeal in this case was argued and decided. N.C. Gen. Stat. § 1-292 clearly contemplates that the seller must compensate the buyer for the buyer's loss of use and occupation of the property pending an appeal in which a judgment and decree ordering sale and possession to buyer is affirmed. Even though the determination of rents and profits from 25 May 1977 to 16 September 1979 is not an issue raised directly by and is not determined by this appeal, plaintiffs may elect to proceed for the recovery of rents and profits during this period; and we note that N.C. Gen. Stat. § 1-292 was enacted precisely for the purpose of protecting those in the position of the plaintiffs in the instant case.

II. APPEAL BY DEFENDANT-SELLERS

[2] Defendants contend that the trial court erred in ordering that the notes secured by two deeds of trust be satisfied out of the funds on deposit in the office of the Clerk of Superior Court of Dare County. In addition, defendants argue that Judge Small erroneously concluded that (1) the pleadings raised no abatement issue except as to the mislocation of the house; (2) that defendants are required to specifically perform the contract; and (3) that the

defendants are required to execute a deed. We find no merit in these contentions.

The contract for sale of the subject property specifically provided:

> "[t]hat the Seller will convey to the Purchaser by deed of warranty, *free from all encumbrance* except as hereinafter mentioned . . . ." (Emphasis supplied.)

Plaintiffs' complaint provides in relevant part:

> "4. In accord with the provision of said agreement, plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance in accord with the contract, *in that the dwelling located on the property is situated in violation of the subdivision ordinances of Dare County,* adopted as by law provided. Said violation being contrary to the provisions of the contract." (Emphasis supplied.)

On 15 April 1977, Judge Collier ordered specific performance of the above contract and further ordered that "[t]he defendants shall convey to plaintiffs by general warranty deed, the property described in the aforesaid contract in return for the payment to defendants of the balance of the purchase price ($31,050.00) *less the amount of the abatement of the purchase price* and the rents and profits since October 12, 1973 . . . ." (Emphasis supplied.)

At trial plaintiffs presented Willie Rogers, a house mover in Dare County, who testified that the cost of moving the subject house to comply with the setback restrictions would be $5,500.00, plus material costs. In summarizing the evidence, Judge Tillery explained that "[t]he evidence further tends to show in substance that in the opinion of Willie Rogers, a person who is engaged in the business of house moving, it would require an expenditure of $5,500.00 for labor costs to move the house first back from one line and then in a different direction back from the other . . . ."

Finally, the following issue was presented to the jury concerning abatement:

> "(1) What amount, if any, are the plaintiffs entitled to recover by way of abatement of the purchase price of the property which is the subject of this lawsuit?

To this the jury responded:

"Answer: $5,500.00."

All of the above reveals that the complaint did not set forth and the jury did not consider offsetting the two outstanding deeds of trust in their determination of the proper amount by which the purchase price should be abated. Consequently, even if, as defendants argue, outstanding deeds of trust can be matters of abatement, we do not agree that the verdict of the jury included these matters, and it would be unjust for us to hold that the right of plaintiffs to satisfy these deeds of trust was lost when the issue of abatement was sent to the jury.

Since the defendants refused to carry out their contract voluntarily, it was entirely proper for the trial court, in compelling specific performance of the contract, to insure that the outstanding encumbrances on the property were removed, particularly when the funds from which these obligations could be satisfied were in the custody of the court. *See generally,* 77 Am. Jur. 2d Vendor and Purchaser § 192 (1975). Moreover, it would approach absurdity for this Court to hold, six years after the contract of sale was signed, that plaintiffs must pay off defendants' notes and then seek reimbursement in an action for damages.

The appeal by plaintiffs is affirmed.

The appeal by defendants is affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. WALTER LEE SINCLAIR

No. 7912SC525

(Filed 20 November 1979)

1. Larceny § 7; Criminal Law § 106.4— confession—corroborating evidence—sufficiency of evidence

In a prosecution for breaking and entering and larceny, there was sufficient evidence corroborating defendant's confession to take the case to the jury, though an officer testified that he found no stolen property in

defendant's possession and that the only evidence he had connecting defendant to the crime was his statement, where the evidence tended to show that defendant lived next door to the premises broken into and defendant showed an officer where another person, who defendant contended committed the crime, had hidden stolen items.

2. Indictment and Warrant § 17.2— larceny—time of offenses—no fatal variance

In a prosecution for breaking and entering and larceny where the premises allegedly were broken into on two consecutive nights, there was no fatal variance between indictment and proof as to the date of the crimes charged in view of the fact that defendant did not rely upon an alibi for either of the nights in question; the indictment charged defendant with theft on the first night; and there was some evidence from which the jury could find that the items defendant confessed to stealing were taken in the first break-in.

3. Criminal Law § 75— confession—voluntariness

Evidence that the interrogating officer had known defendant for years, that defendant did not appear frightened during questioning, that the officer used a normal tone of voice and questioned defendant for 20-30 minutes, that the officer explained defendant's rights, and that he read defendant's statement and explained what it said before defendant signed it was sufficient to support a finding that the statement was voluntarily and understandingly made.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 22 March 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 October 1979.

Defendant was indicted for breaking and entering and larceny. Bobby C. Fulmore testified that on the morning of 18 March 1978 he returned to his residence and found that it had been ransacked. The front door was unlocked and the lock was broken. He did not know exactly what was taken, but "some tapes" and "other items" were missing. He asked defendant, who lived next door, if he had seen anyone enter the house, and defendant said no.

Fulmore was away from home until 12:30 or 1 a.m. on 19 March, and he returned to find that his house had been broken into again. Some clothes, food from the refrigerator, stereo equipment and mag wheels were missing.

Officer Merritt of the Fayetteville police informed defendant on 22 March that he was a suspect in a break-in at Fulmore's, and asked defendant to accompany him to the Law Enforcement Center. There defendant was read his rights, indicated he understood them, and signed the rights form, which included a

consent to be questioned. Merritt had known defendant practically all his life and knew that defendant is retarded. Defendant, when questioned, denied several times that he knew anything about the incident and then confessed his involvement. The statement was reduced to writing and Merritt read it to defendant before defendant signed it. Defendant can read some, and he was able to recognize a few of the words on the statement. Defendant did not appear frightened while in Merritt's presence. Merritt testified further that he found nothing of Fulmore's in defendant's possession, and that the only evidence he had to connect defendant to the break-in was defendant's statement.

Defendant's statement, which was introduced into evidence, indicated that he and two others, Lane and Smith, broke into Fulmore's house "on Friday night" through the back door, which already had a pane of glass broken out. They took three tapes, a white-and-brown sweater, and a steak TV dinner. They ate the dinner and hid the sweater beside a fence.

Defendant testified that he did not break into Fulmore's house, and that he told Merritt he did so because he was scared. Merritt "talked about locking me up and I didn't want to be locked up." He had shown Merritt where Lane hid "the stuff," but he didn't help hide it.

Defendant was found guilty of felonious breaking and entering and felonious larceny and sentenced to three years. He appeals.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr. and Susan G. Kelly, for the State.

Arthur L. Lane, by Paul B. Eaglin, for defendant appellant.

ARNOLD, Judge.

[1] It is recognized as established law that "a felony conviction may not be based upon or sustained by a naked extrajudicial confession of guilt uncorroborated by any other evidence." *State v. Jenerett*, 281 N.C. 81, 85-86, 187 S.E. 2d 735, 738 (1972). This principle appeared in North Carolina case law as early as 1797, where a defendant was indicted for horse-stealing. *State v. Long*, 2 N.C. 455 (per curiam). The only evidence in that case was that the horse had been missing, that two men had brought the horse and

the defendant to the house of the owner, and that the defendant had confessed that he had taken the horse and had begged forgiveness. The court said:

> Where A makes a confession, and relates circumstances which are proven to have actually existed as related in the confession, that may be evidence sufficient for a jury to proceed upon to convict the prisoner; but a naked confession, unattended with circumstances, is not sufficient. A confession, from the very nature of the thing, is a very doubtful species of evidence, and to be received with great caution. It is hardly to be supposed that a man perfectly possessed of himself would make a confession to take away his own life. It must generally proceed from a promise or hope of favor, or from a dread of punishment, and in such situations the mind is agitated—the man may be easily tempted to go further than the truth. Besides, the witness, respecting the confession, may have mistaken his meaning. How easy is it to understand the speaking differently from what he meant; and the smallest mistake in this particular might prove fatal. As there are no confirmatory circumstances in the present case, it is better to acquit the prisoner.

Id. at 456. More recently, however, the court has stated that while "there must be evidence *aliunde* the confession of sufficient probative value to establish the fact that a crime of the character charged has been committed," the independent evidence need not also identify the defendant as the one who committed the crime, *State v. Cope*, 240 N.C. 244, 247, 81 S.E. 2d 773, 776 (1954), and that language has been relied upon in almost every case on the point.

In the majority of the cases dealing with the rule the independent evidence has in fact shown some connection between the defendant and the crime. *E.g. State v. Jenerett*, *supra* (testimony of witnesses that defendant was the robber); *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969) (defendant seen running from the scene near time of crime); *State v. Crawford*, 260 N.C. 548, 133 S.E. 2d 232 (1963) (evidence that deceased was seen with defendant shortly before she disappeared and that her body was found where he said he had placed it, injured as he had said); *State v. Hauser*, 257 N.C. 158, 125 S.E. 2d 389 (1962) (stolen goods

found in defendant's possession). And on occasion the court has found that there was insufficient independent evidence to sustain a conviction. In *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960), the court found the evidence insufficient, saying, "[t]here is no direct evidence to connect defendant with the commission of the crime. The evidence offered is circumstantial, conjectural, and speculative." *Id.* at 323, 116 S.E. 2d 776. Likewise in *State v. Cope, supra*, the court reversed the defendant's conviction, there because there was no independent evidence that the sexual offenses with which the defendant was charged had ever been committed.

Several decisions from this court have upheld convictions where there was no independent evidence connecting the defendant with the crime. *E.g. State v. Thomas*, 17 N.C. App. 152, 193 S.E. 2d 297 (1972); *State v. Thomas*, 15 N.C. App. 289, 189 S.E. 2d 765, *cert. denied* 281 N.C. 763, 191 S.E. 2d 360 (1972); *State v. Macon*, 6 N.C. App. 245, 170 S.E. 2d 144 (1969), *aff'd* 276 N.C. 466, 173 S.E. 2d 286 (1970). And recently, in the case of *State v. Green*, 295 N.C. 244, 244 S.E. 2d 369 (1978), our Supreme Court upheld the defendant's convictions on charges of rape and murder where the only evidence which could have connected the defendant to the crimes was that he had been employed in the area where the victim worked and that the morning after the crimes he had told two people that he had engaged in sexual intercourse the night before. In light of the *Green* decision, we find that there was sufficient corroborating evidence in the instant case to take the case to the jury, though Officer Merritt testified that he found nothing of Fulmore's in defendant's possession and that "[t]he only evidence I have which connects Sinclair to this breaking is his statement."

[2] We find that defendant cannot prevail on his other assignments of error. He argues first that there was a fatal variance between the allegation in the indictment that the crimes were committed on 17 March and the proof at trial. However, as defendant recognizes, a variance which relates to the date of a larceny is not fatal unless time is of the essence or the statute of limitation is at issue. *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376, *cert. denied* 293 N.C. 363, 237 S.E. 2d 851 (1977). Defendant argues that time was of the essence here because there were two break-ins on successive nights and the items defendant con-

fessed to stealing were taken on the second night, while the indictment charged him with the theft on the first night. The record is not clear as to which night the enumerated items were taken, however. Fulmore first testified that in the first break-in the items taken included "some clothes and some food from the refrigerator . . . stereo equipment and mag wheels." He later testified that those items were missing when he returned after the second night. In view of the fact that defendant has not relied upon an alibi for either of the nights in question, and that there was some evidence from which the jury could find that the items defendant confessed to stealing were taken in the first break-in, we find no fatal variance.

[3] Defendant also argues that his confession should not have been admitted into evidence because of questions as to whether it was voluntarily and understandingly made. See *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), death penalty vacated 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976). It appears in defendant's brief, though not in the record, that defendant moved prior to trial to suppress the confession, and his motion was denied. Also according to defendant's brief, "[a] copy of the Order denying the Motion could not be found in the defendant's file maintained by the Clerk of Superior Court." No reference to the motion to suppress appears in the record. When the State offered defendant's statement into evidence, defendant objected and his objection was overruled.

Since the court's order denying the motion to suppress does not appear, we are not able to determine what facts, if any, were found by the trial court to support its decision that the confession was admissible. Furthermore, defendant's counsel has not included in the record the substance of that order, so we have no basis for review. We do note, however, that sufficient evidence appears in the record to support a finding that the confession was both voluntarily and understandingly made. Officer Merritt testified that he had known the defendant for years, and that defendant did not appear frightened while in his presence. Merritt used a normal tone of voice, and questioned defendant for 20-30 minutes. He read defendant the rights form and explained it to him, and he also read the statement to defendant and explained what it said before defendant signed it. Upon these facts we do not find as a

matter of law that this statement was involuntary or made without understanding. *See State v. Thompson, supra.* In defendant's trial we find

No error.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, NORTH CAROLINA REINSURANCE FACILITY, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORIST INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY

No. 7910INS202

(Filed 20 November 1979)

Insurance § 79.1 — automobile insurance rates and classifications — no authority by Insurance Commissioner to order own plan into effect

Under G.S. 58-124.21 the N.C. Rate Bureau is vested with the sole authority to determine rates and classifications for motor vehicle insurance, subject to review by the Commissioner of Insurance. Upon his review, if the Commissioner disapproves the Bureau plan, he must specify "wherein and to what extent" he disapproves it, and he may set a date after which the filing will no longer be effective, but he may not substitute his own proposals, whether they be deemed "modifications" or "substitutions," and may not order his own scheme into effect.

APPEAL by the North Carolina Rate Bureau and member companies from Order of the Commissioner of Insurance issued 30 October 1978. Heard in the Court of Appeals on 23 October 1979.

On 1 September 1977 the North Carolina Rate Bureau filed with the Commissioner of Insurance its proposed revised classification plan for private passenger automobile insurance, pursuant to the directives of G.S. § 58-124.19(4). By letters dated 6 September 1977 and 28 October 1977, the Bureau filed minor amendments to the original proposal. On 10 November 1977, after

notice of and hearings on the revised plan, the Commissioner approved the plan and ordered it into effect. Thereafter, however, by notice and order of public hearing dated 6 March 1978, the Commissioner contended that the classification plan failed to comply with Article 12B, Chapter 58, of the General Statutes in that (1) due consideration was not given to past and prospective loss experience and expenses in setting new rates for farm-use and multi-car discounts, inexperienced operator surcharges, and driving record surcharges for chargeable accidents; (2) the rates implemented in the Filing were "unfairly discriminatory" with respect to the farm-use and multi-car discounts, and the inexperienced operator and driving record surcharges; (3) the rate changes were not authorized by statute; and (4) samples utilized by the Bureau which were based on nationwide data were not credible samples.

Hearings were held on 10 April and 18 October, 1978. LeRoy A. Boison, Jr., assistant manager of the Private Passenger Actuarial Division for Insurance Services Office in New York, testified for the Bureau. W. Byron Tatum, Director of Technical Operations for the North Carolina Department of Insurance, testified for the Department.

On 30 October 1978 the Commissioner issued his Order disapproving in part the revised classification plan promulgated by the Bureau on 10 November 1977, and ordering the Bureau to "implement the proposals of the Department of Insurance . . . with respect to private passenger automobile liability insurance . . . ." The proposals thereby ordered into effect were contained in the findings of fact and conclusions of law made by the Commissioner at the conclusion of the public hearings, and resulted from a "number of modifications to the Bureau's Revised Classification Plan" submitted by staff members of the Department of Insurance. Significant among the "modifications" the Commissioner ordered the Bureau to promulgate were the following:

> a. Restoration of the multi-car discount for liability coverages to 20%, the discount which was in effect prior to December 1, 1977;
>
> b. Restoration of the "Farm-Use" discount for liability coverages to 25%, the discount which was in effect prior to December 1, 1977;

c. Reduction of the inexperienced driver surcharge to $35;

d. Replacement of the SDIP [Safe Driver Insurance Plan] point system with a system which follows as closely as possible the point system established by Chapter 20 of the General Statutes and utilized by the Department of Motor Vehicles;

e. Adjustment of the dollar values of driving record point surcharges so as to progressively increase the cost of each point as points are accumulated, . . .

With respect to the final modification, the Commissioner ordered the Bureau to adopt a schedule of points and surcharges also developed by the staff of the Department of Insurance.

From this Order, the Bureau appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for plaintiff appellee.

Young, Moore, Henderson & Alvis, by Charles H. Young and R. Michael Strickland, for defendants appellants.

HEDRICK, Judge.

Appellants argue that the Commissioner "lacks statutory authority to order the Staff Plan into effect." In response the Commissioner asserts that, since his proposals constitute mere "modifications" of the Bureau plan, rather than a substitution thereof, his order is well within his statutory grant of supervisory authority over the Rate Bureau.

The Filing in question was mandated by the 1977 Legislature when it enacted G.S. § 58-124.19 which provides in pertinent part:

(4) . . . The Bureau is directed to establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction within 90 days of the [sic] September 1, 1977 . . . . The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence.

See also G.S. § 58-30.4.

