NORTH CAROLINA COURT OF APPEALS REPORTS

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45 N.C. App.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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ROBERT M. MARTIN
EDWARD B. CLARK
GERALD ARNOLD
JOHN WEBB
RICHARD C. ERWIN
HARRY C. MARTIN
HUGH A. WELLS
CECIL J. HILL
WILLIS P. WHICHARD[1]

Retired Judges

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FRANK M. PARKER[2]

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SHERRY M. COCHRAN

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1. Appointed 2 September 1980 to fill the unexpired term of Judge Frank M. Parker.
2. Retired 31 August 1980.

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	KENNETH A. GRIFFIN	Charlotte
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	ROBERT E. GAINES	Gastonia
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28	ROBERT D. LEWIS	Asheville
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1. Appointed 18 August 1980.
2. Appointed 3 September 1980.
3. Appointed 31 July 1980.

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1. Retired 30 August 1980.
2. Appointed 1 August 1980 to succeed Tom H. Matthews who retired 31 July 1980.
3. Appointed to Superior Court 31 July 1980.

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Maines v. City of Greensboro	43 N.C. App. 553	300 N.C. 126
Shields v. Bobby Murray Chevrolet	44 N.C. App. 427	300 N.C.
Smith v. Fiber Controls Corp.	44 N.C. App. 422	300 N.C.
State v. Collins	44 N.C. App. 141	300 N.C. 142
State v. White	42 N.C. App. 320	300 N.C.
Trust Co. v. Creasy	44 N.C. App. 289	301 N.C.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. EUGENE OLLIE STREET

No. 7917SC671

(Filed 5 February 1980)

1. **Criminal Law § 92— joinder upon State's motion—timeliness of motion**

There was no merit to defendant's contention that the trial court erred in granting the State's motion for joinder of the charges against defendant because the State's motion was not timely, since there is no statutory time limit for a motion for joinder by the State and since defendant was prepared to go to trial in December 1978 on three of the charges, the trial was not held until February 1979, defendant had over two months to prepare for two additional charges brought against him in December, and there was no showing that defendant, after joinder of the offenses, moved for a continuance so that a new trial strategy could be planned.

2. **Criminal Law § 92.4— sexual offenses against stepchildren—extended period of time—joinder of charges proper**

Though the offenses with which defendant was charged occurred over a five month period, the trial court could properly find that they were part of a single scheme or plan and the court did not err in permitting joinder of the charges, since each of the offenses involved sexual acts committed by defendant upon his stepchildren; all of the victims were members of the same family; each of the offenses allegedly occurred at the same place and under the same circumstances; the incidents under consideration and similar incidents continued for a long period of time and defendant allegedly sexually abused the children virtually every time his wife left him at home alone with them; and in each instance defendant used his parental control over the children to force them to comply with his sexual desires.

APPEAL by defendant from *Albright, Judge.* Judgments entered 23 February 1979 in Superior Court, CASWELL County. Heard in the Court of Appeals 7 December 1979.

The defendant was charged in five separate indictments with the commission of sexual crimes against three of his stepchildren. In the interest of protecting the juvenile victims against embarrassment, each will be referred to by his or her first name. The individual indictments charged defendant with assault with intent to rape Penny, incest with Penny, crime against nature with Charles, rape of Kitty, and incest with Kitty.

Upon call of the matter for trial, and in absence of the jury, the State orally moved to join the indictments for trial. The trial court made a finding that the felony offenses charged were based on a series of acts connected together and constituted parts of a single, common scheme or plan and that the offenses charged were properly joinable under N.C. Gen. Stat. § 15A-926(a).

The jury returned the verdict of guilty of Assault With Intent to Commit Rape, Crime Against Nature, and Incest. The defendant was not convicted of Second Degree Rape. Judgments were entered imposing consecutive prison terms of 12-15 years on the Incest conviction, 8-10 years on the Assault With Intent to Commit Rape conviction, and 5 years on the Crime Against Nature conviction.

STATE'S EVIDENCE

The State's first witness was Kitty, aged 15, who testified that the defendant, her stepfather, had sexual intercourse with her at 9:20 a.m. on Sunday, 16 April 1978; that her mother had gone to the grocery store, leaving her at home with the defendant and her brothers and sisters; that the defendant called her into the bedroom to scratch his back; that he undid her pants, pulled them down to her ankles, pushed her down on the bed, got on top of her, penetrated her vagina with his penis, had sexual intercourse with her, but that he pulled out before he ejaculated; that she tried to push him off and could not; and, that when she told him to get up, he told her to "shut up."

Kitty further testified that she was afraid of the defendant; that he had sex with her just about every time her mother left the house, that it had been going on for about four years, since she was 10 years old; that when her father first started messing around with her the defendant was unable to penetrate; and, that she was about eleven or twelve years old when he was first able

to have sexual intercourse with her. Kitty also testified that her stepfather made her brother have intercourse with her about six or seven times; that she never volunteered to have sex with her brother; that her brother never approached her on his own; and that the defendant was always present and watched on these occasions.

Kitty's younger sister, Penny, aged 14, testified that on 1 April 1978, when she was twelve years old, the defendant called her into the house to scratch his back, shut the door, pulled down her pants against her will, pushed her down on the bed, got on top of her, and tried to have sex with her; and that the defendant was unable to penetrate because she was too little. Penny also testified that the defendant fondled her and tried to have sex with her on many other occasions.

Phyllis, the wife of the defendant and mother of the children, testified that she first learned of these offenses about two and one-half years prior to the incident in April 1978. Phyllis stated that she had left the defendant for a period of about four months but returned to him because he had threatened to kill all of them if she did not go back to him. Phyllis also stated that Charles had told her of incidents in which the defendant made Charles have sex with his sister and in which the defendant would tell Charles to watch while the defendant would engage in intercourse with Kitty so that the defendant could show Charles how to have intercourse.

The stepson, Charles, aged 16, testified that the defendant had unnatural intercourse with him in December 1977, when the defendant made Charles engage in fellatio. Charles stated that this occurred at least five times and that on other occasions the defendant would engage in fellatio with Charles. Charles further stated that he had seen the defendant have intercourse with Kitty, that he had had sex with Kitty, that the defendant would tell Kitty to pull down her clothes and then tell Charles to get on top of her. When Charles was unable to have an erection, the defendant would make Charles go into another room to play with himself until he was able to attain an erection. Charles further testified that when he had sex with Kitty, the defendant would stand there and watch.

The State also introduced evidence of prior statements made by the three stepchildren to a deputy sheriff and social worker for the purpose of corroborating the testimony of the children at the trial.

DEFENDANT'S EVIDENCE

The defendant presented three witnesses who testified that they were with defendant on the morning of Sunday, 16 April 1978, at the Camp Springs Bluegrass Music Festival until about 9:30 a.m. and that after leaving Camp Springs, they went to the Waffle House restaurant in Danville, Virginia.

John Lewis Walker, aged 18, testified that Kitty had told him that the charges against the defendant were not true.

The defendant's mother testified that she, her husband, and granddaughter, visited the home of defendant on Sunday morning, 16 April 1978, and that Phyllis told her that Eugene came in that morning around 11:00 o'clock.

The defendant also testified that he had been at the Camp Springs Bluegrass Music Festival the morning of 16 April 1978, and that he went to the Waffle House restaurant in Danville, Virginia, after leaving the Camp. The defendant denied committing any of the acts for which he was charged and categorically denied that he had ever sexually abused his stepchildren or anyone else.

Attorney General Edmisten by Assistant Attorney General Ralf F. Haskell for the State.

W. Osmond Smith III for defendant appellant.

CLARK, Judge.

[1] The defendant contends that the trial court should not have granted the State's motion for joinder of the offenses because the State did not present the motions in a timely manner. We do not agree. N.C. Gen. Stat. § 15A-952(a) provides the general rule for determining when pretrial motions may be made:

> "(a) Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion."

The time limitations provided in subsections (b)(6)e and (c) of N.C. Gen. Stat. § 15A-952 do not apply because these two subsections jointly refer to N.C. Gen. Stat. § 15A-926(c) which relates to timeliness of a motion by a *defendant* for a joinder of offenses against him. Furthermore, even if a statutory time limitation for a motion for joinder by the State existed, subsections (b) and (e) of N.C. Gen. Stat. § 15A-952 have provisos which allow the court to consider the motion at a later time.

We hold that the trial judge in the instant case acted wholly within the permissible range of his discretion when he granted the State's motion for joinder. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Williams*, 41 N.C. App. 287, 254 S.E. 2d 649 (1979). The defendant's brief admits that the defendant was prepared to go to trial in December 1978, on three of the charges. The trial was not held until February 1979. The defendant had over two months to prepare for the two additional charges brought against the defendant in December. Also, there is nothing in the record showing that the defendant, after the joinder of the offenses, moved for a continuance so that a new trial strategy could be planned.

[2] The defendant's next contention is that the trial court erred in allowing the motion to join the indictments because the alleged acts charged in the instant case were distinct and separate and therefore not a part of a general scheme or plan within N.C. Gen. Stat. § 15A-926(a), which provides as follows:

> "(a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a *series of acts* or transactions connected together or constituting parts of a *single scheme* or plan. Each offense must be stated in a separate count as required by G.S. 15A-924." (Emphasis added.)

The test we must apply is "whether the offenses are *so separate in time or place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant." *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). We, like the defendant, can find no case in this jurisdiction where acts allegedly committed by a defendant five months apart were held to be parts of a single scheme or plan. Nonetheless, each of the offenses for which the defendant was charged allegedly occurred at the

same place and under the same circumstances. All of the victims were members of the same family. The evidence tended to show that these incidents and similar incidents continued for a long period of time, and that the defendant sexually abused his children virtually each time his wife left the defendant home alone with the children. In each instance the defendant used his parental control over the children to force them to comply with his sexual desires. Consequently, we think that even though the time period between some of the acts was substantial, the acts were nonetheless so similar in circumstance and place as not to render the consolidation of the offenses prejudicial to the defendant. We also note that all of the offenses involved sexual abuses of stepchildren, and although N.C. Gen. Stat. § 15A-926 does not permit joinder of offenses solely on the basis that they are the same class, the nature of the offenses is a factor which may properly be considered in determining whether certain acts constitute parts of a single scheme or plan. *State v. Greene, supra.*

Similarly, the trial court did not err in admitting testimony as to other crimes or bad acts because the evidence all went toward showing that the defendant had the intent to commit sexual crimes and that his actions were part of a broader scheme, plan or design to perpetrate these crimes upon his stepchildren at times when he was left alone with them. The Supreme Court of this State has been quite liberal in admitting evidence of similar sex crimes, *State v. Greene, supra,* and we see no reason in the instant case to diverge from the Supreme Court's liberal evidentiary rulings in cases involving sexual assaults.

No error.

Judges ARNOLD and ERWIN concur.

CITIZENS ASSOCIATION FOR REASONABLE GROWTH OF WASHINGTON, N.C., BY R. EUGENE PERREY, CHAIRMAN, AND BILLY D. HILL, VICE CHAIRMAN; MELTON EVANS, VIRGINIA EVANS, ROBERT P. MACKENZIE, JACK MITCHELL, ALTON L. INGALLS, G. D. CURRIN, JESSE R. MAYO, ED BROWN, LEON DAVIDSON, LOUISE BRILEY, FRED MEECE, HERBERT ASKEW, DALE McWILLIAMS, D. S. SWAIN III, AND D. S. SWAIN, JR., PLAINTIFFS v. THE CITY OF WASHINGTON; JACK H. WEBB, CITY MANAGER; RICHARD W. TRIPP, MAYOR; LOUIS T. RANDOLPH, ABBOT N. SAWYER AND CARLOTTA C. MORDECAI, COUNCILPERSONS; PLUMMER A. DANIEL, CITY CLERK; AND THE BEAUFORT COUNTY BOARD OF ELECTIONS, O. J. GAYLORD, MARY VAN DORP AND G. T. SWINSON, MEMBERS, DEFENDANTS

No. 782SC593

No. 792SC365

(Filed 5 February 1980)

1. **Municipal Corporations § 39.3; Taxation § 11.1— errors in bond orders—statute of limitations**

An action based on alleged errors in bond orders for water and sewer bonds was barred by the statute of limitations of G.S. 159-59 where the action was filed more than 30 days after publication of the bond orders.

2. **Municipal Corporations § 39.3; Taxation § 11.1— water and sewer bond election—errors in notice and ballot—due process**

A water and sewer bond election did not violate due process because the published notice of the water bond election contained an erroneous reference to a "sanitary sewer bond issue" and the water bond ballot erroneously stated that the bond issue would not exceed "$1,500,00."

3. **Municipal Corporations § 39.3; Taxation § 11.1— water and sewer bond election—compliance with land use plan and government approval of project**

The validity of a city water and sewer bond election would not be affected by the fact that the city might have to take steps to comply with a land use plan or get the approval of the state or federal government before constructing water and sewer facilities.

4. **Elections § 7; Municipal Corporations § 39.3; Taxation § 11.1— validity of water and sewer bond election—statute of limitations**

Where no action was commenced to test the validity of a city water and sewer bond election within 30 days after newspaper publication of a sufficient statement of the election results, any claim to test the validity of the election was extinguished under G.S. 159-62, and the city could not revive the claim by again publishing the election results in a "Corrected Publication Statement of Result of Special Election."

APPEAL by plaintiffs from *Cowper, Judge* and *Peel, Judge.* Order entered 6 March 1978 and judgment entered 29 December

1978 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 29 November 1979.

This is an action challenging the validity of a bond referendum in the City of Washington. Plaintiffs alleged in detail the steps taken by the City of Washington to have a referendum to determine whether the City of Washington should issue $2,400,000.00 in bonds for the construction of sanitary sewer facilities and $1,500,000.00 in bonds for the construction of water facilities.

As a first claim for relief, plaintiffs alleged that the city published on 18 May 1977 and 25 May 1977 notices of the sewer bond election in which it was stated that an indebtedness of $2,400,000 would be incurred by the issuance of the sewer bonds. Plaintiffs further alleged that on 18 May 1977 the city published a notice entitled "Bond Order Authorizing the Issuance of $1,500,000 Water Bonds of the City of Washington" which in the body of the notice stated the bonds would be issued to construct sanitary sewer facilities. Plaintiffs alleged that this discrepancy invalidated the bond order on which the election was based.

As a second claim for relief, plaintiffs alleged that a copy of the bond order adopted by the City of Washington for the issuance of water bonds was not published in a qualified newspaper prior to the publication of the legal notice of the water bond election.

As a third claim for relief, plaintiffs alleged that the water bond election was invalid because the legal notice entitled "Bond Order Authorizing the Issuance of $1,500,000 Water Bonds of the City of Washington" which was published on 18 May 1977 stated the purposes of the bond order was to provide sanitary sewer facilities.

As a fourth claim for relief, plaintiffs alleged that the water bond election held on 30 June 1977 was invalid because the sample ballot published on 27 June 1977 in the *Washington Daily News* and the ballot used in the election stated the maximum amount of water bonds was to be $1,500,00.

As a fifth claim for relief, plaintiffs alleged that because of the numerous errors in publication and the error in the water

bond ballot, the election was invalid and any issuance of water bonds and levy of taxes to pay for these bonds would deprive the plaintiffs of due process of law.

As a sixth claim for relief, plaintiffs alleged that the City of Washington is proposing to issue the bonds for the construction of a project which will violate the Washington CAMA Land Use Plan and the Coastal Area Management Act of 1974. They alleged further that the City of Washington was planning to construct water and sewer facilities as part of a waste management plan that had not yet been approved by the State of North Carolina or the Federal Environmental Protection Agency and until the plan is approved, the bonds cannot be legally issued.

Defendants filed a motion to dismiss and on 6 March 1978, Judge Cowper dismissed all the claims for relief except the Fourth Claim. From this order the plaintiffs appealed. On 22 November 1978 defendants filed a motion to dismiss for the plaintiffs' failure to join the City of Washington, a necessary party. Defendants also filed a motion for summary judgment as to the Fourth Claim for Relief on that same date. Plaintiffs subsequently moved to amend the complaint to make the City of Washington an additional party defendant. On 29 December 1978, Judge Peel signed a judgment denying the plaintiffs' motion to make the City of Washington a party defendant and granting the motion to dismiss the Fourth Claim for Relief. Judge Peel also allowed defendants' motion for summary judgment. Plaintiffs appealed from the judgment of Judge Peel.

Frassineti, Younger and Glover, by Gayle S. Younger, for plaintiff appellants.

McMullan and Knott, by Lee E. Knott, Jr., for defendant appellees.

WEBB, Judge.

[1] This case brings to the Court two separate appeals. We consider first the appeal from the judgment of Judge Cowper dismissing all except the plaintiffs' Fourth Claim for Relief. The first three claims for relief are based on alleged errors in the bond orders as adopted by the Council of the City of Washington. These orders were adopted pursuant to G.S. 159-54. On 18 May

1977 the City Clerk of the City of Washington published the bond orders for both the water bonds and the sewer bonds pursuant to G.S. 159-58. G.S. 159-59 provides:

> Any action or proceeding in any court to set aside a bond order, or to obtain any other relief, upon the ground that the order is invalid, must be begun within 30 days after the date of publication of the bond order as adopted. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of the order shall be asserted, nor shall the validity of the order be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed in this section.

The action to test the validity of the bond orders by the first three claims for relief was filed on 19 August 1977, more than 30 days after the publication of the bond orders. The first three claims for relief are barred by the statute of limitation contained in G.S. 159-59.

[2] The plaintiffs' Fifth Claim for Relief is based on constitutional grounds. They allege that the errors in the procedure for the conduct of the election were so substantial that the election was invalid and the issuance of the bonds pursuant to the election deprives them of due process of law. The irregularities of which plaintiffs complain consisted of the published notice of the water bond election referring, in the body of the notice, to a sanitary sewer bond issue, and the error in the water bond ballot which said the bond issue would not exceed $1,500,00. In their briefs, plaintiffs do not say how the failure to comply with a statute rises to a due process question. We can see no reason why due process is violated. We hold that Judge Cowper was correct in dismissing the Fifth Claim for Relief.

[3] In the plaintiffs' Sixth Claim for Relief, they allege that the defendants planned to use the money from the bond issue in such a way that it would violate the Washington CAMA Land Use Plan and the Coastal Area Management Act of 1974. They also allege the City of Washington is participating in the formation of a waste treatment management plan which has not yet received the required approval of the State of North Carolina and the Federal Environmental Protection Agency. They allege that the

bonds should not be issued until the deficiencies are corrected. This is an action to test the validity of two bond elections. The fact that the city might have to take some steps to comply with a land use plan or get the approval of the state or federal government should not affect the validity of the election. Judge Cowper properly dismissed the Sixth Claim for Relief.

We affirm the judgment of Judge Cowper dismissing all plaintiffs' claims for relief except the Fourth Claim.

[4] We turn next to the order of Judge Peel dismissing the plaintiffs' Fourth Claim for Relief and granting defendants' motion for summary judgment. This claim for relief is based on the allegation that the sample water bond ballot and the ballots used in the election stated that the bonds issued would not exceed $1,500,00. Plaintiffs contend this voids the water bond election. On 13 July 1977 the results of the election were published in the *Washington Daily News* as required by G.S. 159-61. On 22 July 1977 the results of the election were again published in the *Washington Daily News* entitled "Corrected Publication Statement of Result of Special Election Held in the City of Washington on June 30, 1977." This action was commenced on 19 August 1977. G.S. 159-62 provides:

> Any action or proceeding in any court to set aside a bond referendum, or to obtain any other relief, upon the ground that the referendum is invalid or was irregularly conducted, must be begun within 30 days after the publication of the statement of the results of the referendum. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of or any irregularity in the referendum shall be asserted, nor shall the validity of the referendum be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed in this section.

The question posed by the appeal as to the Fourth Claim for Relief is whether the statute of limitations begins to run from the date of the first publication or the date of the second publication. If it began to run from the first publication, the plaintiffs are barred. If it ran from the second, they are not. We hold that it ran from the first publication. The appellants do not question the sufficiency of the first notice. If the second notice had not been

published, there would be no question that the claim would be barred. The wording of G.S. 159-62 is persuasive that the City of Washington cannot start the statute running anew by publishing the notice a second time. It says the action "must be begun within 30 days after the publication . . . ." It says further that after the 30-day period, "no right of action . . . shall be asserted, nor shall the validity of the referendum be open to question in any court upon any ground whatever . . . ." This statute is different from most statutes of limitation. Ordinarily a statute of limitation does not extinguish a claim. It merely serves as a bar to the prosecution of the claim. *See Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957) and *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870 (1970). As we read G.S. 159-62, by providing actions "must be begun" within the prescribed period, "no right of action . . . shall be asserted" and the "validity of the referendum" shall not be questioned after the prescribed period, this statute provides any claim not prosecuted within 30 days of the date of publication is extinguished. When the notice was published on 13 July 1977 and no action was commenced within 30 days to test the validity of the election, any claim to contest the validity was extinguished under G.S. 159-62. The City of Washington could not, by readvertising, revive a claim that was extinguished by operation of law. We affirm the order of Judge Peel which dismissed the plaintiffs' Fourth Claim for Relief and granted summary judgment for defendant.

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

HENRY M. CHILTON, EMPLOYEE, PLAINTIFF APPELLEE v. BOWMAN GRAY SCHOOL OF MEDICINE, EMPLOYER AND MARYLAND CASUALTY COMPANY, CARRIER

No. 7910IC417

(Filed 5 February 1980)

1. **Master and Servant § 60.4— workmen's compensation—injury at picnic—no coverage**

Plaintiff was not entitled to workmen's compensation for a broken ankle suffered while playing volleyball at an annual picnic for faculty members and new residents in the radiology department of defendant school, since it was not clear that the radiology department did in fact sponsor the picnic; attendance at the picnic was voluntary; no record of attendance was taken; participants were not paid for the time spent, nor was any employee required to work at the medical school if he did not attend; the picnic, though an annual custom, was not an event that plaintiff employee regarded as a benefit to which he was entitled as a matter of right; and the radiology department did not utilize the picnic as an opportunity to give a "pep" talk or grant awards.

2. **Master and Servant § 90— workmen's compensation—notice to employer of accident**

The Industrial Commission properly ruled that plaintiff's failure to give written notice pursuant to G.S. 97-22 did not bar his claim to workmen's compensation, since several members of defendant's faculty had personal knowledge of plaintiff's injury the second it happened, and there was evidence that the dean of defendant school knew of plaintiff's injury.

APPEAL by defendant from Order of the North Carolina Industrial Commission entered 5 February 1979. Heard in the Court of Appeals 5 December 1979.

Dr. Henry Chilton suffered a compound fracture dislocation of his right ankle and lateral malleolus on 5 August 1976. Plaintiff is an instructor of nuclear medicine in the radiology department of the Bowman Gray School of Medicine and was attending a picnic organized each year by the faculty of the department. The doctor was playing volleyball when his right ankle twisted and a break resulted.

Testimony before the Industrial Commission tended to show that the picnic was held so that members of the department faculty and the new residents could become acquainted. One of the faculty members stated that he found the picnic to be valuable, because he liked to meet the residents before their in-

struction began. Another professor testified that the radiology department has a large number of people, is spread out geographically and that it sometimes takes a year or two for residents to rotate through sections of the department. For those reasons, it is valuable to meet new residents at the annual picnic.

The picnic has been held for several years at Tanglewood Park. Invitations to the picnic are on "little slips of paper" and sent through interoffice mail. The radiology department pays for the picnic shelter and beverages and provides passes allowing free entrance into the park. Senior faculty members provide the food. Members of the faculty testified that they felt that they should go to the picnic, although there was no direct pressure to attend. The Industrial Commission found as fact that between 75% and 80% of the personnel were in attendance the day of Dr. Chilton's injury.

The deputy commissioner issued an order denying an award, finding the injury did not arise out of and in the course of employment. On appeal, the Full Commission reversed the order of the deputy commissioner and made an award. The defendants appealed.

Craige, Brawley, Liipfert & Ross, by F. Kevin Mauney, for plaintiff appellee.

Hutchins, Tyndall, Bell, Davis & Pitt, by Richard Tyndall and Richard V. Bennett, for defendant appellants.

HILL, Judge.

[1] By their first three assignments of error, defendants contend that the Industrial Commission erred in ruling ". . . (a) [t]hat the picnic and attendant activities, in the course of which plaintiff was injured, furthered his employer's interests, and (b) [t]hat the plaintiff's injury arose out of and in the course of his employment."

This case presents a situation which is increasingly appearing in litigation. Employers sponsor or encourage a recreational acitivity during which an employee is injured, and the employee seeks workmen's compensation. While it is clear that recovery will be allowed when attendance is required, the question

becomes closer when the degree of employer involvement descends to mere sponsorship or encouragement. 1A Larson, Workmen's Compensation Law § 22.23, p. 5-85. The difference between an award or denial of compensation is more in the strength of the fact situation presented than in the tests and rules applied. *Larson*, at p. 5-89.

Several questions should be considered in determining whether compensation will be awarded:

(1) Did the employer in fact sponsor the event?

(2) To what extent was attendance really voluntary?

(3) Was there some degree of encouragement to attend evidenced by such factors as:

a. taking a record of attendance;

b. paying for the time spent;

c. requiring the employee to work if he did not attend; or

d. maintaining a known custom of attending?

(4) Did the employer finance the occasion to a substantial extent?

(5) Did the employees regard it as an employment benefit to which they were entitled as of right?

(6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards? *Larson*, at p. 5-85.

We find that these questions are helpful in establishing a structural analysis of when to award compensation.

Despite this structure, courts from other jurisdictions have taken fact situations similar to the one in this case, applied an analysis similar to the one set forth above and reached conflicting results. In *Feaster v. S. K. Kelso and Sons*, 22 Pa. Commw. Ct. 20, 347 A. 2d 521 (1975), an employee drowned while attending the employer's picnic, which it sponsored as an annual custom. The picnic was announced by means of a poster; the food was supplied by employer—the employees incurring no expense. There was no

organized program of activity, and no speeches were given. Employee attended purely on a voluntary basis. The Pennsylvania court ruled that the purpose of the picnic was to promote the employer's interest in good relationships with its employees, and thus the employee died while engaged in the furtherance of the business of his employer.

However, *see Ethen v. Franklin Manufacturing Company*, 286 Minn. 371, 176 N.W. 2d 72 (1970), where the court takes similar facts and arrives at a contrary result. There, employee was asked by his foreman to take part in a tug-of-war at a company-sponsored picnic. Attendance was voluntary, and about half of the company's employees attended. The tug-of-war was cancelled. In order to reach another part of the picnic site to "socialize," employee jumped on the running board of a truck, slipped, and fell under the truck, injuring his back. The court found that the picnic was sponsored and financed by employer; attendance was encouraged but voluntary; no record of attendance was taken; no speeches were made or awards presented; and the event was not held on a workday. Contrary to the Pennsylvania court, the *Ethen* court denied workmen's compensation, stating there was no ". . . substantial benefit to the employer which would warrant an award of compensation." *Ethen*, at p. 74.

North Carolina case law illustrates this State's reluctance to grant recovery in a situation such as this. In *Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97 (1950), as a matter of good will, employer gave a fishing trip at its expense to its employees at year's end. Several employees and the manager of the furniture company boarded a company truck one Saturday evening, drove to Morehead City, and camped in the truck for the night. Sunday morning, while driving from Morehead City to Beaufort, the truck ran over a rough place in the road, and employee fell out. As a result, employee suffered head and bodily injuries. The court held that, ". . . it is obvious that the outing, or fishing trip, 'after the store had closed for the day's work' on Saturday, is not incidental to claimant's employment. And there is no causal relation between an injury by accident suffered while on such outing and the employment." *Berry*, at p. 306.

In *Barber v. Minges*, 223 N.C. 213, 25 S.E. 2d 837 (1943), employee was injured while on a fishing trip. Employer, a soft

drink bottler, customarily provided an annual outing for employees and their families for the purpose of promoting good will. Employee attended and was fatally burned when the boat in which he was riding exploded and caught fire. The Court pointed out that,

> The outing sponsored by the employers in the case at bar occurred on Sunday—(citation omitted)—the employee was not paid for attendance, nor penalized for non-attendance, nor ordered to go, but was merely invited. He did no work and there is no suggestion that on this occasion he was under the control and direction of the employer in any respect . . . . It seems a necessary conclusion that the Workmen's Compensation Act has no relation to the circumstances of his case.

Barber, at pp. 219-220.

In situations where there is an injury at an employer-sponsored recreational event, courts throughout the country have either adopted Professor Larson's system of analysis or addressed the same issues that he finds determinative in deciding whether to grant recovery under workmen's compensation laws. We choose to follow that system of analysis and hold that Dr. Chilton should not recover.

First, it is not clear that the radiology department sponsored the picnic. The notice did not appear on department stationery. No invitation came expressly from the head of the department. The event seems to be a self-perpetuating one that occurs each year more because of tradition than from any initiative taken by the department head. Furthermore, sponsorship standing by itself would not indicate coverage.

Second, attendance was voluntary. There was testimony from faculty members that they felt they should go, but that they were not compelled to do so. The estimated attendance of around 80% of the department indicates that there was no compulsion.

Third, no record of attendance was taken. The participants were not paid for the time spent, nor was any employee required to work at the medical school if he did not attend.

Fourth, the picnic, while certainly an annual custom, was not an event that employee regarded as being a benefit to which he was entitled as a matter of right.

Finally, the radiology department did not utilize the picnic as an opportunity to give a "pep" talk or grant awards.

Plaintiff maintains that the event served a larger purpose than just increasing employee good will, in that the faculty was able to meet their new colleagues and students before they started their rotations through the department. This personal contact is vague and unmeasurable as a benefit to the employer.

Admittedly, the business of a medical school is to teach. Personal camaraderie and respect between the faculty and students involved in professional education greatly enhance the educational experience. We cannot say that this vague benefit transforms an annual social occasion into a business meeting.

[2] The second argument in defendants' brief asserts that the Industrial Commission erred in ruling that plaintiff's failure to give written notice pursuant to G.S. 97-22 does not bar his claim. We find no error in the Commission's ruling. Several members of the medical school faculty had personal knowledge of plaintiff's injury the second it happened. There is evidence that the dean of the school knew of plaintiff's injury. Defendants were not prejudiced by plaintiff's failure to file a written claim within the time set forth in G.S. 97-22.

We reverse the Order and Award made by the Full Commission and remand the case to the Full Commission affirming entry of an order in accordance with this opinion.

Reversed and remanded.

Chief Judge MORRIS and Judge PARKER concur.

IN THE MATTER OF: THE APPEAL OF NORTH CAROLINA SAVINGS AND LOAN LEAGUE AND BURKE COUNTY SAVINGS AND LOAN ASSOCIATION FROM JUDGMENT OF CREDIT UNION COMMISSION IN CONTESTED CASE RELATING TO BYLAWS OF STATE EMPLOYEES' CREDIT UNION AND NORTH CAROLINA BANKERS ASSOCIATION, INC., PETITIONER v. NORTH CAROLINA CREDIT UNION COMMISSION AND ROY D. HIGH, ADMINISTRATOR OF CREDIT UNION, RESPONDENTS

No. 7910SC515

(Filed 5 February 1980)

Banks and Banking § 1— public employees—common bond of similar occupation—State Employees' Credit Union—inclusion of local government employees

All public employees, whether employed by a state, county or local governmental unit, share a "common bond of similar occupation" within the meaning of G.S. 54-109.26 since they all serve the public and are all paid from public funds generated by taxing the citizenry. Therefore, the N. C. Credit Union Commission properly approved an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees.

APPEAL by respondents from *Braswell, Judge.* Judgment entered 10 January 1979 in Superior Court, WAKE County. Heard in the Court of Appeals on 10 January 1980.

This case arises from a decision of the North Carolina Credit Union Commission on 10 August 1978 whereby it approved an amendment to the bylaws of the State Employees' Credit Union allowing an expansion of the field of membership to include additional municipal and county employees. The bylaw as amended provides as follows:

> The field of membership shall extend to those having the following common bond: employees of governmental units in North Carolina whose employees are covered under a retirement system administered by the State of North Carolina; Federal employees working in conjunction with these governmental units; employees of agencies or departments whose employees are subject to the State Personnel Act; employees of associations formed for the benefit of the above persons; unremarried spouses of persons who died while in the field of membership; persons retired from any of the above as pensioners and/or annuitants; members of their immediate families and organizations of such persons . . . .

Excluded from eligibility for membership are government employees who "currently have a credit union chartered by North Carolina or the Federal Government and who are included in that field of membership . . . ." The effect of the amendment is to include in the field of membership, along with State government employees previously eligible, those local government employees who participate in retirement systems administered by the State, and those federal employees working in conjunction with them. The Commission approved the amendment following hearings conducted pursuant to a request by the North Carolina Bankers' Association which was joined by the North Carolina Savings and Loan League and the Burke County Savings and Loan Association. Intervening in support of the amendment were the State Employees' Credit Union, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities.

From the decision of the Commission, the Bankers' Association, Savings and Loan League, and Savings and Loan Association [hereinafter petitioners], pursuant to G.S. § 150A-43, filed petitions for review in superior court and argued that the additional membership contemplated by the amendment enjoyed no "common bond" with State employees as required by G.S. § 54-109.26. Judge Braswell agreed with petitioners and, from his judgment of 10 January 1979 reversing the decision of the Commission, respondents appealed.

Jordan, Morris & Hoke, by John R. Jordan, Jr., Robert R. Price and Henry W. Jones, Jr., and Alfred P. Carlton, Jr., for the petitioner appellee North Carolina Bankers' Association, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr. and Edward C. Winslow III, for the petitioner appellees North Carolina Savings and Loan League and Burke County Savings and Loan Association.

Byrd, Byrd, Ervin & Blanton, by John W. Ervin, Jr., for the petitioner appellee Burke County Savings and Loan Association.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and Gary S. Parsons, for the respondent appellant State Employees' Credit Union.

Thomas L. Barringer for the respondent appellant North Carolina Credit Union Commission and Roy D. High, Administrator of Credit Unions.

C. Ronald Aycock for the respondent appellant North Carolina Association of County Commissioners.

Ernest Ball for the respondent appellant North Carolina League of Municipalities.

HEDRICK, Judge.

With respect to the review in Superior Court of a final agency decision, the Administrative Procedure Act provides:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by 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 or capricious.
>
> 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.

G.S. § 150A-51.

In reversing the decision of the Credit Union Commission, Judge Braswell included among his reasons the following:

17. There is no common bond justified in the Judgment. The purported common bond in this bylaw is in violation of G.S. § 54-101.26 [sic]. The action of the Commission in the approval of the bylaw in the absence of common bond amounts to and is an unlawful discrimination against each of the petitioners in violation of the 14th Amendment of the United States Constitution and Article I, Section 19 and Article V, Section 2 of the North Carolina Constitution.

18. Therefore, the Judgment of August 10, 1978 of the Credit Union Commission of the State of North Carolina is reversed because it is in violation of Constitutional law. It is in excess of statutory authority. It is unsupported by the findings of fact in the Judgment from which the appeal is taken. The bylaws' purported inclusion of new members by amendment to the bylaw was arbitrary.

For purposes of this appeal, we interpret the foregoing to constitute the single conclusion on Judge Braswell's part that no common bond existed between the members of the State Employees' Credit Union as it was composed prior to the amendment and the proposed additional members subsequent thereto. Thus, our inquiry, as all the parties agree, is simply whether the membership of the State Employees' Credit Union as enlarged by the amendment meets the "common bond" requirement of G.S. § 54-109.26 (1979 Cum. Supp.), which provides:

"Membership" defined.—(a) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and *such other persons within the common bond set forth in the bylaws* as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed for one or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.

(b) Credit union *membership may include groups having a common bond of similar occupation, association or interest,* or groups who reside within an identifiable neighborhood, community, or rural district, or employees of a common employer, and members of the immediate family of such persons.

[Our emphasis.] If the requirement is met, the bylaw as amended is not repulsive on constitutional grounds.

A straightforward reading of the statute evinces a clear legislative intent to invest the credit union incorporators with the prerogative to establish and describe the "common bond" of its members within the bounds of the three permissible groups described in subsection (b). That is, the "common bond" contemplated by subsection (a) will exist if the group to be included in the field of membership is united by (1) "similar occupation, association or interest"; or by (2) residence in "an identifiable neighborhood, community, or rural district"; or by (3) employment by a common employer. The resolution of the issue in the present case boils down, we think, to a determination whether *public* employees, regardless which unit of government—state, county, or local— employs them, nevertheless share a "common bond" of "similar occupation, association or interest." We think they do.

In our opinion public employees are united by the common bond of similar occupation for the simple reason that they are all employed in the service of the community, whether that community be narrowly defined as is the case with local public employees, or broadly delineated as in the case of State public employees. They all occupy positions in public service. Moreover, such employees are all paid from public funds generated by taxing the citizenry. They serve the public; the public pays their salaries. These two characteristics are common to the membership as envisaged by the amendment to the bylaw in question here. We hold that these factors in particular provide sufficient similarity of occupation, despite the individual place and position of the employee, to meet the "common bond" requirement of G.S. § 54-109.26.

Petitioners would have us narrowly construe "similar occupation" so that only individuals who perform almost identical jobs could qualify for membership in the same credit union. They support their construction of the statutory language with observations such as, "[A] liquor clerk employed by an ABC board in Avery County has nothing in common with a Greek professor employed by a State-supported university in New Hanover County." The fallacy of petitioners' approach to defining "similar occupation" by reference to job description becomes obvious when

we examine the composition of the Credit Union prior to the amendment. If petitioners' logic were to prevail, the Chief Justice of our Supreme Court, a State government employee, would have nothing in common with an orderly at Dorothea Dix Hospital, also a State government employee. Yet, by virtue of their occupational status as State government employees, both have been eligible for membership in the State Employees' Credit Union since its creation. On the other hand, a State highway patrolman would have more in common, as far as employment description, with a county sheriff than he would have with a Greek professor at a State-supported university. But, as petitioners see it, the State patrolman and the county sheriff are not eligible for membership in the same credit union. When viewed in this light, petitioners' position regarding the meaning of "similar occupation" defeats their purported purpose to prove that local and county governmental employees enjoy no "common bond" of similar occupation with State government employees.

We think that these illustrations, however, reinforce our interpretation of "similar occupation" and serve to further clarify what factors are significant in determining whether certain employees share a similar occupation to the extent that a common bond is established among them.

We agree that that part of the amendment which stipulates that only those employees "covered under a retirement system administered by the State of North Carolina" will be eligible for Credit Union membership does not provide the requisite common bond within the meaning of the statute. We believe this provision was intended to, and does, limit the membership since there will be local government employees who do not belong to such a system.

For the reasons stated, the judgment of the Superior Court is reversed. The proceeding is remanded to that court for the entry of an Order affirming the decision of the Commission.

Reversed and remanded.

Judges MARTIN (Robert M.) and WELLS concur.

F. SHELTON THORNTON v. GEORGE L. THORNTON

No. 794SC513

(Filed 5 February 1980)

Master and Servant § 29— plaintiff and defendant's son cropping tobacco together —negligence action—fellow servant rule applicable

In an action to recover for injuries sustained by plaintiff while he and defendant's son were cropping a field of tobacco, the fellow servant rule applied to bar recovery since plaintiff and defendant's son were engaged in the service of defendant and were working together to accomplish the common job of cropping the field of tobacco, and there was no merit to plaintiff's contention that defendant's son, in "doing the bidding of his father without compensation," thereby became the alter ego of his father so that the negligence of the son was imputed to the father.

APPEAL by plaintiff from *Tillery, Judge*. Judgment entered 9 January 1979 in Superior Court, SAMPSON County. Heard in the Court of Appeals on 10 January 1980.

Plaintiff in this negligence action is the brother of the defendant. On 4 February 1977 he filed suit alleging that the negligence of his brother proximately resulted in serious injuries to his leg when a tobacco harvester being operated by the defendant's eleven-year-old son, Keith, lunged forward, throwing plaintiff to the ground and causing the wheel of the harvester to run over his leg. He contended that Keith was negligent in allowing the tractor to lunge forward and that the negligence of Keith was imputable to his father [defendant]. Plaintiff claimed damages in the amount of $65,000.00.

Defendant answered and generally denied the material allegations of plaintiff's complaint with respect to his or his son's negligence. He further alleged that his son Keith "was operating the tractor with his knowledge, permission and consent and that he was then and there acting as the Defendant's employee in the course and scope of his employment." Moreover, he asserted that the plaintiff's contributory negligence solely and proximately caused his injuries, and barred any recovery. By an amendment to his answer dated 20 September 1978, defendant specifically pleaded the affirmative defense of injury by a fellow servant in bar of any right of plaintiff to recover.

The matter came on for trial, and plaintiff testified substantially as follows:

In July 1975 plaintiff was helping his brother, the defendant, "crop tobacco." He was paid by the hour and he had helped his brother "in many harvesting situations in years past." On the morning of the accident plaintiff went to work around 7:00 a.m. He and defendant's two sons, Keith and Lem, along with defendant's wife Frances and an employee, Tom Butler, went to the fields to harvest the tobacco, while defendant remained at the tobacco barns to remove dried tobacco.

Plaintiff testified that the tobacco harvester is a ferris-wheel-type harvester pulled by a tractor. Keith was driving the tractor; the others were seated in various places on the harvester in swing-type seats suspended by chains from the top of the harvester. Plaintiff said that although "you normally sit" to crop tobacco, he was standing at the time of the accident. He described the occurrence this way:

Plaintiff asked Keith to stop the tractor in order to get it in the right row of tobacco. Keith backed up to the proper row and stopped. At that point plaintiff was standing, and he asked Keith to wait while he lowered his seat.

> [Keith] was sitting in the tractor seat at this time. After I asked him to allow me to lower my seat Keith was leaning over the back of his tractor seat and he was looking in the direction of where I was standing. While I was in the process of lowering my seat the tractor and harvester launched forward and my foot was caught. Launched forward means the tractor did not ease off. It jumped forward. When the tractor jumped forward the wheel caught the side of my foot and I began to holler.
>
> I was standing at the time my foot was caught.

Plaintiff testified further that it was not unusual for Keith to drive the tractor and that he had seen him driving the same tractor many times. He explained that "[t]his was a family farm and by this I mean that the whole family worked on the farm. No member of the family had any particular job." On cross-examination he conceded that he knew of nothing which would indicate that Keith was incompetent to drive the tractor, and he

acknowledged that he had never seen the boy operate the tractor in a careless or reckless manner. He also testified that the tractor was still moving when he first got out of his seat.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict. The trial judge allowed the motion upon his conclusion that "the plaintiff and the young Keith Thornton were fellow servants. . . ." Plaintiff appealed.

Daughtry, Hinton & Woodard, by N. Leo Daughtry and Gary W. Ragland, for the plaintiff appellant.

Horton, Singer, Michaels & Hinton, by Walter L. Horton, Jr., for the defendant appellee.

HEDRICK, Judge.

By his single assignment of error, plaintiff contends that the court erred in directing a verdict for defendant. He argues that the fellow servant rule does not apply in this case for that the defendant's son, in "doing the bidding of his father without compensation", thereby became the "alter ego" of his father. Under that theory, plaintiff asserts, the negligence of the son is imputed to the father, and the issue of whether the son was negligent is for the jury.

We disagree with the plaintiff's view of this case. In our opinion, the fellow servant doctrine controls the resolution of the issues raised herein so as to bar, under these circumstances, any recovery by plaintiff from the defendant father.

Initially, we feel compelled to observe that the doctrine respecting injuries inflicted by a fellow servant or co-worker is still a viable rule of law in this State in those limited employer-employee relationships which are not regulated by Chapter 97 of our General Statutes, the Workers' Compensation Act. G.S. § 97-2(1) specifically exempts from the statute's coverage agricultural and domestic employees. Moreover, our rules of civil procedure provide that "injury by fellow servant" constitutes an affirmative defense. G.S. § 1A-1, Rule 8(c). Thus, while the rule has been limited in its scope, it has not been abrogated in its entirety. We believe that application of the rule in this case is appropriate for the reasons to follow.

The fellow servant doctrine derives from early English common law and operates to absolve an employer from any liability to one of his employees for injuries incurred "solely as the result of the negligence, carelessness, or misconduct of others who are in the service of the employer and who are engaged in the same common or general employment as the injured employee." 53 Am. Jur. 2d *Master and Servant* § 295 at 327 (1970).

> If an employer observes the requisite degree of care which the common law imposes upon him and complies with such statutory obligations as are imposed upon him, and an employee is injured because of the negligence of a fellow employee engaged in common employment with the employee injured, during the progress and while performing the part of work incident to the common employment, the employer is exempt from liability. . . .

Id. Accord, Pleasants v. Barnes, 221 N.C. 173, 19 S.E. 2d 627 (1942). In the case before us, it is not disputed that plaintiff and defendant stood in an employer-employee relationship at the time of the plaintiff's accident. Neither is it argued that defendant's liability arises because he has violated some statute, and we note that the child labor regulations in effect at the time of this suit did not apply "to the employment of a minor engaged in domestic or farm work performed under the direction or authority of the minor's parent or guardian." G.S. § 110-1. *See*, for current regulations, G.S. § 95-25.14 (1979 Cum. Supp.). Moreover, plaintiff would be hard-pressed to assert that the defendant's liability arises from his employing or entrusting the job of driving the tractor to a worker whom he knew or should have known was incompetent for the task since plaintiff has testified that he had observed the minor son driving the same tractor on many occasions, and that he had never seen Keith operate the tractor in a negligent or careless way. Plaintiff was also compelled to concede that he knew of nothing which would indicate to him that Keith was not competent to drive the tractor. Although we express no opinion on the matter, we note further that plaintiff's only theory of negligence rests on the fact that the tractor "launched forward." He offered no evidence of any specific acts of negligence on the part of either Keith or the defendant.

The crucial question, then, is whether plaintiff and defendant's son were "fellow servants" as to each other at the time of the injury, and the crux of that determination depends on whether they were engaged in the service of defendant to perform the same general or common work. We think it obvious from the facts that they were so engaged. The issue is not answered by reference to the fact that plaintiff is the brother and Keith the son of the defendant, nor is it resolved on the basis that plaintiff was paid an hourly wage while the son was not. The test, rather, is whether they shared fairly equally the responsibilities of accomplishing a particular task. Clearly, the test is met in this case where everyone involved in the operation of the harvester was working together to accomplish the common job of cropping the field of tobacco.

We cannot agree with plaintiff that the son was the "alter ego" of his father under the facts of this case. An "alter ego" or vice principal of the employer is an employee who exercises authority or control over the job being performed. "Unless the higher rank of the offending servant gave him the right of controlling the injured one, the defense of common employment will prevail." 53 Am. Jur. 2d, *supra* § 333 at 351. Nothing appears in the record before us to suggest that this eleven-year-old boy was in charge of the cropping operation on the morning plaintiff was injured, or that he had the right to control plaintiff's performance. To the contrary, the record supports an assumption that, if anyone was directing the job, plaintiff was.

The facts here are not in dispute. Whether the plaintiff and the son were fellow servants is, in our opinion, a question of law for the court. We hold that the judge correctly determined the question in this case. Thus, it was proper to enter a directed verdict for the defendant since the plaintiff's own evidence establishes the defendant's affirmative defense. *See Price v. Conley*, 21 N.C. App. 326, 204 S.E. 2d 178 (1974); *Wyche v. Alexander*, 15 N.C. App. 130, 189 S.E. 2d 608, *cert. denied*, 281 N.C. 764, 191 S.E. 2d 361 (1972). The judgment appealed from is

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

TRUDY MAE CAISON, BY HER GUARDIAN AD LITEM, CAROLYN H. CAISON v. NATIONWIDE INSURANCE COMPANY

DONALD W. CAISON v. NATIONWIDE INSURANCE COMPANY

No. 795DC305

No. 795DC329

(Filed 5 February 1980)

Insurance § 78.2— automobile liability insurance—coverage exceeding mandatory coverage—proof of permission of vehicle owner

In an action to recover under an automobile liability policy for damages in excess of the statutory minimum liability coverage wherein the policy covered use of the insured vehicle "by the Named Insured or such spouse or with the permission of either," the evidence presented a jury question as to whether the driver of the insured vehicle had permission to use it for the actual use to which he put it at the time of the accident where the evidence showed that the vehicle owner gave the driver permission to drive the vehicle from work to his home and back to work the next morning and that the accident occurred that night in a city approximately 30 miles from the driver's home, but the evidence was conflicting as to whether the owner restricted the permission given the driver so as to exclude the trip to the city where the accident occurred.

APPEALS by defendant from *Barefoot, Judge.* Judgments entered 9 November 1978 and 19 December 1978 in District Court, NEW HANOVER County. Heard in the Court of Appeals 15 November 1979. (Appeals consolidated for purpose of hearing and determination.)

The facts of Trudy Mae Caison, by her Guardian ad Litem, Carolyn H. Caison v. Nationwide Insurance Company (the Trudy Mae Caison case) were fully presented by Judge Mitchell when this case was previously before us. *Caison v. Insurance Co.*, 36 N.C. App. 173, 243 S.E. 2d 429 (1978). We reversed the trial court's granting of summary judgment for the plaintiff and remanded the cause for trial on the issue of whether Cliff had the vehicle owner's permission to take the vehicle for the actual use in which it was engaged at the time of the accident. On remand, the trial court denied plaintiff's motion for a directed verdict after plaintiff had presented all of her evidence and again at the close of defendant's evidence. However, the record discloses that

after denial of her second motion for a directed verdict, plaintiff moved for summary judgment. This motion was granted by the court, which recited in the judgment that plaintiff's motion for summary judgment was, "also considered as a motion for a directed verdict." Defendant appeals from this judgment.

The case of *Donald W. Caison v. Nationwide Insurance Company* involves the same accident out of which the above suit arose. In this suit the father of Trudy Mae Caison is suing the defendant to recover under a judgment he received against Larry Bryant Cliff in the amount of $2,284.55 for medical expenses he incurred in Trudy Mae's behalf. The trial court granted plaintiff's motion for summary judgment based on the pleadings, stipulations, and pre-trial order in the record of the Trudy Mae Caison case. Defendant appeals from this judgment as well. Since both cases present the identical quesiton concerning whether Cliff had the "permission" of the vehicle's owner under the omnibus clause of the insurance policy at the time of the accident, we decide both of these cases in this opinion.

Addison Hewlett, Jr., for the plaintiff appellees.

Smith & Kendrick, by Vaiden P. Kendrick, and Robert Gardner, for the defendant appellant.

WELLS, Judge.

We treat the trial court's granting of plaintiff's motion for summary judgment, after all of the evidence was presented at trial in the Trudy Mae Caison case, which recited that the motion was also considered one for a directed verdict, as a reversal by the trial court of the decision it had just rendered to deny plaintiff's motion for a directed verdict. *Cf., Creasman v. Savings & Loan Ass'n.*, 279 N.C. 361, 183 S.E. 2d 115 (1971), *cert. denied*, 405 U.S. 977, 31 L.Ed. 2d 252, 92 S.Ct. 1204 (1972) (motion for involuntary dismissal under Rule 41(b) in jury case properly treated as one for a directed verdict); *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970) (motion for nonsuit in civil trial treated as one for a directed verdict). The criteria for determining whether the trial court properly granted plaintiff's motion for a directed verdict in the Trudy Mae Caison case and plaintiff's motion for summary judgment in the Donald W. Caison case are the same: The court's granting of both motions may be sustained only if the

evidence before the court failed to show that a material issue of fact existed for the trier of fact to resolve. *See, Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975); *Insurance Co. v. Bank*, 36 N.C. App. 18, 244 S.E. 2d 264 (1978).

There is no dispute here that Babson, the truck's owner, gave Cliff, his employee, permission on 5 April 1974 to drive the truck from work to Cliff's home and back to work the next morning. The accident occurred that night in Wilmington, North Carolina, a distance of approximately thirty miles from Cliff's home. The evidence is conflicting, however, as to whether Babson gave Cliff permission to use the truck for any purpose other than to drive between home and work, including the trip to Wilmington to pick up a television set for Cliff. Babson testified at trial and stated in his deposition that he told Cliff his permission to use the truck was limited to the trip between home and work. Accordingly, unless we were to hold that, at the time of the accident, the limited permission given Cliff by Babson to use the truck only for trips between work and home constituted "permission", within the meaning of the omnibus clause, for any use made of the vehicle by Cliff, the judgments for the plaintiffs may not stand.

In *Caison v. Insurance Co.*, 36 N.C. App. 173, 243 S.E. 2d 429 (1978) we held that the provisions of the Motor Vehicle Safety-Responsibility Act, G.S. 20-279.1, *et seq.*, which require coverage of all persons having "lawful possession" of the insured vehicle, do not apply to coverage obtained by the insured in excess of the statutory minimum. G.S. 20-279.21(g). We stated in *Caison* that coverage with respect to such excess should be determined under the terms and conditions of the policy. It has been stated that this interpretation of the law encourages insurers to offer such additional insurance by enabling them to restrict the class of persons covered. *See,* Comment, *Survey of Developments in North Carolina Law, 1978*, 57 N.C.L. REV. 827, 872, 873 (1979).

The policy in question here covered use of the vehicle by any person, "provided the actual use of the automobile is by the Named Insured or such spouse or with the permission of either." The meaning of this phrase was before us previously in *Caison, supra.* The trial court has overlooked the significance of that opinion. It is clear that, as stated by Judge Mitchell, the terms "law-

ful possession" and "permission" are not synonymous in their meaning or legal effect. We concluded in *Caison*, 36 N.C. App. at 178, 243 S.E. 2d at 432:

> We hold that the entry of summary judgment for the plaintiff by the trial court was error and must be reversed and the cause remanded in order that the contested issue of whether the operator had the permission of the insured or his spouse for the actual use of the insured vehicle may be resolved.

As this is the second time this litigation has been before us and there must be yet another trial, we emphasize for clarity that, under the terms of the omnibus clause, the question to be determined is not only whether the driver had initial permission to use the vehicle, but whether he had permission to use it for the actual use to which he put it at the time of the accident. Of course, we recognize that factual circumstances will always control. For instance, if the permission granted is general in nature, then specific trip permission would not have to be shown. To invoke coverage where permission is at issue, the fact to be found is *whether the use in question falls within the scope of the express or implied permission granted.* This is what we mean by "actual use" with "permission."

Plaintiff urges us to adopt the so-called liberal rule on permission. *See, Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161 (1962); *Packer v. Insurance Co.*, 28 N.C. App. 365, 221 S.E. 2d 707 (1976). This is not our prerogative. As we noted in *Packer*, the General Assembly adopted the "liberal" rule as to the statutory coverage. However, from the enactment of G.S. 20-279.21(g) it is equally clear that the General Assembly did not intend to extend the "liberal" rule to coverage in excess of or additional to the required statutory coverage. For us to adopt plaintiff's position, we would have to ignore the distinction between G.S. 20-279.21(b)(2) and G.S. 20-279.21(g). Again, that question was settled in *Caison, supra.* The distinction is there and we are bound by it.

There is conflicting evidence as to whether Babson restricted the permission given Cliff so as to exclude the trip to Wilmington. It is for the jury to determine whether, at the time of the accident, Cliff's actual use of the truck occurred within the scope of express or implied permission given by Babson.

In *Trudy Mae Caison v. Nationwide Insurance Company,*

New trial;

In *Donald W. Caison v. Nationwide Insurance Company,*

Reversed.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. WALTER RIDDLE, ROBIN SMITH, AND MICHAEL SHANE MAIDA

No. 7924SC725

(Filed 5 February 1980)

1. **Riot and Inciting to Riot § 1— engaging in riot in prison—voluntariness of assemblage**

While an assemblage of prison inmates is involuntary, the involuntariness does not negate the fact of an assemblage within the meaning of G.S. 14-288.2(a) which sets forth the elements of the crime of riot.

2. **Riot and Inciting to Riot § 2.1— engaging in riot—participation by three or more persons—sufficiency of evidence**

In a prosecution of defendants for engaging in a riot, evidence was sufficient to show participation by three or more persons at the time of defendants' actions, though only two persons were specifically named as participating in the riotous activities, where a correctional officer testified that he looked into a window of a dorm and observed one defendant standing with one foot on each of two bunks, breaking out window panes with a stick; he saw another inmate at the widow to the left of defendant doing the same thing; inmates were running back and forth in the dormitories and windows were being broken; there was a lot of shouting and yelling and unrecognizable people were running around; and defendant's own witnesses testified that, at the approximate time they observed defendant, lights were being broken and debris and objects started falling.

3. **Riot and Inciting to Riot § 2.1— engaging in riot—sufficiency of evidence**

In a prosecution for engaging in a riot, evidence was sufficient to show that defendant prison inmate participated in the riot and was not simply present at the scene where it tended to show that he threw a garbage can lid and that he picked something up from the floor and threw it against the bars.

4. Criminal Law § 86.4— prior crimes by defendant—question improper—defendant not prejudiced

In a prosecution of defendant prison inmate for engaging in a riot, the trial court erred in allowing the district attorney to ask defendant how many robberies he had committed, but defendant was not prejudiced where the record did not show that he answered the question.

5. Riot and Inciting to Riot § 1— engaging in riot—statute constitutional

G.S. 14-288.2 making it a crime to engage in a riot is not unconstitutionally vague.

6. Riot and Inciting to Riot § 2.1— "engaging" in riot—no definition required

In a prosecution of defendants for engaging in a riot, the trial court was not required to define the word "engaging" since it is a common word and since defendants did not request special instruction on the word.

APPEAL by defendants from *Barbee, Judge.* Judgments entered 1 December 1978 in a Special Session of Superior Court, AVERY County. Heard in the Court of Appeals 10 January 1980.

Defendants were arraigned on a bill of information charging defendants with feloniously engaging in a riot as defined by N.C. Gen. Stat. § 14-288.2. At the time of the alleged riot defendants were inmates at Avery County Subsidiary of the Department of Corrections. Upon pleas of not guilty, the jury returned a verdict of nonfeloniously engaging in a riot. From judgment sentencing defendants to imprisonment for a term of two years, defendants appealed.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Kyle D. Austin, for defendant appellant Walter Riddle.

William B. Cocke, Jr., for defendant appellant William Smith.

Edwin D. Taylor, for defendant appellant Michael Shane Maida.

MARTIN (Robert M.), Judge.

Defendants Riddle and Maida assign as error the failure of the trial court to grant their motions for dismissal. Defendants contend the State did not introduce sufficient evidence to establish the elements of the crime of riot. Under N.C. Gen. Stat. § 14-288.2(a) the component elements that constitute the crime of riot are as follows:

(1) Public disturbance;

(2) Assemblage;

(3) Three or more persons;

(4) Disorderly and violent conduct, or the imminent threat of such conduct; and

(5) Results in injury or damages to persons or property or creates a clear and present danger of injury or damage to persons or property.

State v. Brooks, 287 N.C. 392, 215 S.E. 2d 111 (1974). Defendants Riddle and Maida specifically contend that the State's evidence did not establish (2) an assemblage or (3) participation by three or more persons at the time of defendants' actions.

[1] Defendants argue that the State has not proved an assemblage other than that which is necessarily required by a prison unit. Although the common law offense of riot is defined in *State v. Cole* as " '[A] tumultuous disturbance of the peace by three persons or more assembled together of their own authority, with intent mutually to assist one another against all who shall oppose them . . .' ", the language "of their own authority" does not necessarily mean that the assembly be voluntary. The *Cole* opinion later cites the following excerpt from 46 Am. jur., Riots and Unlawful Assembly § 10 (1946) with approval.

> An unlawful assembly is a constituent and necessary part of the offense of riot at common law, and must precede the unlawful act which completes the offense . . . Likewise, the fact that the group of persons do not voluntarily come together does not prevent their action from being that of a mob.

249 N.C. 733, 107 S.E. 2d 732, *cert. denied*, 361 U.S. 867 (1959). Regardless of whether voluntary assembly was required at common law, the current legislation requires only an assemblage. While an assemblage of inmates is involuntary, the involuntariness does not negate the fact of an assemblage. If this were the case there could never be an assemblage and hence never be a riot in a prison or in any other situation which requires the involuntary gathering of people. This is contrary to the legislative

intent. N.C. Gen. Stat. § 14-288.1(8) in defining a "public disturbance" states "The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons. . ." The law requires that the State need only show the fact of an assemblage, a group or gathering of people. This the State has done.

[2] Defendants further contend the State's evidence did not prove participation by three or more persons at the time of defendants' actions. Defendant Riddle, in particular, claims the State's evidence showed activity on the part of only two people in Dorm B at the time defendant was observed. Marvin Stamey, Correctional Sergeant, testified that looking into a window of Dorm B he observed defendant Riddle standing on two bunks, one foot on each bunk, breaking out window panes with a stick and inmate Robert Pascarella at the window to the left of defendant doing the same thing. In addition to the participation of these two inmates, Stamey testified that he had seen inmates running back and forth in the dormitories and windows being broken and that at the time he observed inmate Riddle there was a lot of shouting and yelling and unrecognizable people running around. The testimony of defendant's own witnesses show that at the approximate time they observed defendant, lights were being broken and debris and objects started falling. Although only two persons in Dorm B are specifically named, there is sufficient evidence, considered in the light most favorable to the State, from which the jury might infer participation of three or more persons at the time defendant Riddle was observed. The State's evidence sufficiently shows similar activity in Dorm A at the time defendant Maida's actions were observed and the same inference may be drawn. The assignments of error of defendants Maida and Riddle are overruled.

[3] Defendant Maida additionally assigns as error the trial court's failure to grant defendant's motion for dismissal, his motion to set aside the verdict, his motion for a new trial and motion for arrest of verdict on the grounds that the State's evidence was insufficient to show defendant himself participated in "disorderly and violent conduct." Defendant correctly submits that mere presence at the scene of a riot may not alone be sufficient to show participation in it. *State v. Brooks, supra.* Billy Potter, Correctional Officer, testified that he saw defendant Maida throw a gar-

bage can lid and pick up something white from the floor and throw it against the bars. Defendant's evidence that he was wetting towels to protect himself from tear gas; that he dropped some towels; that he picked them up; that he slung them toward the sink and that he broke a window after the gas was thrown to get air to breathe is not inconsistent with the State's evidence and tends to rebut the inference of participation in disorderly conduct. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971). Protecting oneself from tear gas alone may not constitute participating in a riot. Throwing a garbage can lid, however, is arguably disorderly and violent conduct which creates a clear and present danger of injury or damage to persons or property, and would constitute participation. When the evidence is considered in the light most favorable to the State, taken as true, and when defendant's evidence which is in conflict with the State's evidence is not considered (here the conflicting evidence is that defendant ran into an inmate holding a trash can lid knocking it forward), there is sufficient evidence of participation to carry the case to the jury and support the verdict. The motion for nonsuit was properly denied.

Defendant's motions to set aside the verdict and for a new trial are merely formal and require no discussion. These motions are addressed to the discretion of the trial court and refusal to grant them is not reviewable. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). These motions as well as defendant's motion for arrest of judgment were properly denied.

[4] Defendant Maida also contends that it was prejudicial error for the court to allow the District Attorney to ask the question "How many robberies have you committed?" For purposes of impeachment, a witness may be asked whether he has committed specific criminal acts or been guilty of specified reprehensible conduct. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). As propounded, however, the question is similar to those questions in *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954). Because the question assumes facts not in evidence, the question is improper and the objection should have been sustained. The error, however, does not rise to level of prejudice as that in *Phillips* where there was a long series of insinuating and fact assuming questions. Furthermore, the defendant does not claim the jury was prejudiced by his answer to the question and the record does

not show that defendant answered the question. We fail to see how defendant was prejudiced merely by the asking of an unanswered question even though the form of the question was 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).

[5] Defendant Smith assigns as error the failure of the trial court to grant his motion for arrest of judgment on the ground that N.C. Gen. Stat. 14-288.2 is unconstitutionally vague, containing a patent ambiguity as to what constitutes "engaging" in a riot. We disagree. The constitutionality of the statute has been fully answered by *State v. Brooks, supra.*

[6] Finally, each defendant assigns as error the failure of the trial court to define the word "engaging" in his charge to the jury that the State must prove beyond a reasonable doubt that each defendant "wilfully engaged in a riot." Defendants contend that in the absence of a definition of engaging, the charge would permit the jury to render their verdict based upon a permissible but incorrect interpretation that something less than violent or disorderly conduct, perhaps even mere presence, was sufficient for conviction. We disagree. "Engaging" as defendant Riddle concedes in his brief, is a common word. It is not error for the court to fail to explain words of common usage in the absence of a request for special instructions. *State v. McCoy*, 34 N.C. App. 567, 239 S.E. 2d 300 (1977). The record does not show a request for special instructions on the word "engaging." We find no error in the charge of the trial court.

We hold that defendants received a fair trial free of prejudicial error.

No error.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. DONALD LEE ARMSTRONG

No. 7918SC703

(Filed 5 February 1980)

1. **Searches and Seizures § 40— search under warrant—seizure of item not within purview of warrant**

An officer lawfully seized a stolen television set during a search of defendant's home pursuant to a warrant to search for evidence of another crime where the officer knew that defendant had been identified as the person who had stolen such a television set, the officer discovered that a number engraved on the back of the set matched the driver's license number of the owner, and the officer thus had probable cause to seize the set. G.S. 15A-253.

2. **Criminal Law § 75.3— in-custody statements—effect of officers' statements to defendant**

Defendant's in-custody statements to police officers about two break-ins were not rendered involuntary by the fact that officers advised defendant that they weren't interested in his driving violations, asked defendant whether he had a girlfriend in the area where the break-in occurred and stated that they would not tell his wife, told defendant they had obtained his fingerprints from the front window of one of the houses broken into, and showed defendant a stolen television set found in his home and told him that he had been identified as the man who had stolen it.

3. **Criminal Law § 34.5— evidence of another crime—admissibility to show identity**

Evidence that defendant attempted to burglarize another home in the same area on the night following the burglary in question was properly admitted for the purpose of identifying defendant as the perpetrator of the crime charged where the evidence tended to show that both crimes were committed in the same manner and by the same person.

4. **Criminal Law § 95.1— evidence admitted for limited purpose—necessity for request for limiting instruction**

The trial court did not err in failing to give a limiting instruction concerning evidence of another crime admitted to show identity where defendant made no request for such an instruction.

APPEAL by defendant from *Davis, Judge*. Judgment entered 18 January 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 January 1980.

On 8 September 1978, Tammy, Tonya and Chequetha Lanier were asleep in their bedroom. Their mother, Gail Lanier, was working the third shift at Cone Mills. Around 1:00 o'clock that morning, Tammy, age 11, heard a noise, awoke, and saw a man

remove the television set from her room and walk out the back door of the house. The burglary was not reported to the police.

On 9 October 1978, Mrs. Elizabeth Franklin was awakened by a noise from the back and side of her home. Mrs. Franklin tried to turn on the lights, but they would not work. She became frightened and tried to use the telephone, but it was out of order. Finally, she looked out the window and saw a man dressed in dark pants and a hooded jacket. The man asked Mrs. Franklin to let him in, but she refused. The man left, but not before tearing off the window screen in Mrs. Franklin's daughter's room.

Greensboro police responded to Mrs. Franklin's call that same night. Two torn window screens were discovered, the electricity had been cut off, and the telephone junction box had been disrupted. One fingerprint was obtained and later identified to be that of the defendant. At trial, Mrs. Franklin identified defendant as the man who had tried to break into her home.

On 11 October 1978, Detective Belvin of the Greensboro police talked to Gail Lanier and learned that a television had been removed from her home. The next day Belvin exhibited a set of six photographs to Tammy, who picked defendant's picture and stated that he was the man who had broken into her room.

Greensboro police went to defendant's home on 13 October. During a search authorized by a valid warrant, Detective Belvin found the back of a television set. The driver's license number engraved on the part matched that of Mrs. Lanier. Subsequently, Belvin entered defendant's home, saw Mrs. Lanier's television in the living room, and seized it.

Defendant was convicted of second degree burglary, and is appealing from the verdict.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Deno Economou for defendant appellant.

HILL, Judge.

[1] Defendant first assigns as error the trial court's refusal of its motion to suppress the introduction into evidence of the televi-

sion set seized in the search of defendant's home. We hold the television was properly seized and introduced into evidence.

The search was pursuant to a validly issued warrant. G.S. 15A-253 provides that the scope of a search pursuant to a warrant ". . . may be only such as is authorized by the warrant . . . ." Defendant correctly points out that the warrant was for the purpose of obtaining specific property that would connect defendant with the attempted break-in at Elizabeth Franklin's home. No mention was made of the television. However, G.S. 15A-253 also provides that,

> If in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered.

G.S. 15A-242 allows seizure of an item if there is *probable cause* to believe that it, "(1) Is stolen or embezzled;".

Detective Belvin was on defendant's premises pursuant to a valid warrant. When he saw the back of the television set, Belvin had already spoken to Gail and Tammy Lanier and knew that a man they had identified as the defendant had stolen their television. Detective Belvin also knew that Mrs. Lanier's driver's license number had been engraved on the set, and he had a description of the set. With this knowledge, Belvin had probable cause to seize the television set. The trial court's dismissal of defendant's motion was proper.

[2] Defendant next assigns as error the court's refusal to suppress statements made by him to police officers after he was taken into custody. After the search on the evening of 13 October, defendant was taken to the Greensboro Police Department where he was advised of his constitutional rights but was not immediately placed under arrest. Defendant waived his rights.

Police knew defendant ". . . would deny anything about driving a car because he didn't have any driving license"; and advised him they weren't interested in his driving activities. Defendant was asked if he had a girlfriend in Greenfield Homes, the area where both break-ins occurred. Police told defendant that they would not inform his wife, and defendant stated that he did have a girlfriend who lived on the same street as Elizabeth Franklin.

The police told defendant they knew he had tried to break into Mrs. Franklin's house because they had obtained his fingerprints from the front window and, finally, showed him the Lanier television. They further told him that he had been identified as the man who had stolen it.

Defendant asserts that the combination of these statements subtly intimidated him and rendered his statement involuntary. We disagree. The officer's statement concerning defendant's driving violations served to narrow the questioning and inform defendant that the police were interested in a more serious offense. The statement about defendant's girlfriend could have relieved defendant, giving him a strong alibi for his presence in the area without his wife's finding out. The officer's statements concerning the television and the two identifications were admissible. In the absence of evidence that the officer did anything to put defendant in fear or in hope of reward, the confession given after confrontation with incriminating evidence is competent. *State v. Myers*, 202 N.C. 351 162 S.E. 764 (1932), 4 Strong's N.C. Index 3d, Criminal Law § 75.3, p. 307.

[3] Defendant further assigns as error the trial court's allowance of the State's motion to introduce evidence of another crime allegedly committed by defendant. Armstrong was indicted for burglarizing Gail Lanier's home. Mrs. Franklin testified and identified defendant as the man who attempted to break into her home on 9 October 1978.

In *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364 (1954), our Supreme Court stated that,

> The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. (Citations omitted.)

The Court then set forth exceptions to the general rule, such exceptions being ". . . as well recognized as the rule itself . . . ." *State v. McClain*, 282 N.C. 357, 361, 193 S.E. 2d 108 (1972).

The fourth exception states that,

> Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend

> to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. (Citations omitted.)

The sixth exception states that,

> Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (Citations omitted.) *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364 (1954).

Stansbury succinctly summarizes the exceptions by stating that evidence will be admitted,

> . . . if it tends to prove any other relevant fact [and] it will not be excluded merely because it also shows him to have been guilty of an independent crime. 1 Stansbury's N.C. Evidence § 91, p. 289 (Brandis rev. 1973).

In the case at hand, defendant was identified by Tammy Lanier as the man who broke into her house. Identification by just one witness, particularly such a young one, is not the kind of definite identification on which the prosecutor would want to rely. Both Tammy and Elizabeth Franklin identified defendant and described him as wearing a hooded top or jacket. Entry into the Lanier home was through a window as was the attempted entry into the Franklin home. In both cases, fingerprint evidence linked defendant to the scene. We hold that the testimony of Elizabeth Franklin was properly admitted.

[4] Defendant's final assignment of error questions the trial court's failure to instruct the jury regarding the evidence of the similar act of attempted breaking and entering that was alleged to have occurred on 9 October 1978.

As we have indicated above, evidence of the separate and distinct crime was relevant and competent.

> Where there is evidence that the offense charged and another offense were committed by the same person, evidence of the accused's connection with the other offense is admissible as tending to show his guilt of the one for which

> he is being tried. 1 Stansbury's N.C. Evidence § 92, p. 297 (Brandis rev. 1973).

It is our opinion that when evidence of another offense is admitted as it was here, to show identity, the trial court should give a limiting instruction. N.C.P.I.—Crim. 104.15 contains such an instruction.

It was not error, however, for the trial court to fail to give the limiting instruction in this case. In *State v. Harvey*, 26 N.C. App. 716, 217 S.E. 2d 88 (1975), evidence that defendants had committed another crime than the one they were indicted for was used for purposes of identification. As in our case, no limiting instruction was requested by defense counsel, and our Court stated that,

> Under the well-recognized rule, if evidence is competent for one purpose only and not for another, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. (Citations omitted.) *Harvey*, at p. 719.

The rule in *Harvey* was restated in *State v. Collins*, 29 N.C. App. 120, 123-24, 223 S.E. 2d 575 (1976).

> Failure to include instructions as to the purposes for which the evidence was received is not ground for exception unless counsel has requested such an instruction. This is true even though the trial court did not explain the difference between substantive and corroborative evidence. (Citation omitted.)

It is clear from the record that after instructing the jury, the trial court asked defendant's counsel if there were "Any further requests for instructions . . . ." Defense counsel made no request; thus, his final assignment of error is without merit.

For the reasons stated above, we find in the trial of the case

No error.

Chief Judge MORRIS and Judge PARKER concur.

ALAMANCE BUILDERS, INC., APPELLANT v. CENTRAL CAROLINA BANK & TRUST COMPANY, APPELLEE v. GLENN W. SLAUGHTER AND WIFE, DORIS SLAUGHTER

No. 7915SC510

(Filed 5 February 1980)

Banks and Banking § 11— bank's payment of check on endorsement of one of two payees—amount of liability

When the original payee of a check endorsed the check without recourse to plaintiff and third party defendant and delivered it to them, plaintiff and third party defendant had all the rights of payees on the check, and a bank which paid the check to third party defendant on his endorsement only is liable to plaintiff for the full face amount of the check where the court found that third party defendant represented to plaintiff that he would give the entire proceeds of the check to plaintiff in partial payment for a debt. G.S. 25-3-419(2).

Judge MARTIN (Harry C.) concurring in result.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 20 March 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 10 January 1980.

This is an action by plaintiff for the proceeds of a check deposited with the defendant Central Carolina Bank and Trust Company. The bank joined Glenn W. Slaughter and wife, Doris Slaughter, as third-party defendants. The action was tried by the court without a jury on an agreed statement of facts. The court found as facts that Glenn W. Slaughter owed the plaintiff $5,284.63 for building materials used on the Vance Thompson building project. Farmers Home Administration issued a check for $12,000.00 to Vance Thompson. The words "Endorsed without recourse to Glen Slaughter and Alamance Builders Inc." were written on the back of the check. The Farmers Home Administration placed these words on the back of the check in order to ensure that the plaintiff would be paid for materials furnished by it for the Vance Thompson building project. Glenn Slaughter owed a total of $20,885.97 to plaintiff for building materials furnished for the Vance Thompson project and other projects. Prior to the delivery of the subject check by Farmers Home Administration to Glenn W. Slaughter, Glenn W. Slaughter represented to Alamance Builders, Inc. that he would give the entire proceeds of

the check to Alamance Builders, Inc. Vance Thompson endorsed the check as drawn and delivered it to Glenn W. Slaughter. Mr. Slaughter deposited it in the joint account of Glenn W. Slaughter and wife, Doris Slaughter, with the Central Carolina Bank and Trust Company. Plaintiff did not receive any funds from the check. Based on these facts, the court entered judgment for plaintiff against the bank in the amount of $5,284.63. Plaintiff appealed.

Osteen, Adams and Tilley, by J. Patrick Adams, for plaintiff appellant.

Stubbs, Cole, Breedlove and Prentis, by Richard F. Prentis, Jr., for defendant appellee Central Carolina Bank and Trust Company.

WEBB, Judge.

This appeal brings to the Court a question as to the amount of the indebtedness of Central Carolina Bank and Trust Company to the plaintiff. Plaintiff contends it is in the amount of $12,000.00. The bank contends it is indebted to the plaintiff in the amount of $5,284.63. The answer turns on what interest the plaintiff had in the check. At the outset, we note that when Vance Thompson endorsed and delivered the check, plaintiff and Glenn W. Slaughter had all the rights of payees on the check. *See* G.S. 25-3-202. Prior to the adoption of the Uniform Commercial Code, a bank which paid a check without the endorsement of a payee was liable to the payee in the amount of his interest in the check. *Construction Co. v. Trust Co.*, 266 N.C. 648, 147 S.E. 2d 37 (1966) held that the payment by a bank of such a check amounts to the conversion of the payee's interest in the check. The Court in that case said, "[p]rima facie this is the face value of the paper converted." G.S. 25-3-419 provides:

> (1) An instrument is converted when
>
> * * *
>
> (c) it is paid on a forged endorsement.
>
> (2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the

measure of liability is presumed to be the face amount of the instrument.

Whether this section of the Uniform Commercial Code applies to situations where there is payment without the endorsement of a payee has not been determined in this state. In some states it has been held that under this section a bank is liable for the conversion of a check when it pays the check on the endorsement of less than all the payees, reasoning that this is tantamount to paying it on a forged endorsement. *See* 47 A.L.R. 3d 537 (1973) for cases from other jurisdictions. Under our prior law or if we hold this section of the Code includes payment by a bank without the endorsement of all payees, the plaintiff is entitled to recover an amount equal to its interest in the check. If the endorsement by less than all the payees is held to be a forgery under the Uniform Commercial Code, defendant's liability is presumed to be the face amount of the check under G.S. 25-3-419(2). There is language in *Construction Co., supra,* that prior to the adoption of the Uniform Commercial Code the liability of defendant is prima facie the face value of the check.

We believe this case can be determined without reaching the question as to whether the prima facie rule stated in *Construction Co.* or the presumption of G.S. 25-3-419(2) governs. The court found as a fact that Glenn W. Slaughter represented to plaintiff that he would give the entire proceeds of the check to plaintiff. The plaintiff was to take the check in partial payment for a debt. This was good consideration. *See* G.S. 25-3-303(b). Under this finding of fact by the court, it is not necessary to rely on the prima facie rule of *Construction Co.* or the presumption of G.S. 25-3-419(2). When Glenn W. Slaughter came in possession of the check, he was under a legal duty to deliver it to the plaintiff. This gave plaintiff an interest in the entire check and it was entitled to judgment accordingly. We vacate the judgment and direct the superior court to enter a judgment conforming to this opinion.

Judgment vacated and case remanded.

Judge VAUGHN concurs.

Judge MARTIN (Harry C.) concurs in the result.

Judge MARTIN (Harry C.) concurring.

I concur in the result reached by the majority. I find the transaction is governed by the Uniform Commercial Code. By paying the check without the endorsement of plaintiff, defendant bank tortiously converted the check and plaintiff is entitled to recover its value. *Construction Co. v. Trust Co.*, 266 N.C. 648, 147 S.E. 2d 37 (1966). Under N.C.G.S. 25-3-419(2), the measure of liability where a non-drawee bank tortiously converts a check is presumed to be the face amount of the instrument. This portion of the Uniform Commercial Code is a codification of the law in North Carolina prior to the adoption of the Uniform Commercial Code. With respect to the measure of damages, it is stated in *Construction Co.*: "*Prima facie*, this is the face value of the paper converted." 266 N.C. at 653, 147 S.E. 2d at 41. Therefore, I find that under the law both before the adoption of the Uniform Commercial Code and thereafter, plaintiff had a presumption in its favor that it was entitled to recover as damages the face amount of the check. Defendant bank has failed to rebut this presumption.

NANNIE RUTH GREENHILL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM NORWOOD CRABTREE v. LANIE N. CRABTREE, EXECUTRIX OF THE ESTATE OF RAYMOND E. CRABTREE, LANIE N. CRABTREE AND RICHARD S. CRABTREE

No. 7915SC473

(Filed 5 February 1980)

Attorneys at Law § 3— presumption as to scope of authority—failure to rebut

In this jurisdiction there is a presumption in favor of an attorney's authority to act for the client he professes to represent, and this presumption arises not only with regard to technical or procedural aspects of a case but extends as well to the client's substantive rights; plaintiff in this action failed to rebut this presumption and to prove lack of authority of her counsel to enter a second voluntary dismissal of her claim, and she made no exception to the trial court's finding that no limitation was placed on her attorney.

APPEAL by plaintiff from *McKinnon, Judge.* Order entered 15 March 1979 in Superior Court, ORANGE County. Heard in the Court of Appeals 8 January 1980.

On 17 November 1975 plaintiff filed a complaint against defendants, members of her family, alleging that they had improperly influenced her father to grant them a deed to certain property before he died and that one defendant had improperly influenced her father to create a joint banking account from which the defendant had withdrawn $1,073. Plaintiff sought to have the deed declared void and to have the $1,073 returned to her father's estate. Three days before the action was filed, plaintiff had taken a voluntary dismissal pursuant to Rule 41(a)(1) in an identical cause of action, originally filed 24 October 1974. The present action was calendared for trial on 14 September 1977. In an order dated 12 September 1977, Judge McKinnon, having considered both defendants' motion for early trial and plaintiff's motion for continuance, denied the motion for continuance and ordered that the case be calendared for trial on 19 September 1977.

When the case was called, plaintiff's counsel again moved for a continuance; the motion was denied by Judge Snepp. On 22 September 1977 plaintiff's counsel filed a notice of voluntary dismissal pursuant to Rule 41(a). Plaintiff, employing the same counsel, J. William Blue Jr., appealed from the order denying the motion to continue to the Court of Appeals of North Carolina. The appeal was dismissed by this Court on 7 March 1978.

On 2 November 1978, plaintiff employing different counsel, filed a motion pursuant to Rule 60(b)(4) and (6) to set aside the notice of dismissal filed 22 September 1977 by William Blue "for the reason that said dismissal was filed without any authority, expressed or implied, from the plaintiff or anyone representing the plaintiff." The motion was accompanied by affidavits of plaintiff and her husband. Hearing was held on the motion 20 February 1979; plaintiff's former attorneys presented evidence. The court then made findings of fact, concluded that plaintiff's evidence did not justify relief under Rule 60(b)(4) or (6), and ordered that plaintiff's motion be denied. Plaintiff appeals from this order.

Grover C. McCain, Jr., for plaintiff appellant.

Manning, Jackson, Osborn & Frankstone, by Frank B. Jackson, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff's sole assignment of error on appeal is the trial court's denial of her motion to set aside the notice of dismissal. She argues that in North Carolina an attorney may not surrender or waive the substantive rights of his client without the client's express authority, that the second voluntary dismissal of her claim operated as a final adjudication of her substantive rights, and that her attorney, William Blue, entered the dismissal without her authority. For the following reasons, we affirm the order of the trial court denying plaintiff relief.

In this jurisdiction there is a presumption in favor of an attorney's authority to act for the client he professes to represent. *Bank v. Penland,* 206 N.C. 323, 173 S.E. 345 (1934); *Alexander v. Board of Education,* 6 N.C. App. 92, 169 S.E. 2d 549 (1969). This presumption arises not only with regard to technical or procedural aspects of a case; it extends as well to the arena of the client's substantive rights. In *Gardiner v. May,* 172 N.C. 192, 89 S.E. 955 (1916), is found this pronouncement:

> A judgment entered of record, whether *in invitum* or by consent, is presumed to be regular, and an attorney who consented to it is presumed to have acted in good faith and to have had the necessary authority from his client, and not to have betrayed his confidence or to have sacrificed his right.

Id. at 196, 89 S.E. at 957. *See also Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897 (1961); *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826 (1961); *Chavis v. Brown,* 174 N.C. 122, 93 S.E. 471 (1917). Even in the criminal law area, when an attorney enters a guilty plea for his client:

> [I]t is to be presumed that no honorable lawyer would enter such a plea in behalf of his client unless the client authorized him to do so. Generally speaking, the legal profession is composed of honorable men who are fair and candid in their dealings with the court.

State v. Woody, 271 N.C. 544, 548, 157 S.E. 2d 108, 111 (1967).

No one would quibble with the fact that a dismissal which terminates a case on its merits affects a client's substantive rights. Authorities agree that as a general rule, an attorney can

enter a dismissal which will terminate the case on its merits only with special authorization from his client to do so. 7 C.J.S. Attorney and Client § 87 (1937); 7 Am. Jur. 2d Attorneys at Law § 125 (1963). However, just as in the cases previously cited involving consent or compromise judgments, undoubtedly affecting the substantive rights of a client, the presumption arises as well that the client has given the attorney special authorization for entry of a dismissal:

> Where special authorization is necessary in order to make a dismissal or other termination of an action by an attorney binding on the client, the decisions are generally to the effect that it will be presumed, prima facie, that the attorney acted under and pursuant to such authorization.

Annot., 56 A.L.R. 2d 1290, 1295-96 (1957).

It then becomes the burden of the client to rebut this presumption and to prove lack of authority to the satisfaction of the court. *Howard v. Boyce, supra; Bank v. Penland, supra.* In *Bank v. Penland,* the client was successful in rebutting the presumption that her attorney was authorized to sign a consent judgment in her behalf. The court found as facts that the attorney who signed had not been authorized by her to do so, that she neither agreed nor authorized anyone to agree to the consent judgment, and that she had not employed counsel to represent her in the matter under adjudication.

In the instant case, however, the client failed to meet this burden; she was unsuccessful in proving to Judge McKinnon's satisfaction that William Blue lacked the authority to enter the dismissal which terminated her case. With conflicting evidence before him, Judge McKinnon made the following finding of fact:

> 16. At no time during the course of plaintiff's representation in the matter by attorneys J. William Blue and Barry T. Winston, was any limitation placed by the plaintiff on the aforesaid attorneys' authority to represent the plaintiff and the aforesaid attorneys or members of their law firm represented the plaintiff in all matters pertaining to this litigation from the inception of 74 CvS 1476 until a record on appeal was prepared in the present action.

Appellant made no exception to this finding; therefore, it is conclusive on appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962); *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 253 S.E. 2d 494 (1979). In making this finding, the trial court reveals that it was not convinced to its satisfaction that William Blue lacked the requisite authority to act for his client in entering the notice of dismissal. In other words, his client failed to carry the burden of rebutting the presumption of authority.

The foregoing amply supports appellees' position that the trial court acted within its sound discretion in denying plaintiff's motion. Appellate review of the trial court's decision on a motion for relief under Rule 60(b) is limited to determining whether the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). The court's action in denying plaintiff's motion for relief under Rule 60(b) is

Affirmed.

Judges VAUGHN and WEBB concur.

E. ALEXANDER STEVENSON, JR. v. NORTH CAROLINA DEPARTMENT OF INSURANCE AND JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE

No. 7910SC410

(Filed 5 February 1980)

1. Injunctions § 16— improper restraining order—proceeding against bond—amount of recovery

Where the superior court improperly entered an injunctive order reinstating plaintiff to employment in a "comparable position" with the Department of Insurance pending administrative review of his dismissal, and the Department of Insurance proceeded by motion in the cause on plaintiff's bond, the Department's recovery was limited to the amount of the bond ($1,000) even though it was damaged in the amount of $3,803.02. Furthermore, there is no merit in the Department's contention that the bond set by the judge afforded inadequate protection and could not be increased because the extent of the damage could not be determined where it could have been determined when the restraining order had been in effect for one month that damages were approaching the bond limit and the Department could have justifiably moved for an increase in the bond.

2. Appeal and Error §§ 25, 38.1— cross-assignments of error—jurisdiction to determine propriety—exclusion of improper cross-assignments

The trial court erred in ruling that it did not have jurisdiction in settling the record on appeal to determine whether plaintiff appellee's cross-assignments of error were permitted by Appellate Rule 10(d), and the court should have excluded the cross-assignments where they constituted an attack on the judgment and not an alternate basis in law for supporting the judgment.

APPEAL by defendants from *Godwin, Judge*. Judgment entered 7 December 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 5 December 1979.

Upon a prior appeal this Court, in *Stevenson v. Department of Insurance*, 31 N.C. App. 299, 229 S.E. 2d 209, *cert. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1976), ruled that the Superior Court did not have authority to enter the injunctive order reinstating plaintiff to employment in a "comparable position" with the Department of Insurance pending administrative review of his dismissal.

Upon defendants' motion in the cause for damages pursuant to G.S. 1A-1, Rule 65(e), a hearing was held on 27 November 1978. Byron Tatum, Director of Personnel for the Department of Insurance, testified that when the trial court ordered plaintiff's reinstatement no position comparable to that which plaintiff had occupied prior to his discharge was open within the Department. Plaintiff was reinstated as a complaint analyst, a lesser position, and paid a salary of $9,664.88 during the reinstatement period. An employee occupying the position to which plaintiff was reinstated would have been paid $5,861.86, a difference of $3,803.02.

The trial court entered judgment finding that the defendants had been damaged in the amount of $3,803.02 but that recovery was limited to $1,000, the amount of the injunction bond posted by plaintiff. Defendants excepted and gave notice of appeal. Defendants served a proposed record on appeal, plaintiff served a proposed record on appeal, and plaintiff served a proposed alternative record on appeal incorporating exceptions and cross-assignments of error. Defendants moved for settlement of the record.

In its order filed 5 April 1979 the trial court ruled that it had no jurisdiction to determine whether plaintiff's cross-assignments of error are permitted under Rule 10(d), N.C. Rules App. Proc.,

"such being the sole province of the North Carolina Court of Appeals."

Defendants appeal from so much of the order as permits plaintiff's inclusion in the record on appeal of plaintiff's cross-assignments of error and evidence in support thereof.

Attorney General Edmisten by Special Deputy Attorney General T. Buie Costen for defendant appellants.

Bailey, Dixon, Wooten, McDonald & Fountain by Ralph McDonald and Gary S. Parsons for plaintiff appellee.

CLARK, Judge.

DEFENDANTS' APPEAL

[1] The single issue raised by this appeal is whether the trial court erred in limiting defendants' recovery to the amount of the bond ($1,000) even though defendants were damaged in the amount of $3,803.02.

N.C. Gen. Stat. § 1A-1, Rule 65(e) provides:

> "(e) *Damages on dissolution.*—An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury."

It is well-established law that a party who has been wrongfully restrained by a court order which is subsequently dissolved as improvidently entered has two remedies: (1) He may seek damages against the opposing party and his sureties on his undertaking without a showing of malice or want of probable cause, or (2) he may pursue an independent action for malicious prosecution without being limited to the amount of the bond. *Local 755, International Brotherhood of Electrical Workers v. Country Club East, Inc.*, 283 N.C. 1, 194 S.E. 2d 848 (1973); W. SHUFORD, N.C. CIVIL PRACTICE AND PROCEDURE § 65-8 (1975).

If the party damaged by the improvidently issued restraining order elects to proceed by motion in the cause on the bond of the

opposing party and his sureties, his recovery is limited to the amount of the penalty of the injunction bond. *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920); *In re Simon*, 36 N.C. App. 51, 243 S.E. 2d 163 (1978); Annot., 45 A.L.R. 1517 (1926).

In their brief, defendants argue that "the bond set by Judge Smith was ridiculously low and could not possibly afford adequate protection," and that "it was impossible to move to increase the bond because the extent of the damage could not be determined." There is nothing in the record tending to show that Judge Smith, when the restraining order was entered and the bond set, had any knowledge that there was no open position in the Department comparable to his former position and that plaintiff would have to be placed in a position of less importance with a substantially lower pay scale. Plaintiff was employed in this lower position for more than five months. Thus defendants suffered damages at the rate of about $760.00 per month. Defendants could have determined when the restraining order had been in effect for one month that its damage was approaching the bond limit and could have justifiably moved for an increase in the bond. We find no merit in defendants' argument.

PLAINTIFF'S CROSS-ASSIGNMENTS OF ERROR

[2] Rule 10(d), N.C. RULES APP. PROC., under which plaintiff files his cross-assignments of error, provides:

> "(d) *Exceptions and Cross Assignments of Error by Appellee.* Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, *and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.* Portions of the record necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b)." (Emphasis added.)

Appellate Rule 10(d) introduces a new procedure designed to protect appellees who have been deprived in the trial court of an

alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based.

In his cross-assignments of error plaintiff challenges (1) the finding that defendants' actual damages exceeded $1,000, and (2) the exclusion of evidence relating to the value of plaintiff's services to the defendants. It is obvious that these cross-assignments of error constitute an attack on the judgment and not an "alternative basis in law for supporting the judgment." This type of conditional appeal is not allowed. *Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 233 S.E. 2d 76 (1977), *rev'd on other grounds*, 294 N.C. 200, 240 S.E. 2d 338 (1978). *See also*, Commentary, Rule 10(d), N.C. Rules App. Proc.

At hearing for settlement of the record on appeal defendants sought to exclude from the record on appeal the plaintiff's cross-assignments of error. The trial judge in the order of settlement ruled that "it is not within the Superior Court's jurisdiction to determine whether such cross-assignments of error are permitted under Rule 10(d)." The trial court erred in this ruling. Appellate Rule 11(c), in part, provides: "At the hearing the judge shall settle the record on appeal by order." In the case before us the trial judge should have settled the record on appeal and should have excluded plaintiff's cross-assignments of error on the ground that they were not authorized by Appellate Rule 10(d).

A party aggrieved by the order of the trial judge settling the record on appeal may file a motion in the Appellate Court under Rule 9(b)(6), N.C. Rules App. Proc., to add to, amend, or correct the record on appeal.

We find error in the order settling the record on appeal. Since plaintiff failed to sustain his position on this phase of the case, it is ordered that plaintiff pay one-third and defendants pay two-thirds of the appeal costs.

The judgment is

Affirmed.

Judges ARNOLD and ERWIN concur.

ARTHUR HUROW v. RUBY MILLER AND FRANK MILLER

No. 7915SC390

(Filed 5 February 1980)

1. **Malicious Prosecution § 2— voter registration challenged—no malicious prosecution**

Actions for malicious prosecution based on administrative proceedings have been limited by the courts to instances where there is a type of confinement or interference with the right to earn a livelihood; therefore, an action for malicious prosecution would not lie where defendants challenged plaintiff's right to vote.

2. **Process § 19— no abuse of process after action begun**

Where plaintiff brought an action for malicious prosecution against defendants who had challenged his right to vote, defendants' counterclaim for abuse of process would not lie where defendants did not allege that process was abused, misused or otherwise perverted after the suit was begun.

APPEAL by plaintiff and defendants from orders entered by *McKinnon, Judge*, dated 23 January 1979 in Superior Court, ORANGE County, dismissing plaintiff's complaint and defendants' counterclaim. Heard in the Court of Appeals 3 December 1979.

On 25 February 1978, the defendant, Ruby Miller, caused a formal voter challenge to be presented to the Orange County Elections Board, alleging that the plaintiff "was 'not a resident or domiciliary of said precinct and/or of Orange County, North Carolina,' and that Plaintiff was 'improperly registered in that registrar failed to perform statutory duties required by G.S. 163-72.' " As a result of such challenge to the right to vote, the Orange County Elections Board suspended the plaintiff's right to vote, pending a hearing held 3 May 1978. The defendants did not appear, but evidence was heard and the voting judges concluded that plaintiff was duly qualified to vote. Plaintiff contends that this action by defendant, Ruby Miller, was with malice and without probable cause; that defendant, Ruby Miller, knew or should have known, that such challenge would cause the plaintiff much worry, distress, and mental anguish; that, further, such challenge forced the plaintiff to incur legal fees to protect his rights at a cost of $150.00; that plaintiff has suffered injury to his reputation in the sum of $10,000; and that plaintiff has suffered

mental suffering and anguish, in addition to his damages, in the sum of $10,000.

Plaintiff further alleges as a second claim that the defendants, Ruby and Frank Miller, and others agreed and conspired together to commit the acts alleged above as part of a broader plan to challenge wrongfully the voting rights of 6000 persons, and that such acts were done without probable cause and with malice, causing great public expense.

As a third claim, plaintiff alleges that the voter challenge was instituted with gross and wilful negligence, with reckless and wanton disregard for plaintiff's rights, and with malice, and that plaintiff is entitled to exemplary and punitive damages in the amount of $500,000.

The defendants answered, admitting that Ruby Miller presented, or had presented, to the Orange County Elections Board a formal voter challenge which itself discloses the reasons therefor and denied the allegations in the complaint otherwise. The form used by defendant in the challenge appears to be the standard type.

As a further answer and defense and counterclaim, defendants alleged they were exercising legal rights granted by statutory authority; that the plaintiff instituted this process for the purpose of chilling the efforts of the defendants and others to challenge persons who are not legally domiciled in Orange County; that such suit was instituted with a malicious intent to misuse the process of the courts; that as a result of such suit, the defendants have lost time connected with the operation of their farm; that defendants have been reluctant to challenge others illegally registered to vote; and that by virtue of this suit, the defendants have suffered an injury to their property rights. Defendants sought judgment, requesting that plaintiff recover nothing and that defendants recover damages totalling $1,010,000.

Plaintiff moved to dismiss defendants' counterclaim pursuant to Rules of Civil Procedure 12(b)(6) and 12(f) and further denied certain allegations of the counterclaim.

Thereafter, defendants moved to dismiss the complaint for failure to state a claim pursuant to Rule of Civil Procedure 12(b)(6).

The presiding judge dismissed plaintiff's complaint and defendants' counterclaim pursuant to Rule 12(b)(6). Both plaintiff and defendants have appealed.

Epting, Hackney & Long, by Robert Epting, for plaintiff appellant.

Graham & Cheshire, by D. Michael Parker, for defendant appellant.

HILL, Judge.

This Court acknowledges that it is the right and duty of every qualified American citizen to vote. Likewise, this Court is aware that this is a mobile society which results in many American citizens changing their voting place each year. Our legislature has addressed this problem by requiring each county board of elections to establish a full-time system of registration under which the registration books, process, and records shall be open continuously for the acceptance of registration applications and for the registration of voters. G.S. 163-67. In addition, G.S. 163-69 provides that the registration certificates shall be a permanent record of registration and qualification to vote and shall not be cancelled except for specific reasons. Ample protection is provided those persons whose right to vote is questioned. *See* G.S. 163-89. Uniform systems of registration—including loose-leaf forms—are provided for by G.S. 163-65, and transfer to a new precinct is simple.

Because of population growth and frequent changes in domicile and residence by the electorate, the legislature has left the responsibility of policing the voting list to the voters. This is good, for it adds further dimension to our responsibility as voters in the conduct of elections. Such practice is to be commended when done within the guidelines set out by statute.

G.S. 163-85(a) provides that, "Any registered voter of the county may challenge the right of any person to register, remain registered, or vote in the county." Subsequent sections provide safeguards for the voter so challenged. A hearing is conducted at which time the voter may appear and take an oath outlining voting requirements. The voter may sign an affidavit which sets out the requirements for voting in lieu of personal appearance at

the hearing. Generally, such inconvenience is a small price to pay for the right to vote.

A challenge filed pursuant to G.S. 163-85(a) cannot deprive a challenged voter of his right to vote if he or she is qualified. Plaintiff was not denied his right to vote. Instead, as many good citizens did, he appeared at the hearing and established without apparent difficulty such right.

Here, the plaintiff contends that the challenge to his vote was one of 6000 challenges in Orange County; that such voter challenge in his case was made with malice and without probable cause; and that the defendant knew or should have known that said challenge would have caused plaintiff great trouble and expense.

[1] Malicious prosecution will not lie in this case. Actions for malicious prosecution may be based upon civil proceedings which involve an arrest of the person, seizure of property, or the loss of a legally protected right. *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964). However, our courts have limited such actions based on administrative proceedings to instances where there is a type of confinement, *Fowle v. Fowle*, 263 N.C. 724, 140 S.E. 2d 398 (1965), or interference with the right to earn a livelihood. *Carver, supra.* This case does not fall within the limitations so established.

[2] Neither will the defendants' counterclaim for abuse of process lie. Abuse of process is the misuse of a legal process for an ulterior purpose. "It consists in the malicious misue or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ. It is the malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attempted to be secured." *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E. 2d 276 (1945), *citing* 1 Am. Jur. 176; *Stanford v. Grocery Co.*, 143 N.C. 419, 55 S.E. 815 (1906); and *Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936).

Here, defendants have not alleged that process in the suit by plaintiff was abused, misused or otherwise perverted *after* the suit was begun.

Admittedly, plaintiff took all necessary steps to preserve his right to vote at some expense and inconvenience to him, and he is

to be commended. Defendants' action to preserve fair and adequate voting lists is of equal importance, and they should not be penalized for attempting to do so.

For the reasons set out above, the decision of the trial judge in dismissing plaintiff's complaint and defendants' counterclaim is

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WALTER HERMAN BONDS

No. 7916SC563

(Filed 5 February 1980)

1. **Criminal Law § 139— sentence to minimum and maximum terms—statements relating to parole as surplusage**

Where the trial court sentenced defendant to a minimum term of 20 years and a maximum term of 30 years, additional language in the judgment stating the intent of the trial judge with respect to parole of defendant was mere surplusage and not binding on the court, the Department of Correction, or the Parole Commission.

2. **Criminal Law § 144— motion for appropriate relief—no authority to resentence for discretionary reasons after session ended**

A trial court upon a motion for appropriate relief does not have the authority to resentence a criminal defendant for discretionary reasons after expiration of the session of court in which he was originally sentenced where no error of law appears upon the face of the original judgment.

HEARD in the Court of Appeals on 11 January 1980, on rehearing allowed upon petition of Walter Herman Bonds.

This matter was originally heard in this Court on 25 October 1979. Defendant's petition to rehear was granted on 5 December 1979, with leave to counsel to file additional briefs.

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.

Except as hereinafter set out, we affirm our opinion previously filed in this matter reported at 43 N.C. App. 467, 259 S.E. 2d 377 (1979).

Defendant contends that he was present with his counsel in the courthouse in Lumberton, Robeson County, 9 December 1978 when Judge Bruce entered the second judgment against him. For this reason defendant contends that when this Court held the 9 December 1978 judgment a nullity, we did so under a mistake of fact. The record on appeal before this Court on 25 October 1979 did not indicate in any way that defendant was present before Judge Bruce on 9 December 1978. Defendant's counsel during oral argument stated that defendant was not present at that time. However, defendant has filed affidavits definitely stating that he was present and that counsel simply had a memory lapse at oral argument. No affidavits have been filed to the contrary. We allow the affidavits to be filed as a part of the record on appeal of this case and find therefrom that defendant was present before Judge Bruce when the second judgment was entered 9 December 1978.

With this finding, we are now required to address the question whether Judge Bruce upon a motion for appropriate relief could change defendant's criminal sentence for discretionary reasons, when no error of law appears in the judgment and when the session of court in which the sentence was entered has expired. We had passed this "interesting question" in our original opinion in this case.

Clearly, Judge Bruce was empowered to hear and determine the motion for appropriate relief even though the session of court had expired and he was no longer assigned to hold court in that judicial district. N.C. Gen. Stat. 15A-1413(b). That is not the question to be resolved. Rather, the question is did the trial judge have the authority in granting a motion for appropriate relief to vacate defendant's prison sentence and enter another judgment against defendant.

Relief may be granted by the court for errors of law committed during the trial. N.C. Gen. Stat. 15A-1414(a). Specifically, N.C.G.S. 15A-1415(b)(8) allows relief to be granted when a prison sentence was "unauthorized at the time imposed, exceeded the

maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." If resentencing is required, the trial division may enter an appropriate sentence. N.C. Gen. Stat. 15A-1417(c).

Counsel argue that Judge Bruce had the authority to resentence defendant because the original judgment was erroneous and invalid, being vague, uncertain and ambiguous on its face. In general, a trial court loses jurisdiction to modify a judgment after the adjournment of the session. *State v. Duncan*, 222 N.C. 11, 21 S.E. 2d 822 (1942). Until the expiration of the session, the judgments of the court are *in fieri* and the judge has power, in his discretion, to vacate or modify them. After the expiration of the session, this discretionary authority ends. *State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1936). However, if a judgment is invalid as a matter of law, the courts of North Carolina have always had the authority to vacate such judgments pursuant to petition for writ of habeas corpus and, more recently, by way of post conviction proceedings. For example, if it appeared from the record that a defendant was sentenced to a prison term of fifteen years upon a conviction of felonious larceny, punishable by a maximum of ten years' imprisonment, the court had and has the authority to vacate such unlawful sentence either during or after the expiration of the trial session, and the defendant may then be resentenced according to law.

The problem with defendant's contention in this case is that we do not find the original sentence entered against defendant to be erroneous or invalid. It is not vague, uncertain or ambiguous. No evidence has been produced to show the judgment is voidable. *Shaver v. Shaver*, 248 N.C. 113, 102 S.E. 2d 791 (1958).

[1] Judge Bruce's original judgment against defendant was entered pursuant to N.C.G.S. 15A-1351(b) whereby "[a] sentence to imprisonment must impose maximum term and may impose a minimum term." Defendant was sentenced to imprisonment for a minimum term of twenty years and a maximum term of thirty years. Defendant's original judgment also contained the following:

> It is the intent of the Court that the defendant be considered for parole not earlier than at such time as he has served five years of his sentence, less whatever gain time or good time that the defendant is entitled to under the law of this State,

and that only after having served such five years of said sentence that the defendant be eligible for parole; and that after having served such five year portion of his sentence, that the parole of the defendant be in the discretion of the Board of Paroles.

This additional language purported to state the intent of the trial judge with respect to parole of defendant. Such statement in defendant's original judgment is mere surplusage, not binding upon the court or the Department of Correction or Parole Commission.

If the trial judge intends his recommendation with respect to parole to have the effect allowed by N.C.G.S. 15A-1371(c), he must sentence the defendant pursuant to N.C.G.S. 15A-1351(d). This section allows the sentencing judge to recommend to the Parole Commission a minimum period of imprisonment defendant must serve before being granted parole *in lieu of* imposing a minimum term. This is what the trial court attempted to do when the second judgment was entered 9 December 1978.

[2] We hold the original judgment of imprisonment against defendant was lawful, without any error upon its face, and therefore that Judge Bruce had no authority to vacate it, or amend it and resentence defendant after the expiration of the session in which the judgment was entered.

We hold a trial court does not have authority to resentence a criminal defendant for discretionary reasons after the expiration of the session of court in which he was originally sentenced where no error of law appears upon the face of the judgment.

We affirm our original opinion holding the second judgment of imprisonment entered against defendant 9 December 1978 invalid and void. The case is remanded to the Superior Court of Scotland County for a new trial in conformity with this opinion and the original opinion of this Court.

Judges HEDRICK and CLARK concur.

BEADIE FULTON STONE v. J. O. HICKS, D/B/A HICKS' PHARMACY, AND HENRY JACKSON FOWLER

No. 7921SC478

(Filed 5 February 1980)

Rules of Civil Procedure § 4— summons directed to wrong person—no valid service

Summons delivered to each of two defendants directing the other defendant rather than the defendant to whom delivered to appear and answer were fatally defective, and no jurisdiction over defendants was obtained, even if both defendants did have actual notice of the lawsuit.

APPEAL by plaintiff from *Walker (Hal H.), Judge*. Judgment entered 8 January 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 January 1980.

Plaintiff instituted this action on 23 May 1978, two days before the action would have been barred by the statute of limitations. Summons was issued and the sheriff of Stokes County made returns indicating service upon each defendant. The return as to defendant Fowler stated service upon him was made by leaving a copy with his wife, a person of suitable age and discretion who resides in the defendant's dwelling house.

Defendant Fowler filed motion to dismiss for insufficiency of service on 21 June 1978 and defendant Hicks filed a similar motion on 26 June 1978. Plaintiff filed a response to the motions on 10 July 1978. On 19 September 1978 defendant Fowler filed an affidavit by himself and one by his wife, stating that when defendant's wife was served he was in the hospital and that the summons was directed to "J. C. Hicks, Hicks' Pharmacy, North Main Street, Walnut Cove, N.C." Hicks filed an affidavit 6 October 1978 stating that the only summons delivered to him is directed to "Henry Jackson Fowler, Post Office Box 38, Walnut Cove, North Carolina." All three affidavits stated no other summons, alias or pluries, had been served upon either defendant.

Upon hearing the motions to dismiss, Judge Hal Hammer Walker allowed both motions and entered an order dismissing the action as to both defendants. Plaintiff appeals.

Victor M. Lefkowitz for plaintiff appellant.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Kenneth R. Keller and Joseph E. Elrod III, for defendant appellee Hicks.

Hudson, Petree, Stockton, Stockton & Robinson, by J. Robert Elster and John F. Mitchell, for defendant appellee Fowler.

MARTIN (Harry C.), Judge.

We hold the order of Judge Walker must be sustained. While it is true that the conduct of a lawsuit is not a game between counsel, process must be sufficient in order to give the court jurisdiction over the parties. Defendants made their motions for dismissal well within the time in which alias and pluries summons could be issued. No additional summons was issued.

Rule 4(b) of the North Carolina Rules of Civil Procedure requires that summons "shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him . . .." N.C. Gen. Stat. 1A-1, Rule 4(b). Our Supreme Court has held compliance with statutory rules for service is necessary to obtain valid service. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977). The summons issued are a part of the record on appeal. The copy of the summons delivered to defendant Fowler directed the defendant Hicks to appear and answer; the copy of the summons delivered to defendant Hicks directed the defendant Fowler to appear and answer. This was not service in accord with the statutory rules. N.C. Gen. Stat. 1A-1, Rule 4(j)(1)(a). Although both defendants may have had actual notice of the lawsuit,[1] such notice cannot supply constitutional validity to service unless the service is in the manner prescribed by statute. *Distributors v. McAndrews*, 270 N.C. 91, 153 S.E. 2d 770 (1967).

Defendants have carried the burden by three affidavits to overcome the sheriff's returns. *Kleinfeldt v. Shoney's, Inc.*, 257 N.C. 791, 127 S.E. 2d 573 (1962). Also, the summons with the returns of the officer are set out in the record on appeal and are

1. The record on appeal indicates the summons delivered to defendant Fowler was transmitted to the Greensboro claim office of St. Paul Fire & Marine Insurance Company on 7 June 1978 and both defendants promptly filed motions to dismiss by counsel.

patently defective. *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974).

Neal-Millard Company v. Owens, 115 Ga. 959, 42 S.E. 266 (1902), is a case with very similar facts. There plaintiff filed petition against Hampton J. Herb and Mrs. Mary H. Owens. Process was served on Mrs. Mary H. Owens that directed Hampton J. Herb and Ed. L. Prince to appear and answer. Mrs. Owens filed a motion to vacate the service of process, which was allowed by the trial court. On appeal, the Georgia Supreme Court affirmed, the court stating that service upon a defendant of process commanding someone else to appear in court is no process at all as to the defendant and he would have the right to utterly disregard it.

We are aware of *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978). *Wiles* dealt with the narrow question of service of process upon a corporate defendant where a registered agent is involved. We hold *Wiles* does not apply to the facts in this case where jurisdiction is sought over individual natural persons.

Plaintiff's counsel in his response to defendants' motions to dismiss states he is informed and believes that the sheriff served process on defendant Fowler's wife by delivering a copy of the summons to her at the hospital where defendant Fowler was a patient, rather than at defendant Fowler's dwelling house. We consider this a judicial admission. Such attempted service on defendant Fowler being made at the hospital rather than his dwelling house or usual place of abode fails to comply with N.C.G.S. 1A-1, Rule 4(j)(1)(a), and is invalid.

We hold the summons served on defendants are fatally defective and no jurisdiction over the defendants was obtained.

Plaintiff contends the trial judge erred by failing to find facts. He was not required to so do and plaintiff failed to request that the court find facts in its order. N.C. Gen. Stat. 1A-1, Rule 52(a)(2). It is presumed that the trial court on competent evidence found facts sufficient to support the order. *Williams v. Bray*, 273 N.C. 198, 159 S.E. 2d 556 (1968).

Plaintiff further argues that amendment of the summons should have been allowed and that defendants are estopped to question the validity of service upon them. The record does not support these arguments and we find no merit in them.

The order of the trial court dismissing plaintiff's action is

Affirmed.

Judges VAUGHN and WEBB concur.

KENT B. MORRIS v. JEANE JUNKER MORRIS

No. 7926DC529

(Filed 5 February 1980)

1. **Divorce and Alimony § 5— divorce action based on separation—recrimination not defense**

The defense of recrimination based on abandonment or indignities cannot be asserted in an action for absolute divorce on the ground of separation of the parties instituted after 31 July 1977.

2. **Divorce and Alimony § 2.4— action for absolute divorce—right to jury trial**

The trial court erred in failing to grant defendant's request for a jury trial in an action for absolute divorce based on a one year separation of the parties where defendant's right to a jury trial was properly preserved under G.S. 1A-1, Rules 38 and 39.

APPEAL by defendant from *Saunders, Judge*. Judgment entered 7 March 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 27 November 1979.

Plaintiff filed a verified complaint seeking absolute divorce from defendant on grounds of a one year separation of the parties. Defendant filed a verified answer in which she admitted the allegations in the complaint. As a defense and cross-action, defendant alleged abandonment by plaintiff and indignities to her person. She prayed that plaintiff's action for absolute divorce be denied and dismissed, and that she be granted a divorce from bed and board and attorney's fees. She also prayed for a jury trial on all issues. Defendant moved to strike plaintiff's answer and cross-action. In that motion, plaintiff alleged that defendant had instituted a previous action against him in Mecklenburg County for alimony, that the action had been heard and judgment rendered therein for plaintiff, that defendant had appealed from said judgment, and that the appeal was then pending in the Court of Ap-

peals. Plaintiff's motion to strike came on for hearing before Judge Saunders at the Mecklenburg Non-jury Session of District Court on 5 March 1979. Judge Saunders allowed plaintiff's motion to strike, and entered judgment for plaintiff for absolute divorce.

Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., by John R. Ingle, for the plaintiff appellee.

Walker, Palmer & Miller, P.A., by James E. Walker and Robert P. Johnston, for the defendant appellant.

WELLS, Judge.

Defendant brings forward two assignments of error. She contends that the trial court erred in allowing plaintiff's motion to strike her defenses to his action for an absolute divorce and in denying her a jury trial.

[1] In her answer, defendant admitted all of plaintiff's allegations necessary to obtain a divorce based on a one year separation of the parties under G.S. 50-6. Defendant argues that her allegations as to abandonment and indignities committed to her person constitute a defense to an action for absolute divorce. This argument has no merit under our present law. In 1977 the General Assembly amended G.S. 50-6. We considered the effects of that amendment in *Edwards v. Edwards*, 43 N.C. App. 296, 259 S.E. 2d 11 (1979), wherein we held that the defense of recrimination cannot be asserted in actions for absolute divorce instituted in this State after 31 July 1977. G.S. 50-6. It is clear that, as to divorces grounded on a one year separation of the parties, North Carolina is a "no-fault" jurisdiction; *i.e.*, a showing that the parties have achieved the required periods of residency and separation is all that is necessary to obtain a divorce in this State under G.S. 50-6.

[2] Defendant also argues that the trial court erred in not granting her request for jury trial in the divorce action. Prior to 1963, a verdict by a jury was required to support a judgment for absolute divorce in this State. *Wicker v. Wicker*, 255 N.C. 723, 122 S.E. 2d 703 (1961). In 1963, the General Assembly amended the statutes to allow the trial judge to find the facts in actions for divorce based on the required period of separation of the parties. 1963 N.C. Sess. Laws, ch. 540; *Becker v. Becker*, 262 N.C. 685, 138

S.E. 2d 507 (1964); *Laws v. Laws*, 1 N.C. App. 243, 161 S.E. 2d 40 (1968). In 1971, the General Assembly again amended G.S. 50-10 to provide that the right to jury trial in such actions would be deemed waived unless demanded by one of the parties as provided in the Rules of Civil Procedure, and that in actions tried without a jury, "the presiding judge shall answer the issues and render judgment thereon." 1971 N.C. Sess. Laws, ch. 17. In 1973, the statute was again amended to allow the necessary facts to be found by either a judge or a jury. The 1973 amendment included the following sentence: "The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39." 1973 N.C. Sess. Laws, ch. 460.

Thus, it is clear that although the General Assembly has seen fit over the past two decades to significantly liberalize the divorce laws of our State, to the point where "no-fault" is the established law for divorces based on the separation of the parties, there yet remains as a part of our law the requirement for a jury to determine issues of fact about which there may be no dispute simply because a defendant demands it. It is difficult to see what useful purpose is served for a defendant, in such an action as the one *sub judice*, to be able to put the opposing party and the State through the time and expense of a trial by jury. The application to G.S. 50-6 divorces of the G.S. 50-10 requirement that the factual allegations supporting the G.S. 50-6 divorce must be deemed denied requires a finding of the necessary facts. While it remains sound public policy to not allow the granting of such divorces on the pleadings, it would, nevertheless, appear that it would make good jurisprudential sense to clearly remove G.S. 50-6 divorces from the more cumbersome jury procedure and provide that all such cases be heard by the judge without a jury.

As for the instant case, we are bound under the present law to hold that the trial court erred in failing to grant defendant's request for a trial by jury, since her right was properly preserved under G.S. 1A-1, Rules 38 and 39. *Edwards v. Edwards*, 42 N.C. App. 301, 256 S.E. 2d 728 (1979).

We affirm the order of the trial court striking defendant's further answer and defense and cross-action, but for the trial

court's failure to grant her request for a jury trial, there must be a new trial.

Affirmed in part, reversed and remanded in part.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. SHEILA DAVIS

No. 795SC690

(Filed 5 February 1980)

Municipal Corporations § 9— failure of finance officer to preaudit town obligation— purchase of fence not town obligation

In order for a town finance officer to fulfill his statutory duty to preaudit obligations of the town, he must determine whether there are sufficient unencumbered funds in an appropriation to pay for an obligation before the obligation is incurred; therefore, in a prosecution of defendant, who was finance officer for the Town of Carolina Beach, for failure to preaudit an obligation of the Town, the trial court should have granted defendant's motion to dismiss at the close of the State's evidence where the State based its theory of willful failure to preaudit on the assumption that the obligation, payment for a split rail fence, was defendant's *personal* obligation, and all the State's evidence indicated that the fence was purchased for defendant's own use and was never intended to be an obligation of the Town. G.S. 159-25; G.S. 159-28.

APPEAL by defendant from *Reid, Judge*. Judgment entered 9 March 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 January 1980.

Defendant was indicted on charges of embezzlement, felonious approval of an invalid bill while acting as Finance Officer for the Town of Carolina Beach (G.S. 159-181), failure to keep an accurate record of financial transactions for the Town of Carolina Beach (G.S. 14-230, Section 2-2003 of the General Ordinances of Carolina Beach), failure to preaudit an obligation of the Town of Carolina Beach, and failure to establish procedures necessary to assure compliance with the provision of G.S. 159-28 entitled "Budgetary Accounting For Appropriations" (G.S. 14-230). The trial judge submitted three issues to the jury relating to the charges of embezzlement (G.S. 14-92), knowingly approving an in-

valid bill while acting as Finance Officer for the Town of Carolina Beach (G.S. 159-181) and failure to preaudit an obligation for the Town of Carolina Beach (G.S. 159-25(a)(2), 28(a) and 181). The jury returned a verdict of not guilty on the first two issues and a verdict of guilty of failure to preaudit a town obligation. From judgment entered, defendant appealed.

State's evidence tended to show that in April, 1977 the defendant requested Robert Warren, a fellow employee of the Town of Carolina Beach, to purchase a split rail fence at Lowe's in Wilmington and to have the materials charged to her account. The defendant intended to erect the fence on her own property. An employee of Lowe's informed Robert Warren that the defendant did not have a charge account, at which time Warren spoke with the defendant's secretary by phone. He received permission to provide Lowe's with a purchase order (No. 3046) of the Town of Carolina Beach. Defendant's secretary, Lona Lewis, typed purchase order No. 3046. She also typed "personal" on the order since the defendant told her she intended to pay for the fence herself. A purchase order consists of four parts—the original, which is sent to the vendor, two copies, which are filed numerically and alphabetically, and a fourth copy, which is attached to the vendor's invoice and given to the Finance Officer for bookkeeping purposes. Ms. Lewis believes that she wrote "void" on the original, although she has not seen the original since it was typed. The words "paid personal" on the two copies produced by the State as exhibits are in the defendant's handwriting. Lowe's continued to bill the Town of Carolina Beach until it received payment for the fence by means of a town check for $198.45, dated 19 September 1977, which was signed by the defendant and a town councilman. Deanna George, a town employee who processed bills for payment from March 1977 until August 1978, informed the defendant that the town was repeatedly being billed for a fence which had already been paid for (purchase order #3313). At the close of State's evidence, defendant's motion to dismiss was denied.

Defendant testified that she did not see or sign the original purchase order, although the words "void paid personal" look like her handwriting. The defendant did not recall signing the check in payment of the fence. She stated that she thought she paid for the fence in cash in May, 1977. Occasionally the purchase orders

and invoices were not attached to the checks which were placed on her desk for signature. When she signed the check in question, she had no idea that it was to pay for the fence. Defendant's renewed motion to dismiss was denied.

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

Smith and Kendrick, by W. G. Smith and George H. Sperry, for the defendant.

MARTIN (Robert M.), Judge.

The defendant by her second assignment of error contends that the trial court erred in denying defendant's motion for dismissal at the close of the State's evidence and at the close of all the evidence. We agree.

Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of defendant being the perpetrator of such offense. If so, the motion is properly denied. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971). We must, therefore, examine the essential elements of the offense with which defendant was charged.

Defendant was charged in the fourth count of the indictment with wilfully failing to perform her duty as finance officer to preaudit an obligation of the Town of Carolina Beach. The essential elements of the offense of failing to preaudit are set forth by N.C. Gen. Stat. §§ 159-25(a)(2), 159-28(a) and 159-181. Section 159-25(a)(2) imposes on a finance officer in local government the duty to preaudit obligations and disbursements as required by this Chapter 159. Although the term preaudit is not defined, § 159-28(a) contains a description of what the finance officer must do in order to fulfill his duty to preaudit obligations.

§ 159-28. Budgetary accounting for appropriations.—

(a) Incurring obligations.—No obligation may be incurred . . . unless the budget ordinance includes an appropriation authorizing the obligation and an unencumbered balance re-

> mains in the appropriation sufficient to pay in the current fiscal year the sums obligated. . .

Simply stated, the finance officer, in order to fulfill his duty to preaudit, must determine whether there are sufficient unencumbered funds in an appropriation to pay for an obligation before the obligation is incurred. Section 159-181 governing enforcement of Chapter 159 makes the wilfull failure or refusal of a finance officer to perform any duty imposed on him by this Chapter a misdemeanor. A conviction under this statute would require the State to prove that defendant wilfully failed to determine that there were sufficient unencumbered funds to pay an obligation of the Town of Carolina Beach prior to incurring that obligation.

In applying the foregoing principles, it is obvious that the State does not have sufficient evidence on the essential element that the obligation in issue is an obligation of the Town of Carolina Beach. Throughout the trial, the State has based its theory of embezzlement, felonious approval of an invalid bill and wilfull failure to preaudit on the assumption that the obligation was defendant's personal obligation. This position is inconsistent with the duty to preaudit which does not arise until there is a valid obligation of the Town of Carolina Beach. All of the State's testimony indicates that the fence was purchased for defendant's own use and was never intended to be an obligation of the town. Defendant's motion to dismiss at the close of the State's evidence should have been allowed.

Reversed.

Judges HEDRICK and WELLS concur.

SARA M. JEFFREYS, INDIVIDUALLY, AND AS EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF ALMA MOORE SNIPES, DECEASED v. HARVEY FRANKLIN SNIPES AND CAROLINE TRICKEY

No. 799SC375

(Filed 5 February 1980)

Wills § 9.2— probate jurisdiction of clerk—no collateral attack on order

In the administration of decedents' estates, the clerk's probate jurisdiction is original and exclusive, and only where the record of the probate proceeding shows affirmatively on its face that the clerk has no jurisdiction to enter his order can the order be attacked in another court in another proceeding. There was no showing in this action that the order of the clerk allowing defendant's dissent showed affirmatively on its face that the clerk lacked jurisdiction to enter it.

APPEAL by plaintiff from *Smith, David I., Judge.* Judgment entered 12 February 1979 in Superior Court, PERSON County. Heard in the Court of Appeals 29 November 1979.

Plaintiff brought this action in her individual interest and as executrix under the last will of Alma Moore Snipes. Defendant Snipes is the surviving spouse of Alma Moore Snipes and defendant Trickey is the attorney-in-fact for defendant Snipes. This matter is a companion to another case heard by this Court on the same day: *In the Matter of the Estate of Alma M. Snipes, deceased.* The basic facts underlying this litigation are pertinent to both cases.

Alma Snipes died testate, survived by her husband, Harvey Snipes, and other next of kin including plaintiff, who is the sister of the deceased. There are no surviving children. Alma and Harvey were married and living together at the time of her death. From a gross estate valued at approximately $83,400, Alma bequeathed Harvey life insurance proceeds in the amount of $1,000. Alma's will was admitted to probate in Person County on 7 December 1977. On 25 May 1978, Harvey, through his attorney-in-fact, defendant Trickey, dissented to the will, seeking his statutory share of Alma's net estate, as her surviving spouse. A hearing was held before the Clerk of Superior Court of Person County on 27 June 1978, at which all parties to this case were present and represented by counsel. Following the hearing, the

Clerk entered judgment on 24 July 1978, awarding Harvey one-half of Alma's net estate. There was no appeal from this order.

On 20 December 1978, Sara Jeffreys, as executrix of Alma's will, filed a motion for relief from judgment under Rule 60(b)(1) and (2), on the basis of excusable neglect, newly discovered evidence, lack of jurisdiction, and irregularities in the hearing. The motion was heard before the Clerk on 23 January 1979, following which the Clerk entered an order denying relief. Sara Jeffreys appealed from that order to the Superior Court. The appeal was heard before Judge Smith, on 12 February 1979. After the hearing, Judge Smith entered an order affirming the Clerk's order. Sara Jeffreys appealed from that order to this Court, and in a separate opinion filed this day, we have affirmed the order of the Superior Court.

Plaintiff brought this independent action to set aside the order allowing the dissent, for an order restraining defendant Harvey from asserting his right to dissent, and for damages against defendant Trickey. Defendants in apt time moved to dismiss and answered plaintiff's complaint. From the court's order allowing said motion, plaintiff appeals.

Watson, King & Hofler, by R. Hayes Hofler III, for plaintiff appellant.

Mount, White, King, Hutson, Walker & Carden, by R. Michael Carden and Albert W. Oakley, for defendant appellees.

WELLS, Judge.

Plaintiff has set out six claims for relief in her complaint. All of them recite events or circumstances relating to the making of Alma Snipes' will, the probate of that will, and the dissent from that will by defendant Harvey Snipes by and through his attorney-in-fact, defendant Trickey. All of these matters were the subject of proceedings before the Clerk of Court and the Superior Court on appeal. In his findings of fact, Judge Smith has referred to and recalled those proceedings, and upon such findings, he concluded that the complaint in this action constituted a collateral attack on the prior judgment.

It is settled law that a judgment which is regular and valid on its face may be set aside only by motion in the original cause

in the court in which the judgment was rendered. *Hassell v. Wilson,* 44 N.C. App. 434, 261 S.E. 2d 227 (1980). *See also, Lumber Co. v. West,* 247 N.C. 699, 102 S.E. 2d 248 (1958). Such a judgment may not be attacked collaterally. Neither may a direct attack be maintained in an independent action. *Hassell v. Wilson, supra.*

In the administration of decedents' estates, the Clerk's probate jurisdiction is original and exclusive. *In re Estate of Adamee,* 291 N.C. 386, 230 S.E. 2d 541 (1976). *See also, Beck v. Beck,* 36 N.C. App. 774, 245 S.E. 2d 199 (1978). Only where the record of the probate proceeding shows affirmatively on its face that the Clerk has no jurisdiction to enter his order can the order be attacked in another court in another proceeding. *In re Davis,* 277 N.C. 134, 176 S.E. 2d 825 (1970). There is no showing in the case *sub judice* that the order of the Clerk allowing the dissent showed affirmatively on its face that the Clerk lacked jurisdiction to enter it.

All of the claims for relief asserted by plaintiff relating to the form, adequacy, regularity, or legality of the dissent involve matters within the exclusive jurisdiction of the Clerk and were the subject of orders properly entered in the administration of the estate of Alma Moore Snipes. Such matters cannot be collaterally attacked in this proceeding.

In her third and fourth claims, plaintiff has alleged that defendant Snipes had impliedly or expressly agreed with his late wife not to dissent from her will and that defendant Trickey obtained her power of attorney from defendant Snipes by falsely representing to him the nature of the power and by failing to divulge to him that she intended to execute the dissent. Plaintiff maintains that the defendant Snipes relied upon the alleged false representations of Trickey, so that the execution of the dissent was a fraud on the defendant Snipes, a fraud on the Court, and a fraud on the beneficiaries of Alma Snipes' will—the intended beneficiaries of the alleged agreement between Alma and Harvey. Plaintiff further alleged that defendant Trickey had tortiously interferred with the alleged agreement between Alma and Harvey.

These allegations were squarely before the Clerk of Court, who examined Snipes and found him to be of sound mind, capable

of understanding the nature of the action, and desirous of dissenting to the will.

> The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time of appeal or other direct attack has expired only if the alleged fraud is extrinsic rather than intrinsic. Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court . . . . A party who has been given proper notice of an action, however, and who has not been prevented from full participation, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.

Stokley v. Stokley and *Stokley v. Hughes*, 30 N.C. App. 351, 354-355, 227 S.E. 2d 131, 134 (1976). There being no question here as to the jurisdiction of the Clerk of Court and of the plaintiff's opportunity to present her case, if plaintiff has stated a case for any type of fraud, it is clearly for intrinsic and not extrinsic fraud. As stated by this Court in *Stokley, supra*, intrinsic fraud must be attacked by a motion in the cause and not collaterally, as plaintiff has attempted in the present action.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

IN THE MATTER OF THE ESTATE OF ALMA M. SNIPES, DECEASED

No. 799SC374

(Filed 5 February 1980)

1. Clerks of Court § 3; Wills § 61— validity of dissent to will—jurisdiction of clerk of court

A clerk of superior court had exclusive original jurisdiction to determine the validity of a dissent by a surviving spouse to the will of a deceased spouse.

2. Wills § 61— validity of dissent from will—motion for relief from judgment

A clerk of superior court properly denied an executrix's Rule 60(b)(6) motion for relief from the clerk's judgment determining that a dissent to a will was valid made on the ground that irregularities had prevented a full and fair hearing before the clerk.

3. Courts § 6.1— validity of dissent to will—appeal from clerk's judgment—failure to hear subpoenaed witness

In an appeal from a judgment of the clerk finding that a dissent to a will was valid, the superior court did not err in failing to hear a witness subpoenaed by the executrix of the will since the authority of the superior court was limited to review of the clerk's findings and conclusions of law.

APPEAL by executrix from *Smith, David I., Judge.* Judgment entered 12 February 1979 in Superior Court, PERSON County. Heard in the Court of Appeals 29 November 1979.

Alma Snipes died testate, survived by her husband, Harvey Snipes. Alma's will was admitted to probate in Person County on 7 December 1977. From a gross estate valued at approximately $83,400, Alma bequeathed to Harvey life insurance proceeds in the amount of $1,000. On 25 May 1978, a dissent to the will was filed by Harvey, through his attorney-in-fact, Caroline Trickey. On the same date the dissent was filed, notice was served upon the executrix that the dissent had been filed. On 19 June 1978, executrix caused to be filed with the Clerk notice of a motion for an order disallowing the dissent. This motion was heard before the Clerk on 27 June 1978. On 24 July 1978, the Clerk entered judgment finding that the dissent was in proper form and duly filed, and concluding that Harvey was entitled to receive one half of the net estate of his deceased wife. There was no appeal from that judgment.

On 20 December 1978 the executrix filed a motion with the Clerk pursuant to G.S. 1A-1, Rule 60 for relief from the judgment of 24 July 1978. On 2 January 1979, executrix filed an amendment to the motion of 20 December 1978. On 23 January 1979, the Clerk entered a judgment denying the executrix's motion for relief from the prior judgment. The Clerk's judgment of 23 January 1979 was appealed to the Superior Court. On 12 February 1979 Judge Smith heard the appeal and entered his judgment affirming the judgment of the Clerk.

Mount, White, King, Hutson, Walker & Carden, by R. Michael Carden and Albert W. Oakley, for the respondent appellee.

Watson, King & Hofler, by R. Hayes Hofler III, for the petitioner appellant.

WELLS, Judge.

In her appeal from Judge Smith's judgment of 12 February 1979, executrix assigned as error the failure of the trial court to allow her motion for relief from judgment and for the trial court's rendering its judgment without hearing a witness who had been duly served with a subpoena.

In her Rule 60(b) motion, executrix asserted as grounds for relief lack of jurisdiction of the Clerk and irregularities preventing a full and fair hearing.

[1] The first question presented in this appeal is whether the Clerk of Superior Court has exclusive original jurisdiction to determine the validity of a dissent by a surviving spouse to the will of a deceased spouse. The answer to that question must be in the affirmative. In this State, the Clerk is given exclusive original jurisdiction of the administration, settlement and distribution of estates except in cases where the Clerk is disqualified to act. G.S. 28A-2-1; *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976). *See also, Beck v. Beck*, 36 N.C. App. 774, 245 S.E. 2d 199 (1978). A dissent has no meaning or legal effect except as it relates to a will admitted to probate. The right, time and manner, and effect of the filing and recording of a dissent to a will are all matters within the probate jurisdiction of the Clerk.

[2] The next question presented is whether the trial court erred in failing to grant executrix's Rule 60(b)(6) motion, on grounds of irregularities which prevented a full and fair hearing before the Clerk. A Rule 60(b)(6) motion is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the trial court has abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 523 (1975). Under Rule 60(c), the Clerk of Superior Court may exercise the powers authorized in Rule 60(b). We note, however, that a motion under Rule 60(b) may not be used as a substitute for a general appeal. *O'Neill v. Bank*, 40 N.C.

App. 227, 252 S.E. 2d 231 (1979); and a Clerk of Court is limited, with respect to his authority to upset a judgment, to those grounds stated in the Rule.

In denying executrix's motion, the Clerk made specific findings as to the manner and form in which the dissent was handled which showed that the proceeding before the Clerk was held in a full and fair manner. The findings of the Clerk thus support his judgment denying executrix's 60(b) motion and the Superior Court correctly entered judgment affirming the Clerk.

[3] Executrix argues that the Superior Court erred in not hearing a witness she subpoenaed to a hearing held before the Court with reference to the appeal. The authority and duty of the Superior Court was limited to review of the Clerk's findings of fact and conclusions of law. *In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967); *In re Spinks*, 7 N.C. App. 417, 173 S.E. 2d 1 (1970). Accordingly, executrix could not have been prejudiced by the Superior Court's failure to hear her additional evidence.

The judgment of the trial court is

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. AILENE BEAM (STAMEY)

No. 7925SC781

(Filed 5 February 1980)

1. Criminal Law § 162.4— unresponsive answer—necessity for motion to strike

An objection on the ground that a witness's answer is unresponsive to the question is properly available only to the party propounding the question. The opponent's appropriate remedy, when it becomes apparent that some feature of the answer is objectionable, is by way of a motion to strike the answer or its objectionable parts, and failure of counsel to move to strike the unresponsive part of an answer, even though the answer is objected to, results in a waiver of the objection.

2. Criminal Law § 162.4— motion to strike—no relation back to other answers

A motion to strike, made after other questions are asked, will not relate back to earlier answers which counsel contends should be stricken.

3. **Criminal Law § 162.4— unresponsive answer—absence of motion to strike—waiver of objection**

Defendant waived objection to a witness's unresponsive answer where defense counsel interposed no motion to strike the answer at the time he objected to it.

4. **Constitutional Law § 67— no right to disclosure of details of informant's life**

Where a defendant charged with possession and sale of marijuana could not make a sufficient showing of need to justify disclosure of an informant's identity, she could not compel disclosure of details of the informant's personal life simply because the prosecution disclosed the informant's name.

5. **Narcotics § 3.1— testimony that other charges dropped—irrelevancy**

In a prosecution for possession and sale of marijuana, testimony by defendant's daughter that charges against her for the same offenses had been dropped and by defendant that charges brought against her for selling "downs" to the same undercover agent had been dropped was properly excluded as being irrelevant.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 28 March 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 17 January 1980.

In this case defendant was charged in two bills of indictment, each proper in form, with (1) possession with intent to sell 19.7 grams of marijuana, a Schedule VI controlled substance, and (2) selling the same to A. P. Carter, an undercover agent with the Catawba County Sheriff's Department, both in violation of G.S. § 90-95(a)(1). The jury returned guilty verdicts on each charge. With respect to the possession offense, the judge sentenced defendant to three years' imprisonment, suspended for three years on stated conditions. For the selling offense, she was sentenced to two years active imprisonment, and she appeals.

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

Lefler, Gordon & Waddell, by Lewis E. Waddell and Robert A. Mullinax, for defendant appellant.

HEDRICK, Judge.

By her first assignment of error, defendant argues that the court erred in failing to sustain an objection she made on the ground that a witness's answer to a question propounded by

the district attorney was "not responsive." She complains of the following:

> Q. Do you recall the conversation which you had with Debbie Lail at that point in time?
>
> A. At this time she produced a clear plastic bag containing green vegetable material.
>
> Objection, not responsive to the question your Honor.
>
> Overruled.

She contends that the judge should have stricken the answer *in toto*.

[1] We note first that an objection on the ground that the witness's answer is unresponsive to the question is properly available only to the party propounding the question. "The mere fact that the answer is unresponsive is not an objection available to the opponent." C. McCormick, *Handbook of the Law of Evidence* § 52 at 113, n. 26 (1954), citing cases. The opponent's appropriate remedy, when it becomes apparent that some feature of the answer is objectionable, is by way of a motion to strike the answer or its objectionable parts. 1 Stansbury's N.C. Evidence, *Witnesses* § 27 (Brandis rev. 1973). *Accord, State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966). Moreover, in *Battle*, our Supreme Court, speaking through Justice Higgins, held that failure of counsel to move to strike the unresponsive part of an answer, even though the answer *is* objected to, results in a waiver of the objection. "Even valid objections may be, and are usually waived in the *ordinary* case by failure to follow the recognized practice by motion to strike or by motion to limit if the evidence is not competent. . . ." *Id.* at 520-21, 148 S.E. 2d at 604. [Emphasis added.] *See also State v. McMullin*, 23 N.C. App. 90, 208 S.E. 2d 228 (1974); *State v. Norman*, 19 N.C. App. 299, 198 S.E. 2d 480, *cert. denied*, 284 N.C. 257, 200 S.E. 2d 657 (1973). The Justice's use of the word "ordinary" distinguishes *Battle* from capital cases such as *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), and *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967), wherein the Court has held that the absence of a motion to strike will not preclude the granting of a new trial when highly prejudicial evidence which should have been stricken was admitted and emphasized in the judge's charge.

[2, 3] Such is not the case here. This is not a capital case. The answer complained of, while perhaps not responsive to the question posed, was nevertheless admissible evidence. This case is one of those "ordinary" ones which requires that the attorney use the proper incantation. It appears from the record before us, however, that defense counsel interposed no motion to strike the answer at the time he objected to it. Furthermore, no exception to the judge's overruling of his objection is noted in the record at that point. Instead, the district attorney asked and elicited answers to three more questions before opposing counsel made a motion to strike. The motion was allowed, and, at that point, the record inexplicably notes, "Exception No. 1." That is the exception upon which defendant purportedly bases this assignment of error. Clearly, a motion to strike, made after other questions are asked, will not relate back to earlier answers which counsel contends should be stricken. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975); *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046 (1972). We therefore hold that defendant has waived any objection she might have had to the answer of which she now complains. This assignment of error is without merit.

[4] By her second assignment of error, defendant attacks the refusal of the judge to allow her to elicit, on cross-examination, certain information from the witness Carter regarding the alleged criminal record of his informant, Sybil Waters. The record discloses that Waters' sole role in this case was to introduce Agent Carter to the defendant. We are therefore of the opinion that defendant could not initially have required disclosure of the identity of Carter's informant, since the prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime or unless the informant's identity is essential to a fair trial or material to defendant's defense. *State v. Warren*, 35 N.C. App. 468, 241 S.E. 2d 854 (1978); *State v. Brown*, 29 N.C. App. 409, 224 S.E. 2d 193, *cert. denied*, 290 N.C. 552, 226 S.E. 2d 511 (1976). Since the defendant herein could not make a sufficient showing of need to justify disclosure of the informant's identity, we fail to comprehend how she can acquire any greater rights to compel disclosure of details of the informant's personal life, simply because the prosecution has disclosed the informant's name. She has no right to the information and, furthermore, it is

wholly irrelevant to the case. This assignment of error is likewise without merit.

[5] Defendant's third and fourth assignments also relate to evidentiary rulings. She contends first that her daughter, Debbie Lail, should have been allowed to testify that charges against her for the same offense had been dropped and, secondly, that the defendant should have been allowed to testify that prior charges brought against her for selling "downs" to the same agent had also been dropped. Again, defendant argues about wholly irrelevant evidence. In our opinion, what happened to the charges against the witness Lail has absolutely nothing to do with the issue in this case, *i.e.*, whether the defendant is guilty of selling marijuana in violation of the law. Similarly, we find no relevancy in evidence concerning an entirely separate charge against defendant which arose out of an entirely separate incident. We hold that no error flowed from the exclusion of this evidence.

Finally, defendant argues that the court erred in refusing to allow her daughter to testify that neither she nor her mother had ever sold any marijuana to Agent Carter. Suffice it to say that the defendant, not her daughter, was on trial in this case. By her plea of not guilty, she denied that she had sold marijuana to Carter. Whether her daughter had ever sold him anything is totally irrelevant to the determination of defendant's guilt or innocence.

We are persuaded, and so hold, that the defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN WRIGHT MIDYETTE

No. 791SC761

(Filed 5 February 1980)

Indictment and Warrant § 7.1— indictment not marked a true bill—sufficiency

An indictment returned by the grand jury is not defective or insufficient because the foreman failed to mark the box indicating a true bill or not a true bill where the court minutes show that all bills of indictment were returned true bills.

APPEAL by defendant from *Strickland, Judge.* Judgments entered 29 March 1979 in Superior Court, CAMDEN County. Heard in the Court of Appeals 15 January 1980.

Attorney General Edmisten, by Associate Attorney Tiare B. Smiley, for the State.

Robert B. Lowry and Jennette, Morrison and Austin, by John S. Morrison, for defendant appellant.

VAUGHN, Judge.

This appeal raises the sole issue of whether a bill of indictment returned without any marking to indicate whether it is a true bill or not a true bill is defective and insufficient when other evidence shows that the bill was returned in open court by the grand jury as a true bill.

Four indictments were returned by the grand jury on 26 March 1979 against defendant for felonious breaking and entering and larceny. Upon trial, guilty verdicts were returned on all four indictments. Three of the four indictment forms had a paragraph just below the list of witnesses and just above the places for the date and signature of the grand jury foreman which read:

> The witnesses marked "x" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be [ ] a true bill by twelve or more grand jurors [ ] not a true bill.

On two of the forms, no indication was given of whether it was a true bill or not a true bill. On the other identical form indictment, an "x" appears in the box preceding the words "a true bill. . . ."

The fourth indictment was similar except the words "Twelve or more Grand Jurors concurred in this finding" were not part of the printed form but were typed in. This fourth form was similar to the other three in the way "a true bill" or "not a true bill" was to be indicated and an "x" did appear in the box preceding the words "a true bill." The superior court minutes for 26 March 1979, the day these four indictments were handed down, disclose that all bills of indictment received that day were acted upon and disposed of and that all bills of indictment received were returned true bills.

Defendant contends that the two indictments which did not have either the box beside "a true bill" or the box beside "not a true bill" marked were defective and insufficient indictments. This is the only objection to the form of the indictment. For the court to have jurisdiction in this case, it is essential that there be a valid indictment or a proper waiver. N.C. Const. Art. 1, § 22; *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975).

The Criminal Procedure Act, G.S. 15A, also makes certain specifications about indictments. The Act requires that there be an indictment unless there is a waiver. G.S. 15A-923(a). As to the form of an indictment, the same statute further states that "[t]he bill of indictment has entered upon it the finding of the grand jury that it is a true bill." G.S. 15A-923(b). The Official Commentary to this section states that this provision must be read in conjunction with the indictment provisions of Article 32 of the Act. In Article 32, an indictment is defined as "a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses." G.S. 15A-641(a). The Official Commentary to G.S. 15A-641 states that the section was intended to set out the North Carolina common law relating to the definition of indictment.

An indictment must contain:

(1) The name of the superior court in which it is filed;

(2) The title of the action;

(3) Criminal charges pleaded as provided in Article 49 of this Chapter, Pleading and Joinder;

(4) The signature of the prosecutor, but its omission is not a fatal defect; and

(5) The signature of the foremen or acting foreman of the grand jury attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment.

G.S. 15A-644(a).

The Supreme Court has held that G.S. 15A-644(a)(5) is merely directory and that an indictment is not invalid because it contained no attestation clause that twelve or more grand jurors concurred in the findings of a true bill. *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978); *see also State v. Avant*, 202 N.C. 680, 683, 163 S.E. 806, 807 (1932). We follow this reasoning which makes substance paramount over form and hold an indictment is not invalid merely because there is no specific expression in the indictment that it is "a true bill." *See also State v. Cox*, 280 N.C. 689, 187 S.E. 2d 1 (1972); *State v. Marr*, 26 N.C. App. 286, 215 S.E. 2d 866, *cert. den.*, 288 N.C. 248, 217 S.E. 2d 673 (1975).

The report of the grand jury in the minutes of the superior court were a part of the record on appeal in this case. There is precedent for using court minutes to determine whether the indictments were returned as required by law. *State v. Childs*, 269 N.C. 307, 315, 152 S.E. 2d 453, 459 (1967), *death sentence vacated*, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed. 2d 859 (1971). The minutes of court in the record before us show that the indictments were returned as true bills. The minutes in conjunction with the indictments themselves show that the criminal procedure used in the case was not defective nor invalid. The grand jury report in the minutes indicates that the missing "x" in the appropriate boxes on two of the four indictments was merely an oversight. The record on appeal also contains affidavits filed in mid-July 1979 by twelve members of the grand jury that returned these indictments in which they state that all four indictments returned against defendant were true bills.

Early case law which required an endorsement "a true bill" as essential to the validity of an indictment has been expressly overruled. *State v. Sultan*, 142 N.C. 569, 54 S.E. 841 (1906), *overruling, State v. McBroom*, 127 N.C. 528, 37 S.E. 193 (1900). The provisions in the Criminal Procedure Act did not change this.

Therefore, we hold that an indictment returned by the grand jury is not defective or insufficient where the foreman failed to mark the box indicating a true bill or not a true bill where the court minutes show that all bills of indictment were returned true bills.

No error.

Judges HEDRICK and CLARK concur.

LONNIE L. O'NEAL, EMPLOYEE, PLAINTIFF v. THE BLACKSMITH SHOP / U.S. FURNITURE INDUSTRIES, INC., EMPLOYER GREAT AMERICAN INSURANCE CO., CARRIER, DEFENDANTS

No. 7910IC312

(Filed 5 February 1980)

Master and Servant § 55.3— workers' compensation—back injury resulting from accident

Plaintiff employee's injury to his back while lifting the tongue of a trailer to attach it to a truck resulted from an "accident" within the meaning of the Workers' Compensation Act where a jack always used to lift the trailer tongue was broken for the first time on the day of the injury; this necessitated the handlifting of the tongue by plaintiff which he had never done before; the tongue had to be held at a height which required plaintiff to maintain a bent position for a period of 30 to 60 seconds, and plaintiff sustained his back injury at the time when the backing truck made contact with the hitch on the trailer tongue.

APPEAL by defendants from the order of North Carolina Industrial Commission entered 6 December 1978. Heard in the Court of Appeals 16 November 1979.

Plaintiff seeks compensation for a back injury while working for defendant-employer on 30 August 1977.

Deputy Commissioner Conely after hearing denied the claim in an opinion and award entered 30 June 1978, which included the following finding of fact:

> "9. On August 30, 1977 plaintiff sustained an injury arising out of and in the course of his employment. He did not sustain an injury by accident."

Upon appeal the Full Commission in its opinion and award adopted the stipulations and findings of fact made by the Hearing Commissioner, which were amended and revised as follows:

> "9. On the occasion complained of plaintiff held the weight of the tongue of the trailer in a bent or stooped position. He was not accustomed to holding such weight for this period of time. His activity in this connection placed more stress on his body than usual. He thereby sustained an injury by accident arising out of and in the course of his employment on August 30, 1977."

The Full Commission then concluded that the claim was compensable.

Haworth, Riggs, Kuhn, Haworth & Miller by William B. Haworth and R. Bruce Laney for plaintiff appellee.

Johnson, Patterson, Dilthey & Clay by Dan M. Hartzog for defendant appellants.

CLARK, Judge.

The only question raised by this appeal is whether the injury was the result of an accident.

For a determination of this question we think that the following findings of fact made by the Hearing Commissioner and adopted by the Full Commission, are particularly pertinent:

> "1. On August 30, 1977 plaintiff, now 51 years of age, was employed by the defendant-employer as an assistant foreman and also did ordinary machine work, running saws, routers, and other machines. He was also required to do some physical labor and lifting in his work.
>
> 2. A metal frame trailer is used at the employment to haul away scrap wood. Said trailer, which was in use on August 30, 1977, is equipped with a ring-snap hitch which attaches to a one and one-half ton truck. Ordinarily, the tongue and hitch are adjusted to the height necessary for attachment to the truck by use of a hand-cranked jack mounted at the front of the trailer frame. However, on August 30, 1977 the jack was inoperative, having been bent backward, and it

was necessary to lift the tongue of the trailer to the necessary position.

3. On said date plaintiff and another man, in a bent position, lifted the tongue, which weighed between 150-250 pounds, about knee-high and held it in that position for 30 to 60 seconds until just about the time the truck backed into position and the hitch snapped into place. At the instant the trailer hitch was making contact with the truck, plaintiff's back made an audible 'snap' sound and plaintiff let go of the tongue and staggered backward. He stated that he had hurt his back and appeared white in the face. The other employee felt the full weight of the tongue for an instant before the hitch locked in place.

4. The tires of the trailer were chocked at the time and there is no indication that the trailer moved upon impacting with the truck.

5. Plaintiff immediately experienced pain in his back and reported the injury to his foreman. The injury occurred at about 11:30 a.m."

There is no conflict in the evidence. The last sentence of paragraph 9 (as amended) of the so-called "Finding of Fact" by the Hearing Commissioner and the Full Commission is a conclusion of law. Therefore, we must determine if the evidence in the record and the findings of fact support the conclusion that plaintiff sustained an injury by accident. While findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law. *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E. 2d 325 (1976), *cert. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977).

"Accident" as used in the Workers' Compensation Act has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. Accident involves the interruption of the work routine and introduction thereby of unusual conditions likely to result in unexpected consequences. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962).

The conclusion that plaintiff suffered an injury by accident is supported by the facts found, and the evidence in the record including the following significant facts tending to show unusual work routine and conditions: the jack always used to lift the trailer tongue was broken for the first time on the day of the injury; this necessitated the hand-lifting of the tongue by plaintiff which he had never done before; the tongue had to be held at a height which required plaintiff to maintain a bent position for a period of 30 to 60 seconds; plaintiff sustained his back injury at the time when the backing truck made contact with the hitch on the trailer tongue.

We find the factual circumstances in this case before us somewhat similar to those in *Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E. 2d 254 (1977). The Court, in affirming the award order of the Commission stated:

> "We think the evidence is sufficient to support the conclusion that it was an injury by accident in that the evidence shows that plaintiff was not carrying out his usual and customary duties, and that the circumstances involved an 'interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences.' "

33 N.C. App. at 317. *See also, Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960).

We reach the same conclusion for the same reasons. The award order is

Affirmed.

Judges ARNOLD and ERWIN concur.

JERRY M. EVANS v. FRAN-CHAR CORPORATION AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 795SC408

(Filed 5 February 1980)

1. **Master and Servant § 110— unemployment compensation—loss of recording of hearing—absence of prejudice**

A claimant for unemployment compensation benefits was not denied a fair hearing because the Employment Security Commission lost the recording of a hearing before a Claims Deputy where claimant was informed at the beginning of a hearing before an Appeals Deputy that the recording of the prior hearing was lost and that all evidence adduced at the prior hearing would have to be taken again, and all witnesses claimant presented at the prior hearing were also present at the hearing before the Appeals Deputy.

2. **Administrative Law § 8; Master and Servant § 111— claim for unemployment compensation—procedural defect raised for first time in superior court**

Where a claimant for unemployment compensation failed to raise the issue of the alleged absence of a portion of his testimony from the transcript of the hearing before the Appeals Deputy when he appealed to the Deputy Commissioner, he could not raise that issue for the first time upon his appeal to the superior court.

APPEAL by claimant from *Tillery, Judge.* Judgment entered 4 December 1978 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 4 December 1979.

Claimant was employed by defendant Fran-Char Corporation as manager of a gasoline station for approximately two and one-half years prior to his discharge on 8 September 1977. Claimant filed a claim for unemployment insurance benefits effective 9 October 1977. A hearing on the claim was held before a Claims Deputy of the Employment Security Commission (ESC) on 28 October 1977, at which the claim was contested by Fran-Char. The recording made of this hearing was lost by the ESC. The Claims Deputy found that claimant was discharged from employment because of misconduct in connection with his work and held that claimant was disqualified from receiving benefits.

Claimant appealed to the Appeals Deputy and the hearing on the appeal was held on 22 November 1977 at which all of the witnesses present at the initial hearing were present. At the opening of the hearing the Appeals Deputy mentioned that the tape of the prior hearing had been lost and that he would have to "get all of

the information over again rather than using that tape and playing it back today." Claimant testified that he understood. Claimant and another employee of Fran-Char allege in affidavits which appear in the record that claimant testified he was discharged in retaliation for pressing charges of criminal assault against the nephew of one of the gas station's owners. Although no gaps in the testimony appear in the record, claimant maintains his testimony was omitted from the transcript. Fran-Char presented evidence that claimant was discharged for misconduct in connection with his work, in that he failed to promptly deposit company funds in the bank which resulted in the refusal of Fran-Char's bonding company to bond him. The Appeals Deputy affirmed the decision of the Claims Deputy.

The decision of the Appeals Deputy was in turn upheld by the Deputy Commissioner. Claimant next appealed to the Superior Court of New Hanover County and moved to remand the matter to the ESC. From the court's judgment denying claimant's motion and dismissing his appeal, claimant appeals to this Court.

Legal Services of the Lower Cape Fear, by James B. Gillespie, Jr., and Michael Shepard, for the claimant appellant.

Gail C. Arneke for the defendant appellee Employment Security Commission of North Carolina.

WELLS, Judge.

[1] Claimant argues that he was denied a full and fair hearing before the ESC because the ESC lost the recording of the earlier hearing before the Claims Deputy. An administrative agency may not take action adversely affecting the rights of a person without affording the person effective notice and an opportunity to be heard. *Brauff v. Commissioners of Revenue,* 251 N.C. 452, 111 S.E. 2d 620 (1959). Here, claimant was informed at the beginning of the hearing before the Appeals Deputy that the recording was lost and that all of the evidence adduced at the prior hearing would have to be taken again. The only other witness claimant presented at the prior hearing was also present at the hearing before the Appeals Deputy. Under these circumstances we cannot see how the loss by the ESC of its recording of the hearing before the Claims Deputy denied claimant a substantial right. An appellant must show that technical errors made below have prejudiced his

case in order to be entitled to have the decision below set aside. Claimant has clearly not met this burden here.

[2] As to the alleged absence from the transcript of a material portion of claimant's testimony presented at the hearing before the Appeals Deputy, the record fails to disclose that claimant afforded the Deputy Commissioner an opportunity to rule on this matter. The alleged absence of such testimony was also not mentioned by claimant in stating his grounds for appeal from the decision of the Deputy Commissioner to the Superior Court. It appears from the record that claimant raised this issue for the first time in his motion or petition before the Superior Court. The Superior Court was not authorized to hear grounds for remand which could have been presented to the reviewing administrative agency but were not:

> A litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible.

Nantz v. Employment Security Comm., 28 N.C. App. 626, 630, 222 S.E. 2d 474, 477 (1976), *aff'd*, 290 N.C. 473, 226 S.E. 2d 340 (1976).

We have examined claimant's other assignments of error and have found them to be without merit.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

CLINT TRIPLETT v. ROBERT L. JAMES AND BILLY HALL DEAL, D/B/A B AND J AUTO SALES AND WESTERN SURETY COMPANY

No. 7923SC561

(Filed 5 February 1980)

Principal and Surety § 11— automobile dealer's bond—protection of purchaser only

Plaintiff wholesale automobile dealer, who sold vehicles to defendants, could not recover from defendant surety company on a bond obtained by

defendant automobile dealers in order to meet the requirements of G.S. 20-288(e) and to obtain a license as a motor vehicle dealer, since the bond provided recovery only to purchasers from defendants.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 28 May 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 16 January 1980.

Plaintiff instituted this action against defendants seeking a recovery of $25,800. Plaintiff alleged in his complaint that he is a wholesale automobile dealer; that he sold cars to defendants James and Deal, d/b/a B & J Auto Sales, from time to time; that he sold cars to B & J during November and December 1978 and that as payment he received checks that have been returned for insufficient funds. Plaintiff claimed that Western Surety was liable to him for $15,000 of the total debt because of a bond that B & J and Western Surety had executed as principal and surety, respectively, on 28 November 1977.

A confession of judgment was entered into by plaintiff and James on 26 April 1979, authorizing entry of judgment in favor of plaintiff in the amount of $16,800 plus interest. Subsequently, plaintiff moved for summary judgment as to Deal and Western Surety. This motion was denied, and Western Surety's motion for summary judgment was granted. Plaintiff appealed from the entry of summary judgment in favor of Western Surety.

George G. Cunningham for plaintiff appellant.

Moore & Willardson, by Larry S. Moore and Robert P. Laney, for defendant appellees.

HILL, Judge.

The bond prepared by defendant Western Surety (Western) was entered into with B & J for a specific purpose. G.S. 20-288(e) provides that,

> Each applicant approved by the Division for license as a motor vehicle dealer . . . shall furnish a corporate surety bond . . . .
>
> . . . .

> Any *purchaser* [emphasis added] of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against . . . the surety.

It is clear that the bond was purchased by B & J in order to comply with G.S. 20-288(e). Not only does the bond refer on its face to Article 12 of Chapter 20 of the General Statutes wherein G.S. 20-288(e) is contained, but it also gives protection in the amount of $15,000, the sum specifically required by G.S. 20-288(e). The statute seeks to protect purchasers of automobiles; however, plaintiff contends that once issued, the bond can be sued upon by anyone defrauded by a motor vehicle dealer.

Plaintiff points to the language of the Western bond as support for his position. The bond states that Western, as surety, is bound unto the people of North Carolina,

> . . . to indemnify *any person* [emphasis added] who may be aggrieved by fraud . . . or violation by said Principal [B&J] . . . of any of the provisions of Article 12, Chapter 20 of the North Carolina General Statutes in the amount of Fifteen Thousand Dollars . . . .

Plaintiff asserts that the language is ambiguous, it appearing that *any person* aggrieved by fraud will be indemnified, not just the parties covered by Chapter 20, and that the ambiguity must be construed against Western who chose the words when drafting the bond. *Hood, Comr. of Banks v. Davidson*, 207 N.C. 329, 334, 177 S.E. 5 (1934).

Plaintiff is correct in theory but wrong in fact. The Western bond is not ambiguous. The bond refers on its face to Article 12, Chapter 20. In construing a contract of indemnity, our primary purpose must be ". . . to ascertain and give effect to the intention of the parties . . . ." *Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E. 2d 708 (1968). The bond must, ". . . be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses 'which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract.' "

(Citation omitted.) *Id.* at 627. It is clear that B & J obtained the bond from Western in order to meet the requirements of G.S. 20-288(e) and obtain a license as a motor vehicle dealer. Furthermore, it is clear that G.S. 20-288(e) grants only to *purchasers* the right to recover on the bond.

Plaintiff seeks to bolster his position by pointing out that a motor vehicle dealer may have his license denied, suspended or revoked for,

> Willfully defrauding any retail buyer, to the buyer's damage, or *any other person* [emphasis added] in the conduct of the licensee's business. G.S. 20-294(4).

Certainly, a dealer may lose his license for defrauding any person in the conduct of his business. This does not mean, however, that the bond specifically required by G.S. 20-288(e) and specifically limited by that section as a source of indemnity to *purchasers only* is available as a remedy to any defrauded party.

G.S. 20-294(4) only sets out grounds for which the State may suspend or revoke a license. It does not enlarge the coverage of G.S. 20-288(e) to any parties other than a purchaser.

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

Affirmed.

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

STATE OF NORTH CAROLINA v. ANTHONY LEE WINSTON

No. 7912SC712

(Filed 5 February 1980)

1. Burglary and Unlawful Breakings § 2— breaking or entering of building—office of clerk of court

The office of the clerk of superior court in a county courthouse is a "structure designed to house or secure within it any activity or property" within the meaning of G.S. 14-54(c) and therefore is by statutory definition a "building" within the meaning of G.S. 14-54(b), and even though the office is open to the public, it is still protected by the statute during the time that it is not open for public business.

2. Burglary and Unlawful Breakings § 5.9— wrongful entry of office of assistant clerk of court—insufficient evidence

The State's evidence was insufficient for the jury in a prosecution for wrongful entry into an office in a county courthouse in violation of G.S. 14-54(b) where it tended to show that the office was occupied by an assistant clerk of court who handled adoptions, foreclosures and other business of the clerk of court, and that defendant entered the office between 1:00 and 2:00 p.m. while it was open for public business and thus had implied consent to enter the office.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 27 March 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 January 1980.

Defendant was convicted of wrongfully entering an office in the Cumberland County Courthouse in Fayetteville, North Carolina, a violation of N.C.G.S. 14-54(b). From a sentence of imprisonment, defendant appeals.

The state's evidence shows that 4 January 1979 was a regular working day for the employees of the Clerk of Superior Court of Cumberland County. The office in question is located on the first floor of the courthouse and is occupied by Irene Russell, assistant clerk, who handles adoptions, foreclosures and "anything anybody needs me to do." There is a corridor connecting this office to a large hallway in front of the civil division offices of the clerk. There are no signs indicating that either the corridor or the office is private or that the general public should "keep out." Other areas in the courthouse do have such signs informing the public of the private nature of those areas.

A "break room" is located to the left of this office and Ms. Russell was in it between 1:00 and 2:00 p.m. when defendant entered the office. Before he entered, the door to the office was partially closed. Ms. Russell saw defendant enter and sent another clerk to inquire what he wanted. Defendant said he was looking for the public defender's office and was going to leave a note for him. The public defender's office is in the courthouse.

No one gave defendant permission to enter the office and nothing was taken from the office. Defendant was arrested at the scene and charged with this offense.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick, for the State.

John G. Britt, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

We hold the trial judge erred by denying defendant's motion to dismiss the action at the close of the state's evidence. N.C. Gen. Stat. 15A-1227(a)(1). For the state to survive the motion to dismiss, it must present evidence that defendant entered a building within the meaning of N.C.G.S. 14-54(b) and that he did so wrongfully, that is, that he entered without any consent or permission of the owner or occupant. *State v. Boone*, 39 N.C. App. 218, 249 S.E. 2d 817 (1978), *modified and aff'd*, 297 N.C. 652, 256 S.E. 2d 683 (1979). *See* N.C.P.I.—Crim. 214.34 (1978).

[1] Defendant contends that the office of the clerk is not protected by N.C.G.S. 14-54(b) as it is not a "building." We hold the office of the clerk in the Cumberland County Courthouse is a "structure designed to house or secure within it any activity or property" within the meaning of N.C.G.S. 14-54(c) and therefore is by statutory definition a "building" under N.C.G.S. 14-54(b). The office is designed to house the activities of an assistant clerk of court and to secure the property of the clerk. Even though an office may be open to the public, it is still protected by the statute during the time that it is not open for public business.

[2] We turn to the question of whether defendant's entry was wrongful.

The office in question is located in the public courthouse of Cumberland County. It is used to handle adoptions, foreclosures and other business of the clerk of court, a public official. These functions necessarily require the general public to have access to the office and the evidence indicates that members of the general public do use the office. It was open for public business when entered by defendant between 1:00 and 2:00 p.m. The general public, including the defendant, had implied consent and invitation to enter the office at that time. *State v. Boone, supra.*

Boone, although dealing with a felonious entry under N.C.G.S. 14-54(a), is applicable to this case insofar as it discusses

the meaning of "entry." There, the Court held that to be wrongful, an entry must be without the consent of the owner or anyone empowered to give effective consent to entry.

The state's evidence here established that defendant entered the office during the time it was open to the public. We hold the entry was with the implied consent of the occupier of the premises. The evidence fails to disclose that the defendant after entry committed acts sufficient to render the implied consent void *ab initio*. Further, defendant was not tried upon that theory in superior court but upon the basis that his initial entry into the office was wrongful.

The judgment of the superior court is

Reversed.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES THACKER

No. 7918SC745

(Filed 5 February 1980)

1. **Constitutional Law § 30— statements not made available during discovery— admission into evidence proper**

The trial court did not err in allowing defendant's incriminating statements into evidence over objection because the statements were not provided to defendant during discovery proceedings, since the district attorney provided defendant with the information as soon as it became available to him, and defendant could have requested a continuance if he considered the State's response to his request untimely.

2. **Criminal Law § 76.5— incriminating statements—voir dire—failure to make findings**

The trial court did not err in failing to make appropriate findings of fact in an order at the close of a voir dire hearing to determine the competency of defendant's incriminating statements, since the State's voir dire evidence was uncontradicted by defendant, and all the evidence showed that the statements by defendant were voluntary and made after appropriate warnings and waivers; furthermore, the court did enter an order containing detailed findings of fact after trial.

3. Criminal Law § 154.5— settlement of case on appeal by trial judge

When counsel disagree, only the trial judge is authorized and empowered by the Constitution to determine for the purposes of appeal what occurred during the trial.

4. Criminal Law § 73— statement that third person owned contraband—exclusion as hearsay

In a prosecution for possession and manufacture of marijuana, the trial court properly excluded as hearsay testimony by a witness that a third person had told her that the contraband in question belonged to him, and the testimony did not qualify as a declaration against penal interest.

5. Criminal Law § 51— expert witness—finding of expertise not required

Absent a request for a finding, it is not essential that the record show an express finding as to a witness's expertise.

APPEAL by defendant from *Walker (Ralph A.), Judge.* Judgment entered 7 March 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 January 1980.

Defendant was tried on charges of keeping liquor for sale, felonious possession of marijuana, and maufacture of marijuana. He was found not guilty of the manufacturing charge and guilty of the other two charges. From judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Associate Attorney Tiare B. Smiley, for the State.

Lee and Johnson, by Michael E. Lee, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant contends the court erred in allowing his incriminating statements into evidence over objection because the statements were not provided to him during discovery proceedings and for the failure of the trial court to enter an order finding facts and making conclusions of law at the close of the voir dire hearing to determine the competency of the statements.

[1] Defendant requested discovery of any oral statements made by him which the state intended to offer in evidence. The state gave this information to defendant's counsel the day before trial. The delay in responding to this request was not intentional, as the evidence on voir dire showed the district attorney did not have this information earlier. It was not in the investigating of-

ficer's prosecution summary and was not brought out in the district court hearings. If defendant's counsel regarded the state's response as untimely, he should have requested a continuance of the trial. This he did not do. Whether evidence should be excluded for failure to comply with the discovery statutes is in the sound discretion of the trial court, *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977), and is not reviewable on appeal except for abuse of discretion. *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211 (1976). We find no abuse of discretion by the trial court.

[2] Defendant further argues the court erred by failing to make appropriate findings in an order after the voir dire hearing. It is the better practice to make such findings. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). Findings of fact and conclusions of law are not required where there is no conflict in the testimony and all the evidence tends to show that proper warnings were given to defendant and that he knowingly waived his rights and voluntarily made the statements. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978); *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). The voir dire evidence of the state was uncontradicted by defendant. All the evidence showed the statements by defendant were voluntary, made after appropriate warnings and waivers.

The trial court did conclude that defendant's statements "are admissible as having been freely and voluntarily made after he was advised of his constitutional rights." Later, after trial, the court entered a detailed order, finding facts and making conclusions of law. Defendant has failed to show any prejudice from the belated entry of the order. In *Richardson, supra*, the Supreme Court held that defendant must show some prejudice from the entry of such order after trial in order to sustain his assignment of error. Defendant has failed to do so.

[3] Defendant also objects to the inclusion of the voir dire order as a part of the record on appeal. When counsel disagree, only the trial judge is authorized and empowered by the Constitution to determine for the purposes of appeal what occurred during the trial. *Rogers v. Asheville*, 182 N.C. 596, 109 S.E. 865 (1921).

[4] We also find no error in the court's evidentiary rulings. Defendant offered the testimony of Sandra Staley that John

Lewis (Flop) Cherry told her the contraband in question belonged to him. Clearly, the proffered testimony of Sandra Staley was inadmissible hearsay and the court properly excluded it. The testimony does not comply with the following required conditions to qualify as a declaration against penal interest and thus be admissible as an exception to the hearsay rule. There must be a showing that the declarant (Cherry) was beyond the jurisdiction of the court and that defendant had made a good faith effort to obtain his attendance at trial and that the declaration is an admission that declarant committed the crime in question and that the admission is inconsistent with the guilt of defendant. *State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978). None of these conditions is established in the record before us.

[5] Although the court did not make a finding that Officer Caviness was an expert in narcotics, the evidence showed he was an experienced narcotics officer with special training in that field. Absent a request for a finding, it is not essential that the record show an express finding as to the witness's expertise. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). Furthermore, counsel for defendant and the state stipulated that the contraband offered in evidence was 640 grams of marijuana, a Schedule VI controlled substance.

Defendant received a fair trial free of prejudicial error.

No error.

Chief Judge MORRIS and Judge HILL concur.

MARVEL LAMP COMPANY, A CORPORATION v. JAMES A. CAPEL T/A ADVANCED LIGHTING

No. 7926SC502

(Filed 5 February 1980)

Frauds, Statute of § 5— promise to answer for debt of another—insufficiency of letter

A letter written by defendant as president of a corporation stating that "although the above amount was purchased by the corporation and I am not personally liable, I did inform Marvel Lamp Company that I would try to pay

off this balance myself by paying what I could in installments as it [is] impossible for me to pay the complete balance due" was insufficient to constitute a definite promise to answer for the debt of another within the meaning of G.S. 22-1.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 17 April 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 January 1980.

Plaintiff filed its complaint against defendant for payment on a past-due account under which defendant allegedly has agreed to pay plaintiff $17,061.79 for goods and supplies. Defendant filed answer, denying that he purchased goods from plaintiff or that he is liable or indebted to plaintiff. Plaintiff moved to amend its complaint to state a claim against defendant Capel, president of Advanced Lighting, for breach of a promise in writing to pay the debt of Advanced Lighting Center. This claim was based on a letter which defendant wrote to Jeffrey Swanson, an authorized agent for collection of plaintiff's accounts. Interrogatories and answers thereto and requests for admissions and responses were filed.

The court allowed plaintiff's motion to amend. Defendant's answer to the amended complaint denied that he promised to pay for goods and supplies sold by plaintiff to Advanced Lighting or any other entity and alternatively asserted that if it is found that defendant did promise to pay such a debt, there was no consideration for such promise.

Defendant's affidavit in support of his motion for summary judgment states that he wrote the letter in his representative capacity as president of Advanced Lighting, and any representations or promises in the letter are the corporation's and not his. Plaintiff filed an answer and affidavit in response to defendant's motion for summary judgment as well as a cross motion for summary judgment. The court granted defendant's motion for summary judgment. Plaintiff appealed.

Newitt & Bruny, by John G. Newitt, Jr. and Richard M. Koch, for plaintiff appellant.

Perry, Patrick, Farmer & Michaux, by Richard W. Wilson, for defendant appellee.

ERWIN, Judge.

The sole question before us is whether a letter written by defendant, James A. Capel, is sufficient to be considered as a promise to pay the debt of another, Advanced Lighting? We answer, "No," and affirm the trial court.

The body of the letter from defendant to plaintiff's agent reads as follows:

"Gentlemen:

This letter is to inform you that Advanced Lighting Products, Inc. is no longer in business. All sales offices have been closed.

Although the above amount was purchased by the corporation and I am not personally liable, I did inform Marvel Lamp Company that I would try to pay off this balance myself by paying what I could in installments as it impossible [sic] for me to pay the complete balance due.

Very truly yours,
s / JAMES A. CAPEL
James A. Capel—President
ADVANCED LIGHTING PRODUCTS

Attention: Mr. Jeffrey Swanson:"

Plaintiff relies on *Supply Co. v. Person*, 154 N.C. 456, 458, 70 S.E. 745, 746 (1911), to support its position, in which case our Supreme Court held that the following language was a promise in writing, and sufficient under the Statute of Frauds; the forebearance to sue was a sufficient consideration; and defendant was liable for the debt as a guarantor of payment:

"I find that the dry-kiln is not completed, and when it is, which will be soon, I think you will get your money sooner than to sign a paper or papers for the time mentioned in your letter. Just as soon as the dry-kiln gets in operation I will see that your bill is paid."

In the case *sub judice*, the evidence does not establish what amount the defendant would pay plaintiff, the date payment would be made, or the event that would determine when payment would be due. The language of defendant's letter is insufficient to

constitute a definite promise to answer for the debt of another as required by G.S. 22-1. *Deaton v. Coble*, 245 N.C. 190, 95 S.E. 2d 569 (1956). The letter is so vague and indefinite that the writer's intentions are insufficient to support a cause of action. *Thomas v. Shooting Club*, 123 N.C. 285, 31 S.E. 654 (1898).

We hold that summary judgment was properly entered by the trial court for defendant; therefore, plaintiff was not entitled to judgment, in that the contents of the letter in question were too vague, indefinite, and uncertain to give rise to an action for breach of contract.

Judgment affirmed.

Judges CLARK and ARNOLD concur.

GARY A. SHAY v. RALPH EDWARD NIXON AND TAXICABS, INC. T/A YELLOW CAB COMPANY

No. 795SC474

(Filed 5 February 1980)

1. **Automobiles § 55— stopping vehicle without warning—sufficiency of evidence of negligence**

In an action to recover for personal injuries sustained by plaintiff policeman when his motorcycle collided with defendant's taxicab, evidence that defendant suddenly stopped his taxicab without giving a warning signal was evidence from which the jury could conclude that defendant's negligence was a proximate cause of the collision, and the trial court therefore properly submitted the negligence issue to the jury.

2. **Automobiles § 76.1— police officer pursuing vehicle—striking stopped vehicle—no contributory negligence as matter of law**

In an action by plaintiff policeman to recover for personal injuries sustained when his motorcycle collided with defendant's taxicab while plaintiff was in pursuit, plaintiff was not contributorily negligent as a matter of law in failing to keep a proper lookout or in following too closely, since plaintiff testified that immediately before the collision, he glanced down at his speedometer and that he was following standard police procedures when he did so, and since plaintiff, as a police officer, was required to pursue defendant and gain on him if he could.

Shay v. Nixon

APPEAL by plaintiff from *Reid, Judge*. Judgment entered 2 February 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 January 1980.

This is an action for personal injury. It was tried before a jury. The plaintiff's evidence showed that on 24 March 1976 he was an officer with the City of Wilmington Police Department. On that date, while on duty as a motorcycle patrolman, the plaintiff observed a taxicab operated by defendant Ralph Edward Nixon turn into Third Street from Dock Street without stopping at a stop sign. The taxicab was accelerating in speed while proceeding in the inside southbound lane of Third Street. Mr. Shay pursued the taxicab, and when he was five or six carlengths behind it, he turned on his blue light. As he was putting his foot on the pedal to start the siren, he glanced at his speedometer to check his speed. Mr. Shay testified this was normal police procedure. He further testified that he could see the taxicab with his peripheral vision while he was checking the speedometer. When Mr. Shay looked up, the taxicab had stopped in the inside southbound lane of Third Street, and he was unable to avoid a collision. The plaintiff offered evidence that the brake lights on the taxicab never came on and no signal was given by Ralph Edward Nixon that he was preparing to stop. At the conclusion of the evidence, the defendants made a motion for a directed verdict. The court was of the opinion that the motion should be allowed but in order to avoid a possible new trial, the court submitted the issues to the jury. The jury answered the issues favorably to the plaintiff, and the court granted the defendants' motion for judgment notwithstanding the verdict. G.S. 1A-1; Rule 50(b)(1). Plaintiff appealed.

Marshall, Williams, Gorham and Brawley, by Lonnie B. Williams, for plaintiff appellant.

Poisson, Barnhill, Butler and Britt, by Donald E. Britt, Jr., for defendant appellees.

WEBB, Judge.

The question raised by this appeal is whether the court should have granted the defendants' motion for a directed verdict at the end of all the evidence. The defendants' motion for directed verdict should have been allowed if the jury could have drawn no

conclusion from the evidence but that either the collision was not proximately caused by the negligence of defendant Ralph Edward Nixon, or that the contributory negligence of the plaintiff was a proximate cause of the collision.

[1] The evidence that Ralph Edward Nixon suddenly stopped the taxicab in the inside southbound lane of Third Street without giving a warning signal is evidence from which the jury could conclude the negligence of Ralph Edward Nixon was a proximate cause of the collision. *See Stith v. Perdue*, 7 N.C. App. 314, 172 S.E. 2d 246 (1970). The negligence issue was properly submitted to the jury.

[2] As to the contributory negligence issue, the defendant contends plaintiff failed to keep a proper lookout and that he was following too closely in violation of G.S. 20-152(a). The fact that there was a collision between the plaintiff's following vehicle and the vehicle being driven by defendant Nixon is some evidence that plaintiff was following too closely and that he failed to keep a proper lookout. The fact of the collision does not compel such a conclusion, however. *See Ratliff v. Power Co.*, 268 N.C. 605, 151 S.E. 2d 641 (1966). We must look at all the circumstances to determine if the jury must reach either or both of these conclusions. As a police officer, plaintiff was required to pursue defendant Nixon and gain on him if he could. *See* G.S. 20-114(a). We cannot hold that the jury could only conclude plaintiff was following too closely. Plaintiff testified he was following standard police procedures when he glanced down at his speedometer. We cannot hold the jury could only conclude that plaintiff failed to keep a proper lookout. The contributory negligence issue was properly submitted to the jury. *See Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 243 (1971).

It was error to grant the defendants' motion for judgment notwithstanding the verdict. We remand this case for entry of a judgment consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and MARTIN (Harry C.) concur.

DOROTHY O. PIERCE AND HUSBAND, AUBREY R. PIERCE v. DR. JAMES W. PIVER

No. 794SC370

(Filed 5 February 1980)

Physicians, Surgeons and Allied Professions § 12.1— tubal ligation improperly performed—subsequent pregenancy—sufficiency of complaint to allege malpractice

The trial court erred in granting defendant's motion to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted where plaintiff alleged that defendant improperly performed a tubal ligation upon her and that she became pregnant, and plaintiff sought compensation for her expenses and loss of services stemming from the pregnancy and for the costs of raising and providing for the child until the age of emancipation.

Judge WELLS concurring.

APPEAL by plaintiffs from *Tillery, Judge.* Judgment entered 7 February 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals 29 November 1979.

Plaintiffs brought this action seeking recovery for damages suffered as a result of alleged negligence and breach of contract on the part of defendant. The feme plaintiff alleged that she had engaged defendant to remove a tumor from her left ovary. She also alleged that she further engaged defendant to perform a bilateral tubal ligation at the same time, so that she would not again become pregnant. The operations were performed in November of 1976. On the 28th of December, 1977, feme plaintiff gave birth to a child. She prayed for damages to compensate her for her expenses and loss of services stemming from the pregnancy, and also for the costs of raising and providing for the child until the age of emancipation. Defendant moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b))6), and the trial court allowed the motion. From that dismissal plaintiffs appeal.

J. Harvey Turner, for the plaintiffs.

Marshall, Williams, Gorham & Brawley, by Ronald H. Woodruff, for the defendant.

MARTIN (Robert M.), Judge.

The only question presented by the appeal is whether the court erred in granting defendant's motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

In discussing Rule 12(b)(6), Justice Sharp, in *Sutton v. Duke*, 277 N.C. 94, 105-06, 176 S.E. 2d 161, 168 (1970), stated:

> At the beginning of this opinion we noted that the motion to dismiss, which tested "the legal sufficiency of the complaint," performed a function of the demurrer under the former practice. The motion to dismiss, however, will be allowed *only* when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant.

In *White v. White*, 296 N.C. 661, 667, 252 S.E. 2d 698, 702 (1979), Justice Exum stated:

> The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. [Citation omitted] In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. [Citation omitted] "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *Niece v. Sears, Roebuck & Co.*, 293 F. Supp. 792, 794 (N.D. Okla. 1968) (applying Federal Rule 12(b)(6)). Resolution of evidentiary conflicts is thus not within the scope of the Rule.

In *O'Neill v. Bank*, 40 N.C. App. 227, 232, 252 S.E. 2d 231, 235 (1979), speaking through Hendrick, J., we held:

> In North Carolina a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim, or in the disclosure of some fact that will necessarily defeat the claim. A complaint should not be dismissed for insufficiency unless it appears to

a certainty that plaintiff is entitled to no relief upon any state of facts that could be proved in support of the claim. [Citations omitted]

See Alltop v. Penney Co., 10 N.C. App. 692, 179 S.E. 2d 885, *cert. denied* 279 N.C. 348, 182 S.E. 2d 580 (1971).

The action is basically one for medical malpractice, sounding in negligence and breach of contract. Plaintiffs' complaint adequately stated a claim for relief cognizable under existing legal principles of this jurisdiction. Similar complaints, alleging negligence and breach of contract, have been found sufficient in other jurisdictions. *Jackson v. Anderson* (Fla. App.) 230 So. 2d 503 (1970); *Martineau v. Nelson* (Minn.) 247 N.W. 2d 409 (1976); *Vaughn v. Shelton* (Tenn. App.) 514 S.W. 2d 870 (1974).

It was improper to dismiss the action on defendant's Rule 12(b)(6) motion.

Reversed.

Judges HEDRICK and WELLS concur.

Judge WELLS concurring.

To the extent to which the majority opinion recognizes plaintiffs' claim for relief for recovery of fees paid to defendant, expenses incurred due to pregnancy and the delivery of the child, and for pain and suffering to the feme plaintiff due to the pregnancy and birth, occasioned or contributed to by defendant's negligence or breach of contract, I concur.

STATE OF NORTH CAROLINA v. CHARLES DAVIS

No. 796SC767

(Filed 5 February 1980)

Criminal Law § 102.9— prosecutor's reference to defendant as "mean S.O.B."— new trial

Defendant is entitled to a new trial because of the prosecutor's reference to him in the jury argument as a "mean S.O.B."

State v. Davis

APPEAL by defendant from *McConnell, Judge.* Judgment entered 2 March 1979 in Superior Court, HALIFAX County. Heard in the Court of Appeals 16 January 1980.

Defendant was charged in a bill of indictment, proper in form, for the offense of murder in the first degree of one Samuel Davis. Defendant was convicted by a jury of the offense of voluntary manslaughter and was sentenced to a term of confinement of not less than 15 nor more than 20 years. Defendant appealed.

Attorney General Edmisten, by Associate Attorney David Gordon, for the State.

Dwight L. Cranford and Thomas I. Benton, for defendant appellant.

ERWIN, Judge.

The record reveals the following:

> "Counsel for the State in the course of his argument to the jury stated that Rosa Davis, the mother of the defendant and the deceased, had had a rough time in her life, one son being a drunk and alcoholic, the other being a mean S.O.B.
>
> EXCEPTION NO. 30
>
> MR. CRANFORD: Objection.
>
> COURT: Let's move on."

Defendant assigns error in the form of a question:

> "Did the Court err in allowing the Assistant District Attorney to pursue a course of conduct designed and intended to prejudice the defendant and which did so; in failing to reprimand the Assistant District Attorney for his conduct and to admonish its repetition; and in denying the defendant's motion for a mistrial?"

We hold that this assignment of error has merit as it relates to the above argument made by the assistant district attorney for the State in his closing argument to the jury. We award defendant a new trial.

The district attorney or his assistant has wide latitude in making arguments to the jury. *State v. Britt*, 288 N.C. 699, 220

S.E. 2d 283 (1975); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290, *on remand*, 279 N.C. 388, 183 S.E. 2d 106 (1971); *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962); *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949); 4 Strong's N.C. Index 3d, Criminal Law, § 102.1, p. 518.

Ordinarily, an appellate court does not review the exercise of the trial judge's discretion in controlling jury argument unless the impropriety of the counsel's remarks is extreme and is clearly calculated to prejudice the jury. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955).

In the case *sub judice*, the contents of the argument of the assistant district attorney are highly improper, objectionable, and clearly used to prejudice the jury against defendant. The use of the term, "S.O.B.," in referring to a defendant directly or indirectly, is degrading and disrespectful. We do not approve such term, and the use of such prohibits defendant from receiving a fair and impartial trial under the laws of the State of North Carolina. *State v. Wyatt*, 254 N.C. 220, 118 S.E. 2d 420 (1961). The trial court did not take any action to correct this improper argument as required. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). This error is fatal.

We do not consider other errors assigned as they may not occur at a new trial.

Defendant is awarded a

New trial.

Judges MARTIN (Robert M.) and WELLS concur.

DR. TERRY O. BOWMAN v. WILLIAM A. HILL; JAY W. TERRELL AND WIFE, SHIRLEY H. TERRELL

No. 7922SC357

(Filed 5 February 1980)

Contracts § 27.1— agreement to construct parking lot—no binding obligation created

Where defendants sold to plaintiff an office building which adjoined a vacant lot belonging to them, an agreement for the development of the adjoining land which was entered into on the same day as the conveyance of the office building and which provided for the construction of a joint parking lot merely expressed a wish or request and in no way created an obligation for defendants to develop their property in any way at any time.

APPEAL by defendants from *Hairston, Judge.* Judgment entered 5 January 1979 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 28 November 1979.

On 1 August 1974, defendants sold and conveyed to plaintiff a parcel of land on Anderson Street in the Town of Denton. A building which plaintiff had previously constructed for use as his professional office was located on the land. The front of the office building faced north—toward vacant land owned by defendants. One side of the building ran along Anderson Street.

On the date of conveyance the parties entered into a purported agreement for the development of the adjoining land providing *inter alia* as follows:

> . . . whereas the parties of the second part [defendants] desire to construct a building adjacent to the building of the party of the first part [plaintiff] at some future time; and WHEREAS, all of the parties are desirous of having one large inter-connecting parking lot located in front of the buildings and sidewalks connecting to said parking lots;
>
> WITNESSETH:
>
> That for the mutual considerations expressed hereinabove, the parties do contract as follows:
>
> 1. Upon completion of the paving of the parking lot of the parties of the second part [defendants] and at their re-

quest, the party of the first part [plaintiff] hereby agrees to construct a parking area of the same material . . . .

Defendants' land remained vacant and undeveloped from the time the agreement was made on 1 August 1974 until 4 February 1977. On that date, defendants conveyed their land to Harp and Dockham who constructed an office building facing Anderson Street and lying approximately fifty-seven feet north of plaintiff's office. The building was located where plaintiff had contemplated the parties' parking lot would be placed.

Plaintiff sued for breach of contract and fraud. Judgment was entered 5 January 1979 granting plaintiff damages. From that judgment, defendants appealed.

Brinkley, Walser, McGirt, Miller & Smith, by Gaither S. Walser, for plaintiff appellee.

Grubb, Penry & Penry, by Robert L. Grubb, for defendant appellant.

HILL, Judge.

Defendant assigns as error the lower court's judgment that defendants were obligated to plaintiff under the terms of the written agreement. We find that the court was in error.

> Where the language of a contract is plain and unambiguous the construction of the agreement is a matter of law for the court, and a *patent defect* [emphasis added] or omission cannot be cured by matters outside the instrument.
>
> . . . [T]he court may not, under the guise of construction, ignore or delete any of its provisions, nor insert words into it, but must construe the instrument as written . . . . 3 Strong's N.C. Index 3d, Contracts § 12.1, pp. 391-2.

One of the elements of a valid contract is a promise, which has been defined as an assurance that a thing will or will not be done. "The mere expression of an intention or desire is not a promise, however . . . ." 17 Am. Jur. 2d, Contracts § 2, p. 334.

> An apparent promise which, according to its terms, makes performance optional with the promisor no matter what may happen, or no matter what course of conduct in other

respects he may pursue, is in fact no promise. Such an expression is often called an illusory promise. Williston, Contracts § 1A (3d ed. 1957).

When we give the ordinary and usual meaning to the words of the contract—desire and desirous—it is apparent that they express a wish or request. Certainly, they do not carry the thrust of a promise to do or refrain from doing anything with regard to the remaining property. There is no expressed obligation to develop the property at anytime.

In the case of *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946), the plaintiff sued to recover a sales commission for procuring a purchaser who was ready, willing, and able to buy land on terms set out in an agreement. The trial court interpreted the agreement between the parties to mean that the commission was to be paid "when"—and only when—"the deal is closed up." The deal never closed, and the Court said at p. 306 that,

> It can make no difference whether the event be called a contingency or the time of performance. Certainly, under either construction, the result would be the same; since, if the event does not befall, or a time coincident with the happening of the event does not arrive, in neither case may performance be exacted. Nor will it do to say that a promise to pay 'when the deal is closed up' is a promise to pay when it ought to be closed up according to the terms of the contract. Such is not the meaning of the words used. It is the event itself, and not the date of its expected or contemplated happening, that makes the promise to pay performable. *AMIES v WESNOFSKE*, 255 NY 156, 174 NE 436, 73 ALR 918.

By the conveyance of the property on 4 February 1977, the defendants served notice to the plaintiff, and to all the world, that they would never develop the property, and such conveyance and notice terminated the agreement, if any there was.

For the reasons stated above, the decision of the court below is

Reversed.

Chief Judge MORRIS and Judge PARKER concur.

ELIZABETH ANN TAYLOR v. JACK HAYES

No. 7921DC421

(Filed 5 February 1980)

Evidence § 40.1; Landlord and Tenant § 19.1— tenant's action for deceptive trade practices and return of deposit—prejudicial opinion testimony

In an action to recover for unfair and deceptive trade practices in the lease of an apartment and to obtain a refund of a security deposit, the admission of plaintiff's testimony that on one occasion when she sought a refund of her security deposit, defendant "ran up his back steps through his back door through his house and got out the front door, and I thought he had gone to get a gun or something so we left" constituted prejudicial error since the testimony was nothing more than opinion and tended to elicit sympathy for plaintiff and antipathy toward defendant.

APPEAL by defendant from *Keiger, Judge.* Judgment entered 15 November 1978, in District Court, FORSYTH County. Heard in the Court of Appeals 5 December 1979.

Plaintiff was a tenant of the defendant from 11 March 1978 to 18 March 1978 in an apartment located at 15½ Monmouth Street in Winston-Salem, North Carolina. Plaintiff alleged that defendant made untrue and misleading representations which induced her to enter into a rental agreement for the apartment; that the apartment was not habitable. Plaintiff moved out eight days later and brought this action, contending that defendant's misrepresentations and concealments constituted unfair and deceptive trade practices under the provisions of G.S. 75-1.1. Plaintiff also sought a refund of her security deposit. Defendant counterclaimed for damages to the apartment, contended that the lease was for one year, and sought to collect eleven months' rent under the terms of the lease. The jury answered issues in favor of the plaintiff, granting her recovery of her security deposit of $175.00 and the sum of $785.00 for damages otherwise sustained. The judge trebled the damages under the provisions of G.S. 75-1.1 and entered judgment accordingly.

Defendant appealed.

Ellen W. Gerber, of Legal Aid Society of Northwest North Carolina, Inc., for plaintiff appellee.

Tanis & Tally, by David R. Tanis, and White & Crumpler, by G. Edgar Parker, for defendant appellant.

HILL, Judge.

Of the twenty-five arguments brought forward by defendant, we find all exceptions except one to be without merit.

Plaintiff had sought a refund of her security deposit on several occasions after moving out and had been rebuffed by defendant. The record indicates defendant scared plaintiff's children on one occasion when he screamed at plaintiff. Thereafter, plaintiff and her boyfriend again sought a refund of the security deposit, and the boyfriend admonished the defendant that he had "no right to talk to [plaintiff] in this way."

Thereupon, plaintiff testified:

> He [defendant] ran up his back steps through his back door through his house and got out the front door, and I thought he had gone to get a gun or something so we left.

The defendant objected and moved to strike, which motion was overruled.

This was error and sufficiently prejudicial to require a new trial. Such testimony was nothing more than opinion and was incompetent. Plaintiff had no way of knowing what the defendant was going to do.

A witness must speak of facts within his own knowledge. *Tyndall v. Hines Co.*, 226 N.C. 620, 623, 39 S.E. 2d 828 (1946). "Moreover, a witness's opinion of another person's intention on a particular occasion is generally held to be inadmissible." (Citations omitted.) *State v. Sanders*, 295 N.C. 361, 369-70, 245 S.E. 2d 674 (1978).

A careful reading of the record before us reveals extreme tension between the parties during their negotiations after signing the lease and even during the trial. To permit such testimony to remain before the jury under these circumstances could elicit sympathy for the plaintiff and antipathy toward defendant.

For this reason, the judgment in the cause is vacated, and the defendant is granted a new trial.

New trial.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ABRAHAM BROCKENBOROUGH

No. 7912SC774

(Filed 5 February 1980)

1. **Criminal Law §§ 7, 73.2— entrapment—evidence of statements by informant not hearsay**

Since statements by a paid informant were not offered to prove the truth of the matters asserted (*i.e.*, that the informant was addicted to heroin and that she was sick) but instead were offered to show that the statements were made, and that through them defendant was induced to commit an offense he would not otherwise have committed, the statements were not hearsay and the trial court erred in excluding them in a prosecution for possession with intent to sell and sale of heroin.

2. **Constitutional Law § 65— State required to attempt to locate paid informant**

There was no merit to defendant's contention that the trial court erred in failing to require the State to make an affirmative effort to locate a paid informant, since, prior to arraignment and trial, the court declared the informant a material witness and ordered the State to furnish defendant with the best information available to the district attorney and local law enforcement officers as to the informant's whereabouts and it was further ordered that if an address for the informant was found, the State was to inform the court and defendant.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 27 April 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 January 1980.

Defendant was charged with possession with intent to sell and sale of the drug heroin. Sufficient evidence was presented by the State to convict defendant of both charges. Defendant relied on the defense of entrapment and contended that he had met the State's witness, undercover agent Green, through Vicki McArthur, a longtime personal friend; that Vicki McArthur was a paid informant of the State; and that he was encouraged by Green to find heroin for Vicki McArthur. Defendant offered testimony as to conversations he had with McArthur. The trial court excluded this testimony on the ground it was hearsay.

From a guilty verdict and sentence imposed thereon, defendant has appealed.

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

Barrington, Jones, Witcover, Carter and Armstrong, by C. Bruce Armstrong, for defendant appellant.

WEBB, Judge.

[1] We hold the trial court committed prejudicial error in refusing to allow the defendant to testify as to the conversations with the paid informant McArthur. If allowed, he would have testified that McArthur made numerous personal and telephone contacts with him over a four-day period in September 1978; that she asked him to find her some heroin, that he refused and tried to talk her out of using it; and that she repeatedly told him she needed it and that "she was sick." This was evidence from which the jury could have concluded the defendant was entrapped by the State. *See State v. Stanley,* 288 N.C. 19, 215 S.E. 2d 589 (1975). As these statements were not offered to prove the truth of the matters asserted (i.e., that McArthur was addicted to heroin and that "she was sick") but instead were offered to show that the statements were made, and that through them, defendant was induced to commit an offense he would not otherwise have committed, these statements were not hearsay. *See* 1 Stansbury's N.C. Evidence, § 141 (Brandis rev. 1973) and the cases cited therein for situations where declarations may be admitted for non-hearsay purposes.

[2] Defendant also assigns as error the trial court's failure to require the State to make an affirmative effort to locate Vicki McArthur. We find this contention is without merit. Prior to arraignment and trial, the court declared McArthur a material witness and ordered the State to furnish defendant with the best information available to the district attorney and local law enforcement officers as to McArthur's whereabouts. It was further ordered that if an address for McArthur was found, the State was to inform the court and defendant. We hold this was all the State was required to do.

New trial.

Judges PARKER and ARNOLD concur.

IN RE: CONTEMPT PROCEEDING OF TALBOT MICHAEL SMITH

No. 798SC719

(Filed 19 February 1980)

1. **Attorneys at Law § 2— foreign attorney—admission to practice for limited purpose—conditional motion**

G.S. 84-4.1 does not permit an out-of-state attorney to move for admission to practice in a court of this State for a limited purpose on a conditional basis, and the trial court could properly disregard a motion conditioned on the allowance of a continuance for eight weeks and rule on a prior motion which was not conditional, especially where the conditional motion was not signed by the out-of-state attorney.

2. **Attorneys at Law § 2— foreign attorney—motion for permission to appear in criminal trial—letter from judge to defendant as order allowing motion**

A letter from the trial judge to a criminal defendant stating that the judge was waiving the requirement of local counsel and allowing the motion of a foreign attorney to appear for defendant and represent him in the trial of his cases and ordering the attorney to appear for trial on a certain date constituted a sufficient "order" in response to the foreign attorney's motion for permission to appear for defendant where the judge sent a copy of the letter to the attorney and filed a copy for the record.

3. **Attorneys at Law § 2; Contempt of Court § 2.2— order for attorney to appear for trial—order not void—basis for contempt**

The trial court's order waiving the requirement of local counsel, allowing the motion of foreign counsel to appear for defendant in a criminal trial and ordering the foreign counsel to appear for trial on a certain date was not void and could be the basis of contempt proceedings against the attorney where it was a deferred ruling on foreign counsel's motion for admission to practice for a limited purpose.

4. **Attorneys at Law § 2; Contempt of Court § 2.2— court's waiver of local counsel—order to foreign attorney to appear for trial—basis for contempt**

Even if a trial judge has no discretion to waive the requirement of local counsel found in G.S. 84-4.1(5) before admitting a foreign attorney to practice on a limited basis in this State, the Court's order waiving local counsel, permitting foreign counsel to appear in a case, and ordering that the foreign attorney appear for trial on a certain date would be merely erroneous, not void *ab initio*, and could be the basis for contempt proceedings against the attorney because of his failure to appear as ordered.

5. **Contempt of Court § 2.2— failure of foreign attorney to appear for trial—contempt of court**

The willful and deliberate failure of a foreign attorney to appear for the trial of a criminal case as ordered by the court constituted criminal contempt under the provisions of G.S. 5A-11(a)(1), (3), (6) and (7).

6. Contempt of Court § 2.2; Process § 9.1— contempt proceedings—personal jurisdiction over foreign attorney

The superior court had personal jurisdiction over a foreign attorney in contempt proceedings against the attorney because of his failure to appear for trial to defend a criminal defendant as ordered by the court where the attorney was "engaged in substantial activity within this State," G.S. 1-75.4(1)(d), and consented to the jurisdiction of the court by presenting his motion to be admitted to the court *pro hac vice*, and where an order notifying the attorney of the contempt charges and allowing him 60 days to respond thereto was sent to the attorney by certified mail, return receipt requested, at the address he gave the court in his motion to be admitted to the court. G.S. 15A-15(a); G.S. 1A-1, Rule 4(j)(1)c.

7. Contempt of Court § 2.2— contempt proceedings—failure of foreign attorney to appear for trial—plenary hearing

A plenary hearing held by the trial court before holding respondent attorney in contempt for failure to appear for a criminal trial as ordered by the court complied with G.S. 5A-15 and the U.S. and N.C. Constitutions.

8. Contempt of Court § 2.2; Judges § 5— contempt proceeding against attorney—failure of trial judge to recuse himself

The trial judge was not required to recuse himself from presiding over proceedings to hold an attorney in contempt for his failure to appear for a criminal trial as ordered by the court because the judge mailed a proposed contempt order to respondent attorney prior to the hearing where the facts contained in the proposed order did not depend upon the credibility of any witnesses and were not contested or contradicted at the subsequent plenary hearing; the punishment proposed by the draft order did not indicate any bias or prejudgment on the part of the judge but gave notice to respondent of the seriousness of the charges and the possible consequences in the event the charges were proven beyond a reasonable doubt; and the actions taken by the attorney were not personal affronts to the judge and there were no marked personal feelings or personal stings on the judge's part to create an appearance of unfairness.

APPEAL by respondent from *Ferrell, Judge.* Judgment entered 20 March 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 10 January 1980.

This criminal contempt citation against Talbot Michael Smith, a licensed attorney in Michigan, evolved out of circumstances surrounding the criminal prosecution of Leslie "Ike" Atkinson and fifteen other defendants for controlled substance offenses under the laws of North Carolina. Judge Ferrell's proposed contempt order also found Richard Barry Mazer, a licensed attorney in California, in direct criminal contempt of court, but Mazer avoided final judgment of contempt by apologizing to the court and

making restitution for standby counsel fees. Although this contempt action is tangential to Atkinson's prosecution, certain facts concerning pretrial procedures in that case are necessary for an understanding of this case on appeal.

On 27 March 1978 a bill of indictment was returned against Atkinson. On 26 June 1978 Talbot Smith, along with an attorney from Georgia, appeared on Atkinson's behalf and participated in an informal conference in Judge Ferrell's chambers relative to pretrial discovery. Smith was not present when Atkinson was called for arraignment 11 September 1978, but at that time he addressed the court through an attorney for another defendant. The court was informed that Smith was contesting jurisdiction over Atkinson and that Smith requested an adjournment of the arraignment, in part to retain local counsel for Atkinson. The request for adjournment was allowed, and two days later Smith was present at Atkinson's arraignment. He announced that he was appearing on behalf of Atkinson and requested an adjournment of ten days, in order to retain local counsel and prepare certain motions. During this proceeding, when Smith objected to an order served on Atkinson for nontestimonial identification, Judge Ferrell responded: "Well, sir; I don't know how I can do for you in that regard until you have been admitted to practice before the Court." Also at this session Atkinson said that Talbot Smith would be his attorney in all further proceedings. Atkinson's arraignment was continued "upon motion of Talbot Smith."

On 2 October 1978 Stephen Smith, an attorney licensed in North Carolina and appearing in a limited representative position as local counsel, moved for a thirty-day continuance. Judge Ferrell announced to Stephen Smith that "Mr. Talbot Smith will not be permitted to appear if there isn't someone to appear with him from the Bar of North Carolina." Talbot Smith, who was present at this time, attempted to explain the problems he was having in obtaining local counsel. Judge Ferrell instructed Atkinson that unless he had retained local counsel by 4 October 1978, the court would appoint counsel or standby counsel for him. Judge Ferrell also announced that he would rule on a motion for Talbot Smith's appearance "whenever anyone files such a Motion."

At Atkinson's arraignment on 4 October, no attorney was present on his behalf. He informed the court that he was in the

process of retaining Stephen Smith from Raleigh to represent him, "along with my counsel, Talbot Smith from Michigan." He then signed a waiver of court-appointed counsel.

On 30 October 1978 Stephen Smith again appeared with a written notice of limited representation for pretrial motions. When he attempted to defer to Talbot Smith on a particular question, the court said Talbot Smith could not be heard until he had been approved to appear in North Carolina. Stephen Smith's verbal motion to admit Talbot Smith to practice in the courts of North Carolina for the sole purpose of representing Atkinson was then denied because it did not comply with the appropriate statute, N.C.G.S. 84-4.1. A written motion was submitted, but the court again found it was defective. The motion was tendered to the clerk, however, and permission to file a written amendment was given.

On 31 October 1978 a proper motion was submitted, and Judge Ferrell announced he would rule on the motion "in due course." He set the trial date as 3 January 1979. On 27 November Stephen Smith asked that the court "enter a record" concerning the motions; in addition to the motion of 31 October, a renewed motion had been submitted on 17 November. Judge Ferrell's response was that until a North Carolina attorney had been retained generally, not just on a limited basis, he could not entertain a motion to admit foreign attorneys, "although it's my intention likely to do so as I have indicated to you on a telephone conversation or conversations about this matter."

On 29 November Stephen Smith wrote to Judge Ferrell, informing him that his limited representation of Atkinson had been terminated "effective today." Judge Ferrell then wrote to Atkinson, announcing that he was waiving the local counsel requirement and allowing Talbot Smith's motion to appear for him. A copy of the letter was sent to Talbot Smith, notifying him that the case would be called for trial on 3 January 1979. Talbot Smith then informed the judge that unless the case was continued for at least eight weeks, he would be unable to represent Atkinson. He reiterated in a later letter: "[U]nless we have your assurance by December 29, 1978, that the trial of Mr. Atkinson's case will be continued as requested herein, you are respectfully advised that we shall not appear in Goldsboro on January 3, 1979."

When the case was called for trial on 3 January 1979, Talbot Smith was not present. Standby counsel was appointed for Atkinson. The case was concluded on 19 January, after which Judge Ferrell announced that he believed Talbot Smith to be in contempt for failure to appear on 3 January and therefore would conduct an inquiry into the matter at the end of March. He sent by certified mail, return receipt requested, a proposed contempt order to Talbot Smith, giving summary notice of measures to be imposed. The envelope was returned unopened and was entered into the record. On 20 March 1979 Judge Ferrell, after hearing evidence on behalf of the alleged contemnor, ordered and decreed that Talbot Smith was in direct, willful, and criminal contempt; he sentenced Smith to thirty days in jail and imposed a $500 fine. Smith was not present at the hearing.

Respondent appeals from this judgment.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Loflin, Loflin, Galloway & Acker, by Thomas F. Loflin III and James R. Acker, for respondent appellant.

MARTIN (Harry C.), Judge.

[1] This appeal presents several questions for our consideration. First, does N.C.G.S. 84-4.1 contemplate Talbot Smith's being able to make his motion for admission for a limited purpose as an out-of-state attorney conditional upon a specific occurrence? We answer this question in the negative.

On 31 October 1978 Stephen Smith, a North Carolina attorney appearing in a limited representative capacity for defendant Atkinson, submitted to Judge Ferrell a motion signed by Talbot Smith, a Michigan lawyer, for admission for a limited purpose as an out-of-state attorney pursuant to N.C.G.S. 84-4.1. Supporting statements required by the statute accompanied the motion. Judge Ferrell announced he would rule on the motion "in due course." On 17 November 1978, Stephen Smith filed a renewed motion on behalf of Talbot Smith, with a request for immediate hearing. This motion, not signed by Talbot Smith, contained the following language:

11. . . . Stephen T. Smith is further informed by Talbot Smith and Richard Mazer that their renewed motions for limited practice are conditioned upon the court continuing the trial of this case for a minimum of eight weeks so that said attorneys may have an opportunity to properly prepare for the trial of this case after their admission to this case.

12. Furthermore, Stephen T. Smith is informed by Talbot Smith and Richard Mazer that if the court will not continue the trial of this case for a minimum of eight weeks from the date it rules on the renewed motions for limited practice, that said renewed motions for limited practice shall be deemed to have been withdrawn by Talbot Smith and Richard Mazer.

. . . .

WHEREFORE, Defendant prays the Court that:

1. It reconsider its previously entered order denying the motions for limited practice by Talbot Smith and Richard Mazer and permit said attorneys to represent the defendant as trial counsel herein contingent upon the trial of this case being continued for a period of not less than eight weeks from the date the court grants the renewed motions for limited practice by out of state attorneys.

The inclusion of this condition was apparently prompted by testimony of counsel for codefendants in Atkinson's case, given at a hearing on 30 October 1978, to the effect that it would take eight weeks from the receipt of discovery materials to prepare for trial.

We do not think that N.C.G.S. 84-4.1 permits an out-of-state attorney to move for admission for a limited purpose in North Carolina on a conditional basis. Although the statute does not contain a specific prohibition against a conditional application, one of its requirements is that the movant "shall attach to his motion a statement that unless permitted to withdraw sooner by order of the court, he will continue to represent his client in such proceeding until the final determination thereof, ..." N.C. Gen. Stat. 84-4.1(3). This requirement calls for a firm commitment from the movant which is contrary in spirit to a conditional application for admission for a limited purpose. We think the judge who con-

siders such a conditional motion can treat the condition as a nullity, especially when the facts are similar to those in this case. Talbot Smith had already submitted a motion for admission for a limited purpose on 31 October. Judge Ferrell had not yet ruled on that motion when Stephen Smith filed a renewed, conditional motion on 17 November 1978. This conditional motion was not signed by Talbot Smith. Judge Ferrell was correct in disregarding the conditional motion and continuing to consider the motion of 31 October.

[2] Our next inquiry is to determine whether Judge Ferrell's letter of 6 December 1978 was a sufficient "order" in response to Talbot Smith's motion of 31 October. For the following reasons we think that it was.

An order is a mandate, precept, command or direction authoritatively given by a court or judge. Black's Law Dictionary 1247 (4th ed. rev. 1968). As a general rule, some entry or record of an order is made. 56 Am. Jur. 2d Motions, Rules, and Orders § 38 (1971). These fundamental requirements were complied with here.

When Judge Ferrell wrote to Atkinson on 6 December 1978, he sent a copy of the letter to Talbot Smith and filed a copy for the record 8 December 1978. The letter contained the following response to Talbot Smith's motion for admission for a limited purpose:

> I am concerned that your Sixth Amendment Constitutional rights and Due Process guarantees are protected to the fullest extent. Since you told me in open court that you desire Mr. Talbot Smith and Mr. Richard Mazer to represent you, and due to the nature and seriousness of the charges against you, and since Mr. Talbot Smith obviously has expended considerable efforts over a long period of time in preparing your cases for trial, I am, in my discretion, now waiving the requirements of North Carolina counsel, and do now hereby allow the Motion of Mr. Talbot Smith and Mr. Richard Mazer to appear for you and represent you in the trial of your cases.
>
> As you are aware, the cases are scheduled for trial in Wayne County, North Carolina, beginning January 3, 1979. You are hereby advised, therefore, that the cases will stand

> for trial at that time with counsel of your choice, Mr. Talbot Smith and Mr. Richard Mazer now being formally admitted to the North Carolina court for the general purpose of representing you at the trial of your cases, and any subsequent proceedings.

The following instruction to Talbot Smith was also included:

> I am by copy of this letter addressed to your counsel at the addresses listed in their petitions advising them of the ruling of the court, and instructing them that the cases will be called for trial at the appointed session of court beginning January 3, 1979.

The court, in writing, ordered Talbot Smith to appear on 3 January 1979. Furthermore, in a letter to Talbot Smith dated 19 December 1978 and also filed in the case, the judge informed him that any motion to continue Atkinson's case would be determined in open court 3 January 1979. The letter concluded: "Should the cases not be continued, you and Mr. Smith, pursuant to your affidavit to remain in the case, will be expected to represent Mr. Atkinson on the trial of his cases commencing January 3, 1979."

[3] Having decided that Judge Ferrell's letter was a sufficient order, we must make a further inquiry into its nature. This is crucial, for Talbot Smith's duty to obey Judge Ferrell's order to appear for Atkinson's trial on 3 January 1979 depended upon whether it was lawful. Willful disobedience of an order which is void for lack of jurisdiction cannot be made the basis for contempt proceedings. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962); *Patterson v. Patterson*, 230 N.C. 481, 53 S.E. 2d 658 (1949). But disobedience of an order made by a court within its jurisdiction and power is a contempt, although the order may be clearly erroneous. *State v. Sawyer*, 223 N.C. 102, 25 S.E. 2d 443 (1943).

We hold that Judge Ferrell's order to Talbot Smith was not void. It was a response to Smith's original motion for admission for a limited purpose which the judge had deferred ruling on. Respondent takes no exception to the judge's conclusion:

> (4) That the Court deferred ruling on the original application for limited practice for the sole reason that local counsel had not been retained for the entire trial as required by GS 84-4.1.

Clearly Judge Ferrell had jurisdiction and power to respond to that motion.

[4] Respondent argues that Judge Ferrell had no "lawful authority" to direct Talbot Smith to appear on 3 January 1979 to represent Atkinson while he did not have the benefit of assistance of North Carolina counsel. This argument raises directly the question whether a judge can, within his discretion, waive the requirement of local counsel found in subsection (5) of N.C.G.S. 84-4.1.

It is true that the statute contains the strict admonition that an out-of-state attorney may be admitted to practice on a limited basis in North Carolina "only upon compliance with the following conditions precedent." Five conditions are then listed, and one of these reads:

> (5) He shall attach to his motion a statement to the effect that he has associated and has personally appearing with him in such proceeding an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, or any disciplinary matter, with the same effect as if personally made on such foreign attorney within this State.

Subsection (6) then grants the court discretionary power to allow or reject the application even after all the conditions have been complied with. The statute is silent as to whether the court may, within its discretion, waive any of the conditions.

In *State v. Scarboro*, 38 N.C. App. 105, 247 S.E. 2d 273, *disc. rev. denied*, 295 N.C. 652, 248 S.E. 2d 256 (1978), *cert. denied*, 440 U.S. 938 (1979), the trial court did not require written motions under N.C.G.S. 84-4.1 and, more pertinently, defense counsel from Alabama did not associate local counsel for the trial. Defendant argued on appeal that the court erred in allowing out-of-state counsel to appear without strictly complying with the statute. This Court held that there was no error, finding that defendant had desired Alabama counsel and did not object to their competency. The Court stated that the statute upon which defendant relied was not designed for his protection.

> It is apparent that this statute was intended to subject foreign counsel to the jurisdiction of this State's courts on a continuing basis. G.S. 84-4.1(5) provides for mandatory association of local counsel so that at all times in a proceeding the court has power to compel, if necessary, foreign counsel to fulfill the duties placed upon them by G.S. 84-4.1 (1-4).

Id. at 107, 247 S.E. 2d at 274. Although *Scarboro* is not directly on point, it may be cited analogously as authority for allowing a trial judge to waive one or more of the conditions mandated by the statute.

Even assuming *arguendo* that the judge cannot waive the requirement for local counsel, we think the order would be merely erroneous, not void *ab initio*. If the trial court was empowered to issue an order, the parties are bound even though the order later may be found to have been based on a misinterpretation of the law. *Godsey v. Poe*, 36 N.C. App. 682, 245 S.E. 2d 522 (1978). Dissatisfaction with an order erroneously issued should be expressed through appeal or by motion to dissolve, not by open defiance. *Massengill v. Lee*, 228 N.C. 35, 44 S.E. 2d 356 (1947). The rule in North Carolina is that one cannot take it upon himself to reverse or ignore an erroneous judgment. *State v. Goff*, 264 N.C. 563, 142 S.E. 2d 142 (1965). We think that Talbot Smith had a duty to appear on 3 January 1979 as ordered. At that time, or before, he could have contested the order on the ground that Judge Ferrell lacked authority to waive the local counsel requirement, but he had no right to openly defy the order and not appear for the trial.

[5] The trial court correctly held respondent Smith in contempt of court. His conduct in failing to appear for trial on 3 January 1979 as ordered or instructed constituted criminal contempt under the following provisions of N.C.G.S. 5A-11(a):

> (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
>
> (3) Willful disobedience of . . . a court's lawful . . . order . . . or instruction . . ..
>
> (6) Willful . . . failure by an officer of the court to perform his duties in an official transaction.

(7) Willful . . . failure to comply with schedules . . . of the court resulting in substantial interference with the business of the court.

It is generally held that the willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt. *See* Annot., 97 A.L.R. 2d 431 (1964); *State v. Verbal*, 41 N.C. App. 306, 254 S.E. 2d 794 (1979).

We are not required to determine whether attorney Smith's failure to appear on 3 January 1979 as ordered constituted direct or indirect contempt. Judge Ferrell gave Smith the benefits of a plenary hearing before the adjudication of contempt. This was more than Smith was entitled to as a matter of right if his acts were direct contempt and all he was entitled to if they were indirect contempt. Under N.C.G.S. 5A-15(a) Judge Ferrell could have provided Smith a plenary hearing if the acts were direct contempt and was required to do so if the acts were indirect contempt.

[6] The court issued an order notifying Smith of the contempt charges and allowing him sixty days to respond to the charges. This order was mailed to Smith at the address he gave the court in his motion to be admitted in the case *pro hac vice*. The service of the order upon Smith was pursuant to N.C.G.S. 1A-1, Rule 4(j)(1)c, North Carolina Rules of Civil Procedure. This method of service was proper to comply with the requirement of N.C.G.S. 5A-15(a) that "[a] copy of the order must be furnished to the person charged." Where the court has personal jurisdiction as provided in N.C.G.S. 1-75.4, service under the above rule is appropriate. One of the bases for obtaining personal jurisdiction is where the party to be served is "engaged in substantial activity within this State." N.C. Gen. Stat. 1-75.4(1)d. Where an attorney has been admitted to practice in North Carolina *pro hac vice* to defend a person charged with criminal offenses, he is "engaged in substantial activity within this State." Also, Smith submitted himself to the jurisdiction of the court and consented thereto by presenting his motion for admission to the court *pro hac vice*. Jurisdiction over the person may be obtained by consent. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929 (1979). We hold the court had and has personal jurisdic-

tion over respondent Smith. While it is true that the letter to Smith was returned to the court, this did not vitiate the notice to respondent Smith. One cannot by his refusal to accept notice frustrate the courts in the due administration of justice. Smith obviously had actual notice of the charges and hearing date and place. Attorney Thomas Loflin appeared in court on 19 March 1979 and stated to the judge that he represented Smith in the hearing. It would have been unethical for Loflin to do so without Smith's prior authorization to Loflin to represent him. It follows that after Smith received knowledge of the charges and notice of hearing, he obtained Loflin to represent him.

[7] At the hearing Loflin made motions on behalf of Smith, produced testimony for him, argued his contentions to the court, and in general represented him during the plenary hearing. At the conclusion of the hearing, the court denied Smith's motions to dismiss and that Judge Ferrell recuse himself. Judge Ferrell found Smith guilty of contempt, made findings of fact and entered judgment as required by N.C.G.S. 5A-15(f). None of the facts found were in dispute. Respondent does not contend in his brief that the facts found are not established beyond a reasonable doubt. Judge Ferrell held, and we agree, that they were established beyond a reasonable doubt. *Jackson v. Virginia*, --- U.S. ---, 61 L.Ed. 2d 560 (1979). We hold the plenary hearing on 19 and 20 March 1979 complied with N.C.G.S. 5A-15 and the constitutions of North Carolina and the United States.

[8] We turn now to the question whether Judge Ferrell should have recused himself from presiding over the contempt proceedings of 19 and 20 March 1979.

"If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." N.C. Gen. Stat. 5A-15(a). Respondent argues that by Judge Ferrell's dictating and mailing the original draft of an order setting out the facts and conclusions with respect to Smith's alleged contempt, he expressed an opinion as to his guilt and could not have had an unbiased mind or given Smith a fair trial. Smith relies upon *Taylor v. Hayes*, 418 U.S. 488, 41 L.Ed. 2d 897 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed. 2d 532 (1971); *Ponder v. Davis*, 233 N.C. 699, 65 S.E. 2d 356 (1951); *In re Paul*, 28

N.C. App. 610, 222 S.E. 2d 479, *disc. rev. denied*, 289 N.C. 614, 223 S.E. 2d 767 (1976).

The facts set out in the draft order are all found in and supported by the record on appeal. The proposed legal conclusions contained in the draft order are all supported by those facts. The facts did not depend upon the credibility of any witnesses. None of them were contested or contradicted at the subsequent plenary hearing. All were established from the record beyond a reasonable doubt.

In re Dale, 37 N.C. App. 680, 247 S.E. 2d 246 (1978), and *In re Robinson*, 37 N.C. App. 671, 247 S.E. 2d 241 (1978), relied upon by respondent, are clearly distinguishable from this case. In *Dale* and *Robinson* the presiding judge was concerned with disciplinary proceedings against attorneys rather than contempt. The specification of charges signed by the judge was not based upon the personal knowledge of the judge, as here. The judge's information in *Robinson* was based partly upon the record but also upon hearsay statements. The judge did not personally know what the facts were surrounding the failure of the attorneys to perfect the appeals. The Court in *Dale* and *Robinson* properly held the judge who preferred the charges should have recused himself. The case *sub judice* is similar to *In re Paul, supra*, where this Court held it was appropriate for the trial judge to hear the contempt charges some time after the conclusion of the trial in which the charges arose, even though the trial judge had noticed the respondent of the charges during the trial. The Court so held even though the trial judge stated he "would have held him in contempt at that moment except we could not have tried the case." We find Judge Ferrell's conduct in the contempt proceeding did not fall within that proscribed by *Taylor, Mayberry*, or *Ponder, supra.*

The proposed punishment contained in the draft order did not indicate any bias or prejudgment on the part of Judge Ferrell; to the contrary it was notice to Smith of the seriousness of the charges and the possible consequences in the event that the charges were proven beyond a reasonable doubt at the plenary hearing. The draft order also provided Smith an opportunity to evaluate the charges and possible consequences to determine what action he should take. As noted above, attorney Mazer used

this opportunity to make an offer of purging his alleged contempt, which was accepted by the court. *Taylor v. Hayes, supra.* Attorney Smith chose not to so do. The plenary hearing shows clearly that Judge Ferrell conducted the proceedings in an unbiased, fair manner. He did not inject himself into the proceedings. The actions taken by Smith prior to 3 January 1979 were not personal affronts to Judge Ferrell. There were no marked personal feelings or personal stings on Judge Ferrell's part to create an appearance of unfairness. *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed. 2d 921 (1964). The hearing was conducted in a calm, cool and detached judicial manner. Judge Ferrell's attitude throughout the proceedings is exemplified by his statement in response to a request from Smith's attorney: "I will be delighted to do that." Certainly, no abuse of discretion by Judge Ferrell is demonstrated in the record. Smith's refusal to appear in court on 3 January 1979 was manifestly willful and deliberate. His letter of 26 December 1978 establishes this beyond all reasonable doubt. Under these circumstances, we find no abuse of discretion in the punishment ordered by Judge Ferrell. The motion to recuse was properly denied.

We hold the findings of fact found by Judge Ferrell in the order of contempt are supported by the evidence beyond a reasonable doubt and are binding upon this Court. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978). None of respondent Smith's rights, statutory or constitutional, were violated by the judgment.

Affirmed.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. GERALD BONNER HILL

No. 7916SC590

(Filed 19 February 1980)

1. Judges § 5— motion for recusation not referred to another judge—error

The trial judge erred in failing to refer a motion for recusation to another judge for consideration and disposition where defendant testified at the criminal trial of a fellow officer of the Lumberton Housing Authority; im-

mediately after his testimony the trial judge stated that defendant had implicated himself in that trial; upon being informed that defendant had six cases pending against him in superior court and that his bond was set at $2500 in all six cases, the trial judge increased defendant's bond because he thought it was unusually low and increased it without any reference as to whether or not defendant would be present at his trial; and a reasonable person could conclude that the judge had formed an opinion against defendant.

2. Constitutional Law § 30— defendant's statement to third person—disclosure by State not required—failure to disclose documents—defendant prejudiced

Defendant was not prejudiced by the State's failure to disclose prior to trial oral statements made by defendant to a third party witness, but defendant was prejudiced by the State's failure to disclose documents which the State intended to use at trial, including an audit of the housing authority of which defendant was executive director, and the fact that the State did not offer the documents into evidence but merely used them on cross-examination did not alter the fact that harm resulted from the nondisclosure, since the primary effect of the State's improper nondisclosure was to deny defendant a meaningful opportunity to prepare his defense.

3. Criminal Law § 34.7— obtaining money by false pretense—defendant's approval of other false billings—admissibility to show intent

In a prosecution of defendant, the former executive director of a city housing authority, for aiding and abetting in the obtaining of property by false pretenses and for corporate malfeasance, the trial court did not err in permitting testimony by a witness which tended to show other instances of defendant's tacit approval of false billings, since such evidence was relevant and admissible on the issue of intent to defraud.

4. False Pretense § 3.1— director of housing authority—obtaining money by false pretenses—sufficiency of evidence

In a prosecution of defendant, former executive director of a city housing authority, for aiding and abetting in the obtaining of property by false pretenses, evidence was sufficient to be submitted to the jury where it tended to show that defendant approved payment on freight bills when the freight bills had been prepaid; furthermore, there was no merit to defendant's contention that his knowledge of the fraud would be imputed to the corporation and he thus could not be guilty of aiding and abetting the obtaining of property by false pretenses because the corporation did not rely on the false representation, since notice to or knowledge of an agent will not be imputed to his principal where the person claiming the benefit of the notice or those whom he represents colluded with the agent to defraud his principal, and defendant's knowledge thus would not be imputed to the housing authority.

5. Indictment and Warrant § 17.1— aiding and abetting obtaining of property by false pretenses—no variance between indictment and proof

There was no fatal variance between indictments charging aiding and abetting the obtaining of property by false pretenses and evidence at trial where all the evidence tended to show that the person named in the indictments was the person aided and abetted, and all the evidence tended to show

that he submitted invoices for bills which had already been paid with the intent to benefit himself.

6. **Indictment and Warrant § 9.9— corporate malfeasance charged—allegation of intent improper—indictments quashed**

Indictments charging defendant with corporate malfeasance in violation of G.S. 14-254 must be quashed where the statute required that they allege an intent to injure, defraud, or deceive an officer of the corporation, but the indictments in this case alleged an intent "to defraud or to deceive the said Housing Authority of the City of Lumberton, North Carolina."

7. **Criminal Law § 111.1— reading indictments to jury—defendant prejudiced**

The trial court erred in reading the indictments to the jury at the very beginning of the trial and during the charge to the jury at the close of the evidence. G.S. 15A-1213.

8. **False Pretense § 3— aiding and abetting in obtaining money by false pretense—evidence of lack of felonious intent—exclusion error**

In a prosecution of defendant, the former executive director of a city housing authority, for aiding and abetting in the obtaining of property by false pretenses where the evidence tended to show that defendant approved the payment of freight bills to a fellow employee when the freight bills were prepaid, the trial court erred in preventing defendant from eliciting the fellow employee's testimony that he regarded the money "justly due him," since such testimony was manifestly competent to show the absence of felonious intent to defraud on the part of defendant.

9. **Indictment and Warrant § 8.4— aiding and abetting false pretenses—malfeasance by corporate officer—election between offenses not required**

The trial court did not err in refusing to require the State to elect between the charges of aiding and abetting the obtaining of property by false pretenses and charges of malfeasance by a corporate officer, since the offenses were not the same both in fact and in law, and each offense required proof of an element not common to the other.

APPEAL by defendant from *Gavin, Judge*. Judgments entered 26 January 1979 in Superior Court, ROBESON County. Heard in the Court of Appeals 14 November 1979.

Defendant, a former Executive Director of the Housing Authority of the City of Lumberton, was indicted on three counts of aiding and abetting William Sammy Britt in the obtaining of property belonging to the Housing Authority by false pretenses and on three counts of corporate malfeasance in violation of G.S. 14-254 arising from the same transactions. The jury returned a verdict of guilty as charged on all six counts. From the sentences imposed, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Rudolph A. Ashton III, for the State.

I. Murchison Biggs; and Page & Britt, by W. Earl Britt, for defendant appellant.

ERWIN, Judge.

Defendant brings forth numerous assignments of error. For clarity's sake, we will address them in order of convenience.

Motion for Recusation

[1] Defendant contends that the trial court erred in not requesting another judge to consider his motion for recusation. We agree.

The record reveals that immediately after defendant had finished testifying at the criminal trial of another officer of the Lumberton Housing Authority (*State v. Lamb*, COA7916SC571, appealed to this Court and opinion filed December 1979), Judge Gavin, based on defendant's testimony, stated that defendant had implicated himself in that trial. Upon being informed that defendant had six cases pending against him in Superior Court and that his bond was set at $2,500 in all six cases, Judge Gavin increased defendant's bond, because he thought it was unusually low.

G.S. 15A-1223(b) provides:

> "(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
>
> (1) Prejudiced against the moving party or in favor of the adverse party; or
>
> (2) A witness for or against one of the parties in the case; or
>
> (3) Closely related to the defendant by blood or marriage; or
>
> (4) For any other reason unable to perform the duties required of him in an impartial manner."

While G.S. 15A-1223(b) provides the instances in which a judge must disqualify himself, it does not address the question of whether he is the proper party to hear the motion for recusation in all instances.

Canon 3C(1)(a) of the North Carolina Code of Judicial Conduct provides:

"C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings . . ."

In *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E. 2d 375, 380 (1976), our Supreme Court, speaking on the subject of recusation, stated:

"We are, however, constrained to observe that when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously it was not proper for this trial judge to find facts so as to rule on his own qualification to preside when the record contained no evidence to support his findings. *Ponder v. Davis*, 233 N.C. 699, 65 S.E. 2d 356.

In this connection, we think the language found in *Kentucky Journal Publishing Co. v. Gaines*, 139 Ky. 747, 110 S.W. 268, quoted in *Ponder v. Davis, supra*, warrants repeating:

. . . 'It is but the utterance of a legal platitude to say that it is of the utmost importance that every man should have a fair and impartial trial of his case, and that to secure this great boon two things are absolutely essential; an impartial jury and an unbiased judge. But we go further, and say that it is also important that every man should know that he has had a fair and impar-

> tial trial; or, at least, that he should have no just ground for the suspicion that he has not had such a trial.' "

Recently, in *McClendon v. Clinard*, 38 N.C. App. 353, 247 S.E. 2d 783 (1978), we interpreted *Gillespie* as requiring a trial judge to refer a motion to recuse to another judge for consideration and disposition when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner." *Id.* at 356, 247 S.E. 2d at 785. Applying this test to the facts of the instant case, we hold that the trial court erred in failing to refer the motion for recusation to another judge for consideration and disposition. Here, Judge Gavin increased defendant's bond on his own motion under the conditions indicated above. The record clearly shows that Judge Gavin was concerned about defendant's implications in the Lamb case, which to a reasonable person would mean that the judge had formed an opinion against defendant. He complained about defendant's bond and increased it without any reference as to whether or not defendant would be present at his trial. Our decision in *State v. Vega*, 40 N.C. App. 326, 253 S.E. 2d 94, *appeal dismissed*, 297 N.C. 457, 256 S.E. 2d 809 (1979), is in accord with our decision today.

Motion of Discovery

Prior to trial, defendant made a motion for discovery of oral statements made by defendant which the State intended to offer in evidence, for discovery of a list of all witnesses that the State intended to call to give testimony at trial, and for discovery of any books, papers, documents, or records in the possession of the State and intended to be used by the State in any manner at trial. After being ordered to disclose the above, the State stipulated that there were no oral statements made by defendant which it intended to offer in evidence and identified the documents intended to be used by the State in any manner in the trial. During the trial, the State, through its witnesses' testimony, introduced statements made by defendant and used several undisclosed documents on cross-examination of defendant and his witnesses. Defendant assigns error.

[2] The State did not err in failing to disclose the oral statements made by defendant to a third-party witness. G.S.

15A-904(a); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979). In *State v. Crews, supra*, our Supreme Court stated that the intent of our Legislature was to restrict defendant's discovery of his oral statements to those made by him to persons acting on behalf of the State. In stipulating that it had no oral statements made by defendant which the State intended to offer, the State made it clear that it was acting pursuant to the trial court's order of discovery. Our Supreme Court's decision in *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), makes it clear that the trial court had no authority to order discovery of statements made by defendant to third parties not acting on behalf of the State. We find no error in the State's refusal to disclose such statements. However, we do find error in the State's failure to disclose all documents it intended to use at trial. G.S. 15A-903 provides in pertinent part:

> "§ 15A-903. *Disclosure of evidence by the State—information subject to disclosure.*—
>
> * * *
>
> (d) Documents and Tangible Objects.—Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant."

The State contends that since it did not offer the documents into evidence but merely used them on cross-examination, no harm occurred in its failure to disclose. This argument was rejected by our Supreme Court in an analogous situation in *State v. Stevens*, 295 N.C. 21, 36-37, 243 S.E. 2d 771, 780 (1978), where the Court stated:

> "It is implicit in the district attorney's statement to the court that his intention not to offer the questioned evidence was conditional. Obviously, he did intend to use the statements on rebuttal if defendant took the stand and gave

testimony inconsistent with them. It is equally obvious that the district attorney could not know whether defendant would take the stand until defendant either did so or rested his case without having testified. This uncertainty, however, differs little from that which surrounds many decisions the prosecutor must make with reference to the introduction of available evidence. To adopt the district attorney's analysis of G.S. 15A-903(a)(2) would mean that a judge could rarely hold that a district attorney had intended to use a withheld statement at trial."

In the instant case, disclosure of the documents in the possession of the State and which were intended to be used by the State in any manner was also essential to the preparation of defendant's defense. For example, the State was allowed to cross-examine Mr. Patterson, an employee of the Department of Housing and Urban Development, from a twenty-page audit of the Lumberton Housing Authority dated 13 December 1974 which dealt with alleged irregularities in the Housing Authority's operations. Moreover, the State was allowed to use undisclosed documents in cross-examining defendant as to alleged, unauthorized expenditures during his several years as Executive Director of the Housing Authority as follows:

"Q. Mr. Hill, I ask you to look at the sheaf of documents. In your hand, on top, do you have a check to Sealey's 66 Service, your check No. 5032, in the amount of $841.47 and supporting documents attached thereto?

OBJECTION. OVERRULED. EXCEPTION NO. 153

A. I see the check. Can I take the time to look at the documents?

Q. If you will look at Sealey's billing 536 dated 6/3/74.

OBJECTION. OVERRULED. EXCEPTION NO. 154

* * *

Q. The insurance policies that were carried by the Housing Authority would demonstrate the number of trucks, wouldn't it sir?

OBJECTION. OVERRULED. EXCEPTION NO. 169

Q. Would you look through these insurance policies?

OBJECTION. OVERRULED. EXCEPTION NO. 170

A. You want me to look through them all.

Q. I want you to satisfy yourself as to how many trucks you had?

OBJECTION. OVERRULED. EXCEPTION NO. 171

Q. Would it help you to speed up your looking there if you had access to your gas records?

OBJECTION. OVERRULED. EXCEPTION NO. 172

A. I don't even recognize that item. What is it?

Q. I'm asking you. Would it help you to speed up what you are doing there to look at the gas records?

OBJECTION. OVERRULED. EXCEPTION NO. 173

* * *

Q. I will ask you to look through there on Sealey's invoice dated 20 December 1974 and I will ask you if he did not accomplish a brake job?

OBJECTION. OVERRULED. EXCEPTION NO. 178

WITNESS: It says 'turn drums'. That does not necessarily mean a brake job.

* * *

Q. Here's the point. Look over here on the other invoice, 771, please sir, 772. 771, a brake job, $210.90 on the identical vehicle. This is one billed out on the 14th of January 1975. Is that not correct?

OBJECTION. OVERRULED. EXCEPTION NO. 181

A. It appears to be that, yes, sir.

Q. Wouldn't you think Mr. Sealey would guarantee his work for a big customer like the Housing Authority of the City of Lumberton?

OBJECTION. OVERRULED. EXCEPTION NO. 182

A. Yes, I would assume he would do so.

Q. All right, can you explain why you would have one brake job on the 20th of December 1974 and an identical brake job on the 14th of January 1975?

OBJECTION. OVERRULED. EXCEPTION NO. 183

* * *

Q. Mr. Hill, can you tell us about a $52,080.58 overpayment to General Building and Masonry Contractors, Inc., on the project NC14-4 sometime prior to March 31, 1973?

OBJECTION. OVERRULED. EXCEPTION NO. 185

A. May I see it.

I am not familiar with a document, a report of audit dated March 31, 1973, by C. B. Scoggins, Jr., a certified public accountant, published for the Housing Authority of the City of Lumberton, North Carolina. I know that it exists. I have seen it but not since that time.

* * *

Q. You don't recall an overpayment of $52,000.00 that was never gotten back for the City?

OBJECTION. OVERRULED. EXCEPTION NO. 189

A. I remember an overpayment. If you will let me look at it, I will be glad to verify it.

Q. I will let you look at it in a minute. Have you not testified that you were very busy and that you couldn't keep up with things up there at the Housing Authority?

OBJECTION. OVERRULED. EXCEPTION NO. 190

A. No, I have not testified to that.

Q. Well, then, you remember an overpayment of $52,000.00 don't you, sir?

OBJECTION. OVERRULED. EXCEPTION NO. 191

A. I remember an overpayment.

No, I don't remember whether it was $10,000.00 or $52,000.00 or $100,000.00. I don't recall exactly how much it was.

Q. Well, if it had been $100,000 overpayment would you have remembered?

OBJECTION. OVERRULED. EXCEPTION NO. 192

A. Not as to exact figures, no.

I will be most happy to try to recall it and explain it if you will let me see it.

Q. Do you recall seeing this item here, Report of Audit submitted by C. B. Scoggins, Jr., CPA here in Lumberton?

OBJECTION. OVERRULED. EXCEPTION NO. 193

A. Yes, sir."

The primary effect of the State's improper nondisclosure of documents to be used at trial was to deny defendant a meaningful opportunity to prepare his defense.

Evidence of Independent Criminal Offenses

[3] Defendant contends that the trial court erred in allowing the State to introduce the testimony of John Wishart Bennett concerning his purported criminal transactions with defendant and in not granting his motion to nonsuit. We find no error.

It is the law of this State that evidence of one offense cannot be given against a defendant to prove that he is guilty of another. However, an exception to the general rule exists when the purpose of offering the evidence of other independent offenses is to prove *quo animo*, intent, design, or guilty knowledge. *State v. Walton*, 114 N.C. 783, 18 S.E. 945 (1894).

In *State v. Walton, supra*, defendant was charged with obtaining money under false pretenses by falsely pretending that a certain paper writing was a true and genuine order for the payment of money and that he owned or had right to transfer it. At trial, the State was allowed to offer evidence of similar transactions on the part of defendant. In the present case, the State was allowed to offer into evidence the testimony of John Wishart Ben-

nett which tended to show other instances of defendant's tacit approval of false billings. This evidence was relevant and admissible on the issues of intent to defraud in the aiding and abetting in the obtaining of property by false pretenses charges and the corporate malfeasance charges.

Motion for Judgment of Nonsuit

[4] The aiding and abetting in the obtaining of property by false pretenses offenses for which defendant was charged occurred prior to the amendment of G.S. 14-100. In determining the propriety of disallowing defendant's motion to nonsuit on these charges, we must look at the crime's elements as it then existed. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975); *State v. Melton*, 7 N.C. App. 721, 173 S.E. 2d 610 (1970).

Prior to the amendment of G.S. 14-100, a motion for nonsuit of a charge of obtaining property by false pretense had to be denied if there were evidence which, if believed, would establish or from which the jury could reasonably infer that the defendant (1) obtained value from another without compensation, (2) by a false representation of a subsisting fact, (3) which was calculated and intended to deceive, and (4) did in fact deceive. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (1978), *cert. denied*, 439 U.S. 830, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978).

To sustain a conviction of the defendant for aiding and abetting,

> "the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of intent to aid, if needed, does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator."

State v. Rankin, 284 N.C. 219, 223, 200 S.E. 2d 182, 185 (1973).

"Upon motion for nonsuit, all the evidence admitted, whether competent or incompetent, including that offered by defendant which is favorable to the state, 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." (Footnotes omitted.) 4 Strong's N.C. Index 3d, Criminal Law, § 104, p. 541.

The State's evidence, when viewed in the light most favorable to it, tends to show that defendant had placed Britt on the Lumberton Housing Authority's payroll at full pay, although he did not work a full forty hours. In return, Britt agreed to acquire materials for the Housing Authority through his tile company. When this arrangement was unilaterally terminated by Hill, he agreed to help Britt secure the difference in the cost of materials. Britt subsequently presented prepaid freight bills to Hill and demanded payment in that amount. Defendant Hill asked Britt if he paid him for the freight, would he be satisfied. After Britt said that he would be satisfied, Hill placed his arms around him, told Joan Bacot, an employee of the Housing Authority, to pay Britt the original freight bill then presented and two others to be subsequently presented. After Ms. Bacot prepared the vouchers for payment, on each occasion, defendant Hill signed them authorizing payment. When Ms. Bacot discovered that the freight bills had been prepaid, defendant informed her that she need not be concerned with it and that they would continue to pay Mr. Britt's invoices, even though the Housing Authority had already prepaid the freight. We hold that when viewed in the light most favorable, this evidence was sufficient to withstand defendant's motion to nonsuit on the charge of aiding and abetting the obtaining of property by false pretenses. Defendant sets forth several arguments averring a lack of intent to defraud and a lack of deception in fact. Whether or not defendant intended to deceive the Housing Authority was a question for the jury to decide. *See State v. Walton, supra.* The State, through its witness Bennett, presented competent evidence to establish the existence of this required element. Similarly, competent evidence was presented to show a reliance on defendant's misrepresentation of fact as then required by G.S. 14-100. Defendant would have us hold that since he knew of the fraud, his knowledge would be imputed to the corporation, and thus, he could not be guilty of aiding and abetting the obtaining of property by false pretenses, because the corporation did not rely on the false representation. We reject this argument.

Notice to or knowledge of an agent will not be imputed to his principal where the person claiming the benefit of the notice or those whom he represents colluded with the agent to defraud his principal. *Jenkins v. Renfrow*, 151 N.C. 323, 66 S.E. 212 (1909). Thus, defendant's knowledge would not be imputed to the Housing Authority. *See State v. Agnew, supra; accord, Rand v. Commonwealth*, 176 Ky. 343, 195 S.W. 802 (1917).

The State presented evidence showing that an agent of the Housing Authority had in fact been deceived. This was sufficient, *State v. Grier*, 35 N.C. App. 119, 239 S.E. 2d 870 (1978), and the court did not err in allowing the agent to so testify.

Variance

[5] Defendant contends that a fatal variance exists in the indictments on the charges of aiding and abetting the obtaining of property by false pretenses, in that Britt Tile Company and not William Sammy Britt is named as the claimant for reimbursement, and therefore, Britt was not the person aided.

All the evidence tends to show that Britt was the person aided and abetted as alleged in the indictments and that he submitted the invoices with the intent to benefit himself. We find no error.

Sufficiency of Indictments Under G.S. 14-254

> "No indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged. Nothing in GS 15-153 or in GS 15-155 dispenses with the requirement that the warrant or indictment charge all the essential elements of the offense." (Footnotes omitted.)

7 Strong's N.C. Index 3d, Indictment and Warrant, § 9, p. 125.

G.S. 14-254 (as enacted at the time of the alleged offenses) provided:

> "§ 14-254. *Malfeasance of corporation officers and agents.* —If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth

any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any officer of the corporation, or if any person shall aid and abet in the doing of any of these things, he shall be guilty of a felony, and upon conviction shall be imprisoned in the State's prison for not less than four months nor more than fifteen years, and likewise fined, at the discretion of the court."

[6] To support convictions for willful misapplication of corporate moneys, the indictments must allege an accompanying intent to injure, defraud, or deceive *an officer of the corporation.* Here, the indictments allege an intent "to defraud or to deceive the said Housing Authority of the City of Lumberton, North Carolina." They do not comply with the statutory requirement of G.S. 14-254 and must be quashed. *See State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); *State v. King*, 285 N.C. 305, 204 S.E. 2d 667 (1974).

Reading of Indictments

[7] Defendant assigns as error the trial court's reading of the indictments to the jury before and during trial.

G.S. 15A-1213 provides:

"§ 15A-1213. *Informing prospective jurors of case.*— Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury."

"The purpose of the statute, when read as a whole and considered together with the Official Commentary, apparently is to avoid giving jurors 'a distorted view of the case' through the 'stilted language of indictments.'" *State v. Laughinghouse*, 39 N.C. App. 655, 657, 251 S.E. 2d 667, 668, *appeal dismissed*, 297 N.C. 615 (1979).

In *Laughinghouse, supra*, the trial court had read a portion of the indictment to the jury as a part of his charge after the close of the evidence. We found no violation of G.S. 15A-1213, because we felt that it would not serve the statutory purpose. In the instant case, the trial court read the indictments not only while giving his charge, but also at the very beginning of the trial. Thus, the very evil sought to be prevented was furthered, *i.e.*, giving the jury a distorted view of the case through the stilted language of the indictments. This was prejudicial error.

Statement of Belief

[8] The trial court erred in preventing defendant from eliciting Britt's testimony that he regarded the money "justly due him." It was manifestly competent to show the absence of felonious intent to defraud on the part of defendant. *Cf. State v. Jessup*, 181 N.C. 548, 106 S.E. 833 (1921).

Election of Charges

[9] Defendant next assigns as error the trial court's refusal to require the State to elect between the charges of aiding and abetting the obtaining of property by false pretenses and charges of malfeasance by a corporate officer.

The trial court was not required to make the State elect between the charges contained in the indictments at the beginning of the trial and before any evidence had been introduced. *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972). Nevertheless, the question becomes whether the trial court should have required an election later.

The essence of defendant's argument is a plea of double jeopardy. Unless each statute requires proof of an additional fact which the other does not, the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishment. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187, 97 S.Ct. 2221 (1977); *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962); *State v. Cannon*, 38 N.C. App. 322, 248 S.E. 2d 65 (1978). Applying the foregoing "additional facts" test, we hold the trial court did not err in denying defendant's motion for an election of charges.

To sustain a conviction of aiding and abetting the obtaining of property by false pretenses, the State was required to show

that defendant indicated, encouraged, or assisted William Sammy Britt in the obtaining of the Housing Authority's property by false pretenses. To sustain a conviction for malfeasance of a corporate officer, the State was required to show a willful misapplication of the Housing Authority's moneys, funds, or credits. Each offense required proof of an element not common to the other. They are not *the same both in fact and in law*, and the State was not required to make an election.

Upon review of the record, we are convinced that the trial judge's failure to request another judge to consider defendant's motion for recusation, his allowance of the State's use of undisclosed documents on cross-examination of defendant, and his reading of the bill of indictments to the jury prevented defendant from obtaining a fair trial on the false pretenses offenses. Accordingly, we need not consider defendant's other assignments of error, since they may not reoccur at trial.

The judgments entered are vacated in Case Nos. 78CR5945, 78CR5946, and 78CR5947, and defendant is awarded a

New trial in Case Nos. 78CR5948, 78CR5949, and 78CR5950.

Judges CLARK and ARNOLD concur.

JULIUS R. CAUBLE v. CITY OF ASHEVILLE

No. 7928SC17

(Filed 19 February 1980)

1. **Municipal Corporations § 45— action against city—notice of claim**

A letter sent by plaintiff to the mayor of defendant city constituted a sufficient notice of claim to the city to give plaintiff standing thereafter to institute a suit to require defendant city to pay into the county school fund all penalties paid for overtime parking in the city.

2. **Penalities § 1; Schools § 1— penalty or fine for violation of parking ordinance—when payable to school fund**

In any case in which a person is prosecuted, convicted, and a fine imposed for the violation of a parking ordinance, the fine so imposed must be paid, by directive of Art. IX, § 7 of the N. C. Constitution, to the county school fund.

However, if a city chooses to maintain civil actions to recover the penalties imposed for parking violations, the proceeds of any judgment obtained would belong to the city, and the school fund would have no claim thereon.

3. Penalties § 1; Schools § 1— fine for overtime parking—payment to county school fund

Money collected by a city for overtime parking was collected by reason of G.S. 14-4 and G.S. 160A-175(b) and was properly payable to the county school fund as penalties collected for breach of the penal laws of the State.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 27 October 1978, Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 September 1979.

Plaintiff, representing all the citizens, residents, and taxpayers of the City of Asheville, seeks to have the Court require the defendant to pay into the County School Fund all penalties paid for overtime parking in the City of Asheville. He further asks for treble the damages to be paid to the County School Fund and for counsel fees. The allegations of his complaint, other than jurisdictional allegations, may be summarized as follows: The City of Asheville has established parking meters pursuant to G.S. 160A-301 for the purpose of regulating the parking of vehicles within the City. Plaintiff is a citizen and resident of the City and has paid to the City "fines for overtime parking in parking places regulated by" the parking meters. He is informed and believes that other residents have also "made payments for parking overtime as a fine" to the City. He brings the action on his behalf and on behalf of all other persons similarly situated. "Defendant has established upon the streets of Asheville parking meters pursuant to General Statute 160A-301. Further that pursuant to the Asheville City Code, Section 28-117 and following, the City penalizes overtime parking by a fine of One ($1.00) Dollar or a greater amount depending on the type of overtime parking to be paid as a fine and penalty for said overtime parking." Notice of the claim has been given defendant. The "fines and forfeitures" derived from overtime parking are being misapplied by the defendant. Article 9, § 7 of the Constitution of North Carolina specifically requires that all fines and forfeitures such as those described in the complaint are to be applied exclusively for maintaining public schools in North Carolina. The misapplication of the "fines and forfeitures" directly affects plaintiff and all members of the class to the detriment of all citizens and taxpayers of the

City. On two previous occasions, similar actions have been maintained successfully against defendant. The continuing failure of defendant to abide by the Constitution is a "willful, knowing, open and flagrant violation of the laws of the State," and because of the "willful and wanton nature" of defendant's conduct, it should be subjected to punitive damages.

Defendant answered, denying any liability to the school fund but admitted that it had enforced and would continue to enforce its overtime parking ordinances as written.

The parties signed a set of stipulations which were dated 9 May 1978 and filed 5 June 1978. The stipulations listed those provisions of the City's ordinances which are applicable to the action. Stipulation No. 3 is quoted in its entirety as follows:

> Under ordinance #376, the City would place a notice on a motor vehicle indicating overtime parking. The individual who received this notice and who complied with the ordinance would deliver the penalty of $1.00 to an administrative clerk at the City's Police Department or would deposit the $1.00 in a receptacle maintained by the City for such purpose.
>
> Under ordinance #914, the City would place a parking citation on a motor vehicle indicating overtime parking. The individual who received this citation and who complied with the ordinance would deliver the appropriate penalty to an administrative clerk in the City Hall Building or would mail same to the City.
>
> Criminal warrants were taken out on occasions against persons who failed to pay the civil penalty.

The parties also stipulated that in a pretrial conference with Judge Robert Lewis, they had agreed that the action would be tried in two steps. The first step would be a hearing to determine whether Article IX, Section 7, Constitution of North Carolina is applicable. Should the court rule in favor of plaintiff, a second hearing would be held for the determination of the "clear proceeds" payable to the school fund.

The court heard the matter on 26 October 1978 upon the oral motion of defendant for partial summary judgment.[1] The court considered the stipulations of the parties, the documents introduced into evidence pursuant thereto, and the arguments of counsel, and entered partial summary judgment for plaintiffs. In so doing, he found that there is no genuine issue as to the following material facts:

> 1. That the plaintiff wrote a letter to the Mayor of the City of Asheville dated April 5, 1977, a copy of which is attached hereto and hereby made a part of this Order, and that said letter was received by the Office of the City Clerk on April 5, 1977, at 1:50 o'clock p.m.
>
> 2. That the City of Asheville issues parking citations in the form of City's Exhibit 9, a copy of which is attached hereto and hereby made a part of this Order.
>
> 3. That the penalties set forth on said citation, for the violation of the various parking ordinances set out in said citation, are collected by the City of Asheville in the manner set forth in Paragraph 3 of the stipulations dated May 9, 1978.
>
> 4. That the City of Asheville now and since 14 October 1976 collects said penalties under color of the ordinance denominated as Ordinance Number 914, City's Exhibit 2, a copy of which is hereto attached and hereby made a part of this Order; and that in addition, collects additional sums for delinquent payment of said penalty.
>
> 5. That the City of Asheville prior to the 14th day of October, 1976, and since the 22nd day of April, 1975, collected said penalties under color of the ordinance denominated as Ordinance Number 376, City's Exhibit Number 1, a copy of which is hereto attached and hereby made a part of this Order.

1. The parties stipulated on 15 December 1978, that during the 23 October 1978 Session of Superior Court of Buncombe County, the defendant made an oral motion for partial summary judgment, and plaintiff waived all notice requirements.

Upon these facts, the court concluded that each penalty assessed against persons under the provisions of Ordinances 914 and 376 does constitute "a penalty, forfeiture, or fine collected for a breach of the penal laws of the State within the meaning of the provisions of Article IX, Section 7, of the Constitution of the State of North Carolina," and that the Buncombe County Board of Education is entitled to the exclusive use of all clear proceeds collected under color of the provisions of the two ordinances subsequent to 22 April 1975. The court further concluded that the City of Asheville is a municipal subdivision of the State of North Carolina and that plaintiff had given proper demand to the City as required by Section 11 of the Code of the City.

From the judgment of the court, defendant appeals.

McLean, Leake, Talman & Stevenson, by Joel B. Stevenson and Robert S. Swain, for plaintiff appellee.

Patla, Straus, Robinson & Moore, by Victor W. Buchanan, for defendant appellant.

Ernest H. Ball and R. Frank Gray, for North Carolina League of Municipalities, Amicus Curiae.

MORRIS, Chief Judge.

[1] Defendant first raises the question whether plaintiff has standing to bring this action, contending that notice of claim was not given as required by the Code of the City of Asheville. Section 11 of the Code of the City of Asheville provides:

> No action shall be instituted or maintained against the city upon any claim of demand whatsoever of any kind or character, until the claimant shall have first presented his or her claim or demand, in writing, to said council, and said council shall have declined to pay or settle the same as presented, or for ten days after such presentation neglected to enter or cause to be entered upon its minutes its determination in regard thereto, . . .

On 5 April 1977, a letter addressed to the Mayor of the City of Asheville, written by plaintiff's former counsel, was hand delivered to the City Clerk's office. The letter was as follows:

> This is to give notice pursuant to Section 12 of the Asheville City Code that Mr. Julius R. Cauble will file an action against the City of Asheville to prevent the collection and disbursement of the fines and forfeitures collected as overtime parking fines. That such action is based upon the fact that said collections and disbursements as they are now being carried forth by the City of Asheville are unconstitutional. Further that the City of Asheville should pay to the Buncombe County School Fund all fines and forfeitures so collected since January 1, 1963.

Defendant, by its answer, admitted receiving this letter but contends it is not sufficient "claim or demand" under Section 11 of the Code. We note that the letter refers to Section 12 of the Code. Section 12 is entitled "Notice prerequisite to action for damages against the city." That section is intended to apply to actions for damages for injury to person or property through the alleged negligence of the City. It has no application here. Use of Section 12 rather than Section 11 in the letter was obviously an inadvertence. In any event, we think the letter was substantial compliance, with respect to notice; ". . . 'a substantial compliance with the (ordinance) is all that is required, and the notice need not be drawn with the technical nicety necessary in pleading.' McQuillan on Municipal Corporations (Vol. VI), section 2718." *Graham v. City of Charlotte*, 186 N.C. 649, 659, 120 S.E. 466, 470 (1923). *See also* dissent of Justice Lake, concurred in by Justice Huskins, in *Johnson v. City of Winston-Salem*, 282 N.C. 518, 193 S.E. 2d 717 (1973), and cases cited therein.

Defendant draws distinctions between the word "notice" and the words "claim" and "demand." We certainly agree that there are differences. Nevertheless, the letter leaves no doubt but that the writer claims that the present system of the City in its use of the funds collected from overtime parking is unconstitutional and that those funds should be paid to the Buncombe County School Fund. This is substantial compliance and sufficient. This assignment of error is overruled.

We now turn to the second question raised by this appeal, which is not so easily answered.

Article IX, Section 7, of the Constitution of North Carolina provides:

> All moneys, stocks, bonds, and other property belonging to a county school fund, *and the clear proceeds of all penalties and forfeitures* and of all fines *collected in the several counties for any breach of the penal laws of the State,* shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools. (Emphasis supplied.)

In *Board of Education v. Town of Henderson,* 126 N.C. 689, 691, 36 S.E. 158, 159 (1900), the Court said:

> To our minds there is a clear distinction between a fine and a penalty. A "fine" is the sentence pronounced by the court for a violation of the criminal law of the State; while a "penalty" is the amount recovered—the penalty prescribed for a violation of the statute law of the State or the ordinance of a town. This penalty is recovered in a civil action of debt. (Citations omitted.) A municipal corporation has the right, by means of its corporate legislation, commonly called town ordinances, to create offenses, and fix penalties for the violation of its ordinances, and may enforce these penalties by civil action; but it has no right to create criminal offenses.

Experience proved that it was difficult, if not impossible, to enforce the ordinances of municipalities by civil actions for the collection of penalties, so it became necessary for the General Assembly to make the violation of municipal ordinances a criminal offense. This was done by G.S. 14-4 which provides: "If any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars ($50.00), or imprisoned for not more than thirty days," and was first enacted in the Session of 1871-72.

The Court in *Henderson* further said:

> But whether the criminal offenses created by the violation of town ordinances [under Section 3820 of The Code (now G.S. 14-4)], are tried before the mayor, or before a justice of the peace, they are State prosecutions, in the name of the State, or for violations of the criminal law of the State, and at the expense of the State (citation omitted), and the city can not be charged with the costs of such prosecutions.

. . .

> It must therefore follow that all the fines the defendant has collected upon prosecutions for violations of the *criminal laws* of the State, whether for violations of *its ordinances* made criminal by section 3820, of The Code, or by other criminal statutes, such fines belong to the common school fund of the county. It is thus appropriated by the Constitution, and it can not be diverted or withheld from this fund without violating the Constitution. This is not so with regard to "penalties" which the defendant may have sued for and collected out of offenders violating its ordinances. These are not penalties collected for the *violation of a law of the State,* but of a town ordinance. But wherever there was a fine imposed in a State prosecution for a misdemeanor under section 3820 of the Code, it belongs to the school fund, and, as we have said, must go to that fund.

126 N.C. at 692, 36 S.E. at 159.

The question before the Court in *School Directors v. City of Asheville,* 128 N.C. 249, 38 S.E. 874 (1901), was whether Article IX, Section 5, of the Constitution of North Carolina applied to "all and the whole" of the *fines* which were collected by the city authorities for violations of municipal ordinances in prosecutions for criminal offenses under section 3820 of The Code (now G.S. 14-4). The question was before the Court on appeal by defendant from the overruling of its demurrer to plaintiff's complaint. The defendant contended that "clear proceeds" under the Constitution meant such of the fines, penalties, and forfeitures as have not been appropriated by act of the General Assembly to other purposes, and that since the General Assembly had conferred upon the City of Asheville the power to appropriate the fines and penalties, there were no clear proceeds to which the school fund was entitled. The Court, following *Henderson,* held that *all* fines so collected belonged to the school fund of the county, having been appropriated by the Constitution. Further, the Court held that "it applies also to 'penalties', the collection of which is enforceable by proceedings before a Justice of the Peace or municipal officers empowered by law to enforce the collection of such penalty in a criminal action under section 3820 of The Code (now G.S. 14-4), for, in such cases, though the word 'penalty' is used, it is really a 'fine'." 128 N.C. at 251, 38 S.E. at 875.

The matter was again before the Court in *School Directors v. City of Asheville*, 137 N.C. 503, 50 S.E. 279 (1905). The cause had been referred to a referee for determination of the amount due under the holding of the Court in *School Directors v. City of Asheville*, 128 N.C. 249, 38 S.E. 874 (1901), and from judgment entered on plaintiff's motion for judgment in the amount set by the referee, defendant appealed. On this appeal, defendant argued that the General Assembly had the same power to appropriate to a municipality a portion or all of the fines collected for the violation of its ordinance in the same manner and to the same extent as penalties. The Court reiterated the position it had taken in the earlier appeal and held further that the Legislature does not have the power to appropriate to the municipal corporation all or any part of the fines imposed upon conviction of misdemeanors committed by violating the ordinances of the City of Asheville. The Court stated "It is settled that the Legislature may give to cities and towns the entire penalty incurred for the violation of ordinances to be recovered in a civil action, but when the State interposes and declares the violation of an ordinance a misdemeanor, the fine imposed for the criminal offense must go in the way directed by the Constitution." 137 N.C. 508, 509, 50 S.E. at 281.[2]

2. The opinion in *School Directors v. City of Asheville*, 128 N.C. 249, 38 S.E. 874, was filed 14 May 1901. On 23 November 1901, in a suit brought by members of the City Board of Education to compel the payment of fines collected in the Police Justice's Court to the school fund, judgment was entered for defendant in the Superior Court. On appeal to the Supreme Court (*Bearden v. Fullam*, 129 N.C. 477, 40 S.E. 204 (1901)), the Court said the suit should be against the City, but in its opinion stated:

> We can not let this case pass off without an unqualified expression of our disapproval of the conduct of those who have caused this litigation by their refusal to turn these fines over to the proper fund. We are met with an open defiance of two most solemn decisions of this Court on the matter which is the subject of this litigation. In the case of *Board of Education v. Henderson*, 126 N.C., 689, we decided that all fines for violation of the criminal laws of the State, whether the fines were for violations of town ordinances made misdemeanors by section 3820 of The Code, or other criminal statutes, were appropriated by Article IX, sec. 5, of the Constitution for establishing and maintaining free public schools in the several counties. And that case was reviewed and approved in *School Directors v. City of Asheville*, 128 N.C., 249, and yet, in the face of these two decisions, it is sought to raise this question again. We are surprised at the continual violation of the law and the persistent refusal of the authorities of the city of Asheville to conform their actions to the decisions of this Court on the matter before us; and we would be untrue to ourselves if we did not express in unmistakable terms our disapprobation of their

We now turn to the provisions of the ordinances of the City of Asheville. Ordinance 376 as amended provides:

> It shall be unlawful for any person or operator to cause, allow, permit or suffer any vehicle registered in his name, or under his control, to be parked overtime or beyond the lawful periods of time as above set forth.

Section 28-117 Asheville City Code.

Under Ordinance 376, the City, through its agent, placed a notice on a motor vehicle which was parked overtime, and under Ordinance 914, a parking citation is placed on the motor vehicle to indicate a violation. Under both ordinances, the individual so notified and who wanted to comply with the ordinance, would pay the appropriate penalty (set out on the citation) to the Police Department (#376), Clerk at City Hall (#914), or deposit the money in a receptacle maintained by the City for that purpose (#376), or mail the money to the City (#914).

Occasionally criminal warrants were issued against a person who failed to pay the penalty.

G.S. 160A-175(c) provides:

> An ordinance may provide that violation shall subject the offender to a civil penalty to be recovered by the city in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance.

[2] There can be no question that in any case in which a person is prosecuted, convicted, and a fine imposed for the violation of a parking ordinance, the fine so imposed must be paid, by directive of the Constitution of North Carolina, to the county school fund. It is also clear that had the defendant chosen to maintain civil actions to recover the penalties imposed for parking violations, the proceeds of any judgment obtained would belong to the City, and

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conduct. Their course is a dangerous example, and an incentive to others to defy the rulings of the Supreme Court of the State, and it manifests as well an indifference to public education which ought not to characterize the ruling authorities of ane [sic] of the largest and most progressive cities of the State.

129 N.C. at 479, 40 S.E. at 205.

the school fund could have no claim thereon. *Board of Education v. Henderson, supra, School Directors v. Asheville, supra.*

[3] The defendant has not chosen to follow the provisions of G.S. 160A-175(c) either in its ordinances or in practice.[3] The ordinances do not make the nonpayment of the overtime parking penalty unlawful. The overtime parking itself is the act which is declared unlawful. The money collected by reason of overtime parking is collected by reason of G.S. 14-4 and G.S. 160A-175(b) and is properly payable to the county school fund as penalties collected for breach of the penal laws of the State.

We are advertent to the holding in *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), which was filed 5 February 1979, the judgment in the case before us having been entered 27 October 1978. There Justice Exum, speaking for a unanimous Court (Justice Brock did not participate), held that a partial summary judgment entered for the plaintiff on the issue of liability only and leaving for determination at a subsequent trial the issue of damages, is not immediately appealable. There the Court declined to issue its writ of certiorari under Rule 21 of the Rules of Appellate Procedure, 287 N.C. 728, because there appeared to be a substantial legal dispute between the parties as to what items of damages were covered under the policy, if it afforded any coverage at all. Here we are not confronted with that problem. We have, therefore, treated the appeal itself as a petition for writ of certiorari, which we have granted in order that the questions raised might be answered prior to a determination of the question of damages.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

3. The provisions of this section of G.S. 160A-175 are not before us for interpretation, and we make no comment with respect to whether a municipality's following its provisions would relieve it from the mandate of Article IX, Section 7 of the Constitution of North Carolina.

Nolan v. Nolan

CAROLYN ANN NOLAN, INDIVIDUALLY; CAROLYN ANN NOLAN, EXECUTRIX OF THE ESTATE OF MARIE CLAUDE BIET NOLAN; AND PATRICK BIET NOLAN v. ROBERT EARL NOLAN; ROBERT ERIC NOLAN; AND MICHELLE ALICE NOLAN

No. 7921SC234

(Filed 19 February 1980)

Husband and Wife § 11.2; Conversion in Equity § 1; Vendor and Purchaser § 1.3—separation agreement—husband's right to purchase property upon contingencies—dependency of children—jury question—exercise of option against children

Under the terms of a separation agreement a husband had the right to purchase a wife's interest in the parties' homeplace at a specified price if the wife elected to surrender the property or at the termination of the dependency of the parties' children; defendant husband admitted that the wife did not surrender her interest in the property before her death, but a jury question arose as to whether the children ceased to be dependent during the wife's lifetime. If the children ceased to be dependent during the wife's life and if the husband effectively exercised his option during the wife's life, then the children would be entitled only to the proceeds of the sale of the house pursuant to the terms of the separation agreement, but if the children did not cease to be dependent during the wife's life, then the husband could not exercise the option to purchase against the children.

APPEAL by plaintiffs from *Wood, Judge.* Judgment entered 4 December 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 October 1979.

On 18 September 1947 Marie Claude Biet and Dr. Robert Earl Nolan were married. During their marriage the Nolans had four children: Carolyn Ann Nolan (born 17 May 1949); Patrick Biet Nolan (born 28 August 1951); Michelle Alice Nolan (born 18 May 1954); and, Robert Eric Nolan (born 11 January 1956). Dr. and Mrs. Nolan lived together until their separation on 13 May 1969. Dr. and Mrs. Nolan were divorced on 7 September 1971.

There is no dispute that the separation agreement between Dr. and Mrs. Noland was a valid and binding instrument. The agreement provided, *inter alia,* for the support of the children during their minority and while they maintained a scholastic average sufficient for graduation from an accredited college, university or professional school. Paragraph 6 of the separation agreement allocated the rights to occupancy and disposition of

the Nolan's house and lot located at 1150 Arbor Road in Winston-Salem, North Carolina. Paragraph 6 provides as follows:

> "6. Wife shall have the sole and exclusive right to the use and occupancy of the house and lot now owned by the parties as tenants by the entirety at 1150 Arbor Road, Winston-Salem, North Carolina, during the period of dependency of each of the minor children, subject to the following conditions and provisions:
>
> a. So long as Wife continued in the occupancy of the aforesaid property, Husband shall have the right, at his option, to make payments with respect to encumbrances against said property, as such payments fall due, and to deduct the same as a credit upon sums payable for child support and education as set forth in Paragraph 3.
>
> b. When the last of the minor children above named ceases to be dependent, as hereinabove provided, then the aforesaid property shall be offered for sale at the best price obtainable and, after deducting the expenses of sale and all liens and encumbrances then owing upon said property, the proceeds shall be divided equally between Husband and Wife.
>
> c. Notwithstanding any provisions to the contrary, if, during the period of dependency of any of the aforesaid minor children, Wife shall so elect, the aforesaid property shall be offered for sale at the best price obtainable and, after first deducting expenses of sale and payment of all liens and encumbrances, the proceeds shall be equally divided between Husband and Wife.
>
> d. Notwithstanding any of the provisions above relating to the sale of the aforesaid property, if Wife should elect to surrender her right to the use and occupancy of the aforesaid property during the dependency of any of the children, or upon termination of the dependency of the last dependent child and the corresponding right of occupancy of Wife, Husband shall have the right to purchase Wife's interest by making payment to her of a sum equal to one-half of the difference between $65,000 and the total sum of liens and encumbrances then owing upon the aforesaid property."

On 4 May 1973 Mrs. Nolan filed a motion requesting that an order be entered requiring Dr. Nolan to pay increased alimony to Mrs. Nolan and to pay increased support for the three children still receiving support. The Court of Appeals held that the father's legal obligation for support of the four children ceased when the children became 18 and that there was no evidence showing that the needs of the children had increased. *Nolan v. Nolan*, 20 N.C. App. 550, 202 S.E. 2d 344, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974).

On 8 December 1975 Mrs. Nolan instituted a second action against Dr. Nolan in the District Court of Forsyth County. Her amended complaint, filed 5 January 1976, sought a declaratory judgment proclaiming that Mrs. Nolan had an exclusive right, under Paragraph 6(c) of the separation agreement, to sell the house and lot located at 1150 Arbor Road. The particular language in the amended complaint was as follows:

> "VIII. Because of the high cost of maintaining the house and lot located at 1150 Arbor Road, *plaintiff wishes to sell* said property at the best price obtainable and divide the proceeds of such a sale between herself and the defendant, . . . The permissibility of this action is clearly established by subparagraph (c) of paragraph 6, 'notwithstanding any provisions to the contrary.'
>
> IX. *Defendant has informed plaintiff that, in the event that such a sale takes place, defendant will seek to purchase plaintiff's interest in the property* by making payment to her of a sum equal to one-half (½) of the difference between $65,000.00 and the toal sum of liens and encumbrances then owing upon the property . . . ." (Emphasis supplied.)

Mrs. Nolan also alleged in her second claim for relief that Patrick, Robert and Michelle were still dependent because Robert was incapable of self-support and because Patrick and Michelle were continuing their education.

During the discovery which ensued after the amended complaint was filed, an interrogatory was sent to the plaintiff, Mrs. Nolan, which asked:

> "14. Will you agree to convey your interest in the residence located at 1150 Arbor Road in Winston-Salem,

> North Carolina, to the defendant in consideration of the sum equal to one-half of the difference between $65,000.00 and the total sum of liens and encumbrances now owing on the property?"

In an answer dated 12 February 1976, Mrs. Nolan replied: "No."

Exhibit 2 in the record indicates that on 16 December 1976 Patrick Nolan was suspended from Tennessee Wesleyan College, after a period of academic probation, for failure to meet minimum academic standards. Mrs. Nolan contended that Patrick Nolan was later admitted to North Carolina Wesleyan College and was eligible to graduate in the summer of 1976.

Also, Exhibit 3 in the record indicates that on 31 December 1975 Michelle was suspended from the University of North Carolina at Charlotte for maintaining an inadequate quality point average.

Mrs. Nolan died on 16 August 1976. The second action was pending at her death and was not dismissed until 3 August 1978, long after the present case was instituted on 28 April 1977.

On 16 November 1976 Dr. Nolan sent a letter to his children indicating his "intention to exercise the right to purchase the property according to the terms of the Deed of Separation," and stating that he would tender them a check for the full sum due on 14 January 1977. The letter also referred to a discussion concerning the disposition of the house held between Dr. Nolan and his children "several weeks" prior to the date of the letter.

In this action the executrix of Mrs. Nolan's estate and two of the children of the marriage between Dr. and Mrs. Nolan pray for a declaratory judgment that the heirs of Mrs. Nolan's estate have no obligation to sell their interests to Dr. Nolan. Dr. Nolan answers and presents a counterclaim praying that the court order the children to convey the Arbor Road property to Dr. Nolan.

In Paragraph VIII of Dr. Nolan's answer in this action, he stated:

> "During her life, Marie Claude Biet Nolan did not elect to surrender her right to the use and occupancy of the property in question and the question of continued dependency raised

[in the earlier declaratory judgment action by Mrs. Nolan] was not resolved prior to her death.

By reason of the foregoing, the defendant could not effectuate his rights under paragraph 6d [of the separation agreement]."

The answer further stated that upon the death of Mrs. Nolan, the defendant requested that the children convey property to him in accordance with paragraph 6(d). The offer was refused by the plaintiffs in this action. Further, Dr. Nolan asserted that the plaintiffs by stipulation expressly waived the actual tender by the defendant and, irrespective of such stipulation, expressly tendered to all of the children their total and proportionate share which they would receive if the property were purchased under paragraph 6(d).

The plaintiffs in this action sent two sets of interrogatories to the defendant. In the first set of interrogatories, Dr. Nolan was asked, in relevant part:

"2. State whether, prior to the death of Marie Claude Ann Biet Nolan, you ever tendered to her the sum of one-half the difference between $65,000.00 and the liens and encumbrances then owing upon the property located at 1150 Arbor Road and advised her that she was required to sell her interests in the property to you under paragraph 6(d) of the Deed of Separation . . . ."

To this Dr. Nolan responded, in relevant part:

"A. Yes. Over a long period of time, various discussions were had regarding the sale of the property at 1150 Arbor Road. At the time of the death of plaintiffs' testate, there was an action pending in the District Court Division of Forsyth County, North Carolina, . . . wherein plaintiffs' testate sought a declaratory judgment to the effect that she owned a one-half interest in the property . . . and rejecting the contention . . . that this defendant was entitled to purchase all interest of plaintiffs' testate in the property . . . . During the course of that litigation and preceding and up to the time of the death of plaintiffs' testate, numerous conversations occurred between counsel for the plaintiff, now plaintiffs' testate, and this defendant, with no resolution having

been reached. It was a common understanding between the parties, up to the time of the death of plaintiffs' testate, that plaintiffs' testate would not convey the Arbor Road property to this defendant in accordance with the terms of paragraph 6d of the Deed of Separation, and a lawsuit designed to resolve the conflict was pending at the date of death of plaintiffs' testate."

In the second set of interrogatories sent to Dr. Nolan in this action, Dr. Nolan was asked to state whether, prior to Mrs. Nolan's death, if she decided to attempt the sale of the property, he ever advised Mrs. Nolan that she was required to sell her interest in the property under the terms of paragraph 6(d) of the Deed of Separation and whether he tendered to her the sums specified in that provision. To this question, Dr. Nolan responded.

"A. At the present time, I do not recall specifically telling Mrs. Nolan that if she decided to attempt the sale of the property, she was required to sell her interest to me under paragraph 6(d) of the Deed of Separation. During all such times, Mrs. Nolan was represented by legal counsel, and it was not appropriate for me to make such a proposal directly to her. However, my attorney in the litigation took the position in the pleadings filed in the case that such was the proper interpretation in the agreement. However, it was very obvious to us that any tender of anything would have been futile until a decision in that litigation, which Mrs. Nolan brought for the purpose of declaring the rights of the parties with respect to such provisions in the separation agreement and which was still pending trial at her death. Mrs. Nolan's terminal illness made it inappropriate for me to press legal matters, and out of respect for her, I did not do so."

Dr. Nolan was also asked whether he ever advised Mrs. Nolan that her right to use and occupy the property located at 1150 Arbor Road had terminated in accordance with the separation agreement. Dr. Nolan replied:

"A. Yes; this was a foregone conclusion for a long time, ever since Eric began working. There were a number of conversations on the subject matter, but it was in light of the fact that litigation was pending to declare the rights of the parties under the Deed of Separation. Mrs. Nolan obviously

did not agree with my position in view of the posture of the litigation which was being maintained at the time. After her terminal illness developed, it was, of course, inappropriate for me to press the issue. At the present time, I do not recall the dates of such conversations or the names of any persons who were present at the time."

In March 1978 both sets of parties in this action moved for summary judgment. On 4 December 1978 the trial court denied plaintiffs' motion, granted defendants' motion, and further ordered the children to convey any interest they might have had in the Arbor Road property for the sum specified in the separation agreement.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Elizabeth L. Quick, and Keith W. Vaughan for the plaintiff appellants.

Hudson, Petree, Stockton, Stockton & Robinson by William F. Maready and Robert J. Lawing for defendant appellees.

CLARK, Judge.

Five fundamental questions lie at the heart of this convoluted case:

1. Does subparagraph 6(d) of the separation agreement between Dr. and Mrs. Nolan control over the subparagraph 6(c) of the same instrument?

2. Did Mrs. Nolan actively "elect" to surrender her rights to the property?

3. Did the children cease to become "dependent" during Mrs. Nolan's lifetime?

4. Did Dr. Nolan effectively exercise his option to purchase the property upon cessation of the children's dependency during Mrs. Nolan's lifetime?