In its overhaul of Chapter 58, the Legislature also wrought some rather sweeping changes with respect to the power of the Commissioner to act upon Bureau filings. Prior to 1977, the Commissioner derived his authority from the following provision, G.S. § 58-248.1:

> *Order of Commissioner revising improper rates, classifications and classification assignments.*—Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau *directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order* to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest.
>
> . . .
>
> [Emphasis added.]

Section 58-248.1 was repealed in its entirety, effective 1 September 1977. (*See* N. C. Session Laws, c. 828, s. 1) In its stead, the Legislature enacted § 58-124.21, the title of which alone is instructive of the change intended to be thereby effected. We quote *in toto* this authority statute under which the Commissioner must presently act, if he is to act at all:

> *Disapproval; hearing, order; adjustment of premium, review of filing.*—(a) At any time within 30 days from and after the date of any filing, the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply with the requirements of this Article and fixing a date for hearing not less than 30 days from the date of mailing of such notice. At such hearing the factors specified in G.S. 58-124.19 shall be considered. *If the Commissioner after hearing finds that the filing does not comply* with the provisions of this Article, *he*

may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, *after which such filing shall no longer be effective.* Any order of disapproval under this section must be entered within 90 days of the date such filing is received by the Commissioner.

(b) In the event that no notice of hearing shall be issued within 30 days from the date of any such filing, the filing shall be deemed to be approved. If the Commissioner disapproves such filing pursuant to subsection (a) as not being in compliance with G.S. 58-124.19, he may order an adjustment of the premium to be made with the policyholder either by refund or collection of additional premium, if the amount is substantial and equals or exceeds the cost of making the adjustment. The Commissioner may thereafter review any such filing in the manner provided, but if so reviewed, no adjustment of premium may be ordered.

[Our emphasis.]

The Commissioner contends that the Legislature neither intended to limit his former statutory authority, nor did it succeed in so doing through the enactment of the foregoing § 58-124.21. To the contrary, he asserts, his supervisory powers "continued unabated." In so contending, the Commissioner relies upon *Commissioner of Insurance v. Automobile Rate Office,* 293 N.C. 365, 239 S.E. 2d 48 (1977), wherein our Supreme Court, per Justice Exum, held that orders of the Commissioner which constituted an approval in part, or a "modification or revision of the Rate Office plan", were statutorily authorized. *Id.* at 387, 239 S.E. 2d at 62.

This is a different case, however, and we cannot agree with the Commissioner's position. First, we note that the case upon which he purports to rely predates the 1977 legislative revisions. Secondly, we must construe the statute now in effect as the Legislature wrote it, to give it its plain meaning and intended effect.

The rule with respect to the construction and interpretation of statutory language is so well-settled that it hardly bears repeating: "[W]hen 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." *Norris v. Home Security Life Insurance Co.*, 42 N.C. App. 719, 721, 257 S.E. 2d 647, 648 (1979); 12 Strong's N.C. Index 3d, *Statutes* § 5.5 (1978). Moreover, it is to be presumed that the Legislature acted in accordance with reason and common sense, and did not intend "untoward results." *State ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 294 N.C. 60, 68, 241 S.E. 2d 324, 329 (1978). We believe that an "untoward result" would flow from an interpretation of G.S. § 58-124.21 that fails to take account of the obvious excision of language formerly employed in G.S. § 58-248.1 under which the Commissioner could claim the power to issue his own order, disguised as a "modification" of the Rate Bureau plan.

Such authority as the Commissioner now has with respect to approving or disapproving rate and classification filings by the Bureau is specifically spelled out in § 58-124.21: (1) He may give notice "specifying in what respect and to what extent he contends [the] filing fails to comply" with the statute; and (2) after hearings, "he may issue his order *determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, . . . after which such filing shall no longer be effective.*" [Emphasis added.]

The legislative intent is clear. The Rate Bureau is vested with sole authority to determine rates and classifications for motor vehicle insurance, subject to review by the Commissioner. Upon his review, if the Commissioner disapproves the Bureau plan, he must specify "wherein and to what extent" he disapproves it, and he may set a date after which the filing will no longer be effective. He may not, however, submit his own proposals, whether they be deemed "modifications" or "substitutions." Nor may he order his scheme into effect. Obviously, no vestige of the Commissioner's former authority under former G.S. § 58-248.1 to direct that "rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in [his] order" survived the legislative surgery of 1977.

The Commissioner is a creature of statute and, as such, he may act only to the extent and in the manner legislatively pre-

scribed. Thus, we will not be distracted by the fluttering of mother quail to examine, as the Commissioner urges we must do, whether his Order is supported by material and substantial evidence of record. In this case, it matters not. *See* G.S. § 58-9.6(b).

We hold as follows: The Order entered by the Commissioner dated 30 October 1978 is in excess of his authority, and, thus, we declare it null and void *ab initio.* G.S. 58-9.6. *See State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau,* 44 N.C. App. 75, 259 S.E. 2d 926 (1979). Moreover, by attempting to do what he has no power to do, the Commissioner has abdicated what authority remains his to exercise under G.S. § 58-124.21. Therefore, the Order of the Commissioner is vacated, and the Filing of the Bureau, having never been disapproved as provided by the statute, by the very terms of the statute, remains in effect.

Order vacated.

Judges CLARK and MARTIN (Harry C.) concur.

JOHN J. OSMAR v. CROSLAND-OSMAR, INC., A CORPORATION

No. 7926SC91

(Filed 20 November 1979)

Contempt of Court § 3.1— motion denied by trial court—action immediately brought in S.C.—indirect contempt

The trial court properly determined that the individual defendant was in contempt of court when the court had denied defendant's motion that the receiver of defendant corporation be required to notify attorneys in S.C. that the individual defendant was the owner of commissions on the sale of real estate which had been listed by defendant corporation, and the individual defendant immediately went outside the jurisdiction of the N.C. courts and brought an action in the S.C. courts against the S.C. attorneys claiming the commissions, thereby interfering with and failing to cooperate fully with the receiver in the performance of his duties as required by the court's earlier consent judgment.

APPEAL by J. Miller Crosland from *Snepp, Judge*. Order entered 31 August 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 September 1979.

J. Miller Crosland was adjudged as being in indirect criminal contempt of court under the provisions of G.S. 5A-11(a)(3) reading as follows:

> (a) Except as provided in subsection (b), each of the following is criminal contempt:
>
> . . .
>
> (3) Wilful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

The case arose out of the following facts:

J. Miller Crosland and John J. Osmar each owned 1000 shares of the outstanding common stock in the defendant corporation. On 28 November 1977, John J. Osmar filed a petition in the superior court requesting that a receiver be appointed for said corporation alleging that the directors were deadlocked and requesting that the corporation be dissolved and liquidated. A consent order was entered 19 December 1977 by Judge Hasty, pursuant to G.S. 55-125(a), appointing Samuel A. Wilson III as receiver for the corporation.

The order set out guidelines for the parties, among which were the following:

> . . .
>
> 2. The defendant corporation Crosland-Osmar, Inc., and its employees, agents and other representatives are hereby ordered and directed to turn over to and deliver immediate possession and control of all of the property and assets of the defendant corporation, including all books and records, and fully to cooperate with the receiver in the performance of his duties hereunder.
>
> . . .
>
> II. *Status of claims and notification to and claims by creditors.*

1. All persons, firms, and corporations are hereby restrained and enjoined from interfering in any manner with the property or assets of the corporation or with the receiver in the exercise of his duties; and they are hereby further restrained and enjoined from suing said receiver or foreclosing upon any property of the defendant corporation except by permission first obtained from this court.

J. Miller Crosland contends that he resigned as an officer and director of the corporation on or about 9 December 1977; however, the notice in the record of his resignation is dated 17 April 1978 and was filed 25 April 1978.

Among the purported assets of the corporation at the time of the appointment of the receiver was an expired listing on certain lands in South Carolina known as the PTL Club property. The listing had expired 6 October 1977. It would seem that this expired contract had been retained by Mr. Crosland in his personal files.

On 13 December 1977, prior to the order of receivership, Mr. Crosland in conjunction with two other realtors offered the lands to a proposed purchaser in South Carolina, and a new contract of sale was executed 17 December 1977. The last contract showed Miller Crosland Company as the realtor making the offer and had substituted the names of the heirs in lieu of the executor of an estate as one of the parties.

On 16 February 1978, the receiver moved the court for an order requiring J. Miller Crosland to show cause why he should not be held in wilful contempt of the court for failure to go to the office of an accountant employed in this matter to explain certain bookkeeping entries and for his failure to turn over the records in connection with the sale of the PTL property. The order entered in this cause compelled Mr. Crosland to go to the office of the accountant, explain the entries and turn over his records, from which was discovered the last named sales agreement for the PTL Club property. The answer filed by Mr. Crosland denied that the receiver or the corporation had any interest in the sale of the South Carolina property.

Correspondence between the receiver and Mr. Crosland revealed that the receiver claimed commissions from the sale as

an asset of the corporation, and Mr. Crosland denied any rights in the receiver to the commissions.

A motion was filed by Mr. Crosland on 6 April 1978 stating that the receiver had contacted the closing attorneys in South Carolina requesting that no real estate commission be paid to Mr. Crosland, and further contending this defendant corporation had no interest in the real estate commission; and moving the North Carolina courts for an order directing the receiver to notify the closing attorney in South Carolina that he was entitled to the commissions. The motion filed by Mr. Crosland was denied by Judge Griffin on 19 April 1978.

On the day following, Mr. Crosland brought a suit in South Carolina against the closing attorney claiming the commissions. The receiver was not made a party to the suit but did appear and testify regarding his claim to the commissions as receiver. The court advised the receiver that it intended to sign an order granting the funds to Mr. Crosland but would withhold signing the order from Thursday, 28 April 1978, until Monday, 1 May 1978, so that the receiver could take any appropriate action in the North Carolina courts to protect his interest. Thereafter, the commissions were paid to Mr. Crosland.

On 28 April 1978 the receiver filed a motion in the cause setting forth the facts in the South Carolina case and requesting that the court issue an order directing J. Miller Crosland to pay into the office of the clerk of superior court the moneys he received from the sale of the South Carolina property. The motion and order in this cause were not served; thereafter, a like motion and order were filed 4 May 1978 and served on Mr. Crosland on 8 May 1978.

In the meantime, prior to service of the said order, Mr. Crosland had received and disposed of the commissions received from the sale of the South Carolina lands.

On 17 August 1978 Judge William T. Grist issued an order directing J. Miller Crosland to appear before the court on 28 August 1978 and show cause why he should not be held in contempt of court for his wilful failure to comply with the orders of the court entered on 19 December 1977, 28 April 1978 and 4 May 1978. At the trial of the case before the Honorable Frank Snepp,

the judge found facts, made conclusions of law and entered a judgment finding the defendant in indirect criminal contempt of the court, having wilfully disobeyed, resisted and interfered with the lawful order of the court in violation of G.S. 5A-11(a)(3). Among the findings of fact by the presiding judge was the following:

> 16. J. Miller Crosland with full knowledge of the claim of the Receiver herein as to the proceeds of the commission referred to wilfully and without legal justification . . . prevented the Receiver in this court from making an ordinary determination as to whether or not the said commission was an asset of the defendant in violation of the Order entered by Judge Fred H. Hasty on December 19, 1977, that all employees and agents of the defendant deliver possession and control of all the property and assets of the defendant to the Receiver and to cooperate fully with the Receiver in the performance of his duties.

After making the findings of fact and conclusions of law, the said judge entered an order requiring J. Miller Crosland to be imprisoned in the Mecklenburg County jail for a term of 15 days; that he pay a fine of $500; and that the clerk certify a copy of the order to the bankruptcy judge, the North Carolina Real Estate Licensing Board and the South Carolina Real Estate Licensing Board.

Mr. Crosland appealed.

Reginald L. Yates, for the defendant appellant.

No brief for plaintiff appellee.

HILL, Judge.

Two questions were raised by J. Miller Crosland on appeal:

1. Did the trial judge err in finding that J. Miller Crosland wilfully and without legal justification violated the order of Judge Fred Hasty entered 19 December 1977?

2. Did the acts of J. Miller Crosland constitute indirect criminal contempt?

The evidence is undisputed that the second sales contract for the sale of the PTL property was entered into prior to 19 December 1977, the date of the appointment of the receiver. Although Mr. Crosland contended that he resigned as an officer and director effective 9 December 1977, there was no notice before the court prior to 25 April 1978, the date on which Mr. Crosland gave formal notice to both the corporation and Mr. Samuel A. Wilson III as receiver. Mr. Crosland had retained the records concerning the South Carolina property in his personal files and had refused to divulge the contents thereof until ordered by the court to do so several weeks after the appointment of the receiver. By doing so, he failed to fully cooperate with the receiver in the performance of his duties to determine what were the assets of the corporation.

Although the order entered 19 December 1977 prohibited any person, firm or corporation from interfering in any manner with the property or assets of the corporation or with the receiver in the exercise of his duties and further restrained and enjoined persons, firms and corporations from suing the receiver or foreclosing upon any property of the defendant corporation except by permission first obtained from this court, Mr. Crosland attempted to do indirectly that which he could not do directly. In spite of the direct order of the North Carolina superior court denying Mr. Crosland's motion that the receiver be required to notify the closing attorney in South Carolina that Mr. Crosland was the owner of the commissions, he immediately went outside the jurisdiction of the North Carolina courts and brought a suit to accomplish the same result.

No longer was the dispute over the commission one between interested parties on equal footing. The order of 19 April 1978 denying Mr. Crosland's motion made it clear that the receiver had some claim to the proceeds. No determination on the merits had been made. Mr. Crosland certainly had the right to claim property that he alleged was his, but Mr. Crosland also had a duty to cooperate with the receiver. Mr. Crosland had signed the consent order of 19 December 1977, and by its terms it applied to him. Once the North Carolina court determined that the receiver had a claim to the proceeds, Mr. Crosland was bound to comply with the order. Admittedly, Mr. Crosland did not make the receiver a party to the South Carolina action, but the very act of instituting the

action constituted interference and a failure to fully cooperate with the receiver in the performance of his duties. At this point, it is evident that Mr. Crosland was in violation of G.S. 5A-11(a)(3).

The question before this Court is not whether Mr. Crosland is entitled to the commissions but rather whether there was a wilful disobedience, resistance to, or interference with the court's lawful process, order, direction or instructions or its execution. We hold that there was.

Had Mr. Crosland paid the commissions so received into court and then sought permission of the court to sue the receiver to determine ownership thereof, perhaps the judgment of this court would have been different. Rather, he chose to bypass the North Carolina court by going to South Carolina and doing indirectly what he had been ordered not to do directly.

For the reasons set out above, the order entered by the Honorable Frank W. Snepp is in all respects

Affirmed.

Judges VAUGHN and ERWIN concur in the result.

STATE OF NORTH CAROLINA v. WILLIE L. SMITH

No. 7912SC506

(Filed 20 November 1979)

Criminal Law § 145.1 — probation revocation hearing — failure to make payments — ability to pay

Order revoking defendant's probation for failure to pay a fine, court costs and restitution at a rate of $50.00 per month is reversed, and the cause is remanded for a new hearing, where defendant offered evidence of his inability to make the required payments, but the record does not show that the trial judge considered and evaluated such evidence.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 22 February 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 19 October 1979.

On 26 August 1976 defendant was given a two year sentence and placed on probation for three years in the Superior Court of Cumberland County for the offense of filing a false insurance claim. When the defendant was placed on probation and accepted for supervision, he was ordered by the court to pay a fine of $150, cost of court of $148, and restitution in the amount of $831 for the use and benefit of Virginia Mutual Insurance Company. Restitution was to be paid into the office of the clerk of Superior Court, in payments at the rate of no less than $50 each and every month until all such amounts were paid in full, with the first payment to be due on or before 30 September 1976. On the date of his trial, defendant was transferred to his home state of Ohio for probationary supervision. On 6 November 1978 a violation report was presented in the Superior Court of Cumberland County, at which time an order for arrest was issued to have defendant picked up when located in Ohio, served with the warrant and returned to North Carolina for a violation hearing. Defendant was returned to North Carolina on 3 February 1979.

At the violation hearing, the State presented evidence showing that the defendant had made none of the payments required in the order of suspension. At the violation hearing, defendant presented lengthy testimony. In his testimony, defendant indicated that at the time of his trial he had been employed by the City of Cleveland, Ohio, and that after being placed on probation, he had been laid off. He further testified that such layoff continued until June 1977 and that he received no unemployment benefits during that time. He testified that during that period he had worked at various odd jobs in order to pay his rent and support his wife and three children. He further testified that from June 1977 until December 1977 he worked for the City of Cleveland at the rate of $4.90 an hour and took home from $280 to $290 every two weeks. After being laid off in December 1977 defendant was again unemployed until June 1978. During this period, in January 1978, the rented house in which he and his family resided caught fire, and the fire destroyed most of the family's furniture and clothing. Defendant and his family then resided with relatives until he was able to go back to work in June 1978.

In July 1978, defendant bought a house, which did not require a down payment, but which did require monthly payments

of $150. He further testified that his gas bill varied from $59 to $75 a month, his electric bill from $20 to $25 a month, and that in addition, he had the sole responsibility for buying food and clothing for his family and furnishings for their home. In August 1978, defendant requested his employer to deduct $50 from his paycheck every two weeks to be sent to the clerk of court in Cumberland County. A problem arose when the computer operators had this deduction listed as a tax deduction, but defendant was assured by his foreman that the problem would be corrected. He informed his probation officer of this and stated further that if the amount allotted was not enough to cover the amount be owed, he would pay the balance with money to be received from his income tax refund for 1978. At the time of the violation hearing, defendant tendered the amount of $360 against his obligations and stated to the court that he would pay the balance due before 29 March 1979.

Following the hearing the court entered an order revoking defendant's probation. The court's order made findings with respect to the defendant's conviction and sentencing, and then with respect to his violation, made the following entry.

> 2. That the defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment as hereinafter set out:
>
> > (a) That when the defendant was placed on probation and accepted for supervision he was ordered by the court "to pay a fine of $150.00, cost of court of $148.00, and restitution in the amount of $831.00 for the use and benefit of Virginia Mutual Insurance Company into the office of the clerk of Superior Court. These monies totaling $1,139.00 are to be paid into the office of the clerk of Superior Court. These monies totaling $1,139.00 are to be paid at the rate of no less than $50.00 each and every month until paid in full, the first payment due on or before September 30, 1976 and that as of November 6, 1978 none of the above named monies has been received in the office of the clerk of Superior Court which is in violation of that condition of probation as stated above.

From the order of the trial court revoking his probation, defendant has appealed.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

John Britt, Assistant Public Defender, for the defendant appellant.

WELLS, Judge.

Defendant was represented at the probation and revocation hearing by the office of the Public Defender for the Twelfth Judicial District. Counsel for defendant has not brought forth any assignments of error. The brief for the defendant contains the following statement:

> After reviewing the record on appeal and the applicable law, attorney for the appellant has been unable to determine that during the course of the probation revocation hearing prejudicial error was committed which would entitle the appellant to reversal or to a new hearing. However, attorney for the appellant requests the Court to review the record on appeal and in its wisdom determine if any prejudicial or reversible error was committed during the hearing.

We have reviewed the record on appeal and have determined that pursuant to the provisions of Rule 10(a) of the North Carolina Rules of Appellate Procedure, it is appropriate for us to review the question as to whether the judgment of the trial court is supported by appropriate findings of fact and conclusions of law.

The issue we review in this case is whether the trial judge made proper findings with respect to whether the defendant has violated, without lawful excuse, a valid condition upon which his sentence was suspended.

The "lawful excuse" rule has its genesis in *State v. Robinson*, 248 N.C. 282, 103 S.E. 2d 376 (1958). In *Robinson*, Justice Parker carefully reviewed the existing law as it related to the requirements for activating a suspended sentence. The heart of the decision is found in the following two paragraphs:

> After a diligent search we have found no case, and counsel in the case have referred us to none, which holds that a court cannot revoke a suspension of sentence in a criminal case, and enforce the sentence for a breach of the condition

> on the part of the defendant unless such breach is wilful. Based upon the reasoning and language of the cases we have cited above, it is our opinion that all that is required to revoke a suspension of a sentence in a criminal case, and to put the sentence into effect is that the evidence shall satisfy the judge in the exercise of his sound discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sentence was suspended and that the judge's findings of fact in the exercise of his sound discretion are to that effect.
>
> * * *
>
> The mere finding of fact by the judge "that the defendant has violated the terms of this suspended sentence, and has not made the weekly payments as provided, and on July 23, 1957 was in arrears in the sum of $379.00 under the terms of said judgment" is insufficient to support the judgment putting the six months jail sentence into effect.

248 N.C. at 287, 103 S.E. 2d at 380.

Following *Robinson*, and obviously guided by it, this Court held in *State v. Foust*, 13 N.C. App. 382, 185 S.E. 2d 718 (1972), that, before a court can determine whether a defendant's failure to comply with the terms of a suspended sentence or probationary judgment requiring the payment of money was wilful or without lawful excuse, two essential questions about the defendant must be answered with appropriate findings of fact. These questions are stated in *Foust* as follows: "Has he had the financial ability to comply with the judgment at any time since he became obligated to pay? If not, has his continued inability to pay resulted from a lack of reasonable effort on his part or from conditions over which he had no control?" 13 N.C. App. at 387, 185 S.E. 2d at 722.

Foust was followed in *State v. Huntley*, 14 N.C. App. 236, 188 S.E. 2d 30 (1972) and in *State v. Neal*, 14 N.C. App. 238, 188 S.E. 2d 47 (1972). Then, in *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974), this Court reconsidered the question. In *Young*, the Court distinguished *Foust*, *Huntley* and *Neal* by placing the burden on the defendant to go forward with the evidence as to whether his failure to meet the conditions of sentence suspension

was without lawful excuse. The following two paragraphs reveal the Court's reasoning in *Young*:

> If, upon a proceeding to revoke probation or a suspended sentence, a defendant wishes to rely upon his inability to make payments as required by its terms, he should offer evidence of his inability for consideration by the judge. Otherwise, evidence establishing that defendant has failed to make payments as required by the judgment may justify a finding by the judge that defendant's failure to comply was willful or was without lawful excuse. We disapprove the principle announced in *Foust, supra*, and followed in *Huntley* and *Neal, supra*.
>
> In the case presently under review, the defendant offered evidence which tended to show that he was unavoidably without the means to make payments as required by his probationary judgment. The trial judge, as the finder of the facts, is not required to accept defendant's evidence as true. However, in this case, it is not clear whether the trial judge proceeded under an erroneous assumption that the fact of failure to comply required revocation of probation, or whether he considered defendant's evidence and found that defendant had offered no evidence worthy of belief to justify a finding of a legal excuse for failure to comply with the judgment. Obviously, defendant is entitled to have his evidence considered and evaluated. Because it appears that this was not done, the order revoking probation is vacated and the cause is remanded for a new hearing upon the Report of the Probation Officer and the Bill of Particulars.

21 N.C. App. at 320-321, 204 S.E. 2d at 187-188.

While it appears that the ruling in *Young* may not be entirely consistent with *Robinson*, we do not need to attempt to reconcile the two here. In the case at bar the defendant in fact offered extensive evidence as to his ability or inability to make the required payments, and following *Young*, the defendant is entitled to have the trial judge make findings of fact which will clearly show that he has considered and evaluated that evidence. The judgment under review here fails to do this.

The order revoking the probation is vacated and the cause is remanded for a new hearing on the violation report.

New hearing.

Judges ARNOLD and WEBB concur.

EDMOND S. MENACHE AND WIFE, SUZANNE MENACHE v. ATLANTIC COAST MANAGEMENT CORPORATION, INC.

No. 7915DC98

(Filed 20 November 1979)

1. Rules of Civil Procedure § 60— relief from judgment—excusable neglect

Evidence was sufficient to support the trial court's conclusion that defendant's failure to defend a summary ejectment action constituted excusable neglect where such evidence tended to show that plaintiffs failed to advise defendant that the leased property had been transferred to them and defendant did not receive notice of the name and address of the person to whom rent should be sent until 11 July; the notice given defendant on 11 July claimed that rent was due for June and July; plaintiffs had accepted the July payment; and although the complaint stated that the rent was due for July, the affidavit of defendant's secretary indicated that only June rent was actually due.

2. Landlord and Tenant § 18— relief from judgment—meritorious defense

The trial court in a summary ejectment action did not err in determining that defendant had a possible meritorious defense and in vacating the magistrate's order where defendant contended that as a result of tendering the amounts of rent due to the court and to plaintiffs in accordance with G.S. 42-33, all proceedings ceased.

APPEAL by plaintiffs from *Peele, Judge.* Order entered 15 September 1978 in District Court, ORANGE County. Heard in the Court of Appeals 27 September 1979.

Plaintiffs filed a complaint in summary ejectment on 11 August 1978 alleging: that defendant was the tenant of plaintiffs; that defendant had failed to make rental payments and was in default; that plaintiffs had given defendant notice of default on 11 July 1978; and that plaintiffs were entitled to possession of the property under lease. Summons was served on 12 August 1978, and judgment was entered against defendant for possession of the

property and for one-month's rent on 17 August 1978. Execution was issued on 29 August 1978, and on 31 August 1978, defendant moved pursuant to G.S. 1A-1, Rule 60(b), of the Rules of Civil Procedure for relief from judgment in the District Court.

Juanita Poe, secretary of defendant, filed a supporting affidavit, stating that the original lessor had transferred his interest to plaintiff without making clear the new lessor's identity or location, that defenant did not pay its June rent, because it was not sure where to send the payment. Later, after contact by plaintiffs, the June rent was paid. Ms. Poe further stated that she went to the Orange County Courthouse the day after the summons was served and attempted to pay the clerk of court. The clerk refused the payment, but advised her to give the payment to plaintiffs or to their attorney. Ms. Poe left an envelope containing the checks under the locked door of plaintiffs' attorney, and defendant's officers believed the payments would stop the ejectment action. Defendant did not know that a hearing was held or that further proceedings would take place until 18 August, when the checks were returned through the mail. Defendant attempted to deliver the checks to plaintiffs personally and through the mail, but the payments were refused.

Judge Peele made findings of fact incorporating Ms. Poe's statement and adding: that defendant had not sought to retain counsel from 11 August to 29 August; that defendant did not contact the clerk of court or plaintiffs' attorney between 17 August and 29 August to determine the status of the case; that neither plaintiffs' attorney nor court officials delivered a copy of the judgment to defendant; that the lease required that defendant be given the name and address of the person to whom payments were to be sent; and that defendant did not receive such notice until 11 July. The court further found that the notice given defendant on 11 July claimed that rent was due for June and July; that plaintiffs had accepted the July payment; and that although the complaint stated that the rent was due for July, the affidavit of Ms. Poe indicated that only June rent was actually due. The court concluded that defendant had shown excusable neglect and meritorious defenses and vacated the magistrate's order. Plaintiffs appealed.

John S. Curry, and Epting, Hackney & Long, by Robert Epting, for plaintiff appellants.

Powe, Porter, Alphin & Whichard, by Charles R. Holton, for defendant appellee.

ERWIN, Judge.

The district court is the proper forum to hear and decide a motion made pursuant to G.S. 1A-1, Rule 60(b), of the Rules of Civil Procedure for relief from judgment or order entered in the magistrate's court. A new trial is not permitted before the magistrate. G.S. 7A-228.

[1] Plaintiffs contend that the trial court committed error in concluding as a matter of law:

> "1) the failure of Atlantic Coast Management Corporation and its officers to defend the summary ejectment action constituted excusable neglect pursuant to Rule 60 of the North Carolina Rules of Civil Procedure where Atlantic Coast Management Corporation, Inc., although served with Summons, failed to appear before the Magistrate's Court or to obtain counsel until after judgment was entered and execution was served upon it?
>
> 2) Atlantic Coast Management Corporation had demonstrated the existence of possible meritorious defenses to this action?"

We do not find error and affirm the judgment entered.

G.S. 1A-1, Rule 60(b) grants relief to a party from a final judgment by reason of mistake, inadvertence, surprise, or excusable neglect. For a judgment to be set aside, the moving party must show both excusable neglect and a meritorious defense. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *dis. rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976).

The trial court found *inter alia*:

> "7. That on or about August 16, 1978, Juanita Poe, acting on behalf of the Defendant, went to the Office of the Clerk of Superior Court of Orange County with the intention

of there paying the past due rent. She was told by a Deputy Clerk then on duty, that the Office of the Clerk could not accept rent and that she (Mrs. Poe) should contact the Plaintiffs or their attorney.

8. That in the late afternoon of August 16, 1978, Mrs. Poe left under the locked front door of the office of John S. Curry, Attorney for Plaintiffs, an envelope containing two checks, each in the amount of $375.00 which checks were intended to pay the rent in question.

9. On the evening of August 16, 1978, John Curry discovered the envelope but did not open it. By virtue of the writing on the envelope, Mr. Curry presumed Mrs. Poe had attempted to tender the past due rents to him.

* * *

11. On August 18, 1978, Mrs. Poe received in the U.S. Mail, the envelope which she had left at Mr. Curry's office, unopened, as well as a letter from Mr. Curry stating that the envelope had been refused and that the Plaintiffs expected the Defendant to vacate the premises.

12. Neither Mrs. Poe nor any other officer or agent of the Defendant corporation consulted with, sought or retained counsel to represent the Defendant with regard to this action from August 11, 1978, until August 29, 1978, at which time execution was served.

13. Neither Mrs. Poe nor any officer or agent of the Defendant contacted the Office of the Clerk of Superior Court between August 17, 1978 and August 29, 1978, to determine whether or not the subject case had been heard. Nor did Mrs. Poe or any officer or agent of the Defendant contact Mr. Curry to inquire as to the status of the case, and thus none of the officers or agents of the corporation had any knowledge of the entry of judgment.

14. As they had no duty to do so, neither Mr. Curry nor any court official mailed or delivered a copy of the judgment to the Defendant or its officers.

15. No Entry of Appeal was made on behalf of the Defendant.

16. The notice given to the Defendant on behalf of the Plaintiffs on July 11, 1978, as shown in the Defendant's Exhibit 1, stated that rent for June and July was due. On or about July 13, 1978, Plaintiffs accepted a check from Juanita Poe in the amount of $375.00 marked 'July rent'. The complaint alleged a failure to pay rent for July, but the testimony given by Juanita Poe indicates only the June rent was due as of the date of the complaint.

17. The subject lease stated that the lessors were to advise the tenants of the name and address of the person to whom rentals were to be sent. The first such notification was received by the Defendant July 11, 1978 which was after the Plaintiffs assumed the lease."

Findings of fact by the judge on a motion to set aside a judgement on the grounds of excusable neglect are final unless excepted to or contentions are made that the evidence does not support the findings of fact. *Ellison v. White*, 3 N.C. App. 235, 164 S.E. 2d 511 (1968). In the case *sub judice*, there are no exceptions to the above findings of fact nor is there a contention that the evidence does not support the findings of fact. We hold that the findings of fact by the trial court showed excusable neglect. The record reveals that defendant took enough affirmative acts prior to judgment to do what it felt was sufficient to protect its rights.

[2] "The conclusions of law made by the judge upon the facts found by him are reviewable on appeal." *Moore v. Deal*, 239 N.C. 224, 228, 79 S.E. 2d 507, 510 (1954). Plaintiffs contend that there are no findings of fact which support the conclusion that defendant demonstrated the existence of possible meritorious defenses. The court found facts *inter alia*:

"1. The Defendant owns and operates a business known as The Sidetrack Bar located at 154 East Main Street, Carrboro, North Carolina, and it occupies the premises pursuant to a lease attached to the Complaint in this matter which lease was validly assigned to the Plaintiffs on or about the *18th* day of May, 1978.

2. As shown in Defendant's Exhibit No. 1, the Plaintiffs, on July 11, 1978 delivered notice to the Defendant that rents for June and July were in arrears. On or about July 13, 1978,

Plaintiffs accepted a check from Juanita Poe in the amount of $375.00, marked 'July rent'.

3. Paragraph VII of the lease agreement states that should the Defendant remain in default of the lease for 30 days following notice from the Plaintiffs of default, the Plaintiffs may thereupon 'enter upon the premises and expell [sic] the lessee (Defendant) therefrom, without prejudice to any other remedy which the lessor, his executors, administrators or assigns may have on account of such default'."

Defendant contends that as a result of tendering the amounts of rent due to the court and to plaintiffs in accordance with G.S. 42-33, all proceedings ceased, and this is a defense to plaintiffs' action. Plaintiffs respond that the tender shall not abate an action where the lease provides that the landlord shall have the option to declare the lease void upon the failure of the tenant to pay rent when due, and the landlord has exercised the option. In this case, the lease provides the landlord with essentially the same option under the right to re-enter clause.

This Court stated in *Green v. Lybrand*, 39 N.C. App. 56, 59, 249 S.E. 2d 443, 445 (1978):

"We disagree with plaintiff's contention that G.S. 42-33 is inapplicable simply because it is included in the statutes under the general heading of summary ejectment. The wording of the statute makes clear that it applies not just to summary ejectment actions, but to 'any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent.' And this was the conclusion of our Supreme Court in *Seligson v. Klyman*, 227 N.C. 347, 42 S.E. 2d 220 (1947)."

Whether G.S. 42-33 applies in our opinion is a defense to be determined at the hearing on this matter on the merits.

Plaintiffs accepted the rent check designated "July Rent" two days after giving written notice of default on 11 July. The complaint in summary ejectment specified that the July rent was due. The trial court on remand must determine whether the landlord has waived any prior breach of the lease by acceptance of the rental check after sending notice of a breach.

We hold that the record before us is sufficient to support the conclusions of law entered by the court that defendant has possible meritorious defenses.

Judgment affirmed.

Judges VAUGHN and HILL concur.

ANNE G. PHILLIPS v. CARL R. WOXMAN, JR. AND WIFE, SUSANNE K. WOXMAN, J. D. DIXON, AND JOHN HENRY BANKS AND WIFE, CHRISTINE M. BANKS

No. 783SC1122

(Filed 20 November 1979)

1. **Reformation of Instruments § 1; Agriculture § 12— reformation of deed—federal tobacco allotment—jurisdiction of superior court**

The superior court had jurisdiction to decide whether deeds describing North Carolina land executed by North Carolina residents could be reformed although such reformation related to a federal tobacco allotment.