5. Was Dr. Nolan's option binding on Mrs. Nolan's heirs?

We will deal with each of these questions in the same order.

1. *Subparagraph 6(c) vs. subparagraph 6(d).* Both subparagraphs (b) and (c), as set forth above, provide, respectively,

for the sale of the property upon the conditions of the cessation of the dependency of the children, or when Mrs. Nolan elected to sell the property. Subparagraph (c) does begin with "[n]otwithstanding any provisions to the contrary," and, without more, would lead one to conclude that subparagraph (c) would control over any conflicting provision. Subparagraph (d), however, begins with, "[n]otwithstanding any of the provisions above relating to the sale of the aforesaid property." We find no ambiguity in the introductory language of subparagraph (d) and we hold that the more particular language of subparagraph (d) specifically limits the rights given to Mrs. Nolan under subparagraphs (b) and (c) by providing that upon the occurrence of either of two contingencies, election of Mrs. Nolan to surrender possession or termination of the children's dependency, Dr. Nolan had the right to purchase Mrs. Nolan's "interest" in the property at a specified price. We must now look to see if either of the two contingencies under subparagraph 6(d) occurred.

2. *Mrs. Nolan's election to surrender.* Some question might be raised as to whether Mrs. Nolan effectively elected to surrender her rights in the property by filing the declaratory judgment action on 8 December 1975. We do not, however, have to answer that question for in his answer in the present action, Dr. Nolan admitted that Mrs. Nolan "did not elect to surrender her right to the use and occupation of the property."

3. *Dependency of the children.* There is no doubt that the issue as to whether the children were dependent was contested until Mrs. Nolan's death. This is a material issue in this case, for if the children ceased to be dependent, then it would have been proper for Dr. Nolan to have exercised his option prior to Mrs. Nolan's death. Consequently, the award of summary judgment by the trial court was improper. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972).

4. *Dr. Nolan's exercise of his option.* If the jury should find that the children ceased to be dependent during Mrs. Nolan's lifetime, then, as a matter of law, the trial court must hold that Dr. Nolan effectively exercised his right to purchase. Since Mrs. Nolan, in an answer to an interrogatory directed to her in the second action, openly refused to sell the Arbor Road property to Dr. Nolan, it was not necessary for Dr. Nolan to actually tender the

purchase price to her in order for him to have exercised the option. Dr. Nolan did all that he could have done. It was Mrs. Nolan, not Dr. Nolan, who brought the earlier declaratory judgment action and who litigated up to the time of her death the question of dependency. Dr. Nolan was unable to take further action during the litigation. The law will not require one to do that which is futile or is in derogation of the judicial process. *Millikan v. Simmons*, 244 N.C. 195, 199, 93 S.E. 2d 59 (1956).

5. *The effect of Dr. Nolan's option on the heirs.* Under the doctrine of equitable conversion, under which equity will treat as done that which ought to be done, if the children ceased to be dependent in Mrs. Nolan's lifetime and if Dr. Nolan effectively exercised his option during her lifetime, then the children would be entitled only to the proceeds of the sale pursuant to the terms of subparagraph 6(d). 3 Strong's N. C. Index 3d *Conversion in Equity* § 1 (1976). *See generally,* Annot., 172 A.L.R. 438 (1948); 27 Am. Jur. 2d *Equitable Conversion* §§ 12, 16 (1966).

If, however, the jury should find that the children did not cease to be dependent during Mrs. Nolan's lifetime, then the trial court, as a matter of law, must rule that Dr. Nolan could not exercise the option against the children. Ordinarily, an option to purchase land is a covenant running with the land which is binding upon the heirs of the optionor. *See, Trust Company v. Frazelle,* 226 N.C. 724, 40 S.E. 2d 367 (1946). It is otherwise, however, where from the terms of the option itself, or by necessary implication therefrom, the option is personal and is limited to the parties thereto. 77 Am. Jur. 2d *Vendor and Purchaser* § 37 (1975). By the terms of the agreement in question, and the implication arising therefrom, this option is only enforceable against Mrs. Nolan, not against the children after her death.

Since Dr. Nolan had no right to exercise his option against the interest held by Mrs. Nolan's heirs, we do not need to reach the question as to whether Dr. Nolan effectively exercised his option against the children within a reasonable time.

The judgment of the trial court is

Reversed and remanded.

Judges HEDRICK and MARTIN (Harry C.) concur.

BEVERLY MALONEY v. WAKE HOSPITAL SYSTEMS, INC.

No. 7910SC446

(Filed 19 February 1980)

1. **Evidence § 50.2; Physicians, Surgeons, and Allied Professions § 15.1— cause of physical injury—expert testimony by nurse**

An expert witness is not disqualified from giving an expert opinion as to the cause of a physical injury simply because he is not a medical doctor. The trial court in this malpractice case erred in refusing to permit a nurse who was specially trained in intravenous therapy to state her opinion that burns on plaintiff's hand were caused by the improper intravenous administration of undiluted potassium chloride into the tissue of the hand where the court ruled that such testimony was inadmissible as a matter of law.

2. **Evidence § 50.2; Physicians, Surgeons, and Allied Professions § 15.1— cause of injury—exclusion of expert testimony—testimony not cumulative**

A nurse's opinion testimony that the improper intravenous administration of potassium chloride was *the* cause of an injury to plaintiff's hand was not properly excluded on the ground that it was cumulative where (1) the court ruled the testimony was inadmissible as a matter of law and was not exercising its discretion to limit the number of witnesses, and (2) the testimony was not cumulative since the only other evidence supporting plaintiff's theory of causation was the testimony of a medical doctor who stated that a high concentration of potassium chloride released into the tissue surrounding the site of plaintiff's intravenous treatment *could* have caused plaintiff's injury.

APPEAL by plaintiff from *Bailey, Judge.* Order entered 15 December 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 6 December 1979.

In this action the plaintiff is suing the defendant hospital for the malpractice of a nurse employed by defendant. On 25 June 1975, plaintiff was admitted to Wake Medical Center through the emergency room for treatment of a stomach disorder. During her stay at the hospital defendant was given intravenous (I.V.) treatment. I.V. treatment was initiated by nurse Mary Jo Kulyk on the night of defendant's admission to the hospital. On 27 June 1975, Kulyk, on the orders of a physician, administered a potassium chloride solution orally to the plaintiff. The purpose of this medication was to maintain normal concentrations of potassium in plaintiff's blood during her treatment. Plaintiff vomited the solution.

Kulyk was then ordered by Dr. Claudia Ann Peters Carbonetto, a resident physician practicing at the hospital, to administer the potassium intravenously. Plaintiff testified that she observed Kulyk inject undiluted potassium chloride into the I.V. tube. Kulyk testified that she properly diluted the solution before injecting it. After half of the solution was administered, plaintiff complained to Kulyk of a burning sensation in her hand, the site of entrance of the I.V. treatment. The burning persisted for three or four hours following the potassium treatment, and the hand became swollen. Later, the skin on plaintiff's hand turned a grayish color and this skin was surgically removed. Plaintiff underwent cosmetic surgery to replace the lost and scarred skin, which she claimed was only partially successful. Plaintiff claimed damages for past and future medical expenses incurred in treating the hand, permanent partial disability with respect to the use of the hand, lost wages, and pain and suffering.

At trial, plaintiff testified about her ordeal. Plaintiff offered the testimony of Judy Atkins, a nurse who had been specially trained in I.V. therapy, to show Kulyk had breached her duty of care to plaintiff and that the allegedly improperly administered potassium actually did cause the damage plaintiff sustained to her hand. The court declined to allow Atkins to testify as to causation of the injury, stating out of the presence of the jury that he did not believe an individual not licensed to diagnose or prescribe medical treatment could testify as to injury causation. Plaintiff also offered the testimony of her cosmetic surgeon, Dr. Vartan M. Davidian. Dr. Davidian testified as to his diagnosis of plaintiff's injury, and stated that if undiluted potassium were injected in plaintiff's vein, immediate death would have resulted. However, if the needle were placed outside of the vein, plaintiff's injuries could have been caused by the potassium.

Defendant presented the testimony of nurse Kulyk, one other nurse who had treated plaintiff at Wake Medical Center, and two physicians. The jury found that plaintiff had not been injured by the defendant's negligence, and the court entered judgment for the defendant. Plaintiff appeals from this judgment.

Sanford, Adams, McCullough & Beard, by J. Allen Adams and Catherine B. Arrowood, for the plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, for the defendant appellee.

WELLS, Judge.

Plaintiff has made numerous assignments of error regarding the trial court's exclusion of evidence, allegedly prejudicial remarks in the presence of the jury, charge to the jury, failure to require the reading of a portion of the deposition of one of defendant's witnesses, and precluding plaintiff from showing an exhibit to the jury during plaintiff's closing argument.

[1] The principal question we determine in this appeal is whether an expert who is not a medical doctor may give expert opinion testimony as to the cause of a physical injury.

Plaintiff called as her first expert witness Ms. Judy Atkins. Ms. Atkins' credentials—her education, experience, and skills—are directly at issue in resolving the question before us, and we summarize them here now. Ms. Atkins obtained an Associate Degree of Medicine at Central Piedmont Community College. Subsequently, she completed three years of nurses training at Charlotte Memorial Hospital, following which she attended school at the University of North Carolina at Chapel Hill. She was licensed as a registered nurse in 1969. In February 1972, she was employed as a staff nurse in acute care medicine at North Carolina Memorial Hospital. In 1973, she became a nursing supervisor at Memorial Hospital and was appointed coordinator of the I.V. therapy division. Her duties there included assisting in the organization and implementation of an I.V. team and working with the I.V. mixture service at Memorial. During her employment at Memorial, she served as president of the American Society of Intravenous Therapy and she participated in establishing a program to exchange ideas and presentations by physicians and pharmacists for other hospitals in North Carolina. Several of those meetings were held at Wake Medical Center. She assisted in establishing an I.V. therapy program at Wake Medical Center. Wake Memorial Hospital adopted an I.V. therapy manual almost identical to the one she developed for the University of North Carolina. Ms. Atkins continued to practice nursing and I.V.

therapy until September 1976, when she entered the School of Pharmacy of the University of North Carolina at Chapel Hill. At the time of the trial of this action, she was completing the equivalent of her fifth year of pharmacy school after just three years of study. Her study in pharmacy school related to her previous experience in I.V. therapy. During her experience, she has consulted with many pharmaceutical companies on I.V. administration and practices, and has served on an ad hoc committee of the United States Food and Drug Administration Center for Disease Control and the Pharmacy Appeal Convention for setting standards for preparation of I.V. drugs and on a similar committee whose purpose was to recommend national procedural standards for I.V. administration.

Following this recitation of credentials, counsel for plaintiff confronted Ms. Atkins with a hypothetical question asking if she had an opinion as to whether plaintiff's injury could or might have resulted from the administration of undiluted potassium chloride directly into the tube. The trial court sustained defendant's objection to the question. At this point in the trial, the record shows that the following events occurred.

MR. ADAMS: May I approach the bench?

COURT: I think I can shorten this up a lot if I let the jury go out.

MR. ADAMS: All right.

* * *

(JURY RETIRES TO THE JURY ROOM.)

COURT: Mr. Adams, I have no doubt but that this lady is unquestionably an expert in the field of intravenous therapy and I am sure that she is as competent in that field as anybody I have ever known but you got [*sic*] her in the field of medicine and in the field of pharmacy. She is [*sic*] not yet graduated from [*sic*] pharmacy and I am not going to let her testify in those fields no matter what you want to do but if you want to get the answer to that in the record, now is the time to do it. I ain't never [*sic*] going to let it come in in the presence of the jury in the presence of this witness.

MR. ADAMS: That it takes a medical expert and not a nursing expert?

COURT: That is exactly what I am ruling. I think this lady would tell you here that she is not licensed to diagnose or to prescribe treatment for her field of expertise, to give the treatment in the profession as prescribed by medical people and not to make diagnosis, is that not correct, ma'am?

A. True.

MR. ADAMS: Can I ask her a few further qualifying questions to see if I can qualify her?

COURT: Yes, you can try that.

Q. Mrs. Atkins—

COURT: But it is going to be a long slow road I tell you.

Q. —as a result of your training and experience are you familiar with the injuries that may result, not the diagnosis, diagnosing of such injuries but what type of injuries may result from the improper administration of potassium chloride in I.V. solution?

A. Yes.

Q. And have you seen specifically in the course of your studies and experience seen [*sic*] what type of injuries result from such administration?

A. Yes.

Q. And has that been part of your training as such?

A. Both. I have both seen it in practice and had it taught to me in my educational process.

Q. So you do not diagnose the injury but once you see medical records as to what injury exists, do you feel that you are qualified to know whether that injury, particular injury could have come from a particular I.V. procedure?

A. Specifically from I.V. administered drugs I can discuss those things that might happen.

Q. And is it your duty to be familiar with parenteral fluids and their effects?

A. As a nurse, yes.

* * *

Q. I will rephrase the question. Is it your duty to be familiar with I.V. administered fluids and their effects?

A. It is the duty of all nurses to be familiar with them because they are the people who administer them. It is not the pharmacists or the physicians.

Q. And are you familiar with the effect of potassium chloride injected into the tissue undiluted?

A. Yes.

Q. And it is not your job to diagnose a particular condition as found but once a doctor diagnoses it as being a particular type of a burn, is it within your training to be able to form an opinion as to what might have caused that in the way of I.V. fluids?

A. Yes.

Q. All right. So I would like to ask the question again.

COURT: Still sustained.

Had she been allowed to answer, Ms. Atkins would have testified that, in her opinion, the burn suffered by plaintiff was caused by undiluted concentrated bolus of potassium chloride flowing from the I.V. bag into the tube and then administered into the tissue in plaintiff's hand.

Plaintiff argues that the trial court erred in excluding Ms. Atkins' opinion testimony as to causation of plaintiff's injury. We agree. In North Carolina, the opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony. *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972).

We note that with respect to whether a skilled or expert witness possesses sufficient qualifications to be permitted to testify as to his opinion,

> . . . the unsound rule has sometimes been laid down that the witness must be one who employs his skill *professionally* or *commercially* . . . . But the only true criterion is: On *this subject* can a jury from *this person* receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally.

7 Wigmore on Evidence § 1923, p. 21 (3d ed. 1940). *See also,* McCormick on Evidence § 13, pp. 29-30 (2d ed. 1972); 1 Stansbury's N.C. Evidence § 132, pp. 424-428 (Brandis rev. 1973). The qualifications of a medical expert are judged according to the same standards as those of expert witnesses in general:

> The common law . . . does not require that the expert witness on a medical subject shall be a person *duly licensed to practice medicine* . . . . Except as an indirect stimulus to obtain a license, such a rule is ill-advised, first, because the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses, and, secondly, because some of the most capable investigators have probably not needed or cared to obtain a license to practice medicine.

2 Wigmore on Evidence § 569, pp. 667-668 (3d ed. 1940). *See also, State v. Johnson, supra;* 2 Jones on Evidence § 14.13, p. 619 (6th ed. 1972); 1 Stansbury's N.C. Evidence § 135, pp. 439-440 (Brandis rev. 1973). Since we accept the principle that the giving of expert testimony should not be limited to those witnesses who are licensed in some particular field of endeavor, nor limited by whether such witnesses employ their skills professionally or commercially, there is accordingly no basis or justification for treating medical experts differently—for establishing a preferred or exclusive class among medical expert witnesses.

Our holding is additionally supported by the fact that nurses and other physician's assistants play a much greater role in the actual diagnosis and treatment of human ailments than previous-

ly. *See, e.g.*, Sadler and Sadler, *Recent Developments in the Law Relating to the Physician's Assistant*, 24 VAND. L. REV. 1193 (1971). The role of the nurse is critical to providing a high standard of health care in modern medicine. Her expertise is different from, but no less exalted than, that of the physician. It would be difficult to find a more valid illustration of that principle than the career of Ms. Atkins.

Defendant argues that we should sustain the trial court's exclusion of Ms. Atkins' testimony relating to causation on grounds that the trial court had the *discretionary* authority to keep this testimony out. We agree that the trial court's decision concerning whether or not a witness has qualified as an expert is ordinarily within the court's sound discretion. *Edwards v. Hamill*, 266 N.C. 304, 145 S.E. 2d 884 (1966). However,

> [w]here . . . the trial court is clothed with discretion, but rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter [citations omitted]. . . . "[W]here it appears that the judge below has ruled upon the matter before him upon a misapprehension of the law, the cause will be remanded to the superior court for rehearing in the true legal light." [Citation omitted.]

Capps v. Lynch, 253 N.C. 18, 22, 116 S.E. 2d 137, 141 (1960) (trial court mistaken as to its discretionary authority to admit privileged conversation between physician and patient). This general evidentiary principle has been specifically applied by our Supreme Court to a situation where a trial court excluded expert medical testimony under an erroneous view of the law. *Pridgen v. Gibson*, 194 N.C. 289, 139 S.E. 443 (1927) (general practitioner not excluded as a matter of law from giving expert testimony on the proper standard of treatment for an eye injury).

We readily accept the validity of defendant's position vis-a-vis the general rule. However, in the case before us, it is obvious from the previously quoted remarks of the trial court that the trial judge believed his discretionary authority was severely limited, if not entirely foreclosed, simply because Ms. Atkins was not licensed to diagnose illness or injury or prescribe treatment. As we previously stated, this view of our evidentiary law is erroneous. The license, if any, held by a witness may properly be

one fact for the court to take into account. However, the controlling factors for the court's consideration must be the education, knowledge, information, skill, and experience of the witness. The exclusion of Ms. Atkins' testimony, on grounds that such exclusion is mandated as a matter of law, constitutes reversible error.

[2] Defendant also argues that the testimony of nurse Atkins is cumulative, and therefore its exclusion by the trial court was not prejudicial error. There is no question that the trial court has discretion to limit the number of witnesses a party may call where the additional evidence would merely be cumulative or where it would otherwise needlessly waste the time of the court. *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968); 1 Stansbury's N.C. Evidence § 21, p. 51 (Brandis rev. 1973). In the present case, however, the trial court did not exclude Ms. Atkins' testimony on this discretionary basis.

Furthermore, Ms. Atkins' testimony was not "cumulative". The only other evidence presented as to plaintiff's theory of causation was the testimony of Dr. Davidian, who stated that a high concentration of potassium chloride solution released into the tissue surrounding the site of plaintiff's I.V. treatment *could* have caused plaintiff's injury. Atkins testified that improperly administered potassium chloride was *the* cause of plaintiff's injury.

> Cumulative evidence is additional evidence of the same kind bearing on the same point. Thus when testimony has been given by one or more witnesses . . . and other witnesses are produced who testify to the same set of facts *and to no new fact*, the evidence given by such witnesses is merely cumulative. [Emphasis added.]

1 Jones on Evidence § 1:5, p. 6 (6th ed. 1972). Atkins' testimony, that improperly administered potassium chloride solution was *the* cause of plaintiff's injury, contains an element of certainty which distinguishes it from the testimony of Dr. Davidian, and her testimony was thus not subject to exclusion at the trial court's discretion on the basis that it was cumulative.

New trial.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. FREDDIE RAYNOR

No. 7915SC820

(Filed 19 February 1980)

1. **Criminal Law § 128.2— snowfall—illness of juror—mistrial properly entered**

The trial court did not abuse its discretion in declaring a mistrial and ordering a retrial of defendant's case at the earliest convenient session where the session of court at which defendant's case was called was interrupted by two snowfalls which prevented jurors from getting to the courthouse and where one juror became ill during the session at which defendant's case was called and was advised by her doctor to stay at home.

2. **Criminal Law § 91.7— absence of State's witness—continuance proper**

Defendant was not prejudiced by the trial court's granting of the State's motion to continue, since the State sought the delay in order to have an FBI agent, who was out of the State at the time defendant's case was called, to testify for the State concerning his examination of the evidence and to give the agent time to examine hair samples from defendant and the victim; defendant did not testify or call any witnesses in his behalf, so the delay would not affect the memories of witnesses; and defendant did not request that his case be placed on the docket for trial, nor did he make a motion for speedy trial.

3. **Burglary and Unlawful Breakings § 5; Rape § 18.2— first degree burglary—assault with intent to commit rape—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for first degree burglary and assault with intent to commit rape where such evidence tended to show that the victim was assaulted in her bedroom by a male; the victim struggled with the assailant, scratching his private parts; the victim formed an idea of the assailant's appearance on the basis of what his face felt like; the victim selected defendant's picture as that of her assailant from a group of pictures shown to her; fingerprints from one of the victim's window screens matched those of defendant; and one day after the crimes charged, an officer observed scratches on defendant's private parts.

4. **Criminal Law § 122.1— additional jury instructions—jury's questions answered**

Where the jury asked the judge a question which he answered, the judge asked the foreman if that answered his question and if he had any other question, and the foreman responded in the negative, there was no merit to defendant's contention that the foreman was asked two questions and gave only one answer and that the judge therefore did not answer the question asked by the jury.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 12 April 1979 in Superior Court, ORANGE County. Heard in the Court of Appeals 30 January 1980.

On 21 November 1978, defendant was properly indicted for the offenses of assault with intent to commit rape and first-degree burglary. On 5 February 1979, the trial on said charges began. After the jury had heard all the evidence and the closing arguments, the jury began its deliberations on Thursday (8 February 1979). On Friday, the court declared a mistrial due to the illness of a juror and the accumulation of snow. The court noted in its order that "it is impossible for the trial to proceed in conformity with law in that the delay of the trial and further jury deliberations until Monday would not be fair either to the jurors or to the parties to the action." Defendant had unsuccessfully moved that "because of the length of time the action had been pending that the charges against the defendant be dismissed and in the alternative moved that the term of Court be extended so that the trial could be completed next week." The cases were then calendared for 13 March 1979. On 12 March 1979, the State moved for a continuance due to the unavailability of an F.B.I. agent who had planned to testify for the State. The motion was allowed.

At the trial of the case on 9 April 1979, Elizabeth Boughman testified: that on 17 September 1978, she was living at 116 Basnight Lane, Chapel Hill, with her roommate; that she went to bed around midnight; that her roommate was away; that the doors were locked; that later in the night, someone entered her bedroom and placed his hand over her mouth; that the man told her he would not hurt or rape her, but ordered her to take her clothes off; that after she had taken her gown off, he got on top of her; that she began to struggle; that the man hit her on her face and tried to choke her; and that she scratched his testicles and scrotum with her fingernails. Ms. Boughman was able to get the man off her and ran to her neighbor's house. Ms. Boughman further testified that she was able to feel the man's face during the struggle and that from her experience in studying art from a blind person's perspective, she was able to get an idea of his face. On 18 September 1978, Ms. Boughman selected defendant's picture from a group of ten pictures, because the man in the picture had close-cropped hair, a wide nose, and facial hair similar to that of the man who assaulted her. (Defendant's picture was taken with his consent on 18 September 1978.) Ms. Boughman admitted that she could not definitely identify defendant as being the per-

son, but that his features were very consistent with the features of the man she observed and whose face she felt.

Police Officer Pendergrass testified that based upon the description of the man given by Ms. Boughman, he determined that defendant might be a possible suspect. Defendant voluntarily talked to police officers and consented to be fingerprinted. Defendant denied being on Basnight Lane. On 13 March 1979 while defendant was in jail, he voluntarily allowed Officer Pendergrass to remove some of his pubic hair for analysis.

Detective Truelove testified that on 18 September 1978, latent fingerprints were lifted from one of the window screens at Ms. Boughman's residence. Truelove removed some hair from her bed. Samples were collected from underneath Ms. Boughman's fingernails. All of these samples were sent to the F.B.I. Investigation Laboratory in Washington, D. C. on 22 February 1979.

Laboratory experts from the F.B.I. testified that the debris from under the fingernails of Ms. Boughman contained human tissue that could have originated from a person of any race or sex and that the hairs taken from Ms. Boughman's bed were characteristically similar to the ones taken from defendant. Evidence was presented that on the night in question, the screen by the back porch of Ms. Boughman's residence was not "hooked shut," because it was stuck by paint.

An expert in the field of fingerprints comparison and identification testified that the latent prints from the screen and the prints taken from defendant matched and that on 18 September 1978, he observed scratches or lacerations on defendant's scrotum and testicles. He admitted that the fingerprints found on the screen could have remained there for a year or more.

Defendant did not offer any evidence. Defendant was convicted of non-felonious breaking and entering and assault with intent to commit rape. From the imposition of a prison sentence, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan and Special Deputy Attorney General Myron C. Banks, for the State.

William F. Larimer, for defendant appellant.

ERWIN, Judge.

Defendant presents five arguments for our determination:

"I. That the trial court erred in denying the appellant's motion and by declaring a mistrial following the first trial of this matter in February of 1979

II. That the trial court erred in granting the State's motion for a continuance [on 12 March 1979]

III. That the trial court erred in denying the appellant's motion for dismissal at the end of the State's evidence

IV. That the trial court erred in its charge to the jury

V. That the trial court erred by not directly answering the question posed to it by the jurors deliberating this cause"

We find no prejudicial error in the trial of defendant.

Mistrial February 1979

[1] In this assignment of error, we note that defendant did not move or request to have his cases tried as soon as possible, nor does the record show that he objected to delay in his trial from November 1978 to February 1979. We also note that defendant did not plead at the second trial that jeopardy applied in this case.

We hold that this case is controlled by *State v. Birckhead*, 256 N.C. 494, 506, 124 S.E. 2d 838, 848 (1962), wherein our Supreme Court held:

"We conclude that the trial judge in cases less than capital may, in the exercise of sound discretion, order a mistrial before verdict, without the consent of defendant, for physical necessity such as the incapacitating illness of judge, juror or material witness, and for 'necessity of doing justice.' He need not support his order by findings of fact. His order is not reviewable except for gross abuse of discretion, and the burden is upon defendant to show such abuse. But the discretion of the trial judge is not unlimited, and if it be affirmatively shown that no physical necessity or 'necessity for doing justice' existed, the order of mistrial will be deemed

arbitrary and beyond the scope of the court's discretion. Where a court acts arbitrarily and beyond the bounds of its discretion under the semblance of exercising discretion, such action by the court amounts to a gross abuse of discretion."

This principle of law, as stated in *State v. Birckhead, supra,* has been followed by our Supreme Court in the following cases: *State v. Small,* 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Battle,* 279 N.C. 484, 183 S.E. 2d 641 (1971); *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. Pfeifer,* 266 N.C. 790, 147 S.E. 2d 190 (1966). *State v. Birckhead, supra,* has been followed by this Court in *State v. McGhee,* 16 N.C. App. 702, 193 S.E. 2d 446 (1972), *cert. denied,* 282 N.C. 674, 194 S.E. 2d 154 (1973); *State v. Anderson,* 9 N.C. App. 146, 175 S.E. 2d 729 (1970); *State v. Preston,* 9 N.C. App. 71, 175 S.E. 2d 705 (1970).

The order entered by Judge McKinnon may be reversed by this Court only if gross abuse of discretion appears from the record. *State v. Guice,* 201 N.C. 761, 161 S.E. 533 (1931). The record before us shows that defendant did not contest the mistrial order entered or any matter therein; that on Tuesday afternoon, there was a snowfall of five inches, and court did not convene on Wednesday because of weather conditions; but that court convened on Thursday and recessed until Friday morning at 9:30 a.m. Again, snow began to fall about 7:00 a.m. The court advised the sheriff to tell any jurors who called that they should proceed to court and be present by 9:30 a.m. By 10:00 a.m., seven jurors were present. The court was advised that a changed weather report indicated that the snow accumulation would be from two to three inches and that travel would be hazardous for the remainder of the day. In addition, the following event occurred:

"[T]hat one juror, Mrs. Ballew, had reported that she was ill and believed that she had the flu and that other jurors were calling to know whether they should come in view of a continuing snow and hazardous conditions of the road. That the Court directed the Clerk to have Mrs. Ballew consult a doctor by telephone and to report as to his diagnosis and instruction. Mrs. Ballew has reported that she has consulted a

Dr. Jones, that he has diagnosed her situation as intestional flu and advised that she stay at home."

The court's order provided the following, *inter alia*:

"The Court finds the foregoing statements to be facts and upon these facts is of the opinion that it is impossible for the trial to proceed in conformity with law in that the delay of the trial and further jury deliberations until Monday would not be fair either to the jurors or to the parties to the action, that the length of the trial was such that it may reasonably be tried again in the near future and without injury to the rights of the State or of the defendant, and the Court is of the opinion that the interest of justice will best be served by a mistrial at this time and a retrial of the action at the earliest convenient session.

IT IS, THEREFORE, ORDERED that by reason of the illness of the juror, Mrs. Ballew, she is withdrawn as a juror and a mistrial of the action is declared."

From this record, we cannot find abuse of discretion on the part of Judge McKinnon. He was faced with crucial problems beyond his control, and his response was in the best interest of justice for all parties. We overrule this assignment of error as being without merit.

State's Motion to Continue on 12 March 1979

[2] Defendant contends the granting of the State's motion to continue after the court's order directing a mistrial denied him a right to a speedy trial and that he was prejudiced by the delay, not only in terms of having new evidence introduced against him but also in terms of the effect of further delay on the memories of witnesses and on his own right to a final determination of the charges against him.

First, we note that defendant did not testify nor did he call any witnesses on his behalf. Therefore, the effect of the memories of witnesses would not apply to him. The record does not include a written motion by the State to continue the cases nor does it contain defendant's answer to such motion. Without these documents, we can only review the order entered by the trial judge. We also note that on 12 March 1979, defendant had not re-

quested that his trial be placed on the docket for trial nor had he made a motion for a speedy trial.

The court found, *inter alia:*

> "3. F.B.I. Agent Frier, who has made an examination of evidence in this case and who would be a witness for the State in the trial of this case, is from out of state, is to be testifying in the State of Utah this week, and has advised the District Attorney that he is not available for testimony in the trial of this case this week, and
>
> 4. That Agent Frier advised the State on March 10, 1979, that if the State presented him with sample hair from the victim and the defendant he could make further comparisons which may be substantial in the determination of the guilt or innocence of the Defendant (the hair has not yet been taken from the defendant, because he declined to make it available to the State voluntarily).
>
> The Court therefore concludes that for the reasons set forth above, the ends of justice served by granting the continuance outweigh the best interest of the public and the defendant in a speedy trial."

The ruling on a motion for a continuance is within the discretion of the trial court. *State v. Thomas,* 294 N.C. 105, 240 S.E. 2d 426 (1978). The record does not show that any acts on the part of the State were purposefully used to delay defendant's trial. This case does not fall within the holding in the case of *State v. McKoy,* 294 N.C. 134, 240 S.E. 2d 383 (1978), wherein defendant made several requests for a trial of the charges against him, and those requests were denied. This Court, in *State v. Lamb,* 39 N.C. App. 334, 337-38, 249 S.E. 2d 887, 890, *appeal dismissed,* 296 N.C. 738, 254 S.E. 2d 180 (1979), stated: "While failure to demand a speedy trial does not waive that right, *State v. Hill, supra* [287 N.C. 207, 214 S.E. 2d 67 (1975)], 'failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.' " After considering and balancing the factors: (1) the length of delay, (2) the reason for the delay, (3) defendant's assertion of his right to a speedy trial, and (4) prejudice to defendant

resulting from the delay, we find no error. *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976).

Motion for Judgment as of Nonsuit

[3] The trial court denied defendant's motion, which we will treat as a motion for judgment in the case of nonsuit. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Upon defendant's motion, as here, 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. Where 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); 4 Strong's N.C. Index 3d, Criminal Law, § 106, p. 547. Suffice it to say that in applying the above rule to the case *sub judice*, the evidence was ample to submit the cases to the jury and for the jury to return a verdict thereon. We find no error.

Charge of the Court

[4] After the jurors had deliberated, they returned to the courtroom to ask the judge a question. After the answer was given by the court, the court asked the jury the following questions: "Does that answer your question? Any other question at this time?" The foreman answered, "No, sir." The foreman was given a clear tablet upon his request. The jury returned to its room and later returned a verdict in open court.

Defendant contends that the foreman was asked two questions by the court, and he gave only one answer. From this, defendant concludes that the trial judge did not answer the question asked by the jury, that is, the answer applied to the first question asked by the court. We are unable to follow this reasoning. When the jury needed to ask a question, it did. It follows that if it wanted to follow up on the first question, it would have. The opportunity was present. We cannot see how this was prejudicial to defendant. Defendant's counsel did not make any statement or call the matter to the attention of the court. This contention is without merit.

From our study of the entire charge, we find it to be clear, the law was properly applied to the evidence, and there were no conflicts in it. Again, we find no prejudicial error. 4 Strong's N.C. Index 3d, Criminal Law, § 111, p. 564.

Conclusion

In the trial of defendant, we find no prejudicial error.

No error.

Judges MARTIN (Robert M.) and WELLS concur.

JOSEPH RAYMOND PRITCHARD v. BESSIE MARIE R. PRITCHARD

No. 798DC423

(Filed 19 February 1980)

1. **Divorce and Alimony § 23.9— child custody proceeding—opinion on question before court—harmless error**

While the trial court in a child custody proceeding erred in permitting plaintiff's present wife to give an opinion on the very question before the court, *i.e.*, whether plaintiff should be awarded custody of the child, the admission of such testimony was not prejudicial to defendant where the record does not affirmatively disclose that the court's award was based, in whole or in part, on such testimony.

2. **Divorce and Alimony § 25; Trial § 10.3— child custody hearing—remark by trial court—no indication of bias**

The trial court in a child custody proceeding did not show bias and prejudice against defendant when defendant's counsel offered to qualify a witness as an expert "if the court wishes" and the court stated, "It's up to you, I don't care anything about it frankly."

3. **Divorce and Alimony § 25.9— modification of child custody—sufficient evidence of changed circumstances**

The trial court did not err in concluding that there had been a material change in circumstances since a prior custody order which justified a change in custody of the parties' younger son from the mother to the father where the court found upon supporting evidence that personality differences developed between the sons and the older son had severe emotional problems stemming from his relationship with the younger son; since the younger son has gone to live with his father, the emotional problems of the older son have shown a marked improvement; plaintiff father has remarried and has the ability to pro-

vide a stable home environment for the younger son; and the father's present wife loves the younger son and is able and willing to care for him.

APPEAL by defendant from *Hardy, Judge.* Order entered on 4 January 1979 in District Court, WAYNE County. Heard in the Court of Appeals on 12 November 1979.

Plaintiff and defendant were married on 1 July 1967. Two children were born to the marriage, Joseph Michael Pritchard (Joey) and Michael John Pritchard (Michael). Plaintiff and defendant separated on 27 March 1974, and on 2 April 1974 entered into a separation agreement providing that defendant have primary custody of the two children and that plaintiff pay child support. On 31 July 1975, plaintiff instituted an action for an absolute divorce, to which defendant answered, requesting that she be given custody of the children and that plaintiff be ordered to pay $250 per month as child support. By order dated 1 October 1975, the custody of both children was given to defendant with plaintiff having certain visitation rights. Plaintiff was ordered to pay child support of $225 per month and, in addition, provide reasonable medical and dental care for the two children. Plaintiff, a member of the United States Air Force, went on a tour of duty in Holland and Germany shortly after the 1 October 1975 order, and remarried on 25 November 1976.

During the summer of 1976 defendant allowed the children to visit plaintiff overseas, and in May of 1977, allowed the children to remain with plaintiff in Germany and attend school the following year. In February of 1978, the children returned to defendant's home in Goldsboro, North Carolina, and lived with defendant until April of 1978. In April of 1978, defendant allowed the younger child, Michael, to return with plaintiff to Germany and remain there until the end of plaintiff's tour of duty in October of 1978. Plaintiff was thereafter reassigned to an Air Force Base in Michigan, and in late October 1978, over defendant's objection, took Michael with him to his new assignment.

On 3 November 1978, defendant filed a motion in the cause to have plaintiff cited for contempt, alleging that plaintiff willfully and unlawfully violated the prior custody order by taking Michael to Michigan without her permission. A show cause order was issued the same day ordering plaintiff to return the child on or

before 15 November 1978. In a reply filed 14 November 1978, plaintiff averred that defendant had previously agreed to his taking Michael to Michigan, and that defendant had announced her change of position only hours before he was scheduled to leave for Michigan. Plaintiff stated further that he had previously agreed to return to Goldsboro and settle the matter and requested the court to schedule a hearing for late in December so as to accommodate Michael's school schedule. Plaintiff also requested that the court award custody of Michael to him, averring that a change of circumstances had occurred since the prior custody order was entered. By order dated 22 November 1978, a hearing was set for 18 December 1978. Defendant filed an affidavit and response to plaintiff's reply on 14 December 1978, specifically denying that there had been a change of circumstances, and requesting the court to increase plaintiff's support payments to $350 a month. Defendant further requested the court to order plaintiff to pay her $300 to reimburse her for providing air fare for the children to visit plaintiff overseas.

A hearing was held on these matters on 18 December 1978. Plaintiff presented six witnesses, and defendant presented sixteen witnesses. In addition, the court, with consent of the parties, held a private examination of Michael. On 4 January 1979, the court filed an order awarding custody of Michael to plaintiff, with reasonable visitation rights given to defendant. The court found that there had been a material change of circumstances in that the emotional stability of the older child, Joey, had suffered due to his continued living with Michael, and that since their separation there had been a marked improvement in Joey's emotional state, as well as the academic and social areas of his life. Based on the evidence presented, the court incorporated the provisions of the prior order, and made certain amendments to that order by ordering that the custody of Michael be vested in plaintiff; that plaintiff pay $125 per month to defendant for the support of Joey, who remained in defendant's custody; that defendant was not entitled to reimbursement for travel expenses she paid for the children's travel; that plaintiff pay defendant $250 in attorney's fees; and that defendant have certain visitation rights concerning Michael.

Defendant's motion for a new trial was denied. From the court's findings of fact and conclusions of law, defendant appealed.

Taylor, Warren, Kerr & Walker, by John H. Kerr III and Gordon C. Woodruff, for plaintiff appellee.

W. Harrell Everett, Jr., for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant's first assignment of error concerns the court's admission of the testimony of Betsy Pritchard, plaintiff's wife, as to the reasons for placing the custody of the child with plaintiff. The record shows the following:

> Q. Why do you think it would be better for the Court to allow the custody of Michael to be placed with his father?
>
> Objection.
>
> Objection overruled.
>
> A. Michael has always been closer to Joe. I think he can provide a happier home for him because that's where Michael wants to live.

Defendant argues that this testimony is incompetent and highly prejudicial because the testimony went to the ultimate issue before the court.

We do not believe that the court's admission of this testimony requires a new trial. Defendant correctly states the general rule that a witness may not give his opinion on the very question for decision. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E. 2d 67 (1962); *Wood v. Insurance Co.*, 243 N.C. 158, 90 S.E. 2d 310 (1955). It is also apparent from the testimony quoted above that the question and answer assumed the very question before the court, i.e., whether plaintiff should be awarded custody of the child. However, without considering the admissibility of this evidence, we conclude that there is nothing in the record which affirmatively discloses that the court's award was based, in whole or in part, on this particular testimony. Indeed, "[t]he presumption is to the contrary. In a nonjury trial, in the absence of words or conduct in-

dicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision." (Citations omitted.) *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E. 2d 111, 114-15 (1971). Defendant's first assignment of error is overruled.

[2] Defendant next argues that the trial court showed bias and prejudice against her in considering defendant's offer of testimony by Tommy Hall concerning his conferences with defendant's children. Defendant contends that the trial judge demonstrated his prejudice when, in response to defendant's counsel's offer to qualify Hall as an expert, he stated: "It's up to you, I don't care anything about it frankly." We do not agree. On the contrary, by his statement, it is apparent that the trial judge reiterated his prior ruling on the admissibility of Hall's testimony concerning the psychological condition of the two children at a particular point in time. The appellant's counsel, apparently recognizing the fact that the witness had not been qualified as an expert, offered to qualify him "if the court wishes." Whether to qualify the witness was obviously a decision for counsel, not the court. While the court's remark may have been somewhat flippant, it does not, in our opinion, indicate prejudice toward defendant. There is nothing that indicates any impropriety on the judge's part in ruling in this fashion. Additionally, defendant did not except to the court's ruling on the admissibility of Hall's testimony, nor did defendant provide in the record what the testimony would have been if Hall had been allowed to testify further. Defendant's argument is, therefore, without merit.

[3] Defendant next argues that the court erred in concluding that there had been a material change of circumstances since the prior custody order justifying its award of the custody of Michael to plaintiff. We note in particular the following facts as found by the court in its order:

> 5. That during most of the 1977-1978 and 1978-1979 school year until the time of this hearing the said Michael John Pritchard has been residing with the plaintiff and has been enrolled in the public schools and making excellent academic progress and has been attending church; that the emotional state and condition of the said Joseph Michael Pritchard, the older child, has substantially improved since

he and his brother have been living separate and apart since the spring of 1978.

6. The defendant is employed by Branch Banking and Trust Company on a full-time basis earning approximately $725.00 per month. The plaintiff is earning approximately $810.00 per month. The plaintiff's wife is not employed, has no children of her own and is available to provide and care for said Michael John Pritchard on a full-time basis, in a comfortable and adequate home; that both children are happy, relaxed emotionally and better adjusted since the said Michael John Pritchard has been residing with the plaintiff; that there is mutual love and respect among Michael John Pritchard, the plaintiff and his wife, and that the environment in which Michael John Pritchard has been raised while with the plaintiff and his wife appears to the Court to be stable and to have been conducive and beneficial to the raising of said minor child.

7. That the plaintiff is a fit and proper person to have the care and custody of Michael John Pritchard and he and his wife are able to provide a two parent home and love and care for said child; that there has been a beneficial change in the mental and emotional state of well-being of at least one of the children since Michael John Pritchard has been residing with the plaintiff and that the welfare and best interest of the said Michael John Pritchard will be served by now vesting his custody in the plaintiff so that the said Michael John Pritchard will have both male and female supervision.

. . .

10. From the date of the prior Order of the Court while the defendant has had custody of Michael John Pritchard, said child has been subject to frequent transfers between the households of the plaintiff and defendant at the whim of the defendant and it would be in said minor child's best interest to have a stable environment.

Based on these findings, the court ruled that "there has been a sufficient, substantial and material change of circumstances as defined by N.C.G.S. 50-13.7(a) since the entry of this Order of October 1, 1975" to warrant a change of custody.

G.S. 50-13.7(a) provided, at all times pertinent to this case, that "[a]n order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." In *Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975), our Supreme Court stated the rules applying to a modification of a custody decree:

> An order pertaining to the custody of the child does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the court may modify prior custody decrees. G.S. 50-13.7. *Blackley v. Blackley*, [285 N.C. 358, 204 S.E. 2d 678 (1974)]; *Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649 (1967); *In re Herring*, 268 N.C. 434, 150 S.E. 2d 775 (1966). However, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change in circumstances affecting the welfare of the child, and the party moving for such modification has the burden of showing such change of circumstances. *Blackley v. Blackley, supra; Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968); *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

288 N.C. at 87, 216 S.E. 2d at 5. Such changed circumstances must be substantial; that is, "[i]t must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E. 2d 140, 144 (1969). *See Hensley v. Hensley*, 21 N.C. App. 306, 204 S.E. 2d 228 (1974). Further, "[w]here there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order awarding custody unless some other sufficient change of condition is shown." *In re Custody of Poole*, 8 N.C. App. 25, 28, 173 S.E. 2d 545, 548 (1970).

We are of the opinion that the evidence was sufficient to support the court's finding that the circumstances surrounding the children had changed since the prior custody order and that the welfare of the children would be best served by a modification of custody. Evidence was presented through Tommy Hall and Bessie

Pritchard showing that since 1 October 1975, particularly after Joey and Michael went to live with plaintiff in Germany in May of 1977, Joey had severe emotional problems stemming from his relationship with Michael; that personality differences developed between the two boys; and that since their separation in April of 1978, Joey's emotional state showed a marked improvement. The evidence also showed that since 1 October 1975, plaintiff had remarried and had the ability to provide a stable home environment for a child. In addition, there was evidence that Betsy Pritchard loved Michael and was able and willing to care for him. The court's findings on this point are conclusive in that they are supported by competent evidence. *In re Custody of Williamson*, 32 N.C. App. 616, 233 S.E. 2d 677 (1977).

Moreover, we conclude that the findings are sufficient to establish a change in circumstances of a material nature so as to permit a modification in the custody order of 1 October 1975. Having found that there had been a beneficial change in the mental and emotional state of at least one of the children since Michael resided with plaintiff, the court properly concluded that the welfare and best interests of Michael would be served by vesting his custody in plaintiff. In this respect we are mindful that the trial judge, having the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of children. *Tucker v. Tucker*, supra; *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *In re Custody of Williamson*, supra. "The welfare of the child is the paramount consideration that must guide the court in exercising this discretion." (Citations omitted.) *Tucker v. Tucker, supra*, 288 N.C. at 86-87, 216 S.E. 2d at 5.

In various other assignments of error, defendant argues that the judge erred in making certain findings of fact. After a careful review of the evidence presented in the record, we conclude that the evidence is supportive of the findings made by the trial court. The court's findings of fact are conclusive on appeal if there is any competent evidence to support them, even though the evidence might sustain findings to the contrary, and even though some incompetent evidence may also have been admitted. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

We address in particular defendant's argument that the trial court committed prejudicial error by failing to find plaintiff in contempt for willfully violating the prior contempt order in taking Michael to Michigan with him without defendant's permission. Without ruling on the merits of defendant's contentions, we hold that any error by the trial court in failing to find plaintiff in contempt could not have affected the result in this case and, therefore, does not constitute reversible error.

The court's order below is

Affirmed.

Judges PARKER and HILL concur.

LILLIAN S. HARRELL, EXECUTRIX OF THE ESTATE OF LOUIS F. HARRELL, DECEASED EMPLOYEE, PLAINTIFF v. J. P. STEVENS & CO., INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7910IC539

(Filed 19 February 1980)

Master and Servant §§ 68, 94— byssinosis—no occupational disease—insufficiency of findings—testimony discounted by Commission—error

In a workmen's compensation action where plaintiff claimed disability benefits alleging that he had become totally and permanently disabled because of byssinosis, findings by the Industrial Commission which basically related plaintiff's physical history, work experience and smoking habits were insufficient to support its conclusion that plaintiff did not suffer from an occupational disease arising out of and in the course of his employment; furthermore, the Industrial Commission erred in "discounting" testimony by a pulmonary specialist concerning plaintiff's condition because the history plaintiff gave to the specialist conflicted with histories he gave to other doctors at about the same time, since the Commission was required to consider all the competent evidence, weigh it, and believe whatever part of the evidence it found credible.

APPEAL by plaintiff from the Opinion and Award of the Industrial Commission filed 15 December 1978. Heard in the Court of Appeals on 15 January 1980.

In this workers' compensation action, plaintiff Louis F. Harrell (now deceased) filed a claim for disability benefits with the North Carolina Industrial Commission on 19 July 1976, alleging that he had become totally and permanently disabled "from impairment of respiratory pulmonary functions" caused by "regular exposure to cotton dust for 37 years in the picking, carding areas." He claimed that he contracted the lung disease, commonly known as byssinosis, in his employment with J. P. Stevens, from which he retired in June 1976. Upon the filing of his claim, the Commission referred plaintiff to Dr. Ted R. Kunstling in Raleigh. Dr. Kunstling, whose evaluation of plaintiff's condition will be set out below, is an internal medicine and pulmonary disease specialist, and a member of the Commission's Textile Occupational Disease Panel.

Defendants Stevens and its insurance carrier denied the claim. Thereupon, at a series of hearings before Deputy Commissioner Christine Y. Denson, the following relevant evidence was developed:

Dr. M. C. Maddrey, a general practitioner in Roanoke Rapids, began treating plaintiff in September 1969 and continued to treat him for various medical problems through December 1976. Dr. Maddrey's diagnosis in 1969 was that plaintiff suffered from hypertension and obesity. By October 1970, Dr. Maddrey observed, "[I]t was indicative that he had some kind of heart condition." In 1972, he diagnosed plaintiff's condition to be the result of "ischemic heart disease, plus a chronic bronchitis, plus obesity, plus arthritis." In his opinion, plaintiff was disabled by "these ailments."

Dr. Maddrey further testified that plaintiff "always complained of breathing" problems and "was always short of breath." He attributed that problem to plaintiff's obesity and did not perform any pulmonary tests. Dr. Maddrey conceded that "I wouldn't know a case of byssinosis if it walked in the door." However, he did refer plaintiff "to the man in town that does pulmonary tests", Dr. William M. Brown, who also treated plaintiff off and on "relative to his heart disease" from 1969 through 1977. In Dr. Brown's opinion, plaintiff's breathing problems were related to his heart disease. He diagnosed him as being afflicted "primarily with heart disease, pain of angina and the shortness of breath, of

the congestive heart condition, and also . . . diabetes." According to Dr. Brown, plaintiff was disabled by heart disease "as a primary reason." On cross-examination, on the other hand, he testified that the symptoms which he attributed to plaintiff's heart disease were also symptoms of chronic obstructive pulmonary disease (COPD), a diagnosis which he did not make but could not refute "at all . . . . When I made the diagnosis that Mr. Harrell had congestive heart failure as opposed to COPD, I did that because I already knew he had heart disease, that he had had it for some years, and that the congestive heart failure would be a naturally expected complication."

In June 1970 Dr. Brown referred plaintiff to Dr. Robert E. Whalen, Director of the Cardiovascular Disease Service at Duke University Medical Center, who was recognized by the Commission as an expert in cardiovascular medicine and whose specific area of practice is "individual patient care of the majority of private patients admitted to Duke for cardiovascular disease . . . ." Dr. Whalen testified that he diagnosed plaintiff's condition in June 1970 to be "arteriosclerotic heart disease." He examined plaintiff again on 30 September 1975 and 12 November 1976 during routine revisits to the Coronary-Artery Disease Follow-Up Clinic. By the November 1976 visit plaintiff was classified as a "Class IV Angina" patient, indicating that he was experiencing chest pain during rest periods and was "generally incapacitated by the pain."

Dr. Whalen also testified that his report prepared pursuant to his examination of plaintiff on 12 November 1976 described his "impressions" of plaintiff's condition to be (1) coronary heart disease, (2) obesity, and (3) COPD, secondary to byssinosis. However, on direct examination, he testified that, in his opinion, plaintiff's heart condition rendered him "100% disabled" and that his heart disease could not have been caused by COPD. On cross-examination, he said that he neither made nor participated in the diagnosis of COPD secondary to byssinosis, but rather, "I think I concurred with the observation of others [the Allergy and Chest Clinic at Duke] who had seen the patient. In our file there are notes raising this possibility. There are pulmonary function studies and there's correspondence concerning this diagnosis." With respect to the cause of plaintiff's disability, Dr. Whalen testified as follows:

I have no disagreement with competent decision about degree of byssinosis or asthma or bronchitis, but, aside from the notes, this man's history and findings show that he had been declared 100% disabled from cardiovascular disease. There is no reason why both couldn't be present at the same time. I would not quarrel with a pulmonary specialist making a similar assessment at the same time.

The record indicates that the pulmonary function study to which Dr. Whalen referred was performed by Dr. Maury K. Topolosky of the Duke Medical Center. Dr. Topolosky's report, dated 26 July 1976, describes his diagnostic impressions of plaintiff to be "1. COPD—moderate to severe probably [secondary] to Byssinosis" and "2. ASCVD [arteriosclerotic cardiovascular disease]—angina . . ." The record also contains reports stipulated into evidence by the parties which show the following:

- A discharge summary from Duke Medical Center dated 8 August 1977 and signed by Dr. Russel E. Kaufman records plaintiff's primary problem to be ASCVD and "Problem #2" to be COPD, "with probable byssinosis."

- A letter to Dr. Maddrey from Dr. Topolosky dated 19 August 1976 states: "It is felt that Mr. Harrell had progression of his cardiac problem. His main problem is his cardiovascular disease. His COPD is a contributing factor, . . ."

- A memorandum dated 5 April 1976 and signed by Dr. Melvin L. Haysman of the Duke Medical Center states: "His major problems are: Arteriosclerotic heart disease with angina pectoris and chronic obstructive pulmonary disease . . . . His pulmonary problem is exacerbated by markedly dusty environments and this further complicates his cardiac status."

Finally, plaintiff offered the testimony of Dr. Kunstling, the pulmonary disease specialist for the Commission's Textile Occupational Disease Panel, who examined plaintiff on 30 June 1977. Dr. Kunstling sent him to Wake Medical Center for pulmonary function studies which indicated "moderate obstructive impairment" before treatment with a bronchodilator. He diagnosed plaintiff's problems as follows:

> [H]e has history consistent with byssinosis; he has persisting airway obstruction which would make it [the byssinosis] Grade III; history of chronic bronchitis with chronic productive cough and reversible airway disease; chronic asthmatic bronchitis; he has coronary artery disease with history of myocardial infarction, angina pectoris, atrial fibrillation and has probably had congestive heart failure . . . .

Dr. Kunstling found plaintiff to be "severely impaired" primarily because of "his heart and lung disease." The chronic asthmatic bronchitis and byssinosis added "significantly" to plaintiff's heart disease-related impairment, Dr. Kunstling felt, by placing a "greater strain on his reserved cardiac function." Dr. Kunstling testified further that plaintiff's pulmonary problems resulted mostly from "card room exposure . . . . In my opinion Mr. Harrell has some amount of byssinosis due to the fact that he was exposed to cotton dust."

At the conclusion of the evidence, Deputy Commissioner Denson made findings of fact and concluded that "[p]laintiff does not suffer from an occupational disease arising out of and in the course of his employment with defendant-employer." *See* G.S. § 97-53(13). She denied his claim, and he appealed to the full Commission which made one change in the findings of fact and, as amended, in a 2-1 decision filed 15 December 1978, adopted as its own the Opinion and Award entered by Denson. Plaintiff thereupon appealed to this Court pursuant to G.S. § 97-86.

Davis, Hassell & Hudson, by Charles R. Hassell, Jr., for the plaintiff appellant.

Maupin, Taylor & Ellis, by Richard C. Titus and Richard M. Lewis, for the defendant appellees.

HEDRICK, Judge.

The duties of the Industrial Commission, when deciding a claim under G.S. § 97-53(13), have been recently enunciated by our Supreme Court in *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). Speaking through Chief Justice Sharp, the Court said:

> Whether a given illness falls within the general difinition [sic] set out in G.S. 97-53(13) presents a mixed question of

fact and law. The Commission must determine first the nature of the disease from which the plaintiff is suffering—that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law.

Id. at 640, 256 S.E. 2d at 695-96.

In the present case the Commission made the following findings:

FINDINGS OF FACT

1. Plaintiff . . . has worked in a textile mill all his working life, mostly in the card room. His several jobs required him to be in a work atmosphere that was heavy with both cotton dust and lint.

2. Plaintiff has smoked cigarettes since he was a young boy although he never smoked as much as a pack a day. Although plaintiff claims to have stopped smoking 10 years ago, from credible evidence it is found that plaintiff smoked regularly until at least September, 1975 and has smoked cigarettes occasionally since then.

3. Plaintiff began seeing Dr. M. C. Maddrey, a general practitioner in Roanoke Rapids, in September, 1969. He was diagnosed as suffering from hypertension for which he was given medication and obesity for which he was advised to lose weight.

In November, 1969, plaintiff began to complain of chest pains to Dr. Maddrey and plaintiff was hospitalized. Dr. Brown, an internist in Roanoke Rapids was asked by Dr. Maddrey to consult on plaintiff's case regarding the chest pain. Dr. Brown also noted plaintiff's obesity. Plaintiff was not complaining of shortness of breath.

4. In March, 1970, Dr. Brown hospitalized plaintiff for chest pain and in June referred plaintiff to Duke for an evaluation of the suspected heart problem.

5. Plaintiff was admitted to Duke University Medical Center under the care of Dr. Whalen, a specialist in cardiovascular medicine, from June 14th to June 20th, 1970. After extensive tests, the diagnosis was: (1) arteriosclerotic heart disease with angina pectoris and (2) obesity. Dr. Whalen did not recommend heart surgery at that time, but suggested medication.

Plaintiff was examined routinely and often by Dr. Maddrey or Dr. Brown for the chest pains and the heart medication was continued by them.

6. In September, 1972, plaintiff complained to Dr. Brown of a cough. Dr. Brown's impression was that plaintiff had an acute respiratory infection. The condition responded to treatment and in December, 1972, the condition had cleared.

From that time until 1974, plaintiff would have flare-ups of acute bronchitis treated by Dr. Brown.

7. In February, 1975, plaintiff was hospitalized by Dr. Maddrey for asthmatic bronchitis.

In September, 1975, Dr. Maddrey again hospitalized plaintiff with the following diagnoses: (1) traumatic arthritis of the right knee; (2) asthmatis [sic] bronchitis; (3) obesity. Dr. Maddrey again recommended plaintiff lose weight—both to ease the weight on the knee and to help his breathing.

8. Plaintiff was again seen by Dr. Whalen on September 30, 1975 for a routine check. He indicated he was still having chest pain.

9. On July 26 and again on August 12, 1976, plaintiff was examined by Dr. M. K. Topolosky, a pulmonary medicine specialist at Duke University Medical Center. Plaintiff's complaints were shortness of breath and chest pains and he gave Dr. Topolosky a history indicating that he had these problems both in and out of the work environment. Dr. Topolosky was of the opinion that plaintiff had moderate to severe chronic obstructive pulmonary disease, but that his major disabling factor was his heart.

10. Plaintiff had "retired" from defendant-employer on June 28, 1976. He had requested less strenuous work because of his heart condition, but that had been refused.

11. In November, 1976, plaintiff was hospitalized for his heart condition. Dr. Whalen saw him during November for a routine re-check and concurred that plaintiff was totally disabled as a result of his heart since plaintiff was having chest pains at rest as well as with exertion.

12. In January, 1977, plaintiff went to Dr. Brown complaining of chest pain and shortness of breath. Dr. Brown was of the opinion this was related to plaintiff's heart disease.

13. Plaintiff was in Duke University Medical Center from February 4th to February 13th, 1977. On his way to see Dr. Sieker within the hospital, he suffered a heart attack. The discharge diagnoses were multiple and included: (1) arteriosclerotic cardiovascular disease and the myocardial infarction secondary thereto; (2) chronic obstructive pulmonary disease, probably secondary to byssinosis (plaintiff had given a history of the Monday morning syndrome which is characteristic of byssinosis); (3) obesity and other problems.

14. Dr. Brown examined plaintiff on February 21, 1977 and continued treatment for angina and shortness of breath because of congestive heart failure.

15. Plaintiff saw Dr. Kunstling of Raleigh on the order of the Industrial Commission on June 30, 1977. The history plaintiff gave Dr. Kunstling on which he based his diagnosis of byssinosis is wholly in conflict with complaints given contemporaneously to Drs. Brown, Maddrey, Whalen, and Topolosky and is therefore discounted.

16. Plaintiff's total disability is a result of his heart condition. Plaintiff's heart condition is unrelated to plaintiff's exposure to cotton dust and lint in his employment.

17. The plaintiff has failed to carry his burden of proof that he is disabled as a result of an occupational disease arising out of and in the course of his employment by defendant-employer.

When all of the "findings of fact" made by the Commission are considered in light of G.S. § 97-53(13), and the principles enunciated in *Wood v. Stevens, supra,* it is clear that the Commission has failed to make sufficient definitive findings to determine the critical issues raised by the evidence in this case. [*See also Cannady v. Gold Kist,* 43 N.C. App. 482, 259 S.E. 2d 342 (1979).] Moreover, we note that "findings" numbers 3 through 14 are largely a mere chronicle of the course of plaintiff's treatment by various physicians, their diagnoses and evaluations. At best, they only summarize the evidence.

Assuming that "findings of fact" numbers 16 and 17, although negatively expressed with respect to the essential issues to be determined, are sufficient to support the conclusion that the plaintiff did not suffer from a compensable occupational disease within the meaning of the statute, the statement of the Commission in "finding of fact" number 15 requires that the order be vacated and the cause remanded for further proceedings.

It is the duty of the Commission to consider *all* of the competent evidence, make *definitive* findings, draw its conclusions of law from these findings, and enter the appropriate award. In making its findings, the Commission's function is "to *weigh and evaluate* the *entire* evidence and determine as best it can where the truth lies." *West v. J. P. Stevens,* 6 N.C. App. 152, 156, 169 S.E. 2d 517, 519 (1969). [Emphasis added.] To weigh the evidence is not to "discount" it. To weigh the evidence means to ponder it carefully; it connotes consideration and evaluation; it involves a mental balancing process. To "discount" the evidence, on the other hand, is to disregard it, to treat it as though it had never existed, to omit it from consideration. While the Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony, *Morgan v. Thomasville Furniture Industries, Inc.,* 2 N.C. App. 126, 162 S.E. 2d 619 (1968), it nevertheless may not wholly disregard competent evidence. Contradictions in the testimony go to its weight, and the Commission may properly refuse to believe particular evidence. But, it must first consider the evidence, and the statute itself so commands in the case of evidence supplied by the Commission's own advisory medical committee. G.S. § 97-71.

We think it significant that the Commission ordered that the plaintiff be examined by Dr. Kunstling, the only pulmonary specialist to diagnose plaintiff's condition. Yet, the Commission inexplicably chose to "discount" his testimony. That the plaintiff might have given contradictory statements of his medical history to Dr. Kunstling does not thereby render his testimony incompetent. As we noted, contradictions in the evidence go to its weight, and the Commission may consider any such inconsistencies in weighing the testimony of Dr. Kunstling and, equally, in weighing the testimony of the other experts.

For the reasons stated, the Opinion and Award of the Commission dated 15 December 1978 is vacated, and the proceeding is remanded to the Commission to consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order.

Vacated and remanded.

Judges VAUGHN and CLARK concur.

ROBERT IRA MAYTON v. HIATT'S USED CARS, INC. AND ROBERT F. HIATT, III

No. 7918DC141

(Filed 19 February 1980)

1. **Attorneys at Law § 7.5; Unfair Competition § 1— unfair trade practice—attorney fees**

In a private action to recover damages for an unfair and deceptive act in the conduct of trade in violation of G.S. 75-1.1, the plaintiff, in order to be the "prevailing party" within the meaning of the statute permitting an award of an attorney fee to be taxed as part of the costs, G.S. 75-16.1, must prove not only a violation of G.S. 75-1.1 by the defendant but also that plaintiff has suffered actual injury as a result of that violation.

2. **Attorneys at Law § 7.5; Unfair Competition § 1— unfair trade practice—misrepresentations in sale of automobile—finding of no injury—improper award of attorney fees**

In an action to recover damages under G.S. 75-1.1 for misrepresentations as to the condition and history of an automobile sold to plaintiff, the trial court erred in allowing an attorney fee to plaintiff's attorneys to be taxed as a part

of the costs and paid by defendants where the jury found that defendant salesman made the false representations but that plaintiff suffered no injury as a proximate result of the salesman's representations, since plaintiff was not the "prevailing party" within the meaning of G.S. 75-16.1, and there was no support for the trial judge's finding that there was an unwarranted refusal by defendants to pay a claim which the jury's verdict established plaintiff did not have.

APPEAL by defendants from *Williams, Judge*. Judgment dated 27 September 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 16 October 1979.

In December 1974 plaintiff purchased a used 1972 Volkswagen automobile from the defendant, Hiatt's Used Cars, Inc. In October 1976 plaintiff brought this action against the selling company and its salesman, Robert F. Hiatt, III, alleging that plaintiff had been induced to purchase the automobile through false representations made by the salesman which constituted unfair and deceptive acts in the conduct of trade in violation of G.S. 75-1.1. He prayed for treble damages and attorney fees pursuant to G.S. Ch. 75. Defendants answered, denying making false representations and alleging that the Volkswagen had been sold without warranties on a "condition as is" basis.

At trial before a jury at the 11 September 1978 session of district court, plaintiff presented evidence to show that the salesman represented to him that the automobile had never been wrecked and had been purchased from the estate of an elderly lady, whereas plaintiff discovered three months after the purchase that extensive body work had been done on the Volkswagen as result of a wreck and the parties stipulated prior to trial that the automobile had been purchased from Jack Hurt Salvage, Inc. Plaintiff's evidence also showed that between the time he purchased the Volkswagen in December 1974 and the time he disposed of it approximately three years later, he had to have repair work done on a number of occasions for which he incurred costs of approximately $135.00. During that time he drove the Volkswagen approximately 65,000 miles and the automobile was involved in two accidents.

Defendant's evidence indicated that the salesman had not told the plaintiff that the automobile had never been wrecked or that it had been purchased from the estate of an elderly lady.

The jury answered issues as follows:

1. Did the defendant, Robert F. Hiatt, III, represent to the plaintiff, Robert Mayton, that the used 1972 Volkswagen automobile had never been wrecked?

ANSWER: Yes

2. Did the defendant, Robert F. Hiatt, III, represent to the plaintiff, Robert Mayton, that the used 1972 Volkswagen automobile had been purchased from an estate?

ANSWER: Yes

3. Was Robert Hiatt, III the agent of Hiatt's Used Cars at the time of the sales transaction which is the subject of this lawsuit?

ANSWER: Yes

4. What amount, if any, is the plaintiff Robert Mayton, entitled to recover from the defendants, Robert F. Hiatt, III, and Hiatt's Used Cars, Inc.?

ANSWER: None

After return of the verdict, plaintiff's counsel moved for an award of attorney fees under G.S. 75-16.1. The court entered judgment finding as facts that defendants willfully represented to plaintiff that the automobile had never been wrecked and had been purchased from an estate, and finding there was an unwarranted refusal by the defendants to pay the claim of the plaintiff which constituted the basis of this suit. The court concluded that the representations made by defendants constituted unfair trade practices in violation of G.S. 75-1.1 and that plaintiff's attorneys were entitled to an award of attorney fees under G.S. 75-16.1 to be taxed as part of the costs to be paid by the defendants. The court adjudged that plaintiff recover no compensable damages from defendant but ordered defendant to pay $2000.00 into the office of the clerk of court as attorney fees for plaintiff's attorneys. From this judgment, defendants appeal.

Steven G. Gibson for plaintiff appellee.

Hugh C. Bennett, Jr., for defendant appellants.

Lovelace, Gill & Snow by James E. Gill, Jr., and James M. Snow for Carolina Independent Automobile Dealers Association, Inc., amicus curiae.

PARKER, Judge.

The question presented by this appeal is whether G.S. 75-16.1 authorized the trial judge under the circumstances of this case to allow an attorney fee to plaintiff's attorneys to be taxed as part of the costs and paid by the defendants. We hold that it did not.

G.S. 75-16.1, which was enacted by Section 1 of Ch. 614 of the 1973 Session Laws, effective 18 May 1973, provides as follows:

> § 75-16.1 *Attorney fee.*—In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) the party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to pay the claim which constitutes the basis of such suit; or
>
> (2) the party instituting the action knew, or should have known, the action was frivolous and malicious.

This statute authorizes the presiding judge, in any suit instituted by a person who alleges the defendant violated G.S. 75-1.1, to allow in his discretion a reasonable attorney fee to the attorney "representing the prevailing party, such attorney fee to be taxed as part of the court costs and payable by the losing party," upon the judge's making certain specified factual findings. Subsection (1) of G.S. 75-16.1 sets forth the findings which must be made when the plaintiff is the "prevailing party" and defendant the "losing party" who is ordered to pay the attorney fee. Subsection (2) of G.S. 75-16.1 specifies the findings which must be made when the reverse is the case, and the defendant is the "prevailing par-

ty" and plaintiff the "losing party" who is ordered to pay such fee. In either case the award may only be made to the "prevailing party."

Plaintiff contends that the jury's answers to the first three issues establish that defendants violated G.S. 75-1.1, and, therefore, that he was the "prevailing party" in this suit even though he failed to show he had suffered any damages. Although proof of a violation of G.S. 75-1.1 is, of course, necessary before a plaintiff may be a "prevailing party" within the meaning of G.S. 75-16.1, we express no opinion on whether the jury's answers to the first three issues in the present case adequately establish such a violation. Even if it should be conceded that a violation of G.S. 75-1.1 was shown, for the reasons hereinafter stated, plaintiff was not the "prevailing party," nor was there any competent evidence to support the court's finding of an unwarranted refusal by defendants to pay plaintiff's claim.

G.S. 75-1.1, as in effect in 1974 when the sale giving rise to the present action was made, provided in pertinent part as follows:

> *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.

This statute was enacted in 1969 by Ch. 833 of the 1969 Session Laws, which was entitled "An Act to amend Chapter 75 of the General Statutes to provide civil remedies against unfair methods of competition and unfair or deceptive acts or practices in trade or commerce."

Although G.S. 75-1.1 was patterned after § 5 of the Federal Trade Commission Act, the General Assembly chose to rely on methods of enforcement already in existence within Chapter 75 of the General Statutes as well as to create new methods. Under broad authority granted by G.S. 75-14, the Attorney General has power to obtain mandatory orders to carry out the provisions of Chapter 75, and under G.S. 75-15.1, the presiding judge has power in any suit brought by the Attorney General to order "the restoration of any moneys or property and the cancellation of any

contract obtained by any defendant as a result of such violation." This type of public enforcement through the office of the Attorney General is similar to enforcement of § 5 of the Federal Trade Commission Act insofar as its purpose is to vindicate the public interest rather than to redress individual grievances. In looking to the federal decisions for guidance it is apparent that the Federal Trade Commission need not show that actual injury has resulted, merely that the act or practice complained of adversely affects the public interest. *See*, e.g., *United States Retail Credit Association, Inc. v. FTC*, 300 F. 2d 212 (4th Cir. 1962); *Dejay Stores v. FTC*, 200 F. 2d 865 (2nd Cir. 1952); *see also*, "Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation", 48 N.C.L. Rev. 896 (1970). Similarly, there is no suggestion in our own statutory scheme that the Attorney General would be required to prove such actual injury. However, G.S. 75-16, which grants a private right of action foreign to the Federal Trade Commission Act, does provide otherwise. Unlike G.S. 75-1.1, which is of recent origin, G.S. 75-16 was adopted in substantially its present day form by the General Assembly in 1913 Public Laws Ch. 41, Sec. 14. The intent of the statute as originally enacted was to permit recovery by injured parties for antitrust violations which damaged the parties' business. In *Lewis v. Archbell*, 199 N.C. 205, 154 S.E. 11 (1930), the plaintiff brought private action under this provision to recover damages for violation of the monopoly statute. Our Supreme Court, in construing the statute, stated:

> It is obvious that the mere violation of the [monopoly] statute will not warrant a recovery of damages. The burden is upon the complaining party to show by competent evidence that his business has been broken up, destroyed or injured as the proximate result of such violation. . . . Whether there be a causal relation between the violation of the statute and the injury complained of is an issue of fact for jury . . . .

199 N.C. at 206, 154 S.E. at 12.

As amended by the General Assembly in 1969 Sess. Laws Ch. 833, G.S. 75-16 provides:

> *Civil action by person injured; treble damages.*—If any person shall be *injured* or the business of any person, firm or corporation shall be broken up, destroyed or injured by

> reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation *so injured* shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (emphasis added)

[1] Although the statute now provides a right of action for violations of individual consumer rights which were not contemplated at the time its predecessor was adopted in 1913, it is clear that the essential cause of action has remained unchanged. In the absence of any legislative indication that G.S. 75-16 is now intended to permit an individual to act in the role of a private attorney general rather than in that of an aggrieved party, we hold that in a private action to recover damages for a violation of G.S. 75-1.1, the plaintiff, in order to be the "prevailing party" within the meaning of G.S. 75-16.1, must prove not only a violation of G.S. 75-1.1 by the defendant, but also that plaintiff has suffered actual injury as a result of that violation.

[2] In the present case the jury found that the individual defendant had made certain representations as to the condition and history of the 1972 Volkswagen which plaintiff purchased. However, on the issue of damages, the jury found that plaintiff was entitled to recover nothing. This was in essence a determination that plaintiff suffered no injury as a proximate result of defendant's representations. Thus, plaintiff's contention that he prevailed on the issue of liability is meritless, because the jury's determination on the damage issue deprived him of an essential element of his cause of action, i.e., actual injury. Thus, plaintiff here was not the prevailing party within the meaning of G.S. 75-16.1. In addition, on the present record there is no support for the trial judge's finding that there was an unwarranted refusal by defendants to pay a claim which the jury's verdict establishes plaintiff did not have.

In a brief filed by Carolina Independent Automobile Dealers Association, Inc., as amicus curiae, a question was raised as to the constitutionality of G.S. 75-16.1. That question is not properly before the Court on this appeal since it was not raised in the court below. *Johnson v. Highway Commission*, 259 N.C. 371, 130

S.E. 2d 544 (1963); *Phillips v. Shaw, Comr. of Revenue*, 238 N.C. 518, 78 S.E. 2d 314 (1953).

Defendants have assigned error to various orders of the trial court directed to their attempts to stay execution of the judgment entered against them. Because of our disposition of this case, we do not address the propriety of these orders. In event execution has in fact been levied or the defendants have otherwise been forced to pay the judgment pending this appeal, defendants are entitled to restitution. *See, Boyette v. Vaughan*, 86 N.C. 725 (1882).

For the reasons stated, so much of the judgment appealed from as assesses an attorney fee and taxes costs against defendants is reversed. That portion of the judgment which adjudges that plaintiff recover no compensable damages from defendants, being supported by the verdict, is affirmed. Plaintiff shall pay the costs.

Affirmed in part.

Reversed in part.

Judges CLARK and MARTIN (Robert M.) concur.

ROBERT STEWART KEELS AND WIFE, DOROTHY NEWBER KEELS v. W. E. TURNER AND HOMESTEAD BUILDERS OF WILMINGTON, INC.

No. 795DC411

(Filed 19 February 1980)

1. Corporations § 25— contract to build house—corporate veil pierced—defendant individually liable

In an action to recover for breach of contract to construct a house on a tract of real estate and then convey the house and lot to plaintiffs, the trial court erred in directing a verdict for the individual defendant and could have "pierced the corporate veil" and held defendant personally responsible on the instrument in question where the evidence tended to show that the contract of sale used the name "Homestead Builders" as did the bank account of the purported corporation, and the corporate name thus did not comply with G.S. 55-12(a); either there was no meeting for the issuance of stock and no stock was ever issued or other corporate formalities were never observed; the in-

dividual defendant ran the business as his own personal business; and at the time the contract of sale was signed, the purported corporation did not own the lot which it agreed to convey, but the land was owned by individual defendant and another person.

2. Corporations § 8— contract signed by officer in individual capacity

The individual defendant was responsible in his individual capacity for any liability resulting from a contract to sell real property to plaintiffs since defendant signed the contract once as "W. E. Turner, Seller" and once as "Homestead Builders by W. E. Turner."

3. Contracts § 26— breach of contract—operating corporation as personal business—similar evidence already admitted

In an action to recover for breach of contract to construct and convey a house to plaintiffs, the trial court did not err in permitting an officer of defendant corporation to testify that the individual defendant "ran the business as his own personal business," since there were facts already in evidence from which the trier of facts could conclude that the corporate defendant was something less than a legitimate N. C. corporation and since the witness, as an officer of the corporation, was well qualified to state the facts about the relationship between individual defendant and corporate defendant.

4. Contracts § 26.2— evidence of other contracts by defendant—best evidence rule violated—evidence not prejudicial

Testimony by the officer of defendant corporation that individual defendant had signed other contracts in his individual capacity, though it violated the best evidence rule and constituted hearsay, was not prejudicial to defendant since individual defendant was liable anyway based upon his individual signature and his failure to observe other corporate formalities.

5. Contracts § 27.3— breach of contract to build house—cost of materials—damages

In an action to recover for breach of contract to construct a house for plaintiffs, the trial court did not err in failing to strike certain elements of damages, and evidence was sufficient to show that the damages were the natural and proximate result of the alleged breach where the evidence tended to show that plaintiff was an employee of Lowe's which entitled plaintiff to a one-time purchase of home building materials at cost; plaintiff explained to defendant that such purchase of supplies was a one-time employee benefit; and the jury could properly conclude that the cost of building materials and the loss of the one-time right to a discount on building materials were foreseeable consequences of the breach.

6. Witnesses § 6.2— defendant's reputation—similar evidence elicited by defense counsel—no prejudice

Even if the trial court in a breach of contract action erred in allowing plaintiffs to reopen their case and present testimony concerning individual defendant's reputation in the community, defendant was not prejudiced, since defense counsel, on cross-examination of the character witness, elicited more testimony including specific acts, concerning defendant's bad character.

Keels v. Turner

APPEAL by plaintiffs and defendant Homestead Builders from *Barefoot, Judge.* Judgment entered 11 December 1978 in District Court, PENDER County. Heard in the Court of Appeals 5 December 1979.

This is an action brought by the plaintiffs against the defendants for specific performance of a contract to convey realty, and for damages. The plaintiffs alleged that the defendants agreed to construct a house on a tract of real estate, and then convey the house and lot to the plaintiffs; that the defendants breached the contract; and that the plaintiffs were entitled to specific performance and damages. Subsequent to the filing of the complaint, the house and lot were foreclosed and sold to a third party. Thereafter, the plaintiffs amended their complaint, alleged the foreclosure and sought additional damages. The defendants, in their answer, admitted that the corporate defendant had contracted with the plaintiffs, but denied that the individual defendant had contracted with plaintiffs. Both defendants denied the plaintiffs' allegations of breach of contract and damages, and the corporate defendant counter-claimed for damages for breach of contract by the plaintiffs. The plaintiffs replied and denied the defendants' allegations that the plaintiffs had breached the contract.

At the close of the plaintiffs' evidence, the defendant W. E. Turner moved pursuant to Rule 50 of the Rules of Civil Procedure for a directed verdict as to him, which the Court denied. After the defendants had offered evidence, and the plaintiffs had introduced two exhibits in evidence in rebuttal, the defendant W. E. Turner renewed his motion under Rule 50 for a directed verdict as to him, which motion was allowed by the Court. The plaintiffs excepted to the ruling of the Court. Issues were submitted to the jury as to the rights and duties of the plaintiffs and the defendant Homestead Builders of Wilmington, Inc., which the jury answered in favor of the plaintiffs. Upon the entering of judgment, the plaintiffs gave notice of appeal to the Court of Appeals. Subsequently, the defendant Homestead Builders of Wilmington, Inc. served notice of appeal. Other necessary facts are stated in the opinion.

Stevens, McGhee, Morgan & Lennon by Richard M. Morgan for plaintiff appellants-appellees.

Burney, Burney, Barefoot & Bain by Roy C. Bain for defendant appellant-appellee.

CLARK, Judge.

I. PLAINTIFFS' APPEAL

The plaintiffs argue that the trial court erred in granting the motion of the defendant W. E. Turner under Rule 50 of the Rules of Civil Procedure for a directed verdict. We agree for the two reasons set forth below.

A. *Piercing the Corporate Veil.*

[1] The evidence clearly indicates that defendant Turner failed to follow the formalities of the corporate organization; consequently, we are able to "pierce the corporate veil" and hold the defendant personally responsible on the instrument. *Fidelity Bank v. Bloomfield*, 246 N.C. 492, 98 S.E. 2d 865 (1957). *See generally*, R. Robinson, N.C. Corporation Law and Practice § 9-9 (2d ed. 1974).

First, N.C. Gen. Stat. § 55-12(a) provides that "[t]he corporate name shall contain the wording 'corporation,' 'incorporated,' 'limited' or 'company' or an abbreviation of one of such words." *See State v. Thornton*, 251 N.C. 658, 111 S.E. 2d 901 (1960) ("The Chuck Wagon" not a corporate entity); *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E. 2d 667, *cert. denied* 281 N.C. 756, 191 S.E. 2d 354 (1972) ("White Plains Baptist Church" not a corporate entity); *State v. Thompson*, 6 N.C. App. 64, 169 S.E. 2d 241 (1969) ("Belks Department Store" not a corporate entity); *State v. Biller*, 252 N.C. 783, 114 S.E. 2d 659 (1960) ("U-Wash It, in Chapel Hill" not a legal entity). In the instant case, however, the contract of sale used only "Homestead Builders." Similarly, the bank account of the purported corporation was opened in the name of "Homestead Builders" some three months prior to the date at which the corporation was incorporated. Also, the name of the bank account did not change after the incorporation.

Second, N.C. Gen. Stat. § 55-9 provides that "[a] corporation shall not transact any business . . . until there has been received

the amount stated in the articles of incorporation as being the minimum amount of consideration to be received for its shares before commencing business." However, the minutes of the Official Meeting of the Initial Board of Directors of Homestead Builders of Wilmington, Inc., dated 21 May 1976—four days after the subject contract of sale was signed, indicated that the purpose of the meeting was, *inter alia*, "to issue stock or take subscriptions for stock of Homestead Builders of Wilmington, Inc." Mr. E. H. Kennedy, vice president and one of two directors of the corporation, testified that "no stock ha[d] ever been issued" and that he "never went to any corporate meetings to organize the corporation, or issue stock, or anything like that." Moreover, the secretary of the corporation, Carolyn M. Kennedy, who was also the wife of E. H. Kennedy, did not sign the purported minutes. The only signature on the purported minutes was that of the defendant W. E. Turner. One may only conclude that either the meeting did not occur and no stock was ever issued, or that other corporate formalities were never observed. *See also*, N.C. Gen. Stat. § 55-11, and § 55-32(g) and (l).

Third, E. H. Kennedy testified that defendant Turner "ran the business as his own personal business" and that Turner had signed another contract with Turner's personal signature instead of Homestead Builder's signature.

Fourth, at the time the contract of sale in this case was signed, Homestead Builders did not own the lot which Homestead Builders agreed to convey. The land was owned jointly by defendant Turner and E. H. Kennedy individually. While there is no rule that one may not contract to sell something which one does not yet own (were it so, the commodities futures markets would not exist), this consideration is relevant in the instant case with respect to whether defendant Turner was operating in an individual or corporate capacity.

B. *Signature in Individual Capacity.*

[2] "In general, it may be said that one who places his unqualified signature on an instrument as maker or indorser will not be able to escape liability as such by a mere assertion that he intended to sign only as the representative of a corporation of which he is an officer or director." Annot., 82 A.L.R. 2d 424, 426 (1962). *See also*, N.C. Gen. Stat. § 25-3-403 (1965). These

authorities pertain to negotiable instruments but we can see no reason for treating other contracts differently. Similarly, "where individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate officer signs twice, once as an officer and again as an individual." 19 Am. Jur. 2d *Corporations* § 1343 (1965). In the instant case defendant Turner signed the contract of sale once as "W. E. Turner, Seller" and once as "Homestead Builders by W. E. Turner." By application of the above stated rules, we hold defendant Turner responsible in his individual capacity for any liability resulting from the contract to sell the subject property to the plaintiffs.

II. DEFENDANT'S APPEAL

[3] Defendant's first series of objections pertains to the following question submitted to Harold Kennedy:

> "Q. Did Mr. Turner do business as a corporation and treat you as a stockholder in the corporation, or did he run the business as if it was [*sic*] his own?
>
> MR. BAIN: Objection
>
> COURT: Overruled.
>
> A. He ran the business as his own personal business."

Defendant argues that there was nothing in the record at the point when the question was asked from which the trier of fact could infer or conclude that the corporate defendant was anything less than a legitimate North Carolina corporation, and that consequently the question assumes facts not in evidence or facts in dispute in the case. 1 Stansbury, N.C. Evidence § 31 (Brandis rev. 1973). We disagree. Mr. Kennedy at this point had already testified at two different times, to the effect that although he was an officer in the corporation and was supposed to be a stockholder, nonetheless, he had never subscribed to stock in the corporation, no stock had ever been issued to him, and, in fact, no stock had been issued to anyone at all. Contrary to that asserted by the defendant, there were certainly facts from which a trier of fact could conclude that the corporate defendant was something less than a legitimate North Carolina corporation. In addition, we agree with the assertion of defendant Turner that Kennedy as an officer of the corporation was well qualified to state the facts

about the relationship between defendant Turner and the corporate defendant.

The defendant further argues, however, that the question was leading and that the question calls for an opinion from the witness. These arguments may have more merit, but even if the question were leading and calling for an opinion, it was not sufficiently prejudicial to affect the outcome in light of the other factors, discussed above, which allow defendant's corporate veil to be pierced. 1 Strong's N.C. Index 3d *Appeal and Error* § 48 (1976).

[4] The defendant's next assignment of error pertains to the following question submitted to Mr. Kennedy.

> "Q. Do you know of any other contracts that he signed just W. E. Turner instead of Homestead Builders?
>
> MR. BAIN: Objection.
>
> COURT: Overruled, if he knows.
>
> A. I think there was one other contract.
>
> MR. BAIN: Objection.
>
> COURT: Sustained.
>
> Q. If you know or do not know, that's the question you have to answer, Mr. Kennedy.
>
> A. There was a contract with Cardinal Realty."

Defendant contends that the evidence elicited was in violation of the best evidence rule and constituted hearsay. We agree. 1, 2 Stansbury's N.C. Evidence §§ 138, 191 (Brandis rev. 1973). Nonetheless, this statement is not prejudicial, for we have already held defendant Turner liable based upon his individual signature in the instant case, as well as upon his failure to observe other corporate formalities. It is fundamental that no reversal or new trial will be awarded where there is no prejudicial error. 1 Strong's N.C. Index 3d *Appeal and Error* § 49 (1976).

[5] The defendants also assign as error the failure of the trial court to strike certain elements of damages at the close of the plaintiffs' evidence and at the close of all the evidence. In this

regard the defendant asserts that there was no evidence in the record to support the plaintiffs' claim for damages. We do not agree. It is not for this Court to second-guess the means by which the jury calculated the award of damages. We can only note that there was sufficient evidence in the record to support the jury's verdict of $21,570.79 as the amount of damages the plaintiffs were entitled to recover. The testimony of Robert Keels, the canceled checks, and the Lowe's account credits indicate that the plaintiffs paid $16,933.34 to Lowe's for building supplies. Robert Keels' undisputed testimony also indicated that as a Lowe's employee he was entitled to a one-time purchase of home building materials at cost, and that on the average this amounted to a 25% discount. Even assuming a discount of 25% of $16,933.34, as opposed to the pre-discount sum, plaintiff's discount would have amounted to $4,233.33. Robert Keels' testimony, plus the canceled checks, indicated that $204.11 and $200.00 had been paid for paint and carpet installation, respectively. These amounts total to the exact amount of the jury verdict.

Defendant next contends that there is insufficient evidence to show that the damages were the natural and proximate result of the alleged breach. We find no merit in this argument. There is sufficient testimony by Robert Keels, E. H. Kennedy, and defendant Turner from which a jury could conclude that the materials were to be purchased at a discount on the Lowe's employee account of Robert Keels and that Homestead Builders was to pay Lowe's for the materials out of the contract price for the house. In addition, there is some testimony by Robert Keels from which the jury could conclude that Robert Keels explained to defendant Turner that this was a one-time employee benefit as long as Robert Keels worked at that Lowe's store. It is without dispute that damages for a breach of contract may only be recovered for those "which may reasonably be supposed to have been in the contemplation of the parties at the time they contracted." *Stanback v. Stanback*, 297 N.C. 181, 186, 254 S.E. 2d 611, 616 (1979). Nonetheless, there is sufficient evidence in the instant case from which the jury could conclude that the cost of the building materials and the loss of the one-time right to a discount on building materials were foreseeable consequences of the breach. The trial court instructed the jury on the foreseeability requirement and the decision of the jury on this question is final.

[6] The defendants' final assignment of error challenges the action of the trial court in allowing the plaintiffs to reopen their case and present the testimony of Donald Christian. Christian testified on direct examination that Mr. Turner's reputation in the community was bad. On cross-examination by defendants' attorney, Christian stated that at one time he thought Mr. Turner's reputation in the community was "unreproachable," but that he had "found out very differently since." Christian further explained that he used to own a grocery business which was failing, that he and Turner agreed that Christian would give Turner 50% of the stock and Turner would put $50,000 in the business. Christian then stated that he assigned the stock to Turner but Turner only put $10,000 in the business before it failed.

The defendants concede that the trial judge has discretion to allow a plaintiff to reopen after the close of all the evidence, but they argue that the testimony of Christian was evidence of bad character which was inadmissible as against a party, citing *Godwin v. Tew*, 38 N.C. App. 686, 248 S.E. 2d 771 (1978). In *Godwin*, the evidence of character did pertain to the character of a party who had been a witness. The proffered testimony was that one of the parties had shot his wife. This Court held that the testimony was irrelevant and prejudicial under the facts of that case. We do not think that *Godwin* meant that the rule against admitting evidence of character of a party always applies to a party who testifies as a witness. On the contrary, it is a long-standing rule of evidence that testimony concerning the character of a witness, including a party witness, is admissible for purposes of impeachment. 1 Stansbury's N.C. Evidence §§ 35, 107 (Brandis rev. 1973); 13 Strong's N.C. Index 3d *Witnesses* § 5.2 (1978).

Even if the direct testimony of Christian were inadmissible, the cross-examination of Christian by defendants' counsel elicited, without objection, more testimony, including specific acts concerning Turner's bad character. Consequently, this assignment of error has no merit. *State v. Tew*, 234 N.C. 612, 616-17, 68 S.E. 2d 291 (1951).

On plaintiffs' appeal, the directed verdict entered in favor of defendant W. E. Turner is reversed and remanded for entry of judgment against defendant W. E. Turner.

On defendant's appeal we find no error.

Judges ARNOLD and ERWIN concur.

BENNY G. VASSEY v. WILLIAM H. BURCH, M.D., ROY L. MORGAN, M.D., AND ST. LUKE'S HOSPITAL, INC.

No. 7929SC543

(Filed 19 February 1980)

1. **Rules of Civil Procedure § 56.7— ruling on summary judgment motion—failure to include answers to interrogatories in record on appeal**

Where plaintiff appellant failed to include in the record on appeal his answers to interrogatories which the trial court had before it in ruling on defendant's motion for summary judgment, the appellate court is unable to say that the trial court erred in determining that there was no genuine issue as to any material fact and in entering summary judgment for defendant.

2. **Physician, Surgeons and Allied Professions § 17— negligence of emergency room nurse—insufficient forecast of evidence**

In an action against defendant hospital based on alleged negligence by its emergency room nurse in failing to obtain treatment of plaintiff for appendicitis, plaintiff's forecast of evidence was insufficient to show that the emergency room nurse was negligent in failing to recognize the possibility that plaintiff was suffering from appendicitis or in stating to plaintiff's family physician whom she called that it was not appendicitis without making an examination of plaintiff or taking blood tests where plaintiff presented no expert testimony that the nurse, on the basis of plaintiff's symptoms of severe abdominal pain and vomiting, could not have reasonably concluded that plaintiff was suffering from flu, gastroenteritis or some other stomach ailment or that the nurse did not exercise her best judgment in concluding that plaintiff was not suffering from appendicitis, and where plaintiff presented no expert testimony to show whether, under the circumstances, it would have been accepted standard of medical practice in the community for a nurse in the emergency room to have made an examination of defendant or to have ordered tests.

Judge WELLS dissenting.

APPEAL by plaintiff from *Riddle, Judge.* Judgment entered 29 January 1979 in Superior Court, POLK County. Heard in the Court of Appeals 16 January 1980.

Plaintiff brought this action for malpractice against defendant doctors and defendant hospital seeking to recover the cost of

plaintiff's surgery, extended medical care and hospitalization resulting from a ruptured appendix and severe peritonitis.

On December 21, 1974, plaintiff went to the office of Dr. William H. Burch complaining of nausea and abdominal pain. Defendant Burch looked at plaintiff, gave him a shot of penicillin and a prescription, told plaintiff he was suffering from intestinal flu and sent him home. Later that same day when plaintiff began to vomit violently and the pain in his abdomen intensified, plaintiff went to the emergency room at St. Luke's Hospital accompanied by his parents. Plaintiff's complaint alleges that the nurses at St. Luke's Hospital was negligent and that such negligence is imputed to the hospital. The complaint in pertinent part alleges the following:

> 25. That said nurses were negligent in that:
>
> (a) When plaintiff and his mother came into the hospital they could see the intense abdominal pain and discomfort from which plaintiff was suffering and could see that he was vomiting, they should have immediately recognized the possibility that plaintiff was suffering from appendicitis and should have so reported to Dr. Morgan [plaintiff's family physician whom the nurse telephoned]; that the nurse or nurses not only did not do this, but even told plaintiff's mother, even though plaintiff's mother had suggested that she thought it possible that plaintiff was suffering from appendicitis, that plaintiff was not suffering an appendicitis attack.
>
> (b) That when the nurse or nurses on duty in said emergency room told Dr. Morgan that it was not appendicitis, this statement was made by her without any examination, any blood tests and was made without any facts or basis.

After being advised by the nurses of plaintiff's symptoms, defendant Dr. Morgan prescribed two shots and medication over the phone and did not order further tests or examination. Plaintiff was sent home and his condition worsened. The next day, plaintiff went to defendant Dr. Morgan's office. Dr. Morgan immediately sent him to St. Luke's Hospital where he was operated on and it was discovered that he had a ruptured appendix and

peritonitis. Plaintiff contends that the negligence and failure of defendants Dr. Burch, Dr. Morgan and the nurse or nurses employed by St. Luke's Hospital "to make any reasonable attempt to diagnose the illness from which plaintiff was suffering resulted in a serious delay of treatment for his ruptured appendix and proximately caused severe peritonitis to develop . . ."

Defendant St. Luke's Hospital moved for summary judgment which was granted. Plaintiff appeals.

Hamrick & Hamrick, by J. Nat Hamrick for the plaintiff.

Hedrick, Parham, Helms, Kellam & Feerick, by Richard T. Feerick for defendant St. Luke's Hospital, Inc.

MARTIN (Robert M.), Judge.

Plaintiff's sole assignment of error is that the trial court erred in granting summary judgment for defendant St. Luke's Hospital.

Defendant, in its motion for summary judgment, states that in support of its motion it is relying upon "various pleadings . . . including . . . verified answers to interrogatories served and filed with the court by the plaintiff." Plaintiff, in opposition to the motion, filed affidavits of himself, plaintiff's mother, plaintiff's attorney and Dr. Stewart Todd. Judge Riddle, in his order granting summary judgment for defendant, recites that "the pleadings in the action, affidavits, interrogatories and answers thereto . . ." were considered. However, these interrogatories and answers are not part of the record on appeal.

[1] On its motion for summary judgment in order for the defendant, the moving party, to bear its burden of showing it was entitled to summary judgment, the defendant was required to present a forecast of the evidence which would be available at trial and which showed that there was no material issue of fact concerning an essential element of plaintiff's claim and that such element could not be proved by plaintiff through presentation of substantial evidence. *Jenkins v. Theatres, Inc.*, 41 N.C. App. 262, 254 S.E. 2d 776, petition for discretionary review denied 297 N.C. 698, 259 S.E. 2d 295 (1979). *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). In the present case, absent the

answers to interrogatories on which defendant relied, we are unable to determine whether defendant's forecast is sufficient to meet its burden. It is the duty of the appellant to see that the record is properly made up and transmitted. *Hill v. Hill*, 13 N.C. App. 641, 186 S.E. 2d 665 (1972). When the appealing party fails to include in the record on appeal all of the materials the trial court had before it in ruling on the motion for summary judgment, this Court is unable to say that the trial court erred in determining that there was no genuine issue as to any material fact. *Leasing, Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 230 S.E. 2d 559 (1976), petition for discretionary review denied, 292 N.C. 265, 233 S.E. 2d 393 (1977).

Moreover, we note that on the basis of the record before this Court, plaintiff's argument that defendant was not entitled to summary judgment could not prevail. Assuming defendant, the moving party, met its burden on summary judgment, plaintiff, the opposing party, must assume the burden of producing a forecast of the evidence which would be available at trial to support his claim. *Moore v. Fieldcrest Mills, supra.*

[2] In a claim for relief based on negligence, one of the parties must have been under a duty to conform to a certain standard of conduct and there must have been a breach of that duty. *Jenkins v. Theatres, Inc., supra*, W. Prosser, Torts § 30 (4th ed. 1971). A nurse who undertakes to render professional services is under a duty to exercise reasonable care and diligence in the application of her knowledge and skill to the patient's case and to use her best judgment in the treatment and care of patients. *Byrd v. Hospital*, 202 N.C. 337, 162 S.E. 738 (1932). In an action for medical malpractice the burden of proof on the plaintiff is heavy. In order to recover for personal injury arising out of the furnishing of health care, the plaintiff must demonstrate by the testimony of a qualified expert that the care provided by defendant was not in accordance with the accepted standard of care in the community. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978); N.C. Gen. Stat. § 90-21.12. We will, therefore, examine plaintiff's affidavits to determine whether they show the accepted standard of nursing care in the community and whether the care provided by the nurses was in negligent violation of that standard.

The affidavit of Dr. Stewart Todd states

> That in the State of North Carolina it is accepted medical practice that if a patient comes into your office complaining of severe pains in the right lower quadrant of his abdomen, running a fever and vomiting, he should be checked for appendicitis, a white blood count should be taken, his abdomen should be examined, and particularly the right lower quadrant should be examined to see whether or not it is tender.

Although the affidavit of Dr. Stewart Todd may be sufficient to establish the accepted standard of medical care for a doctor in his office, it does not establish the standard of care for a nurse in a hospital. Plaintiff's affidavit states that the nurse called plaintiff's family physician, Dr. Morgan, and "advised him of plaintiff's complaints." Similarly plaintiff's mother's affidavit states that the nurse "conversed extensively" with Dr. Morgan. There is no allegation that the nurse did not accurately inform the doctor of plaintiff's actual symptoms. On the contrary, paragraph 23(a) of plaintiff's verified complaint states that Dr. Morgan was told that plaintiff was "suffering from a severe abdominal pain and vomiting." Plaintiff has not claimed that the conduct of the nurses in calling the family physician, in advising the physician of plaintiff's complaints and in following the doctor's instructions was in negligent violation of accepted standards of medical practice in the community.

The gist of plaintiff's contention that the nurse or nurses were negligent is that they failed to recognize the possibility of appendicitis and failed to report this possibility to Dr. Morgan. We point out, however, that "[t]he law contemplates that the physician is solely responsible for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the techniques of diagnosis or the mechanics of treatment." *Byrd v. Hospital,* 202 N.C. at 341-42, 162 S.E. at 740. There is no expert testimony to the effect that a nurse on the basis of the symptoms of severe abdominal pain and vomiting could not reasonably conclude that plaintiff was suffering from flu, gastroenteritis or numerous other stomach ailments rather than appendicitis. Nor is there any evidence that the nurse did not exercise her best judgment in concluding that it was not appendicitis. The mere fact

that plaintiff's mother suggested appendicitis does not indicate that the nurse negligently exercised her professional knowledge in concluding otherwise.

Plaintiff also asserts that the nurse or nurses were negligent in stating to Dr. Morgan that it was not appendicitis without making an examination or taking blood tests. Again, plaintiff does not support his position by expert testimony to show whether, under the circumstances, it would have been an accepted standard of medical practice in the community for a nurse in the emergency room to make such an examination or order tests. Plaintiff has given no forecast, by expert testimony or otherwise, of any evidence that the nurse or nurses negligently violated an accepted standard of medical care in the community or that they failed in their duty to exercise reasonable care and their best judgment in the treatment of the plaintiff.

The trial court's entry of summary judgment on plaintiff's claim of negligence on the part of defendant St. Luke's Hospital is

Affirmed.

Judge ERWIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The plaintiff in this case presented a sufficient forecast of evidence for him to succeed under two theories of hospital negligence—*respondeat superior* and corporate negligence. Upon motion for summary judgment the burden is on the moving party to show that no genuine issue as to any material fact exists. *Conner Co. v. Spanish Inns,* 294 N.C. 661, 242 S.E. 2d 785 (1978). The movant can satisfy his burden either 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 its claim. *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974). Summary judgment is rarely appropriate in negligence actions. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972).

The majority first bases its opinion on the failure of the plaintiff appellant to include interrogatories which may have been relied upon by the trial court in the record on appeal. The record does, however, contain plaintiff's verified complaint and three of plaintiff's affidavits in opposition to defendant's motion for summary judgment. Defendant submitted no affidavits in support of its motion for summary judgment. Plaintiff's affidavits allege that the personnel staffing defendant's emergency room at no time performed a physical examination of plaintiff despite the fact that plaintiff was extremely nauseated, vomited violently and felt an intensified pain in his abdomen. The affidavit of Dr. Stewart Todd stated that the accepted medical practice for the treatment of such symptoms involved a check for an appendicitis, including the taking of a white blood cell count. Thus, plaintiff had presented a substantial forecast of evidence showing that his injuries were caused by a breach of duty on the part of the defendant hospital. Plaintiff's failure to include his answers to defendant's interrogatories no doubt leaves the record incomplete, but the disputed material issues of fact are nevertheless plain to see.

The majority also bases its decision upholding the granting of defendant's motion for summary judgment on the ground that plaintiff did not present a sufficient forecast of evidence that nurses employed by the defendant had breached their duty of reasonable care to the plaintiff. The evidence shows that the nurse who cared for plaintiff advised the only physician she telephoned that plaintiff had no symptoms of appendicitis. In addition, plaintiff's affidavits show that the physician left the ultimate decision to the nurse. Plaintiff's mother stated that the physician, over the telephone, prescribed two shots, and ordered that plaintiff be kept thirty minutes and sent home if he seemed to be better. The shots were administered and in thirty minutes plaintiff was sent home. This evidence is sufficient to present a forecast of evidence showing that defendant may be liable to the plaintiff under the theory of *respondeat superior*.

We recently held that North Carolina has adopted the doctrine of "corporate negligence" for hospital liability. *Bost v. Riley*, 44 N.C. App. 638, 261 S.E. 2d 391 (1980), *disc. rev. denied*, 300 N.C. 194, --- S.E. 2d --- (6 May 1980). Under this theory, a hospital owes its patients a direct duty to use reasonable care in their treatment. The affidavit of Dr. Todd presents a sufficient

forecast of evidence of the failure of the defendant hospital to use reasonable care in the emergency room treatment of plaintiff.

Summary judgment is an extreme remedy, and should be awarded only where the truth is quite clear and undisputed. *Edwards v. Means*, 36 N.C. App. 122, 243 S.E. 2d 161 (1978), *disc. rev. denied*, 295 N.C. 260, 245 S.E. 2d 777 (1978). I would reverse the trial court's granting of summary judgment in the defendant hospital's favor.

ECONO-TRAVEL MOTOR HOTEL CORPORATION PLAINTIFF v. JOHN M. TAYLOR, EDGAR M. HOLT AND CHARLES P. FLETCHER, T/A TAYLOR-HOLT-FLETCHER, A PARTNERSHIP AND JOHN M. TAYLOR, BARBARA B. TAYLOR, EDGAR M. HOLT, GUSTANA HOLT, CHARLES P. FLETCHER AND JUANITA U. FLETCHER, INDIVIDUALLY, DEFENDANTS AND CHARLES P. FLETCHER AND WIFE, JUANITA U. FLETCHER, THIRD-PARTY PLAINTIFFS v. FOREMANS, INC., T/A ALL-STATE BUILDING SUPPLY, AND CLAY B. FOREMAN, JR., THIRD-PARTY DEFENDANTS

No. 791SC139

(Filed 19 February 1980)

1. **Partnership § 4— withdrawal of partner—creditor not party to withdrawal agreement**

Defendant's withdrawal from a partnership did not constitute a defense to plaintiff's action on a note which had been entered into while defendant was still a partner, since the withdrawal agreement did not comply with G.S. 59-66(b) in that the holder of the note on the date of the withdrawal agreement was not a party thereto.

2. **Partnership § 4— release between plaintiff and partners—liability on note unaffected**

A release entered into by plaintiff and a partnership, which included defendant, did not discharge defendant from liability on a promissory note which the partnership had entered into for the building of a motel, since the release applied only to rights and obligations running between the parties under licensing agreements but did not affect the partners' financial obligations under the promissory note.

3. **Partnership § 4— loan advances to partnership after partner's withdrawal—failure to give notice—partner liable**

Defendant continued to incur liability for loan advances made to a partnership subsequent to his withdrawal from the partnership since it was incumbent upon defendant to notify the holder of the note of his withdrawal from the partnership so that the holder would then look to the remaining partners

for repayment of further advances, and defendant offered no evidence of notice or actual knowledge of the holder that his partnership status had changed.

APPEAL by plaintiff from *Walker (Hal H.), Judge*. Judgment entered 26 September 1978 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 16 October 1979.

Plaintiff, Econo-Travel Motor Hotel Corporation, instituted this action on 10 February 1976 seeking a deficiency judgment for an amount owing on a promissory note dated 15 May 1973, executed by defendants John M. Taylor, Edgar M. Holt, and Charles P. Fletcher as a general partnership under the name Taylor-Holt-Fletcher. The note was endorsed by the wife of each defendant, Barbara B. Taylor, Gustana H. Holt, and Juanita U. Fletcher, respectively. Originally made payable to Southern Loan and Insurance Company and endorsed to Southern Mortgage Company (Southern), the note was subsequently assigned to plaintiff on 14 June 1974. On 7 September 1978, defendants Fletcher and wife filed a motion for summary judgment. Upon hearing, the trial court granted their motion and dismissed plaintiff's complaint against them.

The following sequence of events was established by materials presented at the summary judgment hearing: On 13 December 1972, defendants Taylor, Holt and Fletcher formed a partnership for the purpose of dealing in real estate, and entered into certain licensing agreements with plaintiff relating to the construction and operation of Econo-Travel Motor Hotels in North Carolina, Kentucky, and Georgia. On 15 May 1973, the partnership executed a promissory note in the principal sum of $375,000 to build an Econo-Travel Motor Hotel in Elizabeth City, North Carolina, due and payable on 15 November 1973. On 10 September 1973, defendants Taylor, Holt, and Fletcher entered into an agreement whereby Fletcher withdrew from the partnership. On 19 September 1973, plaintiff, Fletcher, and the remaining partners, Holt and Taylor, entered into a release agreement whereby Fletcher assigned all of his rights in the licensing agreements to Holt and Taylor, who assumed all of the obligations under those agreements. The release purportedly operated to discharge any rights and obligations running between plaintiff and Fletcher under the licensing agreements. As of 10 September 1973, Southern had advanced $110,000 to the partnership pur-

suant to the loan agreement. On 16 May 1974, foreclosure proceedings were instituted upon default on the promissory note, and the foreclosure sale was set for 17 June 1974. On 14 June 1974, plaintiff purchased the promissory note for $355,392 from Southern. The following day, on 15 June 1974, plaintiff entered into an agreement with Taylor and wife, Fletcher and wife, and William H. Martin, Jr. and wife, whereby plaintiff agreed to bid on the hotel property at the foreclosure sale in the amount of $355,392. The agreement further provided that if the bid was successful, Taylor, Martin, and Fletcher would then purchase the property from plaintiff.

At the sale conducted 17 June 1974, plaintiff was the highest bidder at $355,392. However, an upset bid was filed on 27 June 1974 for $373,211.60. Upon failure of the confirmed bidder to comply with the bid, resales of the property were conducted. The property was finally sold to Overnight Inns, Inc., for $315,050, and on 21 March 1975, $310,584.95 was applied to the indebtedness evidenced by the promissory note. In its action for a deficiency judgment, plaintiff demanded $76,534.35 plus interest, representing the balance owing on the promissory note.

From the trial court's granting of summary judgment against it, plaintiff appeals.

Wilton F. Walker, Jr., for plaintiff appellant.

J. Kenyon Wilson, Jr., and M. H. Hood Ellis for defendant appellees, Charles P. Fletcher and wife, Juanita U. Fletcher.

CLARK, Judge.

Plaintiff's only assignment of error is that the trial court erred in granting summary judgment in favor of defendants Fletcher and wife. A court may grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Plaintiff argues initially that issues of material fact exist concerning whether Fletcher defaulted on the promissory note, and

in what amount, if any, Fletcher is indebted to plaintiff for a deficiency after foreclosure. On this point it is clear that default occurred in the performance of the obligations under the deed of trust, as evidenced by the notice of foreclosure dated 16 May 1974. The promissory note and deed of trust indicate that the loan was made 15 May 1973, and the maturity date was 15 November 1973. There is no evidence in the record of any payments having been made on the principal of the debt. In addition, at no time did the parties contest the issue of default during the progress of foreclosure proceedings. In any event, the dispositive issue for decision here is whether, in light of the materials presented and the applicable law, plaintiff has presented a prima facie case that defendant Fletcher is liable as a maker of the note held by plaintiff Econo-Travel, notwithstanding his withdrawal from the partnership and obtaining a release from plaintiff.

[1] Fletcher's defense to plaintiff's claim is based on the contention that his withdrawal from the partnership on 10 September 1973 constitutes a defense to an action on the note, and that plaintiff purchased the note with knowledge of such defense. Fletcher argues further that since plaintiff had knowledge of his withdrawal, plaintiff cannot assert the rights of a holder in due course under G.S. 25-3-305 in its action on the note for a deficiency judgment. For the reasons stated below, we reject defendant Fletcher's argument and hold that his withdrawal from the partnership does not constitute a defense to plaintiff's action as a holder of the note.

Chapter 59 of the North Carolina General Statutes governs the rights and liabilities of both limited and general partnerships. With respect to obligations incurred by a general partnership, G.S. 59-45 provides that "[a]ll partners are jointly and severally liable for the acts and obligations of the partnership." The liability of each partner is not extinguished by mere withdrawal from the partnership: "The dissolution of the partnership does not of itself discharge the existing liability of any partner." G.S. 59-66(a). However, under G.S. 59-66(b), "[a] partner is discharged from an existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business. . . ."

Under the partnership agreement entered into by Taylor, Holt and Fletcher dated 13 December 1972, any partner had the right to withdraw from the partnership at the end of any fiscal year. Pursuant to that provision, Taylor, Holt and Fletcher on 10 September 1973 entered into an agreement whereby Fletcher withdrew from the partnership. In addition, Fletcher assigned all his right, title, and interest to all partnership assets to Holt and Taylor. In return, Holt and Taylor agreed as follows:

> [T]o save and hold harmless [Fletcher] from any loss, liability or claim from whatever nature arising by reason of the said prior interest of [Fletcher] resulting from the business or transaction of the aforesaid partnership.

By this language, it appears that Holt and Taylor intended to discharge Fletcher from any liability incurred as a partner before withdrawal. However, as between the individual partners and partnership creditors, this agreement does not comply with the requirements of G.S. 59-66(b) in that Southern, holder of the note on 10 September 1973, was not a party to the agreement. Thus, although his liability as between himself and the other partners may have been extinguished, Fletcher remained primarily liable to the partnership creditor as a maker of the note.

[2] Fletcher argues, however, that he was discharged from all liability to plaintiff by the release dated 19 September 1973. The release provided, in pertinent part, as follows:

> Company and Fletcher do hereby remise, release and forever discharge each other and the successors, heirs, executors, administrators, assigns, officers, directors, and employees of each other of and from all actions or causes of action, suits, debts, accounts, contracts, agreements, damages, judgments, claims and demands whatsoever, of every name and nature, which Fletcher or Company or their successors and assigns now has, ever had or hereafter can, will or may have, by reason of any matter, happening, cause or thing whatsoever, from the beginning of the world to this date arising from, out of or relating to the Agreements."

It is clear from the language of the release that it discharged each party from liability concerning any matters arising under the licensing agreements. However, it is apparent that the

"Agreements" referred to the construction and operation licensing agreements between plaintiff and the partnership only, as they specified no other documents or transactions. The only parties to the release were plaintiff Econo-Travel and the three original partners.

A release is contractual in nature, and its scope and extent is determined from its purpose, subject matter, and language. *See Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975); 76 C.J.S. *Release* § 51 (1952). After review of the document, it is our opinion that the release did not reach the partners' financial obligations under the promissory note, and Fletcher was never discharged from his individual liability by Southern. Although plaintiff was the holder of the note at the time foreclosure occurred, plaintiff was not the holder at the time the release was made. At that time, plaintiff signed only as licensor, and had no right or obligation to release Fletcher from liability under the note. The licensing agreements and the construction loan were two entirely separate transactions, and a release as to one transaction obviously does not operate to affect liability as to the other.

[3] Alternatively, Fletcher contends that if liable at all, he is only liable for $110,000, representing the extent to which the loan proceeds were advanced as of 10 September 1973, and that since more than that amount was realized by the foreclosure sale, there is no deficiency as to the amount he owes. In our opinion, however, Fletcher continued to incur liability for the loan advances made subsequent to his withdrawal, for the following reasons. As to liability as of his withdrawal, under the provisions of Chapter 59 previously discussed, it is clear that Fletcher remained jointly and severally liable for existing partnership obligations. Furthermore, to escape liability for loan advances subsequent to his withdrawal from the partnership, it was incumbent upon him to notify Southern of his withdrawal so that Southern would then look to the remaining partners for repayment of further advances. *Ring Furniture Co. v. Bussell*, 171 N.C. 474, 88 S.E. 484 (1916). *See generally* 60 Am. Jur. 2d *Partnership* §§ 210, 226, 227 (1972). In the materials presented, we find no evidence that Southern was ever notified or had actual knowledge of Fletcher's withdrawal from the partnership. Further, as evidenced by the statement of account certified by Southern and

relied upon by Fletcher on summary judgment, Southern continued to rely on Fletcher's name as a partner in the firm and on his signature as a maker of the note. Absent evidence of notice or actual knowledge that the partnership had changed, Fletcher remained primarily liable on the note.

Fletcher argues nonetheless that plaintiff, rather than Southern, had knowledge of both the withdrawal agreement and that at the time of that agreement only $110,000 had been advanced to the partnership. The question of notice to plaintiff is not relevant to this determination. Without deciding whether plaintiff is a holder in due course under G.S. 25-3-302 and, therefore, not subject to any defenses except as listed in G.S. 25-3-305, we find no evidence in the materials presented of a defense to plaintiff's claim on the promissory note that would compel an award of summary judgment for defendant Fletcher.

We note that although plaintiff moved for summary judgment as well as defendant Fletcher, plaintiff does not bring forward the court's denial of that motion as a cross-assignment of error on appeal. Therefore, since we do not reach that question, we must reverse the trial court's granting of summary judgment for defendant, and remand this case to the trial court for further proceedings in accordance with our decision.

In a companion case, before another panel of this Court, it was held that there was a prima facie case that either Clay B. Foreman, Jr. or Foreman's Inc. filed an upset bid following foreclosure on the subject property in the instant case. *Econo-Travel Motor Hotel Corporation v. Foreman's, Inc.*, 44 N.C. App. 126, 260 S.E. 2d 661 (1979). G.S. 45-21.30(d) provides that a defaulting bidder is liable to the extent that the final sale price is less than his bid plus all costs of resale. In order to prevent Econo-Travel in the instant case from having a double recovery, the partnership and defendant Fletcher are entitled to an offset in their liability to Econo-Travel to the extent of any recovery obtained by Econo from the defaulting bidder.

Reversed and remanded.

Judges PARKER and MARTIN (Robert M.) concur.

JOHN P. REDDINGTON v. V. W. THOMAS

No. 793SC492

(Filed 19 February 1980)

1. Partnership § 1.2— existence of partnership—jury question

Evidence was sufficient to submit to the jury an issue as to the existence of a partnership where it tended to show that plaintiff, defendant and two other people entered into discussion which resulted in the purchase of three apartment complexes in the name of their partnership; state and federal income tax returns were filed in their name as a business partnership; and a bank account was established and used in the name of the partnership.

2. Partnership § 1.2— existence of partnership—making of profit not required

There was no merit to defendant's contention that, because he and his associates never achieved a "profit" in their business dealings, there could be no partnership, since the word "profit" as used in G.S. 59-36(a) relates to the purpose of a business, not to whether the business actually produced a net gain.

3. Partnership § 3— partner's taking of property in own name—breach of duty—sufficiency of evidence

In an action to recover for defendant's breach of duty which he owed a partnership when he purchased apartments for his own interest, evidence was sufficient to be submitted to the jury where it tended to show that the partners discussed the purchase of the apartments by the partnership; defendant wrote two clarifying letters to the seller of the apartments stating that the partnership wished to acquire the property and referring to "my group" and "us"; and defendant took title to the property in the name of himself, his wife, his son-in-law and his daughter rather than in the name of the partnership.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 29 September 1978 in Superior Court, PITT County. Heard in the Court of Appeals 8 January 1980.

This civil action was brought to recover damages for breach of contractual obligations and fiduciary duty to a partnership. The essential allegations in the complaint are as follows: On 30 September 1974 plaintiff and defendant entered into a partnership agreement to purchase properties in Greenville, North Carolina, the name of the partnership being Thomas and Associates. In furtherance of that agreement, plaintiff and defendant purchased Country Club and Greenway Apartments, and leased Cherry Court Apartments, with an option to purchase. On 13 June 1975, defendant made an offer on behalf of Thomas and Associates to purchase Eastbrook Apartments and ten acres of

land. On 2 July 1975, defendant further clarified the offer on behalf of Thomas and Associates. The offer of 2 July 1975 was accepted by the owners of Eastbrook, but defendant and another party purchased Eastbrook, taking title to the property in themselves as individuals and not in the name of Thomas and Associates. By defendant's self-dealing, plaintiff was deprived of one-fourth of the ownership of Eastbrook, and due to defendant's breach of his duty to the partnership, plaintiff was damaged in the amount of $200,000.

Plaintiff amended his complaint to allege that, as an express term and condition of the partnership it was agreed that defendant would be the managing partner and was authorized on behalf of the partnership to enter into negotiations for the purchase of rental properties. Defendant answered, denying all of the operative allegations of the complaint.

At the close of plaintiff's evidence and at the close of all the evidence, defendant moved for a directed verdict. Both motions were denied. The issues submitted to the jury and their answers were as follows:

1. Was there a partnership under the name of Thomas & Associates of which the plaintiff and defendant were two of the partners?

ANSWER: Yes

2. Did the defendant negotiate for the purchase of Eastbrook Apartments on behalf of the partnership?

ANSWER: Yes

3. If so, did he breach a duty to the plaintiff by purchasing Eastbrook Apartments in a manner other than on behalf of the partnership?

ANSWER: Yes

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

ANSWER: $51,928

Pegram, Hahn & Roberts, by Garry T. Pegram, and Williamson, Herrin & Stokes, by Mickey A. Herrin, for plaintiff appellee.

Mattox & Davis, P.A., by Fred T. Mattox and Gary B. Davis, for defendant appellant.

WELLS, Judge.

The main question presented in this appeal is whether plaintiff presented sufficient evidence to withstand defendant's motion for a directed verdict on the issues relating to the existence of a partnership between plaintiff and defendant and the defendant's breach of any duty which he owed the partnership when he purchased the Eastbrook Apartment property for his own interest. Since the parties never executed a written partnership agreement, the relationship between them must be determined on the basis of the manner in which they conducted their business.

[1] Under the North Carolina Uniform Partnership Act, a partnership is, by definition, a business. G.S. 59-36(a) states, "A partnership is an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-37 provides in pertinent part:

> In determining whether a partnership exists, these rules shall apply:
>
> * * *
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> a. As a debt by installments or otherwise,
>
> b. As wages of an employee or rent to a landlord,
>
> c. As an annuity to a widow or representative of a deceased partner,

d. As interest on a loan, though the amount of payment vary with the profits of the business,

e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.

Plaintiff's evidence clearly shows that beginning on or about 30 September 1974, plaintiff, defendant, E. C. Powell, and C. H. Powell (The Four) entered into discussions which led to their acquisition of Country Club Apartments. Subsequently, The Four negotiated the acquisition of two other apartment properties, the last of these being Cherry Court, acquired in February 1975. State and Federal income tax returns were filed in the name of Thomas and Associates as a business partnership. A bank account was established and used in the name of Thomas and Associates. Thus, plaintiff introduced an abundance of evidence which tended to show that The Four were engaged together in business transactions.

[2] While The Four received income from the properties acquired by them, the group's financial records and tax returns showed a net loss. Defendant argues that since the group never achieved a "profit" there could be no partnership. We do not believe this argument can prevail. The word "profit", as it is used in the Act relates to the purpose of the business, not to whether the business actually produced a net gain. In *Williams v. Biscuitville, Inc.*, 40 N.C. App. 405, 253 S.E. 2d 18 (1979), *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979), the plaintiff restaurant manager was paid a salary of $270 per week plus seventy percent of gross sales from which he paid the employee's wages and food purchases. We held:

> A partnership agreement may be inferred without a written or oral contract if the conduct of the parties toward each other is such that an inference is justified. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1948). The plaintiff in this case may be said to have received a share of the profits in the form of keeping whatever part of the seventy percent of gross receipts that he was able to retain. This is "prima facie evidence that he is a partner in the business" unless he received this share of the profits as "wages of an employee."

> We conclude that all the evidence shows he did receive this compensation as "wages of an employee."

40 N.C. App. at 407, 253 S.E. 2d at 19. The case at bar involved no payment of wages.

The filing of a partnership tax return is significant evidence of the existence of a partnership. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1948). Under the State and Federal income tax laws, a business partnership return may only be filed on behalf of an enterprise entered into to carry on a business. G.S. 105-154; 26 U.S.C. § 761. There is evidence in the case before us that the tax returns for Thomas and Associates were prepared by defendant. Thus, it appears that defendant demonstrated an intent to enter into an association to carry on a business, and that his preparation of the returns for a partnership, in which he was a party, constitutes a significant admission against his present interest in denying the existence of such a partnership. *Eggleston v. Eggleston, supra.*

While defendant testified that he never intended to enter into a partnership relationship with plaintiff, that he refused to sign a written partnership agreement tendered by plaintiff, and that he indicated to plaintiff he did not want a partnership, we believe the evidence in this case comfortably brings it within the following rules set out in *Eggleston*:

> "Partnership is a legal concept but the determination of the existence or not of a partnership, as in the case of a trust, involves inferences drawn from an analysis of 'all the circumstances attendant on its creation and operation' [citations omitted]."
>
> Not only may a partnership be formed orally, but "it may be created by the agreement or conduct of the parties, either express or implied" [citation omitted] . . . . "A voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the acts and declarations of the parties, warranting the inference that the parties understood that they were partners and acted as such." [Citation omitted.]

228 N.C. at 674, 47 S.E. 2d at 247. We therefore hold that there was sufficient evidence to submit the issue of the existence of the partnership to the jury.

[3] The next question concerns the sufficiency of plaintiff's evidence that defendant breached his duty to the partnership. The duty of a partner is defined by G.S. 59-51(a): "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property."

The evidence shows that on 13 June 1975, defendant wrote a letter to Drucker and Falk as agent for the owners of the Eastbrook Properties. The letter stated:

> In reference to our many conversations regarding the acquisition of the Eastbrook Apartment Project, Greenville, N.C. by the *Thomas and Associates*, I would like to make the following Offer To Purchase under the following conditions . . . .
>
> David, a great deal of planning has gone into this project with detailed and comprehensive studies and analysis made. It is my considered opinion that the Offer contained in this letter would be the only Offer feasible *for my group* [Emphases added.]

Another clarifying letter was written by defendant to Drucker and Falk on 2 July 1975, and commented:

> The above Offer to Purchase is contingent on the acquisition by *us* of the shopping center land adjoining the apartment complex as outlined below.
>
> * * *
>
> B. Land to be deeded to *us*, subject to the present option.
>
> C. A non-interest bearing note from *us* for $150,000 until September 14, 1975. [Emphases added.]
>
> * * *

Plaintiff testified to conversations between The Four and Falk leading to the offer of 13 June and clarification letter of 2 July 1975. He stated that the letter of 2 July contained "in detail what I understood to be Thomas and Associates' offer . . . for the purchase of the Eastbrook Apartment complex." E. C. Powell testified to the same effect. Both plaintiff and Powell testified that none of The Four authorized defendant to purchase Eastbrook for anyone other than Thomas and Associates.

Defendant, called as an adverse witness, testified that he purchased the Eastbrook properties in 1975 and that title to the property was taken in the name of himself, his wife, his son-in-law and his daughter. Defendant later testified on his own behalf that plaintiff knew six or seven months before Eastbrook was purchased that defendant and his son-in-law were going to take title to the property. Whatever the meaning of that testimony may be, it appears to be altogether inconsistent with the representation set forth in the letters of 13 June and 2 July 1975. Defendant attempted to explain this inconsistency by testifying that he had operated other enterprises under the name of Thomas and Associates. However, there was no evidence that his son-in-law had any connection with Thomas and Associates before the actual acquisition of the Eastbrook properties. Thus, the evidence is convincing that defendant made the offer to purchase on behalf of the partnership.

In *Casey v. Grantham*, 239 N.C. 121, 124, 79 S.E. 2d 735, 738 (1954) Justice (later Chief Justice) Parker said, "It is elementary that the relationship of partners is fiduciary and imposes on them the obligation of utmost good faith in their dealings with one another in respect to partnership affairs."

> When one partner wrongfully takes partnership funds and uses them to buy or improve property, his co-partners may obtain redress in one of these alternative ways:
>
> 1. They may compel him to account to the partnership for the funds, and enforce the resulting claim as an equitable lien on the property. [Citations omitted.]
>
> 2. They may charge the property with a constructive trust in favor of the partnership to the extent of the partnership funds used in its purchase or improvement. G.S. 57-51; [citations omitted].

McGurk v. Moore, 234 N.C. 248, 252, 67 S.E. 2d 53, 55 (1951). Our examination of cases from other jurisdictions indicates that the weight of authority is to the effect that a partner may not, in cases such as the one *sub judice*, engage in self-dealing for his own benefit and to the exclusion of his partners. *See, e.g., Terry v. Simmons*, 261 Or. 626, 496 P. 2d 11 (1972); *Mining Co. v. Exploration Co.*, 282 F. 2d 787 (10th Cir. 1960); *Stark v. Reingold*, 18 N.J. 251, 113 A. 2d 679 (1955); *Sadugor v. Holstein*, 199 C.A. 2d 477, 18 Cal. Rptr. 859 (1962); *O'Bryan v. Bickett*, 419 S.W. 2d 726 (Ky. App. 1967). Accordingly, we hold that there was sufficient evidence for the trial court to have submitted issues two and three to the jury.

We have examined the errors defendant assigns to the trial court's charge to the jury, as well as defendant's other assignments of error, and have found them not to be substantiated by the record.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. SHELTON EARL HARVELL

No. 793SC724

(Filed 19 February 1980)

1. **Criminal Law § 157.2— record on appeal—absence of indictment, verdict and judgment**

Defendant's purported appeal from a conviction of second degree rape is dismissed because of an insufficient record where the indictment, verdict and judgment were not included in the record on appeal.

2. **Witnesses § 1— competency of 12-year-old witness—failure to hold hearing**

The trial court did not err in permitting the 12-year-old prosecutrix in an incest case to testify without first hearing testimony as to her competency since (1) an accurate determination of the child's moral and religious sensitivity could be made by the court through personal observation while the child was being questioned, and (2) defendant's trial counsel stipulated that the child was competent to testify.

3. Criminal Law § 106— incest—sufficiency of evidence to overrule nonsuit

The evidence in an incest case reasonably supported a finding of defendant's guilt beyond a reasonable doubt within the purview of *Jackson v. Virginia*, --- U.S. --- (1979).

4. Incest § 1; Rape § 5— incest with and rape of daughter—sufficiency of evidence

The State's evidence was sufficient for the jury on issues of defendant's guilt of second degree rape of and incest with his 12-year-old daughter where the daughter gave positive testimony that she and her father engaged in sexual intercourse on a certain date; defendant father forced her down and made her have sex with him; she told him no but he did not stop; and she was afraid of him, especially since he had been drinking.

5. Incest § 1; Rape § 1— incest with and rape of daughter—no merger of crimes

The trial court did not err in refusing to merge charges against defendant for second degree rape of and incest with his 12-year-old daughter since rape requires force while incest does not, incest requires kinship while rape does not, and the two crimes therefore have different elements and are distinct offenses even though one crime was committed during perpetration of the other.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 11 April 1979 in Superior Court, CARTERET County. Heard in the Court of Appeals 10 January 1980.

Defendant was charged with second degree rape of and incest with his twelve-year-old daughter. He was represented at trial by John E. Nobles, Jr. Subsequent to defendant's conviction, R. L. Frazier was retained to perfect this appeal, and John E. Nobles, Jr. was released by the court.

State's evidence tended to show that Tina Harvell was 12 years old on 30 December 1978. Her mother was not at home around one or two o'clock. Her father, a commercial fisherman, sent her brother and sister to check on the boat. He had been in an accident and asked Tina to rub his face which she had done before and agreed to do so again. They went into the bedroom and sat on the bed. Defendant requested sexual favors, but Tina refused. He forced her down on the bed, hugged her, and asked again. She again refused, but defendant insisted. Tina was afraid of him and felt that she had no choice because he was stronger than she. Defendant had sexual relations with Tina.

State's evidence further tended to show that defendant had never struck Tina, but he "does many things when he is drunk." Incidents of sexual abuse had occurred three or four times a

month since Tina was nine. She had sometimes resisted successfully by holding defendant's hands and saying no. She never agreed to have intercourse with her father or told him that it was alright. She had not had intercourse with anyone else.

A medical examination showed that Tina had been sexually active, and Tina told the doctor that she had had intercourse with her father. Defendant had once threatened to leave if Tina was taken to the doctor.

Defendant's evidence was that Tina's brother and sister had failed to observe anything that indicated these incidents were occurring. The family lived in a trailer which did not have locks on the interior doors and in which sound traveled easily. Defendant had injured his eye and all of the family members rubbed his head. Tina had not mentioned the incidents to any of her family, including a grandmother with whom she was close. Defendant testified that he had never taken sexual liberties with his daughter. Tina had never shown any fear of defendant or reluctance to go places with him or to be alone with him. Tina's mother thought that Tina was not telling the truth and had asked her to tell the truth. Tina had once admitted to her that the charges were not true.

Defendant was convicted of incest and second degree rape and sentenced to imprisonment in the North Carolina Department of Correction for not less than 12 nor more than 14 years in each case, the sentences to run concurrently.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

Frazier & Moore, by Reginald L. Frazier; Bowen C. Tatum, Jr., by T. E. Moore, for the defendant.

MARTIN (Robert M.), Judge.

[1] It is clear from the argument in defendant's brief concerning the charge of second degree rape that he intended to appeal from the judgment entered therein. A copy of the indictment, verdict and formal judgment on the charge of second degree rape was not included in the record on appeal. Both the defense counsel and the Attorney General submitted briefs in this Court. Neither made any objection or called any attention to the defective condi-

tion of the record as it pertains to the purported appeal on the charge of second degree rape. Rule 9(b)(3)(vii) provides that "the record on appeal in criminal actions shall contain . . . copies of . . . indictments . . . verdict and of the judgment . . ." In an appeal in criminal cases, the indictment or warrant, and the plea on which the defendant was tried in the Court below, the verdict, and the judgment appealed from, are essential parts of the transcript. *State v. Hunter*, 245 N.C. 607, 608, 96 S.E. 2d 840, 841 (1957). *State v. Gaddy*, 14 N.C. App. 599, 188 S.E. 2d 745 (1972). In this case the appeal is fatally defective for the reason that it contains no bill of indictment. *State v. Hunter, supra; State v. Currie*, 206 N.C. 598, 174 S.E. 447 (1934); *State v. Dobbs*, 234 N.C. 560, 67 S.E. 2d 751 (1951); *State v. Jenkins*, 234 N.C. 112, 66 S.E. 2d 819 (1951). It was the duty of the defendant to see that the indictment appeared in the record. *State v. Currie, supra.* The "minutes" of the court that were included are not a substitute for a copy of the judgment. A judgment is a necessary part of the record. *State v. Willis*, 285 N.C. 195, 204 S.E. 2d 33 (1974); *State v. Gilliam*, 33 N.C. App. 490, 235 S.E. 2d 421 (1977). When a necessary part of the record has been omitted, the appeal will be dismissed. *State v. Dobbs, supra*; 4 Strong's N.C. Index 3d, Criminal Law § 157.2 (1976). It is the duty of appellant to see that the record is properly made up and transmitted to the court. *State v. Stubbs*, 265 N.C. 420, 423, 144 S.E. 2d 262, 265 (1965). The purported appeal in the charge of second degree rape is dismissed for an insufficient record; however, we have nevertheless reviewed all of defendant's assignments of error and found them to be without merit.

We also note that the entire charge of the trial judge was included in the record on appeal, even though no error was assigned to the charge. This is in violation of Rule of Appellate Procedure 9(b)(3)(vi).

Defendant brings forward thirteen assignments of error which he groups in seven questions. The first question is as follows: "Does the Court of Appeals of North Carolina have the authority to weigh the evidence in this case and determine the credibility of the witnesses who testified?" The question and the supporting argument bears no relationship to his assignment of error on the exception upon which the assignment is based. The assignment of error stated in the record is as follows: "Did

the trial court commit reversible error by failing, on its own motion, to establish the competency of a witness, who was a minor child and unable to understand the nature and obligation of the oath?"

[2] The competency of a child to testify is a matter resting within the sound discretion of the trial judge, and the trial judge has been held not to abuse that discretion without hearing testimony as to the child's competency since an accurate determination of the child's moral and religious sensitivity can be made by the trial judge through his personal observation while the child is being questioned. *State v. Roberts*, 18 N.C. App. 388, 197 S.E. 2d 54, *cert. denied*, 283 N.C. 758, 198 S.E. 2d 728 (1973); *State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493 (1968). Moreover, defendant's trial counsel stipulated that the child was competent to testify. Defendant has shown neither error nor prejudice. Defendant's first assignment of error is overruled.

[3] Defendant argues in his brief that this Court has authority to weigh the evidence and pass on the credibility of witnesses. He relies on the holding in *Jackson v. Virginia*, --- U.S. ---, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979). In *Jackson*, the Court stated: ". . . [t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." --- U.S. at ---, 61 L.Ed. at 573, 99 S.Ct. at 2789. In footnote twelve to the *Jackson* opinion the Supreme Court approved the test long used in North Carolina in resolving a challenge to the sufficiency of the evidence, i.e., "whether 'considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might *reasonably find* the defendant is guilty beyond a reasonable doubt.'" --- U.S. at ---, 61 L.Ed. at 574, 99 S.Ct. at 2789. In the case under consideration we hold that the record evidence reasonably supports a finding of guilt beyond a reasonable doubt.

[4] Defendant contends in his second argument, based on assignments of error Nos. 3, 4, 5 and 6, that the court erred in denying defendant's motion to dismiss the charges of second degree rape and incest.

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essen-

tial element of the offense charged, or a lesser included offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

The defendant's daughter, Tina, gave positive testimony that on December 30, 1978, she and her father engaged in sexual intercourse, penetration having definitely occurred. Tina also testified that defendant forced her down and made her have sex with him. She told him no, but he did not stop. She was afraid of him, especially since he had been drinking. The force necessary to constitute rape need not amount to actual physical force; fear, fright or coercion may take the place of actual force. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977).

A father violates G.S. 14-178 and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter. *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971). There was positive testimony that the defendant, Tina's father, while living with her in the relationship of father and daughter, had sexual intercourse with her. We hold the evidence was sufficient in both the case of second degree rape and incest to carry the cases to the jury. Defendant's assignments of error are overruled.

[5] By his third assignment of error, defendant contends the court erred in denying defendant's motion to merge the charges of incest and rape. We do not agree. Rape requires force, incest does not. Incest requires kinship, rape does not. Obviously, they are different offenses. They have different elements and are therefore distinct offenses even though one crime was committed during the perpetration of another. *State v. Vert*, 39 N.C. App. 26, 249 S.E. 2d 476 (1978), *cert. denied* 296 N.C. 739, 254 S.E. 2d 181 (1979).

By his 7th assignment of error defendant contends the court erred by admitting evidence of a conversation by defendant and his wife overheard by the prosecutrix. The prosecutrix was permitted to refute testimony of her mother who had testified that defendant, her husband, never said that if she took Tina to a doctor he would leave. He relies on *Hicks v. Hicks*, 271 N.C. 204, 155 S.E. 2d 799 (1967). *Hicks* was a civil case and the holding of the

court therein is not applicable to the case *sub judice*. N.C. Gen. Stat. § 8-57 specifically provides that the privilege does not apply with regard to any criminal offense against a minor child. The privilege is waived in criminal cases where the conversation is overheard by a third person. *State v. Freeman*, 197 N.C. 376, 48 S.E. 450 (1929). Moreover, the privilege was waived where the wife testified to the conversation, without objection. Defendant's argument is unavailing and his assignment of error is overruled.

Defendant filed a motion for appropriate relief after judgment was entered. The motion was denied at a post-trial hearing by Allsbrook, Judge. In his ruling we find no error.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit and they are overruled.

On the charge of second degree rape the appeal is dismissed.

On the charge of incest we find no prejudicial error.

No error.

Judges HEDRICK and WELLS concur.

ROCKINGHAM SQUARE SHOPPING CENTER, INC. v. TOWN OF MADISON

No. 7917SC253

(Filed 19 February 1980)

1. Municipal Corporations § 22.2— street paved by private corporation—road opened by town—ultra vires contract

Even if an express contract existed between the parties whereby plaintiff agreed to grade and pave a road owned by defendant town and the town agreed to open a road as an inducement for plaintiff to build a shopping center in the town, such contract was *ultra vires* and void, since the contract purported to restrict the statutory discretion vested by G.S. 160A-296 in the Board of Aldermen of defendant town to determine whether a street should be opened for public benefit; even if the town's opening of the road would in fact serve the interests of the residents of the town, the governing body's agreement with plaintiff, a private party, to do so would nevertheless be void as against public policy; and plaintiff's performance of its part of the agreement in expending money for the paving of a street belonging to the town would not

render the agreement valid, since the town could not be estopped from asserting that the agreement was *ultra vires* and therefore void.

2. **Municipal Corporations § 22.2— street paved pursuant to illegal contract—no recovery for expenditures**

Since an alleged contract by plaintiff to pave a town street in exchange for the town's opening of another road was *ultra vires* and void, plaintiff could not recover money expended by it in paving the street and thereby executing its part of the agreement.

APPEAL by plaintiff from *Long, Judge.* Order dated 17 November 1978 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 12 November 1979.

This civil action arose out of an alleged agreement entered into between plaintiff Rockingham Square Shopping Center, Inc. and defendant Town of Madison. In a complaint filed in September 1978 plaintiff alleged that at a meeting of the town governing body on 16 February 1972, defendant town had agreed that it would open and construct Lonesome Road at its own expense as an inducement for plaintiff to construct a shopping center development in the town. The opening of the road was to provide additional access to plaintiff's proposed development site. Plaintiff alleged that, in consideration of defendant's promise, it had agreed to grade and pave C Street, a dedicated street, at no cost to the town. Because defendant encountered difficulties in negotiating necessary right-of-way agreements with abutting landowners, Lonesome Road was never opened. Plaintiff alleged that defendant never notified it that the road would not be opened. As a result of breach of the alleged express or implied contract, plaintiff was forced to sell the shopping center under threat of foreclosure on 13 October 1976 for $1,000,000.00, whereas the fair market value of the shopping center, had the defendant complied with its promise to open Lonesome Road, would have been in excess of $1,250,000.00. Plaintiff claimed that it suffered damages from the breach in the amount of $250,000.00. In addition, plaintiff alleged that, in reliance upon the alleged agreement, it had procured the grading and paving of C Street, and plaintiff sought an additional recovery of $20,000.00, the amount expended by it for the work, on a theory of unjust enrichment.

In its answer the Town of Madison denied that any express or implied contract ever existed between the parties for the opening of Lonesome Road, and alleged that if any such contract did

exist, it was *ultra vires*, void and unenforceable. As to plaintiff's claims for recovery of the amount expended by plaintiff for grading and paving C Street, defendant alleged that the work done was substandard and that the Town of Madison had received no benefit from it so as to create any liability for the cost thereof.

On 20 October 1978 defendant Town of Madison moved for judgment on the pleadings and summary judgment. In an order dated 17 November 1978, the trial court granted defendant's motion for summary judgment. Plaintiff appeals.

C. Orville Light for plaintiff appellant.

S. J. Webster, Jr., and Donald P. Eggleston for defendant appellee.

PARKER, Judge.

Upon its motion for summary judgment on plaintiff's cause of action, defendant town had the burden of showing that there was no triable issue of fact, and that it was entitled to judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Because plaintiff's complaint on its face discloses that no cause of action exists, summary judgment for defendant was properly granted in the present case. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

[1] The basis of the action here at issue was a purported express contract entered into between plaintiff corporation and defendant Town of Madison. Plaintiff alleged that, in consideration of plaintiff's agreement to grade and pave C Street, a road owned by the Town of Madison, the town agreed to open Lonesome Road as an inducement for plaintiff to build a shopping center in Madison. The first question presented is whether, assuming that such an express contract existed, the town of Madison had the legal power to enter into it so as to be liable for breach thereof. As stated by our Supreme Court in *Madry v. Town of Scotland Neck*, 214 N.C. 461, 199 S.E. 618 (1938):

> A municipality is a creature of the Legislature and it can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the ac-

> complishment of the declared objects of the corporation- . . . . In exercising such powers of the municipal corporation's authority to bind itself by contract is limited . . . .

214 N.C. at 462, 199 S.E. at 619.

G.S. 160A-296 provides an express grant of power to municipalities "to open new streets and alleys, and to widen, extend, pave, clean, and otherwise improve existing streets, sidewalks, alleys, and bridges." This power is to be exercised in the discretion of the governing body of the municipality acting in its governmental, rather than its proprietary capacity. *Improvement Co. v. Greensboro,* 247 N.C. 549, 101 S.E. 2d 336 (1958); *Hoyle v. Hickory,* 164 N.C. 79, 80 S.E. 254 (1913). Although there is no question that a municipal corporation has the power to enter into contracts, there are certain limitations on its governing body's power to contract with respect to its governmental authority. As stated by our Supreme Court in *Edwards v. Goldsboro,* 141 N.C. 60, 53 S.E. 652 (1906):

> Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, *so they cannot, without legislative authority, express or implied, be bargained or bartered away.* Such corporations may make authorized contracts, but they have no power, as a party, to make contracts . . . . which shall cede away, control, or embarrass their legislative or governmental powers . . . . [The governing body] must at all times retain freedom of judgment, so that its decisions will be influenced only by a regard for the public welfare. 141 N.C. at 64-65, 53 S.E. at 653.

Accord, Improvement Co. v. Greensboro, supra; 10 McQuillin, The Law of Municipal Corporations, § 29.07, pp. 244-246. (3rd Ed. 1966 Revised Volume). If a contract does restrict the discretionary authority of the governing body of a municipality, it is *ultra vires* and of no legal effect. "The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it." *Jenkins v. Henderson,* 214 N.C. 244, 248, 199 S.E. 37, 40 (1938). Thus, there can be no right of action upon the contract for its breach, and no performance on either side can give it any validity. *Madry v. Scotland Neck, supra; Jenkins v. Henderson, supra.*

Applying these principles to the present case, we conclude that the alleged contract relied upon by plaintiff is *ultra vires*, and, therefore, unenforceable. Assuming that a contract was in fact entered into between the parties, that contract purported to restrict the statutory discretion vested by G.S. 160A-296 in the Board of Aldermen of the Town of Madison to determine whether a street should be opened for the public benefit. Even if the opening of Lonesome Road would in fact serve the interest of the residents of Madison, the governing body's agreement with plaintiff, a private party, to do so would nevertheless be void as against public policy. Neither does plaintiff's performance of its part of the agreement in expending money for the paving of C Street render the agreement valid, since the Town of Madison cannot be estopped from asserting that the agreement was *ultra vires* and therefore void. *Jenkins v. Henderson, supra.* Thus, the alleged express contract being void, plaintiff corporation had no cause of action for its breach.

[2] Having determined that plaintiff was not entitled to recover for breach of any express contract, we next consider whether plaintiff is entitled to recover the sum of $20,000, the amount by which it alleges defendant has been unjustly enriched at the expense of the plaintiff because of the paving of C Street. Plaintiff contends that even if the express contract is unenforceable, defendant Town of Madison may not retain the benefits of the paving without paying therefor. In support of its contention, the corporation relies upon the Supreme Court decision in *Hawkins v. Dallas*, 229 N.C. 561, 50 S.E. 2d 561 (1948). In that case, the plaintiff brought an action against a municipality to recover on a theory of express contract for the paving of streets and the laying of sewer lines. The contract in question was improperly let because the municipality had failed, as required by statute, to take bids for the work. Although the court held that the contract was void because the statutory bidding requirements were not met and that the plaintiff had no right of recovery on the contract, it nevertheless concluded that the municipality, having accepted the plaintiff's services and materials, was bound to compensate him for the reasonable and just value of the benefits received.

The decision in *Hawkins v. Dallas, supra*, is in accord with the general rule that, where a contract is within the scope of the

municipal powers but is void and unenforceable as an express contract because of irregularities in execution or performance, recovery may still be had for the value of benefits received by the municipality on a theory of implied contract. 10 McQuillin, supra, at § 29.111, pp. 536-537; *see also, Manufacturing Co. v. Charlotte*, 242 N.C. 189, 87 S.E. 2d 204 (1955); *Moore v. Lambeth*, 207 N.C. 23, 175 S.E. 714 (1934); *McPhail v. Commissioners*, 119 N.C. 330, 25 S.E. 958 (1896). However, a distinction has been drawn between cases in which the express contract involves an irregular exercise of a corporation power to contract, and those in which the express contract is *ultra vires* because the power of the municipality to contract is absent. In the latter cases, the municipality may not be bound, even in implied contract, for the value of benefits received. See generally, McQuillin, *supra*, § 29.111a, pp. 542-544; Annot., 154 A.L.R. 356, pp. 370-373 (1945); Annot., 110 A.L.R. 153, pp. 159-161 (1937). One rationale for such a rule is that the law will not permit a party to benefit directly or indirectly from a contract which is against a public policy. Our Supreme Court applied this rationale in *Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E. 2d 496 (1955), holding that a contract between a county and a private corporation of which the county manager was an officer was not only unenforceable, but that public policy precluded the corporation from recovering in an action *indebitatus assumpsit* on a *quantum meruit* basis. For the same reason of public policy, there can be no recovery in quasi contract by plaintiff in the present case. The express contract alleged by plaintiff being void as founded upon an illegal consideration, i.e., the promise of the Board of Aldermen to restrict its legislative discretion, plaintiff may not recover on account of the money he expended in executing his part of the agreement.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

MARSHA D. BROWN, WIDOW AND MARSHA D. BROWN, GUARDIAN AD LITEM FOR CHRISTOPHER JAMES BROWN, MINOR SON OF JAMES WILLIAM BROWN, JR., DECEASED v. JIM BROWN'S SERVICE STATION

No. 7810IC1013

(Filed 19 February 1980)

1. **Master and Servant § 60— workers' compensation—service station employee—death while installing CB antenna in home—accident arising out of and in course of employment**

The death of a service station employee who was electrocuted while installing a CB radio antenna in his home after working hours arose out of and in the course of his employment where the service station owner purchased the CB radio equipment and directed the employee to install it in his home so that he could be called by radio to help in the business when he could not be reached by telephone.

2. **Master and Servant § 81— workers' compensation insurance policy—scope of coverage—insured business as partnership—injuries away from premises**

An insurance policy providing workers' compensation insurance coverage for James William Brown t/a Jim Brown's Service Station covered the business operating as Jim Brown's Service Station even though the evidence showed the service station was a partnership consisting of Brown and his wife. Furthermore, the policy excluded accidents away from the business premises only when the insured had other insurance coverage for such accidents.

3. **Evidence § 34.1; Master and Servant § 93.3— workers' compensation case—admission by employer**

In an action to recover workers' compensation benefits for the death of a service station employee who was electrocuted while installing a CB antenna in his home, a statement by one of the service station owners that the CB radio was being installed in order to be better able to get in touch with decedent was admissible into evidence as an admission of the owner.

APPEAL by defendant from order of North Carolina Industrial Commission entered 5 September 1978. Heard in the Court of Appeals 21 August 1979.

This proceeding was instituted by the plaintiff, individually and as guardian ad litem for her minor son, under the Workmen's Compensation Act. The evidence before the Deputy Commissioner was to the effect that James William Brown, Jr. was employed at Jim Brown's Service Station. Lessie Brown, the mother of James William Brown, Jr., testified that she and her husband, as a partnership, owned Jim Brown's Service Station. She testified the partnership purchased a CB radio, and she told her son to install

it in his home so he could be called to come to the station when he was needed at times when he did not ordinarily work. She testified that sometimes she could not get him on the telephone. James William Brown, Jr. was electrocuted while installing the CB antenna in his home after his regular working hours. The Deputy Commissioner made findings of fact, including a finding that "[t]he base station that decedent was installing at his privately-owned residence on 23 January 1976 was intended to become part of a back-up and emergency communications system for the service station and farming operations." The Deputy Commissioner concluded the accident arose out of and in the course of employment and awarded benefits.

Defendant petitioned the Full Commission for review and the Full Commission held there was sufficient evidence in the record to support the opinion and award of the Deputy Commissioner. The Full Commission modified the award of attorney fees and affirmed the opinion and award as modified. Defendant appealed.

West and Groome, by Ted G. West, for plaintiff appellees.

Moore and Willardson, by Larry S. Moore and John S. Willardson, for defendant appellant.

WEBB, Judge.

[1] Lessie Brown testified that the partnership purchased the CB radio and the deceased was installing it at her direction after working hours. This was done so that decedent could be called by radio to help in the business when he could not be reached by telephone. This evidence supports the finding of fact that "[t]he base station that decedent was installing at his privately-owned residence on 23 January 1976 was intended to become a part of a back-up and emergency communications system for the service station and farming operations." The first question posed by this appeal is whether this finding of fact supports the conclusion that decedent's death, while installing the radio, was an accident arising out of and in the course of employment under G.S. 97-2(6). The words "arising out of and in the course of employment" have been interpreted many times. The phrases "arising out of" and "in the course of" are not synonymous and both must be fulfilled in order for the plaintiff to recover. An accident arises out of employment where any reasonable relationship to the employment and the ac-

cident exists or the employment is a contributory cause of the accident. *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476 (1960). From the finding of fact that decedent was installing a back-up radio system for his employer when the accident occurred, the Commission was correct in concluding the accident arose out of the decedent's employment.

The phrase "in the course of" employment deals with time, place, and circumstance. All three of the conditions must be fulfilled for the plaintiffs to recover. *See Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). "Time and place" do not necessarily mean the regular hours of employment and on the premises of the employer. If the employee is doing work at the direction and for the benefit of the employer, the time and place of work are for the benefit of the employer and a part of the employment of the employee. This satisfies the condition of time and place although the work is done off the premises of the employer and after regular working hours. *See Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957). In the case sub judice, the decedent was installing the radio at his own residence at the direction of his employer. The employer wanted this radio installed so it would have a back-up communication system for its own benefit. This satisfies the condition of time and place. In respect to "circumstance," compensable accidents are those sustained while the employee is doing what a man so employed may reasonably do within a time he is employed, and at a place where he may reasonably be during the time to do that thing. *See Harless v. Flynn, supra.* When the decedent was installing the radio in his home at the direction of his employer, he was doing what a man so employed may reasonably do at a time he was employed and at a place where he may have been during the time to do that thing. The condition of circumstance was fulfilled. The Commission was correct in concluding the accident arose out of and in the course of employment.

[2] Defendant next assigns as error the awarding of benefits to be paid by Aetna Casualty and Surety Company on the ground that the policy did not cover the partnership or the accident. The policy contained the following provisions:

"1. NAME OF INSURED AND ADDRESS

JIM BROWN'S SERVICE STATION
JAMES WILLIAM BROWN T / A
ELKIN ROAD
NORTH WILKESBORO, N. C. 28659

* * *

4. Classification of Operations

Entries in this item, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy.

* Clerical Office Employees N.O.C.

* Salesmen, Collectors or Messengers—outside

* Drivers, Chauffeurs and their Helpers N.O.C.—commercial (*if not specifically included below)

GASOLINE STATIONS, RETAIL—INCLUDING DRIVERS—AND TIRE RECAPPING SHOP

* * *

AETNA CASUALTY AND SURETY COMPANY

(A stock insurance company, herein called the Company)

Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declaration and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. COVERAGE A—WORKMEN'S COMPENSATION

To pay promptly when due all compensation and other benefits required of the Insured by the workmen's compensation law.

* * *

EXCLUSIONS

This policy does not apply:

(a) under Coverages A and B to operations conducted at or from any workplace not described in item 1 or 4 of the declarations if the Insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;

(b) under Coverages A and B unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;"

Defendant contends that the policy does not cover this claim because it was issued to James William Brown t/a Jim Brown's Service Station and the Deputy Commissioner found as a fact based on the evidence that Jim Brown's Service Station is a partnership. The defendant also argues that the exclusions provide that the policy does not apply to accidents occurring away from the location of the business at Elkin Road, North Wilkesboro, N.C. As to the argument that the policy does not cover the partnership, it is clear that it was written to cover the business operating as Jim Brown's Service Station at Elkin Road, North Wilkesboro, N.C. We hold that it covers the business although it is a partnership. As to the argument that accidents away from the premises are excluded, we hold that this exclusion applies to accidents for which the insured has other insurance coverage. The specific terms of the policy provide that Aetna Casualty and Surety Company will pay all sums which the insured is liable to pay for accidents "by any employee of the Insured arising out of and in the course of his employment . . . ." This covers the case sub judice. Defendant relies on *Burnett v. Paint Co.*, 216 N.C. 204, 4 S.E. 2d 507 (1939). That case involved the coverage of a workmen's compensation policy. The Court in that case held the plaintiff's injury was not covered by the Workmen's Compensation Act. The workmen's compensation policy did not cover the accident. There was no intimation that the coverage under the policy was not co-extensive with the insured's liability under the Workmen's Compensation Act.

Defendant next assigns as error the finding that the "[d]efendant employer is a partnership. Jim Brown and his wife

are the partners." James William Brown and Lessie Brown each testified it was a partnership. This is evidence which supports the court's finding.

[3] The defendant next assigns error to the testimony of decedent's widow. During her testimony, decedent's widow testified she had heard Lessie Brown say the radio would be installed in order to be better able to get in touch with decedent. Defendant contends this testimony should have been excluded as hearsay. Lessie Brown was a partner in the business against which the claim was made. Her statement as to the purpose for installing the radio was admissible evidence as an admission. *See* 2 Stansbury's N.C. Evidence, § 167 (Brandis rev. 1973).

Defendant also assigns as errors: a statement made by the Deputy Commissioner during the hearing that "[i]t was an oral partnership," the asking of leading questions by plaintiff's counsel, and the examination of the same witness by separate counsel. These assignments of error are overruled.

Affirmed.

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

ROBERT L. THOMAS, ADMINISTRATOR OF THE ESTATE OF JOYCE THOMAS, DECEASED v. ERNEST EDWARD POOLE, JR., DWIGHT M. DUNLAP, AND GUY R. RANKIN, INDIVIDUALLY AND GUY R. RANKIN SECURITY SERVICE CORPORATION, TRADING AS VANGUARD SECURITY SERVICE

No. 7914SC451

(Filed 19 February 1980)

1. Master and Servant § 35.2— shooting by security guard—application of respondeat superior—jury question

In an action to recover from defendant corporation for the wrongful death of plaintiff's intestate which occurred when an armed security guard employed by defendant was leaving his duty station at the end of his shift, the trial court erred in determining that there was no genuine issue of material fact relating to the doctrine of *respondeat superior* and in entering summary judgment for defendant corporation, since the jury could find that defendant security guard engaged in "horseplay" in that, thinking his gun was empty, he pointed it at plaintiff's intestate and intentionally pulled the trigger after she

grabbed and held his sleeve, thereby deviating from the scope of his employment and absolving defendant corporation from liability under the doctrine of respondeat superior; or on the other hand the jury could find that the security guard was not engaged in horseplay but negligently failed to remove all cartridges from the gun and, thinking it was empty, negligently handled the gun causing it to discharge and strike plaintiff's intestate, thus raising a question for the jury as to whether the security guard was acting within the course and scope of his employment.

2. **Corporations § 15— shooting by security guard—president of corporation insulated by corporate entity**

In an action to recover for the wrongful death of plaintiff's intestate who was shot by the security guard employed by defendant corporation, the trial court properly entered summary judgment for the major stockholder and president of defendant corporation, since there was no showing that he was acting in his individual capacity and he was consequently insulated by the corporate entity through which he was doing business.

3. **Negligence § 30.3— shooting death—failure to warn of bullet—no foreseeability**

In an action to recover for the wrongful death of plaintiff's intestate who was shot by a security guard at her place of employment, the trial court properly granted summary judgment for defendant security guard whose shift preceded that of defendant who shot deceased, since the first security guard was under no duty to warn that he had placed an extra bullet in the gun when he transferred the gun to the second guard, who had full knowledge that it was loaded, and even if the first guard were negligent in failing to warn of the extra bullet, his negligence would not be actionable because it was not foreseeable that the second guard would either engage in horseplay or fail to check all the cylinders while unloading the gun.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 22 January 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 December 1979.

This is an action for wrongful death. Joyce Suggs Thomas, employed as a switchboard operator by Lincoln Hospital, Durham, North Carolina, was unintentionally shot and killed on 7 February 1975, by defendant Poole, employed as a security guard by Guy R. Rankin Security Service Corporation, trading as Vanguard Security Service.

At the hearing on the motion of all defendants for summary judgment, the trial court considered the pleadings, the depositions of defendants Poole and Rankin, the affidavit of defendant Rankin, and a portion of the transcript of the trial in the case of

State v. Ernest Edward Poole, Jr. involving a manslaughter charge.

The pleadings and supporting materials tend to show:

Defendant Rankin was a major stockholder and president of defendant corporation, which was in the business of providing security guards and watchmen for several businesses and institutions in the Durham area. The corporation had an oral agreement, existing over a period of several years, with the hospital to provide security guards.

Defendant Poole was employed by defendant corporation as a security guard in early 1973 and was assigned to work at the hospital. On 7 February 1975 defendant Poole was the senior guard at the hospital and his duty shift was from 6:30 to 10:30 p.m. at a duty station located in the lobby area on the first floor and adjoining the switchboard room.

A .38 caliber revolver had been issued by Vanguard Security to defendant Poole, but the pistol was worn in a holster by defendant Dunlap, whose duty shift ended at 6:30. Poole usually loaded the gun with five cartridges, but Dunlap added a sixth cartridge in the chamber, and Dunlap gave the pistol to Poole when Dunlap left his duty station at 6:30.

At the trial on the manslaughter charge, defendant Poole testified that about 10:30 p.m. he received a phone call from the security guard on the successive shift advising him that he was downstairs at the nurses' station. Poole got up to leave. He had not signed the log to indicate the time he was leaving the duty station. Poole took the gun from the holster for the purpose of unloading it before taking it to his home where he had a wife and baby, emptied five cartridges from the gun by dumping them in his left hand, but in doing so did not use the cartridge ejector. Unknown to him one cartridge remained in the gun cylinder. Poole got up to leave and walked behind Joyce Thomas, who was seated at the switchboard. She grabbed his sleeve as he went by. He pulled the pistol out of the holster. She asked him if he was going to the Angel of Mercy Club. Poole said that he may see her there. As he started to walk out of the office, he stated, "I just pulled the trigger on the pistol and it went off." In his deposition defendant Poole stated that the gun accidentally went off and that he did not pull the trigger.

Officer Mitchell of the Durham Police Department testified at the criminal trial that he talked to Poole at the hospital about 11:00 p.m. and Poole told him that he pulled the trigger and it went off, and that he did not know it was loaded because he normally had only five rounds of bullets in the pistol. By using the ejector or push rod, all cartridges would have been ejected from the cylinder.

The Rules and Regulations issued by Vanguard Security Service to its security guards included the following:

> "E. Never remove pistol from holster unless you intend to use it.
>
> 3. Remember the wearing of a weapon carries with it a grave responsibility, irresponsible behavior should not be tollerated [*sic*] at any time, i.e., quick draw, playing cowboys, toying with weapon or showing it off, flashing gun, etc."

The trial court entered summary judgment dismissing the action against defendant Rankin and defendant Dunlap, and further adjudged:

> "3. That Plaintiff have and recover nothing of Defendant Guy R. Rankin Security Service Corporation t/a Vanguard Security Service upon Plaintiff's claim against said Defendant based upon the doctrine of Respondeat Superior;
>
> 4. That the Motion of the Defendant Guy R. Rankin Security Service Corporation t/a Vanguard Security Service for Summary Judgment as to the Plaintiff's claim against it based upon its alleged independent negligence is denied; and . . . ."

Hedrick, Parham, Helms, Kellam & Feerick by Hatcher M. Kincheloe and Kenneth B. Spaulding for plaintiff appellant.

Spears, Barnes, Baker & Hoof by Alexander H. Barnes for defendant appellees.

CLARK, Judge.

[1] We elect to consider initially whether the trial court erred in ruling that plaintiff had no claim against the defendant corporation upon the doctrine of *respondeat superior*.

Under the doctrine of *respondeat superior* the master, or employer, is liable for the negligent acts or omissions of his servant, or employee, while acting as such and within the "scope of his employment." *Jackson v. Mauney*, 260 N.C. 388, 132 S.E. 2d 899 (1963); *Rollison v. Hicks*, 233 N.C. 99, 63 S.E. 2d 190 (1951); *Gillis v. A & P Tea Co.*, 223 N.C. 470, 27 S.E. 2d 283 (1943); 57 C.J.S. *Master and Servant* § 571 (1948); 8 Strong's N.C. Index 3d *Master and Servant* §§ 32 to 36 (1977). Unless there is no material issue of fact as to whether the employee was acting within the scope of his employment, N.C. Gen. Stat. § 1A-1, Rule 56(c); W. Shuford, N.C. Civil Practice and Procedure § 56-7 (1975), the question will be submitted to the jury. *See also*, 8 Strong's N.C. Index 3d *Master and Servant* § 34 (1977), and the authorities cited therein.

The circumstances of the fatal shooting in the case *sub judice* are particularly significant to the question of whether defendant Poole was acting within the scope of his employment and thereby made the defendant corporation liable by application of the doctrine of *respondeat superior*. Since it appears that there were no eyewitnesses to the shooting other than defendant Poole, these circumstances appear in the the deposition of Poole and in the testimony of Poole and Officer M. W. Mitchell, who investigated the homicide and arrived at the scene about 11:00 p.m. and talked with Poole, as transcribed at the criminal trial of defendant Poole on the manslaughter charge.

In his deposition Poole admitted that he told Officer Mitchell that he pulled the trigger, but at that time he was upset and did not understand what was happening. "I did not pull the trigger," stated Poole. "I closed the cylinder with my right hand as I was lifting the gun to put it in the holster." It was "at that point the gun went off." "At the time of this incident," explained Poole, "I thought the gun was fully unloaded."

In contrast, at the manslaughter trial Officer Mitchell testified that Poole made a statement about 12:50 a.m. and said: "I just pulled the trigger on the pistol and it went off. . . . I didn't know it was loaded . . . ."

In the trial on the manslaughter charge defendant Poole testified that he did tell Officer Mitchell that he "just pulled the

trigger and it went off." He added that he was nervous and the statement was made before he consulted legal counsel.

The foregoing transcribed testimony, offered by plaintiff in support of the motion for summary judgment established that defendant did not willfully and maliciously shoot the telephone operator, Joyce Thomas. But his version of the circumstances as related to Officer Mitchell and his version as related in his deposition and in his criminal trial are conflicting.

From Poole's statement to Officer Mitchell it may be reasonably inferred that after Joyce Thomas grabbed his sleeve, Poole engaged in "horseplay" in that, thinking the revolver was empty, he pointed the gun at her and intentionally pulled the trigger. But from his deposition and trial testimony it may also be reasonably inferred that he negligently failed to empty the gun and that it accidentally discharged when he was attempting to put the gun in his holster. These two versions raise a material issue of fact, and, if the evidence at trial is substantially the same as appears in the record before us, the issue must be determined by a jury.

If the jury should find that defendant Poole engaged in "horseplay" in that, thinking the gun was empty, he pointed the gun at the telephone operator and intentionally pulled the trigger after she grabbed and held his sleeve, he deviated from the scope of his employment and engaged in a personal mission of his own, then, as a matter of law, the defendant corporation would not be liable to plaintiff under the doctrine of *respondeat superior*. *See Norman v. Porter*, 197 N.C. 222, 148 S.E. 41 (1929), where it was held that the employee-son of the store owner deviated from the scope of his employment when he threw a cartridge in the stove and it exploded, hitting plaintiff in the eye. For other "horseplay" cases involving the use of a gun where it was held that the employee was operating outside the scope of his employment, *see, e.g., Olson v. Staggs-Bilt Homes, Inc.*, 23 Ariz. App. 574, 534 P. 2d 1073 (1975); *Scrivner v. Boise Payette Lumber Company*, 46 Idaho 334, 268 P. 19 (1928); *American Ry. Express Co. v. Tait*, 211 Ala. 348, 100 So. 328 (1924); *American Ry. Express Co. v. Davis*, 152 Ark. 250, 238 S.W. 50 (1922); *Smith v. Peach*, 200 Mass. 504, 86 N.E. 908 (1909); *Burns v. Texas Midland R.R.*, 167 S.W. 264 (1914), Cf., *Du Pree v. Babcock*, 100 Ga. App. 767, 112 S.E. 2d 415 (1959).

On the other hand, if the jury should find that defendant Poole was not engaged in horseplay, but negligently failed to remove all cartridges from the gun and, thinking it was empty, negligently handled the gun causing it to discharge and strike Joyce Thomas, then the additional question of whether defendant Poole was acting within the course and scope of his employment would be for the jury to determine under proper instructions from the court. 8 Strong's N.C. Index 3d *Master and Servant* § 34 (1977).

Since the defendant corporation has failed to establish that there was no genuine issue of a material fact relating to the doctrine of *respondeat superior*, the ruling of the trial court allowing summary judgment for the defendant corporation on this question was error.

[2, 3] We affirm so much of the judgment of the trial court allowing summary judgment for individual defendants Guy R. Rankin and Dwight M. Dunlap. The supporting material fails to show that Rankin was acting in his individual capacity; consequently, defendant Rankin is insulated by the corporate entity through which he was doing business. The material also fails to show actionable negligence on the part of Dunlap. We find no duty on the part of Dunlap to warn of the extra bullet when he transferred the gun to Poole who had full knowledge that the gun was loaded. Even if Dunlap were negligent in failing to warn of the extra bullet, his negligence would not be actionable because it was not foreseeable that defendant Poole would either engage in horseplay or fail to check all the cylinders while unloading the gun. *See also, Smith v. Peach, supra.*

Reversed in part; Affirmed in part.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. TONY RUSHELL WYNN

No. 797SC691

(Filed 19 February 1980)

Searches and Seizures § 34— pistol in plain view in car—warrantless seizure proper

Where an officer was informed that armed robbery suspects had fled in a certain direction, he proceeded in that direction, and he stopped a car which carried passengers fitting the description of the robbers and which had run a stop sign, the officer could properly seize without a warrant a .22 caliber pistol which was on the floorboard of the car and which he saw when he shone his flashlight through the open passenger door.

APPEAL by defendant from *Brown, Judge.* Judgment entered 8 March 1979 in Superior Court, WILSON County. Heard in the Court of Appeals 9 January 1980.

Defendant was charged with the armed robbery of Margie Lucas, taking $50.00 from the Texaco Grill on 27 December 1978. He moved to suppress from evidence a .22 caliber pistol found on the floorboard of defendant's automobile and seized by Policeman Floyd Dickerson. After *voir dire* the trial court denied the motion to suppress, and defendant entered a plea of guilty as charged. Judgment was entered imposing a sentence of 20 years' imprisonment as a committed youthful offender, and defendant appealed under G.S. 15A-979(b).

Attorney General Edmisten by Assistant Attorney General Thomas F. Moffitt for the State.

E. J. Kromis, Jr. for defendant appellant.

CLARK, Judge.

The determination of the suppression question is dependent upon whether the seizure of the pistol comes within the "plain view" warrantless search exception to the exclusionary evidence rule.

In *Coolidge v. New Hampshire,* 403 U.S. 443, 446, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), the Supreme Court enunciated four elements of the "plain view" doctrine as follows:

1. the prior intrusion must be valid;

2. the discovery must be inadvertent;

3. the evidence must be immediately apparent as such; and

4. the evidence must be in plain view.

After *voir dire* the trial court, in concluding that the plain view doctrine was applicable and denying the defendant's motion to suppress, found facts as follows:

> "That Officer Floyd Dickerson of the Wilson Police Department received a radio message that a robbery had occurred at the Texaco Grill and that the suspects were two young black males, one of light complexion and one of dark complexion; that the two black males left the grill running in the direction of Carver Trailer Park. That Dickerson proceeded to the trailer park and observed a 1973 Chevrolet automobile, that he followed the automobile and observed two black males in the rear seat who looked back frequently at his car; that at one intersection that the car passed through it failed to stop for a stop sign and ran up on the curb, almost striking the stop sign, and accelerated rapidly. That the officer continued following the automobile and the subjects in the back seat continued to look back in the direction of the officer's car. That he stopped the car and four black males got out, that they were all young and one was of dark complexion and one was of light complexion; that the four black males walked toward his patrol car and then one of the black males turned and walked back to the car and then returned to the patrol car. That the officer told the subjects to put their hands on his car and they were frisked and the defendant had $50.00 crumpled or balled up on his person. That Officer Dickerson walked over to the passenger side of the automobile and the door had been left open and he observed a .22 pistol in the floorboard on the passenger side."

The foregoing facts were fully supported by the State's evidence.

1. The Prior Valid Intrusion

The valid intrusion element has been applied liberally where the police discover evidence in plain view; in general it is only re-

quired that the police have legal justification to be at the place where he sees evidence in plain view. *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979); *State v. Rudolph*, 39 N.C. App. 293, 250 S.E. 2d 318 (1979), (where the circumstances are somewhat similar to those in the case before us). The plain view doctrine can be used in conjunction with the exception for moving vehicles, enunciated in *Carroll v. United States*, 276 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), where the elements of exigent circumstances and probable cause exist. Thus intrusion has also been considered valid where police have stopped a vehicle for inspection based on probable cause, or for traffic violation, and see evidence in plain view from without the vehicle. *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E. 2d 190 (1977); *State v. Dixon*, 241 N.W. 2d 21 (1976). Consequently, we have no problem finding a valid prior intrusion in the instant case.

2. Inadvertent Discovery of the Evidence

The requirement of inadvertent discovery is not clearly defined in *Coolidge, supra.* Where the police know in advance the location of the evidence and intend to seize it, the constitutional requirement of a warrant applies. However, the mere expectation that the evidence will be discovered does not negate the inadvertency element. Some commentators feel that inadvertency means the absence of probable cause. Comment, 85 Harv. L. Rev. 3, 243-247 (1971). In the case before us Officer Dickerson did not have probable cause to believe that he would discover a pistol in the automobile operated by defendant. Though he was investigating a crime in which a firearm was used, there was at most an expectation or possibility that at the time of detention he would discover a pistol in the car.

3. Immediately Apparent

The requirement that the evidence seized be immediately apparent as such is a corollary of the probable cause requirement. There must be some ". . . nexus . . . between the item to be seized and criminal behavior." *Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967). This element is required so that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something in-

criminating at last emerges." *Coolidge, supra,* 403 U.S. at 466. In *United States v. Truitt,* 521 F. 2d 1174, 1177 (6th Cir. 1975), the court held that the issue is not whether the object is contraband, but whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused. See *State v. Prevette,* 43 N.C. App. 450 (1979).

In the case *sub judice,* there was a nexus between the pistol discovered in defendant's car and the crime of armed robbery. The pistol was undoubtedly incriminating to the defendant. Consequently, the "immediately apparent" element is present in the instant case.

4. Plain View

The object of the Fourth Amendment is to protect reasonable expectations of privacy. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). When the evidence seized is in plain view the police officer is outside constitutionally protected areas. Plain view does not require unobstructed sight, but only as much sight as is necesssary to give a reasonable man the belief that there is evidence of criminal activity present. See *United States v. Drew,* 451 F. 2d 230 (5th Cir. 1971), which held that a gun was in plain view when police observed the outline of a gun through an opaque plastic case.

In the case before us, after defendant and the other three occupants of the car were frisked by Officer Dickerson and Officer Roberts and a wad of bills amounting to $50.00 was found in defendant's pocket, Officer Dickerson then went to defendant's car; he shined a flashlight into the car and saw a .22 caliber pistol on the floor of the front seat. He seized the gun. In *State v. Whitley,* 33 N.C. App. 753, 236 S.E. 2d 720 (1977), it was held that a rifle, jewelry box and pocketbook, which were on the backseat of the accused's automobile and which were visible to officers when they shined a flashlight into the automobile were in "plain view."

We find that the .22 caliber pistol discovered by Officer Dickerson with the aid of the flashlight was in the plain view and

that its seizure without a warrant was justified under the plain view doctrine.

The judgment is

Affirmed.

Judges ARNOLD and ERWIN concur.

CHARLES H. MONTGOMERY, GUARDIAN AD LITEM FOR THOMAS RICHARD HINTON v. ODELL HINTON

No. 7910SC244

(Filed 19 February 1980)

Executors and Administrators § 13— executor's sale of devised realty—authority not given by will or statute—necessity for court approval

Where a will granted the executor all the powers set forth in G.S. 32-27, neither the will nor G.S. 32-27 gave the executor the authority to sell real property devised to testator's minor son without prior court approval, since title to the real property vested in the devisee son upon testator's death, and the executor did not "hold" the property and it was not at his "disposal" within the meaning of G.S. 32-27.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 11 December 1978, Superior Court, WAKE County. Heard in the Court of Appeals 12 November 1979.

Nehemiah Hinton died testate on 23 June 1978. His will was admitted to probate in Wake County on 13 July 1978, and defendant, executor named therein, was qualified on that date. On 15 September 1978, plaintiff qualified as guardian ad litem for Thomas Richard Hinton, sole devisee under the will. Thomas Richard Hinton, a minor, is the son of testator.

Plaintiff brought this action seeking a declaration of the minor's rights under the will and asking the court to restrain a pending sale, arranged by defendant, of the real property devised to the minor. Plaintiff's complaint and "motion for temporary restraining order and preliminary injunction" was filed 15 September 1978. Defendant filed answer on 20 September 1978, and on 26 September 1978 moved for summary judgment. On 20

November 1978, plaintiff moved for summary judgment and filed affidavit of the minor's mother. Although the record contains a stipulation that "captions and verifications need not be printed in the record," there is no stipulation that the complaint and answer, or either of them, were verified. Nor does the record contain any indication of the ruling, if any, on the "motion for temporary restraining order and preliminary injunction," with the exception that defendant's answer avers that "the defendant has been wrongfully restrained." The court heard the matter on the cross motions for summary judgment and held "that there is a genuine issue as to one or more material facts on the following issues: A) Whether the will in question creates a specific devise of real property to Thomas Richard Hinton; B) Whether the sale of said real property is necessary and in the best interests of Thomas Richard Hinton." The court held that neither of the parties was entitled to summary judgment as a matter of law on these issues. The court further held that "no genuine issue as to any material fact exists concerning the issue of whether the defendant, as executor and guardian under the will in question, has the lawful power and authority under the will and N.C.G.S. 32-27 to sell the real property that is the subject of this action without first obtaining court approval. On this issue the court specifically finds that the powers and authority given Defendant under the will in question and N.C.G.S. 32-27, do not allow the Defendant to sell the real property in question without court approval since neither the will nor North Carolina law confer (sic) any interest, possession or title to the real property in the Defendant that will defeat the rights of the Plaintiff devisee. Plaintiff is thus entitled to partial (summary) judgment as a matter of law as to this issue." Plaintiff does not assign as error the court's first holding, but defendant appealed, assigning as error "[t]he granting of the plaintiff's Motion for Summary Judgment on the ground that the plaintiff is entitled to Judgment as a matter of law."

Wake-Johnston-Harnett Legal Services, by Gregory C. Malhoit, for plaintiff appellee.

Charles H. Montgomery, for Guardian Ad Litem for Thomas Richard Hinton.

Fellers & Link, by Carlton E. Fellers, for defendant appellant.

MORRIS, Chief Judge.

It has been established that summary judgment is an appropriate procedure in a declaratory judgment action. *Frank H. Connor Co. v. Spanish Inns Charlotte*, 294 N.C. 661, 242 S.E. 2d 785 (1978); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972).

The will of Nehemiah Hinton first directed his executor to pay all of his debts, funeral expenses, costs of administration, and estate and inheritance taxes. The will by Article II provided that:

> After the payment of all such debts, expenses, taxes and obligations, I give, bequeath, devise and appoint unto my son, THOMAS RICHARD HINTON, all of my property of every sort, kind and description, whether real or personal and wheresoever situated, and all other property of whatsoever nature or kind over which I shall have any power of appointment exercisable by will, whether the same be known to me or not, to have and to hold the same absolutely and in fee simple forever, including, but not by limitation, my savings account at First Citizens Bank and Trust Company of Raleigh, 086-2068269, a savings account at First Citizens Bank and Trust (S/N.H.)
>
> Page Two
>
> Company of Raleigh for the benefit of THOMAS RICHARD HINTON 0862076064, real property located on Bloodworth Street, Raleigh Township, Wake County, North Carolina, and all my interest in Evans Used Cars.

Article III provided for the appointment of testator's brother, Odell Hinton, as guardian "to have custody of my minor child and to have full guardian powers over the property passing to my minor child both within and without this Will." Article IV appointed Odell Hinton as executor, to serve without bond, and further provided: "By way of illustration and not limitation and in addition to all powers otherwise granted by law, I hereby grant to my Executrix (sic) and any successor hereunder all the powers set forth in North Carolina General Statutes, Section 32-27, and these powers are hereby incorporated by reference and made a part of this instrument.

Defendant contends that the question for decision is whether the testator intended that the executor, his brother, have the right to exercise the power to sell, without prior court approval, real property devised under the terms of his will to his son and that that intention is clearly spelled out in Item IV.

Appellee contends that the testator's will only empowers the executor to sell real property if it is necessary to carry out the purposes of the will, pay debts of the estate, or make distribution of the estate.

Appellant concedes that the executor has no power to sell the land without court approval except when authorized to do so by the will, but contends the will grants that power.

It is elementary that when a person dies testate, title to his real estate vests in his devisees. *Moore v. Jones*, 226 N.C. 149, 36 S.E. 2d 920 (1946). This rule is codified in G.S. 28A-15-2(b) which provides:

> The title to real property of a decedent is vested in his heirs as of the time of his death; but the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent's death, subject to the provisions of G.S. 31-39.

Under G.S. 28A-13-3(a)(1) (Supp. 1979), an executor has the "power to take possession, custody or control of the real property of the decedent if he determines [that] such possession, custody or control is in the best interest of the administration of the estate." However, prior to exercising control of the real property, he must follow the provisions of G.S. 28A-13-3(c) which require that he obtain a court order after filing a petition and making the devisees parties to the proceeding and having them served with summons.

Here defendant has not followed this procedure.

G.S. 28A-15-1 makes all of the real and personal property of a decedent available for the payment of debts of the decedent, and G.S. 28A-17-1 provides that the personal representative may apply to the Clerk of Superior Court for an order requiring the sale of realty for the payment of debts and other claims against the estate. Here it is stipulated that there are no debts of the estate which would require the sale of realty.

G.S. 32-27 enumerates powers which may be incorporated by reference in a will pursuant to the authority of G.S. 32-26. The statute in its entirety was incorporated by reference in Item IV of testator's will. Section (2) entitled "Sell and Exchange Property" is the portion of the statute upon which defendant relies. It provides:

> To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein *which the fiduciary may hold from time to time*, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the *property* or interest therein *which is at the disposal of the fiduciary*, in fee simple absolute or otherwise, free of all trust, and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange. (Emphasis supplied.)

This statute availeth defendant nothing for it is clear that he does not "hold the property," nor is it at his "disposal." To allow an executor to rely on this statute, and nothing more, to justify the sale of property devised under a will would be to grant to all executors unbridled discretion to dispose of devised real estate without showing any reason or necessity therefor and without the knowledge of the devisee. This would obviously be a ridiculous result and just as obviously not the intent of the Legislature.

Here, the testator's intent is clear. He first directs the executor to pay his debts, the costs of administration, and all death taxes. After the payment of those obligations, he gives everything he owns to his son, Thomas Richard Hinton, specifically including in the devise the real estate which is the subject of this lawsuit. We read nothing in the will which gives the executor the power to sell the real estate without the authority given by order of the court.

Because we conclude the executor has no power of sale granted by the will, we do not discuss the doctrine of reconversion.

The portion of the order of the trial court, holding that the powers and authority given defendant under the will and G.S.

32-27 do not allow defendant to sell the real property in question without court approval, from which defendant appeals, is

Affirmed.

Judges PARKER and HILL concur.

STATE OF NORTH CAROLINA v. MITCHELL A. PARKER

No. 7916SC625

(Filed 19 February 1980)

1. **Criminal Law § 89.7— cross-examination about psychiatric care—impeachment**

The trial court in a rape case did not err in permitting the prosecutor to ask defendant on cross-examination whether he had ever received any psychiatric treatment since the question was competent for the purpose of impeachment.

2. **Criminal Law § 46— defendant's actions after crime—competency as evidence of flight**

In this rape prosecution, evidence that defendant left the scene of the incident and went to his dormitory room and that he attempted to evade the arresting officers and was uncooperative when they went to his room more than an hour after the rape occurred was properly admitted as bearing upon the issue of his guilt of the rape charge.

3. **Rape § 5— second degree rape—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for second degree rape where the prosecutrix testified that a male forced his way into her dormitory room and had sexual intercourse with her against her will; a witness testified that he fought with defendant as defendant attempted to flee from the prosecutrix's room; and police officers testified that they apprehended defendant in his dormitory room where he appeared to be hiding and that he refused to cooperate with them.

APPEAL by defendant from *Barbee, Judge*. Judgment entered 9 February 1979 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 28 November 1979.

Defendant was indicted on charges of second degree rape, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and assault on a police officer. Upon the State's motion, the first two charges were consolidated for trial. The charge of assault on a police officer was tried separately.

Evidence presented by the State at trial tended to show the following: On 18 June 1977 defendant, a student, approached the prosecutrix at the door to her room in a college dormitory and forced his way into her room. Resisting her attempts to escape, defendant had sexual intercourse with her against her will. Upon hearing other students outside the dormitory room, defendant fled. Defendant was confronted by a fellow student, Frankie McLaurin, who tried to prevent defendant's flight, and after a brief struggle, defendant escaped. Defendant was later arrested by police officers in his dormitory room where he was apparently hiding.

Defendant presented medical evidence showing no presence of sperm on the body or clothing of the prosecuting witness, and that she had no scratches or bruises which would indicate a struggle. Defendant himself testified that he was near the prosecuting witness's room on the night in question; that she approached him and asked him to come into her room and talk with her; that shortly thereafter she began to scream, and left the room; and that he attempted to leave the room but was attacked by McLaurin. Defendant denied ever forcing the prosecuting witness to have sexual intercourse with him.

The jury found defendant not guilty of assault with a deadly weapon with intent to kill inflicting serious bodily injury. Defendant was found guilty of second degree rape, and appealed from the judgment entered on the verdict, sentencing him to a prison term of not less than 12 nor more than 30 years.

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

Gordon and Horne, by John H. Horne, Jr., for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant assigns error to the court's ruling allowing the prosecutor to question defendant concerning his previous psychiatric treatment. The prosecutor asked defendant: "Mr. Parker, have you ever received any psychiatric treatment prior to today, Sir?", to which defendant replied that he had undergone an examination at the request of his attorney to determine his abili-

ty to stand trial but had not undergone any psychiatric treatment or evaluation at any other time. Defendant argues that the State had already obtained information concerning a psychiatric evaluation of defendant, and that the prosecutor's questions were asked for the sole purpose of inflaming the minds of the jury. He contends that the question was improper because his mental capacity to stand trial was not at issue, and there was no claim of a defense of insanity. From our review, we conclude that this evidence was relevant for the purposes of impeachment and that the question was properly allowed.

"A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination," *State v. Waddell*, 289 N.C. 19, 26, 220 S.E. 2d 293, 298 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976), and the scope of the cross-examination is not confined to matters brought out on direct examination but may extend to any matters relevant to the case. *State v. Brown*, 20 N.C. App. 71, 200 S.E. 2d 666 (1973), *cert. denied*, 284 N.C. 617, 202 S.E. 2d 274 (1974). The scope of such cross-examination is largely within the discretion of the trial judge. *State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979). A judge's ruling as to whether cross-examination "transcends propriety" will not be disturbed absent a showing of gross abuse of discretion, *State v. Ruof*, supra, or a showing that the jury verdict was improperly influenced thereby. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970). It is a broadly accepted rule that in determining the credibility of a witness or the weight to be accorded his testimony, regard may be had to his mental condition. *See generally* 81 Am. Jur. 2d *Witnesses* § 540 (1976). In this regard, it has been held that a witness may be impeached by questions as to his mental state. *E.G., State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969); *Moyle v. Hopkins*, 222 N.C. 33, 21 S.E. 2d 826 (1942). Notwithstanding a prior determination of a witness's competency to testify, a showing of mental deficiency is relevant to the credibility of the witness. In *State v. Witherspoon*, 210 N.C. 647, 649, 188 S.E. 111, 112 (1936), our Supreme Court stated:

> [Competency and credibility] are not the same thing. A person may be a competent witness and yet not a credible one. Competency is a question for the court; credibility a matter for the jury.

We are aware of the decision in *State v. Summrell*, 13 N.C. App. 1, 185 S.E. 2d 241 (1971), *reviewed on other grounds*, 282 N.C. 157, 192 S.E. 2d 569 (1972), where defendant was charged with disorderly conduct, resisting arrest, and assault on an officer. This Court found no error in the trial court's sustaining the State's objections to questions asked by defendant's counsel on cross-examination of a State's witness, one of which was whether the witness had sometime previous to the incident for which he was charged visited a mental health clinic. The Court held that the questions called for "irrelevant and immaterial" testimony. In the present case wherein defendant was charged with rape, we do not reach the same conclusion, nor has defendant presented anything on appeal which would require that result. There is no abuse of discretion in the court's ruling on defendant's objection. Certainly there has been no showing that inquiry into the mental health of defendant was sufficiently prejudicial to require a new trial.

[2] In his next assignment of error defendant contends that the trial court erred by allowing testimony concerning his behavior and his resisting arrest when approached by police officers more than an hour after the alleged rape occurred. Evidence presented by the State revealed that after the incident with the prosecuting witness defendant returned to his dormitory room and refused to cooperate with police officers who subsequently arrived. Although the evidence does not concern the immediate circumstances surrounding the alleged rape, we reject defendant's argument that the evidence is irrelevant to the rape charge and was introduced solely to prejudice defendant.

It is our opinion that this evidence was properly admitted as bearing upon the issue of guilt to the rape charge, as well as the assault offense. "North Carolina has long followed the rule that an accused's flight from a crime shortly after its commission is admissible as evidence of guilt." *State v. Self*, 280 N.C. 665, 672, 187 S.E. 2d 93, 97 (1972). "[S]uch evidence does not create a presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E. 2d 697, 698 (1973). It having been established that defendant left the scene of the incident and later attempted to evade arresting officers, it was for the

jury to determine whether those facts, together with the surrounding circumstances, evidenced defendant's guilt of the offenses charged.

[3] Finally, defendant argues that the trial court erred by denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence. Upon review of a motion to dismiss in a criminal case, the court must consider all the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). If the court determines that there is sufficient evidence, direct or circumstantial, from which a reasonable inference of the defendant's guilt may be drawn, it must deny defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of defendant's innocence. *State v. McKinney, supra; State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). In the present case, the prosecuting witness testified that a male forced his way into her room and had sexual intercourse with her against her will. Frankie McLaurin testified that he fought with defendant as he was attempting to flee from the room. Police officers testified that they apprehended defendant in his dormitory room where he appeared to be hiding, and that he refused to cooperate with them. Even though defendant offered certain contradictory evidence, the trial judge nevertheless properly submitted the case to the jury. At this point, "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, supra*, 40 N.C. App. at 79, 252 S.E. 2d at 540. We must, therefore, overrule defendant's assignment of error.

In the trial of this case, we find

No error.

Judges PARKER and HILL concur.

NORTH CAROLINA NATIONAL BANK AND NICK J. MILLER, CO-TRUSTEES, AND MARJORIE A. WELLING v. T. RICHARD MORRIS AND WIFE, ELEANOR R. MORRIS, ROBERT L. VINCENT AND WIFE, ALICE MARIE M. VINCENT, GEORGE F. MIFFLETON, III AND WIFE, CAROLYN T. MIFFLETON

No. 7926SC462

(Filed 19 February 1980)

Deeds § 19.4— driveway easement reserved—restrictions of prior deeds not violated

The restrictive covenants and reservations placed in deeds conveying lands from plaintiffs to four of the defendants were not violated by the reservation of a fifteen foot driveway easement along the boundary of a lot sold by the four defendants to the remaining defendants, since the prior deeds, with their covenants and reservations, contemplated limited division of the lands for the building of single family dwellings; it was reasonable to expect that easements would be necessary for access to the lots established; and the covenants in the prior deeds reserved a right of way along the side lines for poles or conduits for utilities and drainage and grantors therefore anticipated that easements along the lot lines would not necessarily depreciate the value of the property.

APPEAL by plaintiff from *Snepp, J.* Judgment entered 27 February 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 January 1980.

This is an action for a declaratory judgment to construe the reservation of a driveway easement in a deed to property conveyed by the defendants Vincent et ux and Morris et ux to Miffleton et ux, and for an injunction to prevent the violation of deed restrictions as a result thereof. Defendants denied any violation of the restrictions. The parties waived trial by jury. The court found the following facts, which are not contested.

1. Plaintiffs, North Carolina National Bank and Nick J. Miller, conveyed seven tracts of property to defendants, T. Richard Morris and wife, Eleanor R. Morris, and Robert L. Vincent and wife, Alice Marie M. Vincent, by two separate deeds which are recorded in Book 4049 at Page 401 and 407 of the Mecklenburg County Public Registry, respectively.

2. The property conveyed by deed recorded in Book 4049 at Page 407 was subject to the restrictions and covenants, which ran with the land, recorded in Book 2123 at Page 247

of the Mecklenburg County Public Registry. [These restrictions *inter alia* are as follows: (1) This tract of land hereby conveyed shall be used for a single family residence only and shall not be subdivided. (2) No structure shall be erected, altered, placed or permitted to remain on this tract other than one detached single family residence not to exceed two and one-half stories in height and a private garage for not more than three cars.]

3. The property conveyed by deed recorded in Book 4049 at Page 401 was subject to the restrictions and covenants contained within said deed, which ran with the land, and provided, among other things, that Tract I of said parcel could be subdivided into not more than three residential building tracts with access via Home Place, and Tract II of said parcel could be subdivided into lots to be used for single family residences only with access via Elizabeth Lane.

4. Defendants, T. Richard Morris and wife, Eleanor R. Morris, and Robert L. Vincent and wife, Alice Marie M. Vincent, transferred and conveyed to defendants, George F. Miffleton, III and wife, Carolyn T. Miffleton, by deed recorded in Book 4138 at Page 629 of the Mecklenburg County Public Registry, a portion of the property previously conveyed to them by deed recorded in Book 4049 at Page 407 and identified therein as Tract IV, while excepting and reserving an exclusive permanent 15-foot access driveway for ingress, egress, and regress beginning at Home Place and continuing along the southerly and easterly boundaries of said tract to a residential building lot within the property of Defendants, the Morrises and the Vincents, which had been conveyed to them by deed recorded in Book 4049 at Page 401.

5. The property transferred and conveyed to the Defendants, the Miffletons, upon which the easement was imposed, is subject to the restrictions recorded in Book 2123 at Page 247 and the property which the easement serves is subject to the restrictions contained within the deed recorded in Book 4049 at Page 401.

Upon these facts the court made the following conclusions of law:

1. The reservation and use of right-of-way easements to provide means of ingress and egress to proposed residential lots was contemplated by and was consistent with the intention of the parties in agreeing to the restrictions upon the subject property and with the results sought thereby, and such easements neither interfere with the carrying out of the intentions of the parties nor defeat the purpose of the restrictions.

2. The exception and reservation of an exclusive permanent 15-foot access driveway across the property of Defendants, the Miffletons, is not a violation of the covenants and restrictions to which it is subject or of the covenants and restrictions upon the property served by said driveway.

Plaintiffs appealed from entry of judgment declaring that defendants are not in violation of the covenants and restrictions contained in plaintiffs' conveyances.

Sanders, London & Welling, by Charles M. Welling, for plaintiff appellants.

Perry, Patrick, Farmer & Michaux, by Richard W. Wilson and James G. Wallace, for defendant appellees.

HILL, Judge.

Plaintiffs assert that the reservation of a fifteen foot driveway easement along the boundary of the lot sold by defendants Morris and Vincent and their wives to the defendants Miffleton constitutes a subdivision of the lot and violates the restrictive covenants and reservations placed in prior deeds in the chain of title concerning the usage to which the land could be put.

In construing restrictive covenants, the fundamental rule is that their intention must be gathered from study and consideration of all covenants contained in the instrument or instruments creating the restrictions. *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619 (1954).

In construing a deed, it is the duty of the court to ascertain the intent of the grantor as embodied in the entire instrument, and every part of the deed must be given effect if this can be

done by responsible interpretation. *Hardy v. Edwards*, 22 N.C. App. 276, 206 S.E. 2d 316, *Cert. denied* 285 N.C. 659, 207 S.E. 2d 753 (1974).

> Covenants and agreements restricting the free use of property are strictly construed against the limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of the property, so that where the language . . . is capable of two constructions, the one that limits, rather than one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land. 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 187, pp. 755-6.

It is elementary that reference can be made in one deed to another deed for the purpose of incorporating provisions without the necessity of spelling out the details. This occurred in the deeds under consideration where the restrictions were set out in detail elsewhere and incorporated by reference. Hence, to determine the intent of the grantor, it is necessary to examine the chain of title to the property in question, as well as the immediate facts.

The lands described in Deed Book 4049, page 401, and in Deed Book 4049, page 407, totaled approximately 28 acres and were contiguous. Two deeds apparently were used in conveying the lands by the plaintiffs to the defendants Morris and Vincent in order to separate the five lots described in Book 4049, at page 407, and subject to the restrictions mentioned above, from the two tracts set out in Deed Book 4049, at page 401, which were not subdivided into lots at the time. However, the deed conveying the two tracts (recorded in Book 4049, at page 401) permits Tract I described therein to be further subdivided into not more than three building tracts with access via Home Place (a street). Tract II contains no limitation as to the number of lots, provides for access by Elizabeth Lane, and requires a house to face the street on which the lot fronts. The right of way, which is the subject of this controversy, begins in the center of Home Place and runs along

the southerly and easterly line of the lot owned by defendant Miffleton, one of the five lots included in Deed Book 4049, at page 407, along the margin of a lake, where it provides access to a lot lying east of the lake. The lot served by the right of way is the northern part of Tract I in Deed Book 4049, at page 401. Considering the fact that the lake mentioned above must be bypassed, the right of way offers the most direct route from the lot served to Home Place.

"Whether or not the maintenance, use, or grant of a right of way over restricted property is a violation of the restriction depends largely upon the language of the restriction, the objects sought to be obtained, and the conditions and circumstances surrounding the premises involved." 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 232, p. 798.

> In general, it may be said that if the granting of the right of way seems to be inconsistent with the intention of the parties in creating or agreeing to the restriction and with the result sought to be accomplished thereby, the Courts incline to hold such a grant to be a violation of the restriction, while if the granting of the right of way does not interfere with the carrying out of intention of the parties and the purpose of the restrictions, it will not be held to be a violation. Annot., 39 A.L.R. 1083 (1929).

In the case *sub judice,* both tracts of land were owned by the defendants Morris and Vincent. They were a part of a common larger tract originally owned by the plaintiffs. One tract so conveyed was already subdivided, and the deed to the undeveloped tract provided for the subdivision of it into three residential lots. The tract to be subdivided provided that it would be served by Home Place. Since all boundaries of the tract did not face on Home Place, it is reasonable to expect easements would be necessary for access to the lots established. Here only a driveway was reserved, not a street or roadway.

The lot over which the right of way passes is within the easternmost tract described in Book 4049, page 407, and is contiguous to the tract to be subdivided into three lots. Considering the fact that a lake lies between Home Place and the lot to be served by the driveway, making direct access impractical, if not

impossible, it is likewise reasonable to expect location of the driveway over adjoining property.

The restrictive covenants set out in Deed Book 2123, page 247, which affect the subject property, reserve a right of way along the front, rear and side lines for poles or conduits for utilities, and for drainage. Hence, it was anticipated by the grantor when the covenants and restrictions were imposed that easements along the lot lines would not necessarily depreciate the value of the property. In this case the inconsistency between the right of way and the restriction does not interfere with the purposes of the restrictions as originally established.

Plaintiff relies heavily on *Long v. Branham*, 271 N.C. 264, 156 S.E. 2d 235 (1967), which is recognized as the leading decision in North Carolina with respect to the application of residential and subdivision restrictions to access easements. Justice Sharp (later Chief Justice), in a thorough opinion, reviews cases in other jurisdictions, makes distinctions, offers guidelines and concludes that each case must be judged on the particular facts. In *Long*, the Supreme Court concluded that the restrictive covenants at issue precluded the road proposed by the defendant. The facts are distinguishable in the case *sub judice*. Here a driveway, not a road, is involved. Furthermore, in *Long* the proposed road would have connected two subdivisions, thus converting a quiet access road into a thoroughfare. In our case, the driveway only gives access to a street for one house—access that is provided for in the deed.

We have examined the facts and circumstances in the cases cited by plaintiff as well as in the case before us and conclude that the trial judge did not err in making his conclusions of law.

The judgement entered in the court below is

Affirmed.

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

PETE J. AND CHRIS J. CHRIS v. S. BRUCE AND CAROLE E. HILL

No. 7921SC472

(Filed 19 February 1980)

Judgments § 25.3; Rules of Civil Procedure § 60.2; Trial § 1— trial in absence of defendants—notice of trial—failure to appear not excusable

Defendants' failure to appear for trial before a jury was not excusable, and the trial judge did not abuse his discretion in the denial of defendants' Rule 60(b)(1) motion to set aside the judgment entered against them in their absence, where defendants' counsel received notice that the case would be heard that session by a tentative trial calendar and by a final trial calendar which indicated that jurors should report at 9:30 a.m. on 23 January and that defendants' case was fourth on the calendar; defendants' counsel did not appear for the calendar call on Monday, 22 January as the calendar indicated he was expected to do, and defendants' case was moved to first on the calendar; defendants' counsel did not call either the court or plaintiff's counsel on Monday to determine where his case had finally been placed on the calendar for trial; and defendants and their counsel did not appear when the case was called for trial on 23 January. However, common courtesy and decency required plaintiff's counsel after the calendar call to notify defendants' counsel, who lived over 200 miles away, that the case had been moved to first on the calendar, and the action of the trial judge in failing to make any attempt to determine the whereabouts of defendants and their counsel when the case was called for trial is disapproved although it did not constitute an abuse of discretion.

APPEAL by defendants from *Washington, Judge.* Judgment entered 23 January 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 January 1980.

Plaintiffs allege that they own certain property in Chapel Hill which on 15 July 1975 they leased to defendants to operate as a restaurant. The lease was for a five-year term at $3,000 per month. Plaintiffs allege that defendants have failed to make rental payments under the lease, and that they are indebted to plaintiffs in the amount of $3,000 per month from 1 January 1976 through the end of the lease on 1 June 1980. At the time the complaint was filed, 11 April 1978, plaintiffs alleged that their damages were "in excess of" $15,000.

Defendants sought a change of venue to Orange County, which was denied for defendants' failure to timely place their motion on the motion calendar. Defendants answered and counter-

claimed for $110,000 damages for alleged violations of the lease by plaintiffs' "son, agent, or employee."

When the case came on for trial on 23 January 1979, the following occurred:

> THE COURT: Is Mr. Thomas Jones [defendants' attorney] here?
>
> MR. PFEFFERKORN: I don't think so, Your Honor, although I have never seen him.
>
> THE COURT: Is either S. Bruce Hill or Carole Hill here?
>
> MR. PFEFFERKORN: No, Your Honor.

The Court then proceeded with jury selection, asking some questions of the prospective jurors himself "to be sure that a fair trial is afforded to persons, even though they may not be here." The court excused one juror because he was acquainted with the plaintiffs. After the jury was impaneled, defendants were "called out" by the Deputy Sheriff, and when they failed to appear, their counterclaim was dismissed.

Plaintiff Pete J. Chris then testified, and a number of questions were asked him by the court. He testified that to that date he had been damaged in the amount of $66,000, "the difference between the amounts that I got for rent [in mitigation of damages] and what the lease called for on a monthly basis." The trial court then charged the jury, giving what he called the "logical and natural contentions of the defendants."

At 11:33 a.m. the jury retired. At 11:35 a.m. the Deputy Clerk approached the bench with the information that the secretary to defendants' attorney had just called to inquire when the case would be tried. At 12:07 p.m. the jury returned a verdict that defendants had failed to pay rent and were indebted to plaintiffs in the amount of $66,000.

The trial court noted in the judgment that defendants' counsel had been notified that the case would be heard during that session of court by a tentative trial calendar mailed 3 January 1979 and a final trial calendar mailed 17 January 1979, and that defendants had failed to appear at the call of the calendar on 22 January or for trial on 23 January, and entered a judg-

ment of $66,000 in plaintiffs' favor. The next day, defendants' counsel moved under Rule 50 for a judgment notwithstanding the verdict or a new trial and under Rule 60 for a new trial on the basis of mistake, inadvertence, surprise and excusable neglect.

At the hearing on the motion, the parties argued substantially as follows: On 18 January defendants' counsel received the final trial calendar, which indicated that jurors should report at 9:30 a.m. on 23 January, and that four cases were calendared ahead of the instant case. As a result of his experience as a trial lawyer, he did not expect the case to be reached on the same day that jurors were to appear. Also on 18 January defendants' counsel received from plaintiffs' counsel a letter which stated that the case "is presently the fourth case on the trial calendar for the week of January 22, 1979, and therefore there is substantial likelihood that it will be reached sometime during that week."

Plaintiffs' counsel argued that defendants' counsel had three notices that his case was fourth on the calendar for the week of the 22nd—the tentative and final trial calendars and the letter from plaintiffs' counsel. Defendants' counsel never asked him or the court for any additional information about the status of the case. Defendants' counsel did not appear for the calendar call on Monday, 22 January, as the calendar indicated he was expected to do, and he did not call either plaintiffs' counsel or the court at any time on Monday to determine where his case finally had been placed on the calendar.

The trial court denied defendants' motion, and defendants appeal from the denial of this motion and from the judgment entered against them.

William G. Pfefferkorn and David C. Pishko for plaintiff appellees.

Satisky and Silverstein, by John M. Silverstein, for defendant appellants.

ARNOLD, Judge.

Defendants argue that the trial court denied them their due process and other constitutional rights by proceeding with the trial in their absence. Essentially, defendants argue that because they and their counsel live two hundred miles away from the site

of the trial, "common courtesy and decency" required that plaintiff's counsel notify them after the calendar call that the case had been moved to first on the calendar, and that the trial court abused his discretion by proceeding to trial without making any attempt to determine their whereabouts.

We agree with defendants that, under the circumstances, common courtesy and decency required more than plaintiffs' counsel did. A telephone call after the calendar call on Monday to opposing counsel two hundred miles away would not have been a heavy burden upon plaintiffs' counsel. Moreover, we cannot agree with the argument by plaintiffs' counsel that such an act of courtesy on his part would in any respect "compromise his role as an advocate."

As noted in *Pepper v. Clegg*, 132 N.C. 312, 315, 43 S.E. 906, 907 (1903), however, "[I]n all cases . . . counsel and their clients are sole judges of what should be done as a matter of courtesy. The courts administer only legal rights." While we may find counsel's conduct less than exemplary, and his attitude disappointing, there is no indication that plaintiffs' counsel did anything to mislead defendants, or failed to fulfill any promise to defendants' counsel to notify him of changes in the calendar.

Situations and emergencies may arise (illnesses, accidents, acts of God) which excuse court appearances by parties or counsel. A reasonable effort by the trial court, such as a telephone call to the attorney of record, to determine the absent party's whereabouts might prevent the necessity of a new trial. Furthermore, such courtesy and consideration of counsel by the trial court helps to remove any appearance of favoritism by the court.

In the matter before us, we disapprove of the trial judge's failure to make any attempt to determine defendants' or their counsel's whereabouts when the case was called for trial. However, we cannot find that he abused his discretion in failing to do so. It has been stated often that a party to a lawsuit must give it the attention a prudent man gives to his important business. *Pepper v. Clegg, supra; City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E. 2d 585, *cert. denied* and *app. dism.* 297 N.C. 608, 257 S.E. 2d 217 (1979). Defendants in this case received adequate notice, and the evidence supports the court's finding

that their failure to appear for trial was not excusable. See G.S. 1A-1, Rule 60(b)(1). We find no abuse of discretion in the denial of defendants' motion.

Defendants proceed to argue a number of purported errors in the conduct of the trial, but as plaintiffs point out, the majority of these alleged errors are not reviewable upon appeal because they were not objected to at trial. Rule 10(a) and (b)(1), Rules of Appellate Procedure. And we do not find that the trial court expressed an opinion on the merits of the case, violating G.S. 1A-1, Rule 51(a). We find no error prejudicial to defendants in the conduct of the trial. The judgment is

Affirmed.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. JOHN GARRETT KRAMER

No. 791SC779

(Filed 19 February 1980)

1. **Searches and Seizures § 47— validity of search warrant—good faith of affiant—accuracy of information**

G.S. 15A-978(a) permits a defendant to contest the validity of a search warrant by attacking the good faith of the affiant in providing the information for the warrant, not by attacking the factual accuracy of the information relied on to establish probable cause.

2. **Searches and Seizures § 24— probable cause for warrant to search apartment—incorrect identification of defendant in warrant**

Probable cause existed for the issuance of a warrant to search defendant's apartment for narcotics where an officer's affidavit stated that a confidential informant had told him that at the described premises a man, described in detail, had given the informant marijuana and hashish, and the affidavit contained further information from which the magistrate could determine that the unnamed informant was reliable, notwithstanding defendant was named in the warrant because he was the tenant of the apartment and was reported by another officer to match the person described, and defendant's roommate but not defendant met the description of the person who had given marijuana and hashish to the informant.

State v. Kramer

APPEAL by the State from *Reid, Judge.* Order entered 11 June 1979 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 17 January 1980.

Defendant was indicted for possession of butabarbital (Case #79CRS155) and more than one ounce of marijuana (Case #79CRS156), which were seized in his apartment pursuant to a search warrant. Defendant moved to suppress the evidence seized, on the ground that he was incorrectly identified in the search warrant. The warrant was issued for the rear upstairs apartment at 115 Selden Street, on the basis of information received by Corporal Hoffman from a reliable confidential informant that he had been given marijuana and hashish in that apartment by a red-headed, freckle-faced white male, approximately 22 years old, 5' -5'6" tall, weight 150 lbs. Defendant was named in the warrant because he is the tenant of that apartment and was reported by another officer to match the description. Defendant is a 22-year-old white male, but he has brown hair, no freckles, is 6'1" tall and weighs 185 lbs. Curtis Lee Litchfield, who shared defendant's apartment, matches the description in the warrant.

At the hearing on defendant's motion, the State presented evidence that both Litchfield and defendant were present during the search, and each pointed out to the officers which was his bedroom. A search of the premises revealed controlled substances and other items which were seized. Nothing was found on defendant's person.

Corporal Hoffman testified that his informant did not know the name of either of the residents of the apartment, so the informant gave him a description of the man from whom he had received marijuana and hashish. The only way Hoffman knew to put a name on the search warrant was to get the name of the tenant of the apartment. He got defendant's name from the light and water departments. He also relied on a statement made to him by Officer Williams that Williams knew defendant, and that defendant matched the description the informant had given. When Hoffman entered the apartment to search, he could see that defendant did not fit the description, but that Litchfield did.

The trial court found that "there was no probable cause for the issuance of a warrant against the person or premises of

[defendant]," and ordered the evidence suppressed. The State appeals.

Attorney General Edmisten, by John H. Byers and Tom Ziko, for the State.

White, Hall, Mullen, Brumsey & Small, by John H. Hall, Jr., for defendant appellee.

ARNOLD, Judge.

The search warrant in this case was issued for a person, defendant, and for certain described premises. It is now uncontradicted that in fact it was not defendant who was described by the informant as participating in the drug transaction at these premises. Defendant argues that because this portion of the affidavit supporting the search warrant has been shown to be factually inaccurate, the entire warrant must fail.

The State contends that we may disregard the information in the affidavit which later proved to be erroneous, and that when we do, we will find that the remaining information is sufficient to establish probable cause for a search of the premises. See *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630 (1979); *State v. Steele*, 18 N.C. App. 126, 196 S.E. 2d 379 (1973). We find it more appropriate, however, to consider all the information contained in the affidavit, including that which subsequently proved to be erroneous. The magistrate is required to determine the presence or absence of probable cause upon the basis of the information he has before him. It has never been held that he must inquire into the factual accuracy of that information before reaching a decision.

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

Dumbra v. United States, 268 U.S. 435, 441, 69 L.Ed. 1032, 1036, 45 S.Ct. 546, 549 (1925).

[1] Defendant argues that he has established the invalidity of the warrant by showing the untruthfulness of the underlying information as provided for by G.S. 15A-978(a). That statute provides, however, for an attack on the good faith of the affiant in providing the information, not on the factual accuracy of the information relied upon to establish probable cause. Accord, *State v. Winfrey*, 40 N.C. App. 266, 252 S.E. 2d 248, *cert. denied* 297 N.C. 304, 254 S.E. 2d 922 (1979). There is no showing here of a lack of good faith on Officer Hoffman's part, and defendant makes no argument to that effect. Accordingly, no "untruthfulness" under G.S. 15A-978(a) has been established.

[2] We have no difficulty in finding that probable cause existed for the issuance of this warrant. Officer Hoffman's affidavit indicated that a confidential informant had told him that at the described premises a man, described in detail, had given the informant marijuana and hashish. The affidavit contained further information from which a magistrate could determine that the unnamed informant was reliable. This information is sufficient. See *State v. Beddard*, 35 N.C. App. 212, 241 S.E. 2d 83 (1978); *State v. Singleton*, 33 N.C. App. 390, 235 S.E. 2d 77 (1977).

The trial court's conclusion that there existed no probable cause for the issuance of this search warrant is error. The order appealed from is

Reversed.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. RONALD ERNEST DUDLEY

No. 7920SC769

(Filed 19 February 1980)

Assault and Battery § 11.3; Indictment and Warrant § 17— obstructing officer in discharging duty—duty officer was performing—variance in charge and proof

In a prosecution of defendant for obstructing an officer in the performance of his duty there was a fatal variance between the charge and proof where the warrant alleged that defendant shoved an officer while he was conducting a search of a residence, but the evidence tended to show that the officer whom defendant pushed was not engaged in conducting the search but was merely present at the scene.

Judge MARTIN (Robert M.) dissenting.

APPEAL by defendant from *Seay, Judge.* Judgment entered 26 June 1979 in Superior Court, UNION County. Heard in the Court of Appeals 16 January 1980.

Defendant was convicted of obstructing an officer in the performance of his duty, a violation of G.S. 14-223. Defendant was sentenced to a term of six months in the Union County jail. His sentence was suspended on condition that defendant assent to placement on probation for two years and payment of a fine of $100.00.

The warrant charges defendant with resisting, delaying, and obstructing Curtis Rollins, a Deputy Sheriff of Union County. The warrant alleged that defendant shoved Rollins with his hands while Rollins was discharging a duty of his office—conducting a search of the residence of William R. Dudley and Donna Strawn for stolen property.

The evidence shows that on the night of 1 February 1979, Deputy Sheriff Joe Moore of Union County went to the Union County residence of Donna Strawn and William Dudley to look for plastic signs stolen from the Union County Courthouse. He made two initial visits without a search warrant, one at 10:00 p.m. and another at 2:00 a.m. the next morning. He was refused entry on these visits. He then obtained a warrant and at about 2:25 a.m., returned to the residence with seven other deputies. A search was conducted. Defendant was seated in a room in which Moore was searching. As the search progressed, defendant stated that

he was leaving and stood up in preparation to exit. Moore told him to remain seated. As defendant approached the door, he pushed Officer Curtis Rollins who was standing in the exit. Defendant was then arrested. Moore testified that he found one small sign which did not come from the Union County Courthouse. Rollins testified under cross-examination that at the time of the incident, he was not engaged in the search, nor directing it, but was there because he was the supervisor of the night shift.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General William Woodward Webb, for the State.

Ronald Williams for the defendant appellant.

WELLS, Judge.

There is a fatal variance between the charge and the evidence. The warrant charging the offense proscribed under G.S. 14-223 must set forth in particular the duty the officer is performing or attempting to perform. *State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967). *Accord, State v. Waller*, 37 N.C. App. 133, 245 S.E. 2d 808 (1978) (holding that although the duty must be stated for violations of G.S. 14-223, this requirement need not be met for violations of G.S. 14-33(a)).

The warrant charges that defendant "did . . . resist, delay and obstruct Curtis Rollins . . . [a]t the time said officer was discharging and attempting to discharge a duty of his office, to wit; conducting a search of the residence of William R. Dudley and Donna Strawn for stolen property." As the state's evidence clearly showed, Lt. Rollins was not engaged in conducting the search. His mere presence at the scene—standing in the door—does not show that he was engaged in the search then being conducted. It is the resisting or obstructing of an officer *in the performance of some duty* which is the gravamen of the offense charged in G.S. 14-223. *State v. Kirby*, 15 N.C. App. 480, 190 S.E. 2d 320 (1972), *appeal dismissed*, 281 N.C. 761, 191 S.E. 2d 363 (1972).

Vacated.

Judge ERWIN concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

In this case, seven officers went to the residence of William R. Dudley and Donna Strawn to conduct a search pursuant to a search warrant. Joe Moore, the officer in charge of the search, testified that Lt. Rollins was present at the search "to keep watch over the house, to watch the front door, to make sure nobody did leave while we were searching." The purpose of Lt. Rollins' presence at the search is pursuant to G.S. 15A-256 which, as Officer Moore was aware, allows an officer executing a warrant directing a search of premises not generally open to the public to "detain any person present for such time as is reasonably necessary to execute the [search] warrant." Hence, detaining a party during a search is part and parcel of the search process and Lt. Rollins was an important member of the law enforcement team engaged in conducting a search.

There is no fatal variance between the charge which states that the officer was "discharging and attempting to discharge a duty of his office, to wit: conducting a search" and the proof showing Lt. Rollins' participation in the component activities constituting a search. Furthermore, the proof shows that Lt. Rollins was obstructed in discharging that duty. When defendant, contrary to instructions to remain seated on the couch, rose, approached the door in an attempt to leave and pushed Lt. Rollins, he obstructed, hindered, impeded Lt. Rollins in the performance of his duties. *See State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971).

For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. SAMMY M. STAFFORD

No. 7929SC730

(Filed 19 February 1980)

1. Burglary and Unlawful Breakings § 4; Larceny § 6.1— value of property taken overstated—harmless error

In a prosecution for breaking and entering and felonious larceny, any error in the admission of testimony that the value of the items stolen was $1070, based on replacement cost, was harmless since the larceny in this case was a felony without regard to the value of the property taken.

2. Burglary and Unlawful Breakings § 5.9— judgment arrested on larceny conviction—felonious breaking or entering conviction unaffected

The trial court's arrest of judgment on defendant's conviction of felonious larceny had no effect on defendant's conviction for felonious breaking or entering, since a conviction of breaking or entering under G.S. 14-54(a) did not require that a felony or larceny actually be committed in the building broken into but only that defendant have an intent at the time of breaking or entering to commit the larceny.

3. Attorneys at Law § 7.2— indigent defendant—judgment for counsel fees—insufficient notice and hearing

The trial court erred in entering a judgment against the indigent defendant for attorney's fees without notice or an opportunity to be heard, and a statement printed on the "Affidavit of Indigency" which defendant was required to complete before counsel was appointed for him did not constitute sufficient notice.

APPEAL by defendant from *Barbee, Judge*. Judgment entered 15 March 1979 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 11 January 1980.

Defendant was indicted for breaking and entering and felonious larceny for the theft of tools from Furniture Plastics, Inc. The State presented evidence that sometime between 12 May and 14 May 1978 the loading dock door of Furniture Plastics, Inc. was bent and opened, and a tool box and tools were taken. Curtis Forester, the plant manager, testified that the reasonable market value of the items was $1,070. Two days later he identified the tools and tool box at the jail. On 15 May Officer Price asked defendant to come to the county jail. There defendant was informed of his *Miranda* rights, and he signed the waiver of his rights. Lieutenant Epley then asked defendant a question, to which he replied, "You have got me, and I will tell you about it." He told the officers that he and Larry Downey had parked Downey's Mustang behind the Methodist Church and walked down the railroad track to the plastics plant. He knew the door had been hit with a hammer and would be very easy to open. He took the tools and put them down on the loading dock, and they went back and got the car, put the tools in it and left.

Defendant took Officer Epley to defendant's brother's house, where he said he and Downey had put the tools in a barn. The tools were found there. Defendant's statement to the police was never reduced to writing. His motion to suppress the statement

was denied. In spite of the statement the investigating officers at times during the investigation had doubts as to defendant's involvement in the crime.

The defendant presented no evidence, but moved to dismiss. His motion was denied. Defendant was found guilty of felonious breaking or entering and felonious larceny. The court arrested judgment on the larceny conviction and sentenced defendant to 10 years for breaking or entering. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

J. Christopher Callahan for defendant appellant.

ARNOLD, Judge.

We find no error in the denial of defendant's motions to suppress and to dismiss. Ample evidence appears to support the trial court's finding that defendant's statement to the police was "voluntarily, knowingly, and intelligently made." Any doubts the investigating officers may have had as to defendant's guilt are irrelevant. Moreover, there is no contention that an unreasonable time elapsed between defendant's being advised of his rights and his giving the statement. The State presented evidence of each essential element of the crime.

[1] Defendant argues that Curtis Forester should not have been allowed to testify that the value of the items stolen was $1,070, since he further testified that this was the replacement cost of the items. Defendant is correct that in determining whether a crime is felonious or nonfelonious the proper measure of value is the price the stolen items in their condition at the time they were stolen would bring on the open market. *State v. Dees*, 14 N.C. App. 110, 187 S.E. 2d 433 (1972). However, we find any error in the admission of Forester's testimony to be harmless, since the larceny in the present case is a felony without regard to the value of the property taken. See G.S. 14-72(b)(2) and G.S. 14-54. We reject defendant's argument that the purportedly inflated valuation "inflamed" the jury.

[2] The trial court, apparently upon its own motion, arrested judgment on the conviction of felonious larceny. Defendant argues, therefore, that at the most he can be guilty of misde-

meanor breaking or entering. Generally, a judgment is arrested because of insufficiency in the indictment or some fatal defect appearing on the face of the record. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). Assuming that such was the case here (no reason for the arrest of judgment appears in the record on appeal), the arrest of judgment on the conviction for felonious larceny has no effect on the conviction for felonious breaking or entering. The essential elements of felonious breaking or entering are (1) breaking or entering (2) any building (3) *with intent* to commit any felony or larceny therein. G.S. 14-54(a) (emphasis added). It is not necessary for conviction under this statute that a felony or larceny actually be committed in the building. It is merely the *intent* at the time of the breaking or entering to commit the felony or larceny within the building that is required. *State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250 (1973). This assignment of error is without merit.

[3] Finally, defendant assigns error to the entry of judgment against him for attorney's fees without notice or an opportunity to be heard. G.S. 7A-455(b) allows the court to enter a civil judgment against a convicted indigent for attorney's fees and costs. Such a judgment was entered against defendant in this case. In *State v. Crews*, 284 N.C. 427, 442, 201 S.E. 2d 840, 849-50 (1974), our Supreme Court vacated such a judgment "without prejudice to the State's right to apply for a judgment in accordance with G.S. 7A-455 after due notice to defendant and a hearing." The State argues here that defendant was given sufficient notice of the possibility of such a civil judgment by the "Affidavit of Indigency" which he was required to complete before counsel was appointed for him. On this form, near the top, in italicized type appears the following: "NOTE: If you are convicted the value of services rendered by the lawyer furnished you will be recorded as a judgment and will be a lien against you." We question the sufficiency of this notice, and we note further that even if it were sufficient, there appears no indication that defendant received any opportunity to be heard on the matter. Guided by the decision in *State v. Crews, supra*, we vacate this civil judgment and remand for a hearing upon proper notice.

In the criminal conviction we find no error.

The civil judgment is vacated and remanded.

Judges CLARK and ERWIN concur.

ESTELLE SKINNER v. PIGGLY WIGGLY OF LAGRANGE, INC., AND HARVEY S. HINES COMPANY, A CORPORATION DOING BUSINESS AS COCA COLA BOTTLING COMPANY OF KINSTON

No. 798SC494

(Filed 19 February 1980)

1. **Food § 1.3; Negligence § 57.3— explosion of Coke bottle which fell from display—insufficient evidence of negligence**

In an action to recover for injuries sustained to plaintiff's lower leg when a 32-ounce Coke bottle fell from a display and exploded on the floor of a grocery store, plaintiff's evidence was insufficient to show actionable negligence by either the store owner or the Coke distributor who prepared the display where plaintiff failed to show any specific acts of negligence by either defendant, that defendants had actual or implied knowledge of an existing defect or dangerous situation, that defendant owner failed routinely to inspect the soft drink display, that the same or similar type of injury had occurred with similar displays elsewhere, that the display was inherently dangerous, that there was anything unusual about the way the bottles were stacked at or around the time of the accident, or that there was no opportunity for interference or intervening negligence by other customers within a short period of time prior to the accident.

2. **Food § 1.2— explosion of Coke bottle which fell from display—inapplicability of res ipsa loquitur**

The doctrine of *res ipsa loquitur* was inapplicable in an action to recover for injuries sustained by plaintiff customer when a Coke bottle fell from a display and exploded on the floor of a grocery store where there was no showing that other customers did not have access to the soft drink display.

APPEAL by plaintiff from *Stevens, Judge.* Judgment entered 6 February 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 9 January 1980.

This appeal arises from the trial court's favorable ruling on defendants' Rule 50 motion for a directed verdict. The plaintiff's evidence tended to show that she received a serious cut on ten-

dons in her lower leg when a 32-ounce Coke bottle fell from a display and exploded on the floor of the Piggly Wiggly store in LaGrange, North Carolina. The coke bottles were approximately ten inches high, were packed in paper board cartons containing six bottles each, and were stacked three layers high on a display counter which contained a four-inch slope so as to make the bottles tilt toward the back of the display. The bottles were placed on the bottom shelf of the display. Between the first and second layer of the bottles, there was a sheet of linoleum, and in addition, there were rolls of plastic, or milar strips, between the layers, which strips would roll up as the cartons were removed and which would help to lock the carton in its place while the carton was stationary. There was no vertical supports between the cartons and there was no guard rail to prevent shopping carts from contacting the display.

The evidence also tends to show that the bottles were on an aisle which was visible from the store manager's office. In addition, the store manager would pass by the Coke rack once every ten to twenty minutes. There was no testimony indicating that there was anything unusual about the manner in which the Coke bottles were displayed at or around the time of the accident. Also, E. J. Dixon, of the Coca-Cola Bottling Company of Kinston, had restacked all of the cartons on the day of the accident and had checked the tilt of the bottles before he left. Dixon further testified that the manner in which these bottles were displayed was similar to the manner in which bottles were displayed at over 150 stores that he serviced.

Just prior to the occurrence of the accident, plaintiff had selected a shopping cart, located across the aisle from the drink rack, and was beginning to go to the produce section when the bottle burst behind her. Another shopper, Margaret Warren, testified that she reached over and picked up a carton of 32-ounce Coca-Colas from the second or third layer of the stack, and that when she picked up the carton, a carton of 32-ounce Coca-Colas fell to the floor and one or two of the bottles burst.

Duke & Brown by John E. Duke for plaintiff appellant.

Taylor, Warren, Kerr & Walker by Robert D. Walker, Jr.; Freeman, Edwards and Vinson by H. Jack Edwards for defendant appellees.

CLARK, Judge.

[1] The sole issue in this case is whether there was sufficient evidence from which a jury could infer actionable negligence on the part of either of the defendants. We hold that the record in this case would not support a finding of actionable negligence.

The record is devoid of any facts that show specific acts of negligence on the part of defendants, that defendants had actual or implied knowledge of an existing defect or dangerous situation, that the defendant failed to routinely inspect the soft drink display, that the "same or similar" type of injury had occurred with similar displays elsewhere, that the display was inherently dangerous, that there was anything unusual about the way the bottles were stacked at or around the time of the accident, and that there was no opportunity for interference or intervening negligence by other customers within a short period of time prior to the accident.

In sum, we find no breach of the store owner's or distributor's duty to stack bottles in a reasonable manner so as to avoid injury to the store's customers. We note that while the store owes the customer as an invitee a duty of reasonable care in building displays, "[t]he proprietor of a business establishment is not required to take extraordinary precautions for the safety of his invitees . . . ." *Gaskill v. Great A & P Tea Co.*, 6 N.C. App. 690, 694, 171 S.E. 2d 95 (1969). The store owner "is not an insurer of the safety of a customer while on the premises." *Watkins v. Taylor Furnishing Company*, 224 N.C. 674, 676, 31 S.E. 2d 917 (1944). *See also, Bodenheimer v. National Food Stores, Inc.*, 255 N.C. 743, 122 S.E. 2d 715 (1961).

Even if specific acts constituting a breach of due care on the part of the store owner or distributor were shown, there is still insufficient evidence from which a jury could conclude that such acts were the proximate cause of plaintiff's injury. There is no evidence, for example, which would indicate that had a guard rail or vertical supports been installed that they would have prevented the occurrence in this case.

[2] As the plaintiff has failed to show that other customers did not have access to the soft drink display, and therefore that the store owner had exclusive control over the positioning of the bot-

tles on the display, we cannot apply the doctrine of *res ipsa loquitur*. *Phillips v. Bottling Co.*, 256 N.C. 728, 729, 125 S.E. 2d 30 (1962); *Jackson v. Neill McKay Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540 (1961); *Watkins v. Taylor Furnishing Co., supra; Peterson v. Winn-Dixie*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972); *Farmer v. Drug Corp.*, 7 N.C. App. 538, 173 S.E. 2d 64 (1970); *Gaskill v. Great A & P Tea Co., supra; Connor v. Thalhimers Greensboro, Inc.*, 1 N.C. App. 29, 159 S.E. 2d 273 (1968).

The holding in this case should not be construed to mean that those who display soft drinks can never be found to be negligent in the manner of their display or that the doctrine of *res ipsa loquitur* can never apply in these cases. *See*, for example, the extended compilation of cases found in Annot., 38 A.L.R. 3d 363 (1971). We are also aware that there is a fine line of distinction, if any, between the scope of the storekeeper's duty and the standard of proximate causation in these cases. *Id.* The fact situation in the instant case, however, does not require us to expound upon this question.

Affirmed.

Judges HEDRICK and ERWIN concur.

AUGUSTA W. BUNTING v. WILLIE RAY BEACHAM

No. 792DC757

(Filed 19 February 1980)

Bastards § 6; Estoppel § 3— action to establish paternity—husband excluded by blood tests—sufficiency of evidence—no assertion of contrary positions

The trial court in an action to establish paternity erred in directing a verdict for respondent at the close of petitioner's evidence where the evidence tended to show that petitioner was married to another when the child was conceived and born; a criminal action against petitioner's husband for nonsupport of the child was dismissed because a blood grouping test excluded him as the father; petitioner testified that she had sexual relations only with her husband and with respondent during the period of conception; petitioner testified that she did not testify in the criminal trial that her husband was the father of the child but had always said that respondent was the father; and there is nothing in the record on appeal to show that petitioner is now asserting a position contrary to the position she asserted in the criminal trial of her husband for nonsupport.

Bunting v. Beacham

APPEAL by plaintiff from *Ward (Hallet S.), Judge*. Judgment filed 29 May 1979 in District Court, BEAUFORT County. Heard in the Court of Appeals 15 January 1980.

This is a proceeding under N.C. Gen. Stat. Ch. 110, Art. 9 to establish paternity of the alleged father (respondent) of a dependent child ancillary to an action by the mother (petitioner) for financial support of the child. The mother is a recipient of public assistance.

The petitioner appeals from the judgment directing verdict for respondent at the close of petitioner's evidence. The trial court found that petitioner was married to Bernice B. Bunting when the child was conceived in February 1978 and born on 19 October 1978; that a criminal action against Bernice B. Bunting for nonsupport of the child was dismissed on 23 February 1979 because a blood grouping test excluded him as being the father of said child.

At trial petitioner testified that she had sexual relations with both her husband and with respondent on several occasions during February 1978; that she did not testify in the criminal trial that her husband was the father of her child but that she had always said respondent was the father.

Rodman, Rodman, Holscher & Francisco by Edward N. Rodman for plaintiff appellant.

L. H. Ross for defendant appellee.

CLARK, Judge.

In the husband's criminal trial on the charge of nonsupport of petitioner's child, blood tests were conducted under N.C. Gen. Stat. § 8-50.1, which in pertinent part, provides:

> "§ 8-50.1. *Competency of evidence of blood tests.*—In the trial of any criminal action or proceedings in any court in which the question of paternity arises, regardless of any presumptions with respect to paternity, the court before whom the matter may be brought, upon motion of the defendant, shall direct and order that the defendant, the mother and the child shall submit to a blood grouping test; provided, that the court, in its discretion, may require the person requesting the blood grouping test to pay the cost thereof. The results of such blood grouping tests shall be admitted in

evidence when offered by a duly licensed practicing physician or other qualified person. In any such case, where the result of such blood test is not shown to conflict with the result of any other such blood tests, and where the result of such blood test indicates that the defendant cannot be the father of the child, the jury shall be instructed that if they believe the witness presenting the result testified truthfully as to it, and if they believe that the test was conducted properly, then it will be their duty to return a verdict of not guilty. (1949, c. 51; 1965, c. 618; 1975, c. 449, s.s. 1, 2; prior to amendment, 1979 c. 576, effective 6 May 1979.)

In the previous criminal trial defendant-husband was found not guilty because the tests revealed that he was not the natural parent of the child. As N.C. Gen. Stat. § 8-50.1 existed in 1972, such evidence was competent to rebut the common law presumption of legitimacy. *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972). Under the 1975 amendments quoted above, an undisputed test indicating the defendant is not the father requires a jury verdict of "not guilty."

In the instant case there is nothing in the record to support the finding of the trial court that "the Plaintiff in this action previously asserted that her husband was the father of the child . . . and that she is barred from testifying that the Defendant herein, Willie Ray Beacham, is the father of the child, Crystal Gale Bunting."

The blood test results indicating that the husband could not be the natural father of the child was evidence of adultery. *Wright v. Wright, supra.* The evidence for petitioner tended to show that her only adulterous relationship was with respondent Beacham during the period of conception.

The record on appeal does not include any of the proceedings in the criminal trial of the defendant-husband for nonsupport. We do not know that the criminal summons or warrant for arrest was supported by the oath or affirmation of the mother. Nor does the record on appeal include a transcript of the mother's testimony, or any part thereof, in the criminal trial. In the case *sub judice*, the mother testified that in the criminal trial she did not say her husband was the father, and that she had always said respondent Beacham was the father, even though both of them had sexual

relations with her during the period of conception. We are cognizant of the principle of law that where the parties assert a particular position in an action, they may not thereafter assert a contrary position in subsequent proceedings. 5 Strong's N.C. Index 3d *Estoppel* § 3 (1977). There is nothing in the record on appeal, however, indicating that plaintiff in the case before us asserts a position contrary to the position she asserted in the criminal trial of her husband for nonsupport.

The judgment is

Reversed and the cause remanded.

Judges VAUGHN and HEDRICK concur.

HECHT REALTY, INC. v. JOSEPH M. HASTINGS

No. 7926DC693

(Filed 19 February 1980)

1. **Rules of Civil Procedure § 55.1— default judgment entered by clerk—no method of computing damages—clerk without authority**

The clerk of court had no power to enter a default judgment in a breach of contract action since nothing in the complaint made it possible to compute the amount of damages to which plaintiff was entitled by reason of the breach.

2. **Rules of Civil Procedure § 55.1— setting aside default—wrong test applied by court**

The trial court erred in denying defendant's motion to set aside entry of default on the ground that defendant failed to show excusable neglect, since all that defendant was required to show in order to have entry of default set aside was good cause.

APPEAL by defendant from *Brown, Judge*. Order entered 15 June 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 7 February 1980.

Plaintiff commenced this civil action on 23 March 1979 by filing the following complaint:

The Plaintiff complaining of the Defendant alleges and says:

1. That the Plaintiff is a North Carolina Corporation with a principal office in Mecklenburg County.

2. That the Defendant is a resident of Mecklenburg County.

3. That on or about August 29, 1978, Plaintiff and Defendant entered into a written agreement whereby Plaintiff was appointed the exclusive agent to sell certain real property owned by Defendant, a copy of said agreement being attached hereto as Exhibit "A".

4. That Plaintiff procured a prospective purchaser ready, willing and able to purchase said real property according to the terms prescribed in the said listing agreement and so notified Defendant.

5. That on or about September 3, 1978, the Defendant and the purchaser procured by Plaintiff executed a real estate sales contract for the sale of the real property described in the listing agreement. A copy of the sales contract is attached hereto as Exhibit "B".

6. That Defendant refused and continues to refuse to convey said property according to the terms of Exhibit "A" and Exhibit "B".

7. That Plaintiff is duly licensed as a real estate broker in this State, and all conditions precedent to the liability of Defendant have been performed.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of Three Thousand Two Hundred Ten Dollars ($3,210.00), together with interest and the costs of this action.

Neither the Exhibit "A" nor the Exhibit "B" referred to in the complaint was attached to the original complaint filed with the court, nor were copies of these Exhibits attached to the copy of the complaint served upon the defendant. Copies of the summons and complaint, without the Exhibits, were served on the defendant on 28 March 1979 by registered mail pursuant to G.S. 1A-1, Rule 4(j)(1)c.

The defendant failed to file answer or other responsive pleading. This being made to appear from affidavit of plaintiff's

counsel, on 11 May 1979 the assistant clerk of court entered default against the defendant. On the same date the assistant clerk of court also signed judgment reciting the entry of default and adjudging that plaintiff recover $3,210.00 of the defendant.

On 25 May 1979 defendant moved to set aside the entry of default and the judgment by default on the grounds that his failure to file answer was due to excusable neglect and that he had a meritorious defense. The district court judge denied the motion, finding that "the failure of the Defendant to file answer or otherwise plead or appear in this action was not due to any reasons justifying relief set out in Rule 60(b) of the North Carolina Rules of Civil Procedure." From the order denying his motion to set aside the entry of default and the default judgment, defendant appeals.

Cannon, Kline & Blair by Eric M. Newman for plaintiff appellee.

Childers, Fowler & Whitt by Robert C. Whitt for defendant appellant.

PARKER, Judge.

[1] A judgment by default, as distinguished from an entry of default, may be entered by the clerk only when, among other conditions, "the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain." G.S. 1A-1, Rule 55(b)(1). "In all other cases the party entitled to a judgment by default shall apply to the judge therefor." G.S. 1A-1, Rule 55(b)(2).

Plaintiff's claim as stated in its complaint in the present case was neither for "a sum certain" nor for "a sum which can by computation be made certain" within the meaning of Rule 55(b). The mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for "a sum certain" as contemplated by Rule 55(b). Such a demand is normally included in the prayer for relief in every complaint in which monetary damages are sought, including complaints alleging claims for damages for bodily injuries caused by a defendant's negligence. The complaint in the present case alleged a breach of contract by the defendant, but nothing in the allegations of the complaint

makes it possible to compute the amount of damages to which plaintiff is entitled by reason of the breach. It may be that had the Exhibits A and B referred to in the complaint been attached thereto, such a computation would have been possible. However, since the exhibits were not attached and are not part of the record, that possibility is mere speculation. If it be granted that the complaint as filed gave sufficient notice of plaintiff's claim to withstand a motion to dismiss made under Rule 12(b)(6), *see Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), nevertheless it is certain that its allegations were not sufficient to state a claim "for a sum certain or a sum which can by computation be made certain" within Rule 55(b)(1). Therefore, the clerk had no power to enter the judgment by default, and the district court judge erred in denying defendant's motion to set aside the judgment.

[2] For a different reason the court also erred in its denial of defendant's motion to set aside the entry of default. Although the clerk had power under Rule 55(a) to make the entry of default, "[f]or good cause shown the court may set aside an entry of default." Rule 55(d). In refusing to set aside the entry of default, the district court found that "the failure of the Defendant to file answer or otherwise plead or appear in this action was not due to any reasons justifying relief set out in Rule 60(b)." Such a showing was not necessary. In moving to set aside an entry of default, as distinguished from a default judgment, a showing of excusable neglect is not necessary. All that need be shown is good cause. *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972); *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). It is apparent that the district court applied the wrong test in refusing to set aside the entry of default.

For the reasons stated, so much of the district court's order as denied defendant's motion to set aside the judgment by default is reversed and the judgment by default is vacated. So much of the district court's order as denied defendant's motion to set aside the entry of default is vacated and this case is remanded to the district court to consider whether there is good cause to set aside the entry of default. In this connection any doubt should be resolved in favor of setting aside the entry of default so that the case may be decided on its merits. *Whaley v. Rhodes, supra.*

Reversed in part;

Vacated and remanded in part.

Judges ARNOLD and WEBB concur.

CARRIE H. WHEELER, ADMINISTRATOR OF THE ESTATE OF WILLARD W. WHEELER, DECEASED v. THOMAS M. ROBERTS AND B. H. ROBERTS

No. 7928SC697

(Filed 19 February 1980)

Actions § 11: Rules of Civil Procedure §§ 4, 41.1 — absence of service on defendants — action discontinued — voluntary dismissal ineffective

Plaintiff's prior wrongful death action against defendants was discontinued where the original summons was never served on defendants and no alias or pluries summons was issued or endorsement made within the time specified in G.S. 1A-1, Rule 4(d), and plaintiff's attempt to dismiss her prior action voluntarily was ineffectual to give plaintiff an additional year within which to commence a new action against defendants pursuant to G.S. 1A-1, Rule 41(a)(1). G.S. 1A-1, Rule 4(e).

APPEAL by plaintiff from *Lewis, Judge*. Judgment entered 4 June 1979 in Superior Court. BUNCOMBE County.

Plaintiff's intestate died 31 October 1973 after being struck by an automobile. On 30 October 1975 plaintiff commenced civil action No. 75CVS2124 against defendants to recover for the wrongful death of her intestate, alleging that his death was caused by their negligence. Summons was issued but was returned by the sheriff on 30 November 1975 with the notation as to each defendant: "Unable to locate." Thereafter no alias or pluries summons was issued nor was endorsement made on the original summons extending the time to complete service of process. On 12 August 1977 plaintiff filed in Case No. 75CVS2124 a notice of voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1)(i).

On 11 August 1978 plaintiff commenced the present action against defendants to recover for the wrongful death of her intestate, alleging the same facts and claim for relief as she had alleged in the prior action. Summons in the present action was

served on defendants, and defendants filed answer denying material allegations of the complaint and pleading, among other defenses, the statute of limitations.

The court granted defendants' motion for summary judgment dismissing plaintiff's action, from which judgment plaintiff appeals.

VanWinkle, Buck, Wall, Starnes and Davis by Philip J. Smith for plaintiff appellant.

Dumont, McLean, Leake, Harrell, Talman and Stevenson by Larry Leake for defendant appellees.

PARKER, Judge.

An action for damages on account of the death of a person caused by the wrongful act or neglect of another must be brought within two years of the death. G.S. 1-53(4). Plaintiff's intestate died 31 October 1973. The present action was commenced on 11 August 1978, almost five years after the date of death. The action was barred by the statute, and summary judgment dismissing the action was properly entered.

We do not agree with plaintiff's contention that the filing of a notice of voluntary dismissal in her prior action, which was commenced in apt time, gave her an additional year within which to commence the present action. In support of this contention, plaintiff relies upon the following from G.S. 1A-1, Rule 41(a)(1):

> "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 . . . ."

This provision from Rule 41(a)(1) has no application to the present case because plaintiff's prior action was not dismissed by her filing a notice of voluntary dismissal on 12 August 1977. At the time that notice was filed, plaintiff's prior action had already been discontinued.

> "When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant

not theretofore served with summons within the time allowed." Rule 4(e).

The original summons in plaintiff's prior action was never served on defendants and no alias or pluries summons was issued or endorsement made within the time specified in Rule 4(d). Plaintiff's prior action was discontinued well before plaintiff attempted to dismiss it voluntarily pursuant to Rule 41(a)(1). Her attempt was ineffectual to bring the provisions of Rule 41(a)(1) into play. *Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E. 2d 155 (1979).

The summary judgment dismissing plaintiff's action is

Affirmed.

Judges ARNOLD and WEBB concur.

GLENDA M. FRANK, PETITIONER-APPELLEE v. MARSHALL GLANVILLE, RESPONDENT-APPELLANT

No. 7911DC461

(Filed 19 February 1980)

1. **Contempt of Court § 3.1— civil contempt—failure to take job in order to make payments**

A person may be guilty of civil contempt, even if he does not have the money to make court ordered payments, if he could take a job which would enable him to make those payments and he fails to do so.

2. **Contempt of Court § 6.3— civil contempt—ability to comply with order—finding required**

In order for a person to be held in civil contempt, the person to whom the contempt order is directed must be able to comply with the order or be able to take reasonable measures that would enable him to comply, and the trial court must find that the defendant has the ability to comply.

APPEAL by defendant from *Christian, Judge*. Order entered 5 March 1979 and amended 10 April 1979 in District Court, HARNETT County. Heard in the Court of Appeals 14 January 1980.

The State of Maine, pursuant to its obligation under Section IV-D of the Social Security Act, 42 U.S.C. § 652(a)(1), commenced

an action for support on behalf of plaintiff and against defendant. The action was forwarded to North Carolina where defendant now resides pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA); and on 7 July 1978, Judge Elton Pridgen ordered defendant to provide support for his children in the amount of $150 per month.

Defendant failed to comply with the order, and on 2 November 1978 an order to show cause was issued. Judge Christian found defendant to be in wilful contempt of the support order during July, August, September, and the first two weeks of October 1978 and committed defendant to the custody of the Harnett County sheriff for sixty days. Defendant was given the opportunity to purge himself by paying $525 in arrearages. The judge also found as fact that since the middle of October 1978 defendant did not have the financial means to comply with the support order.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

M. Travis Payne, of Wake-Johnston-Harnett Legal Services, Inc., for defendant appellant.

HILL, Judge.

Defendant first assigns as error the order that he be imprisoned for civil contempt, contending that a person must possess the present ability to comply with the contempt order before he can be so imprisoned.

Our Supreme Court stated in *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E. 2d 403 (1948) that,

> Manifestly, one does not act wilfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered.

Lamm has been favorably cited in subsequent cases—*Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966), and *Cox v. Cox*, 10 N.C. App. 476, 179 S.E. 2d 194 (1971)—for the same proposition.

[1] Since the decision of the above cases, the legislature has rewritten the statute governing civil contempt. The new statute, G.S. 5A-21, is consistent with prior case law and states that,

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

. . . .

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order.

The official commentary points out that civil contempt is appropriate " . . . only so long as the court order is capable of being complied with."

The official commentary also points out that subsection (a)(3) of the statute has perhaps broadened the scope of acts punishable by contempt. Under *Lamm, supra,* one could not be punished by contempt for failing to comply with a judgment if, since the time of the judgment, he has not had the ability to do so. The commentary to G.S. 5A-21 attempts to close any loopholes that may have arisen by stating that a person will be guilty of civil contempt, even if he does not have the money to make court ordered payments, if he " . . . could take a job which would enable him to make those payments . . . ." We concur in the interpretation set out in the commentary.

Defendant, by his second assignment of error, contends there was no finding of fact by the trial court of a present ability to comply with the contempt order.

Our Supreme Court stated in *Mauney, supra,* at p. 257, that,

> . . . this Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default.

The Court in *Vaughan v. Vaughan,* 213 N.C. 189, 193, 195 S.E. 351 (1938), even found it necessary before a contempt order could be issued for

> . . . the court below [to] take an inventory of the property of the [defendant]; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition.

The trial court attempted to meet the directive of *Vaughan* in its fourth finding of fact which detailed the property defendant owned. The finding was found to be contrary to the evidence, however, and was deleted by subsequent order. Therefore, no finding of fact that defendant possessed the means to comply with the order was contained in the order.

[2] We find that in order for a person to be held in civil contempt, the person to whom the contempt order is directed must be able to comply with the order or be able to take reasonable measures that would enable him to comply. It would be ridiculous to hold otherwise, for the purpose of civil contempt is not to punish the contemnor, but to coerce compliance with a previous order. *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 169 S.E. 2d 867 (1969). The trial court must find as fact that the defendant has the ability to comply.

It is not clear from the record in this case that defendant has the ability to comply with the contempt order, ever had the ability, or will ever be able to take reasonable measures that would enable him to comply. For that reason and because no finding of fact detailing defendant's ability to comply with the contempt order was made, this case is reversed and remanded to Judge Christian to find the facts, make conclusions of law, and enter judgment, all in accordance with the provisions of this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JAMES WADDELL DAYE

No. 7910SC798

(Filed 19 February 1980)

1. Larceny § 7.3— larceny of property from corporation—no fatal variance between indictment and proof

There was no fatal variance between indictment and proof where the indictment charged that defendant aided and abetted in the larceny of two suits owned by "J. Riggings, Inc., a corporation" and the evidence showed the suits were owned by "J. Riggings, a man's retailing establishment," "J. Riggings

store," and "J. Riggings," since the evidence sufficiently showed that the suits were owned by the entity named in the indictment, and no fatal variance occurred because the evidence did not refer to the owner as a corporation.

2. Criminal Law § 99.7— court's statement to defendant—no prejudice to defendant

Defendant was not prejudiced when the trial judge, in sustaining the State's objection to the way defendant answered a question, stated to defendant, "Just answer the question asked and we'll get along better."

APPEAL by defendant from *Bailey, Judge*. Judgment entered 27 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 29 January 1980.

Defendant was charged with aiding and abetting another man to "steal, take, and carry away two (2) men's suits, the property [of] J. Riggings, Inc., a corporation, such property having a value of $350.00." At trial, the State's witnesses referred to: "J. Riggings, a man's retailing establishment," "J. Riggings store," and "J. Riggings" as the entity named in the indictment.

From a verdict of guilty of aiding and abetting in larceny and the imposition of a prison sentence, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Carlos W. Murray, Jr., for defendant appellant.

WEBB, Judge.

[1] Defendant contends there was a fatal variance between the indictment and the proof at trial in that the evidence did not refer to "J. Riggings" as a corporation. We note that this is not a case in which there was proof that title to the stolen property was in someone other than the owner alleged in the indictment. If the proof had shown J. Riggings was an individual, the case should have been dismissed. *State v. Vawter*, 33 N.C. App. 131, 234 S.E. 2d 438 (1977). In the case sub judice, the indictment alleged that J. Riggings, Inc. owned the two suits. The proof was that they were owned by "J. Riggings, a man's retailing establishment," "J. Riggings store" and "J. Riggings." The question posed by this appeal is whether this proof is so at variance with the indictment that the case should be dismissed. We hold that it is not. The evidence was that the suits were owned by the entity named

in the indictment. We hold that it was not a fatal variance that no one testified J. Riggings was a corporation. *See State v. Whitley*, 208 N.C. 661, 182 S.E. 338 (1935).

[2] The defendant also assigns error to a comment by the court during the trial. The State objected to the way defendant answered a question. The following comment was made:

> "COURT: Sustained. Just answer the question asked and we'll get along better."

We hold the defendant suffered no prejudicial error by this statement.

No error.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF: ETHEL MAE GOODSON HIATT, RESPONDENT

No. 799DC646

(Filed 19 February 1980)

Insane Persons § 1.2— voluntary commitment—concurrence by court—finding required

Under G.S. 122-56.7(b) before a court can concur with a voluntary commitment for an incompetent, it must find that the incompetent is mentally ill or an inebriate and is in need of further treatment at the treatment facility.

APPEAL by respondent from *Wilkinson (C. W.), Judge*. Order entered 15 March 1979 in District Court, GRANVILLE County. Heard in the Court of Appeals 31 January 1980.

This is a proceeding under G.S. 122-56.7. The respondent, who has been adjudicated non compos mentis, was voluntarily admitted to John Umstead Hospital upon the petition of her legal guardian. After hearing evidence, the court held that respondent was in need of further treatment at John Umstead Hospital and ordered that she be allowed to continue voluntary hospitalization and treatment. Respondent appealed.

Attorney General Edmisten, by Assistant Attorney General Christopher S. Crosby, for the State.

Susan Freya Olive for respondent appellant.

WEBB, Judge.

In this case the court in its order, concurring with the voluntary commitment of the respondent, did not make a finding that the respondent was mentally ill. The only question raised by this appeal is whether the court erred in ordering respondent's continued voluntary hospitalization and treatment without such a finding. We hold this was error. G.S. 122-56.7 provides:

> (a) A hearing shall be held in district court in the county in which the treatment facility is located within 10 days of the day a minor or a person adjudicated non compos mentis is admitted to a treatment facility pursuant to G.S. 122-56.5. No petition shall be necessary; the written application for voluntary admission shall serve as the initiating document for the hearing.
>
> (b) The court shall determine whether such person is mentally ill or an inebriate and is in need of further treatment at the treatment facility. Further treatment at the treatment facility should be undertaken only when lesser measures will be insufficient. If the court finds by clear, cogent and convincing evidence, that these requirements have been met, the court shall concur with the voluntary admission of the minor or person adjudicated non compos mentis. If the court finds that these requirements have not been met, it shall order that the person be released. A finding of dangerousness to self or others is not necessary to support the determination that further treatment should be undertaken.

We hold that under G.S. 122-56.7(b) before a court can concur with a voluntary commitment for an incompetent, it must find that the incompetent is mentally ill or an inebriate and is in need of further treatment at the treatment facility. In the case sub judice, the court found the respondent was in need of further treatment

at the treatment facility. It made no finding as to mental illness or inebriacy. It was error to concur in the voluntary commitment without such a finding.

Reversed.

Judges PARKER and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 FEBRUARY 1980

BLANTON v. BLANTON No. 7919DC866	Randolph (78CVD686)	Affirmed in Part; Vacated in Part
IN RE ROGERS No. 791SC678	Dare (77CVS74)	Vacated and Remanded in Part; Affirmed in Part
McNEILL v. McNEILL No. 7919DC847	Randolph (79CVD40)	Dismissed
MURPHY MFG. CO. v. DEPOSIT CO. No. 7910SC409	Wake (77CVS263)	Affirmed
STATE v. BELL No. 7918SC856	Guilford (79CRS16207)	No Error
STATE v. JACKSON No. 7912SC764	Cumberland (78CRS45565)	No Error
STATE v. McCOY No. 798SC808	Wayne (79CR1073)	No Error
STATE v. NORCOM No. 7920SC811	Stanly (79CRS2808)	No Error
STATE v. NORMAN No. 792SC788	Beaufort (78CRS8508)	No Error
STATE v. PARKER No. 795SC790	New Hanover (79CRS617)	No Error
STATE v. PHIFER No. 7926SC607	Mecklenburg (78CR6267) (78CR6268)	No Error
STATE v. PLUMIDES No. 7926SC799	Mecklenburg (77CRS62934)	No Error
STATE v. ROUSSEAU No. 7921SC739	Forsyth (78CR54693)	No Error
WHITE v. PETERS No. 7925SC591	Burke (77CVS73)	No Error

THELMORE THOMAS, PLAINTIFF v. RANDOLPH DELOATCH, DEFENDANT AND THIRD PARTY PLAINTIFF v. MINNIE E. FUTRELL AND DAVID LEE GATLING, THIRD PARTY DEFENDANTS

RUFUS LONG, PLAINTIFF v. RANDOLPH DELOATCH, DEFENDANT AND THIRD PARTY PLAINTIFF v. MINNIE E. FUTRELL AND DAVID LEE GATLING, THIRD PARTY DEFENDANTS

No. 796SC677

(Filed 4 March 1980)

1. **Automobiles § 75.2— passenger in disabled vehicle—contributory negligence as jury question**

In an action to recover for injuries sustained by plaintiff who was struck by defendant's car while he was standing near a disabled vehicle on the side of a road, evidence as to plaintiff's contributory negligence raised a question for the jury where the evidence was contradictory, conflicting and inconsistent as to whether plaintiff continued to ride as a passenger in a car, on which he was responsible for the maintenance, knowing it had transmission problems; whether he instructed the driver to pull to the side of the road rather than into two driveways they passed thus creating a situation where a portion of the car was possibly still on the main portion of the highway; whether he was placed on notice by a previous sideswipe that the car was in a dangerous position but did nothing to attempt to move the car before the second collision; whether, when he went to the rear of the disabled vehicle, he placed himself in a position of peril and failed to keep a reasonable and proper lookout for oncoming traffic; and whether plaintiff's intoxication contributed to the accident.

2. **Automobiles § 83— pedestrian standing near highway—no contributory negligence as matter of law**

There was no merit to defendant's contention that one plaintiff was contributorily negligent as a matter of law in talking to his cousin while standing near but not on the highway in a lane beside his home and there being hit by a disabled vehicle which was knocked into him by the impact when defendant's oncoming car hit it.

3. **Automobiles § 11.4— striking disabled vehicle—instructions proper**

In an action to recover for injuries sustained when defendant struck a disabled vehicle, the trial court's instructions on G.S. 20-134 and G.S. 20-161 concerning leaving a disabled vehicle on a highway and displaying lights on such disabled vehicle were proper.

4. **Automobiles § 11.4— disabled vehicle parked on side of road—disability due to plaintiff's negligence—plaintiff entitled to instruction on exculpatory provision of statute**

There was no merit to defendant's contention that plaintiff was not entitled to an instruction on the exculpatory provision of G.S. 20-161 prohibiting

the parking of a vehicle upon a highway except in cases of disablement because the disability was due to plaintiff's own wrongful conduct, since the statute does not provide for such distinction.

5. **Automobiles § 11.4— emergency parking on shoulder of road**

G.S. 20-161 prohibiting the parking or leaving of a vehicle on "the paved or main traveled portion of any highway" does not prohibit the emergency parking of a vehicle on the shoulder of a highway, paved or otherwise, which is outside the main traveled part.

6. **Automobiles § 87.5— intervening negligence of other driver—instructions proper**

The trial judge properly instructed on insulating negligence where he stated that, in order to insulate the negligence of one defendant, the intervening negligence of the second defendant must break any causal connection between the first defendant's negligence and the injury to plaintiff.

APPEAL by defendant and cross appeal by third party defendant from *McKinnon, Judge*. Judgments entered 15 March 1979 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 5 February 1980.

This case arises out of a two collision, three car accident which occurred on Saturday evening, 26 June 1976 on U.S. Highway 158 between Jackson and Conway, North Carolina. Thelmore Thomas and Rufus Long, plaintiff appellees, brought suits, which were consolidated for trial, against Randolph Deloatch, defendant and third party plaintiff appellant, for personal injuries suffered in the accident. In both suits, Deloatch denied plaintiffs' allegations of negligence and pled plaintiffs' own contributory negligence as an affirmative defense and bar to any recovery. Deloatch also filed a third party complaint against Minnie E. Futrell and David Lee Gatling, third party defendants, seeking contribution for any judgment plaintiffs might be awarded against him. Deloatch took a voluntary dismissal, with prejudice, on third party complaints against Gatling. A jury trial was held in the case at which the following facts were presented.

Plaintiff Thomas and third party defendant Futrell had recently moved to Northampton County from New Jersey. They had been living together for some time. Futrell owned a white body, black convertible top 1967 Pontiac automobile which she was driving at the time of the collision. Thomas rode in the car often and drove it up until May, 1976 when his New Jersey

license, which he had not replaced with a North Carolina license, expired. Thomas, who had worked as a tire changer and truck driver, looked after the mechanics of the car.

On the night before the accident, Thomas and Futrell noticed problems with the car's transmission. The next morning, Thomas observed a puddle of transmission fluid under the car which holds twelve quarts. The car was a pint low and Thomas added a quart of fluid. He and Futrell then went to a mechanic who told them he could not fix it that day but would look at it Monday morning. Other than this slow fluid leak, there was no other problem with the car. They continued to use the car traveling to Futrell's brother's home and then to the nearby towns of Seaboard, Milwaukee (North Carolina) and Rich Square. They returned to the brother's house that evening about 8:00. When they were leaving, Thomas checked the fluid level in the car and found it to be full. Thomas had testified earlier on deposition that he checked the fluid level because he noticed a puddle under the car when they were leaving.

They were proceeding west on U.S. Highway 158 toward Jackson about 9:30 p.m., with Futrell driving, when the car suddenly "stopped pulling." Though the engine was still running, the car was only coasting. Thomas instructed Futrell to get the car off the road as quickly as possible and turn on the emergency flashers. She coasted the car past two driveways and onto the shoulder of the road up against a ditch and a mailbox. The car was so close to the mailbox that Thomas had to get out on the driver's side of the car.

After they had stopped, Thomas either rode with a passerby who stopped and then walked back, or the passerby alone drove back towards Conway and returned with two cans of transmission fluid to put in the car. Rufus Long, in front of whose house and mailbox the Futrell car was stopped, returned home, noticed the emergency flashers on the car and came over to the car to see what the problem was. He provided light by striking matches while Thomas put transmission fluid in the car. Thomas folded a piece of cardboard into a funnel and poured the fluid in while on the car fender. Thomas had to get onto the fender because he could not reach the fluid opening otherwise by standing in the ditch.

About this time, a car driven by Gatling came along and sideswiped the Futrell car along the left front fender knocking the bumper off. The Gatling car went seventy-five feet up the road and landed in the ditch on the same side of the road as the Futrell car. The Futrell car was not moved by the impact. The deposition testimony which was used for impeachment purposes at trial and the testimony at trial is in conflict as to whether Futrell and Thomas were in the car but had not started it, or whether Thomas was under the hood pouring in the fluid at the time of this collision.

Following the Gatling sideswipe, Thomas, Long and Futrell went up to Gatling's car to see whether he was injured. He was not. While Futrell talked to Gatling, who was denying being involved in a wreck, Long and Thomas started back to the Futrell car. Long was stopped by a cousin who appeared from a nearby residence. Long and his cousin were talking in a lane or drive which goes off U.S. Highway 158 to the right beside his home. Thomas walked in the Long yard along the right side of the Futrell car and crossed the ditch to observe the rear of the car to see if any damage had been done there. The Futrell car was not moved though Gatling testified he suggested it be moved farther off the highway.

While Thomas was standing at the rear of the car with one foot on the pavement and one foot off, he was struck by a vehicle owned and operated by Deloatch, which also struck the left rear of the Futrell car. Long, who had been a car length in front of the Futrell car, was struck and injured by the Futrell car. Pieces of the dark brown pants worn by Thomas and of his flesh were attached to the right front of the Deloatch car. Thomas' left leg was so severely injured that it had to be amputated. He went through four major operations.

Deloatch had left his home a half mile away and was going about fifty-five miles per hour, the speed limit, at the time of the wreck. There were no oncoming cars at that time. He did not see Thomas or the Futrell car. He had not eaten at all that day or the evening before but had consumed alcoholic beverages and had two beers just before the wreck.

No more than fifteen minutes passed between the Gatling and Deloatch collisions with the Futrell car. A number of vehicles

had passed by before and between the collisions without difficulty. The second collision blocked both lanes of the highway. The Futrell car was knocked completely across the westbound lane with the front end partially across the center line and the rear end off the highway in a driveway. The Deloatch car was two feet east of the Futrell car blocking the eastbound lane with its front facing the Long residence.

The investigating highway patrolman was of the opinion that Futrell, Gatling and Deloatch were all under the influence of alcohol. He did not form an opinion about the sobriety of the injured plaintiffs, Long and Thomas, but did note that both had a strong odor of alcohol about their persons.

Defendant presented for impeachment purposes numerous conflicts in Thomas' testimony at trial and on deposition. Thomas testified that at the time of the deposition, when he was still seeing doctors at the Duke Medical Center, his memory was impaired.

The evidence is in conflict on whether the emergency flashers, which were the parking lights in front and the red taillights in the rear, were on continuously from the time the car pulled off until the time of the collisions. Deloatch and Gatling testified they saw no rear reflectors but other testimony was to the contrary.

The evidence is also partly in conflict as to the location of the car once it was coasted to the side of the road and stopped. There is no conflict that the right side of the car was up against a ditch and mailbox. The hard surface of the two lane highway is at that point eighteen feet wide from outer white line to outer white line. On the side to which Futrell turned the car, there is a three feet paved apron outside the white line. On the other side, the apron is only one foot. The testimony conflicts on whether the car was over the white line in the main traveled portion of the highway. Some of the testimony placed the car a foot or more over the outer white line and into the westbound lane of the highway. Other testimony placed the car entirely on the paved apron and grassy knoll. According to Thomas, a foot of the Futrell vehicle which was six feet in width remained on the hard surface of the road. The highway from this point is straight and level in both directions with unobstructed visibility for a mile to the east and

700 to 800 feet to the west toward Jackson. The area is generally unlighted. It was hazy that evening and was beginning to rain.

The case was submitted to the jury on the issues (1) whether Thomas or Long were injured and damaged by the negligence of Deloatch; (2) whether Thomas or Long were contributorily negligent; (3) what amount of damages were Thomas or Long entitled to recover and (4) whether Futrell was negligent and did such negligence combine and concur with any negligence of Deloatch in proximately causing the injury and damage to Thomas or Long. The jury verdict was (1) the negligence of Deloatch injured and damaged Thomas and Long; (2) Thomas and Long were not contributorily negligent; (3) Thomas was entitled $85,000.00 and Long was entitled to $3,000.00 in damages and (4) Futrell was not a proximate cause of the injury and damage to Thomas and Long. From this jury verdict, defendant appeals.

Johnson, Johnson and Johnson, by Bruce C. Johnson, for plaintiff appellees.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James G. Billings, for defendant and third party plaintiff appellant.

Battle, Winslow, Scott and Wiley, by Samuel S. Woodley, for third party defendant appellee.

VAUGHN, Judge.

Defendant contends his motion for directed verdict at the close of all the evidence and, therefore, his motion for judgment notwithstanding the verdict should have been granted against both plaintiffs because they were contributorily negligent as a matter of law.

> The general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes [plaintiff's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.

Clark v. Bodycombe, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976); *accord Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973).

[1] Defendant contends several actions of plaintiff Thomas affirmatively constitute contributory negligence as a matter of law. Thomas continued to ride as a passenger in a car, on which he was responsible for the maintenance, knowing it to have transmission problems. He instructed the driver to pull to the side of the road rather than into two driveways they passed thus creating a situation where a portion of the car was possibly still on the main portion of the highway. He was placed on notice by the Gatling sideswipe that the car was in a dangerous position but did nothing to attempt to move the car before the second collision. When he went to the rear of the Futrell car, he placed himself in a position of peril and failed to keep a reasonable and proper lookout for oncoming traffic. Finally, he contends defendant's intoxication contributed to the accident. All these factors do raise the issue of contributory negligence on the part of Thomas but the evidence on these matters is so contradictory, conflicting and inconsistent that in a light most favorable to plaintiff, it is a jury question and not a matter of law. Based on the evidence, it was for the jury to resolve these matters.

It is the duty of a person operating a car to see that it is in reasonably good condition and properly equipped so that it does not become a source of danger for occupants or other travelers. *Dupree v. Batts*, 276 N.C. 68, 170 S.E. 2d 918 (1969); *Scott v. Clark*, 261 N.C. 102, 134 S.E. 2d 181 (1964). Defendant relies on *Prevette v. Bullis*, 12 N.C. App. 552, 183 S.E. 2d 810 (1971), where this Court held the jury was properly permitted to consider the evidence that plaintiff allowed a car to run out of gas and possibly stall on the highway in determining the issue of contributory negligence. These circumstances, factually similar to the case at hand, were not held to be negligence as a matter of law. *See also Rouse v. Snead*, 271 N.C. 565, 157 S.E. 2d 124 (1967).

Defendant contends Thomas was in violation of G.S. 20-161(a), which would be negligence per se, in that he directed Futrell to park the car upon the paved or main traveled portion of the highway. Certainly the conflict of evidence on the location of the car which is a prerequisite before G.S. 20-161(a) is reached makes

violation of this statute a jury question. We further note that G.S. 20-161(a) does have an exculpatory provision for a vehicle "disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main traveled portion of the highway or highway bridge." The situation presented a jury question on whether it was an unavoidable stop due to the transmission disability. Plaintiff's evidence and contentions in a light most favorable to him are to the effect that the car was coasting and could not have turned into a driveway and was in fact completely off the road when stopped. But, such was for a jury to find and not for a trial judge to rule to the contrary as a matter of law.

A pedestrian does have a duty to keep a reasonable and proper lookout and it may be contributory negligence as a matter of law to not so do. *See, e.g., Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967). A driver of a car has a similar duty. *See, e.g., Whaley v. Adams*, 25 N.C. App. 611, 214 S.E. 2d 301 (1975). Plaintiff relies on two cases factually similar to this case. *Basnight v. Wilson*, 245 N.C. 548, 96 S.E. 2d 699 (1957); *Gregory v. Adkins*, 7 N.C. App. 305, 172 S.E. 2d 289 (1970). Both cases involved cars pulled to the road shoulder. The stalled cars were hit and the plaintiffs who were standing near the stalled cars were also hit. The plaintiffs in both cases were held to be contributorily negligent as a matter of law. But there is a crucial difference in both cases. In both *Basnight* and *Gregory*, the evidence is uncontradicted that the stalled car or at least a portion was in the highway traffic lane. In *Gregory*, it is uncontroverted that the plaintiff was also in the traffic lane. The conflict in the evidence in the case at hand on the location of the Futrell car and Thomas makes the question of Thomas' negligence a jury question of fact and not a judge's question of law.

Finally, defendant argues that Thomas' alcohol consumption made him contributorily negligent. But the degree of his impairment, if indeed any, was in dispute and was a jury question.

All defendant's arguments about contributory negligence on the part of Thomas are persuasive arguments for the jury. But the arguments are devoted to inconsistencies and contradictions in the evidence. That is for the jury to determine not for a court to determine on a motion for directed verdict when all such incon-

sistencies and contradictions are to be resolved in favor of the nonmovant.

[2] Defendant also contends plaintiff Long was contributorily negligent as a matter of law in talking to his cousin while standing near but not on the highway in a lane beside his home and there being hit by the Futrell car which was knocked into him by the impact when the Deloatch car hit it. Such is not the law. *See Rowe v. Murphy*, 250 N.C. 627, 109 S.E. 2d 474 (1959); *contrast Gregory v. Adkins*, 7 N.C. App. 305, 172 S.E. 2d 289 (1970).

Defendant's remaining six assignments of error deal with the jury instruction of the trial judge. In these assignments, defendant raises questions of error in the instruction of the trial judge on the law relating to G.S. 20-161 and his instruction on insulating negligence and in his instruction on certain contentions of defendant.

[3] The trial judge instructed in part:

> [A] person may park or leave standing a vehicle on the shoulder of the highway, that is, completely off the traveled portion thereof, at a place where he can be clearly seen by approaching drivers from at least two hundred feet in any direction. A person may not leave a vehicle parked or standing on the highway in the main traveled portion of the highway unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and leaving it there.
>
> So, if one leaves a vehicle at least partially on the main traveled portion of the highway he may excuse that stopping by showing that the vehicle was disabled to such an extent that it was impossible to avoid stopping there and leaving it temporarily. To be impossible to remove means it was not reasonably practicable under the circumstances to move the vehicle. If one must leave a vehicle stopped or standing upon the highway, there shall be displayed thereon lights visible at least five hundred feet from the front, a white or amber light, and a red light visible at least five hundred feet to the rear.
>
> So, if a motorist disabled upon the highway has upon his vehicle a light visible for at least five hundred feet to the rear and to the front under the conditions then existing, he

> would be entitled to leave the vehicle there temporarily when it is not practical to move it. But, if he left a vehicle on the main traveled portion of the highway at a time when he could have with reasonable care removed the vehicle from the highway and left it there without the lights required by law, he would be negligent.

Defendant contends this was an erroneous instruction on the law set forth in G.S. 20-161 as it relates to this case. We disagree.

A reading of the complained of portion of the charge reveals that the trial judge was also instructing on G.S. 20-134 as well as G.S. 20-161. These statutes provide the following:

> (a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway or highway bridge.
>
> (b) No person shall park or leave standing any vehicle upon the shoulder of a public highway outside municipal corporate limits unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

G.S. 20-161(a)(b).

> Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in § 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon any such vehicle when parked in accordance with local ordinances upon a highway where there is sufficient light to reveal any person within a distance of two hundred feet upon such highway.

G.S. 20-134. The portion of the charge complained of is an adequate instruction on the law contained in these statutes.

[4] Defendant contends that Thomas was not entitled to an instruction on the exculpatory provision of G.S. 20-161 for disabled vehicles because the disability was due to Thomas' own wrongful conduct. The statute does not provide for such distinction and we will not imply it. Further, defendant did not timely request such an instruction in writing as required by G.S. 1A-1, Rule 51(b) and G.S. 1-181. The assignment of error on this point is, therefore, overruled.

[5] Defendant also contends the trial judge should have mentioned the "paved" portion of the roadway as well as the "main-traveled" portion of the highway. The statute in part does require that "[n]o person shall park or leave standing any vehicle, whether attended or unattended, upon the paved *or* main-traveled portion of any highway. . . ." G.S. 20-161(a) (emphasis added); *contrast* 20-161(b). The only logical reading of the statute is that it does not prohibit the emergency parking of a vehicle on the shoulder of a highway, paved or otherwise, which is outside the main traveled part. "[T]he provisions of G.S. 20-161 require that no part of a parked vehicle be left protruding into the traveled portion of the highway when there is ample room and it is practicable to park the entire vehicle off the traveled portion of the highway." *Sharpe v. Hanline*, 265 N.C. 502, 504, 144 S.E. 2d 574, 576 (1965). This statute has been the law of this State since the adoption of the Motor Vehicles Act of 1937. 1937 N.C. Sess. Laws ch. 407. The statute when adopted read in part "[n]o person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway. . . ." *Id.*, § 123. The statute was rewritten in 1971 and that rewriting is the wording of the portion of the statute we are today dealing with. 1971 N.C. Sess. Laws ch. 294, § 1. The statute was written so as to apply to dirt country roads and super highways. It is unlawful to park in the main traveled portion of a paved or unpaved road without the excuse provided by the statute and it is unlawful to park in the main traveled portion of a super highway but not unlawful to park in the paved emergency strip or the pavement outside the white line. To interpret the statute as defendant would interpret it would make it illegal to pull over and stop on the paved strip on a super highway

specifically provided for emergency stops. The trial judge correctly instructed on the law arising under this statute for a two lane major highway which has pavement extending beyond the main traveled portion of the highway. It is necessary to qualify highway by the terms "paved or main-traveled portion" for the Motor Vehicles Act defines "highway" as the entire right-of-way width "when any part thereof is open to the use of the public as a matter of right for the purpose of vehicular traffic." G.S. 20-4.01(13). Without the qualification of the term highway in G.S. 20-161, virtually anywhere a driver pulled a car off the road, he would still be on the highway.

[6] Defendant assigns error in the trial judge's instruction on the negligence of third party defendant Futrell and the concept of insulating negligence. It is upon these same points that Futrell cross assigns error. We will, therefore, treat the assigned errors together. The trial judge instructed the jury that Futrell contended her negligence, if any, was "insulated" or "cut off" by the negligence of Deloatch. The trial judge then went on to instruct:

> If you find that Minnie Futrell was negligent in some respect in stopping or leaving her vehicle on the highway, such negligence would be insulated, she would not be liable, if the negligence of Randolph Deloatch was such that it broke any causal connection between Mrs. Futrell's negligence and the injury or damage which the plaintiffs may have suffered so that the negligence of Randolph Deloatch became the sole proximate cause of any injury which resulted.
>
> On the other hand, if negligence on the part of Mrs. Futrell continued to be a proximate cause of the injury right up to the time of the collision, then Mrs. Futrell would be liable for contribution in this action to contribute to any damage which Mr. Deloatch is required to pay.

The instruction was adequate. Our Court has said:

> In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury. The intervening negligence must be the sole proximate cause of the injury. *Rattley v. Powell*, 223 N.C. 134, 25 S.E. 2d 448 (1943). In cases involving rear

> end collisions between a vehicle slowing or stopping on the road without proper warning signals, and following vehicles, the test most often employed by North Carolina courts is foreseeability. The first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen. *See McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); Byrd and Dobbs, *Survey of North Carolina Case Law, Torts*, 43 N.C.L. Rev. 906, 927-30 (1965). *See* Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C.L. Rev. 951 (1973). The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur.

Hester v. Miller, 41 N.C. App. 509, 513, 255 S.E. 2d 318, 321 (1979). The instruction complied with the law of this State on insulating negligence. *See Rowe v. Murphy*, 250 N.C. 627, 109 S.E. 2d 474 (1959); Note, 33 N.C.L. Rev. 498 (1955).

Defendant's remaining assignments of error in the jury charge are in the adequacy of the charge given on the contentions of defendant as to the negligence of third party defendant Futrell. Defendant did not request any particular instructions from the trial judge on these contentions. At no point in the record does defendant indicate what instruction should have been given.

> An exception to the failure to give particular instructions to the jury or to make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted instruction, finding, or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made.

Rule 10(b)(2), Rules of Appellate Procedure. Defendant has not complied with the rules of appellate procedure. *State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978). We further note that the trial judge specifically asked counsel for the parties if there were any further requests for evidence or contentions before he concluded the charge and counsel for all parties including defendant indicated there were none. It was defendant's duty to tender such requests for additional instructions or contentions particularly when the trial judge asked for them. *Hunter v. Fisher*, 247 N.C.

226, 100 S.E. 2d 321 (1957). These assignments of error relating to contentions of defendant are overruled.

The charge considered contextually and as a whole is adequate and free from prejudicial error. The jury has spoken on the issues and their verdict stands.

No error.

Judges HEDRICK and CLARK concur.

PATRICIA T. BAILEY AND EBERT L. BAILEY, JR. v. MARVIN C. GOODING, SEASHORE TRANSPORTATION COMPANY AND CAROLINA COACH COMPANY

No. 798SC538

(Filed 4 March 1980)

1. **Rules of Civil Procedure § 60— default judgment on liability issue—order for trial on damages issue—motion for relief from judgment—no final judgment**

A superior court judge had no authority under Rule 60(b) to set aside on the ground of mistake, inadvertence, surprise or excusable neglect a default judgment entered by another superior court judge which determined the issue of liability in a personal injury action and ordered a jury trial on the issue of damages, since the judgment was not a final default judgment which would be subject to a Rule 60(b) motion.

2. **Rules of Civil Procedure § 55.1— setting aside entry of default—standard of "good cause shown"**

The trial court erred in refusing to set aside an entry of default where the court incorrectly applied the "mistake, inadvertence, surprise or excusable neglect" standard of Rule 60(b)(1) rather than the "good cause shown" standard of Rule 55(d), and the cause is remanded for a determination of whether good cause exists to set aside the entry of default.

Judge CLARK concurring in result.

Judge HEDRICK dissenting.

APPEAL by plaintiffs from *Stevens, Judge*. Judgment entered 9 May 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 January 1980.

The matters at issue arise out of a collision on 6 February 1977 between a car driven by plaintiff, Patricia T. Bailey and owned by plaintiff, Ebert L. Bailey, Jr., and a bus driven by defendant, Marvin C. Gooding, an employee of defendant, Seashore Transportation Company who leased the bus from defendant, Carolina Coach Company. Plaintiffs' attorney wrote a letter to defendant, Seashore Transportation, on 11 May 1977 responding to a letter by this defendant to the plaintiff driver and requesting that this defendant forward the letter to its insurance carrier and have the carrier contact him concerning the collision. Plaintiffs received no further communication, and on 16 June 1977, they filed suit against the defendants, who were properly served.