2. **Reformation of Instruments § 1.1— reformation of deed—reservation of tobacco allotment—mutual mistake**

The trial court properly permitted reformation of a deed for mutual mistake in failing to include in the deed a reservation to the grantor of a tobacco allotment assigned to the land where the court found upon supporting evidence that plaintiff grantor and the original purchaser had agreed that the land would be sold without the agricultural allotments; through the inadvertence and mistake of the deed's draftsman, the deed as executed and recorded failed to express this intent of the parties; and subsequent grantees of the land purchased the land with actual knowledge that the land had been sold without the agricultural allotments.

APPEAL by defendants John Henry Banks and wife, Christine M. Banks, from *Bruce, Judge.* Judgment entered 30 May 1978 in Superior Court, PITT County. Heard in the Court of Appeals 30 August 1979.

Plaintiff filed this civil action in September 1976 for reformation of a 1973 deed from herself to defendants Carl R. Woxman, Jr. and wife on the grounds of inadvertence and mistake by the draftsman in failing to include in the deed a reservation to the

grantor of the agricultural allotment assigned to the land and mutual mistake by plaintiff and the Woxmans in accepting a deed which did not express their mutual intent to exclude the agricultural allotment from the conveyance.

By warranty deed dated 13 December 1974, the Woxmans conveyed the property in question to J. D. Dixon. Thereafter, the Dixons conveyed the property in question to appellants by warranty deed. Defendants Woxman and Dixon did not file an answer, and default judgments were entered against them.

Plaintiff's evidence tended to show: that she bought the 70-acre farm in 1967; that the farm was not suitable for tobacco but was used for pasture land; that plaintiff used the farm's tobacco allotment on her other two farms after going to the Agricultural Stabilization and Conservation Service (ASCS) office and taking steps to have the allotment transferred to those other farms; that in 1973, plaintiff sold the farm to Woxman for approximately $18,000; that plaintiff's agent (her son and attorney) negotiated the sale and drew the deed; that plaintiff informed her son that the tobacco allotment had been transferred to her other farms and inquired as to whether the deed to Woxman should contain a reservation to plaintiff of the allotment; that plaintiff's son, assuming the transfer of the allotment to be a legal, complete one, replied that no reservation would be required in the deed, as the allotment had been transferred; that Woxman understood that there was no allotment on the farm and did not pay for such allotment; that the Woxmans sold the farm to Dixon; that Dixon understood when he bought the farm that there was no allotment on it; that in 1975, Dixon placed the farm with a realty firm for sale; and that the firm advertised the farm in a local newspaper, stating that it included no allotment. Dixon testified:

> "I recognize Plaintiff's Exhibit E by my signature on it. I must have signed it. I told Mr. McPherson on April 15, 1976, 'It was no allotment.' Plaintiff's Exhibit E states 'I, J. D. Dixon, being first duly sworn, state that there was no crop allotment transferred to John Henry Banks in the sale of the farm described in Deed Book 143, Page 610, and furthermore state that John Henry Banks was aware of this fact at the time of the purchase.' At the time I signed the document, I knew the facts that I put in the piece of paper."

Defendant John Henry Banks testified: that prior to purchasing the farm, he did not see the newspaper and was never told that there was no tobacco allotment on the farm; that he went to register the farm with the ASCS office; he was informed that an allotment did exist on the property; and that he is presently using the farm for crop farming and living on it.

The trial court, sitting without a jury, made findings of fact and conclusions of law in favor of plaintiff and reformed the deeds in question. Defendants appealed.

Lanier, McPherson & Miller, by Jeffrey L. Miller, and Ward & Smith, by John A. J. Ward, for plaintiff appellee.

Howard, Vincent & Duffus, by J. David Duffus, Jr., for defendant appellants, Banks.

ERWIN, Judge.

[1] Defendants contend that the federal marketing quotas for tobacco are controlled by Part I of Section B, Subchapter II of the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. § 1311, *et seq.*, and thus, the Superior Court of Pitt County did not have jurisdiction over the subject matter of this action. We disagree and hold that the Superior Court had jurisdiction to hear and to decide whether deeds describing North Carolina land executed by North Carolina residents may be reformed although such reformation relates to a tobacco allotment.

Defendants contend the failure of the trial court to grant defendants' motions for directed verdicts was improper and constituted reversible error. We do not agree.

This case was tried by the court without a jury. In trials by the court, the former motion for nonsuit has been replaced by the motion for a dismissal. G.S. 1A-1, Rule 41(b), of the Rules of Civil Procedure. We will treat the motion for nonsuit at the close of all the evidence as a motion for dismissal. *Schafran v. Cleaners, Inc.*, 19 N.C. App. 365, 198 S.E. 2d 734, *cert. denied*, 284 N.C. 255, 200 S.E. 2d 655 (1973).

This Court stated in *Town of Rolesville v. Perry*, 21 N.C. App. 354, 357, 204 S.E. 2d 719, 721 (1974):

" 'In ruling on a motion to dismiss under Rule 41(b), applicable only "in an action tried by the court without a jury," the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover.' *Knitting, Inc. v. Yarn Co.*, 11 N.C. App. 162, 180 S.E. 2d 611."

[2] The court made the following findings of fact: Plaintiff and the original purchaser, Woxman, had agreed that the farm land would be sold without the agricultural allotments. Through the inadvertence of and mistake of the deed's draftsman, the deed as executed and recorded failed to express this intent of the parties, and defendants Banks, subsequent purchasers of the property, had purchased the land with actual knowledge that the land had been sold without the agricultural allotments.

The court's findings of fact are supported by the evidence in the record, and the evidence in the record before the trial court was sufficient to deny defendants' motion for a dismissal under G.S. 1A-1, Rule 41(b), of the Rules of Civil Procedure. We do not find error.

The Court stated in *Durham v. Creech*, 32 N.C. App. 55, 58-60, 231 S.E. 2d 163, 166-67 (1977):

"Where a deed fails to express the true intention of the parties, and that failure is due to the mutual mistake of the parties, or to the mistake of one party induced by fraud of the other, or to the mistake of the draftsman, the deed may be reformed to express the parties' true intent. *Parker v. Pittman*, 18 N.C. App. 500, 197 S.E. 2d 570 (1973). . . .

* * *

When, due to the mutual mistake of the parties, or perhaps a mistake by their draftsman, the agreement expressed in a written instrument differs from the agreement actually made by the parties, the equitable remedy of reformation is available. However, reformation on grounds of mutual mistake is available only where the evidence is clear, cogent and convincing. *Parker v. Pittman, supra*. . . .

* * *

Reformation is not barred because Margie Creech conveyed the land to third parties, the Smiths. In *Archer v. McClure*, 166 N.C. 140, 144, 81 S.E. 1081 (1914), our Supreme Court said:

> '. . . where because of mistake an instrument does not express the real intention of the parties, equity will correct the mistake unless the rights of third parties, having prior and better equities, have intervened.'

A third party's equities are not great enough unless he is a bona fide purchaser, i.e., one who purchases without notice, actual or constructive, and who pays valuable consideration. *Morehead v. Harris*, 262 N.C. 330, 137 S.E. 2d 174 (1964); *Crews v. Crews*, 210 N.C. 217, 186 S.E. 156 (1936); Dobbs, Remedies, § 11.6 (1973)."

The equitable remedy of reformation of a deed will be granted when it is shown by clear, cogent, and convincing evidence that due to the mutual mistake of the parties, the deed does not express the actual agreement made between the parties. *Yopp v. Aman*, 212 N.C. 479, 193 S.E. 822 (1937); *Durham v. Creech, supra.* The record is replete with competent evidence supporting all the material facts found by the trial court. The conclusions of law as entered by the trial court are proper. In holding that there was clear, cogent, and convincing evidence entitling plaintiff to reformation of her deed, we do not intimate what effect this reformation will have with any governmental agency's actions relating to the allotments.

The judgment entered below is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

REED'S JEWELERS, INC. v. ADT COMPANY

No. 795SC170

(Filed 20 November 1979)

Contracts § 10— burglar alarm system—provision limiting liability

A contractual provision limiting the liability of the supplier or installer of a burglar alarm system to a "sum equal to ten percent of the annual service charge or $250, whichever is the greater," was a valid limitation of liability.

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 4 December 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 October 1979.

Plaintiff filed its complaint against defendant alleging that plaintiff suffered a loss of $38,700 in a break-in at its store as a direct result of the defendant's negligence, gross negligence, breach of express warranty, breach of implied warranty of fitness, and breach of implied warranty of merchantability. Such negligence and breach of warranty allegedly occurred through defendant's manufacturing and distributing of an alarm system with defective parts; inadequately testing and inspecting this system; failing to use proper materials in manufacturing; and improperly monitoring, designing and installing the system.

Defendant answered, alleging that the language in bold print in Paragraph E of its contract with plaintiff for installation and maintenance of the alarm system limited its liability to $250. Plaintiff admitted the genuineness of the contract and admitted that it never made a payment to defendant for purchase of an insurance policy. In answering interrogatories, plaintiff stated that it had numerous false alarms and malfunctioning following installation of the system, that each time defendant would eventually respond to its calls, that wires were reconnected after each call, and that it did not know the exact dates of each malfunction or what work was done. Defendant moved for summary judgment which was allowed, and plaintiff appealed.

Herbert J. Zimmer, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Joseph T. Carruthers, for defendant appellee.

ERWIN, Judge.

Plaintiff presents one question for review: "Was it proper for the court to grant the defendant appellee's motion for summary judgment?" We answer, "Yes," for the reasons that follow.

G.S. 1A-1, Rule 56(c), of the Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *See also Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976), and *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). The judge's role in ruling on a motion for summary judgment is to determine whether any material issues of fact exist that require trial.

Plaintiff contends that the court improperly granted defendant's motion for summary judgment, because there were issues of fact to be decided at trial.

The contract between plaintiff and defendant provided in bold print:

> "E. It is understood that the contractor is not an insurer, that insurance, if any, shall be obtained by the subscriber and that the amounts payable to the contractor hereunder are based upon the value of the services and the scope of liability as herein set forth and are unrelated to the value of the subscribed property or others located in subscriber's premises, the contractor makes no guaranty or warranty, including any implied warranty or merchantability or fitness that the system or services supplied, will avert or prevent occurrences or the consequences therefrom, which the system or service is designed to detect. It is impractical and extremely difficult to fix the actual damages, if any, which may proximately result from failure on the part of the contractor to perform any of its obligations hereunder. The subscriber does not desire this contract to provide for full

liability of the contractor and agrees that the contractor shall be exempt from liability for loss or damage due directly or indirectly to occurrences, or consequences therefrom, which the service or system is designed to detect or avert; that if the contractor should be found liable for loss or damage due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to ten percent of the annual service charge or $250, whichever is the greater, as liquidated damages and not as a penalty. As the exclusive remedy, and that the provisions of this paragraph shall apply if loss or damage, irrespective of cause or origin, results directly or indirectly to person or property from performance or nonperformance of obligations imposed by this contract or from negligence, active or otherwise, of the contractor, its agents or employees, if the subscriber desires the contractor to assume a greater liability, contractor will amend this agreement to allow the subscriber to pay an additional annual amount necessary to purchase an insurance policy for such greater liability. No such amendment shall be effective unless signed by the subscriber, contractor and insurance carrier which will be insuring the additional liability." [The foregoing quotation typed from material in all caps]

Plaintiff contends under North Carolina law, contractual provisions providing for liquidating damages for breach of a contract may be upheld, but contractual provisions providing for a penalty for breach of a contract will not be enforced, and that at trial, plaintiff would have developed evidence which would prove that the contractual provisions in question are in the nature of a penalty rather than liquidated damages.

We believe plaintiff has misconstrued the nature of the contractual provision. The provision when properly construed is a limitation of liability and not a liquidated damages or penalty provision. Although, the words, "liquidated damages," were used in the contract, their use has little bearing on the nature of the provision. *Wedner v. Fidelity Security Systems, Inc.*, 228 Pa. Super. Ct. 67, 307 A. 2d 429 (1973). *See also Horn v. Poindexter*, 176 N.C. 620, 97 S.E. 653 (1918).

"An agreement limiting the amount of damages recoverable for breach is not an agreement to pay either liq-

> uidated damages or a penalty. Except in the case of certain public service contracts, the contracting parties can by agreement limit their liability in damages to a specified amount, either at the time of making their principal contract, or subsequently thereto. Such a contract does not purport to make an estimate of the harm caused by a breach; nor is its purpose to operate in terrorem to induce performance."

Restatement of Contracts § 339, Comment g on Subsection (1) (1932).

Thus, the real question is whether the limitation of damages set out above is valid.

In *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 221 S.E. 2d 499 (1976), our Supreme Court held that a contract provision limiting a telephone company's liability for errors or omissions in an advertisement in the yellow pages of a telephone directory to the cost of the advertisement was not unreasonable and not contrary to public policy. A contractual provision limiting the liability of the supplier or installer of a burglar alarm system to "a sum equal to ten percent of the annual service charge or $250, whichever is the greater," is likewise a valid limitation of liability. *See Central Alarm of Tucson v. Ganem*, 116 Ariz. 74, 567 P. 2d 1203 (1977); *Feary v. Aaron Burglar Alarm, Inc.*, 32 Cal. App. 3d 553, 108 Cal. Rptr. 242 (1973); *Niccoli v. Denver Burglar Alarm, Inc.*, 490 P. 2d 304 (Colo. App. 1971); *Pick Fisheries, Inc. v. Burns Electron. Sec. Serv., Inc.*, 35 Ill. App. 3d 467, 342 N.E. 2d 105 (1976); *Morgan Co. v. Minnesota Min. & Mfg. Co.*, 310 Minn. 305, 246 N.W. 2d 443 (1976); *Foont-Freedenfeld Corp. v. Electro-Protective Corp.*, 126 N.J. Super. Ct. 254, 314 A. 2d 69 (1973); *Wedner v. Fidelity Security Systems, Inc.*, 228 Pa. Super. Ct. 67, 307 A. 2d 429 (1973).

The contractual provision in question was set out in the contract in bold print. Neither party contends the contract in question was not signed by it nor does the plaintiff deny its contents. We hold the summary judgment entered by the trial court was proper in all respects.

The judgment entered below is

Affirmed.

Judges VAUGHN and HILL concur.

FLORENCE WARREN, PLAINTIFF EMPLOYEE v. CITY OF WILMINGTON, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER DEFENDANTS

No. 7910IC133

(Filed 20 November 1979)

Master and Servant § 62.2— workmen's compensation—accident between meeting place and home—deviation from direct route—accident arising out of and in course of employment

Plaintiff's accident as she was returning to her home to write a report about a meeting she had attended arose out of and in the course of her employment as a community coordinator, although she made a substantial deviation from the most direct route between the meeting place and her home, where plaintiff's time traveling to and from meetings in the community and writing reports of the meetings was counted toward her work hours; plaintiff was permitted to take whatever route home she chose as long as she was within her work area; and plaintiff took the indirect route in order to avoid heavier traffic.

Judge HILL dissenting.

APPEAL by plaintiff from an order of the North Carolina Industrial Commission entered 8 December 1978. Heard in the Court of Appeals 16 October 1979.

The Commission's findings of fact are as follows:

"1. Plaintiff is a female and was on November 26, 1977 employed with the defendant employer as a community coordinator. Plaintiff would meet with the citizens in a community and local problems would be discussed.

2. On November 26, 1976 the plaintiff had scheduled a meeting at a church in Sunset Park in Wilmington. Her superior knew about the meeting and had knowledge of other meetings the plaintiff had scheduled on other occasions. Plaintiff would review the material that was to be discussed at her home and she had done this on other occasions when meetings were held. This arrangement was known and consented to by her superiors.

3. On November 26, 1977, a holiday, the plaintiff went from her home to the church at Sunset Park to attend the meeting, this being after 5:00 p.m. Only one person showed up. She waited about fifteen minutes and then left to go to

her home, which was about 5:30 p.m. Plaintiff was going to her home to make a report about the meeting. The route she took, however, was to swing in a loop and then go north along the waterfront of the river passing the street she lived on by approximately eight or nine blocks and at a point some ten blocks to the west, and then she turned to the east toward the northern section of the city, being close to a mile north of her home. At this point at the intersection of 5th and Red Cross Street she was involved in an automobile accident receiving serious injury.

4. The direct route to the plaintiff's home would have been approximately half a mile or more to the west and was at least half a mile or more northerly when she started going east. Plaintiff was permitted to take whatever route she chose to go to her home as long as she was in her work area. Plaintiff was not on a direct route to her home from Sunset Park when the accident occurred. Plaintiff furnished her own vehicle, paid for her gas, and did not receive a mileage allowance. The reason the plaintiff took the indirect route going to her home was because traffic was much heavier on the direct route to her home.

5. Plaintiff's supervisor requested plaintiff to work after regular working hours and sometimes on Sundays and holidays because a lot of people in the plaintiff's area could not attend meeting at any other time. Plaintiff was not paid for working beyond her regular working hours. Her regular working hours being approximately from 8:00 a.m. to 5:30 p.m.

6. Plaintiff did not take the direct route to her home and in fact there was a substantial deviation and departure from the route to her home from the church to where the accident occurred.

7. While the plaintiff sustained an injury by accident on November 26, 1977 it did not arise out of and in the course of her employment."

The Commission concluded as a matter of law that the accident did not arise out of and in the course of her employment with defendant on 26 November 1977.

Hunoval and Fullwood, by Ernest B. Fullwood, for plaintiff appellant.

Crossley and Johnson, by John F. Crossley, for defendant appellee.

VAUGHN, Judge.

Plaintiff excepts to the sixth and seventh findings of fact and the conclusion of law. She contends the Commission erred in concluding as a matter of fact and as a matter of law that she did not sustain an "injury by accident arising out of and in the course of employment." G.S. 97-2(6). We agree with plaintiff and conclude that the Commission's findings of fact (to which defendants did not except) disclose that plaintiff's injury is covered by the North Carolina Workmen's Compensation Act. G.S. 97-1 *et seq.*

> "Whether the accident grew out of the employment is a mixed question of law and fact which the court had the right to review on appeal. If the detailed findings of fact forced a conclusion opposite that reached by the commission, it was the duty of the court to reverse the commission." *Alford v. Chevrolet Co.*, 246 N.C. 214, 216, 97 S.E. 2d 869, 871 (1957).

For a compensable injury to exist, the two related but different ideas embodied in the phrase "arising out of and in the course of employment" must be present on the facts of the particular case. "Arising out of" the employment is construed to require that the injury be incurred because of a condition or risk created by the job. There must be a causal relation between the job and the injury. "In the course of the employment" is construed to refer to the time, place and circumstances under which the accident occurs. *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953).

Generally, the Workmen's Compensation Act does not cover injuries that occur while the employee is going to or returning from his work. Here, however, plaintiff's job required her to travel from her place of work to various places about the community. The job exposed her to the risk of travel. She was required to work nights and holidays. Often these were the only times the people with which plaintiff worked could meet with her. She was required to write reports. The report writing time

and the time traveling to and from meetings was counted towards her work hours. Going to and from the meetings was a part of plaintiff's job duties for which she was paid the same as when actually in the office or at community meetings. There is no suggestion that plaintiff was on a personal errand when the accident occurred. Plaintiff's accident on a city street as she was returning home to write a report about the meeting she had just attended was an accident in the course of her employment. *Mion v. Marble & Tile Co., Inc.*, 217 N.C. 743, 9 S.E. 2d 501 (1940).

The denial of plaintiff's claim was apparently based on the Commission's finding that plaintiff made a substantial deviation from the most direct route between the meeting place to plaintiff's next destination. The factual finding that plaintiff did not take the most direct route does not, standing alone as it does, support the conclusion that there was a deviation from the course of her employment. The Commission expressly found that plaintiff was permitted to take whatever route she chose so long as she was within her work area and that she took the indirect route in order to avoid heavier traffic. These findings negate any notion that the failure to select the most direct route was a deviation from the scope of plaintiff's employment.

The Commission's findings of fact compel the conclusion of law that plaintiff was upon the public street on a mission for her employer and was injured in an accident which arose out of and in the course of her employment. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960); *Hinkle v. Lexington, supra*; *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969).

The opinion and award of the Commission is reversed, and the case is remanded for entry of an award consistent with this opinion.

Reversed and remanded.

Judge ERWIN concurs.

Judge HILL dissents.

Judge HILL dissenting.

There was ample evidence to support the Commissioner's findings. Plaintiff was not necessarily obligated to take the most direct route from the church to her home. In this case, however, she swung a loop which was nine blocks north of and fourteen blocks west of her home. By inference, she would have to return south nine blocks and eastward fourteen blocks to arrive at her home. A map of the town was used by the Commissioner to show that plaintiff traveled several miles out of the way rather than approximately one-fourth mile in a direct route to her home. Her route was through the downtown area and substantially past her home. Plaintiff agreed that this was a holiday with no traffic or less than usual traffic, and this defeats her argument as to why she took the "out-of-way" route.

Taking all of the testimony of the plaintiff and her witness into account, together with the physical facts, it is a reasonable, fair, and honest assumption that the plaintiff was on a personal objective and that it was a deviation from her employment. *See Alford v. Chevrolet Co.*, 246 N.C. 214, 97 S.E. 2d 869 (1957), *citing Withers v. Black*, 230 N.C. 428, 58 S.E. 2d 668 (1949). The Hearing Commissioner so found by his order; the Full Commission ratified the order and by doing so ratified his finding. I dissent from the opinion of this Court and concur with the order entered by the Commission.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 NOVEMBER 1979

ABSHER v. FURNITURE CO., INC. No. 7823SC1043	Wilkes (78CVS325)	Affirmed in Part; Dismissed in Part; and Remanded
DAVIS v. DAVIS No. 7926DC372	Mecklenburg (78CVD7204)	Affirmed
FRAZIER v. KATZBURG No. 7921DC227	Forsyth (78CVM3728)	New Trial
GIBSON v. GIBSON No. 7922DC272	Iredell (78CVD39)	Vacated and Remanded
IN RE PADILLA No. 7919DC120	Randolph (72CVD666)	Affirmed
LOVE v. CITY OF GREENSBORO No. 7818SC232	Guilford (77CVS4653)	Reversed
O'NEIL v. O'NEIL No. 7926DC325	Mecklenburg (78CVD2456)	Affirmed
STATE v. BRANDON No. 7917SC552	Caswell (78CRS450)	No Error
STATE v. CANNON No. 798SC536	Lenoir (78CRS14009) (78CRS14010)	No Error
STATE v. FLEMING No. 7925SC495	Catawba (78CRS6848)	No Error
STATE v. GIBSON No. 7920SC574	Richmond (79CRS588)	No Error
STATE v. HARRIS No. 7914SC507	Durham (78CRS18126)	No Error
STATE v. KORNEGAY No. 7918SC584	Guilford (78CRS52546)	Dismissed
STATE v. LUCAS No. 7924SC497	Mitchell (78CRS1281)	No Error
STATE v. MASSEY No. 7926SC562	Mecklenburg (78CRS11269)	No Error
STATE v. MUKTARIAN No. 7910SC557	Wake (78CRS75565)	No Error
STATE v. PHILLIPS No. 797SC454	Edgecombe (78CRS9330) (78CRS9332)	No Error

STATE v. STUMP No. 7912SC517	Cumberland (78CRS5513)	No Error
STATE v. WALTERS No. 7912SC576	Cumberland (78CRS34670)	No Error
STATE v. WORRELL No. 798SC299	Wayne (78CR15822)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

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ABATEMENT

§ 4. Procedure to Raise Question of Pendency of Prior Action

Defendant waived objection to an action to increase child support on the ground of a prior action pending. *Bethea v. Bethea*, 372.

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

In an action to recover damages for fraud in the sale of a demonstrator automobile to plaintiff, trial court erred in entering summary judgment for defendant dealer on the ground of accord and satisfaction. *Holley v. Coggin Pontiac*, 229.

ADMINISTRATIVE LAW

§ 8. Scope of Judicial Review

Superior court erred in reversing the Savings and Loan Commission and in substituting its judgment for that of the Commission. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 493.

ADOPTION

§ 2. Procedure

A clerk of superior court properly transferred an adoption petition to superior court for hearing where there were issues of law and fact to be determined. *In re Norwood*, 356.

§ 2.1. Consent to Adoption

A county department of social services did not unreasonably withhold consent to petitioners' adoption of a child which had been placed with petitioners under a foster home program. *In re Norwood*, 356.

ADVERSE POSSESSION

§ 25.2. Insufficiency of Evidence

In an action to remove cloud from title, trial court erred in determining that an issue as to adverse possession should have been submitted to the jury. *Young v. Young*, 419.

AGRICULTURE

§ 12. Marketing Quotas

Superior court had jurisdiction to decide whether deeds describing N.C. land could be reformed although such reformation related to a federal tobacco allotment. *Phillips v. Woxman*, 739.

§ 16. Powers of Milk Commission

The statute and rule under which a distributor of milk reconstituted from Wisconsin milk powder was assessed an equalization payment for the benefit of N.C. milk producers are unconstitutional. *In re Dairy Farms*, 459.

ANIMALS

§ 2.2. Injuries Caused by Horses

In an action to recover for loss of plaintiff's horse which was injured by another horse while both were in defendant's care, trial court did not err in failing to require the jury to find that the horse which kicked plaintiff's horse had a vicious propensity and that defendants knew or should have known of this propensity. *Griner v. Smith,* 400.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

An appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. *Smith v. Insurance Co.,* 269.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

The denial of a motion for summary judgment is not immediately appealable. *Golden v. Golden,* 393.

§ 6.12. Appeal Based on Verdict

An order setting aside the verdict in plaintiff's favor was appealable where the court specifically stated that the order was entered because of error in failing to submit two issues to the jury. *Young v. Young,* 419.

§ 9. Moot Questions

An appeal from an order enjoining appellant from using property in violation of a city zoning ordinance was rendered moot when appellant lost its lease and vacated the premises in question. *City of Wilmington v. Camera's Eye,* 558.

§ 14. Appeal and Appeal Entries

A notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if it is likely to put an opposing party on guard the issue will be raised. *Smith v. Insurance Co.,* 269.

Service of notice of appeal on plaintiff's counsel was timely where it was made by depositing the notice in the mail on the same day, but at least two hours later, that notice was filed with the clerk of court. *Smith v. Smith,* 338.

APPEARANCE

§ 2. Effect of Appearance

There was no merit to plaintiff executor's contention that he had not been served with process and therefore was not properly before the court since the executor made a general appearance and moved for dismissal of defendant's motion. *Thomas v. Thomas,* 638.

ASSAULT AND BATTERY

§ 14.1. Assault With Deadly Weapon Generally

State's evidence was sufficient to show an element of intent in a prosecution for assault with a deadly weapon, an automobile, inflicting serious injury. *S. v. Coffey,* 541.

ASSAULT AND BATTERY—Continued

§ 14.2. Assault With Deadly Weapon Where Weapon is Firearm

State's evidence was sufficient to sustain a verdict of guilty of assault with a deadly weapon under the "show of violence" rule. *S. v. O'Briant*, 341.

§ 15.1. Instructions on Assault With Deadly Weapon

Trial court did not err in instructing the jury that defendant would be guilty of assault by intentionally pointing a pistol at a named victim if he intended to point the pistol at a third party but actually pointed it at the named victim. *S. v. Thornton*, 564.

§ 15.7. Instruction on Defense of Others

Evidence in a felonious assault case did not require the court to charge on the right of defendant to act in the defense of another. *S. v. Stephenson*, 323.

§ 16.1. Submission of Lesser Degrees Not Required

Trial court in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries was not required to submit the lesser offense of assault with a deadly weapon. *S. v. Stephenson*, 323.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

In an action for malicious prosecution, plaintiff doctor's allegation that defendant lawyer breached a duty owed to an opposing party in a malpractice suit to investigate properly the facts and law, review hospital records, and to consult medical experts before filing suit was insufficient to state a cause of action in negligence. *Petrou v. Hale*, 655.

§ 7.1. Fee Agreements; Charging Lien

An attorney retained to represent plaintiffs in a personal injury action could not attach a charging lien before any judgment was rendered, and could not attach a charging lien to a fund recovered after his discharge or withdrawal. *Dillon v. Consolidated Delivery*, 395.

AUTOMOBILES

§ 6.5. Fraud in Sale of Vehicle

Trial court erred in directing verdict for defendant where plaintiff alleged that defendant sold him a car with an odometer reading less than the true mileage of the vehicle. *Roberts v. Buffaloe*, 368.

§ 57.6. Exceeding Reasonable Speed at Intersection

Evidence that defendant who was speeding struck plaintiff's vehicle which was stalled in an intersection was sufficient evidence of negligence to be submitted to the jury. *Honeycutt v. Bess*, 684.

§ 89.1. Last Clear Chance

Evidence was sufficient to submit an issue of last clear chance to the jury where it tended to show that defendant's speeding vehicle struck plaintiff's vehicle which was stalled in an intersection. *Honeycutt v. Bess*, 684.

§ 113.1. Sufficient Evidence of Manslaughter

Trial court properly submitted an issue of defendant automobile owner's guilt of involuntary manslaughter as an aider and abettor. *S. v. Whitaker*, 600.

AUTOMOBILES—Continued

§ 127.2. Driving Under the Influence; Identity of Defendant as Driver

In a prosecution for driving under the influence and driving while license was revoked, evidence was sufficient for the jury to determine whether defendant was the driver of the vehicle in question. *S. v. McLawhorn*, 695.

§ 129. Instructions in Driving Under Influence Case

In a prosecution of defendant for driving under the influence, second offense, and driving while his license was revoked, fourth offense, where defendant stipulated to previous convictions for those crimes, trial court did not err in instructing the jury with respect to defendant's prior convictions, and trial court's failure to instruct on operating a vehicle on a public highway when blood alcohol content was .10% or more by weight in violation of G.S. 20-138(b) was beneficial to defendant. *S. v. McLawhorn*, 695.

BANKS

§ 1.2. Establishment of Branch Bank

Superior court erred in reversing the Savings and Loan Commission and in substituting its judgment for that of the Commission. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 493.

BASTARDS

§ 10. Action to Establish Paternity and Compel Child Support

In an action to establish paternity and obtain child support, trial court properly entered summary judgment for plaintiff adjudicating defendant to be the father of plaintiff's illegitimate child and ordering defendant to pay $80 per month for support of the child. *Bell v. Martin*, 134.

§ 13. Legitimation

In an action for child custody and support, the parties' acknowledgment that defendant husband was not the natural father of plaintiff wife's child, who was born before the parties married, negated any inference that defendant was the reputed father within the meaning of G.S. 49-12. *Chambers v. Chambers*, 361.

Where a child born prior to the mother's marriage was known to have been fathered by one other than the husband, G.S. 49-13 providing for issuance of a new birth certificate upon legitimation by subsequent marriage of the mother and reputed father, is inapplicable, adoption being the only mode available for legally recognizing the husband as the father. *Ibid.*

Despite the fact that defendant husband apparently made a false affidavit of paternity in obtaining a new birth certificate for plaintiff wife's child under G.S. 49-13, he was estopped from collaterally attacking his admission of paternity in this proceeding for child support. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.12. Breaking and Entering and Possession of Burglary Tools

Evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious possession of implements of store breaking. *S. v. Bagley*, 171.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

§ 9. Elements of Implements of Housebreaking

A three foot long stepladder and an acetylene torch possessed by defendant were not reasonably adapted for use in housebreaking and did not qualify as implements within the meaning of G.S. 14-55. *S. v. Puckett,* 596.

§ 10.3. Possession of Implements of Housebreaking; Sufficiency of Evidence

In a prosecution for felonious possession of implements of store breaking, trial court did not err in permitting the jury to conclude that a tire tool was an implement of store breaking. *S. v. Bagley,* 171.

CARRIERS

§ 2.7. Granting of Operating Authority; Sufficiency of Findings and Evidence

The Utilities Commission properly granted an application for contract carrier authority to transport beer and malt liquor products from a brewery in Eden to a distributor in Salisbury. *Utilities Comm. v. Delivery Services,* 662.

COMPROMISE AND SETTLEMENT

§ 6. Admissibility of Evidence

In an action to recover for personal injuries sustained in an automobile accident, plaintiff is entitled to a new trial where defendant's attorney in his argument to the jury made statements concerning defendant's attempts to settle the case outside court. *Karriker v. Sigmon,* 224.

CONSPIRACY

§ 6. Sufficiency of Evidence of Criminal Conspiracy

Evidence was sufficient to support the trial court's finding as to the absence of a conspiracy to defraud appellants where appellants contended that an agent and lender principals conspired to defraud them of their interests in certain property by intentionally misrepresenting the identity of the lender of their money, but there was evidence the principals had not instructed the agent to lie as to their identity. *Complex, Inc. v. Furst,* 95.

CONSTITUTIONAL LAW

§ 4.1. Standing as Taxpayers to Raise Constitutional Questions

Intervenors did not have the right as taxpayers or citizens of a city to challenge the constitutionality of an act limiting the power of the city to annex. *Wood v. City of Fayetteville,* 410.

§ 40. Right to Counsel Generally

Trial court did not abuse its discretion in failing to appoint standby counsel for a defendant who elected to represent himself. *S. v. Brincefield,* 49.

The appointment of counsel to represent an indigent respondent in a proceeding to terminate respondent's parental rights is not constitutionally required. *In re Lassiter,* 525.

CONSTITUTIONAL LAW—Continued

§ 48. Effective Assistance of Counsel

When a defendant elects to represent himself at trial, he cannot complain that the quality of his own defense amounts to a denial of effective assistance of counsel. *S. v. Brincefield,* 49.

§ 49. Waiver of Counsel

Defendant knowingly, intelligently and voluntarily waived his right to counsel at trial. *S. v. Brincefield,* 49.

§ 50. Speedy Trial

The Speedy Trial Act which became effective 1 October 1978 was inapplicable where defendant was arrested on 19 August 1978 and tried on 5 September 1978. *S. v. McLawhorn,* 695.

CONTEMPT OF COURT

§ 3.1. Civil Contempt

Trial court properly determined that the individual defendant was in contempt of court where his motion was denied by the court and defendant immediately brought an action in the S.C. courts for the same relief. *Osmar v. Crosland-Osmar, Inc.,* 721.

CONTRACTS

§ 10. Contracts Limiting Liability for Negligence

A contractual provision limiting the liability of the supplier or installer of a burglar alarm system to a "sum equal to 10% of the annual service charge or $250, whichever is the greater" was a valid limitation of liability. *Jewelers, Inc. v. ADT Co.,* 744.

§ 14.2. No Recovery as Third Party Beneficiary

Plaintiff was not entitled to recover from a housing authority and general contractor for their failure to require defendant subcontractor to obtain a payment bond since plaintiff was an incidental beneficiary of the contract between the housing authority and general contractor which required them to obtain from each subcontractor a performance bond and labor and materials payment bond. *Builders Corp. v. Dry Wall, Inc.,* 444.