On 7 July 1977, W. S. Pearce, Jr., a licensed insurance adjuster for Pennsylvania National Mutual Casualty Insurance Company, the insurance carrier for defendant, Seashore Transportation, called on plaintiffs' attorney. The following day, as a result of the visit, plaintiffs' attorney wrote Pearce:

> In line with our agreement this date I write to confirm that I will not take an entry of default in this case until our negotiations break down. As I understand it you will be back in touch with me around the first of August and at that time we will either give you a further continuance or decide to proceed with the suit. At that time if the negotiations break down we will give you additional time within which to secure counsel and file answer.

Based on service of process, defendants, Carolina Coach and Gooding, would have had until 18 July 1977 to answer the complaint and defendant, Seashore Transportation, had until 22 July 1977. Plaintiffs' attorney, in an affidavit, stated the agreement to delay in proceeding on the suit was so that Pearce could continue his investigation and determine if there was any liability, and in particular, interview a certain witness. Pearce, in an affidavit, stated the agreement was made because plaintiffs' attorney had not collected his evidence of special damages (medical bills, medical reports and statements of lost wages) and so that Pearce could interview a certain witness whose name and address had been given him by plaintiffs' attorney.

Plaintiffs' attorney did not hear from Pearce by 1 August, and on 10 August wrote Pearce:

> As I recall from our conversation on July 7th you were to let me hear from you on or about August 1st. I would appreciate it if you would advise me as soon as possible as to your company's position regarding liability.
>
> I am still unable to furnish you complete medicals in the case since Mrs. Bailey is still having to go to the doctor and still having considerable trouble.

Pearce wrote plaintiffs' attorney in reply on 22 August:

> I am sorry that I was not able to get back to you at the planned time. I attempted on numerous occasions to get in touch with the witness without success. I have now been able to talk to her by telephone. I have an appointment on 9-1-77 to obtain her statement and I hope that I will be able to be in touch with you in the very near future after that date.

Pearce was not able to get up with the witness. Pearce, in his affidavit, states that he called on plaintiffs' attorney on 15 September 1977. The attorney was out but Pearce left word that he was still investigating the matter and would get back to the attorney. Plaintiffs' attorney denies ever receiving such a message.

Pearce thought he and the attorney were negotiating the entire case, and because of his inability to interview a particular witness and plaintiffs' attorney's inability to provide medicals, the case was still under investigation. Plaintiffs' attorney maintains the negotiations were on liability only. The parties and their agents did not communicate further.

On 6 October 1977, plaintiffs' attorney filed a calendar request for a hearing on a motion in the case and mailed a copy of the calendar request to each defendant. The request did not specify the nature of the motion. Plaintiffs' attorney caused a default to be entered before the clerk of superior court on 17 October 1977. He had received no response from anyone for defendants until the next day when he received a letter from attorney B. T. Henderson informing plaintiffs' attorney that his firm had been retained in the case of "*Patricia T. Bailey, et al. vs. Seashore Transportation Co., et al.*" The body of the letter dated 17 October 1977 read:

> Pennsylvania National has referred the above matter to us to defend, and we note from correspondence in the file (which we received today) that you agreed to give additional time for filing answer if you and Mr. Pearce could not agree on a settlement.
>
> We are taking the liberty of enclosing a stipulation extending the time for answer for thirty days, and we will appreciate it if you will consent to the stipulation and return it to us for filing.

Plaintiff filed his motion for default judgment on 20 October 1977 and on 28 October 1977 defendants filed a motion to set aside the entry of default and a response to the motion for default judgment alleging mistake in that they thought negotiations, as agreed to and evidenced by the letters of 8 July and 10 August 1977 by plaintiffs' attorney, had not broken down and excusable neglect in that counsel employed on 17 October 1977 had not been furnished any notice of a pending or actual entry of default. Defendants' response also indicates a meritorious defense. The matter was heard on 9 November 1977 by the presiding Superior Court Judge John R. Friday, who deferred ruling until the receipt of medical evidence. Defendants filed an unverified answer in the suit on 22 November 1977. The answer, in part, denied liability and asserts a defense of contributory negligence for defendants and a defense of lack of control of operation of the vehicle for defendant, Carolina Coach, by the terms of its lease with defendant, Seashore Transportation. The plaintiff driver's deposition was taken on or about 26 January 1978.

A hearing was held on 6 February 1978 before presiding Superior Court Judge David I. Smith, who denied defendants' motion to set aside the clerk's entry of default. An affidavit by plaintiffs' attorney, an affidavit by Pearce and the pleadings were apparently before the court. The order provided:

> THIS CAUSE being heard by the undersigned Judge on Motion of the defendants for an order setting aside entry of default ~~and default judgment~~ (DIS 2/9/78) and it appearing to the Court upon the pleadings, affidavits and arguments of counsel that the failure of the defendants to file answer or otherwise plead or appear in this action was not due to any of the reasons justifying relief set out in Rule 60(b) and good

cause has not been shown for the setting aside of said entry. ~~and judgments~~ (DIS 2/9/78)

IT IS THEREFORE ORDERED in the discretion of the Court that the Motions of the defendants to set aside the entry of ~~judgment and~~ (DIS 2/9/78) default ~~judgment~~ (DIS 2/9/78) previously entered be, and the same are hereby denied.

Judge Smith also entered a paper captioned a "Judgment" which provided:

THIS CAUSE being heard by the undersigned Judge on Motion of plaintiffs and it appearing to the Court upon the pleadings, affidavits and arguments that this is an action for damages arising from a collision between a bus owned by the defendant, Carolina Coach Company, leased to the defendant, Seashore Transportation Company, and driven by defendant, Marvin C. Gooding; that personal service was had on the defendants; that the Court has jurisdiction over the subject matter of the action; that the defendants are not under disability and have failed to plead or appear in the time allowed by law; that default had been entered and that the defendants are liable to the plaintiffs for damages to be determined by a jury as demanded by plaintiffs;

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the plaintiffs have and recover of the defendants such damages as may hereafter be determined.

IT IS FURTHER ORDERED that this action be placed on the trial calendar for the determination of damages by the jury.

Defendants excepted to both the denial of this motion to set aside entry of default and the "judgment" awarding a jury trial on the issue of damages which was required because a jury trial had been demanded by plaintiffs in their complaint. The jury trial on damages was never held.

On 2 June 1978, defendants filed a motion pursuant to Rule 60(b) to set aside the default judgment and accompanied it with an affidavit by Pearce almost identical to the one filed when the motions to set aside the entry of default and deny entry of default judgment were heard. This motion was heard on 7 May 1979 by presiding Superior Court Judge Henry L. Stevens III,

who granted the motion and asked defendants' attorney to draw a fact finding order. This order was tendered to plaintiffs' counsel, who filed objections to many of the facts. Plaintiffs' objections and motions for additional findings were rejected and the order was entered as submitted by defendants.

Plaintiffs properly excepted to the findings of fact pursuant to Rule 60(b)(1) and to the order setting aside the default judgment "on grounds of mistake, inadvertence, surprise and excusable neglect." Plaintiffs appealed the granting of the Rule 60(b) motion. A motion in this Court by defendants to dismiss the appeal from the granting of the Rule 60(b) motion as interlocutory was denied by a different panel of judges on 28 June 1979.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., and Narron, Holdford, Babb, Harrison and Rhodes, by William H. Holdford, for plaintiff appellants.

Young, Moore, Henderson and Alvis, by B. T. Henderson II and Robert C. Paschal, for defendant appellees.

VAUGHN, Judge.

This appeal arises out of the attempt by plaintiffs to obtain a default judgment. On 17 October 1977, they obtained an entry of default before the clerk of superior court.

> Entry.—When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

G.S. 1A-1, Rule 55(a). The entry of default by the clerk was properly taken and entered. The entry of default is an interlocutory, ministerial duty looking towards the final entry of judgment by default. It is merely a matter of form. *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). Plaintiffs through an affidavit made it appear that defendants had not answered their complaint within the time required by the Rules of Civil Procedure. G.S. 1A-1, Rules 6, 7, 12(a)(1). Plaintiffs properly demonstrated they were entitled to an entry of default.

The clerk of superior court could not, however, enter default judgment. The clerk can enter default judgment only when (1) plaintiff's claim is for a sum certain or for a sum that can be made certain by computation and (2) the defendant is defaulted for failure to appear and is not an infant or incompetent person. G.S. 1A-1, Rule 55(b)(1); *Roland v. Motor Lines*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977). This personal injury suit does not present a claim for a sum certain and plaintiff's complaint expressly requests that a jury determine the amount of the claim. Thus, plaintiff properly applied to a judge of the superior court.

> (b) Judgment.—Judgment by default may be entered as follows:
>
> (2) By the Judge.—In all other cases the party entitled to a judgment by default shall apply to the judge therefor; for no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

G.S. 1A-1, Rule 55(b)(2). Plaintiffs properly moved for default judgment on 20 October 1977. It was thus before a superior court judge to hear the application for judgment. Proper notice was given to defendants. *See Sawyer v. Cox*, 36 N.C. App. 300, 244 S.E. 2d 173, *cert. den.*, 295 N.C. 467, 246 S.E. 2d 216 (1978).

The case was before the trial court on a motion by defendants to set aside the entry of default and on plaintiffs' motion for judgment of default. "For good cause shown the court *may* set

aside an entry of default. . . ." G.S. 1A-1, Rule 55(d). The motion to set aside the entry of default was addressed to the sound discretion of the trial judge. *Privette v. Privette*, 30 N.C. App. 41, 226 S.E. 2d 188 (1976); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E. 2d 794 (1971). Judge Friday heard the two motions on 9 November 1977 and deferred action. Before the matter was again heard, defendants filed their unverified answer and deposed the plaintiff driver.

[1] On 6 February 1978, the matter came on before Judge Smith. He denied defendants' motion to set aside the entry of default and ordered a jury trial to determine the amount of damages. The order refusing to set aside the entry of default was interlocutory and unappealable. Appeals at this stage have been dismissed. *Acoustical Co. v. Cisne and Associates*, 25 N.C. App. 114, 212 S.E. 2d 402 (1975); *Trust Co. v. Construction Co.*, 24 N.C. App. 131, 210 S.E. 2d 97 (1974); *see also Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). The matter should have gone on for trial on damages and then defendants could have presented their exceptions to the entry of default and the default judgment after the jury trial on damages. Under our former procedure, the action of Judge Smith would have been a judgment of default and inquiry. A final judgment of default was not entered. *See* G.S. 1-212 (repealed effective 1 January 1970). Under the new rules, there is no intermediate judgment by default and inquiry. A default judgment, however, can be entered only after everything required to its entry has been done. *See* Official Commentary to Rule 55. In this case, everything required for its entry had not been done. A jury trial to determine damages was still needed. A final judgment is one which disposes of the cause. " 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Tridyn Industries v. American Mutual Insurance Co.*, 296 N.C. 486, 488, 251 S.E. 2d 443, 445 (1979); *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950). In *Tridyn*, the Court held that summary *judgment* on the issue of liability, leaving for trial the issue of damages was merely an interlocutory order from which appeal would not lie. Judge Smith's *judgment* on the issue of liability which ordered that the case be placed on the calendar for trial on the issue of damages is also merely an interlocutory

order. It is not a final judgment entered by default which is subject to a Rule 60(b) motion.

Defendants, however, filed a motion on 2 June 1978, pursuant to Rule 60(b), to set aside the default judgment. This is the proper procedure *if* there is a final default judgment. G.S. 1A-1, Rule 55(d). In this case, no final default judgment had yet been entered. It was necessary to resolve the damage issue before judgment could be entered. Judge Stevens, however, went on to hear the motion, found facts and entered an order removing the nonexistent default judgment "on grounds of mistake, inadvertence, surprise and excusable neglect." He considered nothing more than the matters previously considered by Judge Smith who ruled just the opposite in refusing to set aside the entry of default. Generally, one superior court judge cannot overrule another. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962). This is applicable even in a case involving an interlocutory order such as the present case where there is no showing of changed circumstances since the entry of the interlocutory order. Defendants presented nothing new for Judge Stevens to hear that Judge Smith had not already heard. Thus, the order by Judge Stevens granting the Rule 60(b) motion is vacated.

Although an order refusing to set aside an entry of default is interlocutory, consideration will, nevertheless, be given to whether Judge Smith was in error in refusing to set aside the entry of default in this case. In our discretion, we have previously elected to hear other cases on appeal at this stage. *See, e.g., Miller v. Miller*, 24 N.C. App. 319, 210 S.E. 2d 438 (1974); *Howell v. Haliburton*, 22 N.C. App. 40, 205 S.E. 2d 617 (1974); *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. den.*, 282 N.C. 425, 192 S.E. 2d 835 (1972); *Hubbard v. Lumley*, 17 N.C. App. 649, 195 S.E. 2d 330 (1973); *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970).

There are distinctions between setting aside an entry of default and setting aside a default judgment. The former is governed by the first clause of Rule 55(d) (emphasis added) which requires that "[*F*]*or good cause shown*, the court may set aside an entry of default." The latter is governed "in accordance with Rule 60(b)." *Id.* In setting aside a default judgment, "mistake, inadvertence, or excusable neglect," G.S. 1A-1, Rule 60(b)(1), for ex-

ample, must be present but not in the setting aside of an entry of default. Both are, however, within the sound discretion of the trial judge. Thus, the standard in this case is whether good cause is shown and whether the trial judge abused his discretion in his decision. The defaulting party does not have to show excusable neglect. The standard is more lax than that required for setting aside a default judgment pursuant to Rule 60(b). *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. den.*, 282 N.C. 425, 192 S.E. 2d 835 (1972).

[2] In this case we do not reach the issue of whether the trial judge abused his discretion in refusing to set aside the entry of default. From the face of the order, it is apparent that Judge Smith was operating under a misapprehension of the law. He denied defendants' motion to set aside entry of default stating that

> it appear[ed] to the Court . . . that the failure of the defendants to file answer or otherwise plead or appear in this action was not due to any of the reasons justifying relief set out in Rule 60(b) and good cause has not been shown for the setting aside of said entry.

Judge Smith was applying the more strict standards of Rule 60(b) and this was error. He was only to determine if good cause was shown to set aside the entry of default. This case will, therefore, be remanded to determine whether good cause is shown to set aside the entry of default.

On remand, we note that the trial judge in the exercise of his discretion should be guided by the following principles. Default judgments are not favored in the law. While litigants should not be able to disregard process or rules of procedure without impunity, any doubt in such cases should be resolved in favor of having cases decided on their merits. "[A] court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment." *Whaley v. Rhodes*, 10 N.C. App. 109, 111, 177 S.E. 2d 735, 736-37 (1970). Further, in determining whether good cause to set aside an entry of default exists, the trial judge should examine the pleadings, including the proposed answer defendants would file, if permitted, any competent affidavits, and any depositions available. If good cause is shown, then the entry of default should be set aside.

The order of Judge Stevens is vacated.

The orders of Judge Smith are reversed and the case is remanded.

Judge CLARK concurs in the result.

Judge HEDRICK dissents.

Judge CLARK concurring.

I concur in the result because it more closely approximates the result that would be reached if the appeal should be dismissed. If dismissed, the case would return to the trial court unobstructed by the "judgment of default"; and if there is a trial and final judgment, the appellant could then appeal and challenge the various rulings of the trial court where exceptions have been made and preserved on appeal. The judgment appealed from is interlocutory and not appealable. I would not elect to consider the case on its merits. This Court should pursue a policy of strict adherence to the Rules of Appellate Procedure which are designed to prevent premature and fragmentary appeals.

Judge HEDRICK dissenting.

I respectfully disagree with the results reached by the opinions of the majority. Since my colleagues have reached the same spurious result by travelling in opposite directions, I must treat each opinion separately.

First, I do agree with Judge Vaughn that the order of Judge Stevens dated 9 May 1979 setting aside the judgment of default dated 6 February 1978 must be vacated. The judgment of default entered by Judge Smith on 6 February 1978 was not a "final judgment" within the meaning of G.S. § 1-277 or G.S. § 1A-1, Rule 60(b). Thus, defendants had no right of immediate appeal from the judgment of default which determined the issue of liability only. The judgment of default entered by Judge Smith, although it precluded the defendants from defending the case on the issue of liability, was an interlocutory judgment, and was not immediately appealable. *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). The proper procedure for

defendants was to except to the entry of the default judgment, as they did, and use such exception as the basis of an assignment of error to be presented for review, when and if the case was appealed after the jury determined the issue of damages. Rule 60(b), by its express terms, applies only to *final judgments. O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). Rule 60(b) has no application to a default judgment entered pursuant to G.S. § 1A-1, Rule 55(a), where the issue of damages has not been determined. Judge Stevens, therefore, had no authority to consider defendants' motion to set aside the default judgment entered by Judge Smith, and his order entered pursuant to such motion setting aside the default judgment is a nullity and should be vacated. *O'Neill v. Bank, supra.*

Judge Vaughn's decision vacates Judge Stevens' order, and remands the proceeding to the Superior Court for another Superior Court judge "to determine whether good cause is shown to set aside the entry of default." Judge Vaughn exercises the "discretion" of this Court to reverse the "orders" of Judge Smith and to remand the case to the Superior Court on the premise that Judge Smith was "operating under a misapprehension of the law . . . [in] applying the more strict standards of Rule 60(b)" in not setting aside the "entry of default." While Judge Smith did recite in his order denying defendants' motion to set aside the entry of default that their failure to appear or plead "was not due to any of the reasons justifying relief set out in Rule 60(b)", he plainly stated that he was acting "in the discretion of the Court", and that the defendants had not shown "good cause" for setting aside the entry of default. Obviously, Judge Smith was not "operating under a misapprehension of the law" and was not applying the stricter standards of Rule 60(b) since he made no findings of fact which would have been necessary to support a conclusion of "mistake, inadvertence, surprise, or excusable neglect."

Although this Court may have discretionary authority to rule in some matters, it is, in my opinion, an improper exercise of that discretion for this Court to review and reverse interlocutory and discretionary rulings of the trial court unless or until such matters are before this Court on appeal or by appropriate writ, and the parties have had an opportunity to brief and argue their respective positions. The majority has remanded this case for another Superior Court judge to exercise his discretion with

respect to whether defendants' motion to set aside the entry of default should be denied, and plaintiff's motion for the entry of judgment by default should be allowed. In other words, the majority would have another Superior Court judge either affirm or overrule Judge Smith, in violation of the rule aptly stated by Judge Vaughn that "[g]enerally, one superior court judge cannot overrule another." [*Citing In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962).] If, upon remand, the next Superior Court judge, oblivious to Judge Vaughn's admonition that "[d]efault judgments are not favored in the law", in the exercise of his discretion again denies the defendants' motion to set aside the entry of default, and allows plaintiffs' motion for a default judgment, would this Court again, *ex mero motu*, exercise its "discretion" to review and reverse such orders, and remand for still another hearing before another judge, until the result desired by the majority has been reached?

Judge Clark would dismiss the appeal from Judge Stevens' order setting aside the default judgment on the theory that such order was interlocutory and not immediately appealable. The problem with this ruling is that it leaves standing an order which is void. Judge Clark has in effect allowed one Superior Court judge to overrule another Superior Court judge on essentially the same evidence. While stating that "[t]his Court should pursue a policy of strict adherence to the Rules of Appellate Procedure which are designed to prevent premature and fragmentary appeals", Judge Clark has, in my opinion, ignored not only the Rules of Appellate Procedure, but the Rules of Civil Procedure as well, in dismissing the appeal from Judge Stevens' void order, when it should be vacated, and in reviewing and reversing Judge Smith's orders, and in remanding the case to be considered by another Superior Court judge.

I vote simply to vacate Judge Stevens' order and to remand the proceeding to the Superior Court for trial on the issue of damages.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER

No. 7920SC387

(Filed 4 March 1980)

1. **Contempt of Court § 5— order to show cause—no proper verification—no civil contempt**

An order directing defendant to show cause why he should not be held in contempt could not lawfully be based on civil contempt since no petition, affidavit or other proper verification served as a basis for the issuance of the order, the order being issued on the basis of a corporate receiver's unsworn testimony given *ex parte* to the court.

2. **Contempt of Court § 5.1— indirect criminal contempt—absence of proper verification—show cause hearing—jurisdiction over defendant**

Where defendant was accused of mismanaging, converting and wasting corporate assets, and the court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the tax returns and list of assets was indirect criminal contempt, and the trial court had jurisdiction to determine whether or not defendant had violated its order to produce his records, even in the absence of a petition, affidavit or other proper verification.

3. **Contempt of Court § 6; Constitutional Law § 24.2— contempt proceeding based on affidavit—right to confront witness abridged**

Inasmuch as an adjudication of contempt against defendant was based on the affidavit of a receiver of the corporation, the assets of which defendant allegedly mismanaged, converted and wasted, the adjudication was invalid, since the affiant did not testify at the contempt hearing and was not present; defendant had the right to confront and cross-examine witnesses by whose testimony his asserted violation was to be established; and defendant did not waive that right inasmuch as he adamantly objected to the use of the affidavit as a basis for holding him in contempt.

4. **Contempt of Court § 6; Constitutional Law § 74— failure to produce tax records and list of assets—self-incrimination pled—no contempt for failure to produce records**

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets and he was instructed by the court to cooperate with corporate receivers, to supply them with copies of his tax returns, and to prepare and give to the receivers a schedule of his assets, defendant's failure to produce his tax returns and a schedule of his assets could not serve as the basis for finding him in contempt, since defendant claimed that his privilege

against self-incrimination would be violated if he were compelled to produce the documents, and defendant could not be required to write out a list of his personal assets.

5. **Contempt of Court § 6— show cause hearing—matters considered**

Since the sole question before the trial judge to be adjudicated at a hearing of an order to show cause why defendant should not be held in contempt for violation of the court's decree was whether the decree had been violated, the court correctly disregarded hearing defendant's contentions that the trial court erred in appointing receivers, in not considering his motion to alter and amend the findings of fact and conclusions of law in the court's original order, and in not hearing his motion to vacate.

APPEAL by defendant, W. Horace Lowder, from *Seay, Judge.* Order entered 21 February 1979 in Superior Court, UNION County, and order entered 28 February 1979 in Superior Court, MOORE County. Heard in the Court of Appeals 30 November 1979.

On 12 February 1979, defendant Lowder was ordered to appear in court on 21 February 1979 and show cause why he should not be held in contempt of a preliminary injunction filed on 9 February 1979. The 9 February order: (1) appointed receivers to operate businesses of which defendant was chief executive officer pending a trial on the merits of allegations that defendant had mismanaged, diverted, converted, and wasted corporate assets; (2) ordered defendant to provide the plaintiffs in the lawsuit and the receivers complete copies of his personal federal income tax returns, complete copies of his state tax returns, and a schedule listing the nature, extent, value, and location of all of his assets; and (3) enjoined defendant from interfering with the authority or duties of the receivers.

Prior to the 21 February hearing, defendant hired an attorney who filed motions to name individual stockholders in the corporations as additional parties in the lawsuit, to vacate a supplemental receivership order entered subsequent to the show cause order, and to alter and amend the findings of fact and conclusions of law upon which the preliminary injunction and order appointing a receiver were based.

At the 21 February hearing, defendant was held in contempt for failing to comply with the 9 February order, in that he:

"1. W. Horace Lowder, in contravention of the Orders of this Court, has interfered with and obstructed the Receivers

in carrying out their Court appointed duties in that W. Horace Lowder undertook to close the feed business of All Star Foods, Inc. and directed letters to the customers of that company that All Star Foods, Inc., was discontinuing its feed production as of February 10, 1979;

2. W. Horace Lowder has failed and refused to immediately relinquish possession of all property of the corporate defendants including, but not limited to, keys and an automobile owned by one of the companies in receivership, which property is in his possession;

3. W. Horace Lowder has not only refused but also has expressly advised the Receivers that he would not cooperate with them in the operation of the businesses and further advised the Receiver, John M. Bahner, Jr., that he had better not try to operate the businesses of the corporate defendants, or spend any time at the offices of All Star Foods, or the employees would walk out;

4. W. Horace Lowder has failed and refused to account to the plaintiffs, and the Receivers, for all assets of the corporate defendants, Carolina Feed Mills, Inc. and for all of the personal assets of W. Horace Lowder;

5. W. Horace Lowder has failed and refused to turn over to the Receivers the combination and keys of all locks and safes of the corporate defendants, together with all safety deposit box keys, notwithstanding the fact that the Receiver, John M. Bahner, Jr., on several occasions, has specifically asked him to do so and specifically advised him that his failure to do so was in contravention of the Order of this Court;

6. W. Horace Lowder has failed to provide the plaintiffs, and the Receivers, copies of his personal federal income tax returns, together with all supporting schedules and work papers in at least sufficient detail as is necessary to construct complete and accurate schedules in accordance with Internal Revenue Service regulations, and has failed to provide the plaintiffs and Receivers with copies of his North Carolina income tax returns and North Carolina intangible tax returns;

7. W. Horace Lowder has failed to provide plaintiffs, and the Receivers, a schedule of the nature, extent, value and location, of all of his assets, whether real, personal, tangible or intangible, and regardless of whether owned solely by him, or jointly with others, including assets held in the name of Tanglewood Farms . . ."

Defendant objected to the contempt citation on the grounds that: (1) the show cause order had been issued without an affidavit or other verification supporting it; (2) the only evidence of a contempt violation was a belated affidavit filed by one of the receivers who was not available at the hearing for cross-examination; and (3) the 9 February order, inasmuch as it required defendant to furnish copies of his federal and state income tax returns, violated defendant's Fifth Amendment right against self-incrimination.

The trial court gave defendant seven days to purge himself of contempt. Defendant gave oral notice of appeal.

On 28 February 1979, the trial court convened to determine whether or not defendant had purged himself of his contempt. Defendant had complied with all portions of the court's previous orders, except the requirement that he furnish complete copies of his personal federal and state income tax returns and a schedule of his assets. The court held that such refusal was both criminal and civil contempt and imposed a fine of $250 per day beginning 1 March 1979 for each day that defendant refused to furnish such documents.

Defendant appealed.

Moore & Van Allen, by John T. Allred and Jeffrey J. Davis, for the plaintiffs and the receivers.

DeLaney, Millette, DeArmon & McKnight, by Ernest S. DeLaney, Jr., for defendant appellant.

ERWIN, Judge.

The foremost question presented is whether the trial court had jurisdiction to adjudge defendant in contempt on 21 February 1979.

G.S. 5A-11 provides in pertinent part:

"§ 5A-11. *Criminal contempt.*—(a) Except as provided in subsection (b), each of the following is criminal contempt:

* * *

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution."

while G.S. 5A-21(a) provides:

"5A-21. *Civil contempt; imprisonment to compel compliance.*—(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order."

As recognized in G.S. 5A-12(d) and G.S. 5A-21(c), a person may be found to be in both criminal and civil contempt, although only a single act was committed. Thus, defendant's acts, *i.e.*, his failure to comply with the court's order to refrain from interfering with the receivers as they carried out their duties and his failure to furnish copies of his income tax returns could possibly be acts of civil as well as criminal contempt.

[1] Two means are available to institute proceedings for civil contempt. One means is the issuance of an order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, and the other is issuance of notice by a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. G.S. 5A-23. In either case, G.S. 5A-23 provides that "[t]he order or notice may be issued on the motion and sworn statement or affidavit of one with an interest

in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt." Although the language used in the statute seems to be permissive in nature, prior case law under the antecedent statute established that in cases of civil contempt, previously denominated as cases *as for* contempt, a petition, affidavit, or other proper verification charging a willful violation of an order of court was necessary in order for an order to show cause to issue. *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 154 S.E. 2d 313 (1967); *In re Deaton*, 105 N.C. 59, 11 S.E. 244 (1890). We do not believe the Legislature has altered this requirement. *See* G.S. 5A-23; Billings, Contempt, Order in the Courtroom, Mistrials, 14 Wake Forest L.R. 909, 917 (1978). In the instant case, no petition, affidavit, or other proper verification served as a basis for the issuance of the order to show cause. To the contrary, the order was issued on the basis of the receiver's unsworn testimony given *ex parte* to the court. Thus, the order to show cause could not lawfully have been one based on civil contempt.

[2] G.S. 5A-13 provides:

> "§ 5A-13. *Direct and indirect criminal contempt; proceedings required.*—(a) Criminal contempt is direct criminal contempt when the act:
>
> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court."

Under prior statutory case law, failure to comply with a prior court order would amount to an act of indirect contempt when the act was committed outside the presence of the court, at a distance from it, even though the act was one which tended to degrade, interrupt, prevent, or impede the administration of justice as here. G.S. 5-7 (since repealed); *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 169 S.E. 2d 867 (1969); *Galyon v. Stutts*, 241 N.C. 120, 84 S.E. 2d 822 (1954); *Ingle v. Ingle*, 18 N.C. App. 455, 197 S.E. 2d 61 (1973). This was so, even though the act fell within the

confines of G.S. 5-1(4) (since repealed). Accordingly, we hold that defendant's acts were not acts of direct contempt within the meaning of G.S. 5A-13(a)(3).

G.S. 5A-13(b) provides that "[a]ny criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15." G.S. 5A-15(a) provides that in cases of indirect contempt, a judicial officer "may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court." The language of G.S. 5A-15(a) is substantially the same as that contained in its predecessor statute, G.S. 5-7. Where an order to show cause was based on an act of indirect contempt, the filing of a petition, an affidavit, or other proper verification was not required as a prerequisite to issuance of the order under G.S. 5-7, *see In re Deaton*, 105 N.C. 59, 11 S.E. 244 (1890), although they may be a proper basis for issuance of the show cause order. *See Rose's Stores v. Tarrytown Center, supra.* We do not believe that G.S. 5A-15(a) imposes such a limitation, and, thus, we hold that the trial court had jurisdiction to determine whether or not defendant had violated its 9 February order on 21 February 1979. Nevertheless, we hold that the trial court erred in holding defendant in contempt.

[3] The trial court's basis for holding defendant in contempt was twofold: (1) an affidavit had been submitted by John M. Bahner, Jr., relating defendant's alleged contemptuous acts; and (2) defendant's refusal in open court to furnish complete copies of his income tax returns and his refusal to furnish a list, schedule, of his personal assets. The affiant did not testify at the hearing and was not present, nor did defendant testify at the hearing.

In *Cotton Mills v. Local 578*, 251 N.C. 218, 111 S.E. 2d 457 (1959), *cert. denied*, 362 U.S. 941, 4 L.Ed. 2d 770, 80 S.Ct. 806 (1960), our Supreme Court held that a person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of Article I, Section 17 (now enacted as Article I, Section 19) of the Constitution of North Carolina, synonymous with due process of law under the United States Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established, but the right

was waivable. Here, no waiver has occurred. Defendant, through his counsel, adamantly objected to the use of the affidavit as a basis for holding him in contempt. By doing so, he preserved his right to confront and cross-examine the witnesses against him, and inasmuch as the contempt adjudication was based on the affidavit, it was invalid.

[4] Under the Fifth Amendment of the United States Constitution, an individual may not be compelled in any criminal case to be a witness against himself. The privilege applies in any proceeding, civil or criminal, where the evidence supplied may serve as a link in a chain leading to a criminal conviction. *Maness v. Meyers*, 419 U.S. 449, 42 L.Ed. 2d 574, 95 S.Ct. 584 (1975), *accord, Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). Defendant has timely asserted the federal privilege, and, thus, we must determine its applicability.

The leading federal case determining whether or not an individual may be compelled to produce his federal income tax returns without violating his privilege to be free from self-incrimination is *Fisher v. United States*, 425 U.S. 391, 48 L.Ed. 2d 39, 96 S.Ct. 1569 (1976). In *Fisher*, the Supreme Court was called upon to decide whether enforcement of summonses served by the Internal Revenue Service on taxpayers' attorneys in investigations of possible civil or criminal liability under the federal income tax laws, which directed the attorneys to produce relevant documents of the taxpayers' accountants that had been given to the attorneys by the taxpayers for the purpose of obtaining legal advice in the tax investigation, violated the taxpayers' Fifth Amendment privilege against self-incrimination. In order to decide the propriety of the summonses, as they related to the assertion of the attorney-client privilege, the Court stated that it was necessary to decide the question now before us, but refused to do so on the grounds that the papers were not "private" ones; *i.e.*, they were not prepared by the taxpayer. Nevertheless, the Court stated:

> "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the

> taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio v United States*, 354 US 118, 125, 1 L Ed 2d 1225, 77 S Ct 1145 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof."

425 U.S. at 410, 48 L.Ed. 2d at 56, 96 S.Ct. at 1581. What *Fisher* reaffirms is that compulsion, incrimination, and testimonial communication must all exist before a claimant can invoke the protection of the Fifth Amendment privilege. That the filing of an income tax return is testimonial was established in *Garner v. United States*, 424 U.S. 648, 656, 47 L.Ed. 2d 370, 378, 96 S.Ct. 1178, 1183 (1976), wherein the Court stated: "The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a 'witness,' as that term is used herein." There can be no serious doubt that an order to produce is compulsory. *Fisher v. United States, supra; see also Rey v. Means, In & For Tulsa Cty.*, 575 P. 2d 116 (1978). Thus, the essential inquiry becomes whether the information sought is incriminating. Here, defendant has been accused of diverting, converting, and misusing corporate assets. The diversion and conversion are surely susceptible to criminal punishment. Submission of the tax returns would surely furnish a link in the chain leading down the road to criminal prosecution. The privilege against self-incrimination does not protect defendant from prosecution, but it does protect him from being a witness against himself. Inasmuch as *Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886), protects against such disclosures, it is still the law of the land, and defendant could not be held in contempt for failure to furnish copies of his federal and state income tax returns. Furthermore, he could not be required to write out a list of his personal assets, *see Marchetti v. United States*, 390 U.S. 39, 19 L.Ed. 2d 889, 88 S.Ct. 697 (1968), and the contempt citation could not be upheld on that ground. Counsel for the plaintiffs and the receivers contend that defendant has waived the privilege against self-incrimination pointing to *Garner*

v. United States, supra. We hold that he has not. *Garner* did not present a situation where defendant was forced to produce the disputed tax returns. In *Garner*, the government already had the tax return.

[5] We need not decide the propriety of the 28 February 1979 order, since in light of our foregoing text, it could not stand. We are compelled, however, to address defendant's contentions that the trial court erred in appointing the receivers, in not considering his motion to alter and amend the findings of fact and conclusions of law in the 9 February order, and in not hearing his motion to vacate.

In denying to hear defendant's motions at the show cause hearing, the trial court stated:

> "COURT: We can't conduct a very full hearing on those things, Mr. DeLaney, I have not got copies of those, I don't have the files here. They were not scheduled for a hearing at this time.
>
> MR. DELANEY: Judge, I'm in this position, I know—I feel that these are matters which should be reviewed."

In refusing to hear these matters, the trial court did not commit error. The sole question before him to be adjudicated at a hearing of an order to show cause why defendant should not be held in contempt for violation of the court's decree was whether the decree had been violated, and the court correctly disregarded hearing anything else. *Rose's Stores v. Tarrytown Center, supra; Williamson v. High Point*, 214 N.C. 693, 200 S.E. 388 (1939). Since defendant's motions are still pending, they may be scheduled for hearing on remand. Other questions presented need not be decided in light of our foregoing text.

The orders adjudging defendant in contempt are

Reversed.

Judges CLARK and ARNOLD concur.

GARY D. ETHERIDGE PETITIONER v. ELBERT L. PETERS, JR., COMMISSIONER, DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 793SC580

(Filed 4 March 1980)

1. **Automobiles § 126.3— breathalyzer test—thirty minute time limit**

The thirty minute time limit for submitting to a breathalyzer test referred to in G.S. 20-16.2(a)(4) is absolute, and a person accused of driving under the influence has no right to delay the test in excess of thirty minutes while waiting for his attorney to arrive or to return his call.

2. **Automobiles § 126.3— breathalyzer test—no constitutional right to consult attorney or refuse test**

A person enjoys no constitutional right to confer with counsel before deciding whether to submit to a breathalyzer test, and the State is not constitutionally required to give an accused an option to refuse the test.

3. **Automobiles § 126.3— willful refusal to take breathalyzer test—elapse of time while awaiting attorney**

Petitioner willfully refused to submit to a breathalyzer test where the court found that petitioner was advised of his rights under G.S. 20-16.2(a); petitioner indicated to the breathalyzer operator that he would like to contact an attorney or have an attorney present during the test; petitioner called an attorney's home and left a message for the attorney to come to the breathalyzer room; the breathalyzer operator offered the test to defendant at the end of a twenty minute waiting period and again at the end of the thirty minute waiting period; petitioner's attorney arrived within two to four minutes after the thirty minute period expired; and petitioner, upon the advice of his attorney, indicated a willingness to take the test approximately five minutes after the thirty minute period expired, but the operator refused to administer the test at that time.

Judge CLARK concurring.

Judge VAUGHN dissenting.

APPEAL by respondent from *Rouse, Judge*. Judgment entered 4 April 1979 in Superior Court, CRAVEN County. Heard in the Court of Appeals on 17 January 1980.

On 18 March 1978 petitioner was driving his automobile near Carolina Pines on U.S. 70 in Craven County when he was stopped and arrested for operating a motor vehicle while under the influence of an intoxicating beverage. He was taken by Trooper Larry DuBose to the Craven County Sheriff's Department and requested by Trooper DuBose to submit to a chemical test of breath

for the purpose of determining the alcoholic content of his blood. Trooper Johnny Brown, a duly licensed breathalyzer operator, was present to administer the test. After thirty minutes had passed and petitioner had not taken the test, Trooper Brown disassembled the breathalyzer machine and recorded the test results as a refusal by petitioner to submit to the test. Thereafter, by letter dated 19 May 1978, the Division of Motor Vehicles advised petitioner that, pursuant to G.S. § 20-16.2, his driver's license was being revoked for a period of six months beginning 29 May 1978.

Petitioner thereupon sought and obtained on 25 May 1978 an Order restraining the Division from revoking his license until the matter was determined *de novo* in Superior Court, pursuant to G.S. § 20-16.2(e). He then petitioned the court to permanently restrain the Division from revoking his driving privileges, and the matter was heard before Judge Rouse on 9 October 1978. After the hearing Judge Rouse made detailed findings of fact and concluded that petitioner had not willfully refused to take the test. He ordered the Division to rescind its action in revoking the petitioner's license. Respondent appealed.

Beaman, Kellum, Mills & Kafer, by David P. Voerman, for the petitioner appellee.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Assistant Attorneys General William B. Ray and Mary I. Murrill, for the respondent appellant.

HEDRICK, Judge.

G.S. § 20-16.2 in pertinent part provides:

> *Mandatory revocation of license in event of refusal to submit to chemical tests; right of driver to request test.*—(a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, . . . to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at

the request of a law-enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor. The law-enforcement officer shall designate which of the aforesaid tests shall be administered. The person arrested shall forthwith be taken before a person authorized to administer a chemical test and this person shall inform the person arrested both verbally and in writing and shall furnish the person a signed document setting out:

(1) That he has a right to refuse to take the test;

(2) That refusal to take the test will result in revocation of his driving privilege for six months;

(3) That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law-enforcement officer; and

(4) That he has the right to call an attorney and select a witness to view for him the testing procedures; *but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.*

. . .

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

[Emphasis added.]

In *Seders v. Powell*, 298 N.C. 453, 259 S.E. 2d 544 (1979), a similar case involving facts virtually identical to those in the case at bar, our Supreme Court, in affirming the decision of this Court reported at 39 N.C. App. 491, 250 S.E. 2d 690 (1979), enunciated the following principles with respect to G.S. § 20-16.2:

[1] The thirty-minute time limit referred to in G.S. § 20-16.2(a)(4) is absolute, and a person accused under the statute has no right to delay the test in excess of thirty minutes while waiting for his attorney to arrive or to return his call. [*See also State v. Lloyd*, 33 N.C. App. 370, 235 S.E. 2d 281 (1977).] Thus, a person who delays taking the test for more than thirty minutes in order to await an attorney runs the risk of having to face the consequences when the clock stops: that is, his failure to submit to the test will be recorded on the officer's report as a refusal. With respect to such a failure, the *Seders* Court stated: "Plaintiff's action constituted a conscious choice purposefully made and *his omission to comply with this requirement of our motor vehicle law amounts to a willful refusal.*" *Seders v. Powell, supra* at 461, 259 S.E. 2d at 550 [Citations omitted.] [Our emphasis.]

[2] The *Seders* decision further established beyond question that a person enjoys no constitutional right to confer with counsel before deciding whether to submit to the breathalyzer test. Moreover, it has been held that the State is not constitutionally required to give an accused an option to refuse the test. That is, the State can require that the test be administered without any delay or process other than reasonable grounds to believe the driver has violated the law. *See Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966). Clearly, then, allowing the driver thirty minutes time to decide whether to submit to the test, while providing that he is deemed to have refused at the expiration of the thirty minutes, is a constitutionally sound principle.

In the present case, the trial court made the following unchallenged findings of fact:

FINDINGS OF FACT

. . .

4. Petitioner was arrested upon reasonable grounds at 8:45 p.m. on March 18, 1979 [sic] by Trooper Larry DuBose of

the North Carolina Highway Patrol in Craven County and charged with the offense of driving under the influence of intoxicating liquor.

5. That the petitioner was forthwith taken before Trooper Johnnie [sic] W. Brown of the North Carolina State Highway Patrol, a duly licensed and qualified breathalyzer operator, and in the presence of Trooper Brown, the petitioner was requested by Trooper DuBose to submit to a chemical test of breath.

6. That Trooper Brown informed the petitioner verbally and in writing, furnished a signed document setting out all of the petitioner's rights pertaining to the breathalyzer test under the provisions of G.S. 20-16.2(a). Trooper Brown completed reading the rights form to the petitioner at 9:19 p.m.

7. Petitioner . . . indicated to Trooper Brown that he would like to contact an attorney or have an attorney present during the test.

8. Prior to and after being advised of his rights with respect to the breathalyzer test, petitioner made calls from the telephone located within the Magistrate's Office in New Bern, North Carolina, in an attempt to contact an attorney.

. . .

10. Petitioner eventually called the home of Mr. Lamar Sledge, an attorney practicing law in New Bern, North Carolina. Mr. Sledge was not at home so a message was left. Mr. Sledge received the message when he returned home.

11. Upon being advised that he had received a call from someone at the Magistrate's office, Mr. Sledge contacted the Magistrate's office and was told that a person named Etheridge had asked for him to come to the Magistrate's office and that Mr. Etheridge had been charged with driving under the influence. Mr. Sledge immediately proceeded to the breathalyzer room.

12. Trooper Brown offered the breathalyzer test to petitioner at the conclusion of the required 20-minute waiting period and at the end of the 30-minute waiting period.

13. At the end of the 30-minute period Officer Brown proceeded to disassemble the breathalyzer machine. Within two to four minutes after the 30-minute period expired Mr. Sledge arrived. The officer had not completed the process of disassembling the breathalyzer machine. He was in the process of taking the ampules out when the attorney arrived.

14. Mr. Sledge asked to speak with petitioner. Officer[s] DuBose and Brown were there and indicated he could talk with the petitioner. . . .

15. Within two or three minutes after he arrived petitioner, upon advice of Mr. Sledge, indicated a willingness to take the test.

16. Officer Brown refused to administer the test at that time. This was approximately thirty-five minutes after the petitioner was advised of his rights with respect to the breathalyzer test.

17. Trooper Brown recorded the test results as a refusal on the part of the petitioner.

18. Petitioner's request to take the test was made within five minutes of the expiration of the 30-minute period, and was made immediately after consultation with his attorney.

By exceptions numbers 2 and 4, respondent attacks the following finding and conclusion:

19. Petitioner did not at any time refuse to take the test. [Finding of Fact.]

3. Petitioner herein, Mr. Gary D. Etheridge, did not willfully refuse to submit to a breathalyzer test. [Conclusion of Law.]

[3] Regardless of the label, the holding of the trial judge that the petitioner did not willfully refuse to take the breathalyzer test under the circumstances of this case is an erroneous conclusion. The unchallenged findings of fact when viewed in light of the controlling principles enunciated by Justice Carlton in *Seders*, dictate the conclusion that petitioner did willfully refuse to take the breathalyzer test within the meaning of the statute. He was informed of his rights, and he consciously chose to run the risk of

waiting too long. As stated in *Seders*, such action amounts to a willful refusal.

For the reasons stated, the judgment of the Superior Court must be reversed. The cause is remanded to that court for the entry of an order based on the unchallenged findings of fact concluding that the petitioner willfully refused to take the breathalyzer test within the meaning of G.S. § 20-16.2, and reinstating the Order of the Division of Motor Vehicles revoking petitioner's license.

Reversed and remanded.

Judge CLARK concurs.

Judge VAUGHN dissents.

Judge CLARK concurring.

The ruling and language in the case *sub judice* and the *Seders* case should not be interpreted as meaning that, as a matter of law, there was a *willful refusal* to submit to the chemical test because of an omission or failure to do so within or immediately after the thirty-minute period. The State has the burden of proving that such omission or failure constituted a willful refusal.

In *Seders* the evidence supported the findings of fact which in turn supported the conclusion that the driver willfully refused to take the test.

In the case *sub judice*, the evidence supported the findings of fact, but the findings of fact did not support the conclusion that there was no willful refusal. There were some contradictions in the evidence, which placed on the trial court the duty of resolving these contradictions by finding facts. Petitioner testified that he was relying on the clock in the magistrate's office, that there was a discrepancy between the patrolman's watch and the clock, and that he did not know the thirty-minute period had expired when he agreed to take the test. In my opinion this evidence would have supported a finding by the trial court that the time period had not expired, or that though it had expired the defendant in

good faith did not know the time period had expired when he agreed to take the test. Such finding would support the conclusion by the court that there was no willful refusal. Instead, the court made findings which negated petitioner's evidence and established "a conscious choice purposefully made" (quoting from *Seders*) and thus erred in concluding that there was no willful refusal.

Willful refusal is a necessary requirement under G.S. § 20-16.2(c), and the trial court has the duty of judicially determining this question. *See Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 182 S.E. 2d 553 (1971).

Judge VAUGHN dissenting.

In every case of this nature at least two things will have taken place. A suspect under arrest will have been offered the test and thirty minutes will have passed without it having been administered. These are the only circumstances in this case that mirror those in *Seders*. There, although the suspect denied that he knew his time had started to run, the trooper testified, " 'I requested Mr. Seders to take the breath test and in fact requested him three times but Mr. Seders refused to take the test and said he was *not* going to take the test until he talked with his lawyer.' " 298 N.C. at 455, 259 S.E. 2d at 546. Based on this and other testimony, the trial judge found that plaintiff wilfully refused to submit to the test. On appeal plaintiff contended that the facts presented to the trial court were insufficient to support its determination that the refusal was wilful. Crucially missing, he argued, is any evidence that he had knowledge that his time was running while he was waiting for his attorney to return his call. The Supreme Court disagreed and noted that the trooper testified that "he warned plaintiff on three occasions that his time was running out and told plaintiff how many minutes he had remaining." *Id.* at 461, 259 S.E. 2d at 549. The Court then affirmed the trial court by applying the following familiar rule. "The findings of the trial court are conclusive on appeal if there is evidence to support them. This is true even though the evidence might sustain findings to the contrary." *Id.* at 460-61, 259 S.E. 2d at 549 (citations omitted). The Court then went on to dispose of other issues that are not raised in the case before us. For example, plaintiff here, unlike the one in *Seders*, does not contend that

he had a *right* to delay the test beyond thirty minutes, that he had a constitutional right to counsel before taking the test or that the thirty minute limit is so unreasonable as to be in violation of due process. The Court in *Seders* surely did not hold that a mere showing that a conscious suspect did not take the test within thirty minutes of the time it was properly offered precludes the judge of the facts from finding or failing to find a wilful refusal. To the contrary, it merely affirmed the long-standing rule in this State that it is the exclusive function of the trial judge to make that determination and that his determination is conclusive if there is evidence before him to support that determination.

The burden of proof was on the State to persuade the trier of the facts that plaintiff *wilfully refused* to submit to the test. It failed to carry that burden. Even if the burden of proof had been on plaintiff to *disprove* a wilful refusal, he offered evidence from which the trial judge could and properly did conclude that he had met that burden. The finding supports the judgment. The judge is not required to find and recite every evidentiary fact. He needs to find only the ultimate facts. In my opinion he has done so. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971).

The court's seventh finding of fact is as follows, "Petitioner did not decline to take the test but indicated to Trooper Brown that he would like to contact an attorney or have an attorney present during the test." There is ample evidence to support that finding as well as the others made by the court. Plaintiff's evidence tends to show the following. He was well aware of the six month automatic license suspension penalty for refusing to take the test. He wanted to take the test to avoid that penalty. He did not refuse to take the test and did not intend to do so. He was in a strange town and wanted to first talk with an attorney. He did not have a watch and there was not a clock in the breathalyzer room. The trooper told him when he had used twenty minutes but did not thereafter advise him or his attorney that his time was about to expire. He did not learn that his time was about to expire until he asked the trooper to administer the test. He relied on a clock in the magistrate's office from where he was trying to telephone an attorney. There was a discrepancy between the time on that clock and the trooper's watch. The evidence raised a pure question of credibility which he resolved in

favor of plaintiff by finding that he did not at any time decline to take the test. I note also that the court found that the test was offered at the end of the thirty-minute period. Significantly, however, he did not find that the trooper advised plaintiff at that time that his time was about to expire although the trooper so testified. My vote is to affirm the judgment of the trial court.

I would also like to suggest that the purpose of the statute is to gather evidence on the degree of a suspect's intoxication in as many cases as possible. It was not intended as a snare for the summary revocation of licenses. I do not suggest that the time should be extended for even one second when the accused is obviously procrastinating. On the other hand, sound judgment should be exercised with the goal being to get the evidence if it is reasonably possible.

DONALD A. KAHAN AND JACK S. JACOBS, PLAINTIFFS HANOVER BROOK, INC., PLAINTIFF INTERVENOR v. SAMUEL M. LONGIOTTI, DEFENDANT

No. 7915SC616

(Filed 4 March 1980)

1. **Appeal and Error § 6.3— ruling on jurisdiction—immediate appealability**

An adverse ruling on the jurisdiction of the court is immediately appealable.

2. **Rules of Civil Procedure § 58; Appeal and Error § 14— notice of appeal—time running from entry of judgment—clerk's entry improper**

Though the clerk's notation in the minutes of the court is ordinarily the date from which time for notice of appeal runs, the trial judge in this case directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, and the clerk should not have noted an entry of judgment on the date of the hearing.

3. **Rules of Civil Procedure §§ 4, 24— motion to intervene—service sufficient to acquire jurisdiction**

An intervenor party who is granted permission to intervene pursuant to G.S. 1A-1, Rule 24(b)(2) is not required then to issue a summons and complaint pursuant to Rule 4, but the service pursuant to Rule 5 of the motion to intervene accompanied with the complaint is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction over the party are met.

APPEAL by plaintiffs, plaintiff intervenor and defendant from *McKinnon, Judge*. Orders entered 27 February 1979 and 14 June 1979 in Superior Court, ORANGE County. Heard in the Court of Appeals 29 January 1980.

This is a civil action brought by plaintiffs and plaintiff intervenor to recover money which they alleged was due them from defendant in connection with the development of a shopping center near Rocky Mount, North Carolina. Plaintiffs filed a complaint on 15 June 1977 alleging that they and defendant entered into a partnership or joint venture to develop a shopping center evidenced by a letter agreement dated 18 June 1974 whereby defendant would be liable for half of all funds paid or advanced for the development. Plaintiffs alleged that pursuant to the agreement they advanced $398,856.00 for the project and defendant was liable for half this amount. Defendant filed answer denying the claim of liability to plaintiffs and counterclaimed against plaintiffs for failure to perform their obligations with respect to the proposed mall. In his defense to plaintiffs' claim, defendant alleged in part that "the plaintiffs (through a corporation owned by them, Hanover Brook, Inc.) and the defendant entered into an agreement with W. Roy Poole and Mary R. Poole . . . to purchase certain property. . . . The plaintiffs and the defendant proposed to develop on that property a shopping center. . . ."

On 27 September 1978, a Motion to Intervene in this action was filed by plaintiff intervenor, Hanover Brook, Inc. A proposed complaint was attached alleging as a first cause of action a right to an accounting for a joint venture or partnership between plaintiff intervenor and defendant for development of the shopping center near Rocky Mount, North Carolina. Through the accounting, plaintiff intervenor sought recovery of half of the losses in the project. The complaint contained a second cause of action alleging that plaintiff intervenor was substituted for plaintiffs in the performance of the partnership agreement evidenced by the 18 June 1974 letter agreement, which was the basis of plaintiffs' complaint. Plaintiff intervenor alleged a novation which made it the assignee of the original plaintiff and that it was, therefore, entitled to an accounting. On 6 December 1978, Judge F. Gordon Battle entered an order granting, pursuant to Rule 24(b)(2) of the Rules of Civil Procedure, plaintiff intervenor's motion. The order provided in part:

3. The proposed pleading attached to the applicant's motion to intervene shall constitute the initial pleading of the intervenor plaintiff; and it shall be deemed to have been filed the date of this order;

4. The defendant herein shall have thirty days from the date of this order to plead or otherwise respond to the intervenor's complaint;

5. Discovery in this action shall be re-opened and may continue up to thirty days before this action is set for trial.

No summons was ever issued to defendant in connection with plaintiff intervenor's suit. Defendant moved to dismiss the complaint on grounds of insufficiency of process and insufficiency of service of process. After a 20 February 1979 hearing, Judge Henry A. McKinnon, Jr., entered an order on 27 February 1979 denying the motion to dismiss. The trial judge found as facts:

1. On September 26, 1978, Thomas P. McNamara, attorney for the intervenor, served a copy of the Intervenor's Motion to Intervene and the Intervenor's Complaint on defendant Samuel M. Longiotti by mailing a copy of both these documents in the United States Mail, first-class, postage prepaid to the attorney of record for the defendant;

2. The attorney of record for Samuel M. Longiotti submitted a memorandum in opposition to the Motion to Intervene, dated October 26, 1978, to the court;

3. After argument of counsel on October 26, 1978, The Honorable F. Gordon Battle, Judge of Superior Court, entered an Order dated November 6, 1978, granting the intervenor's motion;

4. Paragraph 3 of the Order granting the motion to intervene provided that the proposed pleading attached to the applicant's Motion to Intervenor [*sic*] shall constitute the initial pleading of the intervenor plaintiff; and it shall be deemed to have been filed the date of that Order;

5. Paragraph 4 of the Order granting the motion to intervene provided that the defendant would have 30 days from the date of the Order to plead or otherwise respond to the Intervenor's Complaint;

6. The original Complaint and the Intervenor's Complaint alleged certain transactions with the defendant with respect to a shopping center known as Sunset West Mall near Rocky Mount, North Carolina;

7. The $199,000 sued for in the original plaintiff's Complaint is included in the $312,000 sued for in the Intervenor's Complaint.

Upon these facts, the trial judge concluded plaintiff intervenor was not required to have summons issued pursuant to Rule 4(a) of the Rules of Civil Procedure but instead he was to comply with Rule 5 of the Rules of Civil Procedure and plaintiff intervenor had complied with Rule 5. The trial judge further concluded that the 6 November 1978 order really performed the function of a summons since it gave defendant thirty days in which to respond and that service pursuant to Rule 5 gave defendant sufficient notice.

At the 20 February 1979 hearing, the trial judge instructed plaintiff intervenor's attorney to prepare an order within twenty days. Defendant's attorney requested notice of the signing and entry of the order which the trial judge granted. The trial judge received and signed a copy of the order on 27 February 1979, and a copy was mailed to defendant's attorney, who filed written notice of appeal on 8 March 1979. Without the knowledge of the trial judge, the clerk, on the day of the hearing, made a notation in the minutes of the court that defendant's motions to dismiss plaintiff intervenor's complaint were denied that day, 20 February 1979.

On 26 April 1979, plaintiffs and plaintiff intervenor moved to dismiss the appeal on the ground defendant had not given notice of appeal within ten days of the trial judge's order. At a 4 June 1979 hearing, Judge McKinnon denied the motion ruling that the parties and the trial judge had agreed at the 20 February 1979 hearing that the time for responding to plaintiff intervenor's complaint would not begin to run until the written order had been signed, filed and notice given to defendant and that he did not intend the order to be final until an approved written order was signed. From this ruling, plaintiffs and plaintiff intervenor appealed.

Purrington, McNamara and Pipkin, by Ashmead P. Pipkin, for plaintiffs and plaintiff intervenor appellants and appellees.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Mark R. Bernstein and Fred T. Lowrance, for defendant appellant and appellee.

VAUGHN, Judge.

[1, 2] The trial court's ruling denied defendant's motion to dismiss for insufficiency of process and improper service of process. Without proper and sufficient service of process, the trial court had no jurisdiction over his person. An adverse ruling on the jurisdiction of the court is immediately appealable.

> Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . .

G.S. 1-277(b). Rule 3(c) of the North Carolina Rules of Appellate Procedure permits appeal from "a judgment or order" within ten days after its entry. The order in this case which was signed and filed on 27 February 1979 states "The motion of the defendant to dismiss the Intervenor's Complaint on the ground of insufficiency of process and insufficiency of service of process is *hereby denied.*" (Emphasis added.) The date of entry of this written order and not the earlier date of hearing is the date of entry for purposes of appeal and defendant's notice of appeal was served within ten days of the entry of the order. The clerk's notation is ordinarily the date from which time for notice of appeal runs. G.S. 1A-1, Rule 58; *see also* Drafting Committee Note to Rule 3 of the Rules of Appellate Procedure. Here, however, the trial judge, as reflected in the record of the hearing, indicated a later date. The clerk should not have noted an entry of judgment in defendant's motion on 20 February 1979. The trial judge directed a date contrary to the hearing date.

[3] The granting of a motion to intervene pursuant to Rule 24 is not ordinarily appealable. *Wood v. City of Fayetteville*, 35 N.C. App. 738, 242 S.E. 2d 640 (1978). However, the question before us involves an immediately appealable adverse ruling to defendant that plaintiff intervenor has jurisdiction over him. The issue is thus whether, after a motion to intervene, which must be accom-

panied by a proposed pleading, had been served upon all affected parties and the motion is granted, is service of process pursuant to Rule 4 of the Rules of Civil Procedure required or is the former service of the motion and complaint pursuant to Rule 5 of the Rules of Civil Procedure sufficient. We hold that an intervenor party who is granted permission to intervene pursuant to Rule 24(b)(2) is not required to then issue a summons and complaint pursuant to Rule 4 but that the service pursuant to Rule 5 of the motion to intervene accompanied with the complaint is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction over the party are met.

The procedure for intervention is provided in subsection (c) of Rule 24.

> A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure.

G.S. 1A-1, Rule 24(c); *see also Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978). In the Federal Rules of Civil Procedure, subsection (c) states that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5." The North Carolina rule merely ends the sentence with the words "all parties affected thereby" instead of "the parties as provided in Rule 5." While our rule does not expressly provide for service of the motion to intervene pursuant to Rule 5, we think this is the better procedure and certainly in keeping with the spirit and purpose of the Rules of Civil Procedure.

> (a) Service—when required.—Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, de-

mand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Service—how made.—A pleading setting forth a counterclaim or crossclaim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

G.S. 1A-1, Rule 5(a)(b); *see* Shuford, N.C. Civil Practice and Procedure § 24-10 (1975). Service of the motion and pleading upon all affected parties in this manner will give them an opportunity to be heard on the motion.

An intervenor is not considered a party until an order is entered granting his motion to intervene. *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.*, 116 F. 2d 845 (2d Cir. 1941). The granting or denial of this motion to intervene pursuant to Rule 24(b)(2) as in this case is discretionary with the trial judge and reviewable only for abuse of that discretion. *Ellis v. Ellis*, 38 N.C. App. 81, 247 S.E. 2d 274 (1978). Defendant contends that once the trial judge has granted the motion to intervene because the "ap-

plicant's claim or defense and the main action have a question of law or fact in common", G.S. 1A-1, Rule 24(b)(2), the intervenor must issue summons and serve the complaint pursuant to Rule 4. He points to the cases of *In the Matter of the Indiana Transportation Company*, 244 U.S. 456, 37 S.Ct. 717, 61 L.Ed. 1253 (1917) and *Ruck v. Spray Cotton Mills*, 120 F. Supp. 944 (M.D. N.C. 1954).

Indiana Transportation was a libel in admiralty for the death of an individual, arising out of the capsizing of a steamer. An agent of the corporation happened to be in the Northern District of Illinois and was properly served with summons and complaint by the original libellant. In less than a year, 373 other libellants, each alleging a different cause of action for wrongful death arising out of the same sinking, were permitted to intervene. The shipping corporation, an Indiana corporation objected to the jurisdiction of the Northern District of Illinois because one of its agents happened to be inside the district. The Court held:

> Not having any power in fact over the defendant unless it can seize him again, it cannot introduce new claims of new claimants into an existing suit simply because the defendant has appeared in the suit. The new claimants are strangers and must begin their action by service just as if no one had sued the defendant before.

244 U.S. at 458, 37 S.Ct. at 718, 61 L.Ed. at 1255.

Indiana Transportation is distinguishable in that new claims were introduced after the defendant was no longer subject to process in the jurisdiction. Defendant in the case before us does not contend that he is not subject to the jurisdiction of our courts and service of process here but that it should be served pursuant to Rule 4 instead of Rule 5 of the Rules of Civil Procedure. Further, there is some question whether the rule of this case relied on by defendant survived the adoption of the Federal Rules of Civil Procedure. *Berman v. Herrick*, 30 F.R.D. 9 (E.D. Penn. 1962); *Tatem v. Southern Transportation Co.*, 5 F.R.D. 36 (E.D. Penn. 1945); 3B Moore's Federal Practice ¶ 24.20 (2d ed. 1979). Finally, each death in *Indiana Transportation* was a separate cause of action while in the case at hand, the same basic facts—the existence of a partnership for development of a shopping center and subsequent losses—are alleged by both plaintiff and plaintiff intervenor and the same rules of partnership law are applicable.

In *Ruck*, the other case relied on by defendant, again the reach of the court's jurisdiction was involved and not just a matter of proper service to obtain jurisdiction. The original plaintiff in *Ruck*, a Swiss citizen, brought an action in North Carolina to compel Spray Cotton Mills to pay a dividend. After defendant filed answer, the parties settled the dispute without bothering to inform plaintiff's counsel whom plaintiff also neglected to pay. Plaintiff's counsel, upon learning of the events, withdrew as counsel and intervened in the action they had prosecuted to recover compensation for their services and the costs of the action. The original plaintiff moved to dismiss for lack of service on him and the defendants moved to dismiss the proposed intervention. The federal district court ruled against the intervenor holding that this was an independent action for collection of fees. As to the original defendants, the court found no diversity of citizenship between intervenors and defendants in this independent action. The intervenor had attempted to serve the original plaintiff by mailing a copy of the intervenor's complaint to the last known address of the original plaintiff. The court held "That the purported service of the notice and motion to intervene on the plaintiff, Ruck, was ineffectual to bring him into court in this proceeding, *an independent one*, and failed in compliance with the Rules of Civil Procedure as set out in 24a-c, 5(a), 4(c)." 120 F. Supp. at 947 (emphasis added). In the case at hand, we do not have an independent proceeding. It is a claim on common questions of fact and law.

Defendant's motion to dismiss under Rule 12(b) did not recite as grounds lack of jurisdiction over the person. G.S. 1A-1, Rule 12(b)(2). He moved to dismiss only for insufficiency of process and insufficient service of process. G.S. 1A-1, Rule 12(b)(4)(5). Defendant does not argue any ground that the court does not have jurisdiction over his person other than the sufficiency of process. The *Indiana Transportation* and *Ruck* cases involved more basic and fundamental questions of the court's jurisdiction than insufficient or improper service of process. In this case, defendant reaches an attack on the jurisdiction of the court over his person *only* through the sufficiency of the process served upon him.

Thus today, we do not reach the question of the proper manner to serve a party with notice of intervention where the party claims he is no longer subject to personal service in the jurisdic-

tion. We do note that the commentators on the Federal Rules would in such a case find service on the attorneys for the parties pursuant to Rule 5(b) sufficient. 7A Wright & Miller, Federal Practice and Procedure § 1919 at 610 (1972); 3B Moore's Federal Practice ¶ 24.20 at 24-911 (2d ed. 1979).

In the case at hand, service of the motion and proposed complaint pursuant to Rule 5 is sufficient service of process on defendant where the intervenor's complaint is not entirely independent of the original complaint and there is no objection that the intervenor's complaint could not be properly served on defendant in this jurisdiction. Plaintiff intervenor did not commence an action for purposes of Rule 3 of the Rules of Civil Procedure. G.S. 1A-1, Rule 3. Rather, he entered the already existing action, and his complaint did not commence a new action. Further, the trial judge in his order gave defendant ample time to respond to the new complaint in the cause of action. At this stage, having a clerk of court issue a summons to answer a complaint after a superior court judge has already provided for such is superfluous. Only service on all parties is required of the intervenor, not summons to the party against whom the intervenor makes complaint or defense.

Affirmed.

Judges HEDRICK and CLARK concur.

GRETCHEN W. HAYNES v. H. TAYLOR HAYNES

No. 7926DC477

(Filed 4 March 1980)

Divorce and Alimony § 20.1— consent judgment requiring support payments until death or remarriage—effect of divorce obtained by dependent spouse

Where a consent judgment required defendant husband to make certain monthly support payments to plaintiff wife until her death or remarriage and provided that either party might apply for and obtain an uncontested absolute divorce at such time as was thereafter allowed by law, plaintiff wife's right to receive monthly support payments until her death or remarriage did not "arise out of the marriage" within the meaning of G.S. 50-11(a) but arose out of contract, and defendant husband's obligation to make the support payments thus

did not terminate when plaintiff wife initiated and obtained a divorce on the ground of separation for one year. This result is not affected by the fact that plaintiff wife's right to receive the support payments is provided in a judgment of court which may be enforceable by contempt.

APPEAL by defendant from *Brown, Judge.* Judgment signed 29 December 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 November 1979.

This civil action was originally commenced in March 1976 by plaintiff-wife against defendant-husband for alimony, child custody, and child support. As grounds for the award of alimony plaintiff-wife alleged that defendant-husband had willfully failed to provide support for her and the minor children born of the marriage and that he had offered indignities to her person.

In bar of plaintiff's claim for alimony, defendant-husband alleged in his answer that on 21 November 1975 the parties had entered into a written "separation agreement and property settlement contract" which constituted a full and final settlement of all matters arising from the marital relationship except the custody of the minor children. He also alleged that, pursuant to that deed of separation, plaintiff-wife executed a deed in proper form with privy examination, conveying all her right, title and interest in the homeplace to him. In a counterclaim, defendant-husband sought custody of the minor children, and a declaration that the separation agreement was valid and binding. He prayed for an order directing plaintiff-wife to vacate the homeplace and to surrender possession of the personal property located therein and allocated to him by the separation agreement.

Plaintiff-wife replied, denying that the parties had entered into a binding separation agreement on 21 November 1975 in that the purported separation agreement and property settlement to which defendant-husband's pleadings referred was signed by her as the result of duress, misrepresentation, coercion, and fraud. She renewed her prayer for relief set forth in her complaint and further prayed that the alleged separation agreement and property settlement be declared null and void.

At the 28 June 1976 Civil Non-Jury Session of District Court in Mecklenburg County, Judge Fred A. Hicks signed a judgment which recited that "the parties, as evidenced by their signatures

and those of their counsel appearing hereafter, have resolved, compromised and settled all matters and things at issue herein and arising out of the marital relationship, and have waived trial by jury and have consented to the finding of the following stipulated facts by the court and the entry of the following conclusions of law and judgment." The judgment contained findings that plaintiff-wife and defendant-husband had married on 26 March 1964, but that they had not lived together as husband and wife since 21 November 1975, the date of the execution of the separation agreement. The following findings were also included in the consent judgment:

> 4. That on said date, the parties executed and entered into a certain separation agreement, and the plaintiff executed a certain deed, as alleged in the answer of the defendant; that the plaintiff contends and maintains that said instruments are invalid and unenforceable, and the defendant contends and maintains that the same are valid and enforceable in all respects; but that the parties have mutually agreed, in order to finally resolve all matters arising out of their marriage, to rescind said separation agreement upon the entry of this judgment and have agreed that, from henceforth, that their mutual rights and obligations shall be governed by the terms of this judgment.
>
> * * * *
>
> 8. The court finds as a fact that the parties have agreed that either may apply for and obtain an absolute uncontested divorce at such time hereafter as is allowed by law.
>
> 9. The court finds as a fact that the parties have agreed to settle and resolve their respective property rights and other marital rights and obligations, as between themselves, under the terms and conditions and in the manner set forth hereinafter.
>
> 10. That the plaintiff is a dependent spouse within the meaning of General Statute 50-16.1(3) in that she is substantially in need of maintenance and support from the defendant.
>
> 11. That the defendant is a supporting spouse within the meaning of General Statute 50-16.1(4) in that he is the plain-

tiff's husband and the person from whom the plaintiff, a dependent spouse, is substantially in need of maintenance and support, and the said defendant is able-bodied and gainfully employed and capable of providing said maintenance and support.

12. The plaintiff, who is a dependent spouse, is entitled to permanent alimony.

The court then made conclusions of law, in part, as follows:

3. That the parties have agreed to the provisions set forth hereinafter with regard to their property rights and other marital rights and obligations, and that the same should be adopted as the judgment of the court.

4. That the plaintiff is a dependent spouse within the meaning of General Statute 50-16.1(3) in that she is substantially in need of maintenance and support from the defendant.

5. That the defendant is a supporting spouse within the meaning of General Statute 50-16.1(4) in that he is the plaintiff's husband and the person from whom the plaintiff, a dependent spouse, is substantially in need of maintenance and support and the defendant is able-bodied and gainfully employed and capable of providing said maintenance and support.

Based on the stipulated findings of fact and the conclusions of law, defendant-husband was ordered to pay plaintiff-wife "as permanent alimony for her support and maintenance the sum of $350.00 per month and such payments shall continue until and terminate only upon the death or remarriage of the plaintiff," upon plaintiff-wife's relinquishment of any right which she might have to apply to the court in the future to increase the amount. By the consent of the parties the November 1975 separation agreement was declared rescinded with the exception of four paragraphs "where not inconsistent with the terms of this judgment."

In November 1976 plaintiff-wife brought an action in district court in Mecklenburg County seeking an absolute divorce on the ground of one-year's separation. Defendant-husband did not appear in the action. On 29 December 1976, judgment was entered

granting plaintiff-wife the relief sought. The judgment recited that the terms of the consent judgment in Case No. 76CVD1863 entered 28 June 1976 were incorporated by reference.

On 6 November 1978 defendant-husband filed a motion in the cause seeking a determination that he was no longer responsible for alimony payments on the ground that the divorce judgment obtained by plaintiff-wife terminated his marital obligation of support. Defendant-husband had previously successfully moved the court to reduce the amount of support. On 29 December 1978, an order was entered denying defendant-husband's motion. From that order, defendant-husband appeals.

Bryant, Groves & Essex, P.A., by Alfred S. Bryant for plaintiff-appellee.

Bailey, Brackett & Brackett, P.A., by Scott T. Pollard for defendant-appellant.

PARKER, Judge.

G.S. 50-11 provides in pertinent part:

> Effects of absolute divorce. (a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out . . . .
>
> * * *
>
> (c) Except in case of divorce obtained with personal service on the defendant spouse, either within or without the State, upon the grounds of the adultery of the dependent spouse and except in case of divorce obtained by the dependent spouse in an action initiated by such spouse on the ground of separation for the statutory period a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce.

One effect of G.S. 50-11(a) is to terminate the right of a dependent spouse to support upon divorce. However, G.S. 50-11(c) preserves

the dependent spouse's right to support where a judgment or decree for alimony was entered before or at the time of the rendering of the divorce judgment unless one of two specified events has occurred: (1) The supporting spouse has obtained a divorce with personal service on the grounds of adultery; or (2) the dependent spouse has both initiated and obtained a divorce on the ground of one year's separation. *See, McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976). If either of these two events occurs, then G.S. 50-11(c) is inapplicable and the general rule of G.S. 50-11(a) governs.

In the present case plaintiff-wife brought an action against defendant-husband for absolute divorce on the ground of one year's separation and obtained the relief sought on 29 December 1976. Thus, G.S. 50-11(c) does not apply, and determination of the question whether defendant-husband remains liable for the monthly payments provided in the consent judgment of 28 June 1976 depends upon whether plaintiff-wife's rights to those payments "aris[e] out of the marriage" within the meaning of G.S. 50-11(a).

The consent judgment entered on 28 June 1976 which was signed by both parties and their counsel expressly rescinded an existing separation agreement (with the exception of certain paragraphs "not inconsistent with the terms of this Judgment") and recited that the provisions set forth with regard to their property rights and other marital rights and obligations were agreed to by the parties and "should be adopted as the judgment of the court." The portions of the consent judgment relevant to the question presented on this appeal are the provisions requiring defendant-husband to pay to plaintiff-wife the sum of $350.00 for her support and maintenance until her death or remarriage in consideration of plaintiff-wife's relinquishment of any right to apply to the court to increase the amount and the provision that either party might apply for and obtain an absolute uncontested divorce "at such time hereafter as is allowed by law."

Our courts have recognized the validity of a separation agreement by which the husband agrees to support his wife even after a decree of divorce has been entered which, under G.S. 50-11, would otherwise terminate his obligation. *Hamilton v. Hamilton*, 242 N.C. 715, 89 S.E. 2d 417 (1955); *McKnight v.*

McKnight, 25 N.C. App. 246, 212 S.E. 2d 902, *cert. denied*, 287 N.C. 466, 215 S.E. 2d 624 (1975). In such a case, the wife's right to continued support does not arise out of the marriage, but arises out of contract and survives the judgment of absolute divorce. Defendant-husband concedes that a separation agreement may so provide, but contends that where the agreement is embodied in a judgment, G.S. 50-11 automatically terminates the continued support obligation as a matter of law. We do not agree.

A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and its provisions cannot be set aside without consent of the parties except for fraud or mistake. *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732 (1965); *Bland v. Bland*, 21 N.C. App. 192, 203 S.E. 2d 639 (1974). The judgment should be construed in the same manner as a contract to ascertain the intent of the parties. *Webster v. Webster*, 213 N.C. 135, 195 S.E. 362 (1938). "To do so, the entire agreement must be examined with an understanding of the result to be accomplished and the situation of the parties at the moment the contract is made." *Yount v. Lowe*, 288 N.C. 90, 96, 215 S.E. 2d 563, 567 (1975). In applying these principles to the present case it is apparent that in consenting to the judgment entered in June 1976, the parties intended a complete resolution of their respective rights and obligations. As part of that resolution they mutually agreed that either party could apply for and obtain an uncontested divorce and that plaintiff-wife's rights to payments for her support would cease *only* upon her death or remarriage. Reading these two provisions of the judgment together, we conclude that the parties intended that the payments would continue until the occurrence of one of the events, notwithstanding the provisions of G.S. 50-11. This case is distinguishable from those previously decided by this Court in which the supporting spouse's obligation of support provided for by consent judgment was held terminated by operation of law upon the occurrence of certain events. For example, in *Bland v. Bland, supra*, the consent judgment in question specifically stated that the husband was to pay support "until he is relieved therefrom by operation of law." This Court, applying the legal principle that the duty to support terminates upon the death of the supporting spouse, held that the husband's estate was not liable for further support payments, the rationale of the decision

being that the parties had so agreed. Here, however, the parties specified the contingencies which would terminate plaintiff-wife's rights to receive support payments. Insofar as the consent judgment in the present case imposed a duty of support on defendant-husband beyond that imposed by the common law or by statute, plaintiff-wife's rights did not arise out of the marriage, but out of contract, *see Merritt v. Merritt*, 237 N.C. 271, 74 S.E. 2d 529 (1953); *Feldman v. Feldman*, 236 N.C. 731, 73 S.E. 2d 865 (1953). Defendant-husband, by his signature, consented to the provision that either he or plaintiff-wife, might obtain a divorce "at such time hereafter as is allowed by law," and he may not justly contend now that plaintiff-wife, having done so, has forfeited her contractual right to continued payments.

We are, of course, aware of the decisions in which our Supreme Court has drawn a distinction between those consent judgments in which the court merely approves or sanctions the payments and those in which the court adjudicates the right to and the amount of payment, *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), the former not being enforceable by contempt because they are pure contracts, but the latter being so enforceable because they are judgments. However, we do not consider that distinction determinative of the question whether defendant-husband's duty to make support payments to plaintiff-wife until her death or remarriage arises out of marriage or out of contract for the purposes of determining the effect of the divorce obtained by plaintiff-wife. A separation agreement not incorporated into a judgment may provide contractual rights to continued support, *Hamilton v. Hamilton, supra*, and those contractual rights to payments may be specifically enforced, *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979). The fact that a failure to comply with a decree for specific performance of the support provisions of a separation agreement might be punishable by contempt renders the separation agreement no less a contract of the parties. Similarly, the fact that a consent judgment incorporating an agreement of the husband to provide support may be enforceable by contempt proceedings renders it no less a contract. Thus, plaintiff-wife's right to receive monthly payments until her death or remarriage in the present case does not become a right "arising out of the marriage" within the meaning of G.S. 50-11 merely

because that right is provided in a judgment of court which may be enforceable by contempt. Because G.S. 50-11(a) only terminates those rights "arising out of the marriage," plaintiff-wife's initiating and obtaining a divorce on the grounds of one-year's separation had no effect upon her contractual right to receive support payments until her death or remarriage, and defendant-husband remains obligated until the occurrence of one of those events. The order of the trial court denying defendant-husband's motion to terminate his obligation to pay to the plaintiff permanent alimony is, therefore,

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

MARCIA DIANE BROWN, ADMINISTRATRIX OF THE ESTATE OF JAMES W. BROWN, JR., DECEASED v. DUKE POWER COMPANY

No. 7923SC270

(Filed 4 March 1980)

1. **Electricity § 5.1— uninsulated wires—no negligence of power company—electrocution not foreseeable**

In an action to recover for the wrongful death of plaintiff's intestate who was electrocuted when a radio antenna he was carrying came into contact with one of defendant's uninsulated main distribution lines located over decedent's property, the trial court properly granted summary judgment in favor of defendant, since defendant did not breach any duty of care in failing to insulate transmission lines over decedent's property which were a minimum of 22 feet, 2 inches above the ground and approximately 12 to 14 feet away from the house, and since defendant, by placing the lines so high and so far from the house, provided ample clearance from any foreseeable human contacts.

2. **Electricity § 8— radio antenna touching uninsulated wire—electrocution—contributory negligence of decedent**

In an action to recover for the wrongful death of plaintiff's intestate who was electrocuted when a radio antenna he was carrying came into contact with a line maintained by defendant, plaintiff's intestate was contributorily negligent as a matter of law where the evidence presented on motion for summary judgment showed that the electric lines crossing above decedent's property pursuant to a valid easement were within plain view; decedent had lived in the house on the property for at least three years and was aware of the presence of the lines and had appreciation for the potential danger posed by

the lines; decedent had been explicitly warned about the wires by a co-worker; and decedent was aware that the antenna, when carried upright, would necessarily come within a few feet of the wires and that at some points the antenna would reach above the wires.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 15 December 1978 in Superior Court, WILKES County. Heard in the Court of Appeals 14 November 1979.

Plaintiff seeks to recover damages for the wrongful death of plaintiff's intestate, James W. Brown, Jr., who died of electrocution after the aluminum radio antenna he was carrying came near to or in contact with one of defendant's uninsulated main distribution lines located over decedent's property. In her complaint, plaintiff alleged negligence, gross negligence, and strict liability on the part of defendant, alleging that defendant failed to maintain and operate its high-voltage transmission lines with commensurate care. Defendant answered, denying liability, and as an affirmative defense averred that plaintiff was contributorily negligent.

Defendant made a motion for summary judgment, accompanied by supporting affidavits and one deposition. Plaintiff submitted certain affidavits in opposition to defendant's motion. On hearing, the court granted summary judgment in favor of defendant and dismissed plaintiff's claim. Plaintiff appealed.

West and Groome, by Ted G. West and Edward H. Blair, Jr., for plaintiff appellant.

McElwee, Hall & McElwee, by William H. McElwee III, and W. Edward Poe, Jr., and William I. Ward, Jr., for defendant appellee.

MORRIS, Chief Judge.

Plaintiff assigns error to the trial court's summary disposition of her claim in favor of defendant and argues that genuine issues of material fact are presented as to defendant's liability. In order for defendant to prevail on motion for summary judgment under G.S. 1A-1, Rule 56, it must be clear from the materials presented that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419

(1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Summary judgment is recognized as a drastic remedy, and, particularly in cases involving the question of negligence or reasonable care, that remedy is an appropriate procedure only under exceptional circumstances. *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979); *Willis v. Duke Power Co.*, 42 N.C. App. 582, 257 S.E. 2d 471 (1979); *Gladstein v. South Square Assocs.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). However, "[i]n an action for wrongful death predicated on negligence, summary judgment for defendant is correct where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of the decedent, or determines that the alleged negligent conduct complained of was not the proximate cause of the injury." *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976).

In the pleadings, affidavits, and other evidence available on motion for summary judgment there is presented no issue of material fact concerning the events that led to decedent's death. To the contrary, the materials establish the following undisputed facts: On 23 January 1976 decedent and his brother-in-law, Steve Walsh, assembled and were attempting to install a radio antenna in the front yard of decedent's residence. Decedent had lived there since 1972. Two of defendant's 7200 volt electric distribution lines ran above the property. One was located in front of decedent's house, and partially crossed the front yard. The closest distance from the ground to the wires was 22 feet, 2 inches. At the point where decedent came into contact with the wires, the wires were approximately 12 to 14 feet away from the house. The other line ran parallel along the left side of the house, and is not the subject of this action.

After assembly, the antenna was 22 feet, 10 inches long. When the two men got the antenna from the basement into the yard at the rear of the house, they discussed how to transport the antenna from the back of the house to the front yard, where it was to be installed. Steve Walsh testified by deposition as follows:

> We then discussed how we were going to get the antenna to the front yard on account of all the wires around the house . . . James, Jr. (decedent) said that we couldn't bring the completed antenna around the house to the left because the wires that came down that side were so low. He said we could go around the carport end, the long way around, because the wires were real high around that way and you could get under them easily. I told him we would go whichever way he said since he knew more about the wires than I did . . . I told him that the antenna was so high that the wires would have to be up pretty high before we could go under them if the antenna were carried upright. James Brown, Jr. said that he was sure that we could get under the wires over the front of the house since they were real high around the carport into the house.
>
> I told him about a man over at Hickory who was electrocuted as he attempted to set up a tower or a pipe by himself and he had let it fall over into some wires.

Walsh testified further that he walked around to the front of the house and passed under the lines, followed by decedent who was carrying the antenna upright less than a foot off the ground. Since the antenna was to be placed on the side of the yard opposite the two men, it was necessary to pass under the lines a second time. Walsh testified that as he watched decedent cross the yard and approach the wires, there arose a flash of light and fire, and decedent collapsed in the yard. Defendant also presented evidence by way of affidavit that the wires above decedent's property were constructed and maintained in accordance with the National Electrical Safety Code as adopted by the North Carolina Utilities Commission.

Plaintiff presented the affidavit of two engineers, both of whom expressed the opinion that the electric lines running above decedent's property were of "questionable engineering practice". Plaintiff also presented the affidavit of James W. Brown, Sr., who swore that while the house was under construction he had requested a Duke Power Company official to remove the wires running across the yard, but Duke Power refused. Aside from these affidavits, plaintiff produced no evidence which tends to contradict defendant's evidence.

We now consider whether, based on these facts, the trial court properly granted summary judgment in favor of defendant.

[1] Plaintiff first contends that summary judgment was improper inasmuch as there exists a genuine issue of material fact as to defendant's duty to insulate its transmission lines. The general duty of electric companies is that they are required "to exercise reasonable care in the construction and maintenance of their lines when positioned where they are likely to come in contact with the public." *Bogle v. Duke Power Co., supra*, 27 N.C. App. at 321, 219 S.E. 2d at 310. In *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979), our Supreme Court adopted specific rules concerning the use of uninsulated wires by electric companies, which were first announced in *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849 (1952):

> That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore, the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go.

296 N.C. at 402, 250 S.E. 2d at 257. Applying these principles, we must consider whether, as a matter of law, defendant exercised that degree of care in the operation and maintenance of its transmission lines that was reasonable and prudent under the circumstances of this case.

The evidence shows that the transmission lines maintained by defendant over decedent's property were a minimum of 22 feet two inches above the ground and approximately twelve to fourteen feet away from the house. In *Bogle v. Duke Power Co., supra*, a similar transmission line was suspended at a height of 22 feet and at a distance of 21 feet from the nearest structure. This Court held there that defendant had exercised reasonable care in the operation of its transmission lines and was not in breach of any duty of care. Based on our ruling in *Bogle* we now hold that defendant breached no duty to the decedent.

The facts before us are clearly distinguishable from the line of cases represented by *Williams v. Carolina Power & Light Co., supra, Hale v. Duke Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *cert. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979), and *Willis v. Duke Power Co.*, supra. In *Hale*, the power line was shown to be three feet ten inches from the side of a house and approximately four feet above the house. The Court held that "[o]n these facts there is a genuine issue of material fact relating to defendant's duty to insulate the high voltage wires maintained in such close proximity to a house which would obviously need maintenance, such as paint." 40 N.C. App. at 204, 252 S.E. 2d at 267. The *Willis* Court adopted the same reasoning on an identical fact situation. In *Williams*, the Court noted a discrepancy in the parties' evidence as to the distance between the power lines and the house where plaintiff's injuries occurred.

In addition, we affirm the court's granting summary judgment for defendant on the ground that any negligence on the part of defendant was not the proximate cause of decedent's death resulting from his contact with the power lines. "The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Williams v. Carolina Power & Light Co., supra*, 296 N.C. at 403, 250 S.E. 2d at 258. Although proximate cause is ordinarily a question of fact for the jury, many courts have held that a person's contact with a power company's wires was unforeseeable as a matter of law. *See, e.g., Pugh v. Tidewater Power Co.*, 237 N.C. 693, 75 S.E. 2d 766 (1953); *Deese v. Carolina Power & Light Co.*, 234 N.C. 558, 67 S.E. 2d 751 (1951). *See also Williams v. Carolina Power & Light Co., supra.* We find no authority to support the proposition that defendant is required to foresee that some person may hold a metal antenna in the air in such a way as to come in contact with the high voltage wires. Given the height and position of defendant's transmission lines, we conclude that defendant had provided ample clearance from any foreseeable human contacts.

[2] Finally, we are of the opinion that summary judgment was proper on the ground that plaintiff's intestate was contributorily negligent as a matter of law. It is well established that the law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. *Rosser v. Smith*, 260 N.C. 647, 133

S.E. 2d 499 (1963). With respect to power lines in particular, "a person has a legal duty to avoid contact with an electrical wire of which he is aware and which he knows may be very dangerous." *Willis v. Duke Power Co.*, 42 N.C. App. 582, 593, 257 S.E. 2d 471, 478 (1979); *Williams v. Carolina Power & Light Co., supra.* We are aware that a person is not guilty of contributory negligence as a matter of law "if he contacts a known electric wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap." *Williams v. Carolina Power & Light Co., supra*, 296 N.C. at 404, 250 S.E. 2d at 258. However, a court must find contributory negligence as a matter of law where the undisputed evidence reveals that plaintiff has failed to exercise due care while approaching or working around electric lines despite being explicitly warned about the electric lines which subsequently injured him. *See Williams v. Carolina Power & Light Co., supra; Willis v. Duke Power Co., supra; Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966); *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E. 2d 31, *cert. denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977); *Bogle v. Duke Power Co., supra.* This result naturally follows from the notion that one who has the capacity to understand and avoid a known danger and fails to take advantage of that opportunity is chargeable with contributory negligence. *Presnell v. Payne*, 272 N.C. 11, 157 S.E. 2d 601 (1967).

The uncontradicted evidence presented on motion for summary judgment shows that the electric lines crossing above the decedent's property pursuant to a valid easement were within plain view; that the decedent had lived in the house on the property for at least three years and was well aware of the presence of the power lines; and that decedent was aware of and had appreciation for the potential danger posed by the lines. The evidence also shows that decedent had been explicitly warned about the wires by a co-worker, having been told that a person had recently been electrocuted while raising a metal object near transmission lines of a similar nature. Further, it is implicit from the evidence that decedent was aware that the antenna, when carried upwright, would necessarily come within a few feet of the wires and that at some points the antenna would reach above the wires. Despite such knowledge and prior warning, decedent chose to carry the antenna upright and risk coming into contact with

the wires above him. This lapse of attention to a known danger constituted contributory negligence.

For the reasons stated above, the judgment is hereby

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

MICHAEL ROLAND LYNCH v. JEAN T. LYNCH

No. 7927DC530

(Filed 4 March 1980)

1. **Divorce and Alimony §§ 23.4, 23.5; Infants § 5— temporary child custody order—child within State—authority to enter—effect on party not served**

The trial court had authority to enter an order for the temporary custody of a minor child who was physically present in this State, but such order was not binding on defendant since she was not served with summons prior to its entry. G.S. 50-13.5(c)(2), (d)(2).

2. **Divorce and Alimony § 23.4; Rules of Civil Procedure § 4— nonresident defendant—service by registered mail—inadequate affidavit**

The trial court did not have personal jurisdiction over the nonresident defendant in a child custody proceeding, and a custody order entered on 1 June 1978 was not binding on defendant, where plaintiff attempted to serve defendant with process in Illinois by registered mail, return receipt requested, but the affidavit required by Rule 4(j)(9)(b) was not filed until 19 January 1979, and the affidavit did not state that a copy of the summons and complaint was deposited in the post office by registered mail, return receipt requested.

3. **Appearance § 1.1; Infants § 5.1— child custody proceeding—full faith and credit motion—general appearance**

Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in Illinois. However, the trial court, after ruling on defendant's motion, should have permitted defendant to answer plaintiff's complaint.

4. **Constitutional Law § 26.5; Infants § 5.1— foreign interlocutory child custody order—full faith and credit**

The trial court did not err in refusing to give full faith and credit to an Illinois divorce decree awarding child custody to defendant mother where it appears that the child custody portion of the decree was not final but was only interlocutory.

APPEAL by defendant from *Hamrick, Judge*. Order filed 5 February 1979 in District Court, CLEVELAND County. Heard in the Court of Appeals 28 November 1979.

No counsel for plaintiff appellee.

Hicks & Harris, by Richard F. Harris III, for defendant appellant.

ERWIN, Judge.

History of the Case

Plaintiff, husband, and defendant, wife, were married on 30 April 1976 in Cook County, Illinois. One minor child was born on 3 December 1976 in Illinois. The parties separated in October 1977. Defendant had custody of the child in Illinois until plaintiff left the state with the child on 20 March 1978 without his wife's knowledge.

On 30 December 1977, plaintiff filed a Petition for Dissolution of Marriage in Illinois and requested custody of the child. The petition was served on defendant on 15 January 1978. On 13 February 1978, defendant filed a response to said petition requesting that it be denied.

On 6 April 1978, plaintiff filed a complaint against defendant in North Carolina wherein he alleged that the child was in his custody and that he was of excellent character and presently living with his parents in Shelby. Plaintiff further alleged: that defendant is unfit to have custody since she often left the child unattended; that she is now wanted by the "law" for assault on an officer; that she uses hard drugs; and that she has committed adultery. Plaintiff prayed the court to grant custody of the child to him plus divorce from bed and board. On 6 April 1978, the trial court entered an order granting plaintiff temporary custody pending full hearing on the matter to be held on 21 April 1978. The court further ordered defendant to be present at said hearing.

The record shows a certified mail receipt with the purported signature of defendant and a delivery date of 11 April 1978. (The receipt does not indicate what was delivered.)

On 21 April 1978, defendant filed a Counter Petition for Dissolution of Marriage and a Petition for Temporary Child Custody, Child Support, Maintenance, Attorney's fees, and Injunctory [sic] Relief in Illinois. Therein, she alleged that plaintiff, after filing the Petition for Dissolution of Marriage in Illinois, took the child from her, fled the jurisdiction to North Carolina, and filed a divorce action in North Carolina. Defendant alleged that by plaintiff's conduct, he hoped to avoid jurisdiction of the Illinois Court wherein evidence could be presented of his bad character. She alleged that plaintiff was unfit to have custody of the child since he was guilty of habitual drunkenness, extreme mental cruelty, the use and sale of drugs, and the stealing of property. On the same day, an order was entered in the Illinois action awarding temporary custody of the child to defendant, ordering plaintiff to return the child to Illinois, and enjoining plaintiff from proceeding in the North Carolina action.

By order filed 16 May 1978 in the Illinois action, plaintiff's complaint for divorce was dismissed for want of prosecution. By order dated 30 May 1978 and filed 1 June 1978, the North Carolina Court awarded custody of the child to plaintiff. By order dated 31 May 1978 in the Illinois action, the order entered on 16 May 1978 dismissing plaintiff's complaint for divorce for want of prosecution was vacated. The Illinois Court also ordered a hearing to be held on 15 June 1978. At said hearing, an Order of Default was entered against plaintiff since he failed to answer defendant's Counter Petition for Dissolution. Also, by order dated 15 June 1978, plaintiff's attorney was allowed to withdraw as counsel in the Illinois action. After hearing defendant's evidence, the Illinois Court entered a Judgment for Dissolution of Marriage on 17 July 1978. The court ordered that defendant be given custody of the child and that plaintiff return the child to Illinois. On 11 July 1978, an order was entered dismissing plaintiff's Petition for Dissolution of Marriage for want of prosecution. The order was retroactive to 15 June 1978.

On 30 November 1978, defendant filed motions in the North Carolina action seeking to have the North Carolina action for divorce from bed and board dismissed; to have the North Carolina action either dismissed or the North Carolina orders granting custody to plaintiff set aside; and to have given to the Illinois orders granting custody of the child to her full faith and credit.

Attached to the motions were the affidavits of eight people from Illinois attesting to defendant's good character and to plaintiff's bad character.

At the hearing of defendant's motions, the eight affidavits and a certified copy of the Illinois action filed by plaintiff were presented. Plaintiff and his mother testified. Plaintiff testified: that defendant left the child alone, used drugs, and had not requested to see the child since he obtained custody; that he has had no correspondence with his Illinois counsel; and that until November 1978, he had no knowledge of any action that occurred after 15 June 1978. The trial court entered an order dismissing plaintiff's North Carolina complaint for divorce because of a residential violation and denying all other motions filed by defendant.

Order of 6 April 1978

[1] G.S. 50-13.5(c)(2) provided in part (prior to the 1979 amendment):

> "(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 . . ."

The record shows that plaintiff alleged in his complaint that he is a citizen and resident of this State, and more particularly Cleveland County, and that Michael Kenneth Lynch, age 14 months and the minor child of the parties, was within the jurisdiction of this State. Plaintiff requested the court to enter an order placing the child in his custody. A temporary order was requested and was entered on 6 April 1978, the date the complaint was filed. Defendant was not served with summons prior to the entry of the temporary custody order. By reason of the above statute and G.S. 50-13.5(d)(2), the trial court had authority to enter the order in question. Better practice would require the complaint to allege facts sufficient to establish the reasons why the court should act at once. Defendant was not served. This order would not be binding on her, although the court had authority to act in the event. We affirm this order as to plaintiff and hold that such order is not binding on defendant.

Order of 1 June 1978

[2] The trial court found, *inter alia*, "[t]hat the defendant, Jean T. Lynch, has been served as provided by North Carolina law." Defendant excepted to this finding as well as to the conclusion of law "[t]hat the defendant has been served as provided by North Carolina General Statutes to wit registered mail." We hold that this finding of fact is not supported by the record, and the conclusion of law is in error.

G.S. 50-13.5(d)(1) and (2) provided (prior to the 1979 amendment):

> "(d) Service of Process; Notice; Interlocutory Orders.—
>
> (1) Service of process in civil actions or habeas corpus proceedings for the custody of minor children shall be as in other civil actions or habeas corpus proceedings. Motions for custody or support of a minor child in a pending action may be made on five days' notice to the other parties and compliance with G.S. 50-13.5(e).
>
> (2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided."

G.S. 1A-1, Rule 4(j), of the Rules of Civil Procedure provided in part:

> "(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found within State.—Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by such corporation to be served or to accept service of pro-

cess, service upon the defendant may be made in the following manner:

. . . .

b. Registered or certified mail.—Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the address, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered or certified mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him. This affidavit together with the return receipt signed by the person who received the mail raises a rebuttable presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discre-

tion residing in the defendant's dwelling house or usual place of abode."

At the time of the 1 June 1978 order, the record shows one document purporting to prove service of process, a return receipt for certified mail, signed by defendant, dated 11 April 1978, and addressed to her at 8435 South Merrimack Street, Burbank, Chicago, Illinois. The required accompanying affidavit showing the circumstances warranting the use of service by certified mail required by G.S. 1A-1, Rule 4(j)(9)(b) was not filed until 19 January 1979. We note that the affidavit does not state that copies of the summons, complaint, and order were deposited in the post office for mail by registered or certified mail, return receipt, as required by Rule 4(j)(9)(b). Without a proper and sufficient affidavit as required, the service is fatally defective. *See Dawkins v. Dawkins*, 32 N.C. App. 497, 232 S.E. 2d 456 (1977). We hold that the trial court did not have jurisdiction over the person of defendant and that the order entered was not binding on her.

Order of 5 February 1979

Defendant's motion filed 30 November 1978 requested the court to adjudicate the following:

"5. To find as facts that the Cook County, Illinois, court properly assumed jurisdiction to determine the custody of the minor child, that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, and that the Cook County, Illinois, court has entered a final divorce decree awarding custody of the child to the defendant mother, which Judgment should be given full faith and credit, and pursuant to G.S. 50-13.5(c)(5) to refuse to exercise jurisdiction and dismiss this action.

6. To give full faith and credit to the Cook County, Illinois, Judgment awarding custody to the defendant mother and to implement the Judgment by ordering the plaintiff herein to deliver the minor child to the defendant mother.

7. To treat these verified Motions as an Affidavit for all purposes herein."

[3] The first question is whether or not defendant made a special or general appearance. In order to make our determination, we

must consider G.S. 1A-1, Rule 12, of the Rules of Civil Procedure and G.S. 1-75.7 together. Rule 12 did not abolish the concept of the voluntary or general appearance, but did eliminate the special appearance, and, in lieu thereof, gave defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer. *Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979); 1 Strong's N.C. Index 3d, Appearance, § 1, p. 385. The character of the appearance will determine its nature. Defendant, by motion, has invoked the adjudicatory power of the trial court to determine whether or not full faith and credit should be given to the decree from the Cook County, Illinois Court, which does not relate to the question of jurisdiction of the trial court over the person of defendant. By doing so, defendant has submitted herself to the jurisdiction of the trial court, whether she intended to do so or not. *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951); *Swenson v. Thibaut, supra.*

[4] Defendant contends that the trial court committed error in denying her motion to find as a fact that the Illinois Court had entered a final divorce decree awarding custody of the child to defendant mother. We do not find error.

The Illinois order does not appear to be final, but interlocutory as it relates to the custody of the minor child. The order provides, *inter alia*:

> "H. That MICHAEL R. LYNCH is ordered to return the minor child of the parties, MICHAEL K. LYNCH, to the State of Illinois and to the jurisdiction of this Court instanter.
>
> I. That MICHAEL R. LYNCH is barred from visitation with the minor child of the parties until further Order of Court."

This Court state in *In re Kluttz*, 7 N.C. App. 383, 385, 172 S.E. 2d 95, 96 (1970):

> "The Full Faith and Credit Clause of the United States Constitution, Article IV, § 1, does not conclusively bind the North Carolina courts to give greater effect to a decree of another state than it has in that state, or to treat as final and conclusive an order of a sister state which is interlocutory in

nature. *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E. 2d 140. The courts of this State have jurisdiction to enter orders providing for the custody of minor children when the children are physically present in this State. G.S. 50-13.5(c)(2)a. When an order for custody has been entered by a court in another state, a court of this state may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order. G.S. 50-13.7(b); *In Re Marlowe*, 268 N.C. 197, 150 S.E. 2d 204."

Assuming *arguendo* that the Illinois Court had jurisdiction, we find no error in the 5 February 1979 order of the trial court as it relates to the court's denying the request of defendant to give full faith and credit to the order of the Illinois Court.

The trial court had jurisdiction over the subject matter of this cause. Defendant's general appearance without being served with summons or any other process gave the court *in personam* jurisdiction over her. *Simms v. Stores, Inc., supra.* The trial court, after ruling on defendant's motion and with jurisdiction over her, should have permitted defendant to answer plaintiff's complaint as provided by law. The 6 April 1978 and the 1 June 1978 orders were not binding upon defendant, since she was not served, and the court did not acquire jurisdiction over her until her general appearance on her motion filed 30 November 1978. After the answer is filed, the cause should be scheduled for a *de novo* hearing on the merits of the case, the court having jurisdiction over the subject matter and the parties. *Bowman v. Malloy*, 264 N.C. 396, 141 S.E. 2d 796 (1965).

Conclusion

The results in this case are as follow: (1) The order of 6 April 1978 is affirmed; however, it is not binding on defendant, in that she was not served with process. *See Zajicek v. Zajicek*, 12 N.C. App. 563, 183 S.E. 2d 850 (1971). (2) The order of 1 June 1978 is vacated as to the defendant. The attempted service by registered mail was fatally defective, and, thus, the court had no jurisdiction over defendant at that point in the proceedings. (3) The 5 February 1979 order is vacated, as it attempted to place custody of the minor child with plaintiff. (4) Defendant has submitted to the jurisdiction of the District Court, Cleveland County and shall have an opportunity to answer the complaint of plaintiff filed on 6

April 1978 as provided by law. (5) After defendant has been given an opportunity to file answer, this case shall be scheduled for a *de novo* hearing on the merits of the case. (6) The case is remanded for the purposes set out in this opinion.

Affirmed in part, vacated in part, and remanded.

Judges CLARK and ARNOLD concur.

UNITED LEASING CORPORATION v. RANDALL C. MILLER AND POWE, PORTER, ALPHIN & WHICHARD, P.A.

No. 7914SC458

(Filed 4 March 1980)

1. **Contracts § 14.2— contract between attorney and client—plaintiff as third party beneficiary—insufficiency of complaint**

Where plaintiff lessor alleged that it suffered damages when it leased equipment to a third party on the basis of incorrect representations made by defendant attorney to third party lessee concerning the existence of a lien on a piece of property used as collateral by third party lessee for the execution of the leasing agreement with plaintiff, plaintiff's complaint was insufficient to state a claim based on the third party beneficiary contract doctrine, since plaintiff's complaint did not allege the existence of a contract between two other persons which was valid and enforceable and which was entered into for plaintiff's direct, and not incidental, benefit.

2. **Contracts § 15— professional's contract with client—third person not in privity—negligence action—factors to be considered**

A third person not in privity of contract with a professional person may recover for negligence in the professional person's performance of his employment contract with his client, and whether a person has placed himself in such a relation with a third person so that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that the third person will not be injured calls for the balancing of the following factors: (1) the extent to which the transaction was intended to affect the third person, (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.

3. **Attorneys at Law § 5.1; Contracts § 15— negligence of attorney—liability to third person—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a cause of action against defendants based in tort where plaintiff alleged that it had entered into a lease

agreement for certain equipment with a third party; the lease agreement was subject to a condition that title opinions be furnished as to the status of the titles of the properties which were to secure the leasing agreement; defendant law firm through the individual defendant sent plaintiff a letter concerning the title of the subject property; subsequently, a deed of trust constituting a prior lien on the property in favor of a bank was discovered; and as a result of the prior undisclosed lien, plaintiff's equity position in the secured property was impaired.

4. **Rules of Civil Procedure § 56— allowance of motion to dismiss complaint— summary judgment motion moot**

When a court decides to dismiss an action pursuant to G.S. 1A-1, Rule 12(b)(6), any pending motion for summary judgment against the claimant may be treated as moot and therefore need not be decided.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 17 January 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 7 December 1979.

Plaintiff, a leaser of equipment, filed suit against defendant Miller, a lawyer, and his law firm alleging that they negligently failed to discover the existence of a lien on a piece of property used as collateral for the execution of a leasing agreement. Plaintiff had agreed to furnish certain furniture, kitchen equipment and fixtures for use in the Burlington Hilton Inn, which was owned by Burlington Motor Hotel Owners, a general partnership, the lessee. Plaintiff's leasing agreement required Burlington Motor Hotel Owners to furnish deeds of trust, appraisals, and title rundown letters on the property furnished as collateral, "reflecting approximately the equity shown in financial statements as well as a valid 2nd lien." Burlington Motor Hotel Owners hired defendants to make the requisite title search and to render the certifications of title. After conducting the title search, defendants, through defendant Miller, sent a letter disclosing the state of the titles of the parcels and the existing liens thereon. This letter was mailed approximately eighteen days prior to the closing of the lease agreement. In a letter dated the day of the closing, defendants re-certified that the deeds of trust to the parcels were subject only to the prior disclosed liens identified in their prior letter. Subsequently, plaintiff learned that North Carolina National Bank had an undisclosed lien on a piece of property it had been furnished as collateral and sought to recover actual damages in the amount of $65,000 and punitive damages in the amount of $364,698.44 from defendants.

Defendants, in their answer, alleged that plaintiff had failed to state a claim upon which relief could be granted, that the deed of trust constituted a second lien against the parcel in question, and that plaintiff had actual notice of the existence of the North Carolina National Bank lien. Defendants moved for summary judgment based on the pleadings, the deposition of defendant Miller, plaintiff's responses to request for admissions, and the affidavits of defendant Miller and Charles McMillan, a partner in the Burlington Motor Hotel Owners' partnership. They contended that:

> "(1) there is no privity of contract between the plaintiff and the defendants; (2) the plaintiff acquired the valid second liens upon certain real estate which it had bargained for; (3) prior to the closing of its transaction with The Burlington Motor Hotel Owners, the plaintiff had express knowledge of the first deed of trust it contends it did not know about; and (4) no act(s) or omission(s) by the defendants was the proximate cause of any losses the plaintiff alleges it has suffered."

At the hearing of defendants' motion to dismiss for failure to state a claim upon which relief could be granted and their motion for summary judgment, the trial court entered the following order:

> "ORDER OF DISMISSAL (Filed Jan. 17, 1979)
>
> This matter coming on for hearing and being heard before the undersigned at the January 15, 1979, session of Durham County Superior Court upon defendants' motions to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and for summary judgment under Rule 56; and the court having heard the arguments of counsel and having reviewed and considered, as appropriate to each motion, the pleadings, the depositions and admissions and affidavits of record, and the briefs of the parties; and the court being of the opinion that the complaint fails to state a claim upon which relief can be granted; it is therefore.
>
> ORDERED that this action be, and the same hereby is, dismissed with costs to be taxed by the Clerk to the plaintiff.
>
> (The court, having granted defendants' motion to dismiss under Rule 12 (b)(6), declines to rule on defendants' motion

for summary judgment under Rule 56 since the latter motion is effectively mooted by the court's ruling on the Rule 12(b)(6) motion.)

DEFENDANTS' EXCEPTION NO. 1

This 17th day of January, 1979.

s/D. B. HERRING, JR.
Superior Court Judge"

Plaintiff gave notice of appeal. The next day, plaintiff filed a motion for relief under G.S. 1A-1, Rule 60(b)(6), of the Rules of Civil Procedure, seeking to have the order of dismissal set aside and to amend its pleadings to allege a claim based on the third party beneficiary doctrine. The trial court refused to grant the requested relief, because plaintiff's appeal remained pending, and, consequently, the court thought it was without jurisdiction to hear or determine the propriety of the requested relief. Plaintiff appealed.

Frederick J. Sternberg, for plaintiff appeallant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by H. A. Mitchell, Jr. and M. E. Weddington, for defendant appellees.

ERWIN, Judge.

We note at the outset that plaintiff has abandoned its third assignment of error that the trial court erred in declining to hear or determine the plaintiff's motion for post-judgment relief under G.S. 1A-1, Rule 60 (b)(6), of the Rules of Civil Procedure. Questions raised by assignment of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure; *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). Thus, our review is limited to the propriety of the trial court's dismissal of plaintiff's complaint for failure to state a claim upon which relief can be granted and the trial court's treatment of defendants' motion for summary judgment as moot.

"The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. 11 Strong, N.C. Index 3d, Rules of Civil Procedure, § 12, p. 294. A complaint may be dis-

missed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiff's claim so as to enable him to answer and prepare for the trial. *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12 (1970)."

Industries, Inc. v. Construction Co., 42 N.C. App. 259, 263-64, 257 S.E. 2d 50, 54 (1979). Defendants contend that the order of dismissal was proper, because there is an absence of law to support a claim of the sort made. We hold that the trial court erred in dismissing plaintiff's claim on the ground that it failed to state a claim upon which relief can be granted.

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 the attorney's employment. In *Holt, supra*, a general contractor had sought indemnity from attorneys who had certified title to Chicago Title Insurance Company, which subsequently issued title insurance policies covering the condominium units built and sold by the owner. The general contractor had executed lien waiver forms agreeing to indemnify Chicago Title should it incur any liability as a result of the existence of any unpaid subcontractors who might assert mechanics liens having priority over the insured deeds of trust. A materialman filed a claim which was adjudicated to have priority over the insured deed of trust. Chicago Title satisfied the judgment and sued the general contractor based upon the indemnity agreements contained in the lien waivers. The general contractor impleaded the attorneys, alleging their violation of an affirmative duty to determine whether there were unpaid materialmen or subcontractors.

While rejecting tort as a basis of liability for attorney malpractice, we intimated that if properly alleged in a complaint, a party not in direct privity of contract with an attorney could recover if he could show that he was a third-party beneficiary of the attorney-client employment contract. In doing so, we pointed out that:

> "The complaint contained no allegation that LLA, which is alleged to have employed the appellees to certify title to Chicago Title, had any intent to benefit the appellant or owed him any duty which would be fulfilled by such certification. Neither are there any allegations in the complaint that the appellees promised to, or did in fact, certify the title to the appellant. The intention of the parties to the contract of employment determines whether the plaintiff is a mere incidental beneficiary thereof. Here, the allegations of the complaint do not indicate the parties intended the appellant to be anything more than a mere incidental beneficiary, and as such he cannot maintain a claim for relief upon a breach of contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof. *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E. 2d 481 (1974). Thus, the trial court properly allowed the appellees' motion to dismiss."

Insurance Co. v. Holt, 36 N.C. App. 284, 290-91, 244 S.E. 2d 177, 181-82 (1978).

Despite the liberal nature of the concept of notice pleadings, we hold that plaintiff's complaint does not state a claim of relief based on the theory of the third party beneficiary contract doctrine.

A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

[1] To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was

entered into for his direct, and not incidental, benefit. *Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955). Plaintiff's complaint contains none of these essential allegations. It leaves to conjecture that which must be stated. Thus, it fails to state a claim based on the third party beneficiary contract doctrine. Nevertheless, we hold that entry of the 12(b)(6) dismissal order was improper.

[2] In the line of cases since our decision in *Insurance Co. v. Holt, supra*, we have re-examined the rule prohibiting recovery in tort by a third person not in privity of contract with a professional person for negligence in the performance of his employment contract with his client, even though such negligence was the proximate cause of a foreseeable injury to the third person. Thus, we have recognized a cause of action in negligence arising from the negligent breach of a common law duty of care flowing from the parties' working relationship. *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50 (1979), and *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580 (1979). In disavowing the privity requirement as a condition to recovery in all cases, quoting from Prosser, Torts 4th Ed., § 93, p. 662, we opined:

> "[B]y entering into a contract with A, the defendant may place himself in such a relation toward B that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that B will not be injured. The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person."

Industries, Inc. v. Construction Co., 42 N.C. App. 259, 271, 257 S.E. 2d 50, 58 (1979). Whether or not a party has placed himself in such a relation with another so that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that the other will not be injured calls for the balancing of various factors: (1) the extent to which the transaction was intended to affect the other person; (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. *Petrou v. Hale,* 43 N.C. App. 655, 260 S.E. 2d 130 (1979), *dis. rev. denied,* 299 N.C. 332, --- S.E. 2d --- (1980); *Industries, Inc. v. Construction Co., supra; Roberts v. Ball, Hunt, Hart, Brown & Baerwitz,* 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976).

[3] Taking the allegations in plaintiff's complaint to be true, as we must, and balancing the enumerated factors, we hold that on the facts of this case, plaintiff has stated a cause of action against defendants based in tort.

Plaintiff alleged in its complaint that it had entered into a lease agreement with Burlington Motor Hotel Owners, owners of the Burlington Hilton Inn, to furnish certain furniture, kitchen equipment and fixtures; that the lease agreement was subject to a condition that title opinions be furnished as to the status of the titles of the properties which were to secure the leasing agreement; that defendant Powe, Porter, Alphin & Whichard, P.A. through defendant Miller sent them a letter stating that:

> " '5. We have examined the public records of Alamance County in which is located the 9.97 acre tract adjoining Interstate Highway 85 and Maple Street on the outskirts of the City of Graham, North Carolina, which property is more particularly described in Exhibit E attached hereto, and from such examination it is the opinion of the undersigned that a good and sufficient fee simple title to said premises is vested in Houston P. Sharpe *subject only* to the matters and things set forth below in this paragraph and in paragraph 7 of this letter . . . .' " (Emphasis added.)

that in reliance on the letter sent to it by defendants, it executed the lease agreement; that subsequently, a deed of trust constituting a prior lien on the property in favor of North Carolina National Bank was discovered; and that as a result of the prior undisclosed lien, its equity position in the secured property has been impaired. The furnishing of title opinion was done for the express purpose of inducing plaintiff to lease the sought equipment. It was directly intended to affect plaintiff. It was foreseeable that failure to discover and to disclose prior recorded liens would result in an impairment of the plaintiff's security position in the pledged collateral. It is certain that plaintiff's security lien on the property is subject to the undisclosed North Carolina

National Bank lien and that if defendants had discovered the prior recorded lien, plaintiff's injury would not have been sustained. Under these circumstances, defendants owed a duty to plaintiff to use reasonable care in the performance of its employment contract with Burlington Motor Hotel Owners. A violation of that duty would be negligence, and plaintiff properly stated a cause of action in tort.

Defendants contend that even if dismissal of plaintiff's claim for failure to state a claim was error, the trial court erred in not entering summary judgment in their favor. We disagree.

[4] The trial court declined to rule on defendant's motion for summary judgment, because it thought the motion was moot since it had granted defendants' 12(b)(6) motion. When a court decides to dismiss an action pursuant to G.S. 1A-1, Rule 12(b)(6), of the Rules of Civil Procedure, any pending motion for summary judgment against the claimant may be treated as moot, and therefore, need not be decided. *Industries, Inc. v. Construction Co., supra.* In ruling on the respective 12(b)(6) motion and the summary judgment motion, the trial court limited its review to the evidentiary materials proper in determining each motion, and, thus, we hold that it did not err in failing to decide defendants' motion for summary judgment.

The trial court's dismissal of plaintiff's claim for failure to state a claim upon which relief can be granted is reversed and remanded.

The trial court's failure to rule on defendants' motion for summary judgment is affirmed. Our holding does not preclude defendants from renewing their motion for summary judgment or plaintiff from renewing its motion to amend.

Affirmed in part, reversed in part, and remanded.

Judges CLARK and ARNOLD concur.

MARTHA BARHAM, EMPLOYEE v. FOOD WORLD, INC., EMPLOYER, AND STANDARD FIRE INSURANCE COMPANY, CARRIER

No. 7910IC688

(Filed 4 March 1980)

Master and Servant § 62.1— workers' compensation—grocery store employee—injury in loading zone while going from car to work site—on-premises injury

Plaintiff grocery store employee sustained an injury by accident arising out of and in the course of her employment when she slipped and fell on ice in a loading zone in front of defendant employer's store in a shopping center while she was walking to her work site after parking her car in the shopping center parking lot where the loading zone was used for making deliveries to defendant's store and for loading groceries into the cars of the store's customers, and defendant on occasion exercised control over the loading zone by ordering people to move their cars therefrom, since the accident in effect occurred on defendant employer's premises.

Judge HILL dissenting.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission filed 18 May 1979. Heard in the Court of Appeals 6 February 1980.

Plaintiff in this workers' compensation case is a woman who was employed by defendant Food World at the time of her accident. She worked in the delicatessen and bakery section of a Food World store located in a shopping center in Greensboro. On 4 February 1977, as plaintiff was walking from where she had parked her car to her work site, she slipped and fell on a patch of ice in front of the Food World store, sustaining injuries.

On 16 January 1979 Commissioner Coy M. Vance filed an opinion and award finding that plaintiff had sustained an injury by accident arising out of and in the course of her employment. Defendants appealed that decision to the full Commission which, with one member dissenting, adopted and affirmed the hearing commissioner's opinion and award. Defendants appeal from the opinion and award of the full Commission.

McNairy, Clifford & Clendenin, by Harry H. Clendenin III, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and William L. Young, for defendant appellants.

MARTIN (Harry C.), Judge.

The issue presented for our review is whether the full Commission erred in adopting and affirming the opinion and award of the hearing commissioner determining that plaintiff sustained an injury by accident arising out of and in the course of her employment. Defendants argue that on the facts of this case plaintiff is not entitled to benefits under the Workers' Compensation Act and that the award in her favor should be reversed.

In affirming Commissioner Vance's award, the full Commission stated: "It is the opinion of the majority of the Full Commission that this is basically an 'on-premises' type case and that plaintiff was in the course of her employement." The Commission relies upon a series of cases in arriving at this decision, including *Maurer v. Salem Co.*, 266 N.C. 381, 146 S.E. 2d 432 (1966); *Davis v. Manufacturing Co.*, 249 N.C. 543, 107 S.E. 2d 102 (1959); and *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47, *cert. denied*, 274 N.C. 274 (1968). This trio of cases recognized an exception to the general rule that injuries sustained in travel to and from work are not compensable under our statute. Justice Higgins succinctly outlined this exception in *Maurer:*

> ". . . the great weight of authority holds that injuries sustained by an employee while going to and from his place of work upon the premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the meaning of the Workmen's Compensation Acts and are compensable provided the employee's act involves no unreasonable delay." *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570 (citing many authorities).

266 N.C. at 382, 146 S.E. 2d at 433-34.

The key phrase in this passage is "deemed to have arisen out of and in the course of the employment." Under the law of these cases, if an employee is found to have sustained injuries while going to or from work upon any part of his employer's premises, this is sufficient to hold the employee's injuries compensable. The required causal connection between the injuries and the employment has been satisfied, as set forth in *Davis, supra:*

> It seems clear that claimant's going from this parking lot to her working area, all on her employer's premises, was a necessary incident to her employment, and there was a causal connection between her employment and the injury she received with the result that the injury by accident she suffered arose out of and in the course of her employment.

249 N.C. at 549, 107 S.E. 2d at 106.

We think that these cases are still controlling in the area of workers' compensation. Even after the North Carolina Supreme Court's decision in *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977), upon which defendants strongly rely and which we shall discuss *infra*, all three cases are cited by that same court in *Strickland v. King* and *Sellers v. King*, 293 N.C. 731, 239 S.E. 2d 243 (1977). In fact, even the passage from *Maurer* is set out in the *Strickland* opinion. In *Strickland* claimant was denied recovery, but on the basis that the accident occurred a substantial distance (1½) miles) from the employer's plant and parking lot.

Our conclusion, therefore, is that if it were determined without error that plaintiff sustained injuries while going to or from work upon any part of her employer's premises, she would be entitled to receive compensation for those injuries.

Commissioner Vance made the following findings of fact:

> 4. The defendant employer leased the store which gave them access to the entire parking lot of the shopping center to allow their customers and employees to use while shopping and working. There was a sidewalk which ran in front of each store in the shopping center.
>
> 5. There was a traffic lane marked off with yellow lines directly in front of defendant employer's store for the convenience of their customers to pick up and load their groceries. Delivery trucks also parked there when unloading supplies delivered to defendant employer. The bag boys employed by defendant employer placed groceries in customers' cars in the loading zone.
>
> 6. Mr. James Hill, manager of the store, notified employees where they should park while at work away from

directly in front of the store in order that the customers could use the space directly in front of the store.

7. There was a water drain coming from the roof of the store which emptied onto the loading zone. The water had frozen and made a strip of ice from the sidewalk out into the street.

8. On February 4, 1977, plaintiff was walking from where she had been instructed to park to her work position. She started to take a long step over the icy strip that was in the loading zone in front of Store No. 19. Her shoe heel struck the ice and she fell backwards breaking her ankle . . . .

9. Defendant employer leased space for Store No. 19 and the lease gave the store access to all parking space at the shopping center for its employees' and customers' use.

Defendants except to findings 4, 8, and 9. This Court, of course, is limited to determining whether there is any competent evidence in the record to support these findings of fact. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969).

We think findings of fact 4 and 9 are supported by the evidence of Food World's vice-president and controller, Lowell Plunkett, who testified: "We have a right for our employees to use the parking lot." On further examination he also stated: "Food World does have the right for its customers to park there if they want to shop at the store." Similarly, we think there is competent evidence to support finding of fact 8. It is uncontested that Food World instructed its employees not to park directly in front of the store. Plaintiff, along with other Food World employees, had parked for more than two years in the west section of the parking lot.

The evidence supports the Commission's finding that plaintiff slipped and fell while in the loading zone in front of the store. This loading zone was not leased by Food World, but was marked with yellow lines on the pavement and used by Food World for delivery and unloading of supplies for the store. It was also used by the store's customers to load their automobiles with products bought in the store and by the store's bag boys who carried groceries to the customers' cars. They were not permitted to

carry customers' bags out into the parking lot. On occasions, Food World had also exercised control over the loading zone by ordering people to move their cars out of the zone.

As mentioned previously, defendants strongly rely upon the case of *Gallimore v. Marilyn's Shoes, supra,* in urging that the award to plaintiff be reversed. In *Gallimore,* an employee of a shoe store located in a shopping mall was kidnapped and fatally injured when she went to her car after leaving her place of work. The crucial distinguishing feature of *Gallimore* is that there is absolutely no evidence that it is an "on-premises" case. The employer in no way provided plaintiff with a parking place, and the killing did not occur in an area controlled by the employer or used by it in its business.

The findings of fact adopted by the full Commission support its opinion that the case *sub judice* is basically an "on-premises" type case.

In order for an accident to be "on-premises" within the meaning of *Maurer,* it is not necessary that the employer own or lease the area in question. It is enough that the employer controls the area and uses it in his business. The evidence in this case supports the conclusion that plaintiff was injured in an area, the loading zone, controlled by Food World and used in its business. Therefore, we affirm the Commission's conclusion that this is an "on-premises" case and that plaintiff sustained an injury by accident arising out of and in the course of her employment.

Affirmed.

Chief Judge MORRIS concurs.

Judge HILL dissents.

Judge HILL dissenting.

I must dissent from the opinion of the majority. I do not believe this to be an "on-premises" accident.

Plaintiff parked her car on the west side of the parking lot, walked across the parking lot, slipped on some ice located within the loading area in front of Food World, and sustained injuries.

The general rule is that injuries sustained in travel to and from work are not compensable. *See Bass v. Mecklenburg County*, 258 N.C. 226, 231-2, 128 S.E. 2d 570 (1962). The exception cited by the majority and set forth by Justice Higgins in *Maurer v. Salem Co.*, 266 N.C. 381, 146 S.E. 2d 432 (1966), holds that injuries sustained by an employee while going to or from his place of work upon premises *owned or controlled* by his employer are *generally* deemed to have arisen out of and within the course of his employment.

I object to the application of the rule in the *Maurer* case to the facts here. The present case is not an exception to the general rule.

The loading zone was an "in common area," not leased for the specific use of Food World. At least three stores out of a block of eight or nine stores had use of the loading zone, which extended across King's, Food World and Country Kitchen, and was separated from the stores by a sidewalk over which Food World had no control. The purported control found by the Commission arises only out of an instruction to the employees not to park in front of the store and a request by Food World to people to move their cars. There is no evidence that the cars were moved right away, if at all. Since there was no lease of the loading zone area to Food World specifically, there was no legal means by which Food World could keep anybody from using and controlling the loading zone. The voice of Food World could be no louder than that of a stranger and never was more than a request.

One of the purposes of the Worker's Compensation Act is to encourage employers to provide accident-free working conditions for their employees. When there is no legal right to control possession—by ownership or by lease—there can be no legal right to go onto the premises to correct danger and thereby prevent injuries such as the one suffered by the plaintiff. The absence of a lease to the loading area vesting some interest in Food World indicates the right of possession was retained by the owners of the shopping center.

The majority opinion attempts to distinguish *Gallimore v. Marilyn Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977), by indicating that it is not an "on-premises" case, in contrast to *Davis v. Manufacturing Co.*, 249 N.C. 543, 107 S.E. 2d 102 (1959), where all

of the property was under the maintenance and supervision of the employer, and in contrast to *Maurer, supra*, where the automobile was in the company's lot, adjacent to the building where claimant worked.

In the *Gallimore* case, *supra*, Justice Moore dealt with the question of whether an injury did "arise out of" employment. Quoting from *Harden v. Furniture Co.*, 199 N.C. 733, at 735, 155 S.E. 728, at 730 (1930), the Court said:

> '[T]he causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relationship of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.' *Gallimore*, at p. 403.

Justice Moore went on to say in *Gallimore, supra*, at page 403,

> [T]he Court further held that to be compensable, the injury must be caused by a risk which is reasonably related to and created by the employment.

And again Justice Moore says, quoting from the case of *Walk v. S. C. Orbach Co.*, 393 P. 2d 847 (Okla. 1964):

> The court reasoned that no recovery should be permitted for an injury caused by a risk to which all persons are exposed. Thus, in the absence of any evidence that the nature of her employment increased the risk of injury or that the employer's parking lot increased the risk of injury (i.e., it was less safe than any other parking lot), the employee could not recover. This 'increased risk' test has been applied in decisions in other jurisdictions. (Citations omitted.)

It is a well settled rule that, ". . . the controlling test of whether an injury 'arises out of' the employment is whether the injury is a natural and probable consequence of the nature of the employment." *Gallimore* at 404. A contributing proximate cause of the injury must be a risk to which the employee is exposed because of the nature of the employment. This risk must be such

that it might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. "The test 'excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment . . . .' " *Gallimore* at 404.

In my opinion, the injury sustained by the plaintiff did not "arise out of" her employment. Stated simply, she had never reached her place of employment. Neither the parking lot in general nor the loading zone in particular was owned or under the control of the employer. She parked in one of the many parking spaces in the shopping center available to all employees. She walked some distance within the parking lot serving eight or nine stores to an area designated "loading zone" owned by the shopping center landlords. She saw ice in the loading zone over which Food World had no legal control, but was used by delivery trucks and shoppers alike patronizing several stores in the shopping center. She attempted to cross the landlord's property by stepping over the ice, slipped and fell, sustaining injuries. The ice had formed from water draining out of a downspout running from the top of the huge shopping complex owned by the landlord and going under the "public" sidewalk. Nothing in this record indicates responsibility or control by Food World over the downspout.

Other people were readily able to detect the ice in the loading area. It was a risk common to the area and in no way peculiar to the work of the employee, who worked in the delicatessen and bakery section of Food World. In no way can slipping on ice in a public area en route to work be contemplated as a risk incidental to such employment in a bakery shop and delicatessen. This was a danger to the public at large and should have been avoided.

In my opinion, the order of the Full Commission should be vacated and the case remanded for entry of an order dismissing the claim.

STATE OF NORTH CAROLINA v. TOMMY ALLEN

No. 7910SC748

(Filed 4 March 1980)

1. **Receiving Stolen Goods § 5.1— receiving stolen televisions—defendant's knowledge that goods stolen—sufficiency of evidence**

Evidence that defendant knew television sets were stolen at the time he received them was sufficient to be submitted to the jury where it tended to show that defendant purchased from an individual two color televisions and two stereos still in their sealed boxes, stamped with the name of a firm from which such equipment had been stolen; defendant paid about half as much as the equipment was worth; on two subsequent occasions defendant made other similar purchases; and five or six months after the purchases in question, defendant told an SBI agent that he knew the items he had purchased were stolen.

2. **Receiving Stolen Goods § 1— absolute knowledge that goods stolen not required**

There was no merit to defendant's contention that the State was required to show that he had absolute knowledge that television sets which he received were stolen, since the statute under which defendant was charged provided that a person would be guilty of receiving stolen goods if he received them "knowing or having reasonable grounds to believe" that they were stolen. G.S. 14-71.

3. **Constitutional Law § 50— Speedy Trial Act inapplicable**

The Speedy Trial Act, which applied to defendants arrested or indicted after 1 October 1978, was inapplicable to defendant's case since he was indicted on 30 May and arrested on 31 May 1978.

4. **Receiving Stolen Goods § 4; Criminal Law § 81— televisions stolen— evidence of value not prejudicial—best evidence rule inapplicable**

In a prosecution for receiving stolen property, defendant was not prejudiced by the trial court's error in allowing an SBI agent to give his opinion of the value of the stolen goods allegedly received; furthermore, the "best evidence rule" did not require that the State introduce the stolen goods into evidence, since that rule applied to writings introduced into evidence to prove their contents.

5. **Criminal Law § 86.5— specific act of defendant—question proper for impeachment**

Defendant who was accused of receiving stolen property could properly be asked for impeachment purposes if he had conspired to break into a named house to steal guns.

6. **Criminal Law § 87— witness's name not on list—defendant not prejudiced by testimony**

Defendant was not prejudiced where the trial court permitted a witness, whose name was not on the list of potential witnesses for the State given to

defendant before voir dire of the jury, to testify, since the court inquired whether any of the jurors were acquainted with the witness; none responded that they were; and defendant did not ask for a recess to secure witnesses to counteract the surprise witness's testimony.

APPEAL by defendant from *Lee, Judge.* Judgment entered 29 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 15 January 1980.

Defendant was charged in each of two indictments with receiving a Philco color console television set knowing it was stolen. The acts allegedly occurred on 30 May and 15 June 1977.

The State presented evidence that in May and June 1977 an employee of Brown-Rogers-Dixson, together with one James Williams, stole some stereos and TVs from the firm. Williams and a companion delivered the appliances to a car lot in Smithfield.

Bobby Davis, security supervisor for GTE Sylvania in Smithfield, went to see defendant about some TVs and stereos on 15 September 1977. On 3 November 1977 defendant was questioned by Reginald Shaw of the SBI, and he told Shaw that in May 1977 he had learned he could purchase a color TV set from James Williams. A few days later Williams arrived in a pick-up truck and delivered two TVs and two stereos, still in their boxes, marked "Philco" and stamped "Brown-Rogers-Dixson." He paid Williams $250 or $275 for each TV and $150 for each stereo. He kept one TV and one stereo and sold the others to Andy Creech. He later sold the TV he had kept to James Cole, who subsequently testified that he had purchased it for his friend Cecil Kelly.

Approximately two weeks later, Williams delivered to defendant another Philco console color TV, for which he paid $300. Two or three weeks later Williams delivered to defendant's place of business another stereo and TV set, which were purchased by Jimmy Britt. Defendant volunteered to Shaw that "he knew he was wrong and guessed that he would just have to pay a heavy fine." He and Jimmy Britt "knew the items . . . purchased from Williams were stolen. Further, he knew it was wrong to buy the stolen items . . . ." In a second interview on 17 November 1977 defendant told Shaw that there was "no question in his mind that Britt knew the stuff was stolen because he got a $1,000 TV set and a stereo for $525." Shaw took the serial numbers from the

TVs in defendant's and Cecil Kelly's residences, and these were the bases of the two indictments.

Shaw questioned defendant again on 3 February 1978. At that time defendant told him that before Labor Day 1977 defendant had told an FBI agent "that Britt had the stolen TV and stolen stereo." Defendant also told Shaw that on the night Andy Creech bought his TV and stereo, 15 June 1977, Creech knew they were stolen.

Defendant testified that when he talked to Williams about purchasing a TV set, he assumed that Williams worked for Brown-Rogers-Dixson. It was explained to him that the sets he bought had been damaged in shipment and repaired, and the employees had a chance to buy them at cost. The sets he received were in sealed boxes. On the Friday after he got the first set, 4 June, defendant contacted Agent Mulholland of the FBI, to whom he had given information in the past, and they discussed the TV set. He gave Mulholland the serial number to check, and it didn't show up stolen. Defendant then told Mulholland that "if any of this stuff is stolen, it has got to be an inside operation. Somebody is covering it up maybe in the shipping department or in the office one." At the times defendant took the sets, he did not know they were stolen.

On Wednesday after Labor Day, Bobby Davis came to see defendant. Defendant had not had "any knowledge or any proof that the TV's were stolen," but Davis told him that they were. Defendant did not tell Shaw that defendant and Britt knew the items were stolen when they purchased them, or that Britt must have known they were stolen because of the price he paid. He did not tell Shaw that Andy Creech knew the stereo and TV he bought were stolen.

Agent Mulholland of the FBI testified that defendant contacted him in May or June 1977 and told him "that he had received some information that some individuals were selling some TV's in the Johnston County area and that there was some indication that possibly these items could be stolen." Mulholland checked the serial number defendant gave him and received no information that that item had been stolen. In September, Mulholland contacted Bobby Davis and suggested he get defendant's cooperation in working on the matter of the TV sets. For several years

defendant had been assisting the FBI, giving them information which enabled them to recover "a substantial amount of things."

On rebuttal, Agent Richardson of the SBI stated he was present when defendant made the statement that there was no question in his mind that Britt knew the stuff was stolen, since he had gotten a thousand dollars worth of equipment for $525. Bobby Davis, recalled, testified that defendant had told him that Britt knew the items were stolen when he bought them.

Defendant was found guilty on both counts of felonious receiving of stolen goods. He was sentenced to one year in Case #78CRS31630, and five years, suspended on condition, in Case #78CRS31632. Defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Gerald L. Bass for defendant appellant.

ARNOLD, Judge.

[1] The major issue on this appeal is whether the evidence that defendant knew the television sets were stolen at the time he received them was sufficient to go to the jury. If it was, defendant's motion to dismiss was properly denied. Considering the evidence in the light most favorable to the State, as we are required to do, *State v. Jones*, 32 N.C. App. 408, 232 S.E. 2d 475, *cert. denied* and *app. dism.* 292 N.C. 643, 235 S.E. 2d 63 (1977), we find the following: In May or June 1977, defendant purchased from James Williams two color TVs and two stereos, still in their sealed boxes and stamped "Brown-Rogers-Dixson." He paid $250 or $275 each for the TVs and $150 each for the stereos. Later he purchased another console color TV from Williams for $300. An additional TV and stereo were delivered to his business for purchase by Jimmy Britt. On 3 November 1977, defendant told the SBI that he knew the items purchased from Williams were stolen.

Defendant argues that this statement of 3 November is the only evidence that defendant knew the items were stolen, and that it is not probative because Bobby Davis had visited defendant on 15 September 1977 and told him that they were stolen. Defendant argues that the fact he knew on 3 November, having

been told by Davis on 15 September, does not mean he knew at the time he purchased the items.

The State presented further evidence, however. On 3 February 1978 defendant told the SBI that "before Labor Day 1977" he had told an FBI agent "that Britt had the stolen TV and stolen stereo." Davis' visit with defendant was after Labor Day. And while defendant is not charged with receiving the items allegedly purchased by Britt, they were acquired from Williams under circumstances identical to the two transactions for which he was charged. If defendant knew in the summer of 1977 that the items Britt purchased were stolen, there is a reasonable inference that he knew the ones he purchased were stolen as well. Further, defendant told the SBI on 3 February that when Andy Creech bought a TV and stereo from him on 15 June, Creech knew they were stolen. Defendant does not attempt to explain how Creech could have known this if defendant did not know.

Other evidence supports an inference of defendant's knowledge. Defendant told the SBI that there was no question in his mind that Britt knew the sets were stolen, because of the good prices Britt got. Defendant got the same low prices on the items he purchased. Defendant purported to believe that the prices were low because the sets had been damaged and repaired, yet they arrived in sealed boxes. When defendant checked a serial number with the FBI and got no information that the set was stolen, he nevertheless told the agent that "if any of this stuff is stolen, it has got to be an inside job."

[2] Defendant argues that to withstand his motion the State is required to show that he had absolute knowledge that the sets were stolen. In defendant's view, any reasonable grounds he had to believe that the items were stolen are insufficient, and he cannot be charged with knowledge until 15 September when he "knew for certain," having been told by Davis that the sets were in fact stolen. G.S. 14-71, as amended in 1975, provides that a person shall be guilty of receiving stolen goods if he receives them "knowing or having reasonable grounds to believe" that they are stolen. Furthermore, guilty knowledge may be inferred from the circumstances. *State v. Hart*, 14 N.C. App. 120, 187 S.E. 2d 351, *cert. denied*, 281 N.C. 625, 190 S.E. 2d 469 (1972). In spite of defendant's argument to the contrary, we find that sufficient

evidence was presented to take the case to the jury. There was no error in the denial of defendant's motion.

[3] Defendant next argues that he was denied his right to a speedy trial because he was not brought to trial within 120 days of his indictment. His reliance upon the Speedy Trial Act, G.S. 15A-701 et seq., is misplaced, however. The Act is Sec. 1 of Chapter 787 of the 1977 Session Laws, and Sec. 2 of that chapter says plainly: "This act shall apply to any person who is arrested . . . or is notified . . . that an indictment has been filed . . . against him, on or after October 1, 1978." As defendant was indicted on 30 May and arrested on 31 May 1978, the Act is clearly inapplicable to his case. Accord, *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979). Defendant concedes that he did not petition for a speedy trial, as was provided for by G.S. 15A-702 & -703 prior to the enactment of the Speedy Trial Act. We find no merit in this assignment of error.

No prejudicial error appears in the court's allowing testimony that there were three thefts from Brown-Rogers-Dixson. While it is true that defendant was charged with only two counts of receiving, defendant himself testified that James Williams made three deliveries to defendant's place of business. And we fail to see how defendant would be prejudiced by evidence that a third party committed a theft in which defendant did not take part.

[4] We agree with defendant that the court erred in allowing SBI Agent Shaw to give his opinion of the value of the TV sets, since no foundation had been laid for this opinion testimony. However, we do not find that this error was prejudicial. In fact, defendant has not argued any prejudice to his case by the admission of this testimony. Nor do we find prejudice in the admission of State's Exhibits 11 and 12 for the purpose of illustrating testimony. Defendant argues that the "best evidence rule" was violated because the State could have produced the sets in question, but we note that the best evidence rule applies to *writings* introduced into evidence to prove their contents. 2 Stansbury's N.C. Evidence § 190 (Brandis Rev. 1973).