§ 27.2. Sufficiency of Evidence of Breach of Contract

In an action to recover for damages to plaintiff's house which occurred when the chimney shifted and settled and which allegedly resulted from defendant's breach of contract, trial court erred in denying defendant's motion for directed verdict. *Ashe v. Associates, Inc.,* 319.

§ 34. Interference With Contractual Rights by Third Persons

Defendant CPA did not maliciously interfere with an internal revenue agent's contract of employment by a letter sent to plaintiff's employer. *Angel v. Ward,* 288.

COUNTIES

§ 9. Governmental Immunity

The operation of a register of deeds office in a county courthouse is a governmental function for which the county and the register of deeds enjoy immunity from suit for negligence. *Robinson v. Nash County,* 33.

CRIMINAL LAW

§ 5.1. Determination of Issue of Insanity

Trial court in an armed robbery prosecution did not err in submitting insanity as the first issue to be determined by the jury. *S. v. Linville*, 204.

§ 5.2. Mental Capacity as Affected by Unconsciousness

In a prosecution for assault with a deadly weapon and hit and run after inflicting personal injury, defendant's own testimony was sufficient to support an instruction on the defense of unconsciousness, and the court properly instructed that unconsciousness is not a complete defense where it was produced by voluntary, excessive consumption of intoxicants or drugs. *S. v. Coffey*, 541.

§ 15.1. Change of Venue for Inability to Receive Fair Trial

Trial court did not err in the denial of defendant's motion for change of venue in his involuntary manslaughter trial based on general ill will against him in the community. *S. v. Whitaker*, 600.

§ 34.6. Evidence of Other Offenses to Show Knowledge or Intent

In a prosecution for possession and sale of marijuana where defendant pled entrapment, the sale of LSD within a month of the sale with which he was charged was relevant to show the state of defendant's mind at the time of the offense charged. *S. v. Dancy*, 208.

§ 60.5. Sufficiency of Fingerprint Evidence

State's fingerprint evidence was insufficient to establish the identity of defendant as one of the perpetrators of an armed robbery. *S. v. McMillian*, 520.

§ 63.1. Evidence as to Sanity of Defendant

Defendant was not prejudiced by the court's exclusion of evidence bearing upon his insanity where similar evidence was subsequently admitted. *S. v. Linville*, 204.

§ 73. Hearsay Testimony

In a prosecution of defendant for embezzlement from a school, the trial court did not err in permitting the school principal to testify concerning dates, amounts and balances shown on a bank statement. *S. v. Barbour*, 143.

§ 75. Admissibility of Confession in General

Evidence was sufficient to support a finding that defendant's confession was voluntarily and understandingly made. *S. v. Sinclair*, 709.

§ 75.6. Sufficiency of Constitutional Warnings

Warnings given to defendant, including a warning that "if you answer any questions now, you may stop at anytime and ask for a lawyer," substantially complied with the Miranda requirements. *S. v. Harris*, 346.

§ 75.9. Volunteered Statements

Statement by defendant made to his wife in the presence of an officer that "I shot him. You know what happened," was volunteered and not the product of custodial interrogation. *S. v. Barbour*, 38.

§ 80. Business Records

The trial court in an embezzlement case did not err in allowing an assistant cashier of a bank to testify as to entries on the bank's ledger card without his hav-

ing made the entries, having supervised them, or having knowledge of them, since the entries to which the cashier testified were made in the regular course of business, near the time of the transaction involved, and were properly authenticated. *S. v. Barbour*, 143.

§ 84. Evidence Obtained by Unlawful Means

Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion of a pistol seized during the stop. *S. v. Harris*, 346.

§ 89.3. Corroboration; Prior Statements of Witness

A witness's testimony that he told two deputies that defendant had approached him about killing the deceased was competent either as laying a foundation for the testimony of the deputies or as corroboration. *S. v. Harris*, 346.

§ 92.1. Consolidation for Two Defendants Charged With Same Crime

Trial court in an involuntary manslaughter trial did not err in refusing to sever defendant automobile owner's trial from that of the codefendant driver. *S. v. Whitaker*, 600.

§ 101. Misconduct Affecting Jurors

Defendant was not prejudiced by a statement made by the bailiff to a juror. *S. v. Bagley*, 171.

§ 101.3. Jury View

Trial court did not abuse its discretion in denying defendant's motion for a jury view of the bridge where a homicide allegedly occurred. *S. v. Rogers*, 177.

§ 102.11. Comment by Prosecutor on Defendant's Guilt

There was no merit to defendant's contention that the prosecutor in his jury argument improperly expressed his personal opinion that defendant was "guilty as sin." *S. v. Barbour*, 38.

§ 106.4. Sufficiency of Evidence; Confession of Defendant

In a prosecution for breaking and entering and larceny, there was sufficient evidence corroborating defendant's confession to take the case to the jury. *S. v. Sinclair*, 709.

§ 113.7. Charge on Acting in Concert

Evidence in a breaking and entering and larceny prosecution was sufficient from which a reasonable inference could be drawn that defendant entered a school with another person and was acting in concert with him. *S. v. Ervin*, 561.

§ 114.3. No Expression of Opinion in Instructions

Trial court in a homicide case did not assume that it had been proven that defendant pushed the victim off a bridge. *S. v. Rogers*, 177.

Trial court did not express an opinion on the evidence because of the omission of the word "alleged" before the phrase "robbery with a firearm." *S. v. Linville*, 204.

CRIMINAL LAW—Continued

§ 119. Requests for Instructions

Trial court properly refused to give an instruction on the definition of proof beyond a reasonable doubt where defendant's request therefor was neither timely nor in writing. *S. v. McLawhorn*, 695.

§ 134.2. Presence of Defendant at Sentencing

Trial court erred in entering a second judgment changing the period of imprisonment in the absence of defendant. *S. v. Bonds*, 467.

§ 134.4. Youthful Offenders

Trial court erred in failing to include in the record a finding that he had considered the committed youthful offender option and determined the 18-year-old defendant would not benefit from it. *S. v. Smith*, 376.

§ 138. Severity of Sentence

There is no merit in defendant's contention that the trial court violated a plea bargain arrangement by imposing on him two consecutive two-year sentences rather than consolidating all charges for judgment. *S. v. Puckett*, 153.

§ 142. Probation

Where the maximum period of confinement for the offense for which defendant was convicted was six months, the maximum period which defendant could be required to serve actively under a sentence of special probation was one-fourth of the maximum sentence, or one and one-half months. *S. v. Thornton*, 564.

§ 142.3. Particular Conditions of Probation

Evidence supported the court's order requiring defendant, as a condition of his probation for assault with a deadly weapon inflicting serious injury, to pay certain amounts to the victim as restitution for medical expenses, lost wages, and clothing damage. *S. v. Stephenson*, 323.

§ 143.10. Violation of Probation Condition as to Payments

Order revoking defendant's probation for failure to pay a fine, court costs and restitution is remanded for a new hearing where the record does not show that the trial judge considered defendant's evidence of his inability to make the required payments. *S. v. Smith*, 727.

§ 155.1. Docketing of Record in Court of Appeals

Appeal is dismissed for failure of appellant to docket the record on appeal within 150 days after notice of appeal. *S. v. Brown*, 532.

§ 156.1. Procedural Aspects of Certiorari

Defendant's appeal is dismissed where he did not file the record on appeal until almost five months after the Court of Appeals entered an order of certiorari. *S. v. Oxendine*, 391.

DAMAGES

§ 13. Competency of Evidence

In an action to recover for the loss of plaintiff's horse which was in defendant's care, evidence concerning the expense of training a horse to do those things which plaintiff's horse was able to do was not sufficiently prejudicial to require a new trial. *Griner v. Smith*, 400.

DECLARATORY JUDGMENT ACT

§ 4.2. Construction and Application of Statutes

A declaratory judgment action was appropriate to obtain a determination as to whether the Governor is required to follow the Administrative Procedure Act in removing for cause a member of the N. C. Cemetery Commission. *James v. Hunt*, 109.

§ 4.3. Insurance Matters

Plaintiffs were entitled to a declaratory judgment as to the validity of binders for medical malpractice issued pursuant to the Health Care Liability Reinsurance Exchange Act to nonappearing defendants, although no litigation is pending as to such defendants which might subject plaintiffs to liability on the binders, since the possibility of such litigation is neither remote nor speculative. *Insurance Co. v. Ingram*, 621.

DEEDS

§ 12. Estates Created by Instruments Generally

Where a grantor conveyed property in fee to a husband, a subsequent deed to husband and wife did not convey any interest in the property to the grantees. *Harris v. Steele*, 44.

The deed upon which plaintiff's title was based conveyed an easement where the granting clause described it as a right of way. *Crawford v. Wilson*, 69.

§ 20. Restrictive Covenants in Subdivisions

Lot owners in one block of a subdivision were proper parties to enforce restrictive covenants in another block. *Hawthorne v. Realty Syndicate, Inc.*, 436.

§ 20.1. Restrictions as to Business Activities

The construction of a public library and apartments on a subdivision lot did not constitute such a radical change in the neighborhood as to preclude the enforcement of a restrictive covenant limiting use of lots in the subdivision to residential purposes. *Hawthorne v. Realty Syndicate, Inc.*, 436.

A racial restrictive covenant was invalid but a restriction to residential purposes remained valid and enforceable. *Ibid.*

§ 20.6. Who May Enforce Restrictions

Plaintiffs' waiver of their right to enforce restrictive covenants against one subdivision lot did not estop them from enforcing the restrictive covenants against other subdivision lots. *Hawthorne v. Realty Syndicate, Inc.*, 436.

§ 20.7. Enforcement Proceedings

An action to enforce a restrictive covenant is governed by the six-year statute of limitations. *Hawthorne v. Realty Syndicate, Inc.*, 436.

DIVORCE AND ALIMONY

§ 3. Venue

The statutory provision for removal of an action for divorce and alimony upon motion of defendant to the county of defendant's residence where plaintiff has moved from the State is mandatory and may be applied retroactively, but it was not applicable where it become effective after the trial court had made a decision settling the question of venue. *Gardner v. Gardner*, 678.

DIVORCE AND ALIMONY—Continued

§ 5. Recrimination

The defense of recrimination cannot be asserted in actions for absolute divorce based on separation of the parties instituted after 31 July 1977. *Edwards v. Edwards*, 296.

Defendant's allegations that plaintiff procured a separation agreement from her by fraudulently misrepresenting that he had not been seeing another woman during their marriage did not state a counterclaim which could be asserted in an action for absolute divorce. *Ibid.*

§ 7. Divorce from Bed and Board

Trial court in a nonjury trial did not err in rendering judgment on the merits against plaintiff in his action for divorce from bed and board at the close of plaintiff's evidence. *Newsome v. Newsome*, 580.

§ 16.2. Pleadings in Alimony Action

Verification of the complaint in an action for alimony without divorce is no longer required. *Southern v. Southern*, 159.

§ 16.9. Amount of Alimony

Trial court did not err in ordering plaintiff husband to pay alimony of $1500 per month and child support of $1000 per month. *McLeod v. McLeod*, 66.

§ 17.2. Effect of Divorce Decree on Action for Divorce from Bed and Board

Plaintiff's action for divorce from bed and board was a pending action which asserted the rights of a dependent spouse with respect to alimony, and plaintiff's rights pursuant to that action were not affected by a decree of absolute divorce granted defendant. *Wilhelm v. Wilhelm*, 549.

§ 18.9. Sufficiency of Evidence for Alimony Pendente Lite

Evidence was sufficient to support the trial court's findings that plaintiff abandoned defendant and that defendant was entitled to alimony pendente lite. *Robbins v. Robbins*, 488.

§ 18.16. Attorney Fees in Alimony Pendente Lite Action

Trial court erred in awarding attorney's fees without making appropriate findings on the issue of a reasonable attorney's fee. *Bowes v. Bowes*, 586.

§ 19.1. Jurisdiction to Modify Alimony Decree

Trial court erred in conditioning a reduction of alimony on defendant's payment of arrearages in child support since the matter of arrearages was not before the court. *Russ v. Russ*, 74.

§ 19.4. Burden and Sufficiency of Showing of Changed Circumstances

Trial court did not err in ordering defendant to increase his alimony payments to plaintiff since a spouse may obtain a modification of an order for permanent alimony upon a showing of changed circumstances, even though the order was by consent. *Bowes v. Bowes*, 586.

§ 21.3. Enforcement of Alimony Order

The trial court did not err in ordering defendant to pay $2500 to plaintiff for reimbursement of medical expenses incurred by plaintiff since defendant was obligated under a prior consent order to provide health insurance coverage for plaintiff, which he had failed to do. *Bowes v. Bowes*, 586.

DIVORCE AND ALIMONY—Continued

§ 21.8. Enforcement of Foreign Alimony Order

The district court in Forsyth County could not properly give effect to a judgment for alimony and child support rendered in England against a N. C. resident based on service in N. C. by uncertified and unregistered mail. *Southern v. Southern*, 159.

§ 23.3. Child Custody Jurisdiction After Divorce

The matters of child custody and support were not brought to issue and determined in a prior divorce action where the divorce decree merely followed child custody and support provisions of a prior separation agreement, and those issues could be determined in an independent action in another county. *Rhoney v. Sigmon*, 11.

Where a divorce decree entered in Catawba County provided for child custody and support, Catawba County was the proper venue for child custody and support proceedings even though none of the parties are now residents of that county. *Bass v. Bass*, 63.

§ 23.5. Absence or Presence of Child as Factor

Trial court had jurisdiction to consider defendant's motion for a change in child custody although the child in question was residing in Pennsylvania with plaintiff's parents. *Misero v. Misero*, 523.

§ 23.10. Jurisdiction on Appeal of Child Custody or Support Order

The court on appeal will not consider respondent's jurisdictional question which was not raised in the trial court. *In re Hayes*, 515.

§ 24. Child Support Generally

Despite the fact that defendant husband apparently made a false affidavit of paternity in obtaining a new birth certificate for plaintiff wife's child under G.S. 49-13, he was estopped from collaterally attacking his admission of paternity in this proceeding for child support. *Chambers v. Chambers*, 361.

§ 24.7. Where Evidence of Changed Circumstances is Sufficient

Court's order requiring defendant father to pay an increased amount for child support based on changed circumstances was supported by its findings of fact. *Bethea v. Bethea*, 372.

§ 25.2. Effect of Separation Agreement on Child Custody

Trial court's child custody order was supported by ample evidence, and the court was not bound by the child custody provision of the parties' separation agreement. *In re Hayes*, 515.

§ 27. Attorney Fees in Alimony and Child Support Actions

Trial court erred in awarding defendant wife counsel fees in an alimony and child support action. *McLeod v. McLeod*, 66.

EMBEZZLEMENT

§ 5. Competency of Evidence

The trial court in an embezzlement case did not err in qualifying a CPA as an expert and in allowing his opinion based upon an examination of only a portion of the entire financial record. *S. v. Barbour*, 143.

EMBEZZLEMENT—Continued

§ 6. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution of defendant school treasurer for embezzlement. *S. v. Barbour*, 143.

§ 6.1. Instructions

The trial court in an embezzlement case did not err in charging the jury that defendant was a "fiduciary person," though the statute under which defendant was charged neither contained nor referred to those words, since the court was not restricted to using the exact words of the statute in giving instructions, and the use of "fiduciary persons" to define the statutory phrasing of G.S. 14-92 has been specifically approved by the N.C. Supreme Court. *S. v. Barbour*, 143.

EMINENT DOMAIN

§ 5.6. Future Uses of Property

Trial court in an action to condemn a power line easement did not abuse its discretion in denial of petitioner's motion in limine to prohibit the landowner from introducing evidence of future plans for expansion which would be precluded by imposition of petitioner's easement. *Power Co. v. Ham House, Inc.*, 308.

§ 6.5. Testimony as to Value

In an action to condemn a power line easement, trial court erred in refusing to permit petitioner's expert appraisers to give opinion testimony as to damages to the lower portion of the tract without including in their computations the value of the land and a building in the northeast portion of the tract where it was undisputed that such land and building would not be affected by the easement. *Power Co. v. Ham House, Inc.*, 308.

§ 13.5. Instructions in Condemnation Cases

Trial court in an action to condemn a power line easement erred in instructing the jury that "the landowner is limited in the use of the property to parking, crossing, raising of crops and the land cannot be used for building." *Power Co. v. Ham House, Inc.*, 308.

EQUITY

§ 2. Laches

Trial court, in an action to remove cloud from title, erred in determining that an issue of laches should be submitted to the jury. *Young v. Young*, 419.

ESCAPE

§ 1. Elements of Offense

An escape from a detention center is not a violation of G.S. 14-256 which provides that escape from a "prison, jail or lockup" is a misdemeanor. *S. v. Puckett*, 596.

ESTOPPEL

§ 1. Estoppel by Deed

Where a grantor conveyed property in fee to a husband and then executed a subsequent deed to husband and wife, plaintiff who claimed title by a conveyance

ESTOPPEL—Continued

from the wife could not rely upon estoppel since the husband and wife acted together to procure the execution of the subsequent deed. *Harris v. Steele*, 44.

§ 4.3. Conduct of Party Sought to be Estopped

Even though the property in question was conveyed by a corporation to secure an agent's loan to a second corporation, the second corporation was estopped by the doctrine of ratification from asserting the existence of its equity of redemption since the second corporation recognized the existence of the title in the agent. *Complex, Inc. v. Furst*, 95.

EVIDENCE

§ 11.3. What Constitutes a Transaction or Communication With Decedent

Trial court in a caveat proceeding did not err in allowing a woman who lived with deceased and had his children but who was not his wife to testify that deceased gave accurate responses to questions at the social security office regarding the preparation of an affidavit legitimating the witness's children. *In re Simmons*, 123.

§ 11.6. Transactions With Decedent Relating to Mental Capacity

Testimony by an attorney who prepared the paper writing in question in a caveat proceeding regarding transactions and communications with the deceased was properly admitted. *In re Simmons*, 123.

§ 34.2. Offer to Compromise

In an action to recover for the loss of plaintiff's horse which was in defendant's care, the prejudicial effect of testimony concerning an offer to compromise was sufficiently dissipated by the trial court's prompt action. *Griner v. Smith*, 400.

EXECUTORS AND ADMINISTRATORS

§ 19.1. Time for Filing Claim Against Estate

A claim against decedent's estate for personal injuries received in an automobile accident was barred where the claim was received by the executor more than six months after the general notice to creditors was published. *Anderson v. Gooding*, 611.

FRAUD

§ 12. Sufficiency of Evidence

The execution of a loan and mortgage agreement with a party with whom appellants did not wish to deal would be sufficient injury to constitute an essential element of fraud. *Complex, Inc. v. Furst*, 95.

Where the trial court found that the agent of lenders had intentionally misrepresented the identity of his undisclosed principals, the court erred in failing to determine what significance the agent's misrepresentation had on borrower's execution of the loan. *Ibid.*

FRAUDS, STATUTE OF

§ 2.1. Sufficient Memorandum

A receipt given by plaintiff to defendant was a sufficient memorandum of the parties' contract to meet the requirements of the statute of frauds. *Bank v. Church,* 538.

GAS

§ 1. Regulation

The Utilities Commission could properly permit a gas supplier to roll forward an undercollection produced by a curtailment tracking rate for one entitlement year for collection in the next entitlement year. *Utilities Comm. v. Industries, Inc.,* 219.

GUARANTY

§ 1. Generally

Where a guaranty made each of two guarantors separately liable for maximum amount, one guarantor's termination of his guaranty did not terminate the second guarantor's liability. *Pearce Young Angel Co. v. Enterprises, Inc.,* 690.

§ 2. Actions to Enforce Guaranty

Plaintiff's suit to recover from the guarantor of a promissory note was not barred by the three year statute of limitations. *Advertising, Inc. v. Peace,* 534.

Defendant guarantor of a promissory note failed to offer specific evidence of a genuine issue of renegotiation, and summary judgment was properly entered for plaintiff. *Ibid.*

Summary judgment was properly entered for plaintiff in an action to recover upon defendant's guaranty of an account for food sold to a restaurant. *Pearce Young Angel Co. v. Enterprises, Inc.,* 690.

HIGHWAYS AND CARTWAYS

§ 11.2. Neighborhood Public Roads; Action to Enjoin Obstructions

In an action for injunctive relief from defendant's closure of an abandoned portion of a road, G.S. 153A-241 was inapplicable and the county was not required to comply with its terms in closing the road. *Community Club v. Hoppers,* 671.

The abandoned portion of a state road was not a necessary means of ingress to and egress from the dwelling houses of families located on the unabandoned portion of the road, and the abandoned portion was not therefore a neighborhood public road. *Ibid.*

HOMICIDE

§ 21.7. Sufficiency of Evidence of Second Degree Murder

Evidence was sufficient for the jury in a second degree murder case where it tended to show that defendant shot his stepdaughter's boyfriend. *S. v. Bonds,* 467.

Evidence was sufficient for the jury where it tended to show that the victim died after being hit by defendant with a stick. *S. v. Hunt,* 428.

State's evidence of causation was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder and to sustain his conviction of voluntary manslaughter. *S. v. Thompson,* 380.

HUSBAND AND WIFE—Continued

§ 11. Binding Effect of Separation Agreement

In an action to recover payments due under a separation agreement, there was no merit to defendant's contention that it was the intent of the parties that payments for maintenance and support should continue only until the wife was capable of supporting herself. *Beverly v. Beverly,* 60.

§ 11.1. Operation and Effect of Separation Agreement

Though a separation agreement between the parties provided that defendant should pay plaintiff child support of $450 per month and that such amount should not be reduced until the youngest child reached 18 years of age, defendant was nevertheless entitled to a credit against his obligation for the support of one of the children who went to live with defendant. *Beverly v. Beverly,* 60.

§ 24. Alienation of Affections

One parent may not recover from the other parent for alienating the affections of their child. *Edwards v. Edwards,* 296.

INDEMNITY

§ 2.1. Losses, Damages and Liabilities Covered

An agreement by the lessee of a crane to indemnify the lessor for liability incurred by the lessor for injuries sustained by third persons "arising from the use of, transportation of, or in any way connected with" the leased crane "from whatsoever cause arising" was not void as against public policy and included liability arising from the negligence of the lessor or one of its employees for whose acts it was derivatively liable. *Cooper v. Owsley & Son, Inc.,* 261.

An agreement by the lessee of a crane to indemnify the lessor for liability incurred for injuries to third persons did not cover attorney fees and other expenses incurred by the lessor in the defense of an action to recover for the death of a third person who was killed when a portion of the crane fell on him. *Ibid.*

INDICTMENT AND WARRANT

§ 17.1. Variance; Charging Same Offense

Where defendant was charged with larceny by an employee, he could not be convicted of common law larceny. *S. v. Daniels,* 556.

§ 17.2. Variance As to Time

In a prosecution for breaking and entering and larceny where the premises allegedly were broken into on two consecutive nights, there was no fatal variance between the indictment and proof as to the date of the crimes charged. *S. v. Sinclair,* 709.

INFANTS

§ 4. Protection by Courts

In a prosecution instituted by a county department of social services to obtain custody of a child from its mother, the evidence was sufficient to support a finding that the child was a "neglected child" within the meaning of G.S. 7A-278(4). *In re Cusson,* 333.

INFANTS — Continued

§ 6.3. Contests for Custody Between Parent and Third Party

Where petitioner signed consent to the adoption of his children by their grandparents, petitioner was rendered a stranger to the blood, but this in no way precluded his right to claim custody as an "other person" within the meaning of G.S. 50-13.1. *In re Rooker*, 397.

§ 17. Juvenile Delinquent; Confessions

Miranda warnings were not required to render admissible statements made by a juvenile to a social worker, but in order to be admissible in a juvenile proceeding, such statements must have been made voluntarily and understandingly. *In re Weaver*, 222.

§ 20. Judgments and Orders in Juvenile Delinquency Proceeding

There was ample evidence to support a conclusion that a 13-year-old juvenile delinquent was committed to a training school because the court felt the threat to the safety of property in the community required that she be sent to a training school and not because the department of social services could not find a placement for her. *In re Weaver*, 222.

INSURANCE

§ 21. Life Insurance; Incontestability Clause

In an action to recover under a policy of disability insurance, there was no merit to plaintiff's contention that the incontestable provision of the insurance contract prevented defendant from raising the defense that plaintiff's prior physical condition contributed to his disability. *Hooks v. Insurance Co.*, 606.

§ 35. Life Insurance; Right to Proceeds When Beneficiary Causes Death of Insured

The evidence on motion for summary judgment did not present a genuine issue of fact as to whether an automobile driver was barred from receiving the proceeds of policies insuring the life of a passenger on the ground that the passenger's death was caused by the driver's culpable negligence. *Smith v. Insurance Co.*, 269.

§ 71. Automobile Collision Insurance; What Constitutes a Collision

The collapse of a bridge upon which insured's truck was being operated did not constitute a "collision" within the meaning of a comprehensive policy providing coverage for losses to insured's vehicles arising from all causes except collision. *Allison v. Insurance Co.*, 200.

§ 79. Automobile Liability Insurance; Inception and Termination of Coverage

Trial court properly entered summary judgment for defendant insurer in plaintiff's action for damages based on plaintiff's allegations that defendant wantonly ignored plaintiff's efforts to find out why a premium for insurance covering his motorcycle had increased by $68, sent a false notice of termination of liability insurance to the Dept. of Motor Vehicles and issued a policy to plaintiff containing a false statement of waiver of uninsured motorist coverage. *Phillips v. Insurance Co.*, 56.

§ 79.1. Automobile Liability Insurance Rates; Approval or Disapproval by Insurance Commissioner

The Commissioner of Insurance could not substitute his own proposals for those of the N.C. Rate Bureau in a motor vehicle insurance filing. *Comr. of Insurance v. Rate Bureau*, 715.

INSURANCE—Continued

§ 128. Fire Insurance; Waiver of Conditions

A rental house owned by plaintiffs and insured by defendant was vacant and a violation of the 60- and 90-day unoccupancy/vacancy clauses of the insurance policy existed on the date of the fire destroying the house, but defendant waived those clauses. *Wells v. Insurance Co.*, 328.

JUDGMENTS

§ 8. Nature and Essentials of Judgment by Consent

Trial court erred in entering a consent judgment based on the parties' agreement dictated four months earlier to the court reporter since neither party nor the judge signed the memorandum of the agreement, there was no consent by defendant to the entry of judgment by the judge four months later, and the judge had no authority to enter such judgment. *Lalanne v. Lalanne*, 528.

§ 13.2. Notice of Judgment by Default

Trial court did not err in entering a judgment by default against defendant in session upon a motion by plaintiff, since defendant had adequate notice that the motion would be heard and ample time to respond. *Bowes v. Bowes*, 586.

§ 21. Attack on Consent Judgment

The fact that the legal consequence of a consent judgment for alimony was different than what the parties contemplated was not a sufficient reason to amend the consent judgment without the agreement of the parties. *Cox v. Cox*, 518.

§ 38. Conclusiveness of Judgments in Federal Courts

In plaintiff's action to enforce a money judgment given by a U.S. District Court, res judicata prevented defendant from attacking, by way of counterclaim, the veracity of plaintiff's testimony in the federal court. *Fabricators, Inc. v. Industries, Inc.*, 530.

§ 41. Conclusiveness of Consent Judgments

Appellants were estopped from contending that an agent's sale of stock of an amusement park corporation was invalid because no default existed under the mortgage terms since the parties had entered into a consent judgment expressly providing that the sale of the stock was valid. *Complex, Inc. v. Furst*, 95.

§ 51.1. Foreign Judgment; Lack of Jurisdiction as Defense to Judgment

The district court in Forsyth County could not properly give effect to a judgment for alimony and child support rendered in England against a North Carolina resident based on service in North Carolina by uncertified and unregistered mail. *Southern v. Southern*, 159.

JURY

§ 9. Alternate Jurors

Trial court did not abuse its discretion in disqualifying a juror on the ground of "lack of attention" and in substituting an alternate juror at the conclusion of the final arguments of counsel. *S. v. Barbour*, 38.

LABORERS' AND MATERIALMEN'S LIENS

§ 8.1. Enforcement of Lien; Actions Against Owner

Trial court erred in changing the theory of the case on its own motion to that of an alleged lien on funds in possession of defendants due to the general contractor after notice of a debt owed to plaintiff, one of the general contractor's subcontractors who had not been paid, and the case must be reversed even under the new theory since the court made no finding that there was a debt owed by the general contractor to plaintiff subcontractor. *Coker v. Stevens*, 352.

LANDLORD AND TENANT

§ 8.5. Liability of Landlord for Damages in Making Repairs

Trial court properly entered summary judgment for defendant in an action to recover for personal injuries sustained by plaintiff as a result of the alleged negligence of defendant landlord in making repairs to a hot water faucet handle in premises leased by defendant to plaintiff's parents. *Haga v. Childress*, 302.

§ 13. Termination of Lease

A month-to-month tenancy after the initial lease period of one year can exist in a federally subsidized low-income housing project, and defendant's month-to-month tenancy continued without interruption where plaintiff landlord failed to evict defendant pursuant to HUD eviction procedures. *Apartments, Inc. v. Williams*, 648.

A month-to-month tenant who was wrongfully evicted was entitled to recover damages under G.S. 42-36 for loss of her security deposit, moving expenses, furniture storage, and loss of federal rental subsidy payments until her eviction order was reversed. *Ibid.*

§ 18. Forfeiture for Nonpayment of Rent

Trial court in a summary ejectment action did not err in determining that defendant has a possible meritorious defense and in vacating the magistrate's order. *Menache v. Management Corp.*, 733.

LARCENY

§ 1. Elements of Crime Generally

Where defendant was charged with larceny by an employee, he could not be convicted of common law larceny. *S. v. Daniels*, 556.

§ 4.1. Warrant and Indictment; Description of Property Taken

The warrant in a larceny prosecution which alleged the theft of "4 L.P. Stereo Record Albums" was sufficiently specific. *S. v. Smith*, 376.

§ 4.2. Warrant and Indictment; Ownership of Property

There was no fatal variance in a larceny prosecution between the allegation in the warrant that the property was stolen from "K-Mart Stores, Inc." and proof at trial that the correct corporate name was "K-Mart Corporation." *S. v. Smith*, 376.

§ 7. Sufficiency of Evidence Generally

In a prosecution for breaking and entering and larceny, there was sufficient evidence corroborating defendant's confession to take the case to the jury. *S. v. Sinclair*, 709.

LIBEL AND SLANDER

§ 11. Absolute Privilege

Where defendant psychiatrist interviewed plaintiff, his estranged wife, and the couple's daughter for the purpose of rendering a report to the court as to the custody of the daughter, defendant's report was absolutely privileged and could not be made the basis of a cause of action for libel. *Williams v. Congdon*, 53.

A letter which was sent by defendant CPA to the Internal Revenue Service at the request of plaintiff's supervisor and which questioned plaintiff's competency to conduct examinations of tax returns was absolutely privileged as a communication submitted in a quasi-judicial administrative proceeding. *Angel v. Ward*, 288.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Negligence Action

Plaintiff's claim based upon defendant physician's alleged negligent causation, misdiagnosis and treatment of an infection during surgery and post-operative care accrued at the time her injury was discovered or should reasonably have been discovered by her. *Johnson v. Podger*, 20.

MALICIOUS PROSECUTION

§ 13.2. Sufficiency of Evidence of Probable Cause

Trial court in an action for malicious prosecution did not err in entering summary judgment for defendant lawyer who had probable cause to file suit on behalf of his client, a patient of plaintiff doctor. *Petrou v. Hale*, 655.

MASTER AND SERVANT

§ 13. Interference with Employment Contract by Third Persons

Defendant CPA did not maliciously interfere with an internal revenue agent's contract of employment by a letter sent to plaintiff's employer. *Angel v. Ward*, 288.

§ 62.2. Workmen's Compensation; Traveling from One Work Place to Another During Day

Plaintiff's accident as she was returning to her home to write a report about a meeting she had attended arose out of and in the course of her employment as a community coordinator, although she made a substantial deviation from the most direct route from the meeting place to her home. *Warren v. City of Wilmington*, 748.

§ 68. Workmen's Compensation; Occupational Diseases

Findings by the Industrial Commission were insufficient to support a determination as to whether the calcification of tendons and ligaments in plaintiff's shoulders was caused by her work and was thus an occupational disease. *Cannady v. Gold Kist*, 482.

§ 69. Workmen's Compensation; Amount of Recovery

The 1973 amendment to G.S. 97-29, governing the maximum weekly workmen's compensation benefit, applies to G.S. 97-38 so that G.S. 97-38 no longer limits recovery for death claims to $80 per week. *Andrews v. Nu-Woods, Inc.*, 591.

MASTER AND SERVANT—Continued

§ 75. Workmen's Compensation; Coverage of Medical Expenses

Treatment received by plaintiff following an injury from an accident arising out of and within the scope of his employment was of an emergency nature though it extended over a period of 17 months, and defendant was justified in substituting a doctor of his own choice to treat his injury. *Schofield v. Tea Co.*, 567.

§ 94.1. Workmen's Compensation; Sufficiency of Finding of Fact by Industrial Commission

Plaintiff's claim for disability allegedly resulting from exposure to cotton dust at her place of employment is remanded for determination of the date upon which she became disabled and, upon such finding, to determine which statutory provisions are applicable. *Taylor v. Stevens & Co.*, 216.

MORTGAGES AND DEEDS OF TRUST

§ 4. Description of Land Conveyed as Security

Though a person had apparent authority to act as an agent for a borrower in executing an agreement to modify the borrower's prior agreement with lenders and their agent, the modification agreement was without legal effect since such agreement failed to contain a description of the land being conveyed by deed of trust. *Complex, Inc. v. Furst*, 95.

MUNICIPAL CORPORATIONS

§ 2. Annexation; Legislative Power Generally

The City of Fayetteville had no standing to contest the validity of an act of the legislature prohibiting the annexation of any area in Cumberland County if a majority of the registered voters signed a petition opposing the annexation. *Wood v. City of Fayetteville*, 410.

§ 2.4. Remedies to Attack Annexation

Intervenors did not have the right as taxpayers or citizens of a city to challenge the constitutionality of an act limiting the power of the city to annex. *Wood v. City of Fayetteville*, 410.

§ 11. Discharge of Municipal Employees

A city ordinance requiring permanent city employees to be city residents was not applied arbitrarily and capriciously in the termination of plaintiff's employment as a city fireman. *Maines v. City of Greensboro*, 553.