[5] On cross-examination, defendant was asked, "Mr. Allen, during the last six months, isn't it a fact, that you have conspired with other people to break into the house of Reginald Shirley and

steal some guns?" Defendant's objection to this question was overruled, and he assigns error to this ruling. He cites no authority for his position, arguing simply that the question was "unfair." It is the law in North Carolina that for the purpose of impeachment a witness may be asked whether he has committed specific criminal acts. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). The question was properly allowed.

[6] On rebuttal, the State called William Talton, and defendant objects to the admission of his testimony since Talton's name was not on the list of potential witnesses for the State given to defendant before voir dire of the jury. Defendant raised this objection at trial, and the court inquired whether any of the jurors was acquainted with the witness. None responded that he was. Defendant now contends that he was prejudiced because Talton's testimony conflicted with defendant's on a particular point, and, not knowing that Talton would be called, he was not prepared with witnesses who could corroborate defendant's testimony on that point. Defendant did not object on this ground at trial, however, or ask for a recess in which to secure witnesses to counteract Talton's testimony. We find no prejudicial error here.

Defendant assigns error to the court's statement in the charge to the jury of the essential elements of receiving stolen goods, arguing not that the instructions given were incorrect, but that the court should have elaborated upon the "skeleton" charge that he gave. Defendant submitted no requested instructions to the trial court, however, and we find that the instructions given were sufficient. See *State v. Boyd*, 278 N.C. 682, 180 S.E. 2d 794 (1971).

Although defendant is correct that Willie Cooley, the Brown-Rogers-Dixson employee who was involved in the thefts, was not an accomplice to the crime of receiving stolen property, we find no prejudice to defendant from the court's charge on this point, directed as it was to the fact that the jury should examine Cooley's testimony with extreme care. The error could only have worked to defendant's benefit. See *State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978).

The defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and WEBB concur.

EDNA FAYE WILLETTS v. INTEGON LIFE INSURANCE CORPORATION

No. 7913SC344

(Filed 4 March 1980)

1. **Insurance § 18— life insurance—avoidance of policy for misrepresentations**

An insurer's duty under an insurance contract may be avoided by a showing that the insured made representations in his application which were material and false, and a representation in a life insurance application is deemed material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract and accepting the risk.

2. **Insurance § 18— life insurance—avoidance of policy for misrepresentations—burden of proof**

After plaintiff has made a *prima facie* case for recovery upon a life insurance policy, the burden of proof is upon the insurer to establish the misrepresentations relied on by it to avoid that policy.

3. **Insurance § 19.1— life insurance—failure to list driving under influence charge—knowledge of agent imputed to insurer**

Where, in an application for a double indemnity life insurance policy which was completed for the insured by defendant insurer's agent, only a charge of speeding 60 in a 45 mph zone was listed in answer to a question as to whether insured had been charged with any motor vehicle moving violations or had had his license revoked within the past three years, but insured discussed with the agent the possibility that a charge against him for driving under the influence might have occurred within the past three years and was told by the agent that he should not worry about whether the charge was within three years because insurer would obtain a copy of insured's driving record and would notify insured if there was a problem, the agent had notice of insured's conviction within the past three years for driving under the influence which further inquiry would have revealed, and such notice was imputed to defendant insurer and precluded defendant from avoiding the policy on the ground that such conviction was not listed in the application, notwithstanding the application contained a provision that knowledge of an agent did not constitute knowledge of the insurer.

APPEAL by defendant from *McConnell, Judge*. Judgment entered 19 October 1978 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 28 November 1979.

Plaintiff seeks to recover $200,000 as the sole beneficiary under a double indemnity life insurance policy dated 9 August 1976 issued by defendant on the life of Graham Arliss Willetts, deceased. Willetts died on 15 March 1977 as a result of injuries sustained in an automobile accident. Defendant refused to satisfy plaintiff's demand for payment and defends this action on the grounds that in the application for insurance, "the plaintiff and her deceased husband, the insured, failed to disclose and concealed certain information which amounted to misrepresentations of the truth."

In support of its affirmative defense, defendant relies on a question and answer contained in the application for life insurance completed by defendant's agent William A. Kopp, who asked the questions in the application as plaintiff and the deceased responded. The pertinent portion of the application follows:

> 7. In the past three years have you been in a motor vehicle accident, charged with a moving violation of any motor vehicle law or had your license restricted or revoked?

The question was checked "Yes" and in the margin beside the question there appeared the phrase "60/45 zone." The instructions preceding the questions stated: "IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS CONCERNING THE PROPOSED INSURED ARE [sic] 'YES', GIVE DETAILS BELOW (NO. 17)." Besides the phrase "60/45 ZONE," there was nothing else written on the application with respect to that question. At the bottom of the fourth page of the application there was printed, in pertinent part, the following:

> REPRESENTATION: I represent that all statements and answers contained herein are complete and true and correctly recorded.
>
> AGREEMENT: I expressly agree that (1) only the president, a vice president, the secretary, or an assistant secretary of the Company, can make, modify, or discharge contracts, or waive any of the Company's rights or requirements, and that none of these acts can be done by the agent taking this application; (2) no information or knowledge acquired by any agent, medical examiner, or any other person in connection with this application for the proposed insurance shall be con-

> sidered as knowledge of the Company unless the same is reduced to writing and made a part of the application or the policy issued thereon; (3) the insurance hereby applied for shall not take effect unless both the first premium thereon is paid and the policy is delivered to the applicant prior to any change in the health or other conditions affecting insurability of the proposed insured since the date of the application; except that if the full first premium is paid to an authorized agent of the Company on the date of this application and a duly executed Premium Receipt bearing the same number and date as this application has been delivered to the applicant, then the liability of the Company shall be only as is stated in such receipt; (4) the acceptance of any policy issued pursuant to this application shall constitute an acceptance and ratification of any corrections, additions, or changes made by the Company in the space provided "For Home Office Endorsements Only," except that in the states of Illinois, Kansas, Kentucky, Maryland, Michigan, and Pennsylvania, no change shall be made as to amount, classification, plan of insurance, or benefit unless agreed to in writing by the applicant.

The signatures of Graham Arliss Willetts and Edna S. Willetts appear at the end of the application.

At trial, defendant presented exhibits which showed that the deceased insured was charged with driving under the influence on 5 December 1973 and, as a result of his being convicted, his driver's license was revoked and he was granted limited driving privileges. Defendant's exhibits further showed that the insured was charged with driving too fast for conditions on 3 March 1974, and that he was charged with speeding 60 miles per hour in a 45 mile-per-hour zone and driving under the influence on 29 January 1975. There was evidence that had defendant known of the charges, it would have denied the application.

With respect to the circumstances surrounding the completion of the life insurance application, the evidence tended to show that on 3 August 1976 plaintiff, her deceased husband, and defendant's agent Kopp were at the Willetts' home in Bolivia, North Carolina. As stated above, Kopp wrote down the answers to the questions on the application. Mrs. Willetts testified:

I recall Mr. Kopp asking Arliss a question regarding his driving record for the past three years immediately prior to the date of the application. I know the question of Arliss being charged with driving under the influence was discussed between Arliss, the agent and myself. We were discussing the tickets or charges that he might have had during the three year period and this is when it came up—in that conversation. When asked whether or not [sic] he had been charged with driving under the influence [during] the past three years, Arliss told Mr. Kopp that he thought that it was prior to that. More than three years. I said I am not sure about that. I was not sure about whether it was more than three years because I did not know the date.

. . .

I had knowledge of another driving record that Arliss had had during the three years immediately preceding August 3, 1976. There was one charge that I was aware of, 60 in a 35 or 45, whatever was put on the application. During that time I did not have any knowledge of any other charges against him or accusations against him during the three year period.

Mrs. Willetts testified further, over defendant's objection, that Kopp told them not to worry about the charges, "that a record of Arliss driving would be ordered from the Department of Motor Vehicles by Integon Company and that if there was [sic] any questions at all Integon would contact me." Mrs. Willetts stated that she realized when she signed the application she was certifying to the company that all answers were complete and true and correctly recorded, and that to the best of her knowledge, the answer in response to question number seven was complete as given.

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

1. Did Graham Arliss Willetts die on March 15, 1977, as a result of injuries sustained by external, violent accidental means on that date in an automobile accident?

ANSWER: Yes.

2. In answer to Question No. 7 on the application for insurance, did Graham Arliss Willetts and Edna Faye Willetts represent that he had not been involved in a motor vehicle accident, charged with a moving violation, other than speeding 60 miles per hour in a 45 mile per hour zone, or had his license restricted or revoked for three years immediately prior to August 3, 1976?

ANSWER: No.

3. If so, was said representation false?

ANSWER: _____

4. If so, was said representation material?

ANSWER: _____

The trial court thereafter awarded plaintiff $200,000 plus interest. Defendant appeals.

Ray H. Walton for plaintiff appellee.

Crossley & Johnson, by Robert White Johnson, for defendant appellant.

MORRIS, Chief Judge.

[1, 2] Through the pleadings and admissions, plaintiff established the execution and delivery by defendant of a life insurance policy issued to the deceased with plaintiff as beneficiary, the death of the insured, and payment of premiums. The death of the insured was shown by medical evidence to have resulted from injuries sustained in an automobile accident during the period the policy was in force. Nothing else appearing, plaintiff has established a *prima facie* case of her right to the insurance proceeds. *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614 (1961); *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952). An insurer's duty under an insurance contract may be avoided by a showing that the insured made representations in his insurance application which were material and false. G.S. 58-30; *Tolbert v. Insurance Co., supra; Gardner v. Insurance Co.*, 163 N.C. 367, 79 S.E. 806 (1913). A representation in a life insurance application is deemed material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the con-

tract and accepting the risk. *Carroll v. Insurance Co.*, 227 N.C. 456, 42 S.E. 2d 607 (1947). After plaintiff has made a *prima facie* case, the burden of proof is on the insurer to establish the misrepresentations relied on by it to avoid the policy. *Rhinehardt v. Insurance Co., supra; Wells v. Insurance Co.*, 211 N.C. 427, 190 S.E. 744 (1937). In this case, the jury answered the question of whether plaintiff and her deceased husband represented to defendant that the insured had not been charged with a moving violation other than speeding 60 miles per hour in a 45 mile-per-hour zone in favor of the plaintiff. Thus, the question of materiality is not before us.

Defendant's contention in this action is that plaintiff and insured, by signing the life insurance application in which the answer to question No. 7 was incomplete, misrepresented the truth to defendant insurer. Plaintiff, on the other hand, contends that she, her husband, and defendant's agent discussed insured's driving record at length, and that they did not represent to defendant's agent that there had only been one charge within the preceding three years. Some evidence supporting plaintiff's position was admitted without objection during direct examination of Mrs. Willetts. A portion of her testimony, however, concerned statements allegedly made by Agent Kopp to plaintiff and the insured, to the effect that they need not worry about whether the charges were within three years because Integon Company would obtain a copy of insured's driving record, and they would be notified if there was any problem. None of this evidence was incorporated into the insurance application, and it obviously contradicted the clause printed in the application disclaiming knowledge on the part of Integon Company.

In North Carolina, evidence of prior parol representations will not be received into evidence to alter the terms of a written insurance contract. This rule is explained as follows:

> [W]hen the parties have bargained together touching a contract of insurance and reached an agreement, and in carrying out, or in the effort to carry out, the agreement [sic] [,] a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be

> received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties.

Floars v. Insurance Co., 144 N.C. 232, 235, 56 S.E. 915, 916 (1907). *See also Rutherford v. Insurance Co.*, 562 F. 2d 290 (4th Cir. 1977); *Cavin's, Inc. v. Insurance Co.*, 27 N.C. App. 698, 220 S.E. 2d 403 (1975). Applying this principle, defendant contends that evidence of Agent Kopp's statements was immaterial, and its admission was, therefore, improper. Without ruling on the admissibility of the statements, we do not find defendant's argument persuasive, in that Agent Kopp, on direct and cross-examination, testified without objection that he told Mrs. Willetts that the company would check her husband's driving record and that she would be notified if the results affected the policy. It is clear that defendant's exception to the admission of this evidence was waived when Agent Kopp testified to the same matter. *State v. Byrd*, 40 N.C. App. 172, 252 S.E. 2d 279 (1979). By so holding, we also reject defendant's argument with respect to the trial court's instructions containing those statements.

[3] Notwithstanding defendant's contentions regarding the inadmissibility of its agent's parol representations, it is apparent that such evidence, admitted without objection, constitutes knowledge on the part of defendant which precludes it from avoiding liability under the policy.

It is well established that an insurance company cannot avoid liability on a life insurance policy on the basis of facts known to it at the time the policy went into effect. *Cox v. Assurance Society*, 209 N.C. 778, 185 S.E. 12 (1936). Defendant argues that it had no knowledge of insured's prior driving record because there was nothing on the face of the insurance application to that effect and nothing to put it on notice that further inquiry should have been made. Defendant overlooks, however, the rule as stated in *Insurance Co. v. Grady*, 185 N.C. 348, 117 S.E. 289 (1923), wherein the Court stated:

> [I]n the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same.

185 N.C. at 353, 117 S.E. at 291. *Cox v. Assurance Society, supra.* *See* 16A Appleman, Insurance Law and Practice § 9101 (1968) [Appleman]. In *Gouldin v. Insurance Co.*, 248 N.C. 161, 102 S.E. 2d 846 (1958), the Court, quoting from Appleman, stated the rule with respect to the degree of knowledge required to constitute notice on the part of the agent and the insurer:

> Knowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry would have disclosed and is binding on the insurer. The rule applies to insurance companies that whatever puts a person on inquiry amounts in law to "notice" of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed.

248 N.C. at 165, 102 S.E. 2d at 849. Applying these principles to the facts before us, it is evident that Agent Kopp had knowledge of the insured's driving history, and that Kopp was at least put on notice that there may have been driving charges within the three years preceding the application other than the charge for speeding 60 miles per hour in a 45 mile-per-hour zone. Such knowledge is sufficient to put Kopp on notice as to the other charges which would have been revealed by further inquiry. Thus, Integon is deemed to have notice of the insured's driving record for the three years preceding the application. By so holding, we reject defendant's assignment of error relating to the trial court's instruction to the jury that it could consider in its deliberations defendant's ability to obtain insured's driving record.

We have carefully reviewed defendant's other assignments of error concerning the admission of evidence and jury instructions. We find no error sufficiently prejudicial to warrant granting defendant a new trial. Further, we find the evidence supportive of the jury's finding that plaintiff and its insured did not misrepresent to defendant information regarding insured's past driving record.

No error.

Judges PARKER and HILL concur.

SPECTOR UNITED EMPLOYEES CREDIT UNION, FORMERLY HENNIS CREDIT UNION v. WILLIAM MICHAEL SMITH AND HERBERT RAY

No. 7921SC547

(Filed 4 March 1980)

Uniform Commercial Code § 43— sale of secured property—subsequent new loan agreement—future advance—summary judgment improper

In an action to determine whether plaintiff lender was entitled to possession of personal property, used to secure a loan, which was subsequently sold to a third party, the trial court erred in granting summary judgment for plaintiff where a genuine issue of fact existed as to whether plaintiff and defendant borrower intended their loan transaction of June 1977 to renew, enlarge or extinguish the note executed in April 1976 by borrower which was secured by the property in question, since the nature of the second loan determined whether it was a future advance within the meaning of G.S. 25-9-307(3) and thus whether defendant purchaser from defendant borrower took the property in question free from plaintiff lender's security interest.

APPEAL by defendant from *Washington, Judge.* Judgment entered 15 February 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 January 1980.

This is an action to determine whether the plaintiff lender is entitled to possession of personal property used to secure a loan which was subsequently sold to a third party. On 29 April 1976 defendant William Michael Smith purchased an eighteen-foot 1976 Larson motorboat and a 1976 Cox trailer with funds he had obtained from the plaintiff credit union. On the date of purchase, Smith executed a note in the principal amount of $6,500 and a security agreement granting plaintiff a security interest in the boat and trailer. The security agreement stated that its purpose was to secure the note "and all extensions or renewals thereof," and the "payment of all other obligations and liabilities of Debtor to Credit Union whether now held or hereafter acquired . . . including all future advances Credit Union may make to Debtor . . . ." Plaintiff perfected its security interest in the collateral by the timely filing of a financing statement.

Defendant Smith sold the boat and trailer to defendant Herbert Ray on 19 August 1976. Both defendants executed a "Bill of Sale" reciting that defendant Ray was "aware of a lien" on the boat and trailer. On 20 June 1977 plaintiff loaned defendant Smith the principal sum of $6,239.26. Smith executed a note in this

amount and another security agreement listing the boat and trailer he had previously sold to Ray as collateral. Of the proceeds loaned to Smith, $5,620.41 were used to pay the balance owed on the 29 April 1976 note and the remaining amount was applied to previous loans made by plaintiff to defendant Smith. In his application for this latter loan, Smith stated that the purpose of the loan was to "catch up on loans and bills." Defendant Smith defaulted on the note of 20 June 1977.

Plaintiff sued the defendants alleging that it was entitled to possession of the boat and trailer under the two security agreements. Both plaintiff and defendant Ray moved for summary judgment under G.S. 1A-1, Rule 56. In ruling on these motions, the trial court considered the pleadings, responses to interrogatories, documents produced, stipulations of the parties and the affidavit of R. W. Hunter, Jr., plaintiff's general manager. From the trial court's judgment denying defendant Ray's motion for summary judgment and granting plaintiff's motion for summary judgment, defendant Ray appeals.

Womble, Carlyle, Sandridge & Rice, by Francis C. Clark and W. P. Sandridge, Jr., for the plaintiff appellee.

John S. Curry for the defendant appellant.

WELLS, Judge.

This case presents the problem of interpreting the term "future advance" as it is used in Section 9-307(3) of the North Carolina Uniform Commercial Code. The term is nowhere defined in the Code. G.S. 25-9-307(3) provides:

> A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, which ever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period.

The parties have stipulated that defendant Ray was not a buyer in the ordinary course of business and that plaintiff's second loan

to defendant Smith occurred more than forty-five days after Ray had purchased the collateral from Smith.

We have not found any cases from this State or other jurisdictions interpreting Section 9-307(3) of the Uniform Commercial Code. Subsection (3) was added to the Official Text as part of the 1972 amendments and was effective in North Carolina on 1 July 1976. 1975 N.C. Sess. Laws, ch. 862, § 7. The obvious purpose of the subsection is to define the priorities between a secured party and a purchaser other than a buyer in the ordinary course of business and to encourage the lenders and purchasers affected to shape their business practices on this basis.

> The provision proceeds on the assumption that, after an appropriate grace period, a creditor should know whether the collateral has been sold before making another advance or committing himself to one. Unless he has knowledge to the contrary, the secured party is allowed for 45 days to assume that the debtor still owns the collateral. Advances made with knowledge, or after the 45-day period, may not be secured by the sold collateral . . . .

1 Bender's Uniform Commercial Code Service § 3A.03[c], p. 202 (1979). Thus, under this subsection of the Code, in situations such as the one here a prudent lender would be well-advised to make sure that the debtor has not transferred or otherwise disposed of the collateral securing the original loan before attempting to expand the obligation covered by the security under the original security agreement's future advances clause.

We say "expand" the obligation because Section 9-307(3) is one of three subsections of the Code added by the 1972 amendments which clarify the extent to which future advances under a security agreement outrank an intervening right. These other subsections are 9-301(4) and 9-312(7). Draftmen's Statement of Reasons for 1972 Changes in Official Text, § 9-307. Section 9-301(4) provides that a "lien creditor" does not take subject to a subsequent advance unless it is given or committed without knowledge, although there is an exception protecting future advances within forty-five days after such lien regardless of knowledge. Section 9-301(4) was proposed for situations in which the intervening party is a judgment creditor because

> [i]t seems unfair to make it possible for a debtor and secured party with knowledge of the judgment lien to squeeze out a judgment creditor who has successfully levied on a valuable equity subject to a security interest, by permitting later *enlargement* of the security interest by an additional advance, unless that advance was committed in advance without such knowledge . . . .
>
> A similar problem arises where the intervening party is a buyer of the collateral subject to the security interest. While buyers must necessarily take subject to rights of secured parties, the buyer should take subject to subsequent advances only to the extent that they are given "pursuant to commitment" or within the period of 45 days after the purchase but not later than the time that the secured party acquires knowledge of the purchase. It is so proposed in Section 9-307(3) . . . . [Emphasis added.]

Draftmen's Statement of Reasons for 1972 Changes in Official Text, § 9-312, § 5. No such unfairness should normally result to a subsequent purchaser from a transaction which merely extends or continues the secured obligation without enlarging it. The other new subsection which clarifies the extent to which a future advance may outrank an intervening right, Section 9-312(7), deals with the date on which a security interest is given priority when a future advance is made, and an analysis of this subsection would not aid our understanding of the meaning of Section 9-307(3).

So the question in the instant case is the nature of the loan transaction of 20 June 1977. The parties agree that if it constituted merely an extension or renewal of plaintiff's obligation of 29 April 1976, it was not a future advance. It is also apparent from the above analysis that, to the extent the second loan may have placed an additional burden on the collateral, it must be considered a future advance. If the second loan was intended by the parties to extinguish the first obligation, the entire amount of the second obligation would be considered a future advance.

Plaintiff relies in large part on *Mid-Eastern Electronics, Inc. v. First Nat. Bank of So. Md.*, 455 F. 2d 141 (4th Cir. 1970) in support of its position that the second loan transaction constituted an extension or renewal of the original debt as a matter of law. In that case the issue was whether the creditor's failure to include a

future advances clause in its original security agreement caused it to lose its security interest in the collateral following a subsequent exchange of new notes for the old notes. The district court had concluded that new notes were future advances as a matter of law. The Fourth Circuit reversed the district court on this point, holding the intent of the parties governed and that there was no indication that the parties had intended that the new notes serve any purpose other than to renew or extend the earlier obligation. Likewise, the pre-Code law in North Carolina held that an exchange of notes was presumed not to extinguish the underlying obligation unless the parties intended that such an extinguishment occur. *Hyman v. Devereux*, 63 N.C. 624 (1869). *See also, Lancaster v. Stanfield*, 191 N.C. 340, 132 S.E. 21 (1926); *Cable v. Oil Co.*, 10 N.C. App. 569, 179 S.E. 2d 829 (1971), *cert. denied*, 278 N.C. 521, 180 S.E. 2d 863 (1971). The Code continues the same rule. G.S. 25-3-802(1)(b).

In *Mid-Eastern*, however, no new advances were made to the debtor—there was a mere exchange of notes. The debtor admitted in his deposition that the subsequent transaction constituted a "renewal" of the prior debt. The Court stated that the fact the old notes were returned to the debtor as new notes were issued did not, *in and of itself*, rebut the inference that the original indebtedness had not been extinguished. The *Mid-Eastern* Court distinguished the circumstances present in that case from the situation involved in *Safe Deposit Bank & Trust Co. v. Berman*, 393 F. 2d 401 (1st Cir. 1968), where new notes were issued which increased the debtor's obligation owed to the bank. The *Berman* Court had treated the subsequent loan as a future advance.

It therefore becomes evident that in the case *sub judice*, different factual inferences may be drawn as to the intent of the parties from the circumstances surrounding the 20 June 1977 loan. Supporting the inference that although a part of the loan was intended to pay off the 29 April 1976 obligation, the latter transaction was not intended to simply renew the April 1976 debt is the fact that it involved an actual advance of funds by the credit union which defendant Smith could have used for any purpose. Smith was not obligated to apply any of the proceeds toward the earlier obligation. The June 1977 transaction involved a note for a greater amount than the balance owing on the earlier

note and contained somewhat different terms than the previous note. A new security agreement was in fact entered into by the parties. This was not a mere exchange of notes for notes, as was the situation in *Mid-Eastern*. That defendant here used the proceeds of the 20 June 1977 note to satisfy the April 1976 obligation, which was subsequently marked "paid and satisfied," may not itself be conclusive. *Lancaster v. Stanfield, supra.* When viewed together with the other circumstances mentioned above it does, however, provide some additional evidence that the June 1977 transaction was intended to extinguish the earlier obligation.

On the other hand, there are facts present which support an inference that the 20 June 1977 transaction constituted a renewal of the earlier obligation. Defendant Smith stated that the purpose of the June 1977 loan was to "*catch up* on loans and bills" (emphasis added). One of the plaintiff's agents stated during discovery that the purpose of the loan was to "renew and refinance" the earlier obligation. Plaintiff also argues that the execution of a second security agreement with somewhat different terms was mandated by Federal law and that the amount of the second loan differed from the balance owing on the April 1976 note because the second note consolidated three loans which plaintiff had made to defendant. These arguments and explanations should be considered and weighed by the trier of fact at trial. However, on motion for summary judgment they cannot be deemed to conclusively determine the factual issue of the intent of the parties. We agree with defendant Ray, that in light of the other circumstances present in this case, the fact that the parties in their stipulations agreed that the 1977 loan "refinanced" the 1976 note involved an unfortunate and unintended use of this term by counsel for defendant Ray, which should not be deemed determinative.

Summary judgment is appropriate only where the movant has shown that no material issue of fact exists and that he is entitled to judgment as a matter of law. *Baumann v. Smith*, 298 N.C. 778, 260 S.E. 2d 626 (1979). If different material conclusions can be drawn from the evidence, summary judgment should be denied. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979). In the present case, the circumstances surrounding the June 1977 loan transaction do not lead, as a matter of law, to a single conclusion as to the intent of the parties to either renew, enlarge or ex-

tinguish the April 1976 note. We therefore affirm the trial court's denial of defendant Ray's motion for summary judgment and reverse the granting of plaintiff's motion for summary judgment.

Affirmed in part and reversed in part.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. BRAXTON CHAVIS

STATE OF NORTH CAROLINA v. MRS. MARTIN BULLARD

STATE OF NORTH v. MARTIN BULLARD

STATE OF NORTH CAROLINA v. MRS. JOHN L. BARTON

STATE OF NORTH CAROLINA v. JOHN L. BARTON

STATE OF NORTH CAROLINA v. SANFORD BARTON

STATE OF NORTH CAROLINA v. JAMES G. OXENDINE

STATE OF NORTH CAROLINA v. MRS. JAMES G. OXENDINE

No. 7916SC602

(Filed 4 March 1980)

Schools § 14— failure to send children to assigned schools—belief in exemption from assignment plan as American Indians

In a prosecution of defendants for failing to cause their school-age children to attend the public school to which they had been assigned in violation of G.S. 115-166 and G.S. 115-176, the trial court properly refused to instruct the jury that it should return a verdict of not guilty if it found that defendants failed to

send their children to the assigned school because of their good faith belief that as American Indians they were exempt from school board attendance guidelines established at the direction of the Department of Health, Education and Welfare, since (1) the desegregation plan pursuant to which the school district lines were established affected Indians, as it affected all other county residents, as members of a racial group and, as a matter of law, they were equally subject to the plan's mandate, and (2) defendants' good faith belief in their exemption from the plan was based on a misunderstanding of the law and as such could furnish no defense in a prosecution for the offense charged because that offense did not require willfulness or any specific intent.

APPEAL by defendants from *Brannon, Judge.* Judgments entered 22 February 1979 in Superior Court, ROBESON County. Heard in the Court of Appeals 26 November 1979.

Defendants were tried and convicted in district court upon warrants charging them with violation of the compulsory school attendance law, G.S. 115-166 and G.S. 115-169, in having failed to cause their children to attend the school to which they were assigned on September 25, 26, 27, and 28, 1978. A trial *de novo* was held before a jury at the 19 February 1979 Session of Superior Court in Robeson County.

Prior to trial the State and the defendants stipulated that each of the defendants was the parent of a child or children between the ages of seven and sixteen years on 25 September 1978 through 28 September 1978. At trial the Superintendent for the Robeson County Board of Education testified that in 1970 the school board had established school district zones such that children living in a particular zone would attend school there. The zones were established under a plan ordered developed by the U.S. Department of Health, Education and Welfare. Prior to the 1978-1979 school year, defendants' children had been assigned to Prospect School in Robeson County, although as early as 1974 they should have been attending Oxendine School. In February 1978 the county school board adopted a new policy requiring that children attend school within the district in which their parents resided, the district lines being those established in 1970. When the school board discovered that under this policy, defendants' children should have been attending Oxendine rather than Prospect School, the parents were notified in person and by certified letter of the proper assignment. This occurred prior to the beginning of the 1978-1979 school year. Defendants informed the

superintendent that, as American Indians, they felt they had a constitutional right to send their children to the school of their choice. The school superintendent wrote the Department of Health, Education and Welfare and inquired whether an exemption could be granted on that basis. HEW replied that it could not because the Indians were equally subject to the desegregation process and that federal funding, which comprises approximately 10% of the money available for the schools in Robeson County, could be withheld if the county did not comply with desegregation plans.

Defendants' children arrived at Prospect School on the first day of class of the 1978-79 school year to attend school there. The defendant parents, who claim Indian heritage, contended that since Prospect School had historically been an Indian School and since the older brothers and sisters of the children had gone to Prospect School, they were entitled by virtue of being American Indians, to continue to send their children to Prospect School. The principal of Prospect School was directed by the school board not to provide instruction or books to the children, but he was informed that the children would remain in a place provided for them on school premises. Some school fees were mistakenly collected from some of defendants' children by Prospect School teachers, but refund checks were written for those fees. The State's evidence showed that defendants were concerned that their children be educated and that they had consistently caused their children to attend Prospect School even though the children were not receiving instruction there.

Defendants testified that they had no objection to Oxendine School, the school to which their children were assigned, but that they felt that the Civil Rights Act of 1964 was not applicable to Indians, and that it was their right to send their children to the school of their choice.

Defendants requested that the court instruct the jury that if defendants had "fail[ed] to send their children to the assigned school as the result of a good faith belief that as American Indians they are exempt from guidelines of the local School Board mandated by the Department of HEW, then you are to return a verdict of not guilty." This instruction was refused. As to each defendant-parent the jury returned a verdict of guilty of the of-

fense of failing to cause his school-age children to attend their assigned school. From judgments imposing suspended sentences of imprisonment, defendants appealed.

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

Seawell, Pollock, Fullenweider, Robbins & May, P.A., by Bruce T. Cunningham, Jr. for defendant appellants.

PARKER, Judge.

Defendants' sole assignment of error is directed to the trial court's refusal to instruct the jury that they should return a verdict of not guilty if they found that defendants failed to send their children to the assigned school because of their good faith belief that as American Indians they are exempt from school board attendance guidelines established at the direction of the Department of Health, Education and Welfare. We find no error in the refusal to give the tendered instruction.

G.S. 115-166 provides in pertinent part:

> Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session. No person shall encourage, entice or counsel any such child to be unlawfully absent from school.

G.S. 115-169 provides:

> Any parent, guardian or other person violating the provisions of this Article shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days, or both, in the discretion of the court.

G.S. 115-166 does not explicitly require the parent to cause his child to attend the public school to which he is assigned, but instead requires only that the parent cause his child to attend school "for a period equal to the time which the public school to which the child is assigned shall be in session." However, G.S. 115-166 must be read in *pari materia* with G.S. 115-176 which pro-

vides in part that "[n]o child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education." Thus, unless a parent chooses to have his child attend an approved nonpublic school, he must cause him to attend the public school to which he is assigned.

The record discloses that defendants had ample notice prior to the beginning of the 1978-79 school year that their children were assigned to Oxendine School, and there is ample evidence that they willfully caused them to attend Prospect School. In light of this, the question presented is whether their good faith belief that as American Indians they are exempt from compliance with the school assignment plan adopted by the Robeson County Board of Education pursuant to the mandate of the Department of Health, Education and Welfare is a defense to the offense charged. As a matter of law, no such exemption exists. Although the American Indian tribes have been accorded a unique legal status by virtue of Art. I, § 8, cl. 3 of the Federal Constitution which empowers the Congress "To regulate commerce . . . with the Indian tribes," even if the defendants were members of a federally recognized tribe, which they concede they are not, the provisions of the Civil Rights Act of 1964 with respect to public school desegregation would apply no less to them. A distinction must be drawn between governmental requirements affecting the American Indian as a political classification and those affecting the American Indian as a racial classification. *See, Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L. Ed. 2d 290, n. 24 (1974). As one court has expressed it, laws or practices in the former category are "closely related to furthering the federally recognized interests of political sovereignty and tribal self-government and the classifications consequently depend on tribal membership or proximity to reservations." *Booker v. Special Sch. Dist. No. 1*, Minneapolis, 451 F. Supp. 659, 667 (D. Minn. 1978), aff'd 585 F. 2d 347 (8th Cir. 1978). Those in the latter category, however, are directed to a "racial" group consisting of "Indians," *Morton v. Mancari, supra*, and are to be judged no differently than other classifications based on race. In *Booker*, the United States district court held that a court-ordered desegregation plan which affected Indians not living on a reservation raised no question of the political status of Indians but, instead, affected them as a racial

group. Thus, the court concluded that any variance from the plan, even if intended to promote the special needs of Indian children not living on a reservation, would raise serious questions under the equal protection clause of the Federal Constitution. Similarly, the desegregation plan pursuant to which the school district lines were established in 1970 in the present case, insofar as it affects the defendants and the other Indians in Robeson County, affects them, as it affects all other county residents, as members of a racial group and, as a matter of law, they are equally subject to the plan's mandate.

Although the record supports the good faith of defendants' belief in their exemption from the plan, that belief was based on a mistake of law, and the general rule is that a mistake of law, however bona fide, is no defense to prosecution for an act which violates the criminal laws unless the offense includes the element of willfulness or requires specific criminal intent. 21 Am. Jur. 2d Criminal Law § 94, p. 176. The offense defined by G.S. 115-166 clearly does not require any specific intent, and this Court has previously held that willfulness is not an element of the offense. *State v. Vietto*, 38 N.C. App. 99, 247 S.E. 2d 298 (1978), reversed on other grounds, 297 N.C. 8, 252 S.E. 2d 732 (1979). Therefore, defendants' good faith belief, based as it was on a misunderstanding of the law, could furnish no defense in a prosecution for the offense charged. We note that the defense offered in this case is distinguishable from that presented in *State v. Miday*, 263 N.C. 747, 140 S.E. 2d 325 (1965). In that case, the defendant's child was refused admission to public school because he had not met the legal requirements for inoculation. The Supreme Court held that the defendants' good faith assertion of his perceived rights under a statute exempting children whose parents were bona fide members of a religious organization whose teachings opposed inoculation from having a certificate of inoculation for admission to school was a valid defense to a charge of violation of G.S. 115-166. In that case, the defense was provided by statute. In the present case, no defense, statutory or otherwise exists. The trial court properly refused to give the tendered instruction.

No error.

Chief Judge MORRIS and Judge HILL concur.

NANCY CAROL LOVE, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

AND

NATIONWIDE MUTUAL INSURANCE COMPANY, THIRD PARTY PLAINTIFF v. FRANK WILLARD MOORE, THIRD PARTY DEFENDANT

No. 7926SC629

(Filed 4 March 1980)

1. **Rules of Civil Procedure § 4.1— service by publication**

Service of process by publication was not void since the affidavit of publication showed that the newspaper in question, the *Mecklenburg Times*, was one meeting the requirements of G.S. 1-597 and since the affidavit was signed by the "Legal Advertising Manager" of the newspaper, and this constituted an affidavit of an agent of the publisher sufficient to satisfy the requirement of G.S. 1-75.10(2).

2. **Rules of Civil Procedure § 55— non-appearing defendant-entry of default unnecessary**

Entry of default by the clerk was not a prerequisite to plaintiff's obtaining judgment against a non-appearing defendant.

3. **Rules of Civil Procedure § 55; Insurance § 106.1— non-appearing defendant-default judgment—notice to insurer condition precedent to action on judgment**

A trial which results in findings or a verdict against a non-appearing defendant does not take the resulting judgment for the appearing party out of the "default" category within the meaning of G.S. 20-279.21(f)(1) so that plaintiff is not required to give the insurer of assigned risk or Reinsurance Facility individuals notice of actions brought against such person; rather, the giving of such notice is a condition precedent to maintaining a subsequent action against the insurer on the judgment, and plaintiff's failure to provide that notice in this action operated as a bar to her action against defendant insurer.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 12 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 January 1980.

John D. Warren for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by William C. Livingston, for defendant appellee.

WELLS, Judge.

In this suit the plaintiff seeks recovery against the defendant insurance company to collect on a previous money judgment

entered against defendant's insured, Frank Willard Moore. The parties agree as to the essential facts presented in this action.

On 30 October 1970 plaintiff was injured in an automobile accident when her vehicle collided with a 1956 Chevrolet automobile driven by a man the police identified as Frank *William* Moore. Sometime prior to 29 September 1972, plaintiff's attorney contacted defendant's office and advised one of defendant's adjustors that he was representing plaintiff and that he wished to make a claim on her behalf as a result of the accident. The parties corresponded with one another over the possibility of a settlement of the claim, although defendant never informed plaintiff's counsel that the middle name of its insured was Willard rather than William.

The claim was never settled and on 29 October 1973 plaintiff filed a complaint against Frank *William* Moore in Mecklenburg County. The summons and later an alias and pluries summons directed to Frank *William* Moore were returned unserved. Plaintiff also attempted to effectuate service of process by publication. On 30 April 1975 the 1973 action came on for trial, and the plaintiff, waiving a jury trial, presented her evidence. The defendant Frank *William* Moore failed to appear, and the court entered judgment for the plaintiff in the sum of $8,000 for personal injuries and $1,395.58 for property damage and for the loss of the use of the vehicle. Counsel for the plaintiff did not at any time prior to obtaining judgment against defendant Frank *William* Moore forward to defendant Nationwide, by registered or certified mail with return receipt requested, or serve Nationwide by any other method of service provided by law, a copy of the summons, complaint or other pleadings filed in the action. Furthermore, Nationwide was not notified of the action by its insured, Frank *Willard* Moore.

On 31 May 1977 plaintiff filed a complaint against defendant Nationwide to collect on its judgment against Frank *William* Moore. Nationwide answered, denying it had issued a policy to one Frank *William* Moore. Nationwide impleaded Frank *Willard* Moore, alleging that he was its insured on the date of plaintiff's accident, that he had violated the terms of the policy by failing to notify Nationwide of the action, and that he would be liable to Nationwide for any amount Nationwide was found to be liable to

plaintiff. Nationwide obtained entry of default against Frank Willard Moore on its third-party complaint for his failure to plead or defend.

The trial court found that the person involved in the accident with plaintiff was defendant's insured, Frank *Willard* Moore, and entered the following conclusions of law:

> 1. The Court which entered the Judgment in the 1973 action did not have jurisdiction over the person of Frank Willard Moore since service in that case was not sufficient in that the affidavit of publication does not on its face show that it was executed by a person listed in G.S. § 1-75.-10(2). The judgment entered in the 1973 action is, therefore, void.
>
> 2. No appearance having been made by the defendant in the 1973 action, plaintiff was obligated to comply with the provisions of G.S. 1A-1, Rule 55. Plaintiff failed to comply with said provisions; therefore, the judgment entered in the 1973 action is void. HILL v. HILL, 11 N.C. App. 1, 180 SE [2d] 424 (1971).
>
> 3. The defendant has raised the question before this court of the constitutionality of the manner in which service of process was purported to be effected in this case and while it is not necessary for a resolution of this case that the Court resolve that issue, the Court has considered the issue and concludes that if the affidavit of publication referred to in Conclusion of Law #1 had been prepared in accordance with statute, the exercise of jurisdiction over the person of Frank Willard Moore based on service by publication in this case would have been constitutional.

Upon his conclusions, Judge Hairston entered judgment as follows:

> 1. That the judgment entered in civil action number 73 CvS 15328 (the 1973 action) is void and of no force and effect and cannot be enforced against the defendant in this action.
>
> 2. That this action is dismissed with prejudice.

Subsequent to entry of judgment, Nationwide filed a request for additional conclusions of law. The trial court, in its discretion, denied the request.

[1] The first question we deal with is whether service of process in the 1973 case was void. We hold that it was not, and that Judge Hairston's conclusion on that aspect of this case was in error. In *Philpott v. Johnson*, 38 N.C. App. 380, 247 S.E. 2d 781 (1978) we held that an affidavit by an agent of the publishing corporation met the requirements of G.S. 1-75.10(2). There is no showing in the case before us whether or not the publisher (*Mecklenburg Times*) is a corporation. The affidavit of publication does show, however, that the newspaper was one meeting the requirements of G.S. 1-597. The affidavit was signed by the "Legal Advertising Manager" of the newspaper. We hold that this constitutes an affidavit of an agent of the publisher sufficient to satisfy the requirement of G.S. 1-75.10(2).

[2] We next address the question of whether, on the facts of this case, the judgment in the 1973 action is void by reason of the plaintiff's failure to comply with the provisions of G.S. 1A-1, Rule 55. We hold that it was not, and that Judge Hairston's conclusion in this respect is in error. In reaching this conclusion, Judge Hairston obviously relied on our holding in *Hill v. Hill*, 11 N.C. App. 1, 180 S.E. 2d 424 (1971), *cert. denied*, 279 N.C. 348, 182 S.E. 2d 580 (1971). In *Hill*, we held that the entry of default by the clerk was invalid because of failure to meet the requirements of G.S. 1-75.11(1). We did not hold that Rule 55 was the exclusive procedure for obtaining judgment against a non-appearing party. In *Whitaker v. Whitaker*, 16 N.C. App. 432, 192 S.E. 2d 80 (1972) we held that an entry of default under Rule 55(a) is not a prerequisite to obtaining a judgment against a defendant who has not answered, but does appear at the trial. Based upon the facts in the case before us, it is *Whitaker* which controls, not *Hill*—entry of default by the clerk is not a prerequisite to obtaining judgment against a non-appearing defendant. Plaintiff had the option to bypass entry of default and proceed to trial.

Nationwide argues that whatever the result with respect to the questions raised under G.S. 1-75.10 and Rule 55, the judgment plaintiff obtained in the 1973 case is a default judgment within the meaning of G.S. 20-279.21(f)(1), and was unenforceable against defendant Nationwide because plaintiff did not give Nationwide notice of the 1973 action prior to judgment. This statute provides:

> *** As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Vehicle

> Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action. . . .

Counsel for plaintiff did not furnish or attempt to furnish to Nationwide a copy of the summons or complaint filed in this case.

[3] This is a question of first impression before our courts. In order for us to resolve the question, we must construe the meaning of the term "default judgment" as used in the statute. Plaintiff argues that she was not required to obtain a default judgment and could ignore the procedural requirements of Rule 55, and proceed to trial on all issues. Defendant argues that a trial which results in findings or a verdict against a non-appearing defendant does not take the resulting judgment for the appearing party out of the "default" category within the meaning of G.S. 20-279.21(f)(1). We agree with defendant. Our cardinal rule of statutory construction is to ascertain and effectuate the intent of the General Assembly. *Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E. 2d 566 (1977). It seems obvious that a manifest purpose of G.S. 20-279.21(f)(1) is to require the plaintiff to give the insurer of assigned risk or Reinsurance Facility individuals notice of actions brought against such persons so that the insurer may protect its interests.

We therefore hold that "default judgment", as this term is used in the statute, must be construed so as to include all judgments obtained where an insured person falling within the provisions of G.S. 20-279.21(f)(1) has not timely filed a responsive pleading or has otherwise made himself *subject to* a Rule 55 default. The burden which our holding places on plaintiff's counsel, to inquire into the insurance status of the defendant and in appropriate cases notify the insurer, is slight compared to the damage which could result to the insurer if it is effectively foreclosed from defending against the action. The giving of such notice is a condition precedent to maintaining a subsequent action against the insurer on the judgment, and the plaintiff's failure to

provide that notice here operates as a bar to her action against Nationwide. Under the facts stipulated by the parties, plaintiff has shown no right to relief.

Our holding makes it unnecessary for us to reach defendant's other cross-assignments of error. That portion of the judgment entered by the court below decreeing that the judgment in civil action No. 73CVS15328 (*Nancy Carol Love v. Frank William Moore*) to be void and of no force and effect is reversed. That portion of the judgment below dismissing this action is affirmed.

Reversed in part and affirmed in part.

Judges MARTIN (Robert M.) and ERWIN concur.

MARY R. TAYLOR v. D. WAYNE TAYLOR, INDIVIDUALLY, ROLAND TAYLOR AND WIFE, EDNA H. TAYLOR; T. C. TAYLOR AND WIFE, MARJORIE A. TAYLOR; DORIS TAYLOR ROBINSON AND HUSBAND, DAVID ROBINSON; EDWARD TAYLOR; TRUSTEES OF CEDAR GROVE METHODIST CHURCH; ERVIN TAYLOR; FRANCES T. BLAKELY; EDNA MAY MAYNOR; RUBY LEE DAY; SAMUEL TAYLOR

No. 7915SC645

(Filed 4 March 1980)

1. Wills § 61.5— dissent to will—right to obtain declaratory judgment as to provisions of will

The fact that plaintiff had filed a dissent to her husband's will did not preclude her from maintaining an action to obtain a declaratory judgment to ascertain what property passed under the will to her and to other devisees and legatees.

2. Wills § 1.4— devises void for vagueness of description

Items of testator's will in which he attempted to devise to named devisees separate tracts of land described simply as, first, "my home and 30 acres of land surrounding the same," second, "12 acres of my Plantation located in the Northwest corner of same," and third, "12 acres on the East side of my Plantation" are void for vagueness and uncertainty in the descriptions of the property attempted to be devised. Furthermore, a fourth item of the will which attempted to devise the "remainder of my real estate" constituted an attempted specific devise of that portion of testator's farm which remained after carving out of the farm the tracts referred to in the first three items and was also void for vagueness of description since the location of the boundaries of the

tracts in the first three items cannot be identified, and therefore the boundaries of the remainder cannot be identified.

Judge MARTIN (Robert M.) dissenting.

ON writ of certiorari to review judgment entered by *Bailey, Judge*, 25 April 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 31 January 1980.

Plaintiff, the widow of J. B. Taylor, brought this action on 22 July 1976 against all other devisees and legatees named in the will of her deceased husband to obtain a declaratory judgment determining the rights of the parties under the will. J. B. Taylor, the owner of a farm in Orange County, died on 31 January 1973 leaving a last Will dated 30 August 1958 which was duly admitted to probate. In pertinent part, the Will provided as follows:

> After the payment of my just debts and funeral expenses, I give, devise and bequeath my property as follows:
>
> FIRST: To my beloved wife, Mary R. Taylor, I give, devise and bequeath my home and 30 Acres of land surrounding the same to be hers for and during the term of her natural life, and at her death, I give, devise and bequeath the same to my two nephews, Wayne Taylor and Roland Taylor, share and share alike.
>
> SECOND: To my brother, Edward Taylor, I give, devise and bequeath 12 Acres of my Plantation located in the Northwest corner of same, to be his absolutely and in fee simple.
>
> THIRD: To my brother, T. C. Taylor, I give, devise and bequeath 12 Acres on the East side of my Plantation to be his absolutely and in fee simple.
>
> FOURTH: The remainder of my real estate, I give, devise and bequeath to my two nephews, Wayne Taylor and Roland Taylor in fee simple, share and share alike.
>
> FIFTH: I give, devise and bequeath to the Trustees of Cedar Grove Methodist Church the sum of $400.00 to be used in the upkeep of the Church and Cemetery as they deem advisable.
>
> SIXTH: To my sister, Mary T. Graham, and to my nieces and nephews, Ervin Taylor, Frances T. Blakely, Edna May

Maynor, Ruby Lee Day, Doris T. Hawkins and Samuel Taylor I give, devise and bequeath the sum of $25.00 each.

SEVENTH: The remainder of my property, real, personal and mixed, I give, devise and bequeath to my beloved wife, Mary R. Taylor, to be hers absolutely and in fee simple.

The farm in Orange County was the only real estate owned by the testator. In her complaint plaintiff alleged that questions had arisen as to whether the devises made by the first three items of the will were void because of vagueness and as to whether the remainder of the testator's real estate passed to his nephews, Wayne Taylor and Roland Taylor, under Item Fourth or to his wife, Mary R. Taylor, under Item Seventh of the Will.

The defendants moved under G.S. 1A-1, Rule 12(b) to dismiss the complaint on the ground that the plaintiff, having previously filed a dissent to the Will, no longer had any interest in its interpretation. This motion was denied. The case then came on for hearing upon plaintiff's motion for summary judgment. Defendants sought to introduce affidavits, maps, and an aerial photograph which they contended would make clear what the testator intended to devise by the first four items of the Will. The plaintiff objected to this evidence on the grounds that it was irrelevant, and the court sustained the objection. The court then entered judgment as follows:

The Court concludes that the attempted devises contained in the First, Second and Third items of the Will of J. B. Taylor are void for vagueness; that the testator intended by Item Fourth of said Will to devise to Wayne Taylor and Roland Taylor the remainder of said farm not included in the devises attempted by the first three items of said Will; that since the attempted devises contained in the first three items are incapable of location because of the vagueness of said descriptions, the remainder of said property cannot be determined and is void for vagueness; that said void devises fail to take effect and pass under Item Seventh to the widow of the testator, Mary R. Taylor, absolutely and in fee simple.

From this judgment, the defendants gave notice of appeal. In order to permit perfection of the appeal, this Court thereafter granted their petition for writ of certiorari.

Graham & Cheshire by Lucius M. Cheshire for plaintiff appellee.

Latham, Wood and Balog by James F. Latham for defendant appellants.

PARKER, Judge.

[1] Defendants' first two assignments of error are each directed to the denial of their motion to dismiss the plaintiff's complaint. They contend that the plaintiff, having filed a dissent to her husband's Will on 23 May 1973, no longer had sufficient interest when this action was commenced on 22 July 1976 to permit her to maintain the action and that because of the dissent the court lacked jurisdiction over the subject matter. We do not agree. The record reveals that all that has happened is that plaintiff has *filed* her dissent within apt time as she was required to do by G.S. 30-2, else she would have been deemed to have waived her *right* to dissent. Whether plaintiff has a *right* to dissent is governed by the provisions of G.S. 30-1 and is yet to be determined. That determination cannot be made until, among other matters, it is first ascertained what is "the aggregate value of the provisions under the will for the benefit of the surviving spouse." G.S. 30-1(a); *See In re Estate of Connor*, 5 N.C. App. 228, 168 S.E. 2d 245 (1969). The present action for a declaratory judgment is an appropriate procedure for ascertaining what property passed to the surviving spouse under the will, and she has a right to maintain this action in order to determine whether she has a right to dissent. For the same reason, the court had jurisdiction over the subject matter. Defendants' first two assignments of error are overruled.

Defendants' third assignment of error challenges the court's entry of summary judgment declaring the first three items of the will void for vagueness and their fourth assignment of error challenges the court's ruling that the fourth item of the will is also void for vagueness and that the real property of the testator passed under the seventh item to the plaintiff. We find no error in these rulings.

At the outset we note that summary judgment is appropriate in an action for a declaratory judgment where, as in the present case, there is no genuine issue as to any material fact and the

rights of the parties may be determined as a matter of law. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). Although defendants attempted to introduce affidavits, maps, and an aerial photograph, which they contended would make it possible to ascertain exactly what lands the testator intended to devise by each of the first four items of his Will, these documents were excluded from evidence by the trial court and no exception was taken or assignment of error made to that ruling. Thus, the present case comes before us for decision, as it did before the trial court, on undisputed facts.

[2] It is undisputed that at the time of his death the testator owned but a single tract of real property, a farm in Orange County. The exact size of this farm is not disclosed in the record, but it is undisputed that the area of the farm is greater than the total number of acres which the testator referred to in and attempted to devise by the first three items of his will. By these items the testator attempted to devise to named devisees separate tracts of land described simply as, first, "my home and 30 Acres of land surrounding the same," second, "12 Acres of my Plantation located in the Northwest corner of same," and third, "12 Acres on the East side of my Plantation." No further description of these tracts is contained in the will, nor does the will refer to any means by which the separate tracts can be identified and set apart. We agree with the trial court that the descriptions contained in the first three items of the will are too vague and indefinite and that the devises attempted to be made therein are void for uncertainty.

> The principle is firmly established in our law that a conveyance of land by deed or will must set forth a subject matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the instrument refers. It is essential to the validity of a devise of land that the land be described with sufficient definiteness and certainty to be located and distinguished from other land.

Devin, J. (later C.J.) in *Hodges v. Stewart*, 218 N.C. 290, 291, 10 S.E. 2d 723, 724 (1940); *see, Carlton v. Anderson*, 276 N.C. 564, 173 S.E. 2d 783 (1970); *Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964).

In *Hodges v. Stewart, supra,* our Supreme Court held a devise of "twenty-five acres of the home tract of land including the dwelling and outhouses" void for vagueness and uncertainty in the description of the property attempted to be devised, the opinion of the Court pointing out that the will furnished no means by which the twenty-five acres could be identified and set apart nor did it refer to anything extrinsic by which the twenty-five acres could be located. The court held the description "too vague and indefinite to admit of parol evidence to support it." We find the description of the tract which the testator attempted to devise in the first item of the will now before us, "my home and 30 acres of land surrounding the same," no more definite than the description held void for vagueness in *Hodges v. Stewart, supra.* Similarly, we find the descriptions of the tracts which testator attempted to devise in the second and third items of his will no more definite than the description of the tract which the Supreme Court found void for uncertainty in *Carlton v. Anderson, supra.*

The question remains concerning the description contained in the fourth item of the will, in which the testator described the property attempted to be devised as the "remainder of my real estate." We agree with the trial court's interpretation of this item as constituting an attempted specific devise of a particular tract of land rather than as being a general residuary clause. Such an interpretation is supported by the position of the fourth item in the will and by the fact that the will contains a clearly expressed general residuary clause in Item Seventh. So interpreting Item Fourth as an attempted specific devise of that portion of the testator's farm which remained after carving out of the farm the tracts referred to in the first three items of the will, it is apparent that, since the boundaries of those tracts cannot be identified, it is equally impossible to identify the boundaries of the tract attempted to be devised by Item Fourth.

We agree with the trial court's decision that devises attempted to be made by the first four items of the will are void for uncertainty of the descriptions and that the real property which the testator attempted to devise therein passed under Item Seventh to the testator's widow, the plaintiff in this action. Accordingly, the judgment appealed from is

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

I dissent from the majority. I do not quarrel with the majority's interpretation of *Hodges v. Stewart*, 218 N.C. 290, 10 S.E. 2d 723 (1940) as applied to this case. I believe the rule of *Hodges* should be reconsidered. I would hold that a devise of a tract of real estate should not be governed by the same requirement of definiteness of description as a deed or contract to convey. I would hold that the devises of real estate in the first, second, and third items of the will are definite enough to be located from the real estate which was owned by the testator and the will should be enforced. I believe this is the law in the majority of our jurisdictions, Annot. 157 A.L.R. 1129, 1130 (1945) and was the law of this state prior to *Hodges v. Stewart, supra. See Harvey v. Harvey*, 72 N.C. 570 (1875); *Wright v. Harris*, 116 N.C. 462, 21 S.E. 914 (1895); *Blanton v. Boney*, 175 N.C. 211, 95 S.E. 361 (1918); *Freeman v. Ramsey*, 189 N.C. 790, 128 S.E. 404 (1925). I dissent from the majority in order to give our Supreme Court the opportunity to reconsider *Hodges v. Stewart, supra.*

SHIRLEY IVORY, WIDOW, MARY McADOO IVORY FARROW, GUARDIAN AD LITEM FOR SULISA IVORY AND TONY IVORY, AND SALLY IVORY, GUARDIAN AD LITEM FOR MAURICE IVORY, PLAINTIFFS v. GREER BROTHERS, INC., EMPLOYER, AMERICAN MUTUAL LIABILITY INSURANCE CO., CARRIER DEFENDANTS

No. 7910IC705

(Filed 4 March 1980)

Master and Servant § 79.2— workers' compensation death benefits— invalidity of purported second marriage

There was sufficient evidence to overcome the presumption of the validity of the deceased employee's purported second marriage, and the Industrial Commission properly found that the deceased employee was still married to his first wife at the time of his purported second marriage and that his second

wife was not his "widow" and entitled to share in workers' compensation death benefits with minor children born to deceased employee during his first marriage, where there was evidence that the employee and his first wife were married in 1962 and lived together until 1968; his first wife lived at the same address after she and the employee separated, but she did not hear anything from the employee until he came back to visit in 1968; the first wife was never served with any legal process regarding a divorce action instituted by the employee; the first wife obtained an absolute divorce from the employee some ten months after the employee purported to marry his second wife; when the employee obtained a license for the second marriage, he told the clerk that he was single and had never been married before; and the employee never told the second wife that he had been married before and never told the first wife he had remarried.

APPEAL by plaintiff Shirley Ivory from the Opinion and Award of the Industrial Commission filed 22 May 1979. Heard in the Court of Appeals on 7 February 1980.

This is a Worker's Compensation proceeding brought by the alleged widow and children of James Ivory to determine which parties are entitled to benefits payable as a result of his death. His employer, Greer Brothers, Inc., and its insurance carrier, American Mutual Liability Insurance Company, stipulated that Ivory was killed in an accident arising out of and in the course of his employment and that his death was compensable. Thus, the only question raised by the proceeding was whether Shirley Ivory, claiming as the widow of the deceased, was entitled to share in the benefits with the minor children born to deceased during a previous marriage.

The matter was heard before Industrial Commission Chairman William H. Stephenson on 11 September 1978, and evidence tending to show the following was presented:

Shirley Ivory was married to James Ivory on 31 January 1972 in Hastings County, Richmond, Virginia. She testified that, before they were married, James told her he had never been married before; that, when they applied for their marriage license, he told the clerk that he was single and that this was his first marriage; and that she did not find out about his previous marriage until his funeral. She lived with James "continuously" until about 10 or 11 months before his death when he came to North Carolina to look for work, but he "visited" her in Richmond about three days before his death. Furthermore, Shirley had visited him once

at his mother's home in Warren County, North Carolina. She testified that he had introduced her to his mother as his "wife."

James's mother, Sally Ivory, testified that her son was living with her at the time of his death; that he was first married to Mary McAdoo with whom he had three children and that James's son Maurice, for whom she was appointed guardian ad litem, had lived with her since he was one month old. Sally said that she knew Shirley and knew "that James married her in January of 1972."

James's first wife, Mary, testified that she and James were married in March of 1962 and separated in 1968. Since that time she has lived with their children at 1301 Willowdale in Durham, North Carolina. After they separated, she did not see or hear from James until 1976 when he suddenly showed up for a visit. She said he came back several times after that, but "never mentioned the fact that he was married." She did not find out about Shirley until after James died.

Mary testified further that she had filed for and obtained a divorce from James on 11 December 1972 on the grounds of one year's separation. She said she had been unsuccessful in locating his residence at the time, and that she "never received any lawsuit, summons or complaint which related to any divorce instituted by James." Mary remarried in 1973. She did not claim benefits for herself, but claimed as guardian ad litem for the two minor children, Tony and Sulisa Ivory.

Exhibits admitted into evidence for the minor children included the marriage license of Mary and James and the judgment of divorce obtained by Mary from James. Shirley also introduced a marriage license granted to her and James.

Chairman Stephenson filed his Opinion and Award on 27 December 1978 wherein he made findings of fact and concluded that the three minor children were entitled to all benefits due because the marriage between James and Shirley was a nullity since James was still married to Mary at the time.

Shirley appealed to the full Commission which, on 22 May 1979, affirmed and adopted as its own the Opinion and Award of Chairman Stephenson, and she then appealed to this Court.

Loflin, Loflin, Galloway & Acker, by Ann F. Loflin, for plaintiff appellee Mary McAdoo Ivory Farrow.

Blanchard, Tucker, Twiggs & Denson, by Charles F. Blanchard, for plaintiff appellant Shirley Ivory.

No counsel for defendants.

HEDRICK, Judge.

The findings of fact of the Industrial Commission, when supported by competent evidence, are conclusive on appeal. G.S. § 97-86; *Inscoe v. DeRose Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977) [Citations omitted.]; *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). The question before this Court in this case is whether competent evidence was adduced at the hearing before Chairman Stephenson to support the following challenged findings of fact:

FINDINGS OF FACT

. . .

2. James and Mary lived together continuously as man and wife from the date of their marriage until they separated in 1968. Mary thereafter continued to reside in the home which they occupied at 1301 Willowdale Drive, Durham, North Carolina, to the date of the hearing in this case. Mary had absolutely no contact with James from the date of their separation until sometime during the year 1976 when James showed up at the Willowdale Drive address and talked to Mary. No legal documents of any type were ever served on Mary concerning any divorce, although James knew at all times where Mary was living. When James returned to Mary's home in 1976 he did not tell Mary he had remarried but Mary informed him when he tendered a present to her that she could not accept it for the reason that she had remarried.

3. On December 11, 1972 Mary obtained an absolute divorce in the General Court of Justice, District Court Division of Durham County. This was the only divorce ever obtained by Mary or James.

4. On January 31, 1972 James and Shirley Elizabeth Neblett (hereinafter "Shirley") obtained a marriage license in Richmond, Virginia. On the application for license James stated that he was single and this was his first marriage, when in truth and in fact it was his second "marriage" and he was at that time still legally wed to Mary. James and Shirley went through a "marriage" ceremony in Hastings, Virginia on January 31, 1972. James told Shirley he had never been married before but had one illegitimate son. Shirley thereafter lived with him continuously until about ten months prior to his death. James was then having difficulty obtaining work in the Richmond area so he went to temporarily stay with his mother, Sally V. Ivory, in North Carolina, but when he could do so would return to his home with Shirley in Virginia. In fact, he spent three nights with Shirley during the latter part of November of 1977.

5. When James and Shirley went through a marriage ceremony in Virginia on January 31, 1972 James was still legally married to Mary. At that time he could not legally enter into a marriage contract with anyone else and said "marriage" was therefore void ab initio. For this reason, Shirley was not the "widow" of James.

6. At the time of his death James left surviving as his sole whole dependents his three minor children, Maurice Ivory, Sulisa Ivory, and Tony A. Ivory who are entitled to all compensation due by reason of the death.

From these facts the Commission concluded that the "marriage" between James and Shirley was a nullity and thus the three minor children were entitled to all benefits due by reason of James's death. The appellant asserts that the evidence was not sufficient to support the findings upon which these conclusions were based for the reason that the evidence was not sufficient to overcome the presumption in law that the second marriage is the valid one. That presumption has been well-stated as follows:

> "A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage."

Kearney v. Thomas, 225 N.C. 156, 164, 33 S.E. 2d 871, 877 (1945) [citations omitted]. While it is true that the presumption exists, our Supreme Court has held that the issue of the validity of the second or subsequent marriage is properly submitted to the finder of facts which, in a case like the one before us, must decide whether the party contesting the marriage's validity has produced sufficient evidence to overcome the presumption. *Id.; see also Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967).

In the case at bar, the fact-finder has determined that Mary, the party with the burden of proof, did offer enough evidence to rebut the presumption that James's marriage to Shirley was valid. We agree. The findings of fact on the issue are amply supported by competent evidence in the record, namely: Mary and James were married in 1962 and lived together thereafter until 1968; Mary live at the same address after she and James separated, but she did not hear anything from him until he came back to visit in 1976; Mary was never served with any legal process regarding a divorce action instituted by James; Mary obtained an absolute divorce from James on 11 December 1972, some ten months after James purported to marry Shirley; when James applied for a license to marry Shirley, he told the clerk that he was single and had never been married before; James never told Shirley that he had been married before; James never told Mary that he had remarried.

From this evidence the Commission found that James was still married to Mary when he went through the marriage ceremony with Shirley and therefore concluded that the subsequent "marriage" was void ab initio. We think the Commission properly so found and concluded.

Appellant relies on *Denson v. C. R. Fish Grading Co., Inc.*, 28 N.C. App. 129, 220 S.E. 2d 217 (1975), for the proposition that "[t]he mere proof that one party had not obtained a divorce [*e.g.*, by a showing of no notice or service of divorce proceedings] is not sufficient to overcome the presumption, since the other party might have obtained a divorce." *Id.* at 131, 220 S.E. 2d at 219. That is a correct statement of the law which obtains in this State, but *Denson* also held that the question of whether a first wife of a deceased employee had overcome the presumption of the validity of a subsequent marriage was a question of fact for the Commis-

sion. In that case, the Commission found as a fact that the first wife had not overcome the presumption. Its finding was supported by the record which established *only* that the first wife had never been served with any notice of a divorce obtained by her husband.

Conversely, in the case at hand, the Commission has found as a fact that the first wife has overcome the presumption. Its finding is supported by competent evidence of record, including evidence in addition to the lack of notice to Mary that James had ever instituted divorce proceedings. Its finding will thus not be disturbed on appeal. Accordingly, the Opinion and Award appealed from, dated 22 May 1979, is affirmed.

Affirmed.

Judges VAUGHN and CLARK concur.

DAN MCCALL RAWLS, JR., PETITIONER v. ELBERT L. PETERS, JR., COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 796SC648

(Filed 4 March 1980)

Automobiles § 2.4— officer's approach to vehicle justified—refusal to take breathalyzer test—license properly suspended

Where an officer observed petitioner's car pulled off the highway, its motor running, its interior light on, and its emergency lights flashing, the officer was justified in approaching the vehicle, and evidence that petitioner was seated behind the wheel with both hands on it, had eyes that were red and glassy, and smelled strongly of alcohol was sufficient to support a finding that the officer had reasonable grounds to arrest petitioner for operating a motor vehicle while under the influence of an intoxicating liquor. Therefore, petitioner's conscious refusal to take a breathalyzer test was willful within the meaning of G.S. 20-16.2 and his driving privilege was properly suspended.

APPEAL by petitioner from *Allsbrook, Judge.* Judgment entered 19 March 1979 in Superior Court, HALIFAX County. Heard in the Court of Appeals on 31 January 1980.

About 11:00 p.m. on 3 December 1977, North Carolina Highway Patrolman C. J. Carmon observed a car parked on the roadside of Rural Paved Road 1804 near Scotland Neck. The emergency flashers on the vehicle were turned on and flashing; its interior light was on; three individuals, two males and a female, were inside the car. When Trooper Carmon approached the car, he discovered that the car's motor was running and that the petitioner was seated under the steering wheel with both hands on it. Carmon "smelled a strong odor of alcohol on his [petitioner's] breath" who advised the patrolman that he was driving the car. Thereupon, Carmon arrested the petitioner and promptly took him to the Scotland Neck Police Department, where petitioner was first requested to take performance tests. Carmon testified:

> On the balance test he was wobbly, the walking test he was staggery, the turning he was staggery; on his right hand touching his nose, he completely missed it, and with his left hand, he was hesitant. There was a real strong odor of alcohol on his breath, his eyes were real red and glassy.

In Carmon's opinion, petitioner was "under the influence of some intoxicating beverage." He requested petitioner to take the breathalyzer test before Lieutenant Eberle, a duly licensed operator. Petitioner refused.

Thereafter, following a hearing at the State Highway Patrol office in Ahoskie, petitioner was notified by the Division of Motor Vehicles that his driving privilege was being suspended for a period of six months, pursuant to G.S. § 20-16.2, for his willful refusal to take the breathalyzer test. The suspension "directive" was stayed pending a hearing *de novo* in Superior Court as provided for in G.S. § 20-16.2(e). The matter was heard before Judge Allsbrook on 19 March 1979 who took evidence and made findings and conclusions which, except where quoted, are summarized as follows:

When Trooper Carmon saw the car parked on the roadside with its emergency flashing lights turned on, he approached it and observed the petitioner in the driver's seat with both hands on the steering wheel. The motor was running and petitioner told Carmon that he had driven the car there. Carmon detected a strong odor of alcohol about petitioner, noticed that his eyes were

red and glassy, and arrested him for driving under the influence of intoxicating liquor. These facts and circumstances afforded Patrolman Carmon "reasonable grounds to believe that the Petitioner then was operating a motor vehicle upon the highways while under the influence of intoxicating liquor." Hence, Carmon took petitioner to the Scotland Neck Police Department and requested that he submit to a breathalyzer test in the presence of Officer Dave V. Eberle, who was duly qualified and licensed to administer such a test. Officer Eberle informed petitioner of his rights verbally and in writing under G.S. § 20-16.2(a), but petitioner "without just cause or excuse, voluntarily, understandingly and intentionally refused to submit to [the breathalyzer] test." The court thereupon concluded that petitioner "willfully refused to take the chemical test of his breath in violation of law, and the order of the Respondent [Division of Motor Vehicles] . . . is justified in fact and in law." From a judgment affirming the revocation order, petitioner appealed.

Cherry, Cherry & Flythe, by Larry S. Overton, for the petitioner appellant.

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

HEDRICK, Judge.

Petitioner brings forward and argues three assignments of error: (1) Did the court err in finding that Trooper Carmon had reasonable grounds to believe that petitioner was operating a motor vehicle while under the influence of intoxicating liquor? (2) Did the court err in finding that he intentionally, without just cause or excuse, refused to submit to the breathalyzer test? and (3) Did the court err in concluding that he willfully refused to take the test, thus justifying the suspension of his driving privilege? Petitioner concedes, as he testified at the hearing in Superior Court, that he "did refuse to take the breathalyzer test." He further concedes that the evidence is plenary to support the finding that he intentionally, without just cause or excuse, refused to take the test since there was sufficient, although conflicting, evidence that the car's motor was running, that he was seated behind the steering wheel with both hands on the wheel, that

Trooper Carmon smelled an odor of alcohol on his breath, but that he thereafter consciously refused to take the test. "The findings of the trial court are conclusive on appeal if there is evidence to support them. This is true even though the evidence might sustain findings to the contrary." *Seders v. Powell*, 298 N.C. 453, 460-61, 259 S.E. 2d 544, 549 (1979) [citations omitted]. It follows that, since the findings are supported by competent evidence, the court could properly conclude that the petitioner willfully refused to take the breathalyzer test, in violation of G.S. § 20-16.2, which provides in pertinent part:

> (a) Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, . . . to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law-enforcement officer *having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor* . . . .
>
> . . .
>
> (c) The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test . . . . If the person arrested willfully refuses to submit to the chemical test, . . . none shall be given. However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, . . . willfully refused to submit to the test . . . , the Division [of Motor Vehicles] shall revoke the driving privilege of the person arrested for a period of six months.

[Emphasis added.]

Petitioner also concedes on appeal that the evidence is ample to support a finding that the arresting officer had "reasonable grounds" to believe that he was operating the automobile while

under the influence of some intoxicating beverage. His key argument, and the issue upon which the whole determination of this case depends, is simply this: Was Trooper Carmon justified in approaching the car at the outset? It is petitioner's contention that the officer "had no . . . reasonable grounds for approaching [his] vehicle" and, thus, his refusal to submit to the breathalzyer test was neither intentional nor willful "since his prior arrest was unconstitutional."

We do not agree. Petitioner relies solely on the recent decision of the United States Supreme Court in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979), a case which we find readily distinguishable. In *Prouse* a police officer *stopped* a vehicle and seized marijuana which was in plain view on the floor of the car. Defendant moved to suppress the evidence so seized and, at a hearing on his motion, the officer testified that his stopping the car was "routine. I saw the car in the area and was not answering any complaints so I decided to pull them off," *Id.* at 440 U.S. 650-51, 99 S.Ct. 1394, 59 L.Ed. 2d 665. He further stated that, before stopping the car, he observed neither traffic nor equipment violations, nor any suspicious acitivity. He stopped the car only to check the driver's license and registration of the vehicle. The defendant's motion to suppress was allowed and affirmed on appeal.

In what we interpret as a very narrow holding, the Supreme Court rules as follows:

> [W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion . . . . We hold only that persons in automobiles on public roadways may not *for that reason alone* have their travel and privacy interfered with at the unbridled discretion of police officers.

Id. at 440 U.S. 663, 99 S.Ct. 1401, 59 L.Ed. 2d 673-74. [Our emphasis.]

The Court condemned *random stops* of vehicles for the sole reason of checking driver's licenses and registration documents. For that reason we find the case inapplicable to the situation in the case now before us since the trooper did not stop, randomly or otherwise, the petitioner's vehicle. But, assuming that the officer must have reasonable grounds for initially approaching a stopped vehicle, the facts of the instant case clearly justify Trooper Carmon's actions. The uncontradicted testimony in this case establishes that the petitioner's car was pulled off the highway, its interior light was on, and, most significantly, its emergency lights were flashing. Surely the majority of motorists activate their emergency flashers to alert other motorists of an emergency situation and to call for help. Surely, the majority would not only desire, but also expect, a law-enforcement officer to come to their assistance. Moreover, in our opinion, the officer not only has the right to approach such a vehicle, he has a duty to do so.

We hold that the circumstances of the case before us fully justified Trooper Carmon's initial approach and that the evidence adduced at the hearing amply supports a finding that he had reasonable grounds to arrest petitioner for operating a motor vehicle while under the influence of an intoxicating liquor. It follows that petitioner's conscious refusal to take the breathalyzer test was willful within the meaning of G.S. § 20-16.2. *See Seders v. Powell, supra.*

Accordingly, the judgment of the Superior Court affirming the action of the respondent in suspending petitioner's driving privilege for a period of six months will be and the same is hereby

Affirmed.

Judges VAUGHN and CLARK concur.

King v. Forsyth County

WOODROW C. KING, EMPLOYEE, PLAINTIFF APPELLANT v. FORSYTH COUNTY, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANT APPELLEES

No. 7910IC682

(Filed 4 March 1980)

Master and Servant § 67— workmen's compensation—heart attack—overexertion shown—no showing of unusual activity required

Where it was clear from the evidence in a workmen's compensation case that the injury to plaintiff deputy sheriff's heart occurred suddenly and immediately after the foot chase of a suspect, and that it was the overexertion experienced during the foot chase that caused the injury to his heart, it was not necessary for plaintiff to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity, since it was the extent and nature of the exertion that classified the resulting injury to the plaintiff's heart as an injury by accident within the meaning of G.S. 97-2(6).

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 27 March 1979. Heard in the Court of Appeals 6 February 1980.

Claimant (King) was employed as a Deputy Sheriff in Forsyth County. On 9 May 1977, while on duty, he engaged in a vigorous foot chase of a fleeing suspect. Immediately following the chase, King suffered difficulty in breathing. He was promptly taken to Forsyth Memorial Hospital where he was examined by Dr. William J. Spencer. Dr. Spencer diagnosed that King had experienced an acute myocardial infarction. King was totally disabled and has not worked since the heart attack. Following the hearing before Deputy Commissioner Denson, King was found to be totally and permanently disabled and was awarded compensation. On review, the full Commission reversed Deputy Denson's award.

Yokley & Teeter, by D. Blake Yokley, for plaintiff appellant.

Hutchins, Tyndall, Bell, Davis & Pitt, by Richard Tyndall, for defendant appellees.

WELLS, Judge.

We first note that jurisdiction of appellate courts from an award of the Industrial Commission is limited to review of: (1)

whether there was competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *McRae v. Wall*, 260 N.C. 576, 133 S.E. 2d 220 (1963).

The full Commission found that on 9 May 1977, King was forty-nine years old, in good health, and had no prior indication of heart problems. His most recent physical examination was on 25 February 1977. The Commission determined that King suffered his heart attack as a result of physical exertion entailed in the chase on 9 May 1977, and that he became totally disabled as a result of the heart attack. The Commission then concluded that on 9 May 1977, King did not sustain an injury by "accident" arising out of and in the course of his employment, within the meaning of G.S. 97-2(6). To put the matter clearly in focus, we quote the following pertinent entry in the Commission's order:

> The element of accident in this case turns on whether the activity of plaintiff's chasing on foot the suspect constituted a sufficient departure from plaintiff's normal or ordinary work routine. It is the plaintiff's burden to place in the record evidence of his normal work routine. This record does not supply information as to frequency with which plaintiff engaged in chase on foot of a suspect.
>
> To the question: "How would you describe the foot chase that you engaged (sic) as being a part of your duties, normally?" [h]is answer was: "Very unusual."
>
> This does not establish a variance from the ordinary work routine upon which can be found facts to support [a] conclusion of an accident within the meaning of that term as used in the Workmen's Compensation Act. This record does not contain evidence such as was present in GABRIEL v. NEWTON, 227 N.C. 314 (1941). [sic] [Brackets removed.]

We believe the Commission's ruling is based upon an erroneous interpretation of law. In *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96 (1947), our Supreme Court clearly recognized that damage to heart tissue clearly precipitated or caused by "overexertion" constitutes an injury by accident. In *Gabriel*, the claimant was employed as a municipal policeman. On the night of his injury, he was called upon to arrest a man under the influence of

liquor. The man violently resisted arrest and after great exertion and a prolonged struggle, he was subdued and carried to jail. There, Gabriel and another person carried him up three flights of stairs to the jail. On arrival at the top of the stairs, Gabriel collapsed. A physician was called, and he diagnosed Gabriel's condition as acute dilatation of the heart due to excessive exertion. In holding that the injury to Gabriel's heart was by accident within the meaning of the Workmen's Compensation Act, our Supreme Court enunciated a number of standards from which an accident might be inferred under such circumstances:

> The injury was not a natural and probable consequence of the work he was engaged in, but was due to an unusual and unexpected occurrence, connected with the employment. [Citations omitted.] It was an untoward event without design or expectation. [Citations omitted.] * * * The unusual circumstances and conditions under which said injury was produced constituted an accident . . . . It has very generally been held that a strain or rupture resulting from overexertion is an injury for which compensation should be allowed . . . . But the exertion must be exceptional to constitute an accident within the Act . . . . Sudden heart dilatation caused by a strain would, we think, in ordinary parlance be called accidental.

227 N.C. at 318, 42 S.E. 2d at 98-99.

In *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E. 2d 410 (1954) our Supreme Court reviewed its position on the compensability of heart attack claims under the Workmen's Compensation Act. Writing for a unanimous court, Justice (later Chief Justice) Parker concluded, 240 N.C. at 404, 82 S.E. 2d at 415:

> From our cases cited above it is clear that in *heart disease* our decisions require a showing that the exertion was in some way unusual or extraordinary.

The question again came before our Supreme Court in *Bellamy v. Stevedoring Co.*, 258 N.C. 327, 128 S.E. 2d 395 (1962). Bellamy was employed at the Sunny Point Army Terminal as a carpenter. At the time his heart attack occurred, he was helping to move a safety net weighing about 500 pounds. While lifting the net, he experienced pain in his chest and became ill. A diagnosis

of coronary occlusion with myocardial infarction was made. It was unusual for Bellamy to do heavy lifting. The Industrial Commission awarded compensation, but the Supreme Court reversed, holding that the evidence was not sufficient to support a finding that Bellamy sustained any injury by accident. The medical evidence in *Bellamy* had shown that the work in which Bellamy was involved did not cause the attack. While Bellamy's expert medical witness testified that the exertion on the occasion might have been a precipitating or hastening factor, he concluded that "activity has nothing to do with production of a myocardial infarction." 258 N.C. at 329, 128 S.E. 2d at 397.

It is clear, therefore, that *Bellamy* must be distinguished from the position of the Supreme Court as articulated in *Gabriel* and *Lewter* on the grounds that the claimant in *Bellamy* failed to establish a causal link between the exertion and heart attack. We note that a substantial majority of other jurisdictions in the United States follow the spirit of *Gabriel* and allow compensation where work-related strain or exertion is the causing or precipitating factor of heart failure. 1B Larson's Workmen's Compensation Law § 38.30, p. 7-48 (1979).

Dr. Spencer saw the plaintiff immediately after the onset of his symptoms. He diagnosed plaintiff's condition as acute myocardial infarction. A "myocardial infarct" is a "region of dead or dying tissue in the muscle of the heart which is the result of a sudden obstruction of the blood circulation, usually by a clot lodged in a coronary artery." 2 Schmidt, Attorneys' Dictionary of Medicine, p. M-141 (1978). An infarction is defined as "the process which leads to the formation of an infarct . . . ." *Id.*, at I-30. The medical term "acute" means "of short and sharp course, not chronic . . . ." Stedman's Medical Dictionary, p. 19 (22nd ed. 1972). The events show that the chase took place on a muggy, hot morning and was extremely vigorous. Deputy King testified:

> I jumped out of the car and started pursuing on foot. The subject took off down between two houses into the woods. He was running fast. I pursued him on foot. I was running as hard as I could. I chased the subject for about two or three blocks. For about two to four minutes I was running flat out as hard as I could.

It is clear from the evidence in this case that the injury to Deputy King's heart occurred suddenly and immediately after the

foot chase, and that it was the overexertion experienced during the foot chase that caused the injury to his heart. The Commission's own findings are to that effect. We hold that under such circumstances, it was not necessary for the plaintiff to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity. It was the extent and nature of the exertion that classifies the resulting injury to the plaintiff's heart as an injury by accident within the meaning of G.S. 97-2(6). The evidence and the findings of the Commission support no other legal conclusion.

The order of the Industrial Commission is reversed and this matter is remanded to the Commission for entry of an order consistent with this opinion.

Reversed and remanded with instructions.

Judges MARTIN (Robert M.) and ERWIN concur.

H. C. CODY AND WIFE, LENA JO CODY v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND ASHEVILLE CONTRACTING COMPANY, INC.

No. 7924SC560

(Filed 4 March 1980)

Indemnity § 2; Eminent Domain § 13— highway reconstruction—damages from contractor's blasting operations—indemnity agreement—right to sue Department of Transportation and contractor

An agreement between the Department of Transportation and a contractor that the contractor would indemnify the Department of Transportation for any claims arising out of the performance of a highway reconstruction contract, including any claims caused by the contractor's blasting operations, did not affect plaintiffs' right to sue the Department of Transportation or the contractor or both for loss of a building on their property allegedly caused by the contractor's blasting operations, and the trial court erred in dismissing the Department of Transportation as a party in plaintiffs' action against the Department under the inverse condemnation statute and the contractor based on strict liability.

Cody v. Dept. of Transportation

APPEAL by plaintiffs from *Johnson, Judge*. Order signed 30 April 1979 in Superior Court, MADISON County. Heard in the Court of Appeals 16 January 1980.

Plaintiffs instituted this civil action against the North Carolina Department of Transportation under N.C.G.S. 136-111, the inverse condemnation statute. They alleged that continuous blasting operations necessitated by the reconstruction of N.C. 213 between Marshall and Mars Hill resulted in the total loss of a building on their property and constituted a taking of a portion of their property. Plaintiffs then amended their complaint to join Asheville Contracting Company, Inc., which had contracted with the Department of Transportation for the actual performance of the reconstruction work, as a party defendant. There were no allegations of negligence against either defendant. The Department of Transportation answered the amended complaint and alleged its indemnity claim against Asheville Contracting Company.

The contract between the defendants contained the following sections:

> Section 107-11 Use of Explosives
>
> When the use of explosives is necessary for the prosecution of the work, the contractor shall exercise the utmost care not to endanger life or property. The contractor shall be responsible for any and all damage or injury to persons or property resulting from the use of explosives . . .
>
> Section 107-15 Responsibility for Damage Claims
>
> The Contractor shall indemnify and save harmless the commission (now Department of Transportation) . . . from all suits, actions or claims of any character brought for any injury or damages received or sustained by any . . . property by reason of any act of the contractor, subcontractor, its agents or employees in the performance of the contract. The contractor's liability to save harmless and indemnify shall include . . . The following . . . (6) any damages or claims caused by blasting operations of the contractor with or without proof of negligence on the part of the contractor; . . .

The Department of Transportation moved that the action be dismissed as to it. Upon a review of the pleadings and memoranda of law submitted by the parties, Judge Johnson made findings of fact and conclusions of law and ordered that the Department of Transportation be dismissed from the action. Plaintiffs appeal from this order.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Bennett, Kelly & Cagle, by Harold K. Bennett, for plaintiff appellants.

MARTIN (Harry C.), Judge.

The sole question for our review is whether the trial court erred in ruling that the Department of Transportation was not a necessary party to this action and in dismissing the action as to it. We hold the trial court did err in its decision.

Plaintiffs first elected to bring suit against the Department of Transportation under the inverse condemnation statute. They then asserted an additional claim against Asheville Contracting Company, Inc., premised upon a theory of strict liability for blasting operations. The state and Asheville Contracting are jointly and severally liable to plaintiffs for the damages to their property. We think that plaintiffs were entitled to sue the Department of Transportation, the contractor, or both. In accordance with established rules governing remedies, plaintiffs would be permitted only one recovery for the dynamite damage to their property. But they are not thereby forced into having to select only one party to sue.

Unquestionably plaintiffs could sue the Department of Transportation for their statutory remedy under N.C.G.S. 136-111. The trial court found that plaintiffs based this action on inverse condemnation and timely filed their complaint against the Department of Transportation. Plaintiffs also had the legal right to sue the contractor upon the theory of strict liability. A contractor employed by the Department of Transportation cannot be held liable to a property owner for damages resulting from work done with proper skill and care. The owner's remedy is against the Department of Transportation on the theory of condemnation.

Highway Commission v. Reynolds Co., 272 N.C. 618, 159 S.E. 2d 198 (1968); *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900 (1963). It is otherwise when the contractor uses explosives. Because of the inherently dangerous or ultrahazardous nature of blasting, when a contractor employed by the Department of Transportation uses explosives in the performance of his work, he is "primarily and strictly liable for any damages proximately resulting therefrom." *Sales Co. v. Board of Transportation*, 292 N.C. 437, 442, 233 S.E. 2d 569, 573 (1977).

The court found that under the terms of the contract between defendants they intended that "defendant Contractor would 'save harmless' defendant D.O.T. and that defendant Contractor would be strictly liable for blasting damages." It then concluded as a matter of law that defendant Department of Transportation is not a necessary party to this action.

The court erred in dictating to plaintiffs that their suit must be maintained against the contractor alone. We do not think that contracting parties can, by the terms of their private agreement, eliminate a cause of action created by statute to benefit a citizen of North Carolina. The contractor and the Department of Transportation could, and did, agree that the contractor would indemnify the Department of Transportation for any claims arising out of the performance of the contract. As the Court acknowledged in *Sales Co., supra*, the Department of Transportation clearly intended, by inserting section 7.11 into the contract specifications, to insure itself against the highly unpredictable and dangerous consequences of blasting. But the defendants here could not contract away the Department of Transportation's statutory liability and the concomitant right of the injured property owner.

Defendant Department of Transportation argues in its brief: "[I]t is pointless then for the State to remain a party here, go to trial, seek reimbursement, etc. when this entire issue can be handled in one action; a trial between plaintiffs and the contractor, exactly as the contract intended and sets forth." This contention cannot be upheld. The Court in its opinion in *Sales Co.*, upon which the Department of Transportation heavily relies for its position, recognized that the Department of Transportation cannot cause its liability to disappear. It has the right to enter into

an indemnity contract with the contractor, but it is "liable for any 'taking' of property through the use of explosives by its contractors." *Id.* at 442, 233 S.E. 2d at 573.

Many practical considerations support our holding. The contractor may be insolvent; he may have violated any insurance contract that would have benefited plaintiff; he may be a very popular person in the county, making it difficult for plaintiff to secure an unbiased jury. On the other hand, the state is solvent and in many areas is considered a "target" defendant. It would be most unjust for the state, by its agreement with a contractor, to destroy plaintiff's cause of action against the state.

The facts involved in this case are the same as to each defendant, and there is no reason the claims cannot be tried jointly. The defendants, *inter se*, have their allegations of indemnity to resolve, but this does not affect plaintiffs' right to sue all parties responsible for the damages they received. Plaintiffs have no rights against Asheville Contracting based upon the indemnity agreement between Asheville Contracting and the state. *Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826 (1951). It is only a matter of coincidence that Asheville Contracting is both an indemnitor to the state and also primarily liable to plaintiffs for damages caused by the blasting.

We hold the indemnity contract between the Department of Transportation and Asheville Contracting Company does not affect in any way plaintiffs' right to sue the Department of Transportation or Asheville Contracting or both. The order of the superior court dismissing the Department of Transportation as a party is

Reversed.

Chief Judge MORRIS and Judge HILL concur.

ELOISE TARKINGTON v. ZEBULON VANCE TARKINGTON

No. 7915SC618

(Filed 4 March 1980)

Trusts § 13.4— wife furnishing down payment for land—title in husband and wife as tenants by entirety—no resulting trust for wife

The trial court correctly ruled that the parties had certain property as tenants by the entirety and that no purchase money trust resulted in favor of plaintiff where the evidence tended to show that the parties purchased a home which cost $36,000; plaintiff furnished $19,800 from her personal savings account; the balance of the purchase price was secured by a note and deed of trust signed by both plaintiff and defendant; defendant was thus liable for a portion of the consideration furnished to pay for the realty; by plaintiff's own admission, defendant paid some of the subsequent monthly payments on the note and deed of trust; at the time the property was purchased, it was understood that the property would be deeded to both plaintiff and defendant; it was not against plaintiff's wishes that the property was deeded to both of them; and plaintiff assumed that each of them would own a one-half undivided interest in the property.

APPEAL by plaintiff from *Martin (John C.), Judge.* Judgment entered 26 February 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 29 January 1980.

Plaintiff brought this action against her husband seeking the conveyance of a fee simple title to her in a certain piece of realty held by her and her husband as tenants by the entirety. She based her claim in the property upon the theory of a purchase money resulting trust. The parties waived a trial by jury.

The presiding trial judge upon hearing the evidence found the following pertinent facts:

> 5. That plaintiff and defendant were married on November 25, 1973, and lived together as husband and wife until May 5, 1977;
>
> 6. That the plaintiff, Eloise Tarkington, was married to Boyd Holt Wright in 1949, and was widowed in 1967, and that the plaintiff married the defendant, Zebulon Vance Tarkington, on November 25, 1973;
>
> 7. That from the Social Security payments received by the plaintiff by reason of the death of her first husband and from her earnings prior to her marriage to the defendant, the

plaintiff accumulated a substantial savings account, having funds in excess of $20,000.00 on or about April 18, 1974;

8. That on April 18, 1974, plaintiff and defendant purchased a house and lot located at 519 Williamsdale Drive, Graham, North Carolina, receiving title therefor as tenants by the entireties from Equitable Life Assurance Society and that as down payment for the purchase of said property, the plaintiff withdrew the sum of $19,800.00 from her savings account, which was her sole and separate property, and paid that amount directly to or for the benefit of Equitable Life Assurance Society;

9. That the balance of the purchase price was around $16,500.00, the purchase price being $36,000.00 and was secured from a loan from Graham Savings and Loan Association the loan secured by a note signed by the plaintiff and the defendant and by a deed of trust on said property signed by the plaintiff and the defendant;

10. That the deed from Equitable Life Assurance Society to the plaintiff and defendant as husband and wife was not made at the specific request of the plaintiff or the defendant, but from the evidence offered in court both the plaintiff and the defendant testified that the deed was made to them as husband and wife with the knowledge of both and for the reason that each assumed that the property should be placed in the joint names as tenants by the entireties due to marriage;

11. From the evidence the Court finds that at the time of the transaction the plaintiff was under the impression that each of the parties would own an equal interest in the home, and with that impression she voluntarily furnished the money for the down payment of the house, and that the plaintiff testified that she does not contend that the deed to herself and the defendant as tenants by the entireties was as a result of any coercion or dishonesty on the part of the defendant;

12. The Court finds as a fact that there is no clear, strong and convincing evidence that at the time the property was titled in the name of the plaintiff and defendant as

tenants by the entireties that there was any intention or agreement on the part of either of the parties that the plaintiff be the equitable owner of said property;

13. That from all the facts and circumstances surrounding the purchase of the property there does not appear to the Court to be sufficient facts based solely upon the marriage relationship to imply in law any intention on the part of the plaintiff or the defendant that the equitable ownership should be other than legal title or that the defendant was not entitled to beneficial interest as well as legal title;

14. That since the date of the purchase of the property, both plaintiff and defendant have made certain payments on account of the note and deed of trust securing the balance of the purchase price on said house. That the plaintiff has made payment for all real estate taxes for the years 1974 through 1978, and had further made payments for all insurance for those years;

15. That on or about May 9, 1977, the plaintiff and defendant were separated, and that plaintiff is now in possession of the premises and furthermore since that date, she has made all payments on account of the indebtedness existing, taxes and insurance.

Upon these findings, the trial judge concluded that there was no purchase money resulting trust in favor of plaintiff and that the parties held the property as tenants by the entirety. From these findings of fact and conclusions of law, plaintiff appeals.

R. Chase Raiford, for plaintiff appellant.

William L. Durham, for defendant appellee.

VAUGHN, Judge.

Plaintiff excepts to several of the trial court's findings of fact. An examination of the record reveals the findings are all supported by competent evidence though in some instances there is also competent evidence to the contrary. The findings of the trial court are conclusive on appeal if there is evidence to support them. This is true even though the evidence might sustain findings to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218

S.E. 2d 368 (1975); *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968).

The issue thus becomes whether these findings support the trial court's conclusion that a purchase money resulting trust did not arise on these facts. Plaintiff contends there is a purchase money resulting trust under the law of this State.

If the husband furnishes the entire consideration and causes title to be taken in his name and his wife's name by the entirety, there is a presumption that he intended a gift to his wife of an entirety interest in the property. *Honeycutt v. Bank*, 242 N.C. 734, 89 S.E. 2d 598 (1955); *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976). A purchase money resulting trust is not presumed. This is consistent with the general rule on the creation of a purchase money resulting trust. Generally, once a person proves he supplied the consideration for realty with title taken by another, a resulting trust is presumed. *Tire Co. v. Lester*, 190 N.C. 411, 130 S.E. 45 (1925). However, if the person supplying the consideration is under a duty to support the one taking the title, a gift and not a trust is presumed. This is the case where a parent supplies consideration and title is taken in a child's name or the husband supplies consideration and title is taken in the wife's name.

On the other hand, if the wife furnishes the consideration for the purchase of the property, there is a presumption in this State that she did *not* make a gift to her husband of an entirety interest in the property but rather that she had title conveyed in this form with the intent that her husband hold such interest in trust for her. *Overby v. Overby*, 272 N.C. 636, 158 S.E. 2d 799 (1968); *Bullman v. Edney*, 232 N.C. 465, 61 S.E. 2d 338 (1950); *Dail v. Heath*, 206 N.C. 453, 174 S.E. 318 (1934); *Wise v. Raynor*, 200 N.C. 567, 157 S.E. 853 (1931); *Tyndall v. Tyndall*, 186 N.C. 272, 119 S.E. 354 (1923); *Deese v. Deese*, 176 N.C. 527, 97 S.E. 475 (1918); *McWhirter v. McWhirter*, 155 N.C. 145, 71 S.E. 59 (1911). These older cases assumed the domination of a wife by her husband. This assumption really no longer holds in contemporary marriages and has already been stricken from our law in other areas. A wife is no longer entitled to the presumption that when she commits a crime in the presence of her husband, she was compelled to so act by her husband. *State v. Smith*, 33 N.C. App. 511, 235 S.E. 2d 860, *cert. den.*, 293 N.C. 364, 237 S.E. 2d 851 (1977), *cert.*

den., 434 U.S. 1076, 55 L.Ed. 2d 782, 98 S.Ct. 1267 (1978); *State v. Robinson*, 15 N.C. App. 362, 190 S.E. 2d 270 (1972). Privy examiantions of the wife in transfers of realty are no longer required. G.S. 52-8; 1977 N.C. Sess. Laws ch. 375, § 1. The presumption that a resulting trust arises when the wife supplies consideration and the husband takes title harkens back to a time when the legal existence of a woman was suspended to nothingness during the time of a marriage and a time when a woman could be beaten by her husband without possibility of punishment for him as long as his battery was not with excessive violence or did not result in serious injury. The presumption in its time was a valiant effort to overcome the lowly position of the married woman in the law. We question the validity of such a presumption in contemporary marriages. Today, wives are not dominated by their husbands, at least not through force and by right of law, and wives are as likely to make gifts to their husbands as their husbands are to them. Substantial authority in other jurisdictions holds that where the wife pays the purchase price for the property conveyed to her husband or to both of them as tenants by the entirety, a gift is presumed. *Peterson v. Massey*, 155 Neb. 829, 53 N.W. 2d 912 (1952); *Emery v. Emery*, 122 Mont. 201, 200 P. 2d 251 (1948); *Hogan v. Hogan*, 286 Mass. 524, 190 N.E. 715 (1934); Tiffany, Law of Real Property § 272 (1939). It is not necessary for us to attempt to change this long-standing rule in the case before us.

The presumption that a trust results where the wife supplies consideration for the purchase of property where title is in the husband or in both as tenants by the entirety is rebuttable. A resulting trust is presumed once the wife proves she provided the consideration for the property held as tenants by the entirety. She must prove she provided the consideration at or before title was taken in the property. However, the husband, the alleged trustee, may rebut the presumption by evidence that a trust was not intended and that the money used for consideration was a gift, or perhaps even payment of a debt to the husband or a loan to the husband. That the wife provided the consideration must be proven by clear, strong and convincing evidence. A mere preponderence of the evidence is not sufficient. *McWhirter v. McWhirter*, 155 N.C. 145, 71 S.E. 59 (1911); *see also Martin v. Underhill*, 265 N.C. 669, 144 S.E. 2d 872 (1965); *Hodges v. Hodges*, 256 N.C. 536, 124 S.E. 2d 524 (1962).

In this case, the evidence does not show that plaintiff furnished the entire consideration for the purchase. The purchase price for the realty was $36,000.00 plus $200.00 in closing cost. The consideration furnished was around $19,800.00 from plaintiff's personal savings account with the balance secured by a note and deed of trust signed by both plaintiff and defendant. Defendant was thus liable for a portion of the consideration furnished to pay for the realty. By plaintiff's own admission, defendant paid some of the subsequent monthly payments on the note and deed of trust. Moreover, plaintiff's own evidence rebuts the presumption that she intended her husband to hold his entirety interest in trust and indicates a donative intent. Her testimony was to the effect that at the time the property was purchased, it was understood that the property would be deeded to both of them. It was not against her wishes that the property was deeded to both of them. She assumed that each of them would own a one-half undivided interest in the property. The question would not have arisen if the marriage had not failed.

The trial court correctly ruled that the parties held the property as tenants by the entirety and that no purchase money trust resulted in favor of plaintiff.

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. MARK SUMMITT

No. 7927SC877

(Filed 4 March 1980)

1. Rape § 11— rapes of eleven year old niece—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for first degree rape of his eleven year old niece on 24 March 1978 and second degree rape of the niece on 28 July 1978.

2. Rape § 11.1— first degree rape of eleven year old child—instructions on second degree rape—question of whether victim was virtuous

Although the evidence in a first degree rape case tended to show that defendant unlawfully and carnally abused a virtuous female child under the

age of twelve and that defendant was more than sixteen years of age, the trial court did not err in instructing the jury on second degree rape where there was some evidence, though slight, which would permit an inference that the victim was not a virtuous child. Furthermore, any error in instructing on second degree rape was favorable to defendant and not a ground for affording him relief.

3. **Rape § 11— rape of eleven year old child—failure to prove specific time alleged**

In a prosecution for rape of an eleven year old child, failure of the State to prove the crime was committed on the specific date given in the indictment was not fatal where defendant did not rely on the defense of alibi and the victim was under the age of twelve at the time given for the offense.

4. **Rape § 10— evidence corroborating prosecutrix**

In a prosecution for rape of an eleven year old child on two occasions, testimony by the State's rebuttal witness that the victim had told her that defendant had had sex with her was properly admitted to corroborate the victim's testimony and did not constitute evidence of a new accusation of rape which was without a time frame where there was no indication that the testimony was about anything other than the crimes for which defendant was charged.

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 29 May 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 7 February 1980.

Defendant was charged with two counts of rape. The first charged him with the second degree rape of his niece on or about 28 July 1978. The second charged him with the first degree rape of the same niece on or about 24 March 1978. The charges were consolidated for trial on a plea of not guilty to both counts.

The State presented evidence which tended to show the following. On the Friday before Easter in 1978, defendant came to the home of the prosecuting witness and took her to his home. They were to go with defendant's wife to buy an Easter dress for the prosecuting witness. His wife was not yet home. Defendant called the prosecuting witness to the bedroom and had sexual intercourse with her. The prosecuting witness was eleven years old having been born on 18 November 1966, and testified she had never had sexual intercourse before this act. Defendant was twenty-nine years old. The prosecuting witness also testified that in the summer of 1978, defendant came to her home and picked her and her brother up and took them to his house trailer. When they got there, he gave her younger brother some cigarettes and

told him to watch television while he packed in the bedroom. The brother was to call if anyone came to the door or the phone rang. Defendant then took the prosecuting witness to the bedroom and had intercourse with her. The brother testified he came back to the bedroom when the phone rang and saw defendant pull up and buckle his trousers. The prosecuting witness testified about other occasions where defendant felt of her body. She further testified she was afraid to tell her mother of these events.

She finally told her mother some of these things in March, 1979 and later told police officers of all the actions of defendant. A medical examination in March, 1979 revealed the prosecuting witness was not a virgin.

Defendant's evidence tended to show the following. He denied ever having sex with his niece. On 28 July 1978, the date the State charged he raped his niece in the summer, he was in another city. Concerning the week before Easter, defendant offered evidence that he and his wife picked up the prosecuting witness at her home and took her to buy an Easter dress and that she spent the weekend with them along with a female friend with whom the prosecuting witness slept. Defendant offered numerous witnesses on his good character and reputation.

The jury found defendant not guilty of the July charge but convicted him of the lesser included offense of second degree rape on the March charge. Defendant appeals.

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

Frank Patton Cooke and James R. Carpenter, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's motion for nonsuit was properly denied. While there were some inconsistencies in the evidence for the State, the evidence and the inferences therefrom were sufficient to take the case to the jury on the charged crimes. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

[2] Defendant assigned error in the charge of the trial court on the lesser included offenses of second degree rape, assault with intent to commit rape and assault on a female. His argument on appeal is limited only to the charge on second degree rape. The rape statute then in effect provided:

Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(1) First-Degree Rape—

a. If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

b. If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(2) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

G.S. 14-21 (repealed effective 1 January 1980). Prior to 1973 when the above quoted statute was adopted, there was no division of the crime of rape into first and second degrees. The legislative purpose of dividing the crime of rape into degrees was to reduce the mandatory sentence of death upon all convicted rapists. The 1973 revision did not reconstitute or redefine the crime of rape. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976). Defendant contends the court should have charged only on G.S. 14-21(1)a and not G.S. 14-21(2). The evidence did tend to show that defendant unlawfully and carnally abused a female child under the age of twelve and that defendant was more than sixteen years of age and that the victim was a virtuous child under the age of twelve. This would be a violation of G.S. 14-21(1)a. The evidence on the

age of defendant and the victim is not in conflict. However, there was some inference from the evidence, though slight, that the victim was not a virtuous child under the age of twelve. If the child carnally and unlawfully known by a defendant is not virtuous, the crime would be second degree rape. G.S. 14-21(2). The General Assembly certainly did not want to make such an action against a child, even though unvirtuous, a noncriminal act. It was thus made second degree rape. Force and will of the victim when the victim is a child under the age of twelve have nothing to do with the crime. A child of such age is presumed incapable of consent. *State v. Cox*, 280 N.C. 689, 187 S.E. 2d 1 (1972). To argue against the instruction on second degree rape, defendant must argue the victim was clearly and without conflict on the evidence within the age proscription *and* was virtuous. Then, the error in the instruction would be to the benefit and favor of defendant and not, therefore, a ground for relief. *See State v. Hall*, 293 N.C. 559, 238 S.E. 2d 473 (1977).

[3] In this case defendant was charged with two rapes, one on or about 24 March 1978 and one on or about 28 July 1978. It was the former charge on which defendant was convicted of second degree rape. Of the latter, he was found not guilty. The prosecuting witness could not remember the exact dates of the rapes but instead related one to the purchase of an Easter dress and the other to the summer before school started. The dates in the warrants and indictments were created by the district attorney. Time for the charged offenses is not of the essence in this case as long as the time given for the offense is not at a time when the prosecuting victim is not under the age of twelve. Failure of the State to prove the crime was committed on the very date given in the indictment is not fatal to the case against the defendant and does not entitle him to nonsuit. *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Gillyard*, 246 N.C. 217, 97 S.E. 2d 890 (1957). An exception to this rule results where the defense is one of alibi. In such a case, where alibi is used, the State cannot reopen the case and introduce evidence that the offense was committed on another date. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). The trial judge recognized this rule of law and its exception. In his instruction, he recognized the defendant's evidence of alibi to the 28 July charge of rape and held the State to prove that offense occurred on 28 July or 29 July. This was proper. No

alibi was offered for the 28 March defense. Rather, defendant's evidence tended to show that on or about that date, he was with the prosecuting witness but that someone else was also always with them. The trial judge properly instructed on the facts and circumstances arising from this case.

[4] After the defense rested, the State put on rebuttal evidence. Linda Harris was called as a witness and testified, in part, that in November or December, 1978, the prosecuting witness told her defendant had had sex with her. This corroborated the testimony of the prosecuting witness and a limiting instruction to that effect was given. Defendant now argues that this introduced evidence of another new accusation of rape that was without a time frame reference. The testimony did not rebut any alibi of defendant. There is no indication from the testimony that it was about anything other than the crimes of which defendant was then charged. The limiting instruction on corroboration properly placed the testimony in context for the jury.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. ROBERT MURRAY VERNON

No. 7926SC696

(Filed 4 March 1980)

Searches and Seizures § 11— inventory search of car—police procedures not followed—no probable cause to search

An officer who searched defendant's car completely failed to follow the standard procedures for towing and inventory established by the Charlotte Police Department, and the search therefore could not be upheld as a valid inventory search; nor were there probable cause and exigent circumstances to search the vehicle where the officer had no reason to believe that contraband would be found in the car of defendant, who allegedly served as a bodyguard for a person who made a prearranged drug sale to officers, and, even if probable cause had existed, officers could have obtained a warrant before searching the car, since the owner had been placed under arrest and the car was parked in a motel parking lot.

State v. Vernon

APPEAL by defendant from *Allen (C. W.), Judge*. Judgment entered 5 April 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 January 1980.

Defendant was indicted for possession of marijuana with intent to sell and deliver (Case # 78CR133978), possession of more than one ounce of marijuana (Case # 78CR133977), felonious sale and delivery of 3, 4-Methylenedioxy Amphetamine (Case # 78CR133976), and conspiring to possess and possession of 3, 4-Methylenedioxy Amphetamine with intent to sell and deliver (Case # 78CR11777). He was found not guilty on the 3, 4-Methylenedioxy Amphetamine charges and guilty on the charges relating to marijuana. The trial court arrested judgment in Case # 78CR133977, and in Case # 78CR133978, possession of marijuana with intent to sell and deliver, sentenced the defendant to 2-5 years. This appeal relates only to Case # 78CR133978 (possession of marijuana).

Prior to trial defendant moved to suppress evidence, and a voir dire hearing was held. Evidence was presented that on 6 September 1978, Officer Clark of the SBI arranged to meet one Charles Frank Pridgen at a Charlotte Holiday Inn, where Pridgen would sell to Clark 3, 4-Methylenedioxy Amphetamine (MDA) for $13,300. Clark saw Pridgen arrive at the motel in a dark green Chevelle, followed immediately by a new orange Corvette driven by defendant and with one Emory Lifsey in the passenger seat. Pridgen came into Clark's room and sold him MDA. Lifsey waited outside Clark's room on the balcony, and defendant remained standing beside the Corvette. Clark asked Pridgen who the two others were and Pridgen said they were his bodyguards. He asked whether Clark were interested in purchasing any Columbian marijuana, and Clark said no. When Pridgen left, Clark advised other law enforcement officers to arrest Pridgen, Lifsey and defendant.

All three men were arrested in the motel parking lot. Officer Cochran of the Charlotte Police arrested defendant, and he testified, "After I arrested Mr. Vernon, I decided to tow the Corvette to the police station because I didn't want to be responsible for it being damaged for being left out there." Cochran then "started inventorying" the car, and found in the passenger compartment a large cloth bag containing marijuana. Defendant asked that the Corvette not be towed because of the damage a wrecker might do, so Cochran drove it to the police department. The car

was never actually towed or stored. Pridgen's Chevelle was not towed because it was "battered up" and the officers felt there would be no danger in leaving it there.

Defendant's motion to suppress was denied, the court having determined that Office Cochran had discovered the marijuana pursuant to a valid inventory search. The evidence presented by the State before the jury was substantially the same as that given on voir dire. Defendant presented no evidence. Verdicts were returned as set out above, and defendant appeals from his conviction for possession of marijuana with intent to sell and deliver.

Attorney General Edmisten, by Associate Attorney Sarah C. Young, for the State.

Levine, Goodman and Pawlowski, by Paul L. Pawlowski, for defendant appellant.

ARNOLD, Judge.

The trial court upheld the search of the Corvette defendant had driven to the motel as a valid inventory search. The recent decision of our Supreme Court in *State v. Phifer*, 297 N.C. 216, 254 S.E. 2d 586 (1979), however, reveals that the search cannot be upheld on that ground. Here, as in *Phifer*, the officer who searched the defendant's car completely failed to follow the standard procedures for towing and inventory established by the Charlotte Police Department. These procedures provide in part:

> B. Citizens should be allowed to make disposition of their vehicles when:
>
> 1. The driver or owner is on the scene.
>
> 2. In the officer's judgment the subject is capable of making such disposition.
>
> 3. Said disposition does not interfere with the case or create a traffic problem.

Officer Cochran, who searched defendant's car, testified at trial that defendant was present and competent to make a decision about the disposition of the car; that the car was presenting no traffic hazard, parked as it was in the Holiday Inn parking lot;

and that towing the car was in no way necessary to the arrests for the sale of MDA. Cochran admitted that his actions with regard to defendant's vehicle were contrary to police department policy. Further, he testified that he decided to tow the Corvette "so it would not be damaged." Nowhere in the Charlotte Police Department statement of procedures for towing and inventory does this appear as a ground upon which an officer may decide to tow a vehicle. There is no evidence of any other circumstances which would bring the inventory and towing of this vehicle within the police department procedures.

The court in *Phifer*, having found the search there invalid as an inventory search, upheld it on the basis that there was probable cause to search. We find that in the present case the necessary probable cause and exigent circumstances to justify the search do not appear. Charles Frank Pridgen went to the Holiday Inn to make a prearranged sale of MDA. He arrived in a Chevelle, followed by defendant and another man in a Corvette. Defendant remained standing by the Corvette, while Pridgen went into the motel and completed the prearranged sale. He indicated during the sale that defendant was his bodyguard. All three men were arrested immediately after Pridgen left the motel room. Upon these facts, no probable cause appears for a search of defendant's car. "Probable cause . . . may be defined as a reasonable ground of suspicion supported by circumstances sufficiently strong to lead a man of prudence and caution to believe defendant's car contained contraband of some sort." *State v. Phifer, supra* at 225, 254 S.E. 2d 590. At the time of the search, the prearranged drug sale, in which defendant participated at most as a lookout or bodyguard, had been completed. Pridgen, the seller, had not arrived at the scene in defendant's car. There is no evidence that the officer who conducted the search had knowledge of Pridgen's offer to sell Clark marijuana in addition to the MDA. Viewing the totality of circumstances here we cannot say that a prudent and cautious person would believe contraband would be found in defendant's car at the time it was searched by Officer Cochran.

Furthermore, if probable cause had existed, we find no exigent circumstances which would justify a warrantless search. See *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. denied* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971). Prior to the search, defendant and his companions had

been placed under arrest. The situation was not one where it was " 'not practicable to secure a warrant, because the vehicle [could] be quickly moved out of the locality.' " *Carroll v. United States*, 267 U.S. 132, 153, 69 L.Ed. 2d 543, 551, 45 S.Ct. 280, 285 (1925), quoted in *Coolidge v. New Hampshire, supra* at 460, 29 L.Ed. 2d 579, 91 S.Ct. 2034.

It is well-established that warrantless searches are per se unreasonable unless they fall within a specific exception. *Coolidge v. New Hampshire, supra.* Neither the inventory search exception nor the exception for probable cause plus exigent circumstances applies here. Accordingly, the marijuana found in defendant's car was the fruit of an illegal search and should have been suppressed. *State v. Chambers*, 41 N.C. App. 380, 255 S.E. 2d 294 (1979), relied upon by the State, is distinguishable upon its facts.

For the reversible error committed by the court in denying his motion to suppress, in Case # 78CR133978, defendant is entitled to a

New trial.

Judges CLARK and ERWIN concur.

TWIN CITY APARTMENTS, INC. v. MARALYN LANDRUM (WHEDBEE)

No. 7921DC601

(Filed 4 March 1980)

1. Rules of Civil Procedure § 13— actions arising out of landlord and tenant relationship—no compulsory counterclaim

Plaintiff's claim for summary ejectment was not a compulsory counterclaim in defendant's prior action for breach of a lease agreement, breach of covenants of fitness and habitability and of the duty of repair, violations of the unfair trade practices statute, and conspiracy to deprive defendant of her civil rights, although both actions arose out of the same landlord and tenant relationship, since the nature of the actions and the remedies sought were too divergent. G.S. 1A-1, Rule 13(a).

2. Ejectment § 1— summary ejectment procedures—constitutionality

The summary ejectment procedures set out in G.S. 42-26(1) and G.S. 42-32 are not unconstitutional because the statutes provide no defense to a residen-

tial tenant of commercially owned property who holds over after being given notice that the term has expired or that the owner desires possession.

3. **Ejectment § 1; Constitutional Law § 4— constitutionality of summary ejectment statutes—equal protection—absence of standing**

Defendant had no standing to attack the summary ejectment statutes, G.S. 42-26(1) and G.S. 42-32, on the ground that they discriminate against lower and lower middle income persons who are economically compelled to rent where she failed to show that she was a member of the allegedly injured classes.

APPEAL by defendant from *Alexander (Abner), Judge.* Judgment entered Nunc Pro Tunc 31 January 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 28 January 1980.

This is an action in summary ejectment. Maralyn Landrum (Whedbee) executed a lease with Twin City Apartments, Inc., 15 March 1974, which expired 14 September 1974, but provided that,

> Renewal. Unless at least thirty (30) days prior to the expiration of the original term of this lease, Landlord gives to tenant or tenant gives Landlord notice of an intention to permit this lease to expire on its expiration date, *this lease shall continue in effect at the rental and on the same terms, covenants, conditions and provisions herein contained, on a month-to-month basis, unless terminated as above provided.* (Emphasis added.)

By letter written sometime in April, 1978, plaintiff notified the defendant and her new husband that they must execute a new lease. Defendant's husband refused to do so, either for himself or on behalf of the defendant. Notice to vacate was given to defendant, and an action in ejectment brought around 6 May in Forsyth County. On or about 1 May 1978, the defendant, along with her husband as co-plaintiff, began an action in Hertford County which sought *inter alia* a temporary restraining order prohibiting the plaintiff from ejecting the defendant. Prior to service of the temporary restraining order, the Twin City Apartments dropped the action against the defendant. On 6 June 1978, the case *sub judice* was filed before a magistrate. Answer was filed by the defendant and judgment rendered in favor of the plaintiff. Defendant appealed. On 31 January 1979, the district court found facts, entered conclusions of law, and rendered judgment in favor of the plaintiff. Defendant appealed.

James T. Lambie for plaintiff appellee.

Rosbon D. B. Whedbee for defendant appellant.

HILL, Judge.

[1] The defendant contends the trial judge erred in denying the defendant's motion to dismiss this suit on the grounds that the instant action for summary ejectment must be brought as a compulsory counterclaim, pursuant to G.S. 1A-1, Rule 13(a), in the pending Hertford County action. Rule 13(a) states that,

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The trial judge in the instant case found as fact that the case was filed 6 June 1978 in the Small Claims Court of Forsyth County; that on or about 1 May 1978, the defendant filed as a co-plaintiff with her husband a cause of action in Hertford County against the plaintiff, covering *inter alia* subject matters arising out of the same transaction and occurrence as gave rise to the instant case and alleging that Barbara Horrell, the resident manager of the Village Apartments Complex, owned by the Twin City Apartments did breach the terms of the lease for personal reasons and as a personal vendetta against Maralyn Landrum Whedbee. The complaint further alleged breach of rental contract and covenants of the leasehold; breach of covenants of fitness for habitability and of the duty of repair; violations of G.S. 75-1.1 and a civil conspiracy to deprive the said Maralyn Landrum Whedbee of her civil rights prescribed by 42 U.S.C. § 1983, et seq. The Hertford County action is still pending. The judge in the Forsyth County action then concluded that the Forsyth County action for summary ejectment was not an action which plaintiff, defendant in the Hertford County action, was compelled to bring pursuant to the requirements of G.S. 1A-1, Rule 13(a). The court thereupon dismissed the motion of a defendant Maralyn Landrum Whedbee as to compulsory counterclaim.

An examination of the findings of fact by the trial judge reveals that defendant's Hertford County action is completely distinct from an action for summary ejectment, the case *sub judice*. Both defendant's Hertford County action and plaintiff's action for summary ejectment arise from a common relationship between the parties. Both parties' claims originate from plaintiff's request that defendant vacate the apartment and defendant's refusal. This common origin is not enough, however, to require that plaintiff's summary ejectment action be designated a compulsory counterclaim in defendant's Hertford County action. The nature of the actions and the remedies sought are too divergent. In fact, it is the similarity in the nature of the action *and* the remedy sought which seems to be more important in establishing when an action will be treated as a compulsory counterclaim, rather than a basis in a common factual transaction.

Hy-Way Heat Systems, Inc. v. Jadair, Inc., 311 F. Supp. 454 (E.D. Wisc. 1970), involved an action for patent infringement and for unfair competition. Defendant answered and counterclaimed, making allegations based on common law questions of unfair competition which would normally be tried in state court. The federal court claimed jurisdiction on the basis of Rule 13(a), saying that the counterclaim was compulsory. In making its findings, the court seemed to rely not so much on a logical relationship between the factual backgrounds of the two claims, but the fact that, "[b]oth claims deal[t] with misrepresentation . . . ." In effect, the similar nature of the actions was determinative.

Manufacturing Co. v. Manufacturing Co., 30 N.C. App. 97, 100, 226 S.E. 2d 173, *disc. review granted on other grounds* 290 N.C. 662 (1976), is a similar case. There, a manufacturer had charged another company with unfair trade practices. Several months later, the second company filed an action against the first for unfair trade practices in another superior court. Both claims arose out of the manufacturers' claim regarding a purportedly unique device their respective tobacco harvesting machines carried. This Court recognized the logical relationship between the factual backgrounds of the two claims, but went one step further. The Court, citing from *Hy-Way, supra*, stated that " ' . . . [b]oth claims deal with misrepresentation of the defendants' products . . . .' " The second action was held to be a compulsory counterclaim in the original.

In order to find that an action must be filed as a compulsory counterclaim pursuant to G.S. 1A-1, Rule 13(a), a court must first find a logical relationship between the factual backgrounds of the two claims. In addition, the court must find a logical relationship between the nature of the actions. Rule 13(a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other. Defendant's first assignment of error is overruled.

[2] Defendant next contends that the summary ejectment procedure as set out in G.S. 42-26(1) and G.S. 42-32, is unconstitutional. Defendant argues first that G.S. 42-26(1) provides no defense whatsoever to a residential tenant of commercially owned property who holds over, after being given notice that the term has expired or that the owner desires possession. Secondly, defendant argues that the North Carolina law discriminates against lower and lower middle income persons who are compelled to rent because of economic inability to purchase suitable residential premises. The trial court concluded the statute to be constitutionally valid. We agree.

The parties executed a written lease. Defendant was not deprived of any vested right. In fact, the lease protected her rights. Plaintiff had superior title in the property, and the lease guaranteed defendant's quiet enjoyment during the term of the lease. Defendant had no right to possession once the lease expired and plaintiff gave proper notice to vacate.

G.S. 42-26(1) provides no defense because none exists. Once the estate of the lessee expires, the lessor, by virtue of his superior title, may resume possession by following proper procedures. Defendant's right to possession is protected by virtue of G.S. 42-35 and G.S. 42-36, which provide a remedy to the tenant if he is evicted, but later restored to possession.

[3] Defendant further argues that G.S. 42-26(1) and G.S. 42-32 are unconstitutional because they discriminate against lower and lower middle income persons.

> A person who is not included in the class against which there has been a discrimination cannot take advantage of the discrimination by pleading that the proceeding constitutes a

violation of the equal protection guaranteed by the Fourteenth Amendment of the Constitution of the United States, and by Article I, section 17, of the Constitution of North Carolina.

State v. Sims, 213 N.C. 590, 591, 197 S.E. 176, 177 (1938). Defendant has not exhibited that she is a member of the allegedly injured classes. In fact, in defendant's appellate brief the statement is made that, ". . . defendant falls only within the class of the general public at large . . . ." Defendant has no standing to attack the statutes on the basis of denial of equal protection. Defendant's second assignment of error is overruled.

We have examined defendant's third assignment of error and find it to be without merit. Defendant's lease ran from month to month pursuant to the same terms as her original six-month lease. The original lease provided for eviction for certain objectionable conduct, none of which was done by defendant. This does not preclude the landlord from ejecting tenant, pursuant to the proper procedures, at the end of the lease term. The lease provisions in the instant case were designed to give plaintiff a remedy *during* the lease term and were not meant to limit his right to reassert his superior title.

The judgment of the trial court is

Affirmed.

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

STATE OF NORTH CAROLINA v. LASH LARUE HAMMONDS

No. 7918SC787

(Filed 4 March 1980)

1. Jury § 6.3— juror's ownership of weapons—examination properly limited

In a prosecution of defendant for assault with a deadly weapon and discharging a firearm into occupied property, the trial court's refusal to allow defendant to examine prospective jurors as to whether they owned firearms or weapons did not prejudice defendant or hinder his ability to make peremptory challenges.

2. Criminal Law § 73.3— hearsay testimony—admissibility to show state of mind—intent

In a prosecution of defendant for assault with a deadly weapon and discharging a firearm into occupied property, testimony by the victims that a neighbor knocked on their door and told them that defendant "is out here and wants a piece of [the victims'] ass" was not excludable as hearsay, since the statement of the neighbor was admissible to show the state of mind which caused the victims to take action and was not offered to prove the truth of the matter asserted, and since defendant's statement was admissible to show his intent.

3. Criminal Law § 89.10— pending charge against witness—cross-examination for impeachment improper

The trial court did not err in refusing to allow defendant to ask an assault victim questions concerning an assault charge pending against him, since a witness may not be cross-examined for impeachment purposes as to whether he had been indicted or is under indictment for a criminal offense.

4. Criminal Law § 102.3— improper jury argument—impropriety cured

Where the trial court sustained defendant's objection to the prosecutor's improper remarks concerning the burden of producing the gun used in the assault with which defendant was charged, any prejudice which defendant may have suffered was removed.

5. Weapons and Firearms § 3— shooting into occupied property—sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for shooting into occupied property where it tended to show that defendant commenced shooting; bullets hit the victims' house; and two females were inside the house.

APPEAL by defendant from *Davis, Judge.* Judgment entered 4 May 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 January 1980.

The events which led to these criminal prosecutions took place around 9:00 p.m. on 12 November 1978. Evidence was presented at trial tending to show that defendant parked his car on the street in front of a house occupied by Billy Joe Fritts and his sons, Tommy Joe and Billy Ray. Defendant told a neighbor to knock on the front door of the house and deliver a message. Billy Joe Fritts answered the door, and the neighbor stated that defendant was outside and that ". . . he wants a piece of Tommy's and Billy's ass."

Billy Ray Fritts went out the front door, through the yard to the road, and confronted defendant. Billy Joe Fritts, the father, came outside and stood on the front porch. It is not clear from the

evidence what words passed between Billy Ray and defendant, but not long after Billy Ray approached defendant, Hammonds pulled out a gun and began firing in Billy Ray's direction. Billy Ray swung a knife at defendant and then retreated into the house.

There was testimony at trial that bullets were found in the outside wall of the house, in Billy Joe Fritts's truck, and in a car owned by a neighbor. Billy Joe Fritts testified that two shots went through a bedroom.

Defendant was arrested on 12 November 1978 and subsequently indicted. Hammonds was found guilty of assault with a deadly weapon and of discharging a firearm into occupied property and sentenced to an active prison term. From the conviction, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Frederick G. Lind for defendant appellant.

HILL, Judge.

[1] Defendant argues that the trial court erred by not allowing him to examine prospective jurors as to whether they owned firearms or weapons. "Regulation of the manner and the extent of the inquiry on voir dire rests largely in the trial judge's discretion. (Citations omitted.) A defendant seeking to establish on appeal that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion. (Citations omitted.)" *State v. Young,* 287 N.C. 377, 387, 214 S.E. 2d 763 (1975); *modified as to death penalty* 428 U.S. 903 (1976). We find that the trial judge's refusal did not prejudice defendant or hinder his ability to make peremptory challenges. There was no abuse of discretion by the trial judge. Consequently, defendant's first assignment of error is without merit.

[2] Defendant next assigns as error the trial court's action in overruling his objections to testimony given by Billy Ray, Billy Joe, and Tommy Joe Fritts. Defendant contends that testimony from the above witnesses to the effect that a neighbor came to their door and stated that, "Lash is out here and wants a piece of Tommy's and Billy's ass." was hearsay. Similar testimony regard-

ing the statement by the neighbor was given by each witness and properly objected to each time.

Testimony is defined as hearsay ". . . whenever 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 . . . ." 1 Stansbury's N. C. Evidence § 138, pp. 459-60 (Brandis rev. 1973). (Citing many cases.) "When the witness reports on the stand that one declarant stated to him that another declarant made a given statement, this may be termed 'double hearsay,' *if both statements are offered to prove the facts asserted.*" (Emphasis added.) McCormick, Evidence § 246, p. 585 (2d ed. 1972). In order to find "double hearsay" competent, we must find an exception to the hearsay rule for each of the out-of-court statements.

We discuss the witnesses' testimony regarding the neighbor's statement first. Courts have traditionally characterized such a statement as hearsay and then applied the *res gestae* exception. The *res gestae* exception ". . . appears to have been first used as a justification for admitting evidence of oral statements attending and connected with the transaction which was the subject of inquiry, without examining too closely the possible hearsay aspects of the declaration." 1 Stansbury's N.C. Evidence § 158, at p. 530-1. The exception has been criticized often as being too vague, and Judge Learned Hand once wrote that the phrase ". . . has been accountable for so much confusion that it had best be denied any place whatever in legal terminology." *United States v. Matot*, 146 F. 2d 197, 198 (2d Cir. 1944).

The better analysis of how to characterize the witnesses' testimony concerning the neighbor's statement is to say that the testimony is simply not hearsay. The testimony was not given as proof of the matter asserted. We are not concerned with whether the neighbor actually stated what the witnesses have alleged he did. Our only concern is that the neighbor made a statement which catapulted the Fritts family into action. "When it is proved that D made a statement to X, with the purpose of showing the probable state of mind thereby induced in X, . . . the evidence is not subject to attack as hearsay." *See* McCormick, Evidence § 249, pp. 589-90 (2d ed. 1972) and cases cited therein.

Next, we discuss the neighbor's statement regarding what defendant had told him. Defendant had told the neighbor that he ". . . want[ed] a piece of Tommy's and Billy's ass." Defendant was indicted for assault with a deadly weapon with intent to kill. "Where intent is *directly in issue*, as in cases involving . . . assault with intent to commit a felony, . . . a person's statements relative to his then existing intention are admitted without question." 1 Stansbury's Evidence § 162, pp. 541-2 (Brandis rev. 1973). Defendant's assignment of error is without merit.

[3] During the trial, defendant's counsel questioned Billy Ray Fritts regarding an assault charge pending against him. The question was important to the defense because Fritts was charged with assaulting defendant. The State objected to the question each time it was asked, and the trial court sustained the objections. Defendant assigns as error the court's action. Defendant's assignments are without merit. "[A] witness may not be cross-examined for impeachment purposes as to whether he has been indicted or is under indictment for a criminal offense." (Citations omitted.) *State v. Coxe*, 16 N.C. App. 301, 305-6, 191 S.E. 2d 923, *cert. denied* 282 N.C. 427 (1972).

Defendant's next assignment of error deals with comments made by the judge during the trial. We find that the judge's questioning of witness Roland Starr was exercised well within his power to do so. *State v. Horne*, 171 N.C. 787, 88 S.E. 433 (1916); and that the judge's comments to the jury regarding a side-bar conference and a witness's cursing were made in furtherance of his duty to run a fair and decorous trial. Defendant's assignment of error is without merit, borders on the frivolous, and is overruled.

[4] Defendant assigns as error prejudicial remarks made by the prosecutor during his closing argument to the jury which tended to place the burden of producing the gun defendant had allegedly used in the shooting on the defense rather than on the State. Defendant's counsel objected to the remarks, and his objection was sustained. " 'It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed.' " *State v. Morrison*, 19 N.C. App. 573, 574, 199 S.E. 2d 500, *cert. denied* 284 N.C. 257 (1973). The court sustained defendant's objec-

tion to the improper remarks. This was enough to remove any prejudice defendant may have suffered. *See State v. Correll*, 229 N.C. 640, 644, 50 S.E. 2d 717 (1948), *cert. denied* 336 U.S. 969 (1949). Defendant's assignment of error is without merit and is overruled.

[5] Defendant's final assignment of error is to the judge's submission to the jury of the charge of shooting into occupied property. Defendant asserts that his motion for nonsuit should have been allowed.

> Motion to nonsuit requires the trial court to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. (Citations omitted.) . . . [I]f there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. (Citations omitted.) *State v. Goines*, 273 N.C. 509, 513, 160 S.E. 2d 469 (1968).

We find that there was more than sufficient evidence to withstand defendant's motion for nonsuit. Two members of the Fritts family, Tommy Joe and Billy Ray, testified that bullets were coming into the house and that two females were inside. Billy Joe Fritts testified that defendant "commenced shooting" and that bullets hit the corner of his house. Defendant's final assignment of error is without merit.

In defendant's trial we find

No error.

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

STATE OF NORTH CAROLINA v. MELVIN DWIGHT SMITH

No. 7923SC819

(Filed 4 March 1980)

1. **Rape § 4— discussion with complainant about sexual problems—inadmissibility to show consent**

In a prosecution for rape, evidence of a discussion between the complainant and defendant concerning the complainant's sexual problems was not admissible under G.S. 8-58.6(b)(1) since such discussion did not constitute sexual behavior or activity between the complainant and defendant.

2. **Rape § 4— complainant's sexual activity with third persons—inadmissibility to show consent**

In a prosecution of defendant for the rape of his sister-in-law in her parents' home, evidence of sexual activity between complainant and defendant's brother and between complainant and other third persons was not admissible under G.S. 8-58.6(b)(3) as showing a "pattern of sexual behavior so distinctive and so closely resembling the defendant's version . . . as to lead the defendant reasonably to believe the complainant consented" where complainant's activity with defendant's brother and with other third parties was in "dating-type circumstances" and there was no evidence that any such activity occurred in the home of the complainant's parents.

3. **Rape § 5— second degree rape—sufficiency of evidence of force**

The State's evidence of force was sufficient to support defendant's conviction of second degree rape where it tended to show that defendant, the brother-in-law of the prosecutrix, grabbed the prosecutrix from behind while she was cooking at a stove; defendant forced the prosecutrix toward a bedroom, and when she put her arm on the door to keep from going into the bedroom, defendant knocked her hand down and shoved her into the bedroom; defendant shoved the prosecutrix down on the bed and held her down; the prosecutrix pinched, scratched and hit defendant but was unable to get away; and the prosecutrix sustained bruises on her arms and scratches as a result of defendant's actions.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 11 June 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 30 January 1980.

Defendant was charged with the second degree rape of Rebecca Sue Roten. The jury returned a verdict of guilty. From judgment sentencing him to a prison term of fifteen years, the defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Hayes, Hayes and Evans, by Samuel C. Evans, for defendant appellant.

MARTIN (Robert M.), Judge.

[1] Defendant's first argument involves the admissibility of evidence under N.C. Gen. Stat. § 8-58.6 which redefines the law of relevancy in rape cases. The statute provides in pertinent part that

> (b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complain[an]t and the defendant; or
>
> . . .
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented. . .

The evidence which defendant sought to introduce under the above subsections in order to develop his defense of consent consists of the following:

(1) sexual activity between the complainant and defendant's brother and between complainant and other third persons.

(2) the complainant's being undressed or undressing with the door open in view of defendant while defendant and his wife were living at the home of complainant's parents.

(3) discussions between defendant and complainant concerning the sexual problems of complainant and defendant's brother.

As to the second category of evidence which defendant argued in his brief, any error in the trial judge's order excluding the evidence is harmless because the defendant later testified without

objection that he had seen the complainant nude at her parents' home. As to the third category of evidence, discussion between complainant and defendant of complainant's sexual problems, there is no error in the exclusion of such evidence under subsection (b)(1). Subsection (a) of the statute defines the term "sexual behavior" to mean "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." While the topic of conversation may have been sexual in nature, there is no evidence presented in this case to indicate that the speech rose to the level of sexual behavior or activity between the complainant and defendant.

[2] Under the first category of evidence which defendant contends is admissible under subsection (b)(3) defendant offered to show that in December of 1976 "certain sexual behavior took place between the prosecuting witness and the defendant's brother, Bill Smith, in the defendant's presence . . ." and "in January of '77 the prosecuting witness and Bill Smith spent the night together in the same bed at the residence of Wilson Smith and defendant was aware and understood what took place." In February, 1977 "[w]ith defendant's knowledge, the prosecuting witness and defendant's brother, Bill Smith, stayed in a motel together" and also in February, 1977 "defendant observed Bill Smith and the prosecuting witness in bed together in a mobile home in North Wilkesboro, both nude at the time." However, defendant's narration of the evidence fails to meet the criteria of subsection (b)(3) in that it does not show a "pattern of sexual behavior so distinctive and so closely resembling the defendant's version . . . as to lead the defendant reasonably to believe that the complainant consented." Recognizing the requirement of a distinctive pattern of sexual behavior, the trial judge specifically asked defense counsel if he had any evidence of complainant's sexual activity at her parents' home with third parties. The trial judge stated that if it was a similar type of situation where somebody came into complainant's house he would consider the admission of such evidence. Defense counsel in his narration did not offer evidence of sexual intercourse between complainant and defendant's brother in her home. Although witnesses testifying to complainant's sexual behavior with other third parties may have erroneously been excluded from testifying in the in camera hearing, defense counsel conceded that complainant's activity with

other third parties was in "dating-type circumstances" much like those with defendant's brother and which the trial court had properly found not material. Furthermore, defendant did not show that the excluded evidence would lead the defendant to believe that complainant would consent to intercourse with him. Hence defendant did not carry his burden defined in subsection (c) to "establish the basis of admissibility of such evidence" under subsection (b)(3).

[3] Defendant also argues that the trial court erred in denying defendant's motions to dismiss and to set aside the verdict because of lack of evidence concerning force. Upon defendant's motion for dismissal, 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 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.

State v. Evans, 279 N.C. 447, 452-53, 183 S.E. 2d 540, 544 (1971) (citations omitted); *State v. Thompson*, 43 N.C. App. 380, 380-81, 258 S.E. 2d 800, 800-01 (1979). Under N.C. Gen. Stat. § 14-21, force is an essential element of the offense of rape.

Taken in the light most favorable to the State, the evidence for the State tended to show that complainant lived at home with her parents but they had left to go to church. Complainant was at home cooking dinner for her boyfriend when defendant, complainant's brother-in-law, drove up. Complainant unlocked the door and admitted defendant. Defendant made a phone call and complainant returned to the stove. Defendant asked where her parents were and when her boyfriend was expected. Complainant testified that defendant came up to the stove, told her to put down a pot lid she was holding and grabbed her from behind. Although complainant told defendant to leave her alone, he began trying to

undo her pants. She testified that she tried to get away but could not, that defendant forced her into the bedroom and when she put her arm on the door to keep from getting into the bedroom, defendant shoved her into the bedroom, shoved her down on the bed and held her down. Complainant pinched, scratched and hit defendant. Complainant tried to get away but couldn't. As a result of this, complainant sustained bruises on her arms and scratches.

Evidence of force is also present in defendant's confession admitted after a *voir dire* hearing in which the judge concluded that the statement was freely, voluntarily and understandingly given.

> She was standing at the stove and I grabbed her from the side and pushed her into the bedroom door and she put her arm up against the door and I smacked it down. She then said, "No Melvin." I just pushed her on into the bedroom and I unbuckled her pants outside the door. Then I forced her down onto the bed and then I unzipped her pants and pulled her leg out of her pants. And she screamed, said, "I'm not going to do it no matter what you do." Her panties were pulled down at the same time. She pulled my hair and I jerked hers. She kicked me and screamed. I held her down. . .

Examination of the record reveals ample evidence of force to justify the denial of defendant's motions for dismissal and to set aside the verdict.

Defendant abandoned his first and second assignments of error in his brief and did not bring forward his sixth assignment of error and did not discuss his sixth assignment of error in his brief. It is therefore deemed abandoned. Rule 28, North Carolina Rules of Appellate Procedure.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges ERWIN and WELLS concur.

EDDIE GAMBLE v. BORDEN, INC.

No. 7910IC628

(Filed 4 March 1980)

Master and Servant § 94.1— workmen's compensation—permanent disability—evidence uncontradicted—finding of temporary disability erroneous

Where the Industrial Commission deleted the word "permanent" from the Deputy Commissioner's finding of fact and conclusion of law and in its opinion referred to plaintiff's case as one "wherein no one knows what the future holds" and concluded that defendants owed plaintiff compensation "until plaintiff is tendered or obtains work suitable to his capacity or has a change in condition," the Industrial Commission in effect found that the duration of plaintiff's disability was temporary, but such finding was erroneous since plaintiff's uncontradicted evidence was that he was permanently disabled and that his condition likely would not improve.

APPEAL by plaintiff from an Order and Award of the North Carolina Industrial Commission filed 26 March 1979. Heard in the Court of Appeals 30 January 1980.

It was stipulated that the plaintiff was injured on 23 September 1976 by an accident arising out of and in the course of his employment with defendant Borden, Inc.; that the case is one of admitted compensability and that plaintiff receive compensation at the rate of $146.00 per week.

Plaintiff's evidence tended to show that on 23 September 1976 plaintiff was driving a truck as a salesman and deliveryman for Borden, Inc. when he swerved to avoid an on-coming vehicle. Plaintiff was thrown from the truck and knocked unconscious. Plaintiff was found by Dr. Walter S. Lockhart to have ligamentous injury of the cervical spine, lumbosacral sprain, multiple contusions and cerebral concussion. Plaintiff has continued to suffer from constant back pain, headaches, dizziness and severe anxiety and depression and has been unable to return to work. Prior to the accident, plaintiff was a responsible and praiseworthy employee. Because of severe anxiety and depression suffered by plaintiff, Dr. Lockhart referred plaintiff to Dr. Karl Stevenson, a psychiatrist. Dr. Stevenson first saw plaintiff on 24 December 1976 and was treating plaintiff continuously at the time of the hearing before the Industrial Commission. Dr. Stevenson diagnosed plaintiff's injury as "post-traumatic syndrome, traumatic

neurosis" resulting from the concussion. Both Dr. Stevenson and Dr. Lockhart testified at the hearing with respect to plaintiff's injuries.

On 29 August 1978 Deputy Commissioner Denson filed an opinion and award in which she made findings of fact including fact No. 4 as follows: "4. Plaintiff suffers from post-traumatic syndrome, traumatic neurosis, as a result of the injury giving rise hereto and is permanently and totally disabled as a result thereof." Based on the finding of fact, Deputy Commissioner Denson made the following conclusion of law: "2. Defendants owe plaintiff compensation at the rate of $146.00 per week for plaintiff's lifetime because of the permanent total disability. G.S. 97-29." The Deputy Commissioner awarded plaintiff "compensation at the rate of $146.00 per week for plaintiff's lifetime."

Defendant appealed. The full Commission amended and revised Deputy Commissioner's finding of fact No. 4 to the effect that: "Plaintiff suffers from post-traumatic syndrome, traumatic neurosis, as a result of the injury giving rise hereto and at the time of the hearing on April 4, 1978 he was totally disabled as a result thereof." The full Commission revised conclusion No. 2 to the effect that: "Defendants owe plaintiff compensation at the rate of $146.00 per week until plaintiff is tendered or obtains work suitable to his capacity or has a change in his condition. G.S. 97-29; G.S. 97-32; G.S. 97-47." and revised the award to the effect that compensation be paid "until further order of this Commission."

From the opinion and award of the full Commission, plaintiff appealed.

Bryant, Bryant, Drew and Crill, by Lee A. Patterson II, for plaintiff appellant.

Young, Moore, Henderson & Alvis, by B. T. Henderson II, for defendant appellee.

MARTIN (Robert M.), Judge.

The critical fact in issue is the duration of plaintiff's total disability. "The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact."

Priddy v. Cab. Co., 9 N.C. App. 291, 297, 176 S.E. 2d 26, 30 (1970). Duration is a critical finding necessary to support a compensation award under G.S. 97-29 and 30 which provide "[c]ompensation for disability, dependent as to amount upon whether the injury produces a permanent total, a permanent partial, a total temporary or a partial temporary incapacity." *Watts v. Brewer*, 243 N.C. 422, 423, 90 S.E. 2d 764, 766 (1956). 2 A. Larson, The Law of Workmen's Compensation § 57.10 (1976). Hence under the traditional four-way classification of disabilities, a total disability under G.S. 97-29 must be either permanent or temporary.

The terms permanent and temporary are not defined in the North Carolina Worker's Compensation Act. However, the Industrial Commission in its Twenty-Fourth Biennial Report for 1974-75, 1975-76 provides the following definitions: "Permanent Total Case: A permanent total case is one in which an employee sustains an injury which results in his inability to function in any work-related capacity at any time in the future." "Temporary Total Case: A temporary total case is one in which the employee is temporarily unable to perform any work duties." Larson defines permanent as "lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed a permanent one. If its duration is merely uncertain, it cannot be found to be permanent." A. Larson, *supra*, n. 7.

"[S]pecific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required." (Citations omitted) *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 128, 162 S.E. 2d 619, 620 (1968). "If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon matters in controversy, the proceeding must be remanded for the Commission to make proper findings." (Citation omitted) *Perry v. Furniture Co.*, 296 N.C. 88, 92, 249 S.E. 2d 397, 400 (1978). In its findings of fact, the Commission found only that "at the time of the hearing on April 4, 1978 he was totally disabled . . ." This finding is insufficient on the crucial fact of duration upon which plaintiff's right to compensation depends and is insufficient to support an award of compensation. However, although the Commission did not expressly find that plaintiff's disability is temporary, that finding is implicit in the Commission's opinion

and award taken as a whole. The Commission in deleting "permanent" from the Deputy Commissioner's finding of fact and conclusion of law, in referring in its opinion to plaintiff's case as one "wherein no one knows what the future holds" and in concluding that defendants owe plaintiff compensation "until plaintiff is tendered or obtains work suitable to his capacity or has a change in condition" has, in effect, found that the duration of plaintiff's disability is temporary. We, therefore, elect to treat the Commission's finding that plaintiff was totally disabled on the day of the hearing as a finding of temporary total disability.

Having made this determination, we must now apply the pertinent legal principles to the evidence and findings of the Commission. "[J]urisdiction of appellate courts on appeal from an award of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions." (Citations omitted) *Perry v. Furniture Co.*, 296 N.C. 88, 92, 249 S.E. 2d 397, 400 (1978). "The courts may set aside findings of fact only upon the ground they lack evidentiary support (Citations omitted). The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." (Citations omitted) *Inscoe v. Industies, Inc.*, 292 N.C. 210, 215, 232 S.E. 2d 449, 452 (1977).

Examining the evidence before the Commission on the issue of the duration of plaintiff's disability, we hold that the evidence does not support a finding that plaintiff's disability is temporary. Dr. Stevenson testified:

> In response to the question of the probable duration of his condition at the time of my last examination of him, Mr. Gamble's condition to date has been almost downhill. I would conclude that his disability is probably permanent. Based upon my examination and conversations and treatment of Mr. Gamble, it is my opinion that the probable duration of Mr. Gamble's disability to work is permanent.

Dr. Lockhart testified:

> It is my opinion from my examination of Mr. Gamble that he is not able to work and that he is permanently disabled for

work. My opinion as to the probable duration of the disability to work is that he is permanently disabled from work.

There is no conflicting evidence in the record on the duration of plaintiff's disability nor is there evidence that plaintiff's condition will improve. In no reasonable view of the evidence before the Commission is the duration of plaintiff's disability any less than permanent. Therefore, the Commission erred in failing to find that plaintiff is permanently and totally disabled.

The case is remanded to the Industrial Commission for entry of an award in accordance with this opinion.

Reversed and remanded.

Judges ERWIN and WELLS concur.

STATE OF NORTH CAROLINA v. CRAIG WESSON, JR.

No. 7915SC853

(Filed 4 March 1980)

Arson § 4.2; Property § 4— willful burning of personal property—intent to prejudice or injure owner—sufficiency of evidence

In a prosecution for the unlawful burning of personal property , a stolen automobile, in violation of G.S. 14-66, the jury could properly find an intent to injure or prejudice the owner or some other person by the burning from the nature of the act—the willful burning of an automobile stolen from a stranger, evidence that defendant poured paint thinner over the interior of the car and set it on fire, and defendant's alleged statement that the automobile should be burned because it was nothing but trash. The holding in *State v. Murchinson*, 39 N.C. App. 163 (1978), that an intent to injure or prejudice the owner of the burned property must be shown by evidence other than the act of burning itself is overruled.

Chief Justice MORRIS and Judge ERWIN concur specially for the purpose of overruling *State v. Murchinson.*

APPEAL by defendant from *Graham, Judge.* Judgment entered 9 May 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 5 February 1980.

Defendant was indicted for burning personal property, a violation of G.S. 14-66. The State presented evidence that in the late evening of 1 April 1978, Dwight Webster found that his white 1965 Chevrolet station wagon was missing from the parking lot of Holly Hill Mall. The next time he saw his car it was "scorched beyond recognition." Webster did not know defendant or his co-defendant Barry Stone.

At about 8 p.m. on 1 April, Steve Conklin saw three boys in the parking lot of Byrd's Supermarket. He went into the store, and when he came out five minutes later he saw a white Chevrolet station wagon on fire at the other end of the parking lot. Conklin identified defendant and Stone as two of the boys he had seen.

James Michael Foster testified under a plea bargain that on the afternoon of 1 April, he, Stone and defendant took a white 1965 Chevrolet station wagon from the parking lot of Holly Hill Mall. They drove around for a while and then parked the car. Defendant poured paint thinner over the interior of the car and set it on fire. Foster said "that the reason the car was burnt was to get rid of the evidence." Foster's statement, given to the SBI the day after the burning, was introduced into evidence. In that statement Foster had indicated that defendant said "they should burn the car and blow it up because it was nothing but trash."

Defendant presented evidence that he was not involved in either the theft or the burning of the automobile, but that both were Foster's doing.

Defendant's motion for dismissal was denied, and he was found guilty and sentenced to two years. He appeals.

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

Donnell S. Kelly for defendant appellant.

ARNOLD, Judge.

Defendant's sole argument on appeal is that he was entitled to a nonsuit because the State failed to present evidence of the specific intent which is an essential element of the crime created by G.S. 14-66. That statute provides in pertinent part: "If any per-

son shall wantonly and willfully set fire to or burn . . . personal property of any kind . . . with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, . . . he shall be guilty of a felony . . . ." G.S. 14-66 was enacted, in substantially its present form, in 1921, and yet prior to our decision in *State v. Murchinson*, 39 N.C. App. 163, 249 S.E. 2d 871 (1978), it appears that our courts had never addressed the question of what evidence was necessary to show the requisite intent. In *Murchinson* we held that the State had sufficiently established that the defendant there was the person seen at the burning car, but we vacated the defendant's conviction under G.S. 14-66 on the ground that the State had presented no evidence that by the burning the defendant specifically intended to injure or prejudice the owner of the vehicle.

We must agree with defendant that *Murchinson* is factually indistinguishable from the present case, and that with *Murchinson* as controlling precedent he is entitled to a nonsuit. In our view, however, we should re-examine our decision in *Murchinson.* Accordingly, to the extent that it is inconsistent with our decision today, our holding in *Murchinson* directed to G.S. 14-66 is expressly overruled.

In *Murchinson*, as here, the question was one of nonsuit, and we relied upon *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964), for the proposition that where specific intent is an essential element of the crime, the intent may not be inferred from the act itself, but must be shown by "other facts and circumstances" present in the case. A re-examination of *Ferguson*, however, reveals that the proposition as stated does not arise in that case, and that we erred in applying the *Ferguson* holding to the *Murchinson* context.

The defendant in *Ferguson* was charged with assault with a deadly weapon with intent to kill, and on appeal he was awarded a new trial for error in the charge to the jury. The trial court had instructed the jury that every man is presumed to intend any consequence which naturally flows from an unlawful act, and that therefore defendant had the intent to kill at the time he committed the assault. Our Supreme Court pointed out that the defendant, committing the assault, might have had either the intent to kill or the intent to inflict great bodily harm, so that the assault

itself would not establish as a matter of law the intent to kill. The defendant's intent "must be found by the jury as a fact from the evidence." *Id.* at 561, 135 S.E. 2d 628. The court went on to say that the intent to kill " ' "may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." [Cite omitted.]' " *Id.* at 561, 135 S.E. 2d 629. *Ferguson*, then, stands for the proposition that a specific intent may not be presumed *as a matter of law* from the commission of the act itself.

In *Murchinson* we held that while the State had sufficiently established the wilfulness of the burning, "the statute further requires proof of intent to injure or prejudice the owner of the vehicle [and] [o]ther than intent to injury [sic] inferable from the act of burning itself, *which is a legally impermissible inference* . . . , there is no *other* evidence to prove intent to injure or prejudice the owner of the stolen vehicle." *Supra* at 170, 249 S.E. 2d 876 (emphasis added). The misapplication of *Ferguson* is clear. The *Ferguson* court expressly said that specific intent may be inferred from the nature of the act, and did not per se require evidence other than the act to prove such intent. *Ferguson* held only that specific intent was a *jury question*, and could not be determined as a matter of law from the nature of the act.

In the case sub judice, we find sufficient evidence to go to the jury on the question of intent to injure or prejudice some person by the burning. "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974). Circumstances here from which the jury could infer the requisite intent include the nature of the act—the wilful burning of an automobile stolen from a stranger—the manner in which it was done, and defendant's alleged statement that they should burn the car because it was nothing but trash. Though this may not be the strongest fact situation from which a specific intent to injure could be inferred, it is certainly sufficient evidence to allow the jury to make that determination.

In the trial and judgment imposed we find

No error.

Judges PARKER and WEBB concur.

Chief Judge MORRIS and Judge ERWIN concur specially for the purpose of overruling *State v. Murchinson.*

STATE OF NORTH CAROLINA v. HOWARD P. LINDSAY

No. 798SC797

(Filed 4 March 1980)

Homicide § 21.9— husband's attempt to prevent wife's suicide—insufficient evidence of manslaughter

Defendant who was accused of shooting his wife was entitled to a dismissal of the charges against him where the evidence tended to show that defendant turned from the refrigerator to see his wife holding a gun; the wife said, "I've had it"; defendant walked toward his wife and attempted to prevent her suicide; and the gun went off when he had a partial hold on it.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 26 April 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 29 January 1980.

Defendant was indicted for second degree murder in the shooting death of his wife. He was found guilty of voluntary manslaughter and sentenced to 10-12 years. Defendant appeals.

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

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

ARNOLD, Judge.

Defendant contends that he was entitled to have his motions for dismissal granted. We need not consider whether defendant was entitled to dismissal of the charge of second degree murder, since the jury did not find him guilty of that crime. However, we do consider the merits of his contention with regard to the lesser offenses of voluntary and involuntary manslaughter.

A motion to dismiss and a motion for nonsuit are equivalent. See G.S. 15-173. Upon either motion, the test is whether the evidence, considered in the light most favorable to the State, is sufficient to show each essential element of the offense, and that defendant was the perpetrator. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). Having applied this test, we have determined that defendant was entitled to have the charges against him dismissed.

The evidence, in the light most favorable to the State, shows the following: On 28 November 1978, the police, responding to a call, found defendant's wife lying in a pool of blood on the floor of her home. A .38 caliber revolver was lying across the fingertips of her right hand. Defendant told the police at that time that his wife just had fixed a sandwich for him to take to work. He had been at the refrigerator getting some juice, and when he turned around his wife said, "I've had it." She had a gun in her right hand and the gun was cocked. Defendant started walking toward her, asking her to talk about it, and he was about one foot away from her when she shot herself.

Defendant stated that things bothered his wife at times, but that she was not sick at this time as far as he knew. She had been upset over his buying a sweater the night before, but they did not argue. He could not understand why she shot herself.

On December 1, defendant was questioned by the police. At that time, he told them that his wife had had bad headaches, dizziness and depression. At one time she had stated that she couldn't live with the headaches. On the day of her death, his wife had decided not to go to work, and he offered to stay home with her but she said it was not necessary. Defendant repeated to the police that when he turned from the refrigerator, his wife had a gun in her hand, and she said, "I've had it." He stated that he took hold of her arm and the gun fired. To specific questions, defendant gave the following answers: Q: "Did your wife shoot herself?" A: "I'm satisfied that my wife did not shoot herself." Q: "Did you shoot your wife?" A: "I could have. I partly had a hold of the gun. I was trying to get the gun away from her." Defendant and his wife had not argued on the day of her death.

The forensic pathologist who performed the autopsy on defendant's wife testified that she died from a gunshot wound to

the head. Powder found on the skin near the wound indicated that the gun was "not too far away" when it was fired. The wound was not like suicide wounds he had observed, because "[s]uicidal individuals, when they shoot themselves will place the gun in contact with or very close proximity . . . [to] the skin." But if the suicide were interrupted by two people struggling for the gun, he would not expect to see a typical suicide pattern.

Hand wipings taken from the deceased did not reveal significant concentrations of barium and antimony, but this did not eliminate the possibility that the deceased had fired the gun. No hand wipings were taken from defendant.

We find that this evidence fails to establish the essential elements of either voluntary or involuntary manslaughter. Voluntary manslaughter "occurs when one kills *intentionally* but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978) (emphasis added). The State has presented no evidence here that defendant intentionally shot his wife. The only evidence of his involvement in her shooting is defendant's statement that "I could have [shot her]. I partly had a hold of the gun. I was trying to get the gun away from her." This statement, in factual context, is consistent with an accidental firing of the gun, but not with an intentional firing.

Involuntary manslaughter is an unintentional killing without malice done by (1) an unlawful act not amounting to a felony or naturally dangerous to human life, or (2) a culpably negligent act or omission. *Id.* As we have said above, the evidence would not support a finding of an intentional act on defendant's part, so part (1) of the definition of involuntary manslaughter does not apply. Nor is there evidence that defendant was culpably negligent. Defendant's statement which implicates him in the shooting shows only that defendant, having heard his wife say "I've had it" as she stood with a gun in her hand, took hold of the gun to try to get it away from her. There is no evidence that the shooting resulted from reckless handling of the firearm. See *id.* (ordinarily an unintentional homicide resulting from the *reckless* use of firearms is involuntary manslaughter). Our holding that the State has

failed to establish involuntary manslaughter is consistent with the decision in *State v. Church*, 265 N.C. 534, 144 S.E. 2d 624 (1965) (per curiam), on similar facts.

Since we have determined that defendant was entitled to the dismissal of the charges against him, we need not address his assignments of error directed to the conduct of his trial. The judgment of the trial court is

Reversed.

Judges PARKER and WEBB concur.

HELENA CHEMICAL COMPANY v. E. L. RIVENBARK AND WIFE, ELIZABETH G. RIVENBARK

No. 7913SC511

(Filed 4 March 1980)

1. **Bills and Notes §§ 4, 19— action on note—fraud not material—consideration**

An allegation of fraud in the sale of merchandise was not material to a suit on a note and guaranty given for the amount owed for the merchandise because all of the facts were known when the note and guaranty were executed. Furthermore, the note was supported by consideration where defendants obtained a forbearance of twenty months by virtue of its acceptance by plaintiff.

2. **Bills and Notes § 19; Duress § 1; Fraud § 12— threat of legal action not fraud or duress**

Defendants' statement in an affidavit that plaintiff forced them to execute the note and guaranty agreement sued on by plaintiff to forestall a lawsuit by plaintiff to collect an amount allegedly owed by defendants for merchandise and to protect the credit of defendants' business did not raise a genuine issue of fraud or duress in the procurement of the note and guaranty agreement.

3. **Rules of Civil Procedure § 15.1— refusal to permit amendment of answer—no abuse of discretion**

The trial court did not abuse its discretion in refusing to permit defendants to amend their answer and counterclaim to allege a contract between plaintiff and the male defendant operating as a sole proprietorship rather than between plaintiff and a corporation in which defendants were the only stockholders. G.S. 1A-1, Rule 15(a).

APPEAL by defendants from *Clark, Judge.* Judgment entered 13 April 1979 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 10 January 1980.

Stanley and Wright, by C. Franklin Stanley, Jr., for plaintiff appellee.

Ralph G. Jorgensen, for defendant appellants.

VAUGHN, Judge.

The question presented is whether the court erred in allowing plaintiff's motion for summary judgment against the defendants.

On 22 November 1976, plaintiff started this suit on a note in the amount of $25,029.26 executed by the male defendant on 31 December 1975. The note was under seal and was due on 31 August 1976. Defendant admits the execution and nonpayment of the note. The female is sued on a guaranty and also admits the authenticity of the document.

The defenses raised in defendants' pleading were also set out in defendants' affidavit filed 8 December 1978 in response to plaintiff's motion for summary judgment. That affidavit, in material part, is as follows:

> 3. That Helena Chemical Company has in this case sued the defendant E. L. Rivenbark on a promissory note issued by the defendant E. L. Rivenbark and on a written guarantee executed by defendant E. L. Rivenbark and wife, Elizabeth G. Rivenbark.
>
> 4. That the promissory note and written guarantee were executed totally without consideration and containing usurious charges pursuant to a scheme of the plaintiff to deceive and defraud the defendants—which is set out in detail below:
>
> A. That plaintiff's agent and/or employee Tom Nolan approached defendant E. L. Rivenbark in the fall of 1974 for the purpose of selling insecticides to a corporation E. L. Rivenbark & Son, Inc. owned and controlled by the defendant E. L. Rivenbark.

B. That on the day aforementioned, plaintiff through its agent and employee, Tom Nolan, who at all times herein mentioned was acting within the scope of his authority, orally represented to the defendant E. L. Rivenbark, after specific questioning by said defendant on the matter, that the plaintiff would not sell any insecticides directly to farmers but would sell their insecticides only through dealers such as E. L. Rivenbark & Son, Inc. That the aforesaid representations were made with the intent to deceive and defraud the defendant E. L. Rivenbark who was acting on behalf of E. L. Rivenbark & Son, Inc.

C. That the aforesaid representations were false and were then and there known by plaintiff's agent and employee as aforesaid to be false; that in truth and in fact, said plaintiff was contemplating and in fact did directly sell insecticides to farmers at a lower price than the dealers could during the 1975 farming season without notice to the dealers and without an opportunity for the dealers to dispose of the insecticides on a competitive basis.

D. That the defendant E. L. Rivenbark believed and relied upon the aforesaid representations of the plaintiff's agent and employee Tom Nolan and purchased large quantities of insecticides for the corporation E. L. Rivenbark & Sons, Inc.

E. That the plaintiff refused to take the merchandise back in the fall of 1975 and forced the defendant E. L. Rivenbark to sign the promissory note sued on by plaintiff in an individual capacity, and forced the defendants E. L. Rivenbark and wife, Elizabeth G. Rivenbark to execute the guarantee agreement sued on by plaintiff to forestall a lawsuit and the damaging of the credit of E. L. Rivenbark & Son, Inc.

F. That by reason of the aforesaid misrepresentations made by plaintiff, acting through its agent and employee, to defendant, E. L. Rivenbark, defendants have been defrauded and damaged in the sum of Ninety Thousand and no/100 Dollars ($90,000.00).

G. That in the alternative the defendants have been damaged in the amount set forth above by plaintiff's breach

of the oral agreement not to sell insecticides directly to dealers.

H. That the plaintiff has admitted the sale of large quantities of goods and merchandise, i.e., insecticides and part performance in its original Complaint in paragraph 3 and in its Reply to the Counterclaim in paragraph 4 of the Second Defense.

[1] If the affidavit raises a genuine issue of fact that is material to the lawsuit, the summary judgment should be reversed. The allegation of fraud in the sale of the merchandise is not material to the suit on the note because, among other things, all of the facts were known when the note and guaranty were executed. Defendants' argument that the note was without consideration is without merit. By virtue of its acceptance by plaintiff, defendants obtained a forbearance of twenty months.

[2] We now consider that part of defendant's affidavit, taken as true and considered in the light most favorable to them, wherein it is stated:

E. That the plaintiff refused to take the merchandise back in the fall of 1975 and forced the defendant E. L. Rivenbark to sign the promissory note sued on by plaintiff in an individual capacity, and *forced the defendants E. L. Rivenbark and wife, Elizabeth G. Rivenbark to execute the guarantee agreement sued on by plaintiff to forestall a lawsuit and the damaging of the credit of E. L. Rivenbark & Son, Inc.* (Emphasis added).

The statement does not raise a genuine issue of fact of fraud or duress in the procedurement of the note. It does not suggest that plaintiff threatened to do anything except start suit to collect the debt it contends was owed by defendant. Defendants' desire to avoid the damage to the credit of E. L. Rivenbark & Son, Inc., was a legitimate reason for agreeing to execute the note. Generally, duress exists where one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. *Smithwick v. Whitley,* 152 N.C. 369, 67 S.E. 913 (1910). Our Supreme Court has gone further and adopted the more modern rule that

> the act done or threatened may be wrongful even though not unlawful, *per se;* and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se,* becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim *and not related to the subject of such proceedings.*

Link v. Link, 278 N.C. 181, 194, 179 S.E. 2d 697, 705 (1971) (emphasis added). Here, defendant does not suggest that plaintiff threatened an action that was "not related to the subject of such proceedings," and does not raise a material issue of duress.

[3] On 26 January 1979, over two years after suit was started and answer filed, defendants moved to amend their answer. Plaintiff had alleged that the goods were sold to a corporation, E. L. Rivenbark & Sons, Inc., in which defendants were the only stockholders. Defendants had admitted these allegations in their answer and asserted them in their counterclaim wherein, among other things, they sought to recover damage for the alleged breach of the contract between the *corporation* and plaintiff. They tried to amend to allege that the contract was between plaintiff and the male defendant operating a sole proprietorship. The motion was denied. As defendants contend, it is true that leave to amend "shall be freely given when justice so requires." G.S. 1A-1, 15(a). The motion, however, is addressed to the sound discretion of the trial judge and is not reviewable in the absence of a showing that the judge abused his discretion. We have carefully considered all the matters of fact and law in this case and conclude that there is no showing that the judge erred when he denied the motion to amend.

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

CHARMA BRYANT CASEY v. WAKE COUNTY, WAKE COUNTY HEALTH DEPARTMENT AND DR. RICHARD KURZMANN

No. 7910SC652

(Filed 4 March 1980)

Counties § 9— dispensing contraceptives—governmental function— sovereign immunity

The activities of defendant county and defendant county health department in prescribing and dispensing contraceptives through a family planning clinic without charge were governmental in nature and were therefore immune from liability under the doctrine of sovereign immunity.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 13 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 31 January 1980.

This is a personal injury action brought by plaintiff on 30 June 1976 against Wake County, Wake County Health Department and Dr. Richard Kurzmann. Plaintiff alleged that on 17 February 1973 when she was sixteen years of age, she went to the family planning clinic of Wake County Health Department seeking contraceptive aid and was treated and counseled at the clinic by Dr. Kurzmann, an employee of the Wake County Health Department. Dr. Kurzmann inserted in plaintiff an intrauterine device from which severe and damaging complications developed. Plaintiff alleged the complications were the result of negligent acts on the part of Dr. Kurzmann.

The defendants filed answers denying the material allegations of plaintiff's complaint. On 12 March 1979, plaintiff filed notice of dismissal of her claim against Dr. Kurzmann, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. The other defendants had asserted in their answer in part the defense of sovereign immunity. This defense was the basis of a motion to dismiss which was granted by the trial court. Plaintiff appeals from the order dismissing her claim against Wake County and Wake County Health Department.

Winston, Blue, Larimer and Rooks, by J. William Blue, Jr., for plaintiff appellant.

Michael R. Ferrell, Arthur M. McGlauflin and Shelley T. Eason, for defendant appellees.

VAUGHN, Judge.

The sole question on appeal is whether the activities of Wake County and Wake County Health Department in prescribing and dispensing contraceptives through a family planning clinic without charge are governmental in nature and therefore immune from liability under the doctrine of sovereign immunity. We hold that such activities are not proprietary in nature and the county and its health department can assert the doctrine of sovereign immunity as a defense to actions arising out of these activities.

The doctrine of sovereign or governmental immunity, though often criticized, has been recognized as the law of this State since the decision in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). Our Supreme Court has said that, even though the logic of the doctrine may be unsound and the reasons for its adoption not as forceful today as they once were, modification or repeal of the doctrine at least where it provides immunity from tort liability must come from the General Assembly. *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976); *Steelman v. City of New Bern*, 279 N.C. 589, 594-95, 184 S.E. 2d 239, 242-43 (1971). Thus far, the General Assembly has provided that the purchase of liability insurance waives the county's governmental immunity to the extent of insurance coverage. G.S. 153A-435(a). Such waiver was not alleged by plaintiff and has not been an issue in this case. It is, however, the judicial trend in this State not to expand but resist the application of the government immunity doctrine. *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). We adhere to and support that trend. This case presents no expansion of the doctrine. It is, instead, an application of the doctrine to a governmental function, public health care.

The distinction upon which governmental immunity is based is whether the action is governmental or proprietary in nature. In *Sides*, the Court 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. " 287 N.C. at 23, 213 S.E. 2d at 303; *see also Robinson v. Nash County*, 43 N.C. App. 33, 257 S.E. 2d 679 (1979). Family health care without cost to the indigent patient is not something engaged in by private corporations. Instead, our

State Constitution mandates care for those in need as a duty of the State. N.C. Const. art. XI, § 4; *Vaughn v. County of Durham*, 34 N.C. App. 416, 240 S.E. 2d 456 (1977), *cert. den.*, 294 N.C. 188, 241 S.E. 2d 522 (1978). This duty has been delegated to each county to make public health service available to its residents. G.S. 130-13(a). Local boards of health are the policy making bodies which make "rules and regulations, not inconsistent with law, as are necessary to protect and advance the public health." G.S. 130-17(b). Wake County has merely complied with these constitutional and statutory mandates. Providing for the health and welfare of the citizens of the county is a legitimate and traditional function of county government. The services provided in a family clinic to all women, whether they can pay or not, helps to prevent unwanted pregnancies and provides proper health care to children, born and unborn, and their parents. This is a benefit to the general populous and, as such, is a governmental function. We note further that in *Sides*, the county was merely authorized to operate a county hospital if the citizens of the county approved a referendum to that effect. By contrast, here, the legislature mandated in G.S. 130-13(a) a requirement that the county operate a health department.

One test sometimes used in determining whether the doctrine of governmental immunity applies is whether a monetary charge is involved. Such a charge and particularly a showing of profit or covering of costs by the charge is not, however, essential to a proprietary classification. *See, e.g., Glenn v. Raleigh*, 246 N.C. 469, 98 S.E. 913 (1957). County health departments are funded by local property tax levies. G.S. 130-21. But certain services can be rendered for a charge not to exceed the cost of rendering the service. G.S. 130-17(e). A charge has been involved in most cases which hold a particular function to be proprietary. But providing certain services at cost should not alone make an overall operation or other free services proprietary in nature. A county health department is not run for pecuniary profit but for the common good of all. "Certainly, the preservation of public health is one of the duties devolving upon the State as a sovereign power and in the discharge of this duty the State is acting strictly in the discharge of one of the functions of government." *McCombs v. City of Asheboro*, 6 N.C. App. 234, 240, 170 S.E. 2d 169, 173-74 (1969).

A new program in a health department program such as family planning free of charge is not a traditionally private pecuniary function being encroached on by a governmental body. It is but an expansion within those duties traditionally placed with governmental functions. As long as the doctrine of governmental immunity survives, it will cover those functions it has always covered even when these governmental functions change because of technological or societal changes.

Affirmed.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF: REGINALD JEROME THOMAS

No. 799DC804

(Filed 4 March 1980)

Infants § 16— juvenile delinquency hearing—trial judge's assumption of role of prosecuting attorney—due process

The respondent in a juvenile delinquency hearing who was represented by counsel was denied due process by the trial judge's examination of the witnesses for the State because of the absence of the district attorney or other counsel for the State, since the hearing was adversary in nature and the trial judge in effect assumed the role of the prosecuting attorney.

APPEAL by respondent juvenile from *Allen (C. W.), Jr., Judge.* Order and Commitment entered 7 May 1979 in District Court, PERSON County. Heard in the Court of Appeals 29 January 1980.

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

Jackson & Hicks by Alan S. Hicks for respondent appellant.

CLARK, Judge.

In a petition under N.C. Gen. Stat. § 7A-281 (repealed, effective 1 January 1980, *but see* N.C. Gen. Stat. § 7A-560), respondent

juvenile was charged with breaking and entering a coin-operated machine on 20 April 1979 and larceny of $60.00 therefrom.

At the hearing on 7 May 1979 respondent was represented by counsel. The State was not represented by the District Attorney or other counsel. The State offered three witnesses, all of whom were examined by the trial judge and cross-examined by respondent's counsel. Respondent offered no evidence.

Respondent appeals from the order and commitment to the North Carolina Board of Youth Development.

Respondent argues that his due process rights were violated in that the trial judge examined the witnesses for the State because of the absence of the District Attorney or other counsel to represent the State. The argument has merit.

The record on appeal reveals that the trial judge examined all three witnesses. The record does not reveal that he asked leading questions or was otherwise unfair during the course of the hearing. However, the judge, at least technically, assumed the role of prosecuting attorney in examining the State's witnesses.

In re Gault, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967), focused on the various rights that make up "due process" in juvenile proceedings that could lead to detention. The court commented that a juvenile court was not a social agency and that unbridled discretion, however benevolently motivated, was frequently a poor substitute for principle and procedure. The court ruled that the due process rights which must be afforded a juvenile included sufficient notice to prepare a defense, and to be advised of the right to counsel, the right to remain silent, and the right of confrontation and cross examination. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971); *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). *See also, In re Vinson*, 298 N.C. 640, 260 S.E. 2d 591 (1979) for a discussion on the new North Carolina Juvenile Code, effective 1 January 1980.

Justice Exum, for the court, in *In re Arthur*, 291 N.C. 640, 644, 231 S.E. 2d 614, 617 (1976), stated:

> "While not all the provisions of the Bill of Rights are applicable to juvenile proceedings through the Due Process

> Clause of the Fourteenth Amendment, *McKeiver v. Pennsylvania, supra; In re Gault, supra,* we doubt the validity of the proposition that any applicable provision might nevertheless be given less force or vigor in juvenile proceedings than in adult criminal prosecutions. . . ."

The decision reversed the Court of Appeals decision, 27 N.C. App. 227, 218 S.E. 2d 869, and held as inadmissible in evidence the written report of an S.B.I. laboratory analysis in a juvenile hearing.

Applying this pronouncement to the circumstances of the case *sub judice,* we doubt the validity of the proposition that the presiding judge in a juvenile proceeding that could lead to detention should assume the role of prosecuting attorney where the juvenile is represented by counsel and the hearing is adversary in nature. Such procedure would clearly violate due process in adult criminal prosecutions. Nor does a dual role of judge and prosecutor measure up to the essentials of due process and fair treatment in juvenile proceedings where detention could result.

The State relies on *In re Potts,* 14 N.C. App. 387, 188 S.E. 2d 643, *cert. denied,* 281 N.C. 622, 190 S.E. 2d 471 (1972), but we find this case to be distinguished by the fact that, though the District Attorney was not present to represent the State, someone other than the judge examined the State's witnesses.

It is noted that the trial court made no findings of fact. N.C. Gen. Stat. § 7A-285 provides that the Court order shall contain "appropriate findings of fact." The conclusion that respondent was an undisciplined child should have been supported by findings of fact relative to the charges of breaking and entering and larceny.

The order and commitment are

Reversed and the cause is remanded.

Judges VAUGHN and HEDRICK concur.

SAMUEL JENKINS v. CITY OF WILMINGTON, NORTH CAROLINA

No. 795DC572

(Filed 4 March 1980)

Municipal Corporations § 42— claim against city—notice to city council—notice given to city manager and city attorney

The requirement of G.S. 1-539.15 that written notice of a tort claim against a city be given to the city council within six months after the claim arises was substantially complied with where plaintiff's attorney sent written notice of plaintiff's claim to the city manager and to the city attorney approximately three weeks after plaintiff's injury occurred.

APPEAL by plaintiff from *Rice, Judge.* Order entered 31 January 1979 in District Court, NEW HANOVER County. Heard in the Court of Appeals 17 January 1980.

Plaintiff filed his complaint on 8 December 1978 alleging personal injury on 22 November 1976, resulting from the negligence of defendant municipality in failing to repair a street.

Defendant's answer contained a plea in bar, the failure of plaintiff to give notice of his tort claim to defendant as required by N.C. Gen. Stat. § 1-539.15.

The parties stipulated that on 13 December 1976 the City Manager and City Attorney received a letter from plaintiff's attorney, John J. Burney, Jr., advising them of plaintiff's 22 November 1976 tort claim.

Defendant moved for summary judgment on grounds that no written notice was given as required by N.C. Gen. Stat. § 1-539.15. In support of his motion defendant submitted the affidavits of the City Manager, City Clerk and City Attorney, all averring that the City Council was not notified of the 22 November 1976 claim until after service of summons on 27 November 1978, and that the City Council had not designated a person to receive notice of such claims. City Attorney Yow further averred that to the best of his recollection he had not been notified of the tort claim until after a summons had been served on the City on 27 November 1978.

Plaintiff countered with the affidavit of John J. Burney, Jr., who averred that as attorney for plaintiff he served within six

months' notice of the claim upon the City Attorney, as he had done in many other tort claims against the City, and that the City Attorney accepted service of the notices as required by N.C. Gen. Stat. § 1-539.15.

Plaintiff appeals from summary judgment in favor of the defendant.

Donald M. Saunders for plaintiff appellant.

Crossley & Johnson by Robert White Johnson for defendant appellee.

CLARK, Judge.

The sole question raised by this appeal is whether plaintiff's claim is barred for failure to give written notice to the City Council within six months after the cause of action arose, as required by N.C. Gen. Stat. § 1-539.15.

It must be conceded that plaintiff failed to give written notice to the City Council. However, it is stipulated by the parties that on 13 December 1976 (about three weeks after his injury occurred) the City Manager and City Attorney of defendant municipality received a letter from plaintiff's attorney. It is clear that this letter contained the required information about the time, place and nature of the claim.

We find that the case before us is controlled by *Miller v. City of Charlotte*, 288 N.C. 475, 219 S.E. 2d 62 (1975). The facts in *Miller* are remarkably similar to the facts in the case *sub judice*. In that case the city ordinance required written notice to the City Council. The claimant in apt time gave written notice to the City Manager, who in turn notified the City Attorney. It was held that the notice requirements were "substantially and reasonably met . . . ." 288 N.C. at 484, 219 S.E. 2d at 68. Justice Moore, for the court, noted the newly enacted statewide statute effective 1 October 1975, N.C. Gen. Stat. § 1-539.15, which did not apply to the claim in that case, and commented: "Thus, it is clear that the General Assembly recognizes that notice of a claim filed with a responsible official of a city, such as the city manager or the city attorney, or other designee of the council, is sufficient. Admittedly, these statutes are not applicable to the present case, but they do indicate the legislative intent to broaden rather than further

restrict the officials to whom notice of claim may be given." 288 N.C. at 483-484, 219 S.E. 2d at 68.

We interpret *Miller* as adopting the view that only substantial compliance with N.C. Gen. Stat. 1-539.15 is required, if the claimant has satisfied the requirement of written notice but failed to comply with a particular required element. However, we do not construe the substantial compliance holding in *Miller* to extend to the situation where the claimant failed entirely to comply with the formal notice requirement and relies instead on actual knowledge. One purpose of the notice requirement is to enable the city to conduct a timely investigation of the accident. Where the purpose of the statute has been satisfied, the courts are reluctant to enforce a policy which renders the notice provision a trap for the unwary. Comment, 14 Wake Forest L. Rev. 215 (1978).

The appellee relies on *Johnson v. Winston-Salem*, 282 N.C. 518, 193 S.E. 2d 717 (1973); *Short v. City of Greensboro*, 15 N.C. App. 135, 189 S.E. 2d 560 (1972); and, *Redmond v. City of Asheville*, 23 N.C. App. 739, 209 S.E. 2d 820 (1974). These cases involved various city ordinances with notice requirements differing from those of N.C. Gen. Stat. § 1-539.15. We make no further attempt to distinguish these cases since the applicable city ordinance and the facts in *Miller* are substantially similar to the notice statute and the facts in the case *sub judice*, and since the *Miller* holding of substantial compliance is later authority and is much easier to defend than some of the other cases which appear to support a strict application of the notice requirement.

The summary judgment is

Reversed and the cause remanded.

Judges VAUGHN and HEDRICK concur.

JOHN GREGORY GRIFFIN v. BONNIE CHARLES GRIFFIN AND CHARLES HAMILTON GRIFFIN

No. 7920SC467

(Filed 4 March 1980)

Damages § 16.3— personal injuries—loss of future earning capacity—award not excessive

In an action to recover for injuries sustained in an automobile accident, a verdict of $175,000 was not excessive as a matter of law because the evidence was insufficient to establish plaintiff's loss of future earning capacity where the evidence tended to show that plaintiff suffered a cut four or five inches long on his right knee, multiple fractures of his right hand resulting in permanent disability, a sprained ankle, and injuries to his left eye resulting in a permanent condition which bordered on legal blindness.

APPEAL by defendants from *Seay, Judge.* Judgment entered 2 February 1979. Heard in the Court of Appeals 14 January 1980.

Plaintiff sued defendants for personal injuries sustained 13 April 1976 in a collision between a motorcycle operated by plaintiff and a Buick automobile owned by defendant Charles Griffin and operated by his daughter Bonnie. The parties stipulated defendant's car was a family purpose vehicle and that Bonnie had her father's permission to drive it at the time of the collision. They further stipulated plaintiff had been paid by defendants $2,962.67 for partial payment of medical expenses and that defendants were entitled to a credit in that amount against any judgment in favor of plaintiff. Issues of negligence, contributory negligence and damages were answered by the jury in plaintiff's favor. From the judgment entered, defendants appeal. Further evidence necessary to our decision is set out in the opinion.

Bailey, Brackett & Brackett, by Martin L. Brackett Jr., for plaintiff appellee.

Henry C. Doby Jr. for defendant appellants.

MARTIN (Harry C.), Judge.

Appellants make the following assignments of error:

1. The Court's instructions to the jury explaining the measure of damages on the grounds that the measure of damages was not correctly explained.

2. The Court's denial of defendants' motion for a new trial on the grounds that excessive damages were awarded and appeared to have been given under the influence of passion and prejudice.

3. To the signing and entry of the judgment.

Appellants argue in their brief that there was not sufficient evidence in the case to warrant an instruction to the jury on loss of earning capacity. This contention is not based upon any assignment of error.

The scope of appellate review is limited to a consideration of exceptions set out and made the basis of assignments of error in the record on appeal. Rule 10(a), N.C.R. App. Proc. Appellants failed to except to the court's charge on damages for the reason that the evidence did not support it. Nor does any assignment of error set forth this reason as its basis. We are not required to consider this argument.

Appellants do not argue their first assignment of error in their brief. Therefore, it is deemed abandoned. Rule 28(b)(3), N.C.R. App. Proc.; *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976); *State v. Robinson*, 26 N.C. App. 620, 216 S.E. 2d 497 (1975).

In arguing their second assignment of error, appellants obliquely raise an analogous question in contending the damages were excessive as a matter of law because the evidence was insufficient to establish plaintiff's loss of future earning capacity.

The evidence discloses *inter alia* that plaintiff suffered a cut four or five inches long on his right knee, multiple fractures of the metacarpal bones of his right hand, a sprained ankle, and injuries to his left eye causing fluid, or edema of the macula, which resulted in blurred vision and a 21/100 to 22/100 vision capacity of the eye. The expert medical doctor who treated plaintiff's hand stated that it was permanently disabled. It affected plaintiff's ability to lift heavy objects and to use small tools or instruments, such as a pencil. The eye specialist testified that plaintiff's left eye bordered on legal blindness and the condition was permanent. It could not be corrected by glasses or otherwise. There was other evidence showing that plaintiff endured much physical and mental pain and suffering, extended hospitalization, temporary

disabilities requiring use of crutch and cast, and medical expenses of at least $3,106.33.

We hold there was ample, substantial evidence to support the verdict and to establish loss of future earning capacity of the plaintiff as an element to be considered by the jury. *Johnson v. Lewis*, 251 N.C. 797, 112 S.E. 2d 512 (1960); *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953); *Purgason v. Dillon*, 9 N.C. App. 529, 176 S.E. 2d 889 (1970).

Motion to set aside a verdict as being excessive is directed to the sound discretion of the trial judge. His decision will not be disturbed on appeal, unless it is obvious that he abused his discretion. *Evans v. Coach Co.*, 251 N.C. 324, 111 S.E. 2d 187 (1959). We find no such abuse in this case. The verdict of $175,000 was not excessive and the court properly denied defendants' motion for a new trial.

On oral argument, counsel for plaintiff concedes that defendants are entitled to the credit of $2,962.67, medical expenses paid by defendants, against the judgment entered. This was agreed in the stipulation of the parties prior to trial.

In the trial we find no error. The case is remanded to the Superior Court of Stanly County with directions that the Clerk of Court enter a credit of $2,962.67 on the judgment against defendants.

Chief Judge MORRIS and Judge HILL concur.

RICHARD STEVE MESIMER v. DR. JOHN H. STANCIL

No. 7919SC77

(Filed 4 March 1980)

1. Damages § 11— fraud as part of breach of contract—punitive damages

The trial court erred in dismissing plaintiff's claim for punitive damages where plaintiff alleged that he paid defendant $250.00 to cap a tooth, that defendant refused to complete the work after grinding away the original tooth, and that defendant never intended to complete work on the tooth, since plaintiff sufficiently alleged a claim for fraud as a part of breach of contract, and punitive damages are allowed when an identifiable tort which carries punitive damages is alleged as a part of a breach of contract.

2. Appeal and Error § 62.2— new trial awarded on punitive damages issue—new trial on all issues

Where a new trial was awarded on the issue of punitive damages in an action to recover damages for failure to perform dental work, the amount of compensatory damages awarded by the jury was four times the amount plaintiff paid to have the work performed, and it thus appears that the jury may have given some consideration to punitive damages in rendering such verdict, a new trial will be awarded in the discretion of the appellate court on all issues.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 27 October 1978 in Superior Court, CABARRUS County. Heard in the Court of Appeals 26 September 1979.

Plaintiff brought this action against his dentist. Plaintiff alleged he had paid the defendant $250.00 to cap a tooth, and the defendant refused to complete the work after grinding away the original tooth. Plaintiff further alleged that the defendant never intended to complete work on the tooth for which defendant required payment in advance, and that the defendant's false promise was intentionally designed to mislead and deceive the plaintiff. Plaintiff prayed for actual and punitive damages. When the case came on for trial, the court dismissed the claim for punitive damages under G.S. 1A-1, Rule 12(c). The case was tried and the jury awarded the plaintiff $1,000.00 in compensatory damages. Plaintiff appealed.

Wesley B. Grant, by Randell F. Hastings, for plaintiff appellant.

No counsel contra.

WEBB, Judge.

[1] The sole question presented by this appeal is whether the court committed error by dismissing the plaintiff's claim for punitive damages. Punitive damages are not allowed in claims for breach of contract except breaches of promise to marry. However, if an identifiable tort which carries punitive damages is alleged as a part of the breach of contract, punitive damages will be allowed. Fraud is a tort for which punitive damages are allowed. *See Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). In the case sub judice, the plaintiff alleges he paid defendant $250.00 in exchange for a promise to cap his tooth, and the defendant never intended to cap the tooth. This is sufficient to allege a

claim for fraud. *See Gribble v. Gribble*, 25 N.C. App. 366, 213 S.E. 2d 376 (1975). It was error to dismiss the plaintiff's claim for punitive damages.

[2] We perceive there may be some injustice to the defendant in letting the verdict for $1,000.00 in compensatory damages stand if there is to be a trial on the issue of punitive damages. The verdict is four times what the plaintiff had paid to have the tooth capped. It may be the jury gave some consideration to punitive damages in rendering this verdict. In our discretion, we order a new trial on all issues. *See Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (1977).

New trial.

Judges ARNOLD and WELLS concur.

MELVIN O. ROBERTSON v. GLENDA MANKINS SMITH

No. 7911DC875

(Filed 4 March 1980)

Divorce and Alimony § 26.1; Rules of Civil Procedure § 4 — child custody action — no service of process — action discontinued — full faith and credit given Texas decree

Where defendant brought an action for child custody in Durham County but there was no service of process on plaintiff, the action was discontinued when the time for service of summons lapsed, and the action was not revived when plaintiff subsequently filed a motion in the Durham County action praying for a change of venue or that the action be dismissed; therefore, at the time plaintiff filed this child custody action in Harnett County, there was no action pending in Durham County, and the Harnett County court was required, absent a finding of changed circumstances, to give full faith and credit to a Texas decree awarding custody to plaintiff.

APPEAL by defendant from *Lyon, Judge*. Judgment entered 30 July 1979 in District Court, HARNETT County. Heard in the Court of Appeals 7 February 1980.

This is an appeal from a judgment of the District Court of Harnett County granting custody of the parties' two children to

plaintiff. The Harnett County judgment was based on a decree from the District Court of Lubbock County, Texas. On 26 October 1971, the parties were divorced in Lubbock County, Texas and the defendant was given custody of the children on that date. In 1977 the plaintiff petitioned the District Court of Lubbock County, Texas for custody of the children. Personal service was obtained on the defendant who moved to Harnett County, North Carolina, at approximately the time the petition was filed. The defendant appeared in the District Court of Lubbock County and presented evidence at the custody hearing. On 25 September 1978, the District Court of Lubbock County awarded custody of both children to the plaintiff. Defendant was ordered to deliver the two children to a representative of the plaintiff in Spring Lake, North Carolina on 6 October 1978.

On 5 October 1978, the defendant filed a suit in the District Court of Durham County for custody of the children. On that date, the District Court of Durham County entered an *ex parte* order giving custody of the children to defendant and issued an order to the plaintiff to show cause why the order giving the defendant custody of the children should not be made permanent. The plaintiff was not served with process in the Durham County action but on 13 October 1978, the District Court of Durham County entered an order granting the defendant custody of the children. The court made no findings as to the welfare of the children. On 6 April 1979, the plaintiff filed a motion through his attorneys in the District Court of Durham County asking that the action be moved to Harnett County or that the action be dismissed. No action was ever taken on this motion. On 26 March 1979, the plaintiff filed this action in Harnett County praying for custody of the children. Defendant filed a motion to dismiss the Harnett County action on the ground that the District Court of Durham County had assumed jurisdiction of the case. The District Court of Harnett County denied the defendant's motion and entered a judgment awarding custody of the children to the plaintiff. Defendant appealed.

Johnson and Johnson, by W. Glenn Johnson, for plaintiff appellee.

Loflin, Loflin, Galloway and Acker, by Ann F. Loflin, for defendant appellant.

WEBB, Judge.

At the outset we note that the General Assembly has enacted the Uniform Child Custody Jurisdiction Act. This Act is codified as Chapter 50A of the General Statutes and is effective 1 July 1979. The Act does not exempt litigation pending in this state so it probably applies to this case. Neither party refers to the Act in their briefs. We do not refer to it further in this opinion because we do not feel it affects the reasoning or outcome of this case.

There being no evidence that there had been a change in circumstances after the entry of the Texas decree, the District Court of Harnett County is required by the full faith and credit clause, Article IV, § 1 of the United States Constitution, to enforce the Texas decree, *Searl v. Searl*, 34 N.C. App. 583, 239 S.E. 2d 305 (1977), unless the District Court of Harnett County did not have jurisdiction. The defendant argues that the District Court of Harnett County did not have jurisdiction because the identical suit involving the same parties and same subject matter had previously been filed in Durham County. The defendant relies on *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975) and *In re Greer*, 26 N.C. App. 106, 215 S.E. 2d 404 (1975). Those cases are distinguishable from the case sub judice in that in both *Stanback* and *Greer* no question was raised as to service of process. In the case sub judice, the record does not show there was any service of process on the plaintiff in the action filed by the defendant in Durham County. That action was filed on 5 October 1978. No service of process being had and no endorsement for an extension of time or alias or pluries summons being issued, the action was discontinued on 3 January 1979 under G.S. 1A-1, Rule 4(e). The plaintiff on 6 April 1979 filed a motion in the Durham County action praying for a change of venue or that the action be dismissed. We hold that the filing of this motion did not revive an action that had been discontinued by operation of law. There was not an action pending in Durham County at the time the case sub judice was filed in Harnett County. The judgment of the District Court of Harnett County is proper.

Affirmed.

Judges PARKER and CLARK concur.

HARSCO CORPORATION, D/B/A PATENT SCAFFOLDING CO. v. CISNE AND ASSOCIATES, INC., HARTFORD ACCIDENT & INDEMNITY COMPANY, AND CLEMSON UNIVERSITY

No. 7926SC613

(Filed 4 March 1980)

Courts § 21.8— construction bond—provision specifying court in which action could be brought

Pursuant to the provisions of the construction bond under which plaintiff sought recovery for labor and material furnished by it, all actions for claims on the construction project could only be brought in a state court in the county or other political subdivision of S. C. in which the project was located or in a federal court for the district in which the project was located.

APPEAL by plaintiff from *Allen (C. W.), Judge*. Judgment entered 22 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 January 1980.

This is an action growing out of a construction project on the campus of Clemson University, a municipal corporation of the State of South Carolina. S.C. Code § 59-119-310. Cisne and Associates, Inc. was the general contractor for the project. Cisne, as principal, filed a bond with Hartford Accident and Indemnity Company, as surety, in which it guaranteed payment for all labor and material used in the construction project. Among the terms of the bond were the following:

> "3. No suit or action shall be commenced hereunder by any claimant:
>
> * * *
>
> c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the Project, or any part thereof, is situated, or in the United States District Court for the district in which the Project, or any part thereof, is situated, and not elsewhere."

Cisne ceased work on the project on 18 February 1975. On 19 September 1977 the plaintiff filed this action. It alleged that Cisne was indebted to plaintiff for labor and material furnished for the construction project and that Hartford and Clemson were

indebted to plaintiff on the bond for Cisne's failure to pay the plaintiff's claim.

Defendants Hartford and Clemson made motions for summary judgment which were allowed. Plaintiff has appealed.

John E. McDonald, Jr., for plaintiff appellant.

Golding, Crews, Meekins, Gordon and Gray, by Robert L. Burchette, for defendant appellees.

WEBB, Judge.

At the outset we note that the bond on which the plaintiff's claim against Hartford and Clemson is founded was filed in connection with a construction project to be performed in South Carolina for a South Carolina municipal corporation. The most significant contacts of this bond are with South Carolina, and we hold that South Carolina law governs as to the substantive rights of the parties under the contract. *See Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911 (1943); *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E. 2d 766 (1973); 16 Am. Jur. 2d, *Conflict of Laws*, § 71 (1979).

One of the conditions of the bond is that all actions for claims on the project must be brought in a state court in the county or other political subdivision of South Carolina in which the project is located, or in a federal court for the district in which the project is located. The plaintiff contends this condition should not be enforced by the courts of this state. We have not found in our research, and the parties have not cited in their briefs, any South Carolina authority which holds that such a condition limiting defendants' right to be sued is void under the law of South Carolina. The contract is clear that the parties intended such a restriction. Without any evidence that the courts of South Carolina would not enforce this provision, we do not feel we should hold it is against South Carolina policy to do so. Based on the plain words of the contract, we hold that under the law of South Carolina an action on the bond may be brought only in a state court of a county or other political subdivision in which Clemson University is situated or in a United States District Court in the district in which Clemson University is situated.

One of the principal reasons we enforce conflict of law principles is so the outcome of cases will be the same whether they are brought in the jurisdiction in which the claim originated or elsewhere. *See* 15A C.J.S., *Conflict of Laws*, § 1(1) (1967). Since we have held that under the law of South Carolina this action could be brought only in a state court of one or more counties in South Carolina or a United States District Court of some district of South Carolina, we hold that it cannot be brought in Mecklenburg County, North Carolina. Summary judgment for the defendants Hartford and Clemson was proper.

Affirmed.

Judges PARKER and ARNOLD concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA v. NELMA D. BEST

No. 7910SC687

(Filed 4 March 1980)

State § 12— dismissal of State employee—erroneous order of reinstatement by Personnel Commission

The State Personnel Commission erred in ordering that defendant be reinstated to her position as Personnel Technician II in the Department of Labor on the ground that her dismissal was too harsh in view of her long tenure where both the hearing officer and Full Commission made findings showing that defendant on numerous occasions failed to perform her duties properly, and the record therefore showed that her dismissal was justified.

APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 1 June 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 6 February 1980.

Defendant Nelma Best was released from her employment with the North Carolina Department of Labor in December 1976. Defendant had worked in state government for over twenty years, and at the time of her release was serving as a Personnel Technician II, directly responsible for the accuracy of records by which department employees' rate of compensation was determined.

After defendant's release, internal grievance procedures were followed. A hearing officer for the State Personnel Commission conducted a hearing on 28 September 1977 and, in an order dated 22 November 1977, made findings of fact and conclusions supporting defendant's release from employment.

The Full Commission met to consider the matter, adopted the hearing officer's findings of fact and then concluded that, ". . . in view of Ms. Best's long tenure . . . her dismissal was too harsh." The Commission ordered plaintiff to reinstate defendant to her position as a Personnel Technician II with the proviso that if Labor Commissioner Brooks should find defendant's performance unsatisfactory after six months, he could take action, with no right of appeal, to demote defendant to ". . . a position in which she can satisfactorily function."

Plaintiff appealed the decision of the Full Commission pursuant to G.S. 126-43 and G.S. 150A-43, et seq. Jurisdiction was established in the Wake County Superior Court pursuant to G.S. 150A-45. The superior court declared that portion of the Full Commission's order which restricted defendant's right of appeal to be violative of due process. The court concluded as a matter of law, however, that the Full Commission's determination that defendant should be reinstated was supported by the record and remanded the case to the Commission for reconsideration of its order, not inconsistent with reinstatement of defendant.

From the judgment of the court, plaintiff appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Robert A. Hassell for defendant appellee.

HILL, Judge.

The Personnel Commission went beyond its authority when it reinstated defendant. The superior court erred in its conclusion that the record supported the Commission's action and its order supporting the Full Commission's reinstatement of defendant.

G.S. 126-35 states that, "[n]o permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause." Both the hearing

officer and the full personnel Commission found numerous facts which detailed defendant's inability to handle her duties as a Personnel Technician II. The hearing officer concluded that defendant ". . . committed more than a reasonable allotment of errors . . . ."

The Full Commission, pursuant to G.S. 126-37, may reinstate a state employee to the position from which he has been removed. The implication in that section, however, is that the Commission can only act to correct an abuse or where there is a wrongful denial. "We believe G.S. 126-37 must be read in conjunction with G.S. 126-35 . . . ." *Reed v. Byrd*, 41 N.C. App. 625, 629, 255 S.E. 2d 606 (1979).

> We do not believe the General Assembly intended that the State Personnel Commission would have the power to restore a State employee to a position from which he had been demoted without some finding that the employee had been treated wrongfully. *Reed*, at p. 629.

The record in the case *sub judice* is clear. Defendant failed to perform her duties properly on numerous occasions. Plaintiff's action in removing defendant from her position as a Personnel Technician II was justified. There was no abuse. The Commission erred by ordering defendant's reinstatement.

Neither party questions that portion of the order which restored defendant's due process right to appeal any final action taken by Labor Commissioner Brooks regarding her employment. That portion of the order is not before us. Our disposition of the case, of course, makes the question moot. Nevertheless, we think it is obvious that the portion of the trial court's order is clearly correct.

We reverse that portion of Judge Braswell's order affirming the determination by the Full Commission that the defendant be reinstated and remanding the case to the Full Commission for reconsideration of its order, not inconsistent with reinstatement of the defendant. We remand the case to the superior court for the purpose of entering judgment reversing the decision of the Full Commission and directing the Full Commission to enter an order affirming the decision of John C. Brooks, the Commissioner of Labor.

Reversed and remanded.

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

DISCOUNT AUTO MART, INC. v. BANK OF NORTH CAROLINA

No. 7910SC568

(Filed 4 March 1980)

Uniform Commercial Code § 36— withdrawal against uncollected funds—refusal by bank—prior permission not prospective

Each time plaintiff depositor sought to make a withdrawal against uncollected funds, defendant was entitled to choose whether to stand on or waive its right to refuse to allow such withdrawal, and defendant's waiver of that right on earlier occasions did not operate prospectively. G.S. 25-4-201(1) and G.S. 25-4-213(4).

APPEAL by plaintiff from *Bailey, Judge.* Order entered 25 April 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1980.

Plaintiff alleges the following: It is in the business of buying and selling motor vehicles. Since it opened a checking account at defendant's Raleigh branch on 1 January 1977, it had been common practice for plaintiff to deposit money in the form of checks drawn on other banks with the defendant and to write checks on these funds immediately. Defendant had always honored plaintiff's checks written thus, even though they were written on uncollected funds. In the early part of April 1978, defendant returned a number of plaintiff's checks, marking them "uncollected funds."

Plaintiff alleges that notwithstanding any legal right defendant may have had to return checks drawn on uncollected funds, defendant had waived this right in plaintiff's case by its previous course of dealings, and that plaintiff had relied upon such dealings. Plaintiff also alleges that its business reputation has been damaged and that it has incurred service charges and penalties as a result of defendant's actions.

Defendant's motion to dismiss for failure to state a claim upon which relief could be granted was allowed, and plaintiff appeals.

Clifton & Singer, by Ben F. Clifton, Jr., for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John L. Jernigan, and Carl N. Patterson, Jr., for defendant appellee.

ARNOLD, Judge.

As a general rule, a bank has the right to refuse to allow a depositor to make withdrawals from his account against uncollected funds. See G.S. 25-4-201(1) and -213(4)(a). Plaintiff here argues that defendant has wavied this right by allowing plaintiff to make such withdrawals over a period of 15 months. Both parties argue about whether the facts here are sufficient to constitute the waiver of a contract right, but there is no indication in this case that any right arose in contract. Rather, the right is controlled by statute, as indicated above, and the traditional definition of waiver is sufficient. See *Wheeler v. Wheeler*, 40 N.C. App. 54, 252 S.E. 2d 106, *cert. granted* 297 N.C. 304, 254 S.E. 2d 917 (1979).

Waiver is defined simply as the intentional relinquishment of a known right. *Green v. P.O.S. of A.*, 242 N.C. 78, 87 S.E. 2d 14 (1955). There is no question that in the period between January 1977 and April 1978, defendant waived its right to limit withdrawal to collected funds in plaintiff's account each time it allowed plaintiff to make a withdrawal against uncollected funds. However, we do not find these waivers to have been prospective as well. Cf. H. Bailey, Brady on Bank Checks, § 17.2 at n. 13 (5th ed. 1979) (bank not required to permit overdrafts though it has previously allowed them for same depositor). Each time plaintiff sought to make a withdrawal against uncollected funds, defendant was entitled to choose whether to stand on or waive its right to refuse to allow such a withdrawal. By returning plaintiff's checks presented for payment in April 1978, defendant made clear its intention not to waive its right on those occasions.

Defendant acted within its rights. Plaintiff has alleged an injury for which there exists no legal remedy. Defendant's Rule 12(b)(6) motion to dismiss was properly granted.

Affirmed.

Judges PARKER and WEBB concur.

RITCH REALTORS, INC., T/A CENTURY 21 RITCH REALTORS, A CORPROATION v. DAVID P. KINARD AND DONNA KINARD

No. 7926DC684

(Filed 4 March 1980)

Brokers and Factors § 6— breach of contract giving exclusive right to sell— damages

Where defendants breached a contract giving plaintiff realtor the exclusive right to sell property on behalf of defendants, and the property was sold by another realtor after the expiration date of plaintiff's contract, plaintiff was entitled to recover as damages for the breach all expenses incurred by it prior to defendants' revocation of its authority to sell the property and a reasonable compensation for any labor performed and services rendered which were fairly within the contemplation of the parties at the time the contract was made, not the amount of the commission called for in the contract for a sale of the property by plaintiff, where plaintiff offered no evidence that during the term of the contract it produced an able, willing buyer to purchase the property for the specified price.

APPEAL by defendants from *Brown (L. Stanley), Judge.* Judgment entered 15 June 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 6 February 1980.

Defendants appeal from entry of summary judgment against them. Plaintiff is a corporation engaged in the real estate business in Mecklenburg County, North Carolina. The defendants owned a parcel of real property at Huntersville in that county and entered into a contract with plaintiff, granting plaintiff the exclusive right to sell the property on behalf of defendants. This contract covered the period from 15 August 1978 to 15 November 1978, and plaintiff was to receive as compensation a sum equal to six percent of the gross sales price of the property. The agree-

ment called for a sales price of $66,000. Plaintiff began efforts to sell the property by listing it with the multiple listing service of the Charlotte Board of Realtors and placing "for sale" signs on the property.

During the term of the contract defendants notified plaintiff of their desire to terminate the contract and on 29 September 1978 sent a letter to plaintiff notifying it to "consider our contract rescinded."

After 15 November 1978 the property was sold by another realtor, but the sales price is not in the record.

Both plaintiff and defendants moved for summary judgment. At the hearing on the motions, counsel for plaintiff and defendants stipulated that the contract was valid and that defendants breached it.

John F. Ray for plaintiff appellee.

Scarborough, Haywood & Merryman, by C. B. Merryman Jr., for defendant appellants.

MARTIN (Harry C.), Judge.

By their stipulation in open court at the time of the hearing of the summary judgment motions, defendants concede the validity of the contract sued upon and their breach of it. In so doing, they admitted their liability to plaintiff and left unresolved only the question of damages. A stipulation is a judicial admission, dispensing with proof, recognized and enforced by the courts as a substitute for legal proof. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1972).

Based upon the materials before it, including defendants' stipulation, the trial court found plaintiff entitled to recover and awarded plaintiff $3,960 in damages. This sum was evidently the result of applying the six percent commission called for in the contract to the $66,000 purchase price set out in the agreement. Plaintiff, however, failed to offer any evidence that during the term of the contract it produced an able, willing buyer to purchase the property for the specified price of $66,000. Therefore, plaintiff is not entitled to recover commissions set out in the contract. The commissions are dependent entirely upon an execution

of the contract and a sale of the property or plaintiff's producing an able and willing buyer of the property upon the terms set out in the agreement within the time limitations contained in the agreement. *Gossett v. McCracken,* 189 N.C. 115, 126 S.E. 117 (1925). This, plaintiff has failed to do.

Under the facts of this case, plaintiff is entitled to recover as damages for the breach of the contract by defendants all expenses incurred by it prior to revocation of the power to sell and a reasonable compensation for any labor performed and services rendered which were fairly within the contemplation of the parties at the time of the making of the contract. *Gossett v. McCracken, supra; Advertising Co. v. Warehouse Co.,* 186 N.C. 197, 119 S.E. 196 (1923).

The result is: The summary judgment for plaintiff is affirmed in determining that defendants are liable to plaintiff for the breach of contract. The award of damages in the summary judgment is vacated, and the case is remanded to the District Court of Mecklenburg County for the determination of damages.

Affirmed in part. Vacated and remanded.

Chief Judge MORRIS and Judge HILL concur.

BOBBY T. GOODE AND NANCY CALLAHAN CAMP v. TED C. HARRISON

No. 7927SC10

(Filed 4 March 1980)

Fires § 3; Negligence § 29— tenant cleaning fire box—use of gasoline soaked rag —sufficiency of evidence of negligence

The trial court erred in directing verdict for defendant tenant where there was a jury question as to whether defendant exercised the degree of care which a reasonable man would have exercised when there was evidence that he used a rag which had gasoline on it to clean a fire box in which he did not know whether there was a fire, and there was a jury question as to whether this was a proximate cause of the burning of the house which belonged to plaintiff landlords.

APPEAL by plaintiffs from *Kirby, Judge.* Judgment entered on 12 September 1978 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 19 September 1979.

Plaintiffs appeal from a directed verdict in favor of the defendant. Plaintiffs' claim is based on the alleged negligence of defendant. The evidence tended to show that defendant occupied, as a tenant, a house owned by the plaintiffs. On 19 May 1976 the defendant attempted to start a fire in an oil heater on the premises. Defendant testified there was a fire box in the heater and to start it, a lighted piece of kleenex or tissue paper was thrown on the fire box. He threw three or four pieces of lighted tissue paper on the fire box but did not know whether anything was burning after he did so. He did not think the fire had started and thought there might be some soot or oil accumulated around the fire box area. He went outside and got a rag to wipe out the fire box. When he started wiping the fire box with the rag, it began to blaze and the house was destroyed. Mr. J. R. Greene, Chief of the Rural Fire Department of Boiling Springs, testified that he was at the fire and heard defendant say he was using rags and gasoline to clean the heater. At the end of the plaintiffs' evidence, the court directed a verdict for the defendant.

Caudle, Underwood and Kinsey, by Lloyd C. Caudle and Scott C. Gayle, for plaintiff appellants.

George C. Collie for defendant appellee.

WEBB, Judge.

We hold that the evidence considered in the light most favorable to plaintiffs was sufficient to withstand a motion for a directed verdict. *See Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972). "Negligence is the failure to exercise that degree of care which a reasonable and prudent man, under like circumstances, would exercise . . . ." *See* 9 Strong's N.C. Index 3d, Negligence § 1 (1977) and the cases cited therein. If negligence is a proximate cause of injury or damage to another, the injured party has a claim against the negligent person. Proximate cause is a cause which: (1) in a natural and continuous sequence and unbroken by any new and independent cause produces an injury, (2) without which the injury would not have occurred, and (3) from which a person of ordinary prudence could have

reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed. *See McNair v. Boyette*, 15 N.C. App. 69, 189 S.E. 2d 590 (1972), *aff'd*, 282 N.C. 230, 192 S.E. 2d 457 (1972). We hold that, in this case, it was a jury question as to whether the defendant exercised the degree of care which a reasonable man would have exercised when there was evidence that he used a rag which had gasoline on it to clean a fire box in which he did not know whether there was a fire. It is also a jury question as to whether this was a proximate cause of the burning of the house.

Defendant contends the directed verdict was proper because there was insufficient evidence of the amount of damage to support a jury verdict. Conceding that plaintiffs did not offer sufficient evidence of damage to the property, a directed verdict was not proper. Plaintiffs would, on the evidence, be entitled to at least nominal damages. *See Clark v. Emerson*, 245 N.C. 387, 95 S.E. 2d 880 (1957).

Reversed and remanded.

Judges ARNOLD and WELLS concur.

BETTY JO WEYDENER v. CAROLINA VILLAGE AND THE ST. PAUL INSURANCE COMPANIES

No. 7929SC669

(Filed 4 March 1980)

Master and Servant § 75— workmen's compensation—medical bills—no approval by Commission—court order improper

The Superior Court had no authority to order defendants to pay medical bills incurred by plaintiff for treatment of her work related injury, though the Industrial Commission had ordered that defendants pay all such bills, since the bills in question had not been submitted to or approved by the Industrial Commission. G.S. 97-90.

APPEAL by defendants from *Riddle, Judge*. Judgment entered 13 March 1979 in Superior Court, HENDERSON County. Heard in the Court of Appeals on 5 February 1980.

The following facts are not in controversy:

On 15 September 1978 the North Carolina Industrial Commission filed its amended Opinion and Award providing that defendants pay to the plaintiff specified sums for temporary total disability and permanent partial disability of her back due to a work-related injury, and providing further for the payment by defendants of "all medical bills resulting from the injury giving rise to this claim."

On 7 and 13 March 1979, pursuant to the provisions of G.S. § 97-87, plaintiff filed in the Superior Court of Henderson County a certified copy of the Commission's Opinion and Award together with an affidavit that various medical bills had not been paid by defendants. Thereafter, on 13 March 1979 and without any notice to defendants, the judge entered a judgment that defendants pay to plaintiff the total unpaid bills as set out in her affidavit. In accord with G.S. § 97-87, defendants were notified of the entry of the judgment, from which they timely appealed.

James C. Coleman, for the plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Davis, by Philip J. Smith, for the defendant appellants.

HEDRICK, Judge.

G.S. § 97-90 in material part provides:

> (a) Fees for . . . physicians and charges of hospitals for services and charges for nursing services, medicines and sick travel under this Article shall be subject to the approval of the commission; . . .

Subsection (b) of the statute makes it a misdemeanor for any person to receive any fees which have not been approved by the Commission. It is plain, therefore, that approval by the Commission is required before defendants herein can be ordered to pay any medical charges allegedly incurred by plaintiff.

However, it does not appear from the record before us that any of the bills set out in plaintiff's affidavit as submitted to the Superior Court were ever submitted to or approved by the Industrial Commission. Clearly, then, the Superior Court acquired no authority to act under G.S. § 97-87 or to order these defend-

ants to pay the claimed charges. *See Morse v. Curtis*, 20 N.C. App. 96, 200 S.E. 2d 832 (1973), *cert. denied*, 285 N.C. 86, 203 S.E. 2d 58 (1974). Accordingly, the judgment appealed from is

Reversed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. HENRY JUNIOR PENN

No. 7918SC470

(Filed 4 March 1980)

Rape § 18.3— instructions on assault with intent to rape female under 12—failure of indictment to allege victim was under 12

The trial court erred in instructing the jury on assault with intent to commit rape upon a female under twelve years of age where the indictment charged defendant with assault with intent to commit rape and did not allege that the victim was under twelve years of age.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 25 October 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 September 1979.

The defendant was indicted in form as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Henry Junior Penn in Guilford County, on or about the 18th day of April, 1978, with force and arms, at and in the county aforesaid, did, unlawfully, wilfully and feloniously assault with intent to ravish and carnally know . . . a female, by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State's evidence tended to show that defendant had taken an eight-year-old girl from her home and attempted to have intercourse with her. The court charged the jury in part as follows:

> "Now, members of the jury, for you to find the defendant guilty of assault with intent to commit rape on . . . a child under 12, the State must satisfy you or prove to you

three things beyond a reasonable doubt. First, that the defendant assaulted this child . . . that is, that he put his hands upon her person; that he did take her pants partially down; and second, that he intended to gratify his passion to have sexual intercourse with this child; and third, that at the time that he did this that she had not reached her 12th birthday."

The remainder of the charge was in regard to assault with intent to commit rape on a child under twelve. The defendant was found guilty of assault with intent to commit rape.

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

Herman L. Taylor for defendant appellant.

WEBB, Judge.

The defendant assigns as error the court's charge that the jury could find the defendant guilty of assault with intent to commit rape if they found the victim had not reached her twelfth birthday when the indictment did not charge that the victim was under twelve years of age. Defendant was charged under former G.S. 14-22 (now repealed) with assault with intent to commit rape. Although the words of this statute did not make a difference as to assaults upon females who were under twelve years of age as did the statute in regard to rape, it has been held that G.S. 14-22 is a lesser included offense of G.S. 14-21. A person may be convicted of assault with intent to commit rape without proving he intended to gratify his passion notwithstanding any resistance on the part of his intended victim if the State proves the victim was under twelve years of age. *See State v. Hartsell*, 272 N.C. 710, 158 S.E. 2d 785 (1967). An indictment may charge an assault with intent to commit rape as in the case sub judice or an assault with intent to commit rape on a female under twelve years of age. In the case sub judice the defendant was not charged with an assault to commit rape upon a female under twelve years of age and it was error for the court to submit the case to the jury on that charge. *See State v. Carter*, 265 N.C. 626, 144 S.E. 2d 826 (1965); *State v. Lucas*, 267 N.C. 304, 148 S.E. 2d 130 (1966).

The defendant has brought forward other assignments of error which we do not consider since they may not recur at a subsequent trial.

New trial.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 MARCH 1980

BELIN v. ROHM & HAAS No 7910IC582	Industrial Comm. (G-7559)	Affirmed
GOFORTH v. GOFORTH No. 7929DC82	Rutherford (78CVD213)	Affirmed
GREENE v. DAVIS No. 7928SC666	Buncombe (78SP652)	No Error
HOOVER v. HOOVER No. 7928DC742	Buncombe (79CVD760)	Affirmed
IN RE LAWS No. 7922SC672	Davidson (79CVS639)	Reversed
IN RE RIGSBEE No. 799DC708	Granville & Durham (79SP248)	Vacated
IN RE TROXLER No. 7919SC664	Rowan (78CVS669)	Affirmed
IN RE WOOD No. 7822DC1169	Davie (72J17)	Reversed
MEYERHOFFER v. BYERS No. 7923SC634	Wilkes (78CVS129)	Affirmed
MILLER v. HART No. 7923SC586	Alleghany (77SP22)	Dismissed
MIMS v. MIMS No. 7910DC579	Wake (77CVD5560)	Reversed in Part and Remanded
PARKER v. PARKER No. 7810DC1143	Wake (76CVD2243)	Affirmed
PRATT v. CITY OF DURHAM No. 7914SC641	Durham (79CVS285)	Affirmed
SON-SHINE GRADING v. MARTIN, INC. No. 7914SC653	Durham (76CVS2577)	Affirmed
STATE v. BARKER No. 7917SC882	Surry (75CR8185) Tried in Wilkes	Affirmed
STATE v. BAXTER No. 7926SC878	Mecklenburg (79CRS20036)	No Error

STATE v. BUFF No. 7929SC848	Rutherford (78CRS1788)	No Error
STATE v. COLLINS No. 798SC754	Wayne (78CR17562)	No Error
STATE v. COOPER No. 7915SC837	Alamance (79CRS816)	No Error
STATE v. DICKENS No. 7922SC867	Davidson (79CRS0594) (79CRS17894) (78CRS18626)	No Error
STATE v. FAISON No. 796SC842	Hertford (78CRS2154)	No Error
STATE v. FOUST No. 7918SC816	Guilford (77CRS61882)	Dismissed
STATE v. FREEMAN No. 7912SC883	Cumberland (79CRS3165)	No Error
STATE v. HOLSCLAW No. 7825SC828	Caldwell (78CRS9593) (79CRS1507) (77CRS9016)	Affirmed
STATE v. McNAIR No. 7920SC635	Richmond (78CRS8390)	No Error
STATE v. MOORE No. 7911SC447	Lee (78CRS5818) (78CRS5819)	No Error
STATE v. NETTLES No. 7912SC862	Hoke (78CRS1483)	No Error
STATE v. SMITH No. 793SC892	Pamlico (78CRS470)	Dismissed
STATE v. WATSON No. 7912SC841	Cumberland (79CRS1986)	No Error
STATE v. WRIGHT No. 7926SC890	Mecklenburg (79CRS001142)	No Error
WAREHOUSE v. AUTO SUPPLY No. 798SC420	Wayne (75CVS1440)	Affirmed
WAYFAIRING HOME, INC. v. WARD No. 7929SC679	McDowell (78CVS104)	Reversed

In re Clay County General Election

IN RE: APPEAL OF, AND PETITION FOR JUDICIAL REVIEW BY REPUBLICAN CANDIDATES FOR ELECTION IN CLAY COUNTY, NORTH CAROLINA, OF THE DECISIONS AND ORDERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, IN RE: CLAY COUNTY: GENERAL ELECTION, NOVEMBER 7, 1978 FOR COUNTY ELECTIVE OFFICES

No. 7910SC873

(Filed 18 March 1980)

1. **Elections § 7— authority of State Board to order new election on own motion**

Rules and regulations adopted by the State Board of Elections for the filing of protests do not afford the only means of inquiry into an election, and the State Board had authority to declare a portion of a county's general elections void and to order a new election for some of the offices on its own motion without an election protest having been filed with it.

2. **Elections § 7— public hearing on election irregularities—sufficiency of notice**

Notice published in a newspaper and provided to each member of the county board of elections and each candidate whose name appeared on the ballot for a county office that a public hearing would be held at a specified time and place to inquire into the processes relative to a general election conducted in the county, particularly the processes involving absentee ballots, was sufficient to comply with due process, it not being necessary for the State Board of Elections to particularize any charges in the notice of public hearing.

3. **Elections § 7— public hearing on election irregularities—cross-examination of witnesses**

The State Board of Elections did not err in denying petitioners the right to cross-examine sworn witnesses who testified at a public hearing held to inquire into alleged irregularities in a general election in Clay County where the chairman clearly indicated that if the preliminary proceedings before the State Board were such as to require further proceedings, any petitioner would have the right to recall any witness for cross-examination; two witnesses were thereafter recalled and made available for cross-examination; and petitioners did not ask that any witness not recalled be recalled and made available to them for cross-examination.

4. **Elections § 7— State Board's order of new election—procedures—findings of fact**

A decision of the State Board of Elections ordering a new election for certain offices in Clay County was not made on "unlawful procedures" without findings of fact where the chairman orally announced the board's decision on 6 December 1978 to order a new election because of irregularities in assistance rendered to persons who voted by absentee ballots and in the collection and return of voted absentee ballots; a written decision was filed on the same day incorporating the oral decision; an order was entered 14 December 1978 setting a date for the new election and setting out the rules and procedures for

its conduct; and on 13 February 1979 the State Board filed a written order containing its findings of fact and conclusions of law.

5. Elections § 10— irregularities in absentee ballots—order for new elections—sufficiency of evidence to support findings

The evidence in the record as a whole supported findings made by the State Board of Elections in its order requiring a new election for certain public offices in Clay County because of irregularities in assistance rendered to absentee voters; irregularities in the issuance, collection and return of voted absentee ballots; the voting by absentee ballot of persons who were ineligible to vote; and the payment of money to voters to mark their absentee ballots in a certain way.

6. Elections § 10— irregularities in absentee ballots—order for new election—absence of finding that irregularities affected election results

The State Board of Elections had authority under G.S. 163-22.1 to order a new election for certain public offices in Clay County because of numerous irregularities connected with absentee ballots in the past general election without finding that such irregularities affected the outcome of the past election.

APPEAL by petitioners from *Bailey, Judge.* Order entered 2 May 1979, Superior Court, WAKE County. Heard in the Court of Appeals 26 November 1979.

Petitioners are Republicans who received, in the general election conducted in Clay County on 7 November 1978, a sufficient number of the votes cast to denominate them as winners for the offices of Clerk of Superior Court, Register of Deeds, Sheriff, members of the Board of County Commissioners, and members of the County Board of Education. On 10 November 1978, as the result of complaints received, the State Board of Elections issued a notice that it would, on 4 December 1978, hold a public hearing and inquire "into the processes relative to the general election conducted in Clay County on Tuesday, November 7, 1978 as well as all attendant procedures preliminary to the conduct of said election, including but not limited to the conduct of elections officials, candidates and other citizens resident within and outside of Clay County." The notice further stated that "[t]he processes involved in applying for, receiving and returning absentee ballots shall be a critical concern of the public inquiry." Further, the notice advised that following the hearing the State Board of Elections would determine whether a new election for county offices in Clay County would be ordered.

The hearing was had at the time indicated in the notice. At the conclusion of the public hearing at approximately one o'clock a.m., 6 December 1978, the State Board of Elections, by unanimous vote of the four members attending announced that because of the numerous irregularities which had occurred attendant to the general election, a new election would be called for the offices of Clerk of Superior Court, Register of Deeds, Sheriff, members of the Board of County Commissioners, and members of the County Board of Education. By order of the State Board of Elections entered 14 December 1978, a new election was scheduled for 6 March 1979. Petitioners filed notice of appeal, and the order for a new election was stayed, pending judicial determination of the legality of the Board's action.

On review by the Superior Court, the Court affirmed the State Board. Petitioners appealed from the order entered, and the stay of the order calling a new election was continued pending appellate review.

Facts necessary for decision are set out in the opinion below.

Attorney General Edmisten, by James Wallace, Jr., Deputy Attorney General for Legal Affairs, for the State Board of Elections, appellee.

Long, McClure, Parker, Hunt & Trull, by Robert B. Long, Jr., for petitioner appellants.

MORRIS, Chief Judge.

[1] Petitioners first contend that the State Board of Elections was without jurisdiction and authority to declare portions of the Clay County General Election void and order a new election for some of the offices on its own motion without an election contest having been filed with it. The record does not indicate that any challenge or complaint had been lodged with the County Board of Elections pursuant to the provisions of 8 N.C.A.C. 2 *et seq.*, and we assume that none had been. It is clear from the record that the hearing was had on the State Board's own motion. The notice provided that the Board was directing the conduct of a public inquiry "pursuant to authority contained in G.S. 163-22(d) and upon its own motion."

G.S. 163-22(d) provides:

> The State Board of Elections shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district, and shall report violations of the election laws to the Attorney General or solicitor or prosecutor of the district for further investigation and prosecution.

That the authority of the State Board to conduct the public inquiry and enter an order calling for a new election was not dependent upon a protest having been previously filed was made quite clear by this Court in *Sharpley v. Board of Elections*, 23 N.C. App. 650, 209 S.E. 2d 513 (1974), where we said:

> In our opinion, and we so hold, the authority of the State Board to conduct the investigation and to enter the order in this case was not dependent upon the filing of a timely protest. *The mandatory tone of the statute which directs that the Board "shall investigate when necessary or advisable . . . frauds and irregularities in elections," makes clear that the Board in appropriate circumstances may take action on its own motion even in the absence of any protest. A fortiori* the Board may in its discretion consider and act upon a protest, even though such protest may not have been filed within the time period prescribed by the Board's own rules. By adopting those rules the Board did not, and could not, inhibit or curtail the performance by it of duties otherwise expressly imposed upon it by statute. That this is so is further borne out by the directive in G.S. 163-22(c) that the State Board "*shall* compel observance of the requirements of the election laws by county and municipal boards of elections and other election officers," and that "[i]n performing these duties, the Board *shall* have the right to hear and act on complaints arising by petition *or otherwise*. . . ." (Emphasis added.)

23 N.C. App. at 651-52, 209 S.E. 2d at 514-15. Petitioners' position that the adoption by the State Board of its own rules and regulations for the filing of protests (see 8 N.C.A.C. 2 *et seq.*) affords the *only* means of inquiry into an election is clearly without merit. The Legislature has mandated that the State Board of

Elections shall compel observance of the election laws. To do so, the State Board of Elections must have authority to hear and act on complaints, whether they arise by petitions filed in accordance with the rules and regulations promulgated by the Board *or otherwise*. We reiterate what we said in *Sharpley*. This assignment of error is overruled.

[2] By the next assignment of error petitioners challenge the sufficiency of the notice given by the State Board of the public hearing. They urge that the State Board, by failing strictly to comply with the notice requirements of G.S. 150A-23, failed to satisfy the constitutional requirement of reasonable notice of charges in order to satisfy due process requirements for a fair hearing. While we are of the opinion that the procedure contemplated by G.S. 163-22(d) is not the type of procedure contemplated by Article 3 of the Administrative Procedure Act, there can be no doubt but that petitioners were entitled to notice. G.S. 150A-23 requires that the "parties in a contested case" shall be given "a reasonable notice of the hearing." The notice published by the State Board provided for "a public hearing and inquiry into the processes relative to the general election conducted in Clay County on Tuesday, November 7, 1978, as well as all attendant procedures preliminary to the conduct of said election, including but not limited to the conduct of election officials, candidates and other citizens resident within and outside of Clay County. The processes involved in applying for, receiving and returning absentee ballots shall be a critical concern of the public inquiry." The chairman of the Clay County Board of Elections was directed to have the notice published in a newspaper having general circulation in Clay County at least twice before the date scheduled for the hearing. The chairman was further directed to provide a copy of the notice to all members of the Clay County Board of Elections and to each candidate whose name appeared on the ballot in Clay County for a county office. All citizens were advised that any person who had information which might have a bearing on the inquiry would be afforded the opportunity to be heard. The time and place of the hearing was set for ten o'clock a.m. on 4 December 1978 at the courtroom of the Clay County courthouse in Hayesville. Appellants do not contend that they did not receive the notice. They contend that they were not adequately advised of the charges. This is where appellants' argument

fails. The notice simply notified the public generally, the County Board of Elections, and each candidate for county office whose name was on the ballot that an inquiry had been launched into the conduct of the election and particularly the processes involving absentee ballots. There was no action against any specific candidate. There were no specific charges against any candidate. The action of the State Board in calling for the inquiry in no way constituted an action against anybody. There were no "parties to a contested case" as is contemplated by G.S. 150A-23. The purpose of the public hearing and inquiry was clearly stated. No more particularity than was given was required. To require the State Board to particularize in the notice and limit the inquiry and public hearing to those particulars obviously could militate against the very purpose of a public hearing. The notice was sufficient, and this assignment of error is overruled.

[3] Appellants next assign as error the alleged denial of cross-examination of some of the witnesses whose testimony was considered by the Board in arriving at its findings of fact and conclusions of law. At the beginning of the hearing, the chairman announced that the hearing would "take a two-fold nature." First, the Board would, by examining witnesses whose testimony would be sworn testimony, inquire into such matters as it deemed pertinent. For that portion of the inquiry, there would be no right of cross-examination, unless evidence of criminal conduct on the part of specific individual petitioners was elicited, in which event petitioners' counsel would be allowed to cross-examine. At the conclusion of that inquiry the Board would retire into executive session for the purpose of determining whether "it should proceed further on the question of whether or not [sic] new elections should be ordered in any office in Clay County for county offices." The denial of cross-examination at this stage was, according to appellants, unlawful and unconstitutional. We do not agree. The chairman clearly indicated that if the preliminary proceedings were such as to require further proceedings, any petitioner would have the right to recall any witness for cross-examination. Indeed, at least two witnesses were recalled and made available for cross-examination. Though petitioners were so advised, they did not ask that any witness not recalled be recalled and made available to them for cross-examination. Additionally, as will be pointed out *infra*, the order of the State Board calling for a new election is

amply supported by the evidence even if the testimony of the witnesses who were not recalled were stricken. This assignment of error is without merit.

[4] Appellants next contend that the decision of the State Board was made on unlawful procedures. After the conclusion of the testimony at the hearing, the Board retired into executive session. After consideration of the testimony in executive session, the Board entered an "oral order" in which it concluded "that assistance permitted to voters voting one-stop absentee ballots, as well as the collection of and return of voted absentee ballots, does not satisfy the most elemental requirements of the statutes" and, upon affirmative vote of the four members of the Board present, ordered a new election for the offices of Clerk of Superior Court, Sheriff, members of the Board of County Commissioners, and members of the County Board of Education. This was done on 6 December 1978 by the chairman orally to the assemblage. On the same day, a written decision was filed incorporating the oral decision.

On 14 December 1978, an order was entered setting a date for the new election and setting out rules and procedures for its conduct. On 5 February 1979, this order was stayed. On 13 February 1979, the State Board filed a written order containing its findings of fact and conclusions of law.

Appellants urge that the initial written "decision" and the second written order setting the time for the new election both were without findings of fact, and it wasn't until 13 February 1979 that an order was entered which contained findings of fact. Appellants do not advance any reason for their position except that this is a substantial departure from G.S. 150A-36, which requires findings of fact. We fail to see any "unlawful procedure". Nor do we find any prejudice resulting to appellants. This assignment of error is totally without merit.

[5] Appellants contend that the "findings of fact, conclusions of law and order of the North Carolina State Board of Elections were not supported by competent, substantial, and material evidence upon the whole record as submitted."

The Board made the following findings of fact:

1. That preceding the general election on November 7, 1978, at least 32 absentee ballots of specified voters in Clay County were irregularly and illegally returned to the Supervisor of Elections for the Clay County Board of Elections. That ballots cast by other voters were in the possession of candidates for public elective offices contrary to specific procedures mandated in Article 20, Chapter 163 of the General Statutes of North Carolina wherein it is required that executed absentee ballots shall be returned to the Chairman of the appropriate Board of Elections by U.S. Mail at the voter's expense, by the voter in (illegible) or by a near relative of the voter. Further,

(a) That at least the aforementioned 32 absentee ballots were collected in the office of the Clerk of Superior Court by the Supervisor of Elections (Ms. Diane Maney Lambert) immediately prior to the deadline for the return of absentee ballots, and she delivered them to the Office of County Board of Elections without revealing to the Chairman how she had come into possession of them; that she later represented to the Chairman of the Board of Elections that the ballots were received from the voters in person, when she in fact knew the ballots were received by her from the possession of candidates for office;

(b) That Sheriff Hartsell Moore, candidate for Clerk of Superior Court; Chairman Howard Wimpy, candidate for the Clay County Board of Commissioners, and Jerry Lowe, an employee of the Clay County Tax Office, individually, or acting in concert, illegally received, collected and held the executed ballots of at least 32 voters of Clay County and collectively presented the aforementioned absentee ballots to the Supervisor of Elections shortly before the absentee ballot return deadline on November 6, 1978; and that the aforementioned persons, acting in concert, succeeded in accomplishing the illegal delivery of at least 32 executed absentee ballots to the Office of the Clay County Board of Elections, all of which ballots were counted in the November 7, 1978 General Election;

(c) That said 32 absentee ballots were sealed with cellophane tape by someone other than the voters who ex-

ecuted them and, except for those ballots held in the Sheriff's possession, how those ballots became taped, or why they were taped, could not be determined by the State Board of Elections from the testimony before it;

(d) That the portion of the 32 ballots illegally collected and retained by the Clerk of Superior Court were stored in the vault of the said Clerk; personnel in that office and anyone on business in, or visiting, said office had free and easy access to the ballots during the period of their retention and before their delivery to the Supervisor of Elections on November 6, 1978;

(e) That all 32 of the absentee ballots in question were counted and included in the final calculation of votes, due, at least in part, to the fact that the Supervisor of Elections never revealed to the Chairman or any member of the County Board of Elections the fact that she had received the ballots in the office of the Clerk from candidates for office in the general election; that she represented to the Chairman that she received them from the voters, and admitted, during the hearing before the State Board of Elections, that she lied in order to have the absentee ballots counted;

2. That Robert G. Carlan, a convicted felon whose citizenship has not been restored and who presently is on parole voted an absentee ballot (# 36) in the November 7, 1978 General Election; Carlan is a former employee of Candidate Hoby Garrett;

3. That Denise Ledford, a convicted felon whose citizenship has not been restored and who presently is on parole voted an absentee ballot (# 361) in the November 7, 1978, General Election;

4. That Mike F. Carlan, a minor whose date of birth was incorrectly given by him to be April 6, 1960, voted an absentee ballot (# 6) in the November 7, 1978, General Election, contrary to law; that he was not eligible to register or vote;

5. That Morris Junior Spivey, a minor whose date of birth was incorrectly given by him as March 5, 1960, voted an absentee ballot (# 126) in the November 7, 1978, General Elec-

tion, contrary to law; that he was not eligible to register or vote;

6. That Sandra Ruth Lyons voted an absentee ballot (# 54) in the November 7, 1978, General Election, and was paid $30.00 by Robert Carlan to so do and to vote a straight Republican ballot; that she, being under no legally recognized disability, and without making a request for assistance, was illegally assisted in marking her ballot in the office of the Board of Elections by Hoby Garrett, Republican candidate for County Board of Education;

7. That Lawanda Cope voted an absentee ballot (# 53) in the November 7, 1978, General Election, and was paid $30.00 by Robert Carlan to do so and to vote a straight Republican ballot; that she, being under no legally recognized disability, and without making a request for assistance, was illegally assisted in marking her ballot in the Office of the Board of Elections by Hoby Garrett, Republican candidate for County Board of Education;

8. That Mary Elizabeth Wilson voted an absentee ballot (# 55) in the November 7, 1978, General Election and was paid $30.00 by Robert Carlan to do so and to vote a straight Republican ballot; that she, being under no legally recognized disability, and without making a request for assistance, was illegally assisted in marking her ballot in the office of the Board of Elections by Hoby Garrett, Republican candidate for County Board of Education;

9. That Ida Lloyd voted an absentee ballot (# 73) and was illegally paid $15.00 by Sam Morris to vote a straight Republican ticket;

10. That Jimmy Lloyd voted an absentee ballot (# 12) and was illegally paid $10.00 by Sam Morris to vote a straight Republican ticket;

11. That Milie Lloyd voted an absentee ballot (# 13) and was illegally paid $10.00 by Sam Morris to vote a straight Republican ticket;

12. That all absentee ballots cast in the November 7, 1978, General Election were issued contrary to G.S. Sec.

163-229, wherein it is required that the Chairman or member of the County Board of Elections certify that the applicant is a registered and qualified voter and that the voter's application was properly made. That the certifications on all such absentee return envelopes were executed by the Supervisor of Elections who had not been authorized by the County Board of Elections to execute the certifications thereon;

13. That a total of 366 civilian absentee ballots were issued for the November 7, 1978, General Election, of which 267 were "one-stop" voters and 99 were mailed to the voter. Only 23 ballots were transmitted and received by the County Board of Elections in the U.S. Mail; 6 military absentee ballots were issued;

14. That on numerous occasions candidates checked the Register of Absentee Applications in the Office of the Clay County Board of Elections to ascertain to whom ballots had been issued and subsequently paid visits to many of those applicants in their home; candidates assisted voters in their homes, illegally took executed absentee ballots into their possession, representing to the voters that the ballots would be mailed or delivered to the County Board of Elections, and illegally assisted an undetermined number of "one-stop" absentee ballot voters in the Office of the Clay County Board of Elections after having transported, in some cases, those voters to the Office of the Board;

15. That Ralph Allison, the Clerk of Superior Court and a candidate for re-election, systematically took acknowledgments and used his official seal of office on absentee ballot envelopes;

16. That the Supervisor of Elections forged the name of the Chairman of the Clay County Board of Elections to the "receipt for ballots" issued by the State Board of Elections; that the Supervisor of Elections stored ballots in an often unlocked and unattended vault in the Office of the Register of Deeds, a candidate for re-election, without receiving instructions or permission from the Chairman of the County Board of Elections; and that numerous unauthorized persons, including candidates for election and re-election, had access to said ballots; and that the Supervisor of Elections, without

instructions or permission from the Chairman of the County Board of Elections, and without authority otherwise, removed a number of ballots from said vault and issued them as absentee ballots;

17. That the State Board of Elections, after learning that official ballots, unsealed, had been stored in the office of the said Register of Deeds, a candidate for re-election, and in an attempt to ensure the purity of the November 7, 1978, General Election in Clay County, ordered the removal of said ballots to the vault of a local bank to remain in the custody of the Chairman of the County Board of Elections; that the State Board further directed that the county ballots be reprinted in an effort to ensure the purity of the November 7, 1978, General Election;

18. That an agent of the State Bureau of Investigation, assigned to Clay County at the request of the State Board of Elections, observed Hoby Garrett, a candidate for Board of Education, improperly assist 10 absentee ballot voters on one occasion and 6 absentee ballot voters on a separate occasion in the Office of the County Board of Elections;

19. That, on numerous occasions, absentee "one-stop voting" took place on the desk of the Supervisor of Elections rather than inside the voting booth, contrary to the provisions of G.S. Sec. 163-273;

20. That Lexie Henderson, a critically ill cancer patient was carried to the Courthouse in the truck of Ralph Allison, a candidate for Clerk of Superior Court, in the rain, and an absentee ballot was obtained from the Supervisor of Elections, taken to the voter in the truck, where no election official was present, and returned to the Supervisor of Elections, by the candidate;

21. That on no occasion in the 60 days before the November 7, 1978, General Election did the Supervisor of Elections attempt to determine whether "one-stop" voters of absentee ballots were legally eligible to receive the assistance in voting which they requested; assistance from and to anyone was routinely allowed upon request, resulting is assistance, including the marking of ballots, being given to

voters by candidates and noncandidates alike; that the Supervisor of Elections, either through ignorance or design, failed otherwise to properly supervise the "one-stop" voting which took place in the Office of the Board of Elections.

22. That nearly all of the envelopes containing absentee ballots counted in the November 7, 1978, General Election had been sealed with tape of various origins by persons other than the voters; that the practice of taping closed the envelopes containing absentee ballots by persons other than the voters of those ballots, although the testimony was that said practice was to prevent fraudulent tampering with those ballots, compels the State Board of Elections to recognize the inference that said practice could facilitate, and serve to conceal, fraudulent tampering.

23. That, as a result of the facts hereinbefore found to be true, the voters of Clay County were denied the opportunity to participate in a free and fair election on November 7, 1978, the purity and validity of said election being suspect and doubtful.

Upon those findings of fact the Board made the following conclusions of law:

1. The State Board of Elections has general supervision over primaries and elections in the State, with authority to promulgate legally consistent rules and regulations for their conduct and to compel the observance of the election laws by county boards of elections; and the duty of the State Board to canvass the returns and declare the results of an election in a county does not affect its supervisory power, which perforce must be exercised prior to the final acceptance of the returns made by the county boards. *BURGIN v N. C. STATE BOARD OF ELECTIONS*, 214 N.C. 140, 198 SE 592 (1938); NCGS Sec. 163-22;

2. The State Board of Elections has the power to supervise primaries and general elections to the end that, insofar as possible, the results in primary and general elections in the State will not be influenced or tainted with fraud, corruption or other illegal conduct on the part of election officials or others. *PONDER v JOSLIN*, 262 NC 496, 138 SE 2d 143 (1964); NCGS Sec. 163-22;

3. The State Board of Elections is not limited in its authority to merely investigate alleged frauds and irregularities in elections for the sole purpose of making a report of the same to the Attorney General or District Attorney for further investigation or prosecution, but is empowered as well to determine that discovered fraud and irregularities militate against the propriety of certifying election results and to order new elections or to take such other action as its findings of fact may justify. *PONDER v JOSLIN*, supra; NCGS Sec. 163-22.1;

4. The Findings of Fact hereinabove set forth reflect numerous irregularities in the conduct of the November 7, 1978, General Election in Clay County, and reveal that those irregularities could have been substantially and significantly associated with the perpetration of fraud and corruption in said election;

5. That, as a result of the facts hereinbefore found to be true, the voters of Clay County were denied the opportunity to participate in a free and fair election on November 7, 1978, the purity and validity of said election being suspect and doubtful.

6. That the occurrence of such a large number of irregularities, in itself, and absent the direct proof of any willful wrongdoing, is sufficient to warrant and justify the refusal of the State Board of Elections to permit certification of the results of the November 7, 1978, General Election in Clay County and to order a new election for any or all of the offices in contest on that date. *SHARPLEY v STATE BOARD OF ELECTIONS*, 23 NC App. 650, 209 SE 2d 513 (1974).

In order to give appellants' contention the consideration which every such contention deserves, we have studied carefully the testimony given at the hearing. We think it would serve no useful purpose to take each finding of fact and recapitulate the evidence which supports it. Suffice it to say that an examination of the evidence leaves no doubt but that each finding of fact is supported by competent evidence.

[6] Finally appellants argue that the State Board of Elections is without authority to order a new election without a showing that

the results of the election were affected by the act complained of. It is true that there are no findings of fact upon which a conclusion could be based that the irregularities in absentee ballots could or did affect the outcome of the election. It is also true that our Supreme Court has held that generally an election will not be disturbed because of irregularities absent a showing that the irregularities are sufficient to alter the result. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E. 2d 139 (1967); *Watkins v. City of Wilson*, 255 N.C. 510, 121 S.E. 2d 861 (1961), *appeal dismissed and cert. denied*, 370 U.S. 46, 8 L.Ed. 2d 398, 82 S.Ct. 1166 (1962). *See generally*, 26 Am. Jur. 2d *Elections* § 342 (1966).

G.S. 163-22.1 enacted in 1973 provides:

> If the State Board of Elections, acting upon the agreement of at least four of its members, and after holding public hearings on election contests, alleged election irregularities or fraud, or violations of elections laws, determines that a new primary, general or special election should be held, the Board may order that a new primary, general or special election be held, either statewide, or in any counties, electoral districts, special districts, or municipalities over whose elections it has jurisdiction.
>
> Any new primary, general or special election so ordered shall be conducted under applicable constitutional and statutory authority and shall be supervised by the State Board of Elections and conducted by the appropriate elections officials.
>
> The State Board of Elections has authority to adopt rules and regulations and to issue orders to carry out its authority under this section.

Gardner v. City of Reidsville, supra, and *Watkins v. City of Wilson, supra*, both involve the situation where an unsuccessful candidate seeks to invalidate an election. Clearly, if an unsuccessful candidate seeks to invalidate an election, he must be able to show that he would have been successful had the irregularities not occurred. *See also Owens v. Chaplin*, 228 N.C. 705, 47 S.E. 2d 12, *rehearing denied*, 229 N.C. 797, 48 S.E. 2d 37 (1948). We find no case in this State in which the State Board of Elections is the moving party which requires a showing that the result of the election would be altered. None of the decided cases in this State

was decided contrary to a determination by the State Board of Elections that irregularities in the conduct of an election were such that a cloud is cast upon the election.

Two cases from other jurisdictions are helpful.

In *Tebbe v. Smith*, 108 Cal. 101, 41 P. 454 (1895), the Court ordered the rejection of the votes of an entire precinct. Among other violations, the polls did not open until ten o'clock, closed for lunch, and the election officials took the ballot box with them to lunch, leaving unmarked ballots in the polling place. There was no showing that there would have been a difference in the result had these things not occurred. The Court stated the general rule that "mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while a departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected thereby. (Citations omitted.) But the rule as to directory provisions applies only to minor and unsubstantial departures thereform. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed." 108 Cal. at 111, 41 P. at 457. The Court said further that the courts have a duty to so adhere to the substantial requirements of the election laws as to preserve elections from abuses which are subversive of the rights of the voters. "And, under this view, the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted." 108 Cal. at 112, 41 P. at 457. In that case the Court concluded:

> In this case we are quite willing to believe that the misconduct of the officers of Lake precinct was prompted by nothing worse than ignorance, and lack of appreciation of the responsibilities of their positions, and we may say, further,—for such is the evidence,—that no harm is shown to have resulted from their conduct; but, looking to the purity of elections and integrity of the ballot box, we are constrained to hold that conduct like this amounts, in itself, to such a failure to observe the substantial requirements of the law as must invalidate the election. *Id.*

Much later, the *Tebbe* case was cited and quoted with approval by Justice Christianson, writing for a unanimous court, in *In re Contest of Election of Vetsch*, 245 Minn. 229, 71 N.W. 2d 652 (1955). There the contestant was able to prove numerous violations of election laws but could not show that any one violation or all cumulatively would affect the result. In invalidating the election, the Court said:

> It has long been the policy of this state that "in the absence of fraud or bad faith or constitutional violation, an election which has resulted in a fair and free expression of the will of the legal voters upon the merits will not be invalidated because of a departure from the statutory regulations governing the conduct of the election except in those cases where the legislature has clearly and unequivocally expressed an intent that a specific statutory provision is an essential jurisdictional prerequisite and that a departure therefrom shall have the drastic consequence of invalidity." This policy rests upon the sound principle that no person should be deprived of his right to vote because of the neglect or carelessness of election officials, unless the carelessness or irresponsibility has been carried to such an extent as to affect the true outcome of the election or put the results in doubt. In pursuit of this policy it has been generally held that after an election is over, statutory regulations are usually construed to be directory rather than mandatory unless the departure from the statutes casts uncertainty upon the result.
>
> Although admittedly no fraud has been shown in the present contest, there is no necessity of proving actual fraud in all cases. It is sufficient if there has been such a wholesale violation of the election laws, even be they only directory, that so great an opportunity for fraud exists as to impeach the integrity of the ballot.
>
> . . .
>
> In our opinion there has been such a substantial failure to comply with the law in the instant case. The election laws were violated from the very start of the election in La Crescent village. And in addition the violations were numerous, viz., improper appointment of the election board; improper

> handling of ballots by the village clerk; unauthorized issuance of absentee ballots; failure to take, administer, and indicate proper oaths; unauthorized and ineligible persons filling in as judges and clerks without indication thereof; the intermixing of clerk and judge functions; failure to count ballots before issuing receipts therefor; and inadequate maintenance of the election register. The people conducting the election appeared to be completely unaware of the laws governing elections, and what is more, they made no effort whatsoever to become acquainted with them.

245 Minn. at 238-239, 71 N.W. 2d at 658-59. While in the case before us, there is no showing that the violations contained in the findings of fact were sufficient to change the outcome of the election, certainly a cloud of suspicion has been cast on *all* the absentee ballots cast in the election. Every voter is entitled to place confidence in the election system. Every voter is entitled to assume that every other vote is cast legally. He is entitled to have his vote counted honestly and fairly along with other votes which have been cast honestly and counted honestly and fairly. Anything less is a threat to the democratic system which is wholly dependent upon elections conducted fairly and honestly.

> The people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials.

Ponder v. Joslin, 262 N.C. 496, 500, 138 S.E. 2d 143, 147 (1964).

The identical point of view was expressed with outstanding clarity by Chief Justice Andrews of the Court of Appeals of New York when he said:

> We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the willful misconduct, of election officials in performing the duty cast upon them. The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly-qualified electors, and not to defeat them.

People v. Wood, 148 N.Y. 142, 146-47, 42 N.E. 536 (1895).

We think the violations of election procedures in the Clay County election of 7 November 1978 are more than sufficient to justify the State Board of Elections, acting pursuant to the broad provisions of G.S. 163-22.1, to call a new election for the county offices affected. Indeed, in our opinion, the State Board would have been derelict in its duty had it failed to call a new election. The order of the Superior Court affirming the order of the State Board of Elections is

Affirmed.

Judges PARKER and WELLS concur.

STATE OF NORTH CAROLINA v. MARGARET CATHERINE MAPP

No. 7910SC824

(Filed 18 March 1980)

1. Homicide § 21.7— abused child—second degree murder—sufficiency of evidence

Evidence in a second degree murder prosecution was sufficient for the jury to find that the victim died from other than natural causes and to find that defendant was culpably negligent and such negligence was the cause of the victim's death where the evidence tended to show that the victim was defendant's five-year-old daughter; the child's death resulted from suffocation caused by a blood clot from a wound in her mouth; the child suffered from the "battered child syndrome"; and the child was in defendant's care at all times.

2. Parent and Child § 2.2— child abuse—sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for child abuse where the evidence tended to show that defendant was the mother of the child in question and the child was less than 16; a physician testified that the child suffered from "battered child syndrome"; and the doctor based his opinion on the totality of evidence regarding the child's injuries. G.S. 14-318.2(a).

3. Parent and Child § 2.1— neglect of child—sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for child neglect where it tended to show that defendant was the mother of the child in question who was less than 16; the child had numerous broken bones which had not been treated and a staph infection in the knees, lungs and scalp; and defendant admitted that she was not aware of any broken bones or infection and did not seek medical treatment for any of the child's injuries. G.S. 14-316.1.

4. Homicide § 23.1— jury instructions—second degree murder and involuntary manslaughter—culpable negligence

There was no merit to defendant's contention that there must be different definitions of culpable negligence for involuntary manslaughter and second degree murder, and the trial judge made it clear that culpable negligence evidencing malice must be found before there could be a conviction for second degree murder.

5. Parent and Child § 2.2; Homicide § 5— second degree murder—abuse and neglect of child not lesser offenses

Charges of child abuse and child neglect were not merged into the charge of second degree murder, since second degree murder does not require that the victim be under 16 years of age or that the injury be inflicted by the child's custodian, as do the offenses of child abuse and neglect, and since the abuse and neglect occurred over many months and there were many separate acts of abuse and neglect which by themselves were not the proximate cause of the child's death.

6. Criminal Law § 53— medical expert testimony

Where a doctor had been qualified as a medical expert and had conducted the autopsy on the homicide victim, he could testify directly as to his opinion without first stating that his opinion was satisfactory to himself or based upon a reasonable degree of medical certainty.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 23 April 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 30 January 1980.

The defendant was convicted of murder in the second degree, child abuse, and child neglect. For the conviction of murder in the second degree, the defendant was sentenced to a term of 25 years in a State prison. For each of the convictions of child abuse and child neglect, the defendant received a two-year sentence. The two-year sentences were to run concurrently with the 25-year term.

The State's evidence tended to show that defendant's sister arrived at defendant's home on the night of 21 November 1977 and observed defendant giving mouth to mouth resuscitation to defendant's five-year-old daughter. Defendant corroborated her sister's testimony later, saying that she fed the child and put her to bed around 7:00 p.m. When defendant checked on the child later in the evening, she thought the child was having a seizure. It was at this point that defendant attempted mouth to mouth resuscitation. An ambulance and the police were summoned, and the child was determined to be dead.

The young child, Margaret Catherine Spence, was born prematurely and was considered to be retarded, or at least developmentally slow. In January, 1975 she functioned as a child of 19 to 20 months rather than a child of 36 months. In May, 1977 she functioned as a child of three to three and one-half years although she was four years and eleven months old. At the time of her death, when the child was five years old, she still was considered to be developmentally slow, although she was able to play with other children in the neighborhood regularly.

Dr. Laurin Kaasa, medical examiner for Wake County, testified that he conducted an autopsy on the deceased child. The doctor's findings indicated that the child's face had a mottled appearance. There were areas of depigmentation on the face, cuts about the cheek and beneath the eye, an abrasion under the chin, and several abraded areas on the forehead and in the cheek and mouth area. Dr. Kaasa found swelling in the knees, feet and hands, multiple linear scars on the child's back, and an ovoid scar on the right hip. The right arm could not be extended more than 165 degrees, and an examination of the arm joint showed a calcified area resulting from a prior injury and bleeding into the soft tissues. The left elbow joint was swollen. There was an open sore on the inside of the left knee, sores and a depigmented area on the right leg resulting from previous injuries, and areas of depigmentation in a linear groove around the left ankle, which resulted from a cord being wrapped around the ankle. A loose blood clot, which formed as the result of a blunt force injury, was found beneath the scalp on the back of the child's head, and the child's lips were swollen and contained lacerations. The ninth rib on each side of the back had been fractured by an injury or trauma of considerable force. Blood tests performed by Dr. Kaasa indicated that a staph infection existed in the knee, lungs and scalp area. The doctor concluded that the child had been suffering from blood poisoning of several days' duration due to the entry of bacteria through different wounds and that the poisoning had localized in the joints of the knees. He indicated that the child had been in a weak, moribund state and unable to walk because of the infection in her knees. Dr. Kaasa indicated that the staph infection was lethal and that death would have followed within several days without treatment, but that instead ". . . the final insult was the aspiration, the swallowing of a clot from bleeding

in the mouth which lodged in her voice box and in her trachea and resulted in lack of oxygen going to her lungs, the state of anoxia, from which she expired." The doctor indicated that a person in a healthy state could dislodge or cough up material in the windpipe and that the wound inside the mouth which caused the bleeding was the result of trauma or injury.

The testimony of radiologist, Dr. Julius Green, provided more evidence of the child's injuries. He testified that x-rays of the child's right leg were normal. X-rays of the left leg revealed fractures of the femur, tibia and fibula, which were the result of severe injury or trauma. Dr. Green testified that the fractures did not occur at the same time. Despite the severity of the left leg fractures, Dr. Green found that no treatment was evidenced by the x-rays and that medical attention would have been needed for the fractures to heal properly. X-rays of the left arm indicated fractures of the humerus and radius and a fracture of the fifth finger. Dr. Green offered no opinion as to evidence of treatment. X-rays of the right arm indicated fractures of the humerus, olecranon process and distal ulna, which were caused by severe injury or trauma. In Dr. Green's opinion, no treatment had been sought for the injuries. On cross-examination, Dr. Green admitted that fractures could occur during a seizure, although he had not seen limb fractures as the result of seizure.

The State also presented the testimony of a pediatrician and expert in child abuse, Dr. Ronald Kinney. In response to a hypothetical question, Dr. Kinney testified that the deceased child was a victim of the "battered child syndrome." Dr. Kinney defined the term as encompassing nonaccidental injuries perpetrated by a child's caretaker.

Karen Alexander, an employee with the Pennsylvania Children's Aid Society, gave a history of the child. She testified that pursuant to court order the deceased child was placed in a foster home from June, 1975 through June, 1976. The child had been living in Philadelphia with defendant and her grandmother for several months up until that time. The child was returned to the defendant in June, 1976, and Ms. Alexander followed the child's progress in the home until December, 1976 when the family moved from Philadelphia. When Ms. Alexander first observed the child, she noted some scars, but no open wounds. She in-

dicated the child's physical condition was good during the entire period. She was not aware of any injuries sustained by the child while in the foster home.

The foster mother, Amanda Ferguson, testified that the child did not sustain any injuries while in her care although she had three seizures during a two-day period in May, 1976. Ms. Ferguson stated that she took the child to a hospital where she received a prescription for phenobarbital, a drug used to control seizures. She indicated that when she last saw the child in December, 1976 there was no depigmentation, cuts, nor abrasions on the child's face. At the close of State's evidence, defendant's motion for nonsuit was denied.

The defendant testified that the deceased child had suffered from seizures since she was three months old and that the child fell frequently while playing. Defendant stated that the child lost pigmentation on her face when the child accidentally spilled hot tea on herself. As a result of the accident, defendant's husband obtained an ointment from the pharmacy to apply to the child's face. Defendant stated that, contrary to the doctor's testimony, the child was walking on the day she died.

Defendant further testified that she was not aware of the presence of broken bones or infection in the child's knees. Defendant maintained the child hurt her knees while playing on a swing and testified that she treated the child's knees by soaking them in Epsom salts and by bandaging them. Defendant maintained that the child cut her chin while playing on monkey bars and that the circular scar around the child's ankle was the result of being hurt while on a swing. Defendant acknowledged that the child did not see a doctor while living in Raleigh.

Defendant's husband, Charles Mapp, was called as a witness, at which time the court declared a mistrial as to him. The husband corroborated defendant's testimony that the child's injuries were suffered in accidents. Defendant's renewed motion for nonsuit was overruled.

Defendant appealed.

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

Hatch, Little, Bunn, Jones, Few & Berry, by E. Richard Jones, Jr., and McDaniel & Heidgerd, by C. Diederich Heidgerd, for defendant appellant.

HILL, Judge.

The defendant contends in her first assignment of error that the trial court erred in denying defendant's motion for nonsuit as to all charges against her. We disagree.

Upon a motion for nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State. All contradictions and discrepancies must be resolved in the State's favor, and it must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Yellorday*, 297 N.C. 574, 578, 256 S.E. 2d 205 (1979); *State v. Cutler*, 271 N.C. 379, 382, 156 S.E. 2d 679 (1967).

[1] The defendant was charged and convicted on three counts: murder in the second degree, child abuse, and child neglect. We deal first with the charge of murder in the second degree. Murder in the second degree is defined as ". . . the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Duboise*, 279 N.C. 73, 81, 181 S.E. 2d 393, 398 (1971). Defendant contends that the State has produced insufficient evidence to prove that the child actually died of anything other than natural causes.

Dr. Kaasa testified that the proximate cause of the child's death was ". . . the swallowing of a clot from bleeding in the mouth which lodged in her voice box and in her trachea . . . ." The obstruction blocked the flow of oxygen to the lungs, and the child suffocated. The doctor testified that a healthy person could have coughed up the clot.

The child was not healthy. There was extensive testimony regarding the extent of the child's injuries and testimony to the effect that many of the injuries could have only been caused by physical abuse. Open lacerations, depigmented areas, numerous broken bones, blood clots beneath the scalp, and blood poisoning were all discovered by Dr. Kaasa during his autopsy. "[T]he act of

the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is the natural result of his criminal act." *State v. Minton*, 234 N.C. 716, 722, 68 S.E. 2d 844 (1952). We find there was sufficient evidence that the child died of other than natural causes to withstand nonsuit.

Defendant contends there was no showing of malice. Malice does not necessarily mean an actual intent to take a human life. It may be inferred or implied as ". . . when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925). Thus, culpable negligence from which death proximately results can, under some circumstances, make the actor guilty of murder. *State v. Phelps*, 242 N.C. 540, 544, 89 S.E. 2d 132 (1955). The very extent and severity of the physical abuse in this case are of such magnitude that malice may be implied. *See State v. Vega*, 40 N.C. App. 326, 333, 253 S.E. 2d 94, *cert. denied* and *appeal dismissed* 297 N.C. 457 (1979).

The mere proof of culpable negligence, however, does not establish proximate cause. To hold a person criminally responsible for a killing, there must be evidence that the act constituting culpable negligence was a proximate cause of the death. *State v. Roop*, 255 N.C. 607, 610, 122 S.E. 2d 363 (1961). Defendant contends that the State failed to show that defendant's acts proximately cause the death.

Defendant argues that in cases previously before this Court in which the "battered child syndrome"—a sociological term which sums up the case *sub judice*—was addressed, there was direct evidence of physical abuse. In those cases, someone actually saw the defendants physically assault the abused child. *See State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973); *State v. Periman*, 32 N.C. App. 33, 230 S.E. 2d 802 (1977); *State v. Vega*, *supra*.

No such direct evidence is available in the case *sub judice*. Child abuse of the magnitude that caused this child's death is not the sort of act that is done openly. It is a surreptitious act. Hence, circumstantial evidence must be relied upon to prove the fact.

"When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty." (Citation omitted.) *State v. Cook*, 273 N.C. 377, 383, 160 S.E. 2d 49 (1968).

The State introduced evidence which showed that defendant's opportunity to work or be out of the house was limited because of the deceased child's mental retardation. The child was in defendant's custody during the whole day, every day. Although defendant's husband had access to the child also, there is evidence from the foster mother that the deceased child was scarred prior to the relationship between defendant and her husband, whom she married in 1975.

Based upon all the facts before the Court, there is sufficient evidence reasonably to infer defendant's guilt. A jury could find that the blood clot was caused by the culpable negligence or wilful acts of the defendant, and that further culpable negligence or wilful acts weakened the child so that the weakened state, combined with the clot, resulted in the death of the child. The charge of murder in the second degree was properly submitted to the jury.

[2] Defendant contends that her motion for nonsuit on the charge of child abuse should have been granted. The offense of child abuse arises when:

> 'Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.'

State v. Fredell, supra, at p. 244.

G.S. 14-318.2(a) provides for three separate offenses: "If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the

child, or (3) creates or allows to be created a substantial risk of physical injury." *Fredell* at 244.

The evidence clearly shows that defendant was the mother of the child and the child was less than 16 years of age. Dr. Ronald Kinney, a physician with a specialization in treating abused children, testified for the State. The doctor stated that the deceased child was the victim of the "battered child syndrome"; that the term meant that the child had suffered nonaccidental injuries; and that the injuries were caused by the child's custodian. The doctor based his opinion on the totality of evidence regarding the child's injuries. We find that this evidence, together with the circumstantial evidence of defendant's responsibility for the child's injuries, when taken in the light most favorable to the State, is sufficient to withstand the motion for nonsuit. *See State v. Wilkerson*, 295 N.C. 559, 569-71, 247 S.E. 2d 905 (1978).

[3] The offense of child neglect, as it existed at the time of the child's death, occurs when:

> (a) A parent, guardian, or other person having custody of a child, who omits to exercise reasonable diligence in the care, protection, or control of such child or who knowingly or wilfully permits such child to associate with vicious, immoral, or criminal persons, or to beg or solicit alms, or to be an habitual truant from school, or to enter any house of prostitution or assignation, or any place where gambling is carried on, or to enter any place which may be injurious to the morals, health, or general welfare of such child, and any such person or any other person who knowingly or wilfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or wilfully does any act to produce, promote, or contribute to, any condition of delinquency or neglect of such child shall be guilty of a misdemeanor.

G.S. 14-316.1.

The defendant admitted she was the mother of the deceased child. The child was under sixteen years of age. Failure "to exercise reasonable diligence in the care" of the child can be found by the defendant's admission that she "was not aware of any broken bones or infection" as well as her failure to seek medical treatment for the child's other injuries. The evidence is sufficient to withstand defendant's motion for judgment on this charge.

Defendant's first assignment of error is without merit and overruled.

[4] The defendant by her next assignment of error contends that the court erred in its instructions to the jury by inadequately and incorrectly explaining the doctrine of culpable negligence as it relates to the charge of murder in the second degree. A careful reading of the entire charge shows this assignment of error to be without merit.

Both involuntary manslaughter and murder in the second degree can involve an act of culpable negligence that proximately causes death. "Culpable negligence, standing alone, will support at most involuntary manslaughter. When . . . an act of culpable negligence also 'imports danger to another [and] is done so recklessly and wantonly as to manifest depravity of mind and disregard of human life,' it will support a conviction for second degree murder." (Citations omitted.) *State v. Wilkerson, supra*, at 582.

It is elementary that the distinction between manslaughter and murder in the second degree is malice. Therefore, culpable negligence will not support a murder charge unless there are sufficient facts to support a finding of malice. Malice may be implied from the acts of defendant. *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 366 (1954); *Vega, supra*, at 331-32.

Defendant contends, in effect, that there must be "culpable negligence plus" to support a conviction of murder in the second degree and that this must be made clear by the judge in his charge.

The trial judge in his charge to the jury on the elements of murder in the second degree stated that culpable negligence "is also sometimes synonymously called criminal negligence . . . ." Thereafter, the trial judge further instructed the jury that,

> The second element which the state must prove beyond a reasonable doubt is that an act of criminal negligence was a proximate cause of Margaret Catherine Spence's death . . . .

Defendant contends that the above language does not adequately cover the proposition of "culpable negligence plus"; that such instructions were so confusing that a new trial should be

given defendant. We do not agree that there must be two definitions of culpable negligence—one for involuntary manslaughter and one for murder in the second degree. The distinguishing element of the two offenses is the requirement of malice in murder in the second degree. The trial judge adequately covered this distinction in his charge, as follows:

> Now, I charge that for you to find the defendant guilty of second-degree murder, the State must prove two things beyond a reasonable doubt. First, that the defendant intentionally and with malice did commit an act of criminal culpable negligence which caused danger to Margaret Catherine Spence and which was so reckless or wantonly done as to indicate a total disregard for human life.
>
> * * * *
>
> Malice means hatred, ill will or spite. Also, any action evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind, regardless of social duty, deliberately bent on mischief.

The trial judge made it clear that culpable negligence evidencing malice must be found before a conviction for murder in the second degree could be had. Defendant's assignment of error is without merit and is overruled.

Next, the defendant contends the court erred in its instruction to the jury by inadequately and incorrectly explaining the doctrine of culpable negligence as it relates to involuntary manslaughter. The trial court charged the jury correctly, and this assignment of error is overruled.

Neither are we impressed with defendant's third assignment of error where it is argued that the trial court erred in entering judgment in the misdemeanor convictions for child neglect and child abuse on the ground that the superior court lacked jurisdiction. *State v. Vega, supra,* resolves the issue and expressly permits such joinder. *See* G.S. 15A-926.

[5] Defendant contends in her fourth assignment of error that error was committed by the trial judge when he entered judgment in the misdemeanor convictions for child neglect and child abuse for the reason that the charges merged into and became a

part of the charge of murder in the second degree. The elements of murder in the second degree and the elements of child abuse and child neglect are different.

A conviction for murder in the second degree does not require the victim to be a child under 16 years of age or that the person guilty of the murder be providing care to or supervision of such child. These elements are distinct and independent of those elements which constitute murder in the second degree.

In addition, subsection (b) of G.S. 14-318.2 states:

> The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a).

The General Assembly apparently did not intend child abuse to be a lesser included offense or to merge with any other offense. While the General Assembly cannot, by statute, repeal the double jeopardy provisions of the Constitution, in this situation the double jeopardy clause does not require merger.

The elements constituting child neglect do not appear in the murder offense either. The murderer does not have to be a parent, guardian, or other person standing in loco parentis to a child under 16 years of age, and does not have to fail to exercise reasonable diligence in the care and protection or control of such child.

It is true that the offense of murder in the case *sub judice* arose out of the parent-child relationship. It is not true, however, that the same acts which gave rise to the murder also gave rise to the child neglect and child abuse offenses. There is ample evidence that abuse and neglect occurred over many months. There is also ample evidence that there were many separate acts of child abuse or child neglect which by themselves were not the proximate cause of the child's death. The defendant's assignment of error is without merit and is overruled.

[6] Defendant further assigns as error the trial judge's admission into evidence of opinion testimony by medical expert Dr. Kaasa on the grounds that the doctor failed to state that his opinion was "satisfactory to himself" or based upon "a reasonable

degree of medical certainty." Dr. Kaasa had stated that in his opinion the linear scars, the ovoid scar and the depigmented areas on the child's back were evidence of an old injury.

We note first that the doctor had testified to the same effect earlier without objection. In short, there are many instances where Dr. Kaasa states that he is giving his opinion, both prior to and after the defendant's objection.

> The well established rule in this State is that 'when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost . . . .'

State v. Van Landingham, 283 N.C. 589, 603, 197 S.E. 2d 539 (1973). More importantly, though, we hold that Dr. Kaasa's testimony was competent. The doctor had been qualified as a medical expert, and he had conducted the autopsy. "Where an expert witness testifies as to facts based upon his personal knowledge, he may testify directly as to his opinion." (Citations omitted.) *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 326, 182 S.E. 2d 373 (1971).

We have examined defendant's remaining assignments of error and find them to be without merit.

No error.

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

STATE OF NORTH CAROLINA v. LAVERNE McNEIL SINCLAIR

No. 797SC809

(Filed 18 March 1980)

1. Forgery § 2.2; Criminal Law § 89.9— signing grandmother's name to savings account withdrawal slip—grandmother's prior inconsistent statement—insufficient evidence of forgery

Evidence that defendant withdrew funds from two savings accounts at a bank, that she signed her grandmother's name to the withdrawal slips, that the accounts were listed in the names of her grandparents, and that her grandmother was not aware at the time that defendant was withdrawing the funds

was insufficient to be submitted to the jury in a prosecution for forgery of withdrawal slips and uttering forged withdrawal slips, since affidavits by defendant's grandmother that "she never signed or authorized any other person to sign her name on said check . . ." were competent only for impeaching the grandmother's credibility; the grandmother repeatedly insisted at trial that she had given such authority to defendant; and once the affidavits were removed from consideration as substantive evidence, the State was left with no evidence to rebut the presumption that defendant possessed authority to sign the withdrawal slips in her grandmother's name.

2. Criminal Law § 25.2— plea of no contest—motion to withdraw—no evidentiary hearing required

The trial court did not err in denying defendant's motion to withdraw her plea of no contest to eight counts of forgery and eight counts of uttering made before entry of judgment on the plea, since defendant was not entitled to a hearing to determine if there was a factual basis for allowing the motion, as defendant raised no question of fact.

Judge CLARK dissenting.

APPEAL by defendant from *Brown, Judge*. Judgment entered 10 April 1979 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals on 29 January 1980.

In 14 bills of indictment proper in form, defendant was charged with 14 counts of forgery of savings account withdrawal slips and 14 counts of uttering the forged slips, in violation of G.S. §§ 14-119 and 14-120. Motion of the State to consolidate six of the cases for trial was allowed and, as to the charges of forgery and uttering in those cases, the State produced evidence tending to show the following:

Janet Pittman, a teller at Peoples Bank and Trust Company in Rocky Mount, described six occasions between 8 September and 6 October 1978 on which defendant came to the bank and filled out savings withdrawal slips for varying amounts of money on two accounts listed in the names of R. L. Alston or Alice Alston. On the first occasion, Pittman asked defendant for some identification, and defendant told her "that one of the other tellers in the bank knew her and after making an inquiry with the other teller", Pittman honored the withdrawal slip which defendant tore from a savings passbook she had brought to the bank and filled out at Pittman's window. She testified that defendant brought a passbook with her on three of the six occasions although it was not necessary to bring the book in order to make

a withdrawal. Defendant signed all the withdrawal slips as Alice Alston.

Mrs. Alston was called by the State and testified that she was the defendant's grandmother. She stated that she and her husband had opened two savings accounts at Peoples Bank and Trust in 1967; that the accounts had been opened for the defendant's use, "to be used as she needed it"; and that she had given the defendant permission to withdraw money from the accounts "whenever she needed money". Defendant had made one withdrawal sometime prior to the dates in question to help with college expenses, but Mrs. Alston was not aware that defendant was withdrawing money during September and October of 1978. However, she insisted that the money belonged to the defendant even though the accounts were in her and her husband's names, and that she had authorized defendant to "take the passbook and get it [the money]" anytime.

Mrs. Alston testified that she learned about the withdrawal when bank officials visited her on 10 October 1978. At that time they informed her that someone was withdrawing money from her account, but she was not told who had made the withdrawals. She said she became upset at the news and subsequently signed six affidavits to the following effect:

> [T]hat after an examination of said check she never signed or authorized any other person to sign her name or said check and that name appearing thereon was made without her knowledge or consent; that she has no knowledge as to the person or persons so doing and further says that she never received the whole or part of the proceeds thereof.

The contents of each affidavit were read to the jury, and each was admitted into evidence.

Mrs. Alston said she did not find out that her granddaughter was the person withdrawing the money until after her arrest on charges of forgery and uttering forged slips. Had she known that the defendant was the person who had made the withdrawals, she would not have signed the affidavits. On cross-examination, she added that she "did not think at all that Laverne [the defendant] might have drawn the money out of the bank and thought someone else had gotten the money." Although she had not notified

the bank that the defendant was authorized to withdraw money from the accounts, she had given defendant permission to sign her name "or do whatever she needed to in order to draw the money out."

Defendant offered no evidence. The jury returned verdicts of "Guilty of forgery" and "Guilty of uttering" in all six cases. Thereafter, defendant pleaded no contest as to the remaining eight counts of forgery and eight counts of uttering.

Prayer for judgment in all 14 cases was continued by the court until 9 April 1979 at which time defendant moved to withdraw her plea of no contest on the ground that "it was not freely and voluntarily made." The motion was denied, and on 10 April 1979 the court entered judgment sentencing defendant to ten years' imprisonment on the charges to which she pleaded no contest, and one year to run at the expiration of the ten years' sentence on the charges of which she was found guilty by the jury. She appealed.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

C. Ray Joyner for the defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of her motion for judgment as of nonsuit. Such a motion challenges the sufficiency of the State's evidence for submission to the jury and requires the court to determine whether there is any competent evidence to sustain the allegations of the indictment. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977); *State v. Murdock*, 225 N.C. 224, 34 S.E. 2d 69 (1945). In making that determination, the court must consider the evidence "in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence." *State v. Yellorday*, 297 N.C. 574, 578, 256 S.E. 2d 205, 209 (1979) [quoting from *State v. Cutler*, 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967)]. If there is substantial evidence that the offense charged in the bill of indictment, or a lesser offense included therein, has been committed, and that the defendant committed it, the case is properly for the jury. *State v. Burke*, 36 N.C. App. 577, 244 S.E. 2d 477 (1978).

In the case before us, then, the State must produce at the outset substantial evidence of every essential element of the offense of forgery before it can survive the motion for nonsuit. Those elements are defined by the common law in this State and constitute three in number:

> (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud.

State v. Phillips, 256 N.C. 445, 447, 124 S.E. 2d 146, 148 (1962). *See also State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). Moreover, if the purported maker of the instrument "is a real person and actually exists"—as in the case at bar—"the State is required to show not only that the signature in question is not genuine, but [that it] was made by defendant *without authority*." *State v. Phillips, supra* at 448, 124 S.E. 2d at 148. [Our emphasis.] This is so because it is presumed that one signing another's name to an instrument does so *with* authority. *Id. See also* 37 C.J.S., *Forgery* § 80 (1943). It follows that, if the State fails to produce evidence that the person signing the instrument did not have the authority to do so, then the State has failed to carry its burden, and the defendant's motion for judgment as of nonsuit must be allowed.

While there is substantial evidence in the case before us that the defendant withdrew funds from two savings accounts at Peoples Bank and Trust during September and October of 1978; that she signed her grandmother's name to the withdrawal slips; that the accounts were listed in the names of her grandmother and grandfather; and that her grandmother was not aware at the time that the defendant was withdrawing the funds, there remains the question of whether the defendant acted without authority. By signing the name of a real person, she is presumed to possess authority. Hence, the State must offer substantial substantive evidence that she, in fact, lacked permission. Disregarding for the moment the affidavits made by Mrs. Alston and given to bank officials wherein she stated that "she never signed or authorized any other person to sign her name or said check . . .", the State has offered no evidence that defendant's signing of the check was unauthorized. To the contrary, all the

evidence, even when the inconsistencies and discrepancies are resolved in the State's favor, supports only the inference that defendant was authorized to sign the withdrawal slips as she did. Her grandmother, the State's own witness, repeatedly insisted, on direct as well as cross-examination, that she had given such authority to her granddaughter, the defendant.

Therefore, whether the defendant's motion for judgment as of nonsuit should have been granted depends entirely on whether the affidavits given by Mrs. Alston were admissible as substantive evidence in the case. The writings clearly represent, at best, prior inconsistent statements of the witness. They are out-of-court declarations and, when offered to prove the truth of matters asserted therein, they constitute hearsay. C. McCormick, *Handbook of the Law of Evidence* § 251 (1972). Hearsay, unless it falls within one of the exceptions, is not admissible as substantive evidence. *Id.* None of the exceptions apply in this case, and the rule in this State respecting the use of a witness's prior inconsistent statements is inescapable:

> Inconsistent statements are not admissible as substantive evidence of the facts stated therein, nor do they have the effect of nullifying the testimony of the witness. They are simply for the consideration of the jury in determining the witness's credibility.

1 Stansbury's N.C. Evidence, *Witnesses* § 46 at 131 (Brandis rev. 1973). *Accord, State v. Neville*, 51 N.C. 424 (1859); *State v. Brannon*, 21 N.C. App. 464, 204 S.E. 2d 895 (1974), *cert. denied*, 423 U.S. 1086 (1976); *State v. Terry*, 13 N.C. App. 355, 185 S.E. 2d 426 (1971).

In *State v. Brannon, supra*, this Court held that a prior statement on which the State relied could not be considered in passing on the defendant's motion for nonsuit. The same is true of the case now before us. The inconsistent statements Mrs. Alston made in the affidavits were competent only for the purpose of impeaching her credibility. Thus, it is irrelevant whether the court actually allowed their admission as substantive evidence since, even assuming, *arguendo*, that the State could impeach its own witness in this instance, once the affidavits are removed from consideration as substantive evidence, the State is left with no evidence to rebut the presumption that defendant possessed

authority to sign the withdrawal slips in her grandmother's name. If she had authority, she cannot be guilty of forgery, and obviously she cannot be guilty of "uttering" forged instruments. Her motion for judgment as of nonsuit should have been allowed.

[2] Defendant also assigns as error the denial of her motion to withdraw her plea of no contest to eight counts of forgery and eight counts of uttering made before entry of judgment on the plea. She argues that "[a]t the very least [she] was entitled to an evidentiary hearing on her motion."

Initially, we agree with defendant that she has the right to appeal the denial of her motion. G.S. § 15A-1444 in pertinent part provides:

> (e) Except as provided in G.S. 15A-979, and *except when a motion to withdraw a plea of guilty or no contest has been denied*, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, . . .

[Our emphasis.] This case falls within the exception. Moreover, we note that defendant made her motion to withdraw her plea before judgment was entered and sentence imposed. *See State v. Dickens*, 299 N.C. 76, 261 S.E. 2d 183 (1980).

Addressing, then, the merits of her argument, we do not agree that she was entitled "at least" to a hearing to determine if there was a factual basis for allowing the motion. Defendant misconstrues the statute which requires only that the judge determine that there is a factual basis for the plea before accepting it.

> (c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel.

G.S. § 15A-1022. Defendant does not contend that the judge failed to determine if there was a factual basis for her plea when he accepted it on 22 February 1979, nor does she assert that no such basis existed. Rather, she would require the judge to conduct a hearing and make findings of fact on a motion to withdraw a plea in all cases. However, our Supreme Court has recently resolved this question conversely by holding that evidentiary hearings on a motion to withdraw a plea are mandatory "only when necessary to resolve questions of fact." *State v. Dickens, supra* at 84, 261 S.E. 2d at 188.

> [I]n most cases reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing.

Id. In *Dickens*, the defendant moved to withdraw his plea on the grounds that he thought a plea bargain had been struck before he entered his plea of guilty which would allow him to make restitution rather than serve a prison sentence. The Transcript of Plea in the record revealed that he had not answered the question as to whether he had discussed or entered into a plea bargain. Thus, the Court found that his allegations raised a question of fact which must be resolved at an evidentiary hearing.