NARCOTICS

§ 3.1. Relevancy of Evidence

In a prosecution for possession and sale of marijuana where defendant pled entrapment, the sale of LSD within a month of the sale with which he was charged was relevant to show the state of defendant's mind at the time of the offense charged. *S. v. Dancy*, 208.

In a prosecution for possession and manufacture of heroin, the trial court properly permitted testimony that certain paraphernalia and ingredients found in defendant's house were commonly used in the processing and packaging of heroin. *S. v. Rogers*, 475.

NARCOTICS—Continued

§ 3.2. Evidence Obtained by Search and Seizure

An officer was properly permitted to testify that a dog trained to detect heroin went to defendant's safe deposit box several times and tried to bite the handle, although the officer had no search warrant when he took the dog to the safe deposit area. *S. v. Rogers*, 475.

§ 4.2. Sufficiency of Evidence; Defense of Entrapment

Evidence did not disclose entrapment as a matter of law in a prosecution for possession and sale of marijuana. *S. v. Dancy*, 208.

NEGLIGENCE

§ 6.1. Application of Doctrine of Res Ipsa Loquitur

Plaintiff's evidence supported the application of the doctrine of res ipsa loquitur where it tended to show that a toll bar at the entrance to a hospital parking lot rose and then fell immediately, injuring plaintiff. *McPherson v. Hospital*, 164.

§ 29.1. Sufficiency of Evidence of Negligence; Particular Cases

Trial court erred in entering summary judgment for defendant in an action to recover for injuries sustained by plaintiff when she fell through an unguarded opening in the floor of her home created when defendant's employees removed a furnace grille from the floor. *Taylor v. Air Conditioning Corp.*, 194.

§ 30.1. Particular Cases Where Nonsuit Is Proper

Where defendant guarantors obtained fire insurance on certain equipment, the equipment was subsequently sold at a foreclosure sale, and the purchase was financed by plaintiff and guaranteed by defendants, defendants failed to offer evidence sufficient to show that plaintiff breached its duty in failing to inform them that the insurance policy provided coverage only when the owner of the equipment was the named insured of the policy. *Bank v. Morgan*, 63.

§ 53.7. Duty Owed Invitee by Person in Control of Elevator

Plaintiffs who were injured when an elevator in defendant's home fell were invitees and not licensees as determined by the trial court. *Briles v. Briles*, 575.

§ 57.10. Cases Involving Other Injuries Where Evidence Is Sufficient

In an action to recover for personal injuries sustained by plaintiff when a cinder block wall in defendant's basement collapsed on him, evidence presented a question for the jury to decide whether defendant's failure to brace the wall and warn plaintiff of the danger constituted actionable negligence. *Ryder v. Benfield*, 278.

PARENT AND CHILD

§ 1. Termination of Relationship

The appointment of counsel to represent an indigent respondent in a proceeding to terminate respondent's parental rights is not constitutionally required. *In re Lassiter*, 525.

§ 4.1. Right of Parent to Maintain Action for Alienation of Affections of Child

One parent may not recover from the other parent for alienating the affections of their child. *Edwards v. Edwards*, 296.

PARENT AND CHILD—Continued

§ 6.3. Proceedings to Determine Custody

In a prosecution instituted by a county department of social services to obtain custody of a child from its mother, the evidence was sufficient to support a finding that the child was a "neglected child" within the meaning of G.S. 7A-278(4). *In re Cusson*, 333.

PENALTIES

§ 1. Generally

An action under G.S. 75-16 to recover treble damages for a violation of the unfair trade practices statute instituted prior to 21 March 1979 is governed by the three-year limitation of G.S. 1-52(2), not the one-year limitation of G.S. 1-54(2) applicable to actions to recover a statutory penalty. *Holley v. Coggin Pontiac*, 229.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 11. Malpractice Generally; Liability of Physician

Where defendant psychiatrist interviewed plaintiff, his estranged wife, and the couple's daughter for the purpose of rendering a report to the court as to the custody of the daughter, defendant's report was absolutely privileged and could not be made the basis of a cause of action for medical malpractice. *Williams v. Congdon*, 53.

A binder for medical malpractice insurance issued by plaintiff insurers to defendant physicians only because they were required to write such insurance by the Health Care Liability Reinsurance Exchange Act was null and void from its inception where the Act was declared unconstitutional by the N.C. Supreme Court. *Insurance Co. v. Ingram*, 621.

§ 13. Limitations of Action for Malpractice

Plaintiff's claim based upon defendant physician's alleged negligent causation, misdiagnosis and treatment of an infection during surgery and post-operative care accrued at the time her injury was discovered or should reasonably have been discovered by her. *Johnson v. Podger*, 20.

The statute of limitations for a personal injury action based on malpractice in surgery performed on plaintiff was three years and accrued on the date of the surgery. *Stanley v. Brown*, 503.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

Though a person had apparent authority to act as an agent for a borrower in executing an agreement to modify the borrower's prior agreement with lenders and their agent, the modification agreement was without legal effect since such agreement failed to contain a description of the land being conveyed by deed of trust. *Complex, Inc. v. Furst*, 95.

§ 11. Liabilities of Agent to Third Person

In an action to recover for services rendered by plaintiff in investigating and appraising certain real property and in making a subdivision feasibility study for a housing project, evidence was sufficient to support the trial court's conclusion that defendant agent agreed to make himself a party to the contract. *Simmons v. Cherry*, 499.

PRINCIPAL AND SURETY

§ 9.1. Actions on Public Construction Bonds

No civil liability attached to either a municipal corporation or its officers for failure to provide labor and material payment bond. *Builders Corp. v. Dry Wall, Inc.*, 444.

§ 10. Private Construction Bonds

A contractor's performance bond provided coverage for water damage to a wooden gym floor which occurred after the contract was completed and which was caused by the negligent installation of a water cooler. *School System v. Guaranty Co.*, 71.

PROCESS

§ 7. Personal Service on Resident Individuals

Service of process was not accomplished by mail as permitted by Rule 4(j)(1)c where the return receipt was not addressed to the party to be served, was not restricted to delivery to the addressee only, and was not signed by the party to be served. *Broughton v. DuMont*, 512.

§ 19. Abuse of Process

Plaintiff's allegation that defendant's purpose in filing a malpractice action was to coerce plaintiff and his malpractice insurance carrier into making a cash settlement, without any evidence of misuse of process lawfully issued, did not state a cause of action for abuse of process. *Petrou v. Hale*, 655.

PROSTITUTION

§ 2. Prosecutions

Warrants were insufficient to charge defendants with violation of a city ordinance making it unlawful for any person to be in a public place for the purpose of soliciting or procuring another to commit an act of prostitution. *S. v. Almond*, 76.

PUBLIC OFFICERS

§ 12. Removal from Office

The Administrative Procedure Act is not applicable to the Governor's removal for cause of a member of the N. C. Cemetery Commission, and the Governor has the authority to suspend the Commission member pending a hearing on his removal. *James v. Hunt*, 109.

QUIETING TITLE

§ 2.2. Burden of Proof; Evidence

Trial court, in an action to remove cloud from title, erred in determining that an issue of laches should be submitted to the jury. *Young v. Young*, 419.

RAILROADS

§ 5.1. Duties of Trainmen in Operation of Trains; Speed

A train engineer's negligence in operating a train too fast and in failing to give timely warning of its approach to a grade crossing was not insulated by the

RULES OF CIVIL PROCEDURE—Continued

§ 4.1. Service of Process by Publication

Service of process by publication in a divorce action was void even in the absence of legal fraud or concealment if the information required for personal service was within the plaintiff's actual knowledge or could have been ascertained. *Thomas v. Thomas*, 638.

§ 7. Form of Motions

Where there is an awareness by the trial judge of the grounds for a motion, the motion is adequately stated for the purposes of Rule 6 of the General Rules of Practice for the Superior and District Courts. *McGinnis v. Robinson*, 1.

§ 8.1. Complaint

Trial court erred in changing the theory of the case on its own motion to that of an alleged lien on funds in possession of defendants due to the general contractor after notice of a debt owed to plaintiff, one of the general contractor's subcontractors who had not been paid, and the case must be reversed even under the new theory since the court made no finding that there was a debt owed by the general contractor to plaintiff subcontractor. *Coker v. Stevens*, 352.

§ 15. Amendment of Pleadings

Defendants could not complain of the amendment of plaintiff's motion to reflect the procedural rule followed at the hearing on plaintiff's motion for a new trial. *McGinnis v. Robinson*, 1.

§ 16. Pre-trial Procedure

Trial court erred in entering judgment based in part on the purported stipulation of facts contained in a pretrial order where the stipulation was not signed by respective counsel and was disputed. *Amick v. Shipley*, 507.

§ 19. Necessary Joinder of Parties

The only necessary parties to an action to set aside an absolute divorce decree after the husband's death are the surviving wife and the personal representative of the deceased husband. *Thomas v. Thomas*, 638.

§ 41.1. Voluntary Dismissal

The one year period for commencing another action after the taking of a voluntary dismissal began to run when plaintiff's counsel announced in open court the submission of a voluntary dismissal and not when the written notice of dismissal was thereafter filed. *Danielson v. Cummings*, 546.

§ 52. Findings by Court

Plaintiff was not prejudiced by court's failure to make findings of fact in rendering judgment against plaintiff in his action for divorce from bed and board where the court made findings in connection with defendant's counterclaim for alimony without divorce, and those findings settled all of the issues raised in plaintiff's action. *Newsome v. Newsome*, 580.

§ 56. Summary Judgment

Plaintiff complied with the requirements for a summary judgment motion though her complaint was unverified and though she offered no affidavit or other material to support her motion. *Beverly v. Beverly*, 60

SEARCHES AND SEIZURES—Continued

§ 4. Particular Methods of Search

The State, by monitoring an electronic homing device placed in a container of a substance lawfully owned but known to be a precursor chemical used in the illegal manufacture of methamphetamine, conducted a search under the Fourth Amendment of the U.S. Constitution, but such search was not unreasonable. *S. v. Hendricks*, 245.

§ 12. Stop and Frisk Procedures

An officer did not need "probable cause" to make an investigatory stop of defendant to question him about a shooting. *S. v. Harris*, 346.

Even if a deputy sheriff's investigatory stop of defendant was illegal because it was made outside the limits of his territorial jurisdiction, the stop was not unconstitutional so as to require the exclusion of a pistol seized during the stop. *Ibid.*

§ 23. Application for Warrant; Cases Where Evidence of Probable Cause Is Sufficient

Evidence obtained from an electronic beeper together with other statements in an officer's affidavit established sufficient probable cause to justify a warrant for the search of defendant's private residence. *S. v. Hendricks*, 245.

§ 24. Probable Cause Shown in Application for Warrant; Information from Informers

Evidence before a magistrate was sufficient for him to find probable cause to issue a search warrant for marijuana. *S. v. Harris*, 184.

§ 28. Issuance of Warrant

Showing required for issuance of a search warrant when electronic beepers are involved. *S. v. Hendricks*, 245.

§ 33. Plain View Rule

Officers who received a telephone call from an unknown tipster that a house near a certain dairy farm was full of marijuana lawfully seized the marijuana from defendants' premises without a warrant under the plain view doctrine. *S. v. Prevette*, 450.

§ 41. Conduct of Officers; Knock and Announce Requirements

Exigent circumstances which justified a warrantless search of defendants' house under the plain view doctrine also excused officers from the knock and announce requirement before entering the house. *S. v. Prevette*, 450.

§ 42. Execution of Search Warrant; Exhibiting or Delivering Warrant

Officers substantially complied with the requirement that a search warrant be read to the person in control of the premises where a reading of the warrant was rendered impossible because of obstruction by defendant's husband. *S. v. Rogers*, 475.

§ 47. Motion to Suppress; Admissibility of Evidence

Defendant was not prejudiced by the court's admission of allegedly irrelevant testimony during the voir dire hearing on defendant's motion to suppress. *S. v. Rogers*, 475.

STATUTES

§ 8.1. Prospective and Retroactive Effect of Certain Statutes

A binder for medical malpractice insurance issued by plaintiff insurers to defendant physicians only because they were required to write such insurance by the Health Care Liability Reinsurance Exchange Act was null and void from its inception where the Act was declared unconstitutional by the N.C. Supreme Court. *Insurance Co. v. Ingram*, 621.

TORTS

§ 7.1. Release from Liability; Interpretation and Construction

Where plaintiff settled with one tortfeasor for $2000 before trial, defendant was entitled to have the judgment reduced by the amount of that settlement. *Ryder v. Benfield*, 278.

TRIAL

§ 6. Stipulations

Trial court erred in entering judgment based in part on the purported stipulation of facts contained in a pretrial order where the stipulation was not signed by respective counsel and was disputed. *Amick v. Shipley*, 507.

§ 11.1. Counsel's Argument of Matters Outside Evidence

In an action to recover for personal injuries sustained in an automobile accident, plaintiff is entitled to a new trial where defendant's attorney in his jury argument made statements concerning the lack of damage to plaintiff's car. *Karriker v. Sigmon*, 224.

§ 40.1. Form of Issues

In an action to recover the purchase price of pigs delivered by plaintiff to defendant, defendant is entitled to a new trial where one issue submitted to the jury was so confusing that the jury was unable to arrive at the amount owed plaintiff by defendant. *Turner v. Hog Co.*, 314.

TRUSTS

§ 13.3. Creation of Resulting Trusts; Implied Contracts

Even though the property in question was conveyed by a corporation to secure an agent's loan to a second corporation, the second corporation was the owner of the equity of redemption to the extent that it furnished the first corporation a portion of the purchase price. *Complex, Inc. v. Furst*, 95.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

An action under G.S. 75-16 to recover treble damages for a violation of the unfair trade practices statute instituted prior to 21 March 1979 is governed by the three-year limitation of G.S. 1-52(2), not the one-year limitation of G.S. 1-52(2) applicable to actions to recover a statutory penalty. *Holley v. Coggin Pontiac*, 229.

UNIFORM COMMERCIAL CODE

§ 9. Sales; Parol or Extrinsic Evidence

In an action to recover the purchase price of goods sold to defendant, a letter from the agent of plaintiff's assignor which identified it as an agent and which stated that at the time of the sale it was agreed by the assignor that the goods were sold on a "guaranteed sales basis" was sufficient to comply with the statute of frauds. *Equitable Factors Co. v. Chapman-Harkey Co.*, 189.

§ 22. Sales; Buyer's Remedies

In an action to recover the purchase price of goods sold to defendant, trial court erred in entering summary judgment for plaintiff where there was a genuine issue as to whether defendant was entitled to set off the cost of television advertising against the sales price. *Equitable Factors Co. v. Chapman-Harkey Co.*, 189.

UTILITIES COMMISSION

§ 24. Rate Making in General

The Utilities Commission could properly permit a gas supplier to roll forward an undercollection produced by a curtailment tracking rate for one entitlement year for collection in the next entitlement year. *Utilities Comm. v. Industries, Inc.*, 219.

VENDOR AND PURCHASER

§ 5. Specific Performance

In an action for specific performance of a contract to convey by warranty deed free from all encumbrances, it was proper for the trial court to order that notes secured by deeds of trust be satisfied out of the purchase money on deposit with the clerk of court. *Nugent v. Beckham*, 703.

VENUE

§ 1. Nature of Venue

Plaintiff waived any objection to venue in child support proceedings where he appeared and participated in the proceedings. *Bass v. Bass*, 212.

WATERS AND WATERCOURSES

§ 7. Marsh and Tidelands

The Marine Fisheries Commission erred in requiring petitioner to file an after the fact application for a permit to conduct excavation, dredging or filling projects in a marsh. *In re Milliken*, 382.

WEAPONS AND FIREARMS

§ 2. Possessing Weapons

State's evidence was insufficient for the jury in a prosecution for possession of an unregistered pistol in violation of a local public law. *S. v. Rogers*, 475.

§ 3. Pointing Weapon

Trial court did not err in instructing the jury that defendant would be guilty of assault by intentionally pointing a pistol at a named victim if he intended to point the pistol at a third party but actually pointed it at the named victim. *S. v. Thornton*, 564.

WILLS

§ 13. Form of Caveat Proceedings

Trial court in a caveat proceeding did not err in allowing propounders to open and close the arguments to the jury. *In re Simmons*, 123.

§ 19. Evidence in Caveat Proceeding

Trial court in a caveat proceeding did not err in allowing a woman who lived with deceased and had his children but who was not his wife to testify that deceased gave accurate responses to questions at the social security office regarding the preparation of an affidavit legitimating the witness's children. *In re Simmons*, 123.

§ 22.1. Mental Capacity; Opinion Evidence in Caveat Proceeding

Testimony by an attorney who prepared the paper writing in question in a caveat proceeding regarding transactions and communications with the deceased was properly admitted. *In re Simmons*, 123.

§ 23. Instructions in Caveat Proceedings

Trial court's instructions limiting certain testimony of caveator's witnesses regarding conversations with the deceased to the issue of mental capacity were proper, and the expression "mental capacity" properly precluded the jury from considering the testimony on the issue of undue influence. *In re Simmons*, 123.

§ 28.6. Meaning of Words in Will

The words "Cash, travelers checks . . . in my possession" as used in deceased's will did not include money in a bank or savings and loan association. *Bank v. Baker*, 388.

WORD AND PHRASE INDEX

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