But, in the present case, defendant has not raised a question of fact which cannot be answered by reference to the Transcript of Plea. She based her motion on her allegation that her plea was not freely and voluntarily made. Reference to the Transcript of Plea, however, confirms that she was asked, "Do you enter this plea of your own free will, understanding what you are doing?" She answered affirmatively. In our opinion, the judge resolved the issue of the voluntariness of her plea before he accepted it, and no new issue of fact was raised by her motion. Hence, the judge was able to dispose of her motion without conducting a hearing thereon. In such a case, the judge's ruling on the motion is discretionary and will not be disturbed in the absence of an abuse of his discretion. *State v. Crandall*, 225 N.C. 148, 33 S.E. 2d 861 (1945). Here, defendant has shown no such abuse in the denial of her motion.

We have carefully examined other assignments of error argued by defendant and find them to be moot and without merit.

The result is: With respect to cases numbered 78CRS7707, 78CRS7709, 78CRS7721, 78CRS7723, 78CRS7725, and 78CRS7729, wherein defendant pled not guilty to six counts of forgery and six counts of uttering, the judgment is reversed. With respect to cases numbered 78CRS7705, 78CRS7711, 78CRS7713, 78CRS7715, 78CRS7717, 78CRS7719, 78CRS7727, and 78CRS9767, wherein defendant entered a plea of no contest, the judgment is affirmed.

Reversed in part; affirmed in part.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

I agree with the majority that at trial the State failed to offer evidence sufficient to submit the charges to the jury, but I do not agree that there was a factual basis for the no contest pleas.

A judge may not accept a plea of no contest without first determining that there is a factual basis for the plea. N.C. Gen. Stat. 15A-1022(c). Defendant did not in the Transcript of Plea state orally or in writing that she was guilty of the charges. I find nothing in the record on appeal to support the finding in the court's Plea Adjudication that there was a factual basis for the no contest plea other than the evidence offered at the trial on the other six charges of forgery and uttering, and I agree with the majority decision that judgment of nonsuit (dismissal) should have been allowed.

In *State v. Dickens*, 299 N.C. 76, 261 S.E. 2d 183 (1980), the record on appeal contained "an abundance of information before the trial judge to constitute a factual basis for the pleas of guilty and to support their acceptance." I do not interpret *Dickens* as meaning that the court finding of a factual basis need not be supported.

Further, the evidence at trial on the six charges of forgery and uttering negates a factual basis since the evidence was not

sufficient to support guilty verdicts. All fourteen charges of forgery and uttering allege that defendant forged the name of Alice Alston, beginning 31 August 1978 and ending on 6 October 1978. The six charges at trial involve checks made and uttered between these two dates. The testimony of Alice Alston tended to show that she gave to defendant blanket authority to sign the checks.

In my opinion the pleas of no contest and the judgment based thereon should be vacated.

F. INDUSTRIES, INC., PLAINTIFF v. HARVEY A. COX, D/B/A TRANSPORT EQUIPMENT AND TRANSPORT SALES OF CHARLOTTE, INC., DEFENDANTS, AND VAN F. MILLER AND WIFE, BETTY E. MILLER, THIRD-PARTY DEFENDANTS

No. 7923SC699

(Filed 18 March 1980)

1. Contracts § 27.1— insufficiency of evidence to show definite contract

The trial court properly entered a directed verdict for defendant in plaintiff's action to recover damages for defendant's alleged breach of an oral contract to convey to plaintiff the "patent rights" for truck tractors purchased by plaintiff from defendant where the evidence showed that the agreement, if any, concerning the conveyance to plaintiff of "patent rights" was so general, vague and indefinite as to be incapable of ascertainment and enforcement, and the evidence also showed that plaintiff had to purchase six tractors in order to secure any rights whatsoever and that he purchased only three.

2. Contracts § 27.2— breach of contract—value of parts retained by opposing party

The trial court properly submitted to the jury issues as to plaintiff's breach of contract and the amount defendant was entitled to recover for the value of parts retained by plaintiff where there was evidence tending to show that plaintiff agreed to buy four trucks from defendant, that plaintiff was to receive spare parts at no extra cost if it purchased a minimum of four trucks, that plaintiff stopped payment on the check for the fourth truck and returned that truck to defendant, and that plaintiff refused either to return or pay for the spare parts it had received from defendant.

3. Contracts § 26.3— list and value of parts—competency

A list of spare truck parts delivered by defendant to plaintiff with the fair market value of each part as assigned by defendant was not inadmissible hearsay and was properly admitted by the court to demonstrate how defendant arrived at his opinion of the fair market value of all the parts.

4. Rules of Civil Procedure § 15.1— denial of motion to amend reply—no abuse of discretion

The trial court did not abuse its discretion in the denial of plaintiff's motion made at the end of its evidence to amend its reply to allege the statute of frauds as a defense to defendant's counterclaim. G.S. 1A-1, Rule 15.

5. Appeal and Error § 15— cross-assignments of error—failure to give notice of appeal

Defendant's cross-assignments of error relating to the granting of a directed verdict for the individual third-party defendants were not properly before the appellate court where defendant failed to give notice of appeal from the ruling of the court and the judgment entered thereon as required by Rule 3 of the N.C. Rules of Appellate Procedure.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 13 April 1979 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals on 7 February 1980.

This is an action on an alleged oral contract for the purchase and sale of Hendrickson "tractors" or over-the-road trucks. In a complaint filed 8 November 1978, plaintiff claimed that, through its principal officer and agent Van Miller, Jr., it contracted with the defendant Cox to purchase four such trucks at a price of $13,250.00 per truck, and that, upon purchasing two trucks, it would receive spare parts for and patent rights to the trucks at no additional cost. Plaintiff further alleged that it had received and paid for three trucks; that the fourth truck was in its possession; and that it had received a "certain quantity" of parts, but had not been furnished the patent rights. Failure of the defendant to "sign over" the patent rights, plaintiff contended, constituted a breach which had damaged it in the amount of $25,000.00, "the difference between the value of the trucks with accompanying patent rights and [their] value . . . without [such] rights under the contract."

Answering, the defendant Cox admitted that the plaintiff's agent Miller had in his possession at the time the complaint was filed four Hendrickson trucks and a large quantity of parts, but denied the existence of a contract as alleged in the complaint. Cox also filed a counterclaim against the plaintiff, F. Industries, and a claim against the third-party defendants Van and Betty Miller wherein he asserted that, in September 1978, he sold two of the trucks to the defendant Transport Sales of Charlotte, Inc.; that Transport Sales sold those vehicles to Miller on 20 September

and 27 September 1978; and that he then entered into an agreement with Miller which provided that, if Miller purchased two more trucks, Cox would give him the parts he still owned. Cox further alleged that Miller took possession of the third truck and a portion of the parts on 28 September 1978; that he took possession of the fourth truck and the remainder of the parts on 6 October 1978 and agreed at that time to purchase the last two trucks defendant owned; and that he [Cox] then agreed to assign to Miller "any rights he had under the Purchase Agreement dated January 11, 1977, from Ryder Truck Rentals, Inc.", the company from whom Cox had purchased the trucks, "and did so on the reverse side of the last page of said agreement." Thereafter, Miller stopped payment on the check he had given Cox for the fourth truck. He subsequently returned the truck, but refused to return any parts. Cox claimed damages in the amount of $50,830.00, which he alleged was the fair market value of the parts.

In response, the third-party defendants alleged that, in purchasing the trucks, Van Miller was acting at all times as the agent of the plaintiff, F. Industries. Plaintiff replied and in substance denied the allegations of the counterclaim.

Evidence developed at trial which is pertinent to the decision in this case will be discussed in the opinion to follow. At the close of the plaintiff's evidence, Judge Rousseau allowed the defendant's motion for a directed verdict as to plaintiff's claim. At the close of the defendant's evidence, he allowed the motion for a directed verdict in favor of the individual third-party defendants. With respect to the defendant's counterclaim, Judge Rousseau submitted the following issues to the jury which were answered by it as indicated:

1. Did the plaintiff breach his contract with the Defendant as alleged in the Answer?

ANSWER: Yes.

2. If so, what amount, if any, is the Defendant entitled to recover from the Plaintiff for:

a. Value of the parts?

ANSWER: $20,000.00.

b. Loss of use of vehicles?

ANSWER: 0.

c. Expenses to recover vehicles?

ANSWER: $50.00.

From judgement entered on the verdict, plaintiff appealed.

McElwee, Hall, McElwee & Cannon, by William C. Warden, Jr., for plaintiff appellant and for the third-party defendant appellees.

Sanders, London & Welling, by Charles M. Welling, for defendant appellees.

HEDRICK, Judge.

[1] Based on six exceptions duly noted, plaintiff argues that the court erred in directing a verdict for the defendant Cox as to plaintiff's claim and in refusing to direct a verdict for it as to defendant's counterclaim. These assignments of error present for our review the sufficiency of the evidence to show the existence of contractual terms as alleged in plaintiff's complaint. Plaintiff contends that its evidence establishes a contract entered into between its agent Miller and the defendant Cox which included, in addition to their agreement to buy and sell four Hendrickson trucks, a promise that the plaintiff would receive spare parts and "patent rights" to the trucks at no extra cost. Defendant concedes the existence of a contract with plaintiff to buy and sell the four trucks and the spare parts. He insists, however, that he promised to include the parts at no additional cost only if the plaintiff actually purchased four trucks. At no time, Cox contends, did the parties enter into an agreement respecting "patent rights." Moreover, he testified that he did not now own, nor had he ever owned, any such rights on the trucks. Thus, the first question we must answer is whether the plaintiff's evidence is sufficient to raise an issue of fact for the jury to determine if these parties contracted with respect to "patent rights." We agree with Judge Rousseau that it is not.

The contract at issue in this case was never reduced to a formal written instrument. At most, the record contains mere assertions by the plaintiff's agent Miller that he was supposed to

receive all the "paper work," by which he meant "all the patent rights that come with the Hendrickson tractor." It is impossible to decipher from Miller's testimony exactly what it was the parties allegedly intended the "patent rights" to cover, their extent or their value. For example, it appears from the record that the trucks were designed by one company (Ryder) and manufactured by another (Hendrickson). Some apparently were equipped with Cummins engines; others had the "Detroit engine." Presumably, various other parts which went into making up the whole of the Hendrickson trucks—such as the tires, the batteries, the mufflers—were manufactured by still other companies. Logic and common sense would thus suggest that a number of patents held by numerous individuals or entities would exist on a single truck. Surely plaintiff did not expect to acquire "all the patent rights that come with the Hendrickson tractor" by virtue of purchasing four of them from the defendant. Yet, he was unable at trial to delineate any more clearly what "rights" to the trucks he allegedly contracted to receive from Cox.

It is axiomatic that "[a] court cannot enforce a contract unless it can determine what it is." 1 Corbin, *Contracts* § 95 at 394 (1963); *accord*, 3 Strong's N.C. Index 3d, *Contracts* § 3 (1976). In order to constitute a valid and enforceable written or verbal agreement, the parties must express themselves in such terms that the court can ascertain to a reasonable degree of certainty what they intended by their agreement. In the instant case, the agreement, if any, respecting the conveyance to plaintiff of "patent rights" is so general, vague and indefinite as to be incapable of acertainment, much less enforcement.

Neither are we persuaded that plaintiff's evidence of the "value" of the "patent rights," in the form of opinion testimony by Miller, supplies adequate contours to the alleged contract to enable the jury to ascertain its substance. Hence, whether Judge Rousseau was correct in striking that testimony prior to ruling against the plaintiff on the defendant's motion for a directed verdict is of no consequence to our decision.

Plaintiff's case is weakened even more by one of its own exhibits. The defendant Cox testified that, after plaintiff had purchased the first three trucks, he and plaintiff's agent Miller discussed plaintiff's purchasing three more trucks. According to

Cox, he agreed during a meeting with Miller on 6 October 1978 to assign to Miller any rights in the trucks he had under his purchase agreement with Ryder Truck Rentals, Inc., and he made a notation to that effect on the reverse side of the purchase agreement. Plaintiff's Exhibit No. 14 is the purchase agreement between Ryder as seller and the defendant Cox as purchaser of "ten (10) vehicles and vehicle spare parts". On the back of the last page appears the following handwritten notation:

October 6, 1978

I Harvey A Cox will assign and delegate all my rights given in the agreement that this is written on pertaining to the Ryder designed, Hendrickson manufactured trucks to Van Miller Jr. These rights are not being sold, but assigned at no cost under the conditions that Mr. Miller purchase the other three tractors as agreed.

Harvey A Cox
Witness Jesse L. Moore

This memorandum, which Cox admits he wrote and signed, is the only concrete and unambiguous evidence in the record as to any "rights" Miller was to acquire in the trucks. The purchase agreement makes no mention of "patent rights." Moreover, the logical inference from this writing is that Miller had to purchase a total of six trucks in order to secure any rights whatsoever. He admits he bought only three. In our opinion, this evidence, coupled with the dearth of specific facts showing the existence of the alleged agreement respecting "patent rights," fully justifies and compels the entry of a directed verdict against the plaintiff on its claim. The evidence was plainly insufficient for the jury which would have been required to guess whether such an agreement was part of the contract actually made.

[2] To the contrary, the issues raised by the defendant's counterclaim were properly submitted to the jury for determination. Neither plaintiff nor defendant disputes the existence of an agreement between them to buy and sell Hendrickson trucks and spare parts. Their dispute arises from and revolves around the construction of Cox's promise to include the spare parts at no additional cost. That is, was the plaintiff obligated under their bargain to purchase four trucks before it was entitled to keep the

parts? Unlike the issue of "patent rights" where no agreement which can be interpreted has been shown to exist, the question raised by the evidence as to the parts clearly involves only a factual determination which essentially boils down to an issue of credibility. Given the admitted agreement to include the parts, it becomes the task of the fact-finder to decode the parties' intentions and, as in any other case, to decide which side it will believe. In answering "yes" to the first issue, the jury in this case, on credible evidence, found that the parties intended for plaintiff to receive the parts at no extra cost only if it purchased a minimum of four trucks. Hence, plaintiff's actions in stopping payment on the check for the fourth truck, returning that truck to defendant, and refusing to either return or pay for the parts constitute a breach and render the plaintiff liable in damages.

[3] We turn, then, to a consideration of plaintiff's third assignment of error whereby it argues that the court erred "in admitting into evidence a list of the parts and values of the parts [in its possession] compiled by the defendant." Plaintiff contends that the list constitutes inadmissible hearsay.

The list in question consists of an itemization of the parts delivered to Miller, who does not contend that he does not have possession of every item thereon, and a fair market value per item as assigned by Cox. Upon objection, plaintiff's counsel was allowed to examine Cox concerning the preparation of the list, and the following evidence was thereby elicited:

Q. Mr. Cox, when did you prepare that list?

A. This list was prepared from my records there in my office and given to Mr. Welling after the—this procedure was started.

Q. Was it prepared after the parts had already been delivered to Mr. Miller?

A. Yes, sir.

Q. Was it prepared from, partly from memory?

A. No, sir, it was prepared from my inventory.

Q. Where is that inventory?

A. In Orlando, Florida.

The list was allowed into evidence, and Cox was allowed to testify that, in his opinion, the total fair market value of the parts in Miller's possession was $50,830.00. In rebuttal, plaintiff was allowed to offer evidence that the total value of the parts was only $2,000.00. The jury found their value to be $20,000.00.

Obviously, the list is nothing more than an itemization of the parts sold and delivered by the defendant to the plaintiff. The fair market value attributed by defendant to each item merely demonstrates the manner in which defendant arrived at his opinion as to the fair market value of all the parts. Under the circumstances we find no error in the court's allowing the list into evidence.

[4] By assignment of error number 4, plaintiff argues that the court erred "in overruling the Motion of the plaintiff to amend its Reply" to assert the Statute of Frauds as a defense to the counterclaim. The motion was not made until the plaintiff had rested its case—*i.e.*, about halfway through the trial. In denying the motion, Judge Rousseau gave as his reason the lateness of it. We think it suffices to say that the allowance or disallowance of motions to amend pleadings is a matter committed to the broad discretion of the trial judge whose ruling thereon is not reviewable on appeal in the absence of a showing of abuse of that discretion. G.S. § 1A-1, Rule 15; *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588, *cert. denied*, 281 N.C. 758, 191 S.E. 2d 356 (1972). In our opinion, the plaintiff has failed to make such a showing under the circumstances of this case, and Judge Rousseau's ruling on the motion will not be disturbed.

Finally, plaintiff contends that the court erred in refusing to instruct the jury that the defendant's recovery on his counterclaim "would have to be lessened or reduced by the value of the tractor" which plaintiff returned to Cox. Plaintiff apparently argues that, at the time it purchased the fourth truck and before Miller stopped payment on the check for that truck, it had fully performed the conditions of the contract which would entitle it to receipt of the parts at no extra cost.

This argument is nonsensical at best. Plaintiff's rejection of the fourth truck constituted a breach of the contract terms, as determined by the jury, and, upon its breach, it was no longer entitled to performance by the defendant. The issue at that point

becomes a simple one of measuring the damages to which the non-breaching party is entitled for the breach. Therefore, plaintiff's further assertion that defendant has recovered more in damages than he would have under the contract misses the mark. Once plaintiff breached the agreement, defendant was entitled to the return of the parts or to their value in damages. Plaintiff having chosen to retain possession of the parts, the question of their value was properly submitted to the jury. The value of the truck which plaintiff returned to defendant is, we think, irrelevant to the determination of how much plaintiff owes defendant for the spare parts.

[5] Defendant Cox purports to bring forward and argue cross-assignments of error relating to the granting of a directed verdict in favor of the individual third-party defendants. However, he failed to give notice of appeal from the ruling of the court and judgment entered thereon as required by Rule 3 of the N.C. Rules of Appellate Procedure, and thus his assignments are not before this Court. Rule 10(d) of the Appellate Rules, which allows an appellee to cross-assign as error actions or omissions of the trial court and to argue such assignments without taking an appeal is not applicable in the present case for the reason that Rule 10(d), by its terms, applies solely to errors "which deprived the appellee of an alternative basis in law for supporting the judgment. . . ." Defendant does not argue, nor does it appear, that such is the case here.

Finally, it appears from the record and from the arguments of counsel before us that defendant has in his possession the certificate of title respecting ownership of the third truck. It is conceded by defendant that plaintiff, having purchased and fully paid for the vehicle, is now entitled to the document.

The result is: The judgment directing a verdict for the defendant as to the plaintiff's claim is affirmed. As to the defendant's counterclaim, we find no error.

Affirmed in part; no error in part.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA EX REL. RUFUS L. EDMISTEN, ATTORNEY GENERAL v. ZIM CHEMICAL COMPANY, INC., MELVIN TILLEM, PRESIDENT; THOMAS NOLAND, SALES MANAGER; JERRY WEASE, SALESMAN

No. 7910SC636

(Filed 18 March 1980)

1. **Unfair Competition § 1— failure properly to label antifreeze—misbranding—deceptive trade practice**

Defendant's failure properly to label drums of antifreeze constituted a misbranding under former G.S. 106-571(2), and such misbranding was a deceptive practice within the meaning of G.S. 75-1.1 as a matter of law.

2. **Unfair Competition § 1— deceptive acts in sale of antifreeze—restitution—delivery in S. C.—buyers who did not purchase directly from defendant**

In an action by the Attorney General to enjoin alleged deceptive acts and practices by defendant in the sale of purported antifreeze, the trial court did not err in ordering that defendant pay a restoration sum to a construction company which purchased purported antifreeze from defendant, although the antifreeze was actually shipped to South Carolina, where the invoice was mailed to the business address of the company in North Carolina. Nor did the court err in ordering defendant to pay restoration to four parties who bought antifreeze from two other companies that had purchased directly from defendant where the court ordered no restoration for the two direct purchasers from defendant. G.S. 75-15.1.

3. **Unfair Competition § 1— deceptive trade practices—restitution—return of worthless product unnecessary**

It was unnecessary for parties receiving restitution under G.S. 75-15.1 because of defendant's deceptive acts and practices in the sale of antifreeze first to return the drums of purported antifreeze to defendant where the record clearly showed that the antifreeze was useless and had no value.

4. **Interest § 2; Unfair Competition § 1— unfair trade practices—restitution—interest on judgment**

In an action by the Attorney General to enjoin defendant's deceptive acts and practices in the sale of antifreeze, interest on the court's judgment ordering defendant to make restoration payments to 33 customers was governed by G.S. 24-5 and should have been awarded only from the time of entry of the judgment, not from the date of filing of the complaint.

APPEAL by defendant Zim Chemical Company, Inc. from *Godwin, Judge*. Order signed 30 November 1978 and judgment signed 12 February 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 30 January 1980.

In 1974 Zim Chemical Company, Inc., a Georgia corporation, began selling in North Carolina what purported to be antifreeze. After being notified by William Cobb, the State Chemist with the North Carolina Department of Agriculture, that it had made sales without complying with N.C.G.S. 106-572, which required inspection and approval of the antifreeze before sale, Zim terminated all sales in North Carolina. The embargo placed by the North Carolina Department of Agriculture upon further sale of the antifreeze by Zim extended to Zim's customers, many of whom had purchased for resale.

In February 1975 the State of North Carolina filed a complaint against Zim, its president, its sales manager, and one of its salesmen, pursuant to Chapter 75 of the General Statutes, alleging that the antifreeze was sold without registration, that it was useless for its intended purpose, and that misrepresentations as to the quality of the antifreeze had been made by Zim's salesmen. The state alleged that these acts and practices were unfair and deceptive and in violation of N.C.G.S. 75-1.1. Zim denied the allegations of misrepresentation. Based on affidavits, discovery, stipulations, and other material, the trial court granted the state's motion for summary judgment on the issue of Zim's liability. A separate hearing was held to determine the measure of damages, after which the court entered judgment against Zim and the three individual defendants for $23,084.22 plus interest from the date the complaint was filed.

The three individual defendants subsequently moved that the judgment be set aside as to them, and Judge Godwin granted their motion. The state gave notice of appeal from the order setting aside the judgment as it applied to Melvin Tillem. The corporate defendant Zim Chemical appeals from both the entry of summary judgment against it on the liability issue and the monetary judgment. The state has abandoned its cross-appeal.

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

Bailey, Dixon, Wooten, McDonald & Fountain, by Kenneth Wooten, Jr., and Gary S. Parsons, for defendant Zim Chemical Company, Inc.

MARTIN (Harry C.), Judge.

Defendant Zim's first assignment of error is the trial court's granting the state's motion for summary judgment after finding that no genuine issue of material fact was in dispute as to Zim's liability. Zim argues that because it specifically denied the state's allegations of misrepresentation of the antifreeze and presented affidavits contradicting those offered by the state to support the allegations of misrepresentation, there is a genuine issue of material fact for trial. We find this argument unpersuasive.

It is unnecessary that we decide whether a genuine issue is presented as to whether Zim's sales personnel misrepresented the properties of the antifreeze to its customers by making statements as to its permanency, chemical makeup, or effectiveness in comparison to leading brands. It is an uncontroverted fact in this case that Zim failed to properly label the drums of antifreeze which it sold in North Carolina after purchase from a manufacturer.

Affidavits submitted by plaintiff to support its motion for summary judgment tend to establish this fact. Jerry Walker, a purchaser of fifteen drums of the antifreeze, stated in his affidavit: "The drums of antifreeze did not include labels setting out the formula or ingredients. Some of the drums contained a Zim Chemical Company shipping label and others did not contain a label. Some contained a sticker that stated ANTIFREEZE SOLUTION."

J. D. Turner, another purchaser from Zim, stated: "The containers did not indicate the chemical contents, but was labeled 'Antifreeze' with a Zim Chemical Company shipping label attached."

Affidavits offered by Zim do not contradict these assertions. Melvin Tillem, in the fall of 1974 vice-president of Zim and in charge of sales, stated in his affidavit: "Zim did not attempt to label the product, other than to perhaps place its own shipping label on it giving its name and address and any other label placed upon it would have been done by the manufacturer." In addition, plaintiff's second set of interrogatories served upon defendant contains the following question and response:

2. (a) Were there labels on the drums of antifreeze sold to North Carolina purchasers?

(b) If so, what information was contained on the label?

2. Yes. The defendants do not have in their possession a label such as was used on the drums of antifreeze purchased by customers in North Carolina. Essentially, however, the label would have revealed that the product was antifreeze and probably would have contained some language that it should be kept out of the reach of children as well as other standard cautionary language for hazardous materials. It would also show that the contents of the drums were 55 gallons.

[1] N.C.G.S. 106-571, which was in effect at the time of sale of the antifreeze, contained the following language:

Misbranding; what constitutes.—An antifreeze shall be deemed to be misbranded:

. . . .

(2) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, seller or distributor; and an accurate statement of quantity of the contents in terms of weight or measure, and they are not plainly and correctly stated on the outside of the package or container.

Upon application of this statute to the facts in this case, we find that defendant's failure to properly label the drums of antifreeze constitutes a misbranding. "Misbrand" is defined as "to brand falsely or in a misleading way." We think, therefore, and so hold that defendant's misbranding of the antifreeze, which is undisputed, is a deceptive practice within the meaning of N.C.G.S. 75-1.1 as a matter of law. On the issue of defendant's liability, there is no genuine issue of material fact and summary judgment for plaintiff was appropriate. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Defendant's first assignment of error is overruled.

Zim places great reliance on its good faith in this undertaking, contending that it is uncontradicted that Zim bought and sold what it believed to be good-quality antifreeze, that sales of the

product were halted immediately when Zim was informed the North Carolina inspection law had been violated, and that tests for quality were then conducted. Zim argues these facts "could scarcely be considered a breach of ethics or 'good faith' on the part of the Defendant, nor do they materially fall within the category of 'unfair or deceptive acts or practices.' "

We think that under the facts and circumstances of this case, the good faith argument by defendant is to no avail. Here, the failure to label the drums properly is statutorily *deemed* to be a misbranding, which we in turn declare to be deceptive as a matter of law.

[2] Zim makes two assignments of error relative to specific recipients of restoration sums under the court's order. We find no merit in these assignments of error.

The court awarded $807.75 to Geymont Construction Co. Zim argues that because the antifreeze sold to Geymont was actually shipped to Greer, South Carolina, the purchase was made outside North Carolina and is therefore not within the purview of N.C.G.S. 75-1.1(b) as then written. The record shows that the invoice to Geymont was mailed to Vale, North Carolina, the business address of the company. Moreover, as the state correctly points out, the parties had stipulated "[t]hat the particulars of the sales of antifreeze which are the subject of this Complaint are set out in Appendix A." Geymont Construction Co. is included in the list of buyers from Zim set out in Appendix A. The trial court did not err in ordering restoration to Geymont Construction Co.

The court also awarded $209 to each of four parties included in the list of thirty-three purchasers from Zim. Zim argues that these four bought antifreeze not directly from it, but indirectly from two other companies that had purchased directly from Zim. Its contention is that because Zim had no contractual agreements with the four parties and received no money or property from them, restoration ordered by the court to them was not within the purview of N.C.G.S. 75-15.1 and therefore error.

We agree with the state's position that the court properly awarded restitution to these indirect purchasers from Zim. The court found as a fact that Zim sold, directly or indirectly, to thirty-three named purchasers. The state had not sought restora-

tion for two direct purchasers, Pilot Freight Carriers and Strong Tire Co. These two companies had resold the antifreeze at a profit to four subsequent buyers. The court in effect transferred the restoration due Pilot and Strong to their subsequent buyers, who had suffered actual losses. Defendant's assignment of error is overruled.

[3] Zim further assigns as error the court's "ordering the defendant Zim to return the money received under the agreement without first finding as a fact that the purchasers had made a tender of restoration of defendant's consideration or without including it as part of the order upon final judgment." We agree, however, with the state's counterargument that it was unnecessary that the thirty-three parties receiving restitution be ordered to return the drums of useless antifreeze to Zim. The record clearly shows that the antifreeze had no value. "The plaintiff need not tender back what he got in the transaction if it is utterly worthless, ..." Dobbs, Handbook on the Law of Remedies 295 (1973). This assignment of error is also overruled.

[4] Finally, Zim assigns as error the court's awarding interest from the date of filing of the complaint. It argues that interest should have been awarded from the time of entry of judgment. The two relevant applicable dates are 26 February 1975 and 12 February 1979, a difference of four years. We think Zim must prevail on this assignment of error.

Although it cannot be denied that Zim contracted with its individual purchasers for the sales of antifreeze, this action was not brought as a suit upon a contract for damages sustained as a result of a breach. The Attorney General of North Carolina initiated the action pursuant to N.C.G.S. 75-15. Under the provisions of N.C.G.S. 75-15.1, the presiding judge is authorized to order restoration of money upon a final determination of the cause. This is precisely what was done in this case. This statute, however, does not expressly provide for an interest award.

We think that this judgment is covered by the second sentence of N.C.G.S. 24-5:

> In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the

judgment and decree of the court shall be rendered according to this section.

The first sentence of N.C.G.S. 24-5, to which the phrase "in like manner" in the second sentence refers, contains the provision that "the principal sum due on all such contracts shall bear interest *from the time of rendering judgment thereon.*" (Emphasis added.) Although in construing this provision the rule in North Carolina has been that interest should be allowed from the date of breach, this rule is applicable only when the action is one for breach of contract. *General Metals v. Manufacturing Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963). Because the case *sub judice* was not brought as a breach of contract action, this rule does not apply and interest should have been awarded from the time of entry of judgment. The court erred in awarding interest from the date of filing of the complaint.

Affirmed in part. Remanded to the Superior Court of Wake County for modification of the interest award.

Chief Judge MORRIS and Judge HILL concur.

BLAINE O'BRIEN, JR., ADMINISTRATOR OF THE ESTATE OF ALBERT M. O'BRIEN, DECEASED v. LARRY J. REECE AND CENTRAL CAROLINA BANK & TRUST COMPANY

No. 799DC388

(Filed 18 March 1980)

1. Banks and Banking § 4— certificate of deposit—signature card—no express right of survivorship

A signature card signed by depositors did not comply with G.S. 41-2.1(a) where the card did not expressly provide for the right of survivorship in the certificate of deposit in that there was no indication in the space provided on the signature card that gave effect to the survivorship provision.

2. Banks and Banking § 4— certificate of deposit—no right of survivorship

There was no merit to defendant's contention that a certificate of deposit itself constituted compliance with G.S. 41-2.1(a) since the certificate did not contain the signatures of the depositors and thus did not amount to a signed writing as contemplated by the statute; the provision of the certificate, "Payable to said depositor, or, if more than one, to either or any of said

depositors or the survivors or survivor," was made part of the certificate pursuant to G.S. 53-146, was for the protection of the bank only, and, absent any other evidence, was not dispositive as to the ownership of funds; and the use of the conjunction "or" in the certificate did not establish the right of survivorship but merely created an agency for the one other than the depositor to withdraw funds, such agency terminating at depositor's death.

APPEAL by defendant from *Allen (C. W., Jr.), Judge*. Judgment entered 3 January 1979 in District Court, GRANVILLE County. Heard in the Court of Appeals 3 December 1979.

Plaintiff, administrator of the estate of Albert M. O'Brien, intestate, seeks a declaratory judgment to determine the disposition of proceeds from a certificate of deposit held by intestate at his death. On 28 October 1975, intestate deposited $5,000 in the Central Carolina Bank & Trust Company (Central) in Oxford, North Carolina, and received a Golden Certificate of Deposit for the same amount. The certificate of deposit was issued in the name of "Albert M. O'Brien or Larry J. Reece," and remained in intestate's possession until his death on 10 January 1978. A signature card issued by Central on 28 October 1975 contained the signatures of both persons. The signature card provided spaces for indicating by checkmark the type of account being opened, and in this case the card was checked "SAVINGS". There were also spaces for indicating by checkmark how the account was to be held, whether individual, joint, fiduciary, trade name, association, partnership or corporation. None of these spaces was checked.

During the administration of intestate's estate, plaintiff presented the certificate of deposit to Central and requested that Central redeem the certificate of deposit and pay the proceeds to intestate's estate for disbursement as a general asset of the estate. Central declined to redeem the certificate of deposit on the ground that it could not do so without the endorsement of defendant Reece, whose name appeared on the certificate along with that of intestate.

In his complaint, plaintiff prayed that the court award the proceeds of the certificate of deposit to intestate's estate and that it determine defendant to be entitled to no portion of the funds represented by the certificate of deposit. Defendant Reece answered and averred that the certificate of deposit was issued

"to Albert M. O'Brien or Larry J. Reece as joint owners thereof with the right of survivorship," and alleged the existence of a previous agreement executed pursuant to G.S. 41-2.1 creating such right of survivorship.

At trial, plaintiff presented Mr. James I. Carey, bank manager of Central in Oxford, North Carolina, who testified that intestate purchased the certificate of deposit with a portion of proceeds he had obtained by inheritance. Carey testified further that the bank "had several different styles of certificates," but that bank records showed "that this certificate was a survivorship account." He testified, however, that it is impossible "to determine from the information on the signature card whether it was a joint [account] or not [sic] because our clerk inadvertently failed to check off the joint block." Carey stated further that it was the general policy of bank employees to use the conjunction "or" when opening a survivorship account.

Defendant presented his wife, Linda Reece, who testified that on 28 October 1975, Albert M. O'Brien told her he "had put $2500.00 in a certificate in Larry's [defendant's] name and $5,000.00 in a certificate in his and Larry Reece's name and at his death for him [defendant] to go and get the certificate and not to say anything to anybody and if there wasn't enough money in his estate to pay his burial expenses to pay his burial expenses out of it and what was left for him to keep." Another witness testified that intestate intended "to take care of Larry because he had been so good to him." Plaintiff presented rebuttal evidence tending to show that in May of 1976, intestate desired to go to the bank and make sure his money was still there, and that he was unaware at the time that Larry Reece could "sign checks on his account and get his Certificate out."

On hearing, the trial court made various findings of fact which, in pertinent part, follow:

> That the signature card is the only paper writing signed by the parties relative to the $5,000.00 certificate of deposit, and said paper writing is silent as to whether the certificate of deposit "SAVINGS ACCOUNT" was an individual, joint, fiduciary, trade name, association, partnership or corporation account.

The trial court then made the following conclusions of law:

> 1. That there exists no written agreement signed by the parties expressly providing for the right of survivorship regarding the $5,000.00 certificate of deposit as required by NCGS 41-2.1.
>
> 2. That there was no gift of the $5,000.00 certificate of deposit from Albert M. O'Brien to Larry J. Reece.
>
> 3. That the $5,000.00 certificate of deposit was subject to withdrawal by either of the parties prior to the death of one of the parties. That upon the death of Albert M. O'Brien, he being the sole owner of the funds initially deposited in said certificate, any and all rights of Larry J. Reece to receive the proceeds of said certificate terminated.
>
> 4. That upon the death of Albert M. O'Brien, the $5,000.00 certificate of deposit and proceeds therefrom became the sole and absolute property of the estate of the deceased to be administered therein as a general asset.

The trial court thereupon ordered Central to pay to intestate's estate $5,000.00 upon presentation of the certificate of deposit. Defendant Reece appeals from the court's findings of fact and conclusions of law, and the judgment entered thereon.

Royster, Royster & Cross, by T. S. Royster, Jr., for plaintiff appellee.

Watkins, Finch & Hopper, by Daniel F. Finch, for defendant appellant Reece.

MORRIS, Chief Judge.

The right of survivorship as a legal incident of joint tenancy, with a few exceptions, has been abolished in North Carolina. G.S. 41-2; *Vettori v. Fay*, 262 N.C. 481, 137 S.E. 2d 810 (1964). Although the common law deemed valid, as an exception to this rule, oral as well as written contracts making the rights of parties dependent on survivorship, *Jones v. Waldroup*, 217 N.C. 178, 7 S.E. 2d 366 (1940); *Taylor v. Smith*, 116 N.C. 531, 21 S.E. 202 (1895), the General Assembly has statutorily required the parties to sign a written agreement expressly providing for the right of survivor-

ship. G.S. 41-2.1(a). Specifically applicable to joint accounts opened with banking institutions, G.S. 41-2.1(a) provides:

> A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

The question before this Court is then whether there is a writing sufficient to create the right of survivorship in the savings account evidenced by the certificate of deposit in the name of Albert M. O'Brien and Larry J. Reece.

Defendant argues in his brief that the writing requirement set forth in G.S. 41-2.1(a) is satisfied in the instant case by the language appearing on the certificate of deposit and the certificate signature card. On the certificate of deposit there is the following language: "Payable to said depositor, or, if more than one, to either or any of said depositors or the survivors or survivor." There appears on the face of the certificate signature card, signed by both plaintiff's intestate and defendant, the following statement:

> Assent is hereby made to the terms and conditions printed on the reverse of this card and in the case of a savings account, to the terms and conditions printed in the Savings book issued with the account.

On the reverse side of the signature card, the following appears:

> DEPOSITOR AGREES AS FOLLOWS AND THE BANK ACCEPTS BUSINESS ON SUCH CONDITIONS ONLY:
>
> . . .
>
> 12. When indicated on the reverse of this card that the account is a JOINT account, we, the parties whose signatures appear on the reverse of this card, agree that all sums deposited at any time, including sums deposited prior to the date of this card, in the Central Carolina Bank & Trust Company in the joint account of the signers of this card, shall be held by us as co-owners with the right of survivorship,

> regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account. This agreement is governed by the provisions of Section 41-2.2 of the General Statutes of North Carolina.

It is clear that the signature card and the certificate of deposit refer to each other in that each document lists the identical account number. (We express no opinion as to the applicability of G.S. 41-2.2 appearing on the reverse side of the signature card, as that section deals with joint ownership of corporate stock and investment securities.)

Defendant Reece takes the position that although the signature card does not indicate on its face whether the account is "joint", the conjunction "or" appearing on the signature card contemplates the right of survivorship and brings into effect paragraph 12 on the reverse side. Alternatively, Reece argues that the language on the certificate of deposit itself constitutes a "separate agreement" as required by G.S. 41-2.1(a), and when read in conjunction with the signature card, shows an intent to create a right of survivorship on the part of O'Brien and Reece.

Although G.S. 41-2.1(a), as it applies to savings accounts opened by two or more persons other than husband and wife, has been in effect since 1963, few decisions have considered the type of writing required by that section. In one case, *Moore v. Galloway*, 35 N.C. App. 394, 241 S.E. 2d 386 (1978), this court decided whether a bank account held in the name of two persons was a joint account with the right of survivorship. The trial court had considered oral testimony as to the intent of the depositors as well as the signature card issued for the account, and held that the account included the incident of survivorship. We affirmed that ruling, concluding that the signature card required that result. The Court found that the language of the joint account was virtually identical to that of G.S. 41-2.1(g) which provides:

> A deposit account under subsection (a) of this section may be established by a written agreement in substantially the following form:

> "We, the undersigned, hereby agree that all sums deposited at any time, including sums deposited prior to this date, in the ..... (name of institution) in the joint account of the undersigned, shall be held by us as co-owners with the right of survivorship, regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account. This agreement is governed by the provisions of § 41-2.1 of the General Statutes of North Carolina. . . ."

Even without the oral testimony submitted in that case, the language on the signature card was deemed by the court as creating the incident of survivorship.

Similarly, in *Harden v. First Union National Bank*, 28 N.C. App. 75, 220 S.E. 2d 136 (1975), this Court construed language which was alleged to constitute a joint bank account with the right of survivorship. The agreement in question provided as follows:

> We agree and declare that all funds now, or hereafter deposited in this account are and shall be our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by or upon the order of either of us or the survivor.
>
> It is especially agreed that withdrawal of the funds by the survivor shall be binding upon us and upon heirs, next of kin, legatees, assigns, and personal representatives.

28 N.C. App. at 76, 220 S.E. 2d at 137. We held that this language satisfied the requirements of G.S. 41-2.1(a) for the establishment of joint bank accounts with the right of survivorship.

[1] From these decisions, it is clear that the thrust of our inquiry should be directed toward an interpretation of the signature card signed by the depositors. The signature card is im-

portant because it "constitutes the contract between the depositor of money, and the bank in which it is deposited, and it controls the terms and disposition of the account." *Colley v. Cox*, 209 Va. 811, 814, 167 S.E. 2d 317, 319 (1969). *See also Campbell v. Campbell*, 211 Va. 31, 175 S.E. 2d 243 (1970); *Robbins v. Grimes*, 211 Va. 97, 175 S.E. 2d 246 (1970). In the present case, the language found in paragraph 12 on the reverse side of the signature card is substantially the same as that approved by the foregoing decisions and G.S. 41-2.1(g). However, as stated in that paragraph, that provision is only applicable when it is "indicated on the reverse" of the card that the account is a "JOINT" account. We find no indication in the space provided on the signature card that gives effect to the survivorship provision. We must conclude, therefore, that the signature card does not expressly provide for the right of survivorship in the certificate of deposit. Contrary to defendant's assertion, in light of the specific directions on the signature card, we cannot overlook the failure to indicate that the savings account was to be joint as inadvertent. The signature card does not comply with G.S. 41-2.1(a).

[2] Defendant's contention that the certificate of deposit itself constitutes compliance with G.S. 41-2.1(a) is equally without merit. In this regard, we note the trial court's finding of fact that "the signature card is the only paper writing signed by the parties relative to the $5,000.00 certificate of deposit." Indeed, the certificate of deposit does not contain the signatures of Albert M. O'Brien or Larry J. Reece. Thus, the certificate is not a signed writing as contemplated by the statute.

Defendant, nevertheless, relies on other provisions in the certificate of deposit to support his contention that the certificate evidences an intent to create the right of survivorship. There appears on the certificate the provision: "Payable to said depositor, or, if more than óne, to either or any of said depositors or the survivors or survivor." However, it is apparent that this provision was made a part of the certificate pursuant to G.S. 53-146, which provides that a bank may safely pay either of the two persons, regardless of whether the other is alive, when the deposit is made payable to either, or to either or the survivor. This statute is for the protection of the bank only, and absent any other evidence, is not dispositive as to the ownership of funds. Defendant also contends that the use of the conjunction "or" in the certificate in-

dicates an intent to establish the right of survivorship. Where one deposits money in an account in the name of himself "or" another, the term "or", absent evidence of a separate agreement or a gift, merely creates an agency in the other person to withdraw such funds, and upon the depositor's death the agency terminates and the funds become a part of the depositor's estate. *Hall v. Hall*, 235 N.C. 711, 71 S.E. 2d 471 (1952); *Nannie v. Pollard*, 205 N.C. 362, 171 S.E. 341 (1933). Thus, in this case, nothing in the certificate of deposit serves to comply with G.S. 41-2.1(a) requiring a signed writing that expressly provides for the right of survivorship.

The trial court's findings of fact are supported by the evidence and materials presented, and those findings are, therefore, conclusive on appeal. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). Since we also find the court's conclusions of law to be supported by its findings of fact, the judgment must be

Affirmed.

Judges PARKER and HILL concur.

MODERN GLOBE, INC. v. EDWARD J. SPELLMAN

No. 7923SC418

(Filed 18 March 1980)

Constitutional Law § 24.7; Process § 9.1— nonresident individual in another state —insufficient contacts with N.C.—no personal jurisdiction

Neither the parties' contract nor any activities by defendant provided sufficient minimum contacts with this State so as to give the trial court personal jurisdiction over defendant where the contract in question was entered into outside N.C.; the contract was governed by the law of another state; there was no provision in the contract requiring defendant to perform services within N.C.; defendant performed all services under the contract outside N.C.; and for the life of the contract defendant had not been in N.C. for any purpose.

APPEAL by plaintiff from *Rousseau, Judge*. Judgment entered 16 March 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 5 December 1979.

Plaintiff filed this action for declaratory judgment seeking to have terminated its rights and duties with respect to a contract it entered into with defendant on 11 February 1970. The contract provided that defendant "shall render such consulting and advisory services as may from time to time be requested of him by [plaintiff] Corporation, consistent with the type of services he rendered during his prior employment. . . ." The contract further provided that, although plaintiff's home office and two manufacturing plants were located in North Carolina, defendant was not required to live in North Carolina. As part of his services defendant agreed that during the life of the contract he would reveal to plaintiff's board of directors "all matters coming to his attention pertaining to the business or interest of Corporation." As partial compensation plaintiff maintained an $100,000 life insurance policy on defendant, which was subsequently incorporated on 29 October 1970 into a trust agreement set up with The Northwestern Bank in North Wilkesboro, North Carolina.

On 1 March 1979, defendant moved pursuant to G.S. 1-75.4 and G.S. 1A-1, Rule 12(b)(2) to dismiss the action on the ground that the court lacked jurisdiction over defendant's person. Defendant's motion alleged that plaintiff's action involved "the construction of a contract under the terms of which the defendant is to perform services for the plaintiff." The motion further stated that "defendant is a resident of the State of Connecticut and all services rendered hereunder by the defendant to the plaintiff were rendered in the State of New York and no services were rendered by the defendant to the plaintiff within the State of North Carolina." Defendant, therefore, concluded that the "service of summons upon the defendant was void for the reason that the defendant was beyond the jurisdiction of this Court."

Defendant filed an affidavit dated 5 March 1979 in support of his motion to dismiss, wherein he swore the following:

> Under the terms of this contract I agreed to render certain services to Modern Globe, Inc. from February 16, 1970, until July 31, 1992. My services were to be that of a general advisor and consultant to the management of the plaintiff or any of its subsidiaries and affiliates on all matters pertaining to the business of the corporation. This contract was entered into in the State of New York. No reference was made in the

contract to my rendering services within the State of North Carolina. The services rendered by me to Modern Globe, Inc. under this contract have consisted primarily of advice and consultation regarding the history and background of the corporation. Continually from the time of the execution of this contract, the services rendered by me thereunder were rendered outside the State of North Carolina and were not, at any time, rendered in the State of North Carolina. There were two occasions, in an eight or nine month period, while placing long distance calls to the plaintiff on other matters that I rendered certain advice and consultation during the course of these calls. These calls were placed outside the State of North Carolina and at no time did I come to the State of North Carolina for the purpose of rendering any services under the contract. I am not engaged in any activity within the State of North Carolina and was in the State of Connecticut when I received this summons and complaint in this suit.

In a verified response to defendant's motion to dismiss, plaintiff stated that it had properly served process on defendant pursuant to G.S. 1A-1, Rule 4(j)(9)(b), as evidenced by the registry receipt attached to the motion. Responding to defendant's contention that he performed no services pursuant to the contract in North Carolina, plaintiff averred that "[s]ince all manufacturing facilities of the plaintiff are physically located in the State of North Carolina, and since the management personnel of the corporation are located in the State of North Carolina, any advice or consultation required of the defendant under his February 11, 1970 Agreement would necessarily require the defendant to perform services for the plaintiff within the State of North Carolina." Plaintiff stated that defendant's agreement to perform services within North Carolina is evidenced by the contract provision that defendant would not be required to live in the vicinity of North Wilkesboro, North Carolina. Plaintiff stated further that defendant had contact with North Carolina in that the life insurance policy under which he was insured was handled by Northwestern Bank, and defendant's monthly compensation checks were drawn on the same bank. Plaintiff concluded that it would be impossible for defendant to fulfill the contract terms without coming into contact with plaintiff's physical location in North Carolina.

On hearing, the trial court made findings of fact which were substantially similar to those facts alleged in defendant's affidavit, including the following:

> The contract is silent as to where the duties are to be performed and specifically provides that the defendant is not required to live in the vicinity of New York, New York, or North Wilkesboro, North Carolina. The contract has been in effect for more than nine (9) years and the defendant has not at any time during this period been to the State of North Carolina or rendered any services to the plaintiff within the State of North Carolina. The only services rendered by the defendant to the plaintiff under the contract were rendered outside of the State of North Carolina and the contract itself was entered into outside the State of North Carolina. The contract contains no reference to the defendant rendering services within the State of North Carolina. Defendant has called to the plaintiff's office in the State of North Carolina on two occasions but these were long distance calls placed by the defendant outside the State of North Carolina. Any payments made by the plaintiff to the defendant under the contract cannot be considered as services performed by the defendant within the State of North Carolina.

The court then made the following conclusions of law:

> (1) The contract which is the subject of this action does not provide that the defendant, who is a nonresident of this state, is to perform any services within the State of North Carolina.
>
> (2) The services rendered by the defendant to the plaintiff under this contract have been performed by the defendant outside the State of North Carolina and no services have been performed by the defendant under this contract within the State of North Carolina.
>
> (3) The minimum contacts test established by the Supreme Court of the United States in *International Shoe v. Washington*, 326 US 310 have not been met in this case and the defendant has not established sufficient minimum contacts within the State of North Carolina to be subject to the jurisdiction of this Court.

(4) The purported service of summons upon the defendant within the State of Connecticut is not sufficient to subject the defendant to the jurisdiction of this Court.

Plaintiff thereafter appealed pursuant to G.S. 1-277(b).

McElwee, Hall, McElwee & Cannon, by W. H. McElwee, Wm. H. McElwee III, and William C. Warden, Jr., for plaintiff appellant.

E. James Moore for defendant appellee.

MORRIS, Chief Judge.

The sole question posed for decision is whether the trial court acquired personal jurisdiction over defendant pursuant to G.S. 1-75.4(5) and Rule 4(j) of the North Carolina Rules of Civil Procedure. G.S. 1-75.4 provides, in pertinent part, as follows:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> (a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff. . . .

G.S. 1A-1, Rule 4(j), prescribes the manner of service of process in any action where the State has acquired personal jurisdiction by G.S. 1-75.4. The manner of service of process is not disputed.

In order to exercise jurisdiction over a nonresident defendant under these sections, a court must have proper statutory authorization, and its exercise of such jurisdiction must comport with the requirements of due process. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979); *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). We must, therefore, determine whether personal jurisdiction may

be exercised over defendant on the basis of the contract between the parties in this case.

With respect to statutory authorization, we recognize that the provisions of G.S. 1-75.4, commonly referred to as the "long-arm" statute, are to be liberally construed in favor of finding personal jurisdiction. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973); *Telerent Leasing Corp. v. Equity Assocs., Inc.*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). This section is only part of a broad legislative attempt to assert personal jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution. *Dillon v. Numismatic Funding Corp., supra.* However, in order for G.S. 1-75.4(5)(a) to apply to the contract under consideration, the contract must embody "a promise, made anywhere to the plaintiff" by the defendant "to perform services within this State." Here, the contract required that defendant perform certain consulting services, and in fact defendant did perform such services on two occasions via long distance telephone conversation. However, the contract is silent as to whether those services were to be performed in North Carolina. We need not determine whether the contract is in accord with G.S. 1-75.4(5)(a), since we hold that even if the statute is satisfied here, due process is not.

"[D]ue process, and not the language of the statute, is the ultimate test of 'long-arm' jurisdiction over a nonresident. . . ." *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 706, 208 S.E. 2d 676, 680 (1974). The due process doctrine requires that in order to subject a nonresident defendant to a judgment *in personam*, he must have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158 (1945); *United Buying Group, Inc. v. Coleman, supra; Dillon v. Numismatic Funding Corp., supra; Telerent Leasing Corp. v. Equity Assocs., Inc., supra.* In determining whether there are sufficient minimum contacts to invoke *in personam* jurisdiction, the interests of and fairness to both plaintiff and defendant must be carefully weighed and considered. *Dillon v. Numismatic Funding Corp., supra.* We find language from *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E. 2d 492, 497 (1963), pertinent:

> Whether the type of activity conducted [by defendant] within the State is adequate to satisfy the requirements [of due process] depends upon the facts of the particular case. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445, 96 L.Ed. 485, 492. It seems . . . that the question cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. In the application of this flexible test, a relevant inquiry is whether defendant engaged in some act or conduct by which [he] may be said to have invoked the benefits and protections of the law of the forum. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298; *International Shoe Co. v. Washington, supra*, U.S. p. 319, L.Ed. p. 104.

See also Parris v. Garner Commercial Disposal, Inc., 40 N.C. App. 282, 253 S.E. 2d 29, *cert. denied and appeal dismissed*, 297 N.C. 455, 256 S.E. 2d 808 (1979). Absent such purposeful activity by defendant in the forum State, there can be no contact sufficient to justify personal jurisdiction over defendant. *United Buying Group, Inc. v. Coleman, supra.*

This lawsuit revolves around defendant's alleged connection with North Carolina. It is well settled that a single contract can provide the basis for the exercise of jurisdiction over a nonresident defendant. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 2 L.Ed. 2d 223, 226, 78 S.Ct. 199, 201 (1957) (Where the Court said: "It is sufficient for purposes of due process that the suit [is] based on a contract which [has] substantial connection with [the forum] State."); *Chadbourn, Inc. v. Katz, supra; Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E. 2d 39 (1977). However, it remains essential that "there be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State. . . ." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958). In our opinion, neither the contract in dispute nor any activities by defendant provide sufficient minimum contacts with this State so as to satisfy the requirements of due process. The findings of fact make it clear that the contract was entered into outside of North Carolina; that the contract is governed by the law of another state; that there is no provision in the contract requiring defendant to perform services within North Carolina; that defendant has performed all services under the contract outside

of North Carolina; and that for the life of the contract defendant has not been in this State for any purpose. These findings are supported by competent evidence and are, therefore, conclusive on appeal. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E. 2d 784 (1970). Therefore, defendant's connection with the State of North Carolina is far too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon him the "burden and inconvenience" of defense in North Carolina. *See Kulko v. California Superior Court*, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690, *rehearing denied*, 438 U.S. 908, 57 L.Ed. 2d 1150, 98 S.Ct. 3127 (1978). We hold that the trial court properly dismissed plaintiff's action for want of personal jurisdiction.

The judgment entered thereon is hereby

Affirmed.

Judges PARKER and HILL concur.

FOWLER-BARHAM FORD, INC., WILDOR ENTERPRISES, INC., AND W. B. FOWLER v. INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY

WILL B. FOWLER AND WILDOR ENTERPRISES, INC. v. CHEROKEE INSURANCE COMPANY

No. 7911SC533

(Filed 18 March 1980)

1. Insurance § 121— fire insurance—increasing hazard by intentionally setting fire—sufficiency of evidence

Defendant insurer's evidence was sufficient to support a jury finding that plaintiffs were not entitled to recover on a fire insurance policy because they increased the hazard insured against by intentionally burning the insured property where it tended to show that the individual plaintiff was alone at the insured premises when the fire occurred; plaintiffs were faced with financial difficulties; five areas in the insured premises were points of origin of the fire; classic flammable liquid patterns were found at those five points; and the fire was not accidental.

2. Evidence § 22.2— fire insurance—intentional burning—absence of criminal charges against plaintiff—inadmissibility

In an action on a fire insurance policy in which defendant insurer's evidence tended to show that the individual plaintiff intentionally burned the insured premises, the trial court properly refused to permit plaintiffs to elicit testimony from an S.B.I. agent who testified as an expert in fire investigation that no criminal charges had been filed against the individual plaintiff, since only a criminal conviction based on a plea of guilty would be admissible on the question of liability in a civil action.

3. Insurance § 121— fire insurance—insured's increase of hazard—instructions

In an action on a fire insurance policy, the trial court adequately instructed the jury on defendant insurer's defense that the hazard insured against was increased by means within the control or knowledge of plaintiff insureds.

APPEAL by plaintiffs from *Tillery, Judge*. Judgment entered 30 October 1978 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 11 January 1980.

In these civil actions, plaintiff W. B. Fowler (hereinafter Fowler) was, at all times relevant hereto, president, major stockholder, and agent of plaintiffs Fowler-Barham Ford, Inc. (hereinafter Fowler-Barham Ford) and Wildor Enterprises, Inc. (hereinafter Wildor). Fowler-Barham Ford operated an automobile dealership in Warrenton, and Wildor owned the improved properties upon which the dealership was located. In their complaints against defendants Indiana Lumbermens Mutual Insurance Company (hereinafter Indiana) and Cherokee Insurance Company (hereinafter Cherokee), the companies which issued the insurance policies sued upon by plaintiffs, plaintiffs alleged losses as a result of a 10 January 1976 fire in the approximate amount of $257,708.

In their answer, defendants admitted the losses, but alleged that they were not obligated to pay, because the losses occurred while the hazard was increased by means within the control or knowledge of plaintiffs in violation of the policy contents, and because each policy contained the following provision, *inter alia*:

> "This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact, or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein,

or in case of any fraud or false swearing by the insured relating thereto. . . . conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto, this company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured."

Defendants' evidence will be set out in the opinion.

The jury answered issues against plaintiffs. The trial court denied plaintiffs' post-trial motions that the verdict of the jury be set aside for errors committed in the trial, for a new trial, and for a judgment notwithstanding the verdict. Plaintiffs appealed.

Mast, Tew, Nall, Moore & Lucas, by George B. Mast and Joseph T. Nall, for plaintiff appellants.

Young, Moore, Henderson & Alvis, by Joseph W. Yates III and Jerry S. Alvis, for defendant appellees.

ERWIN, Judge.

Plaintiffs present three questions for our determination on this appeal. We find no error in the trial for the reasons that follow.

Question No. 1

[1] "1. Did the trial court err in denying plaintiffs' motion for directed verdict at the conclusion of defendants' evidence and at the conclusion of all the evidence, in submitting issue four to the jury and in denying plaintiffs' post-trial motions, in view of the evidence of the defendants, which taken in the light most favorable to each of them, failed to reveal that any of the plaintiffs increased the hazard insured against by any means within the control or knowledge of the plaintiffs?"

We answer, "No."

Plaintiffs contend:

"[T]hat all of the evidence of defendants, taken in the light most favorable to them, failed to reveal that plaintiffs increased the hazard insured against by intentionally burning the premises, or that even if the premises were intentionally

> burned, that any of the plaintiffs burned or procured the burning of insured property. Further, defendants' evidence was based upon speculation and surmise, and therefore was not probative on the issue submitted to the jury as to whether or not plaintiffs increased the hazard insured against."

We do not agree. The trial court cannot direct a verdict under G.S. 1A-1, Rule 50, of the Rules of Civil Procedure in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, since it is the established policy of this State—declared in both the Constitution and the statutes—that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless the right is waived. Defendants' denial of allegations of fact necessary to plaintiffs' right of recovery is sufficient to raise an issue of those facts, and defendants offered evidence to contradict those facts. *See Rose v. Motor Sales*, 288 N.C. 53, 215 S.E. 2d 573 (1975).

Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by circumstantial evidence. *See Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920). It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted or known facts. *Simmons v. Lumber Co.*, 174 N.C. 221, 93 S.E. 736 (1917). The evidence must show that the more reasonable probability is that the fire was caused by the plaintiffs or an instrumentality solely within their control. *See Simmons v. Lumber Co., supra; Collins v. Furniture Co.*, 16 N.C. App. 690, 193 S.E. 2d 284 (1972).

At the time the trial court ruled on plaintiffs' motion, defendants' evidence tended to show the following.

Plaintiffs had the opportunity to have acquiesced in or to have controlled the incendiary fire, in that plaintiff Fowler was present and alone at the dealership when the fire occurred. Plaintiffs were faced with financial difficulties giving rise to a legitimate inference from which a jury could find that plaintiffs had a motive to seek funds from defendants via a fire.

Defendants' properly admitted testimony clearly showed that five areas were sources or points of origin of the fire, that at these points, classic flammable liquid patterns were found, and that the fire was not accidental.

John Carroll, an expert in the field of fires and fire investigations, testified that he first visited the fire scene on 15 January 1976; that he found five areas that were sources or points of origin of this fire; and that these points of origin were where he found classic flammable liquid patterns. Four of these patterns were found in the office area proper, the hallway outside the furnace room door, the cashier's area, and the closet of the office. He further testified that, in his opinion, the fire was not accidental, there being no sources for accidental ignition in the areas of the points of origin, and that the fire did not originate in the areas of the furnace or balcony. On cross-examination, Carroll testified that he did not know that furniture was removed from the office area during the fire and that he only layered and cleared the hallway and the office areas.

Dr. Charles R. Manning, Professor of Materials Engineering at North Carolina State University, testified that he first visited the fire scene around 20 January 1976 and visited the scene on two other occasions. Dr. Manning came to the same conclusions as Mr. Carroll. In addition, Dr. Manning stated that there were liquid patterns in the five points of origin and that fuel oil from the area of the furnace could not have gone to the areas where he found these patterns. Manning further testified that from his examination of the furnace area including the ceramic liner from the furnace and the lines coming from the furnace, his opinion was that the furnace did not malfunction.

Joseph Momier, an SBI agent and expert in the field of fire investigation, testified that he visited the scene of the fire on the date of the fire and on five other occasions. Momier came to conclusions similar to the other experts. He further concluded that the charred and broken tile in and near the office area indicated that an accelerant had been ignited on the floor in this area.

From the evidence presented, we hold that such was sufficient to submit the issue to the jury and to support a verdict thereon. The following sums up our conclusion:

> "When each circumstance going to make up the evidence relied upon depends upon the truth of the preceding circumstance, circumstantial evidence may be likened unto a chain, which is no stronger than its weakest link; but, as in this case, when there is an accumulation of circumstances which do not depend upon each other, circumstantial evidence is more aptly likened to the bundle of twigs in the fable, or to several strands twisted into a rope, becoming, when united, of much strength. *S. v. Shines*, 125 N.C., 730."

State v. Moses, 207 N.C. 139, 141, 176 S.E. 267, 268 (1934). We find no merit in this assignment of error.

Question No. 2

[2] "Did the trial court err in admitting evidence which tended to cloak this civil trial with criminal innuendo and in preventing the witness Momier from stating that no criminal charges had been filed against the plaintiff Fowler?"

A motion *in limine* was made by defendants and allowed by the trial court. The court instructed plaintiffs not to elicit testimony from the witness, Joseph Momier, SBI agent, that no criminal charges had been filed against Fowler. Plaintiffs contend that the testimony was prejudicial and that defendants' motion *in limine* prevented plaintiff Fowler from negating the sting of criminal innuendo achieved by identifying witness Carroll. We do not find prejudicial error.

Whether plaintiff Fowler was charged or was not charged with the matters complained of would not be competent on any issues before the court in this action. *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1966). The rule in this State is that evidence of a defendant's conviction in a criminal prosecution for the very acts which constitute the basis of the liability sought to be established in a civil suit is not admissible unless such conviction is based on a plea of guilty. *Trust Co. v. Pollard*, 256 N.C. 77, 123 S.E. 2d 104 (1961); 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), § 112. Plaintiff Fowler requested the answer to show one of two things: (1) to impeach the witness Momier, SBI agent; or (2) that in the opinion of the witness, Fowler was not at fault in initiating the fire. Both were improper. We overrule this assignment of error.

Question No. 3

[3] "Did the trial court adequately explain the law applicable to each issue in controversy?"

Plaintiffs contend:

> "The Court's instructions to the jury are devoid of any explanation of the affirmative defense raised by the defendants that the hazard insured against was increased by means within the control or knowledge of the insureds. Nor did the Court define the term accidental or limit the scope of the term 'increased by any means.'"

We note that the parties did not request the trial court to give any special instructions. At the close of the charge, the court asked, "Are there any further instructions that either the plaintiffs or the defendants would like to come up and talk with me about?" The answers were: "None from the plaintiffs"; defendants replied, "No, sir."

The court instructed the jury, *inter alia*:

> "So, if you find from the evidence on that issue, and by its greater weight, the burden being on the defendants to so satisfy you, that the loss insured against, that is, fire, was increased by any means within the control or knowledge of Mr. Fowler, or Fowler-Barham Ford, or Wildor Enterprises, Incorporated—if you find that to be so by the greater weight of the evidence—you should answer that issue 'yes,' which is as the defendants say you should answer it.
>
> If, on the other hand, you fail to so find, or after a fair and impartial consideration of the evidence, you are unable to say where the truth lies, you should answer that issue 'no,' which is as the plaintiffs say you should answer it."

We hold that the charge of the court was clear, sufficient on all issues, and without error. The word, "accident," did not require defining. The common usage and meaning to the general public is very clear. We find no error in the charge of the court.

Result

In the trial, we find

No error.

Judges CLARK and ARNOLD concur.

IN THE MATTER OF THE TAXABLE STATUS OF PROPERTY CONSISTING OF A 10.5 ACRE TRACT OF LAND AND ALL IMPROVEMENTS AND ALL PERSONAL PROPERTY LOCATED THEREON AT 1700 WEST EHRINGHAUS STREET, ELIZABETH CITY, NORTH CAROLINA, OWNED BY CAROLINA CONFERENCE ASSOCIATION OF SEVENTH-DAY ADVENTISTS, INC. AND MADE AVAILABLE TO W. R. WINSLOW MEMORIAL HOME, INC.

No. 791SC556

(Filed 18 March 1980)

Taxation § 22.1— nursing home affiliated with church—gratuitous occupation—property exempt from taxation

Where a religious association made a loan to respondent nursing home, with which the association was affiliated, to expand its facilities, the nursing home's payment of an amount equivalent to the interest on the loan and the depreciation on the property did not prevent the nursing home from occupying the property gratuitously, and the property in question was exempt from *ad valorem* taxation in that it was being used for a charitable purpose by a charitable institution within the meaning of G.S. 105-278.7(f)(4), G.S. 105-278.7 (a)(2), and G.S. 105-278.7(c)(1).

APPEAL by petitioner from *Walker (Ralph A.), Judge*. Judgment entered 15 March 1979 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 16 January 1980.

This action began when the Commissioners of Panquotank County denied the W. R. Winslow Memorial Home, Inc. an exemption from *ad valorem* taxes. The home appealed to the Property Tax Commission, sitting as the Board of Equalization and Review. The Property Tax Commission ordered that the assessment of the subject property by Pasquotank County be set aside and that respondents' claim for exemption be allowed. The Board of Commissioners of Pasquotank County petitioned for review in Superior Court. The court found that the Property Tax Commission's findings and conclusions were supported by the evidence and affirmed the order allowing exemption from *ad valorem* taxes. Petitioner appealed.

White, Hall, Mullen, Brumsey & Small, by H. T. Mullen, Jr., and G. Elvin Small III, for the Board of Commissioners of Pasquotank County, petitioner appellant.

Mount, White, King, Hutson, Walker & Carden, by E. J. Walker, Jr., for Carolina Conference Association of Seventh-Day Adventists, Inc. and W. R. Winslow Memorial Home, Inc., respondent appellees.

Johnson, Gamble & Shearon, by Samuel H. Johnson, for North Carolina Health Care Facilities Association, amicus curiae.

ERWIN, Judge.

Pasquotank County contends on appeal that:

> "The Superior Court erred in affirming the August 4, 1978 final decision of the North Carolina Property Tax Commission which final decision made findings, conclusions, and decisions affected by error of law on the part of the Commission and unsupported by substantial competent evidence in view of the entire record as submitted and which final decision adjudged that the assessment by Pasquotank County of certain property owned by respondent be set aside and that the property be exempt from ad valorem taxation pursuant to G.S. 105-278.7(a)(2)." (Typed from material in all caps)

We find no error and affirm the judgment entered.

The evidence presented before the Property Tax Commission, sitting as the Board of Equalization and Review, tended to show the following.

The W. R. Winslow Memorial Home, Inc. is a nursing home operated mainly for the aged and infirm located in Elizabeth City. The home is affiliated with the Seventh-Day Adventist Church and is funded partly through the W. R. Winslow Foundation. The land on which the home is located was donated to the Seventh-Day Adventist Church by W. R. Winslow, who had a special interest in the care of the aged. The home is run as a nonprofit corporation separate from the church, although the philosophy of the Seventh-Day Adventist Church is obeyed in the administration of the home. The major application of that philosophy is in concern for the spiritual, emotional, and mental well-being of the

patients in addition to concern for their physical well-being. There are no religious or other restrictions on entry, except that maternity, tubercular, alcoholic, mental, or drug addicted patients are forbidden.

All patients must be able to pay the home's fee when they are admitted, but that rule is violated in practice. The home does pay certain sums labeled "rent" to the Carolina Conference of the Seventh-Day Adventist Church, but that is merely a label of convenience. The sums consist of the interest on a mortgage, which the church entered into to provide funds for the expansion of the home, and a sum for depreciation. The church accumulates the depreciation for future capital improvements. The home's auditor testified that these were expenses which the home would have if it owned the property and that the church did not earn a profit from the rent. The administrator of the home felt that it was no longer possible to define a charitable institution as one which provided services free of charge, because the government now provides funds for the indigent. He felt that the home was a charitable institution, because it provided more services than are covered by government reimbursements.

Medicaid paid all or a portion of the home's fee for most of its patients, but Medicaid placed a ceiling on reimbursements. The home was not allowed to charge the patients or their families the difference between the Medicaid payment and the home's fee. Medicaid paid the home $28.00 per day for skilled care; the home's expenses for skilled care were $31.46 per day. Medicaid paid $23.30 per day for intermediate care; the home's expenses were $24.82. The difference was made up by donations, chiefly from the Winslow Foundation. No patient had ever been forced to leave the home because he or she could not pay the home's fee.

Some patients had been admitted who did not qualify for Medicaid and who could not pay the fee; others were admitted before their Medicaid eligibility or other fee arrangements were determined. It was a policy of the home to try to determine the method of payment before admission. There had been a surplus in recent years, after donations, which the home had used to air condition the original building. The home had no stockholders and paid no dividends. Its assets would be distributed to the church if the corporation were dissolved. The home was exempt from state and federal income taxes as a charitable institution.

Exhibits included financial statements for the home from 1974 through 1977, the constitution and bylaws of the Carolina Conference of the Seventh-Day Adventist Church, the Articles of Incorporation and Bylaws of the W. R. Winslow Memorial Home, Inc., and a letter from the home's administrator to the Department of Social Services concerning determination of Medicaid status prior to admission.

The County contends that the decision holding the real property in question is exempted from *ad valorem* taxation by G.S. 105-278.7(a)(2) is wholly unsupported by either the findings of fact made by the Commission on the entire record as submitted, and in order for property to be exempted from *ad valorem* taxation under G.S. 105-278.7(a)(2), it is necessary that the property be "wholly and exclusively used by the occupant for nonprofit educational, scientific, literary, or charitable purposes" and that if it is occupied by one other than the owner, it must be "occupied gratuitously."

In considering this case, we agree with the statement written by Chief Justice Parker in *Wake County v. Ingle*, 273 N.C. 343, 346, 160 S.E. 2d 62, 64 (1968).

> "What is said in *Seminary, Inc. v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528, is relevant here:
>
> > 'In this connection this Court stated in *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E. 2d 269, that statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation (citing cases).
> >
> > ' "By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed * * * but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used." Stacy, C.J., in *S. v. Whitehurst*, 212 N.C. 300, 193 S.E. 657.' "

Our determination will be made in view of the above.

Carolina Conference Association of Seventh-Day Adventists, Inc. is a nonprofit corporation with authority to hold title to and

operate schools, churches, and medical facilities and "to carry on any line of religious, educational, benevolent and philanthropic work." The occupant and operator of the nursing home is W. R. Winslow Memorial Home, Inc., a nonprofit corporation of North Carolina, with authority to "own, operate, and maintain a home or homes for aged persons or senior citizens." In 1974, the property was improved to a 121 bed extended care nursing home. The funds for expansion were made available through a loan obtained from the association. The home makes monthly payments to the association which includes interest on the loan and depreciation. The association accumulated the depreciation for future expansion.

In *Wake County v. Ingle*, 273 N.C. 343, 347, 160 S.E. 2d 62, 65 (1968), our Supreme Court when faced with an analogous situation held:

> "[T]hat the fact that the church maintains and pays expenses connected with its use of the leased property, which is a church building and its appurtenances on Rhamkatte Road, does not prevent the church from occupying this property gratuitously. It pays no rent for the leased property, and merely maintains and pays the expenses connected with its use of the leased property which it must do to use properly the leased property for religious purposes. If the church had owned this leased property and had used it, it would have had to maintain it and pay the expenses connected with its use as church property. To adopt a contrary construction would mean a narrow and stinting construction of the statute. It is clear that if the church were the owner of this property which it uses wholly and exclusively for religious worship, it would be exempt from taxation. It seems to us, and we so hold, that to hold this property in controversy exempt from taxation pursuant to G.S. 105-296(3) comes clearly within the scope and purpose of the language used in that statute, and it clearly comes within the scope and language of the constitutional provision of Article V, section 5, that property held for religious purposes shall be exempt from taxation. Plaintiffs' assignments of error are overruled."

As in *Ingle*, respondent's payment of an amount equivalent to the interest on the loan incurred by Carolina Conference Association

of Seventh-Day Adventists, Inc. for expansion purposes and the depreciation on the property does not prevent respondent from occupying the property gratuitously, and we so hold.

G.S. 105-278.7(a) provides:

> "§ 105-278.7. *Real and personal property used for educational, scientific, literary, or charitable purposes.*—(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:
>
> . . . .
>
> (2) Occupied gratuitously by an agency listed in subsection (c), below, other than the owner, and wholly and exclusively used by the occupant for nonprofit educational scientific, literary, or charitable purposes."

G.S. 105-278.7(c)(1) provides:

> "(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:
>
> (1) A charitable association or institution. . ."

Thus, the determining questions are whether respondent is a charitable institution and whether it used the property in question for charitable purposes.

When presented with a similar situation in *Central Board on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 630, 171 S.E. 2d 747, 750 (1969), the Georgia Court of Appeals held:

> "Neither would the fact that the residents paid rent according to their ability destroy the charitable nature of the institution. *Brewer v. American Missionary Association*, 124 Ga. 490, 52 S.E. 804; *Williamson v. Housing Authority of Augusta*, 186 Ga. 673, 199 S.E. 43; *Elder v. Henrietta Egleston Hospital*, 205 Ga. 489, 492, 53 S.E. 2d 751. In the present case it was shown that in 1967, which was stated to be typical of the monthly amounts paid by the residents, more than 50% of the residents paid less than maximum and

of the 61 residents 11 paid nothing. The record further reveals that the payments made by the residents have been insufficient to cover the cost of the direct operating expenses of the home and the deficit was made up by contributions.

The purpose of the home is to care for the aged and provide for their physical and mental welfare. As is stated in *Bozeman Deaconess Foundation v. Ford*, 151 Mont. 143, 148, 439 P. 2d 915, 917: 'The concept of charity is not confined to the relief of the needy and destitute, for "aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants." '"

We find the opinion in *Central Board on Care of Jewish Aged, Inc. v. Henson, supra*, persuasive, and we hold that the property in question was properly exempted from *ad valorem* taxes, in that it was being used for a charitable purpose by a charitable institution within the meaning of G.S. 105-278.7(f)(4), G.S. 105-278.7(a)(2), and G.S. 105-278.7(c)(1).

When the record before us is reviewed as a whole, the evidence clearly justifies the Commission's decision. The judgment entered below is

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

DEPARTMENT OF TRANSPORTATION v. WINSTON CONTAINER COMPANY (FORMERLY JACKSON-WINSTON CONTAINER COMPANY); JAMES F. JUSTICE, TRUSTEE; AND JOHN N. JACKSON

No. 7926SC727

(Filed 18 March 1980)

1. Costs § 1.2; Eminent Domain § 14— highway condemnation—costs—litigation expenses of landowner

Litigation expenses and costs incurred by a landowner in a condemnation proceeding do not constitute part of the "just compensation" required to be paid by the Fifth Amendment and may be taxed as part of the costs only if authorized by statute.

2. Costs § 1.2; Eminent Domain § 14— highway condemnation—costs—landowner's attorney, appraisal and engineering fees—no final judgment that property cannot be acquired by condemnation

A judgment entered by the trial court dismissing a condemnation action brought by the Department of Transportation because the court was of the opinion that it lacked jurisdiction for the reason that the resolution of the State Board of Transportation authorizing condemnation of defendant's property was insufficient did not constitute a final judgment that the Department of Transportation cannot acquire defendant's real property by condemnation within the purview of G.S. 136-119, and that statute did not authorize the trial court to award defendant reimbursement for attorney, appraisal and engineering fees incurred because of the condemnation proceeding.

APPEAL by defendant, Winston Container Company, from *Grist, Judge*. Judgment entered 20 April 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 February 1980.

Plaintiff, the North Carolina Department of Transportation, commenced this action on 20 September 1978 to condemn land of the defendant, Winston Container Company, for a highway project in Mecklenburg County. On 15 January 1979 the court, on motion of the plaintiff, ordered the defendant to show cause why it should not be required to vacate the property described in the complaint. In the course of the show-cause hearings, it appeared to the court that the Board of Transportation had not adopted a sufficient resolution for the acquisition of defendant's property. The defendant thereupon moved to dismiss this action pursuant to Rules 12(b)(1) and 12(h) of the Rules of Civil Procedure. The court, being of the opinion that it did not have jurisdiction over this action because of the insufficient resolution by the Board of Transportation, allowed the motion to dismiss and ordered this action dismissed by judgment filed 2 March 1979. No appeal was taken from that judgment. Instead, on 13 March 1979 plaintiff, Department of Transportation, pursuant to a new resolution adopted by the North Carolina Board of Transportation, filed a new action against the defendant to condemn the same property.

In the 2 March 1979 judgment which dismissed this action, the court reserved ruling on whether defendant was entitled to be awarded, as part of the costs to be paid by the plaintiff, the reasonable attorney, appraisal, and engineering fees incurred by defendant because of this condemnation proceeding, and the court

authorized the defendant to file its petition to be awarded such fees in this action. Thereafter, on 22 March 1979, the defendant filed a petition praying that it be awarded its attorney fees in the total amount of $21,283.50 and appraisal and engineering fees in the total amount of $17,167.41. After a hearing on this petition, the court entered judgment dated 20 April 1979 denying the defendant's prayer that it be awarded such fees. From this judgment, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General Eugene A. Smith and Assistant Attorney General James E. Magner, Jr., for plaintiff appellee.

Joseph W. Grier, Jr., and Irvin W. Hankins III for defendant appellant.

PARKER, Judge.

The sole question presented is whether the court erred in denying defendant's petition that it be awarded its attorney, appraisal, and engineering fees as part of the costs to be taxed against the plaintiff. We find no error.

[1] At the outset we note that litigation expenses and costs, including those incurred by a landowner in a condemnation proceeding, may be taxed only if authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972). Such expenses incurred by the landowner do not constitute part of the "just compensation" required to be paid by the Fifth Amendment, compensation therefor being a matter of legislative grace rather than constitutional command. *United States v. Bodcaw Company*, 440 U.S. 202, 59 L.Ed. 2d 257, 99 S.Ct. 1066 (1979).

[2] Appellant recognizes these principles and points to G.S. 136-119 as the statutory authority for awarding it reimbursement for attorney, appraisal, and engineering fees incurred in the present action. In particular, appellant points to the last two paragraphs of G.S. 136-119 which read as follows:

> The court having jurisdiction of the condemnation action instituted by the Department of Transportation to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for

his reasonable cost, disbursements, and expenses, including reasonable attorney fees, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if (i) the final judgment is that the Department of Transportation cannot acquire real property by condemnation; or (ii) the proceeding is abandoned by the Department of Transportation.

The judge rendering a judgment for the plaintiff in a proceeding brought under G.S. 136-111 awarding compensation for the taking of property, shall determine and award or allow to such plaintiff, as a part of such judgment, such sum as will in the opinion of the judge reimburse such plaintiff for his reasonable cost, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

We find this statute inapplicable in the present action. Analysis of G.S. 136-119 discloses that it authorizes the court having jurisdiction of a condemnation action instituted by the Department of Transportation to award the landowner reimbursement for reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceedings only if:

(1) "the final judgment is that the Department of Transportation cannot acquire real property by condemnation;" or

(2) "the proceeding is abandoned by the Department of Transportation;" or

(3) judgment is rendered for the plaintiff in an inverse condemnation proceeding brought under G.S. 136-111.

Unless the case falls within one of these three statutory categories, the statute gives the court no authority to award the landowner reimbursement for his costs. *Board of Transportation v. Royster*, 40 N.C. App. 1, 251 S.E. 2d 921 (1979).

The present case does not fall within any of the three statutory categories. Appellant concedes that this proceeding was not "abandoned" by the Department of Transportation within the meaning of the second statutory category, a concession which is clearly correct since the case was dismissed over the Department's objection, and the Department promptly instituted a new action against the defendant to condemn the same proper-

ty. See, *City of Charlotte v. McNeely, supra*; Annot., 68 A.L.R. 3d 610, § 15 (1976). Clearly, also, this was not an inverse condemnation proceeding so as to bring it within the third statutory category. Appellant does not contend otherwise. Its contention is that this case falls within the first statutory category, i.e., one in which "the final judgment is that the Department of Transportation cannot acquire real property by condemnation."

Appellant cites *United States v. 4.18 Acres of Land*, 542 F. 2d 786 (9th Cir. 1976) as supporting its contention that the present case falls within the first statutory category. In that case a condemnation action was dismissed in the United States District Court without prejudice because the United States Forest Service had failed, prior to commencing the action, to comply with certain regulations promulgated under the National Historic Preservation Act. This defect was cured while the proceeding was still pending in the District Court, but the case was dismissed nevertheless. The landowner then sought an award for attorney fees and other expenses under 42 U.S.C. § 4654(a), the federal statute on which the pertinent provisions of G.S. 136-119 above quoted were modeled. The District Court held that attorney fees and other expenses could not be awarded because it was not the final judgment of the court that the Forest Service could not acquire the real property by condemnation, only that the decision to condemn and the complaint were premature. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed, the opinion of the court containing the following:

> It seems fair to conclude that Congress intended by section 304(a)[42 U.S.C. § 4654(a)] to create a narrow exception to the general rule of nonrecovery of litigation expenses. Recovery of litigation expenses in the present case could be justified only by a most expansive reading of the statute.
>
> The trial court held only that the action was premature, dismissing without prejudice because of a correctable procedural flaw. Such a dismissal is not a final judgment that the federal agency "cannot acquire the real property by condemnation." This language suggests a case in which the federal agency has moved to condemn property without warrant—for example, in the absence of any authority or of a public purpose.

> And it would be contrary to the substance of what occurred in this case to hold that the United States "abandoned" the proceeding. The suit was not dismissed at the instance of the government, but over the government's opposition on motion by the landowner. It is true that the United States dismissed its appeal. However, the government announced that its purpose was only to avoid delay, and that a new condemnation proceeding would be instituted. Such a proceeding has in fact been filed, within a year of dismissal of the original action. Quite a different situation would be presented if the government had not asserted its intention to file a new complaint and declaration of taking, and had not carried out that intention before this appeal was heard.
>
> Were we to construe section 304(a) [42 U.S.C. § 4654(a)] as requiring an award of litigation expenses whenever the initial proceeding was dismissed for whatever reason, the award would often be largely fortuitous, depending upon the effect given by the trial court to errors committed during or prior to trial. Had the district court in this case permitted the government to amend the complaint to reflect the correction of the procedural error, rather than dismissing the action, appellants would not be entitled to expenses. Congress could not have intended that the right to recover expenses turn upon such a difference.
>
> 542 F. 2d at 789.

Contrary to appellant's contention, we find that the decision in *United States v. 4.18 Acres of Land, supra*, supports the ruling of the trial court in the case now before us. In the present case, as in that case, no final judgment has been entered that the condemning authority cannot acquire appellant's real property by condemnation. The judgment entered merely dismissed the action because the court was of opinion that it lacked jurisdiction for the reason that the resolution of the Board of Transportation authorizing condemnation of defendant's property was insufficient. No copy of that resolution is in the present record, and no appeal was taken from the judgment dismissing this action. Therefore, we express no opinion as to whether the court was correct in its finding that the resolution was insufficient or in its ruling that the lack of a sufficient resolution deprived the court of

jurisdiction. What is clear from the present record is that the judgment which was entered was not a final judgment that the Department of Transportation cannot acquire defendant's real property by condemnation. Therefore, the award of fees in the present case is not authorized as being within the first statutory category set forth in G.S. 136-119. Absent any other legislative authorization, the trial court did not err in denying defendant's petition.

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

MICHAEL THOMAS JOHNSON v. DORIS BATTEN JOHNSON

No. 799DC514

(Filed 18 March 1980)

Divorce and Alimony § 25.12— child custody—visitation privileges—restriction—insufficiency of findings of fact

Where severe restrictions are placed on a parent's visitation rights with his child, there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions; the trial court's findings in a child custody proceeding that respondent mother had abandoned her child and that it would not be in the best interests of the child for him to be carried back and forth between N. C., home of the father, and N. J., home of the mother, were insufficient to support the trial court's order restricting respondent's visiting privileges, which were limited to one weekend a month, to occasions only when petitioner father or his designated representative was present.

APPEAL by respondent from *Wilkinson, Judge*. Order signed 28 September 1979 in District Court, GRANVILLE County. Heard in the Court of Appeals 26 November 1979.

This is a civil action involving the custody of a minor child. Petitioner-father filed a petition in August 1977 seeking permanent custody of Thomas Hinton Johnson II, then age 3, the minor child born of his marriage to respondent. In his pleadings petitioner-father alleged that respondent-mother had abandoned the petitioner and the minor child on 12 August 1975 and that he was the fit and proper person to have custody of the child. Respondent-mother answered, denying the allegations of abandonment and counterclaimed for an award of permanent custody of said child, alleging that she was the fit and proper person to exercise such custody.

A hearing was held before Judge Wilkinson at the 22 August 1978 Domestic Session of District Court in Granville County at which both parties offered evidence. Petitioner-father testified that he and respondent were married in April 1973 and that their son was born in March 1974. On 4 August 1975 petitioner-father returned from work to the parties' home in Durham to find a note written by respondent-mother in which she stated that she was leaving him and the baby. Petitioner-father remained in Durham for several months, but then moved with the minor child to live with his sister in Oxford, where he remained until the time of the hearing. While petitioner-father is at work, his sister's children and his cousin's wife have been caring for the boy. Petitioner-father further testified that respondent-mother continued to live in Durham for some time after the separation. He would occasionally see her standing around the street in uptown Durham and received some telephone calls from her in which she told him of her experiences with other men. Petitioner stated that respondent visited the child on two or three occasions in 1976. In 1977, after respondent-mother had moved to New Jersey, she returned to visit the minor child approximately four times, and in 1978, four or five times. On none of these occasions did petitioner-father permit respondent-mother to leave the house with the child.

Respondent-mother testified that she left her husband after an argument and attempted to take the child with her but was prevented from doing so when petitioner threatened her with a revolver. For several months she lived in Durham with a girl friend. She then moved to New Jersey in October 1976, and she asked petitioner to move there with the child. After five and one-half months respondent-mother returned to Durham and shared a five-room house with her sister and worked. During that time she consulted her attorney to attempt to arrange visitation with the minor child, and she also made numerous attempts to contact her husband to see the child. On the approximately eight occasions when she did visit with the child, she was not permitted to leave the house with him alone. In November 1977 she returned to New Jersey and moved in with her mother. From that time until the time of the hearing, respondent-mother has remained a citizen and resident of New Jersey.

Following the hearing, the trial judge signed an order on 28 September 1978 finding as facts that respondent-mother had

abandoned the child on 12 August 1975 and that between 12 August 1975 and the date of the hearing respondent-mother visited with the child "a very few times and only sent him a couple of cards." The court also made the following findings:

> 10. That the petitioner is a fit and proper person to have the care, custody and control of the minor child born to petitioner and respondent, to wit: Thomas Hinton Johnson, II, age three years, and that it is in the best interest of said child that he be placed in the care, custody and control of his father, the petitioner herein.
>
> 11. That the child is of such a tender age and has been in the care, custody and control of his father, the petitioner since abandonment by the respondent, it is not in the best interests of said child to be taken from the home or out of the company of his father or someone else close to the minor child and carried to the State of New Jersey.

Based upon the findings of fact, the court concluded that petitioner-father was the fit and proper person to have the custody and control of the minor child subject to certain visitation rights of respondent-mother. The court ordered that respondent-mother "be allowed to visit with said minor child one weekend of each month, provided that such visitation take place within the presence of the father or some other designated representative of the father." From this order respondent-mother appeals.

R. Gene Edmundson for petitioner appellee.

Charles A. Bentley, Jr., for respondent appellant.

PARKER, Judge.

Respondent-mother has not assigned error to that portion of the judgment awarding primary custody and control of the minor child, Thomas Hinton Johnson, to petitioner-father. Her contention is that the court erred in ordering her visitation with the minor child restricted to one weekend each month "within the presence of the father or some other designated representative of the father."

A noncustodial parent's right of visitation is a natural and legal right which should not be denied "unless the parent has by

conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E. 2d 844, 849 (1971). In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967). The purpose of the award should not be to punish or reward a parent by withholding or granting the right of visitation. *See, In re McCraw Children*, 3 N.C. App. 390, 165 S.E. 2d 1 (1969).

G.S. 50-13.5(i) provides that "[i]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of *reasonable* visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." (Emphasis added.) Clearly, the statute requires an appropriate finding of fact before the trial judge may completely deprive a noncustodial parent of the right of visitation. *King v. Demo*, 40 N.C. App. 661, 253 S.E. 2d 616 (1979). However, we construe the statute to require a similar finding when the right of *reasonable* visitation is denied. Thus, where severe restrictions are placed on the right, there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions.

In the present case the award of visitation privileges to respondent-mother is indeed restrictive. On the weekend per month when she is allowed to visit with the minor child, respondent-mother is only permitted to do so in the presence of the father or his designated representative. The court did find as a fact that respondent-mother had abandoned the child on 12 August when she moved out of the parties' home in Durham. Although evidence as to the circumstances of respondent-mother's leaving was conflicting, there was competent evidence in the record that she indicated in a note to her husband that she was leaving and intended the child to remain with him. The finding of fact, being supported by competent evidence, is conclusive on this appeal. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). However, that finding by itself does not support the type of restriction placed upon respondent-mother's visitation rights in

the present case. The general rule is that abandonment, by itself, does not constitute sufficient ground to deny visitation rights completely, *see*, Annot., 88 A.L.R. 2d 148, § 15, pp. 201-204 (1963), and this rule is in accord with the principle adopted by our courts that the purpose of denying custody or visitation rights is not to punish the noncustodial parent. *See, In re McCraw Children, supra.* Similarly, the purpose of imposing restrictions on those rights should not be to punish, but to protect the welfare of the child.

The only other finding of fact relevant to the award of visitation rights recites that "it is not in the best interests of said child to be taken from the home or out of the company of his father or someone else close to the minor child and carried to the State of New Jersey." In view of the tender age of the child, the trial judge acted within his discretion in determining that it would not further the child's welfare to have him carried back and forth between North Carolina and New Jersey to visit with his mother. However, that finding does not support the provision in the award preventing respondent-mother from visiting with the child out of the presence of petitioner-father or his representative. The record does not disclose that respondent-mother has ever attempted to carry the child away from this state without his father's consent, nor that the danger exists that she would do so now unless her visits are supervised. Neither does the record disclose that the child has ever been harmed physically by respondent-mother such that it would be inadvisable to permit her time alone with him. In any event, if there were evidence of this kind, the trial court was required to make findings of fact to support the restrictions imposed. Where hostilities exist between estranged parents, it may be difficult for the noncustodial parent to maintain a relationship with his or her child when required to exercise visitation only in the presence of the other parent or a member of the other parent's family who may share such hostilities. There are, of course, circumstances warranting such restrictions, but if they are imposed, they must be based on appropriate factual findings. In the absence of any such findings in the present case, we hold that the trial court erred in so limiting respondent-mother's visitation rights. Accordingly, that portion of the award relating to respondent-mother's visitation rights is vacated, and the case is remanded for further proceedings not inconsistent herewith.

Affirmed in part;

In part vacated and case remanded.

Chief Judge MORRIS and Judge HILL concur.

IN THE MATTER OF: TEMPIE J. JOHNSON

No. 793SC541

(Filed 18 March 1980)

1. **Constitutional Law § 17; Insane Persons § 12— rights of procreation, marital privacy**

Procreation, together with marriage and marital privacy, are fundamental civil rights protected by the due process and equal protection clauses of the Fourteenth Amendment.

2. **Insane Persons § 12— sterilization of mental defective—unfitness to care for child—no presumption solely from mental retardation**

In a proceeding for the sterilization of a mentally defective person on the ground that she would probably be unfit to care for a child, there can be no presumption of unfitness founded solely on mental retardation; however, the burden on petitioner to show personality defects or traits of unfitness apart from retardation increases as the retardation ranges from severe to mild.

3. **Insane Persons § 12— sterilization of mental defective—unfitness to care for child—burden of proof**

In an involuntary sterilization proceeding based on the ground that the respondent because of mental deficiency would probably be unfit to care for a child, the courts in construing the phrase "care for a child" must find whether the evidence establishes a minimum standard of care consistent with both state interest and fundamental parental rights, and the petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child.

4. **Insane Persons § 12— sterilization of mental defective—unfitness to care for child—sufficiency of evidence**

The evidence was sufficient for the jury in a proceeding for the sterilization of respondent on the ground that, because of a mental deficiency which is not likely to improve materially, she would probably be unable to care for a child where petitioner offered proof by clear, strong and convincing evidence that, in addition to mild mental retardation, respondent over a period of years had exhibited emotional immaturity, the absence of a sense of responsibility, and a lack of patience with children, and had engaged in continuous nightly adventures with boyfriends followed by daily sleep and bedrest.

5. Insane Persons § 12— sterilization of mental defective—admissibility of evidence

In an involuntary sterilization proceeding based on the ground that respondent because of mental deficiency would probably be unfit to care for a child, evidence concerning respondent's morals, sexual activity, and attitude toward birth control and her statements to a psychiatrist that in her youth she would get impatient and angry with children left in her care by her parents were relevant on the issues of fitness and care and whether respondent's condition was likely to improve materially.

APPEAL by respondent from *Fountain, Judge.* Judgment entered 6 February 1979 in Superior Court, CRAVEN County. Heard in the Court of Appeals 15 January 1980.

This is a proceeding under N.C. Gen. Stat. Ch. 35, Art. 7 for the sterilization of a mentally defective person. On a prior appeal this Court on 18 April 1978 ordered a new trial for errors in the instruction to the jury. 36 N.C. App. 133, 243 S.E. 2d 386 (1978).

The petition by the Craven County Department of Social Services alleges that "because of a physical, mental or nervous disease or deficiency which is not likely to materially improve, the respondent," age 23, "would probably be unable to care for a child or children." This is one of two grounds for sterilization provided for in N.C. Gen. Stat. § 35-43.

Attached to the petition was a letter to the Department from Dr. Paul Williams (Obstetrics and Gynecology) in which he noted that the respondent's Stanford Binet I.Q. was 40, and that in his opinion she was not capable of rearing or caring for children. He recommended permanent surgical sterilization.

In the District Court a judgment was entered ordering sterilization. Respondent appealed to the Superior Court.

At trial in Superior Court, the petitioner offered the following evidence:

Patricia Gavin testified that she had worked for the Department of Social Services for 12 years, that Gertrude Royal had been a foster parent for 10 years and had respondent Tempie J. Johnson under her care as a foster child for 10 years. Patricia Gavin further testified that when respondent was 18 years of age she was involved with several men but was unable either to understand birth control methods or to comprehend that she

could become pregnant from sexual intercourse. At the behest of Social Services, an intrauterine device was inserted but respondent had it removed. She had an abortion. Ms. Gavin observed her with small children in the home; she was not interested in the children and paid no attention to them. Ms. Gavin has the opinion that respondent was unable to care for a child.

Dr. John D. Ainslie, psychiatrist and Clinical Director of Neuse Medical Center, testified that he had known respondent since July 1978. He examined her on two occasions and evaluated her psychological tests. In his opinion, respondent has a mild mental retardation and needs someone to care for her and attend to her concerns. It was also his opinion that her sterilization would be for her own mental and moral improvement and for the public good. He noted that respondent was impatient and lost her temper, and that she had two boyfriends, one of which wanted to marry her. Respondent had further indicated to Dr. Ainslie that she would like to have children.

Gertrude Royal testified that respondent had been her foster child for 10 years and that in her observation, respondent went out every night, had boyfriends, came in later than she was supposed to, slept most of the day and refused to take birth control pills. Gertrude Royal further stated that respondent was able to help clean the house but that she did not have the patience to cook. Gertrude Royal would not leave respondent alone with a small child.

The jury answered the issue in favor of petitioner, and respondent appeals from the judgment ordering the sterilization operation.

Beaman, Kellum, Mills & Kafer by Charles William Kafer for respondent appellant.

Ward and Smith by Michael P. Flanagan for petitioner appellee.

CLARK, Judge.

We consider first the respondent's argument that the trial court erred in denying her motion for directed verdict at the close of all the evidence. In doing so we think it appropriate to make some analysis of the statutory scheme (North Carolina

General Statutes, Ch. 35, Art. 7, effective 1 January 1975), for involuntary sterilization of persons who are mentally ill or mentally retarded.

[1] Procreation, together with marriage and marital privacy, are recognized as fundamental civil rights protected by the due process and equal protection clauses of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Where fundamental personal liberties are at issue the state may prevail only by demonstrating a compelling governmental interest, as for example, in the public health and welfare. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969).

The North Carolina Supreme Court found that the hearing procedures provided for in the sterilization statutes (N.C. Gen. Stat. §§ 35-36 to 35-50) protected the due process rights of the respondent and that the statutory scheme was constitutionally valid. *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976). The statutory scheme also survived a constitutionality attack in a Federal Court, except for subsection (4) of N.C. Gen. Stat. § 35-39, which provided that a petitioner should initiate proceedings, "[w]hen requested to do so in writing by the next of kin or legal guardian of such patient, resident of an institution, or noninstitutional individual." This subsection was held to be an arbitrary and capricious delegation of unbridled power. *N.C. Association for Retarded Children v. State*, 420 F. Supp. 451 (M.D. N.C. 1976).

Though the sterilization statutes have been determined to meet the tests of constitutionality, the absence of standards and statutory definitions requires that the courts construe and apply the statutory provisions to the evidence in each case so as to adequately protect the respondent's fundamental rights.

The statutory scheme provides in substance two bases for sterilization: (1) the respondent because of mental deficiency would probably be unfit to care for a child or children, and (2) the respondent would be likely to procreate a child or children who would probably have serious mental deficiencies. N.C. Gen. Stat. § 35-43. The second basis was involved in *Moore, supra*. The first

basis is involved in the case *sub judice*. The legislative dual purposes, and compelling state interest, are, first, to prevent the birth of a child that cannot be cared for by its parent, and, second, to prevent the birth of a defective child.

Under the second basis, if requested, a hearing is required to determine the respondent's ability to care for a child or children. *Id.* The burden is on the petitioner (the State officer) to prove by "clear, strong, and convincing" evidence that the respondent:

1. is a mentally ill or retarded person subject to the sterilization statutes (Art. 7, *supra*);
2. has a physical, mental or nervous disease or deficiency;
3. the disease or mental deficiency is not likely to materially improve, and
4. would probably be unable to care for a child or children.

[2] The absence of statutory guidance for determining what constitutes proper care of a child and a person's inability to provide that care places on the courts the burden of requiring that the evidence establishes conclusively a compelling state interest before the fundamental right of procreation can be infringed. The statute does not limit unfitness to mental retardation. The term "physical, mental or nervous disease or deficiency" includes qualities other than diminished intelligence. The range of retardation can vary from mild to severe. We hold that a presumption of unfitness founded solely on retardation is unwarranted. *See, e.g., Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974) (presumption of teacher's unfitness due to pregnancy is unconstitutional). The burden on the petitioner to show personality defects or traits of unfitness apart from retardation increases as the retardation ranges from severe to mild.

[3] The statutory phrase "care for the child" is not defined, but the courts in construing the phrase must find whether the evidence establishes a minimum standard of care consistent with both state interest and fundamental parental rights. The petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child.

[4] In the case *sub judice* the petitioner's evidence consists of the testimony of a case worker who had the respondent as a

foster child under her supervision for several years, the testimony of the foster parent who has taken care of respondent in her home for ten years, and the testimony of a duly qualified psychiatrist who personally observed and examined the respondent and had the benefit of the psychological or psychiatric tests as required by N.C. Gen. Stat. § 35-40. We find the evidence sufficient to meet the burden imposed upon the petitioner by the statutory scheme for involuntary sterilization.

The petitioner offered proof, by clear, strong and convincing evidence, that in addition to her mild mental retardation, the respondent over a period of years had exhibited emotional immaturity, the absence of a sense of responsibility, a lack of patience with children, and continuous nightly adventures with boyfriends followed by daily sleep and bedrest. Such conduct and personality traits in addition to mental retardation clearly tend to show that respondent failed to meet any acceptable standard of fitness to care for a child by providing a reasonable domestic environment.

[5] Respondent argues that evidence relative to her morals, sexual activity, her attitude about birth control, and statements she made to Dr. Ainslie that in her youth she would get impatient and angry with children left in her care by her parents, was irrelevant and remote. Since the questions of fitness and care before the court were broad ones and since her conduct and traits over a period of time would tend to show that her condition was not likely to materially improve, we find that the evidence was relevant. The standard of admissibility based on relevancy and materiality is of necessity elastic, and the evidence need not bear *directly* on the issue as long as there is a *reasonable, open* and *visible* connection with the subject of the lawsuit. 1 Stansbury's N.C. Evidence § 78 (Brandis rev. 1973).

We have carefully examined respondent's other assignments of error and considered her arguments. We find the statement of the contentions of the parties by the trial court expressed fairly the court's view of the legal principles applicable to the factual situation, without any expression of opinion prejudicial to the respondent.

The jury verdict was supported by the evidence and the respondent had a fair trial in which her rights were fully protected.

No error.

Judges VAUGHN and HEDRICK concur.

J. CRAWFORD WILLIAMS v. JAMES L. REYNOLDS, D.V.M.

No. 7910SC674

(Filed 18 March 1980)

Physicians, Surgeons and Allied Professions § 11.1— veterinarian—method of treating horse—expert's opinion testimony—familiarity with standard of care

In an action to recover damages for the death of plaintiff's horse as a result of the allegedly negligent method of treatment following castration surgery performed by defendant, the trial court erred in excluding testimony by plaintiff's witness, a veterinarian qualified as an expert with a "horse specialty," that the procedures employed by defendant were contrary to acceptable medical practice standards in Wake County, since the medical procedure involved was not complicated or rare but an operation routinely performed on riding and show horses; the witness's method of performing the operation would be the same whether he performed it in his prior place of practice or in Wake County; and the fact that the witness did not actually begin practicing in Wake County until two months after the treatment in question should not have required exclusion of his testimony but was merely a factor for the jury to consider in deciding what weight it would give his testimony.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 29 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals on 5 February 1980.

Plaintiff brought this action to recover damages for the death of his registered American Quarter Horse, Cee Blair Lee. He alleged that the horse died on 2 November 1975 as the result of the negligent method of treatment employed by the defendant, a duly licensed veterinarian, following castration surgery performed by defendant on the horse on 27 October 1975. Defendant admitted performing the surgery and thereafter treating the horse, but generally denied any negligence in so doing.

At trial plaintiff offered evidence to the following effect:

Plaintiff and his wife raise and breed quarter horses for profit. On 27 October 1975 Mrs. Williams watched the defendant castrate their young quarter horse, Cee Blair Lee, at their farm on Route 6 in Wake County. Following the operation defendant gave the colt a tetanus shot and got him on his feet. He instructed Mrs. Williams to exercise the horse to prevent swelling and prescribed medication in the form of a "packet of red powder" and large tablets, both to be given in the colt's food. For the next three days, Mrs. Williams observed the colt carefully and exercised him regularly. On the morning of the fourth day, 31 October 1975, she noticed that the horse "had not touched his grain from the night before, which is . . . a danger signal." When she checked on him, she found him to be "considerably more swollen in the area of the operation" than he had been. She called the defendant who told her that the colt only needed exercise, so she exercised him more that morning before she put him in a lot to move around on his own.

By noon the swelling had not subsided at all. Plaintiff called the defendant again, and he came out to their farm about 5:00 that afternoon, administered a pink fluid, which he said was a diuretic, by needle into the horse's neck, and exercised the horse himself using a bull whip and a lunge line. He also gave Mrs. Williams three more large tablets which he identified as a diuretic to be crushed and put into the colt's food. He told her to continue the exercise.

The next morning, 1 November 1975, the colt appeared to be "even more swollen" and still had not eaten anything. According to Mrs. Williams,

> In the horse's genital area the horse was swollen at least the size of a football. There was additional swelling, tremendous swelling, extending up from between his back legs, swollen all the way up between his front legs, the entire stomach area, and swelling up both sides of his body.

Plaintiff called the defendant, who told him that there were two ways to "attack" the problem: medication, using antibotics, or exercise. Defendant said he preferred exercise. He arrived at the farm around noon, exercised the colt again with the whip, and

periodically squeezed the swollen prepuce "to make it more pliable and flexible." The doctor was eventually able to push the prepuce back into the horse's abdomen and thereafter applied a pursestring suture to keep the prepuce contained. He prescribed that the horse be exercised fifteen minutes of every hour. Plaintiff followed the defendant's instructions for the remainder of that day and night. By 8:00 the next morning, the horse was dead.

Mr. Williams took the horse to the Rollins Animal Disease Diagnostic Laboratory in Raleigh where Dr. M. A. Ross, a veterinary pathologist, performed an autopsy. Dr. Ross diagnosed the cause of death to be due to "toxemia and/or a septicemia poisoning subsequent to the surgery." He defined "toxemia" as a poisoning resulting from a toxic breakdown of tissue or a toxic breakdown from dead bacteria. Septicemia, he said, can include a toxemia, but generally implies blood poisoning.

When Mr. Williams returned from the clinic, the defendant, without having been called, came out to the farm. Williams testified that defendant told him he had come by because "the night before he had read everything that he could find pertaining to the use of a pursestring suture and . . . he [had] found no instances where a prepuce had ever been contained with a pursestring suture in a horse, and that he thought it best to . . . remove it."

Plaintiff also offered the testimony of Dr. Mark B. Ashby, a veterinarian with a "horse specialty" who is licensed to practice in North Carolina and has practiced in Wake County since January 1976. He testified that he was graduated from the Veterinary Medical School at Purdue University in 1974; that he practiced for one year in Evansville, Indiana, and then practiced in Chicago for a while before coming to North Carolina; and that, in addition to North Carolina, he was licensed to practice in Indiana and Kentucky. Dr. Ashby was issued a temporary license to practice in this State upon arriving and received his permanent license after passing the required state examination in June 1976.

Dr. Ashby testified that he is "familiar with the accepted standards of practice of veterinarians in Wake County . . . and the surrounding area." However, the court refused to allow him to testify as to whether he was familiar with the accepted standards "as those practices were carried on during October and

November, 1975". Neither was he allowed to answer hypothetical questions, which sought to elicit his opinion as to whether the treatment prescribed by the defendant "could or might have been unacceptable medical procedure for practicing veterinarians in the Wake County area."

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

Reynolds & Howard, by Ted R. Reynolds and E. Cader Howard, for the plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, for the defendant appellee.

HEDRICK, Judge.

Medical practitioners in North Carolina "must possess the degree of learning, skill and ability which others *similarly situated* ordinarily possess." *Dickens v. Everhart*, 284 N.C. 95, 101, 199 S.E. 2d 440, 443 (1973) [emphasis in original]. *See also Wiggins v. Piver*, 276 N.C. 134, 171 S.E. 2d 393 (1970). What "similarly situated" means is not defined with precision. It envisions a standard of professional competence and care customary in the field of practice among practitioners in similar communities which, in turn, suggests a consideration of such factors as the nature of the treatment involved; the degree of specialization, if any, required; the character of the community concerned; and the comparability of medical facilities available. What the standard permits is an otherwise qualified expert witness to state an opinion as to whether the treatment prescribed by the defendant in the particular case accords with the standard prevailing in similar communities with which the witness is familiar, "even though the witness be not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed." *Dickens v. Everhart, supra* at 101, 199 S.E. 2d at 443. Thus, in *Dickens*, a physician who was practicing in Riverside, California at the time of the alleged malpractice by a physician in Mount Airy, North Carolina, was held competent to testify as to the standard of care required and the accepted medical practice prevailing in a community similar to Mount Airy. In *Wiggins v. Piver, supra*, plaintiff called as her witness a doctor from Winston-Salem to testify as to accepted

medical practice in Jacksonville, North Carolina. The witness stated that he was not familiar with the actual practice in Jacksonville, but that he was familiar with the approved practice in similar communities around Winston-Salem. In holding that his testimony was competent, our Supreme Court, through Justice Higgins, quoted approvingly from Prosser on Torts: "The present tendency is to . . . treat the size and character of the community, in instructing the jury, as merely one factor to be taken into account in applying the general professional standard." *Wiggins v. Piver, supra* at 140, 171 S.E. 2d at 397.

While the trial judge in the case now before us appears to have been thoroughly familiar with the rule of law as laid down in *Wiggins*, he nevertheless refused to permit Dr. Ashby to testify that he was familiar, in October and November of 1975, with the accepted medical practices respecting the treatment of a horse that has just been castrated in communities similar to Wake County. The judge sustained defendant's objections to every question designed to elicit Dr. Ashby's familiarity with and knowledge of the prevailing standards. Thereafter, he granted the defendant's motion for a directed verdict, apparently accepting defendant's argument "that the plaintiffs [sic] have presented insufficient evidence of actionable negligence on the part of the defendant for the case to be considered by the jury, . . ."

The situation changes, however, when the excluded testimony of Dr. Ashby is considered. From the record it appears that, had he been permitted, Dr. Ashby would have testified that he is familiar with the accepted standards of practice for veterinarians "in communities similarly situated with the community of Wake County, North Carolina, as those practices were carried on during October and November, 1975"; that the procedures of veterinary medicine he followed before coming to North Carolina and those he had followed since coming do not differ in any way; that he did nothing different in performing a castration operation on a horse in Illinois or Indiana than he would do in North Carolina [*see Rucker v. High Point Memorial Hospital, Inc.*, 285 N.C. 519, 206 S.E. 2d 196 (1974)]; and that he knows of his "own knowledge" what the accepted practices of veterinary medicine were within Wake County and the surrounding area at the time of the alleged negligent treatment administered to plaintiff's horse by defendant. He would have

testified further that, in his opinion, the procedures employed by defendant to treat the horse following the castration operation "would have been contrary to acceptable medical standards in Wake County" for the reason that, if exercise had not reduced the swelling within 24 hours, according to Dr. Ashby, "therapeutic levels of antibiotics . . . and also therapeutic levels of corticosteroids" should have been administered. Dr. Ashby's testimony would render plaintiff's evidence sufficient to raise an issue of actionable negligence for the jury to resolve and, thus, the granting of a directed verdict for defendant would be error.

We think the judge did err in excluding the testimony. We are not dealing in this case with a complicated, novel or rare medical procedure, but rather with an operation commonly and routinely performed on certain male animals, especially riding and show horses. The Court's observations in *Wiggins, supra* at 138, 171 S.E. 2d at 395-96 are, we think, equally applicable in this case: "The operative procedures here involved would seem to be as simple and uncomplicated as any cutting operation one may imagine. Reason does not appear to the non-medically oriented mind why there should be any essential differences in the manner of" castrating a horse.

Furthermore, to say that this veterinarian, who is otherwise qualified as an expert with a "horse specialty," cannot testify as to the accepted medical standards prevailing in Wake County during October and November 1975, simply because he did not begin practicing here until two months later, is fatuous. The fact that he was not actually practicing in Wake County at the actual time of treatment is merely a factor for the jury to consider in deciding what weight it will give to his testimony. *Wiggins v. Piver, supra.*

We hold that the trial court erred in excluding the testimony of Dr. Ashby and consequently in granting the defendant's motion for a directed verdict. The judgment entered thereon is reversed, and the matter is remanded to the Superior Court.

Reversed and remanded.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. ANNIE KATE WATKINS

No. 7917SC709

(Filed 18 March 1980)

1. **Criminal Law § 42.6; Homicide § 20— bullet taken from body—failure to show chain of custody—no prejudice**

Even if the chain of custody of a bullet taken from deceased's body was not sufficiently established to permit its admission in evidence, defendant was not prejudiced by its admission or by testimony of the doctor who removed it from deceased's body where the doctor merely explained the shape of the bullet and traced its passage through the body but expressed no opinion as to whether the bullet was fired from a gun found at the murder scene, and the bullet was relevant to the cause of death and was consistent with other exhibits admitted without objection.

2. **Homicide § 28.1— self-defense—insufficient evidence**

Evidence that defendant stated that she "did not mean to shoot" deceased, that the shooting was accidental, and that deceased had threatened her on another occasion did not require the court to instruct on self-defense.

3. **Homicide § 21.7— second degree murder—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of defendant for the second degree murder of her husband where there was some evidence that defendant intentionally shot her husband during a domestic quarrel.

4. **Criminal Law § 132— motion to set aside verdict—discretion of court**

Motions to set aside the verdict are addressed to the discretion of the trial court, and the refusal to grant them is not error absent a showing of abuse of that discretion.

APPEAL by defendant from *Smith (David I.), Judge.* Judgment entered 26 March 1979 in Superior Court, STOKES County. Heard in the Court of Appeals 9 January 1980.

On 29 January 1979, defendant was indicted on the charge of the first degree murder of her husband, Donald Edward Watkins. Defendant pled not guilty, was tried and convicted of murder in the second degree, and sentenced to a prison term.

At trial the State's evidence tended to show that between two and three o'clock in the afternoon on 3 December 1978, defendant and deceased visited the home of Barbara Ann Welch, where they had "a little beer to drink." At about three o'clock defendant and deceased returned to their home. Police officers

were summoned to defendant's residence around three-thirty and found defendant's husband lying on the kitchen floor with a gunshot wound in his chest. He died shortly thereafter. An officer testified that, after being warned of her *Miranda* rights, defendant said that "she was tired of him lying to her. She said that she shot him. She kept saying four or five times that she was tired of him lying to her." Defendant's sworn statement was also admitted into evidence, wherein defendant stated that just before the shooting she and deceased were "arguing about some other women that Mr. Watkins had apparently been dating and that [she] was talking on the phone with one of the women and her husband was cursing her at that time." She also stated that her husband "had cut her with a knife and that he had also shot at her on [a] previous occasion, but that [deceased] had not threatened her on the day of 12/3/78 the day of the shooting." Defendant "admitted shooting her husband but said that she did not mean to shoot him."

Defendant's evidence tended to show that deceased had threatened to kill her on a prior occasion. Sometime before the incident, she found deceased's pistol between the mattresses of their bed and, to protect herself, she hid it. On the day in question, defendant placed the gun in her pocketbook shortly before they visited Barbara Welch. Upon returning home, defendant telephone a relative while being interrupted by deceased. When deceased left the house, defendant attempted to remove the gun from her pocketbook and hide it elsewhere. Deceased appeared and tried to gain control of the gun, which went off in the ensuing struggle. Throughout the trial, defendant maintained that her husband's death was accidental; that she never stated to anyone that deceased had lied to her; and that she loved her husband very much. Defendant's daughter testified that she was in the house at the time of the shooting but did not hear defendant and deceased argue before she heard the gunshot.

Defendant's motions to dismiss, to set aside the verdict, for judgment notwithstanding the verdict, and for a new trial were denied.

Attorney General Edmisten, by Associate Attorney T. Michael Todd, for the State.

White and Crumpler, by Fred G. Crumpler, Jr., V. Edward Jennings, Jr., G. Edgar Parker, Harrell Powell, Jr., Edward L. Powell, Jr., and Frank J. Yeager, for defendant appellant.

MORRIS, Chief Judge.

There are fourteen assignments of error in the record. However, only four are brought forward and argued in defendant's brief. We consider only those assignments.

[1] Defendant first contends that the trial court erred by admitting into evidence the alleged murder bullet over defendant's objection without establishing chain of custody. A medical doctor from the office of the Chief Medical Examiner in Chapel Hill, North Carolina, testified that he recovered a bullet which had been lodged in deceased's arm as a result of the shooting. The doctor was given a cellophane bag with the alleged bullet in it, which he identified as the bullet he had taken from deceased's arm. Regarding the bullet, he testified further:

> This is a large caliber lead bullet which is pointed on one side due to the fact in its course through the body it passed through one of the ribs and also it struck the right upper arm bone. It is badly mutilated as a result of passing through the bones.

There is nothing in the record which indicates who had possession of the bullet from the time it was extracted from deceased's body to the time it was introduced into evidence at trial. In this regard, we express no opinion as to whether the doctor's in-court identification of the bullet was sufficient to establish chain of custody of that evidence. However, assuming arguendo, that chain of custody was not properly established, we find little prejudice in the testimony concerning this exhibit. As seen above, the doctor merely explained the shape of the bullet and traced its passage through the body. He expressed no opinion as to whether the bullet was fired from the gun found at the murder scene. Furthermore, the exhibit was relevant to the issue of cause of death and was consistent with the other exhibits admitted without objection. Defendant's assignment of error is overruled.

[2] Defendant's next assignment of error is that the court improperly failed to charge the jury on self-defense or the burden of proof for self-defense. Defendant argues that there was clear evidence supporting an instruction on the doctrine of self-defense in that defendant stated that she "did not mean to shoot" her husband; that the shooting was "accidental"; and that deceased had previously threatened her. Upon review we find no merit in defendant's contention. The applicable rule is stated as follows:

> [T]here must be evidence . . . that the party assaulted believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm, before he may seek refuge in the principle of self-defense, and have the jury pass upon the reasonableness of such belief.

State v. Rawley, 237 N.C. 233, 237, 74 S.E. 2d 620, 623 (1953). *See also State v. Allmond*, 27 N.C. App. 29, 217 S.E. 2d 734 (1975). Upon review, we find no construction of the evidence which would support such an instruction. Nothing in the evidence indicates defendant believed she was in real or apparent danger of death or serious bodily injury. Further, defendant stated in her statement to the police that, although he had threatened her on prior occasions, her husband had not threatened her on the day of the shooting. This assignment of error is, therefore, overruled.

[3] Defendant also assigns error to the trial court's denial of defendant's motion to dismiss the charge of murder in the second degree at the close of the State's evidence and at the close of all the evidence. In this case, defendant offered evidence, thereby waiving the motion for nonsuit made at the close of the State's evidence. *State v. Mosley*, 33 N.C. App. 337, 235 S.E. 2d 261, *cert. denied*, 293 N.C. 162, 236 S.E. 2d 706 (1977). We, therefore, consider only the motion lodged at the close of all the evidence.

In ruling on a motion to dismiss, the court is concerned only with the sufficiency of the evidence and not its weight. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

> If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it

must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.

State v. Smith, 40 N.C. App. 72, 78, 252 S.E. 2d 535, 540 (1979); *State v. Bell, supra.*

When taken in a light most favorable to the State, we find the evidence sufficient to go to the jury on the charge of second degree murder. "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Cates*, 293 N.C. 462, 466, 238 S.E. 2d 465, 468 (1977). These elements may be presumed present where the State carries its burden of satisfying the jury from the evidence beyond a reasonable doubt that the defendant intentionally used a deadly weapon and inflicted wounds proximately resulting in the death of another. *State v. Drake*, 8 N.C. App. 214, 174 S.E. 2d 132, *cert. denied*, 277 N.C. 114 (1970). Here, there was some evidence to indicate that defendant intentionally shot deceased during a domestic quarrel. We, therefore, conclude that the evidence before the court, although contradicted by defendant's evidence, provided a reasonable basis upon which the jury could find that defendant had committed the crime charged. It was then for the jury to determine whether the facts taken singly or in combination satisfied them beyond a reasonable doubt that defendant was in fact guilty. *See State v. Barbour*, 43 N.C. App. 143, 258 S.E. 2d 475 (1979); *State v. Smith, supra.*

[4] Defendant finally assigns error to the trial court's denial of her motion for "judgment notwithstanding the verdict". We note that G.S. 15A-1414 and G.S. 15A-1415 set out some of the errors of law committed by the trial judge which may be the subject of a post-trial motion for appropriate relief. However, regardless of the name given the motion by defendant, it was properly denied. The evidence was supportive of the verdict returned by the jury. Disposition of such post-trial motions is within the discretion of the trial court and the refusal to grant them is not error absent a showing of abuse of that discretion. *See State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death penalty vacated*, 429 U.S. 912, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976). We find none here. This assignment of error is overruled.

The defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and HILL concur.

HELEN R. BROADDUS v. CLARKE R. BROADDUS

No. 793DC801

(Filed 18 March 1980)

1. **Appeal and Error § 6.3— interlocutory ruling—appeal premature**

Defendant's appeal on the ground that the trial court lacked jurisdiction over him to enter a temporary custody order was subject to dismissal, since the court's order denying defendant's motion to dismiss on that ground was an interlocutory ruling, and since defendant's appeal was not from an "adverse ruling" as to jurisdiction "over the person or property" of defendant. G.S. 1-277(b).

2. **Divorce and Alimony § 23.5— temporary custody—children in N.C.—subject matter jurisdiction in trial court**

There was no merit to defendant's contention that the trial court lacked subject matter jurisdiction to enter its temporary order placing custody of the parties' children with the Department of Social Services and ordering it to place them with plaintiff pending a hearing on the merits, since the children were present in N. C. when the action was commenced and the temporary custody order was entered and the court obviously had personal jurisdiction over plaintiff. G.S. 50-13.5(c)(2).

APPEAL by defendant from *Wheeler, Judge.* Judgment entered 2 April 1979 in District Court, PITT County. Heard in the Court of Appeals on 29 January 1980.

This is an action for the custody of the two minor children born to the parties during their marriage to each other. In her complaint verified 30 November 1978 and filed 1 December 1978, plaintiff alleged that she and her husband, the defendant, separated on 3 April 1978; that the two children, Margaret Ann, born 25 August 1971, and Edward Clarke, born 10 October 1974, remained with her at their home in Grifton, Pitt County, North Carolina, and visited their father on weekends; that defendant

picked up the children for their weekend visit on 12 October 1978; and that she did not see them again until 29 November 1978, although she talked with them by telephone on three occasions.

Plaintiff attached to her complaint a letter which she received from defendant on 14 October 1978 in which he informed her that he was taking the children "for a very long & extended vacation"; that he could not let her "take my children"; and that he was trying to do what he thought was best for them. In telephone conversations, plaintiff learned that defendant, an employee of duPont, had been transferred to Seaford, Delaware. Plaintiff further alleged that on 29 November 1978 she went to Delaware, picked up the children, and brought them back to North Carolina.

Upon the filing of plaintiff's complaint, Chief District Court Judge Charles H. Whedbee entered an Order, dated 1 December 1978, granting temporary custody of the children to the Pitt County Department of Social Services and ordering the Department to place the children in the home of their mother pending a hearing on the merits.

On 25 January 1979 defendant filed a "Motion for Dismissal." He contended, *inter alia*, that:

> 1. The court lacks jurisdiction over the person of the defendant in that there exists no jurisdictional grounds for personal jurisdiction; that the court lacks jurisdiction over the person of the defendant in that it has failed to exercise said jurisdiction by service of process; and that the Order . . . dated December 1, 1978, was entered without a hearing and without notice to the defendant.

The record establishes that defendant was not served and thus, the court acquired no personal jurisdiction over him. Defendant further alleged that there was a prior pending action on the matter in Delaware at the time plaintiff filed her complaint and that the Delaware court had also entered a temporary order placing custody in defendant. That order is dated 4 December 1978.

Defendant's motion to dismiss was heard on 29 March 1979 before Judge Wheeler who made the following pertinent findings and conclusions:

FINDINGS OF FACT

(1) Plaintiff's action for custody, alimony, child support and other relief was instituted on December 1, 1978, by the filing of a Complaint in the office of the clerk of Superior Court of Pitt County, North Carolina.

(2) On December 1, 1978 pursuant to motion made by the plaintiff, an order was entered . . . directing the sheriff of Pitt County to take into his custody the two minor children of the marriage of the parties , . . . and to deliver them to the custody of the Pitt County Department of Social Services. Further, the Pitt County Department of Social Services was directed to place the children in the home of the mother, the plaintiff, pending a hearing on the merits in this case.

. . .

(7) Plaintiff's action was instituted on December 1, 1978, alleging that the children were taken from the State of Delaware by the plaintiff and returned to the State of North Carolina on or about that date. The complaint was verified on November 30, 1978 and filed on December 1, 1978 at 10:30 a.m.

(8) The defendant alleges that he, himself, telephoned the Grifton Elementary School in Pitt County on December 4, 1978, and learned that his children were in school there and that the Pitt County Department of Social Services had taken custody of them.

. . .

(10) No evidence has been presented by either side to indicate that (a) the defendant has been served with copies of pleading and other court papers in North Carolina custody case; . . .

(11) The court finds as a fact that the children were inside the State of North Carolina on the date of November 30, 1978 and December 1, 1978 at the time this action was instituted by the plaintiff. . . .

(12) Hearing on the defendant's motion to dismiss was being conducted on March 21, 1979, when the court was ad-

vised that the two minor children had been seized by parties unknown but believed to be connected with the defendant, and had been forcefully removed from their schools.

CONCLUSIONS OF LAW

THIS COURT has jurisdiction of the plaintiff.

THIS COURT has jurisdiction of the subject matter; that is, the children, Margaret Ann Broaddus and Edward Clarke Broaddus, for that both children were inside the State of North Carolina on the date that this action for custody was instituted.

. . .

Thereupon, the court denied the defendant's motion to dismiss, and he appealed.

Beaman, Kellum, Mills & Kafer, by James C. Mills and George M. Jennings; and David T. Greer for the plaintiff appellee.

Blount, Crisp & Savage, by Nelson B. Crisp and Emily P. Johnson, for the defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion to dismiss. He argues, among other things, that the court lacked jurisdiction to enter the temporary custody order on 1 December 1978 because he was not served and the court never acquired personal jurisdiction over him.

In our opinion, the defendant's appeal on this ground is subject to dismissal. The denial of a motion to dismiss is not a final determination. It is an interlocutory ruling and, ordinarily, no appeal lies therefrom. *Cox v. Cox*, 246 N.C. 528, 98 S.E. 2d 879 (1957); *Godley Auction Co., Inc. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). The statute which defines the right of appeal, G.S. § 1-277, prescribes in relevant part:

> (a) An appeal may be taken from every judicial order or determination . . . upon or involving a matter of law or legal inference, . . . which affects a substantial right . . .; or which in effect determines the action, . . .

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court *over the person or property of the defendant.*

. . .

[Emphasis added.]

Subsection (b) provides an exception to the rule of law expressed in subsection (a), but this case does not fall within the exception because the trial court neither had nor pretends that it had personal jurisdiction over the defendant, and obviously the children are not his property. Thus, this is not an appeal from an "adverse ruling" as to jurisdiction "over the person or property" of the defendant. Neither is it an appeal from a final judgment or, in our opinion, from a determination "which affects a substantial right." *See Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975), which ruled that the right is substantial only where the appellant would lose the case if the order is not reviewed before final judgment. Defendant does not nor could he successfully contend that such is the case here.

[2] In ruling that defendant's appeal is premature and thus subject to dismissal, we emphasize that his attempted appeal is taken from an interlocutory ruling respecting a temporary custody order. We elect to consider the merits of this appeal, however, for the reason that defendant contends the trial court lacked subject matter jurisdiction to enter its temporary order placing custody of the children with the Department of Social Services and ordering it to place them with the plaintiff pending a hearing of the cause on its merits. *See Kilby v. Dowdle*, 4 N.C. App. 450, 166 S.E. 2d 875 (1969). This contention plainly lacks merit. Prior to its amendment effective 1 July 1979, *see* N.C. Sess. Laws, c. 110, s. 12 (1979) [codified at G.S. § 50-13.5 (1979 Cum. Sup.)], G.S. § 50-13.5 in pertinent part provided as follows:

Procedure in actions for custody or support of minor children.

. . .

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.—

. . .

(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, . . . having actual care, control, and custody of the minor child.

. . .

(d) Service of Process; Notice; Interlocutory Orders.—

. . .

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(e) . . .

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

The record before us in this proceeding clearly supports Judge Wheeler's finding that the children were present in the State of North Carolina when this action was commenced and the temporary custody order entered on 1 December 1978. Moreover, the court obviously had personal jurisdiction over the plaintiff. Thus, the prerequisites for the court's gaining jurisdiction of the subject matter of the action under subsection (c) of the statute were met entirely. Subsection (d)(2) clearly gives the court having jurisdiction over the child the authority to enter orders for *temporary* custody pending service of process. *See Zajicek v. Zajicek*, 12 N.C. App. 563, 183 S.E. 2d 850 (1971).

The statute serves further to bolster our ruling regarding the want of personal jurisdiction over defendant. Clearly, under subsection (e)(3), the fact that defendant was not served prior to the court's entering the temporary order will not thereby render such order null and void.

The court provided that its ruling was made pending a full hearing on the merits. The constitutional guarantees respecting

notice and an opportunity to be heard would have to be accorded defendant before the issue of custody could be validly determined so as to be binding on him. The court's authority to enter the temporary custody order having been irrefutably shown, that order accordingly is

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. TIMOTHY MEYERS (IN THE MATTER OF A 1978 MERCURY MARQUIS COUPE AUTOMOBILE ON PETITION OF PASQUALE MORGIGNO)

No. 794SC950

(Filed 18 March 1980)

Narcotics § 6— car used to transport narcotics—forfeiture—no knowledge of such use by owner

Petitioner carried his burden of proving that he did not know and had no reason to believe that his car was being used by two other persons to transport controlled substances, and petitioner was therefore entitled to the return of his car which had been seized by the sheriff's department because of its use to transport the controlled substances, where the only evidence before the court on the issue of petitioner's knowledge was petitioner's testimony that he was in jail when his car was used to transport controlled substances; after being jailed, petitioner gave his car to his friend and told him to deliver his car to his attorney; petitioner did not know and had never met the two persons who transported narcotics in his car; petitioner did not authorize such use of his car; and petitioner did not know until approximately a week after the car was seized that it had been used in violation of the narcotics laws.

APPEAL by petitioner, Pasquale Morgigno, from *Bruce, Judge*. Order entered 4 June 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals on 4 March 1980.

This proceeding was instituted on the motion of the petitioner, Pasquale Morgigno, for the return of his 1978 Mercury Marquis automobile which he alleged had been seized by and was in the possession of the Onslow County Sheriff's Department. At a hearing on the motion before Judge Bruce, the State offered the testimony of William K. Stewart, an undercover agent with the narcotics division of the Onslow County Sheriff's Department,

who testified in substance that he had participated in the apprehension of Timothy Mosley and Timothy Meyers for possession with intent to sell quaaludes; that Mosley and Meyers had arrived near the scene of their subsequent arrests in a 1978 Mercury Marquis, which was later identified as belonging to the petitioner; and that he had seen Meyers take a paper bag containing quaaludes out of the trunk of the car and, after counting out the quantity of pills to be sold, put the remainder of the pills back into the trunk. Following the arrests of Meyers and Mosley, the car was impounded by the Sheriff's Department.

Petitioner testified that he was "from New York City"; that he was the owner of the subject automobile; but that on 23 April 1979, the date the car was seized, he was in jail in Wilmington, North Carolina, and "didn't have any idea" that his car was being used by Mosley and Meyers. He said that, when he was jailed on 20 April 1979, he called Richard Marino, a co-defendant in the case in Wilmington, gave Marino the keys to the car, and told him to drive the car to Jacksonville, North Carolina, and "turn it over" to his [petitioner's] attorney. He did not authorize Marino "to do anything to my car except drive it to Jacksonville and turn it over" to his lawyer. Petitioner did not find out that his car had been seized until he was released from jail on 30 April 1979. He testified that he did not know Marino was "loaning [his] car out to anyone else"; that he did not know and had never met Mosley and Meyers; and that he had never authorized them to use his car.

At the close of the evidence, Judge Bruce made the following findings of fact:

> 1. That the 1978 Mercury Marquis Coupe in question was seized by officers of the Onslow County Sheriff's Department on April 23, 1979 at which time it was being used to transport controlled substances.
>
> 2. That two defendants, Timothy Earl Moseley [sic] and Timothy Dwaine Myers [sic] were charged with having transported the controlled substances in said 1978 Mercury and have been finally convicted and are now in custody of the North Carolina Department of Correction.
>
> 3. That the 1978 Mercury Marquis Coupe automobile is now in the possession of the Sheriff of Onslow County.

4. That the Movant, Pasquale Morgigno, is the owner of the 1978 Mercury Marquis Coupe in controversy here.

From these findings he concluded, *inter alia*, that petitioner "has failed to show by the greater weight of the evidence that he had no reason to believe that the 1978 Mercury Marquis Coupe would be used in violation of the laws of the State of North Carolina relating to controlled substances." From a judgment ordering the car sold and the proceeds from the sale turned over to the Onslow County Auditor to be disbursed to the Onslow County Board of Education, petitioner appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Jeffrey S. Miller for the petitioner appellant.

HEDRICK, Judge.

Among other things petitioner argues on appeal that to allow the forfeiture of his car under the circumstances of this case will result in a deprivation of his property without due process of law. He bases this argument on his observation that the "undisputed" evidence of record "shows that he did not know Timothy Meyers or Timothy Mosley and never authorized them to use his car for any purpose whatsoever."

While our statutes authorize the immediate forfeiture of vehicles used in the illegal transportation of controlled substances, *see* G.S. §§ 90-112 and 18A-21, the power is not absolute. "Forfeiture may be defeated if the claimant can show the illegal use occurred without his knowledge or consent, with the claimant having the right to have a jury pass upon his claim." *State v. Richardson*, 23 N.C. App. 33, 36, 208 S.E. 2d 274, 276, *cert. denied*, 286 N.C. 213, 209 S.E. 2d 317 (1974). *See also State v. McPeak*, 243 N.C. 273, 90 S.E. 2d 505 (1955); *State v. O'Hora*, 12 N.C. App. 250, 182 S.E. 2d 823, *appeal dismissed*, 279 N.C. 513, 183 S.E. 2d 690 (1971); *Annot.*, 50 A.L.R. 3d 172, 189 (1973 & Supp. 1979). That means simply that the claimant is entitled to have the fact-finder, whether court or jury, determine the essential issue in a forfeiture proceeding, namely: Was his vehicle being used illegally to transport controlled substances *without* his knowledge

or consent? The burden is on the claimant to prove to the fact-finder "that he had no knowledge, or reason to believe, that [the vehicle] was being or would be used in the violation of laws of this State relating to controlled substances. . . ." G.S. § 90-112.1 (b) (1979 Cum. Supp.). If the claimant carries this burden, he is entitled to the return of his vehicle. G.S. § 90-112.1(c) (1979 Cum. Supp.).

In the present case Judge Bruce purported to determine the question of the petitioner's knowledge of or consent to the illegal use of his car by Meyers and Mosley when he concluded that the petitioner had "failed to show by the greater weight of the evidence that he had no reason to believe" that his car would be used in violation of our laws. However, this confusingly-phrased "conclusion" fails to determine the essential issue in at least two crucial respects: First, the conclusion is not supported by the meager findings of fact. The court's findings that the automobile was seized while being used to transport controlled substances; that Meyers and Mosley were convicted of transporting the same; that the car is presently in the possession of the Onslow County Sheriff's Department; and that the car belongs to the petitioner, do not lead in any conceivable way to the conclusion that petitioner has failed to carry his burden to show lack of knowledge. The court has made no attempt to enter any findings with respect to the petitioner's knowledge of the purpose for which his car was being used. But, factual determinations concerning what he knew, or had reason to believe, or to what uses of his vehicle he actually or impliedly consented, *must* be made before the fact-finder can answer the essential issue and before it can conclude that the petitioner has failed to carry his burden. *See State v. Richardson, supra.*

Perhaps the reason the court's findings prove so deficient results from the total lack of evidence from which findings to support such a conclusion could be made. All the evidence in this case dictates the contrary conclusion. This is the second and most significant infirmity of the conclusion entered by Judge Bruce. The uncontradicted testimony of the petitioner is that he entrusted his car to Marino, who, from the record before us, has not been linked in any respect to the transaction between Officer Stewart on the one side, and Meyers and Mosley on the other; that petitioner was in jail in Wilmington when Meyers and

Mosley used his car to transport quaaludes; that he did not know and had never met those two individuals; and that he had not authorized such a use of his car, nor did he know until approximately a week after the vehicle was seized, that it had been used in violation of the narcotics laws. The only permissible conclusion to be drawn from his testimony, which we emphasize is the only evidence on the essential issue of knowledge, is that the petitioner has carried his burden of proving that he did not know and had no reason to believe that his car was being used by Meyers and Mosley to transport controlled substances. It follows that he was entitled to the return of his car. G.S. § 90-112.1(c) (1979 Cum. Supp.).

The record discloses, however, that, subsequent to the entry of the order of forfeiture, the parties agreed to the sale of the car, and an Order of Sale was thus entered on 13 July 1979. In that Order Judge Bruce directed that the proceeds of the sale which remained after the deduction of certain expenses, be held by the Clerk of Superior Court of Onslow County pending the outcome of this appeal. We hold that the petitioner is now entitled to those proceeds.

For the reasons stated, the judgment is reversed, and the cause is remanded to the Superior Court for the entry of an Order releasing the proceeds of the sale of the automobile to petitioner.

Reversed and remanded.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. JESSIE VIRGIL PATTON

No. 7928SC913

(Filed 18 March 1980)

1. Criminal Law § 66.1— identification of defendant—opportunity for observation

The trial court did not err in allowing an in-court identification of defendant by a rape victim where the evidence tended to show that the witness had ample opportunity to observe her assailant at the time of the offense; there

was sufficient light to permit the witness to make an identification of the person she observed; and there was nothing in a pretrial photographic identification suggestive or conducive to mistaken identification.

2. **Criminal Law § 43.1— photographs—deletion of identification numbers**

The trial court did not err in allowing the State to introduce photographs into evidence which had been altered since the voir dire hearing to delete identification numbers which had appeared on them.

3. **Criminal Law § 43— photographs reconstructing crime—admissibility for illustration**

Defendant in a rape prosecution was not prejudiced where the trial court allowed into evidence a photographic reconstruction of the alleged crime, since the pictures were admitted for the limited purpose of illustrating a witness's testimony.

4. **Rape § 6.1— second degree rape—instruction on lesser offense not required**

Where the prosecutrix testified that defendant raped her and that his private parts entered her private parts, the trial court properly submitted an issue of second degree rape to the jury and did not err in failing to instruct on the lesser included offense of assault with intent to commit rape.

5. **Criminal Law § 102.1— matters outside record—jury argument properly limited**

There was no merit to defendant's contention that his attorney had a right to argue that results of tests on defendant's hair, blood and other body samples would have been presented to the jury if they had been positive, since neither the court order nor the results argued by counsel were introduced into evidence and they were therefore not proper subjects of argument.

APPEAL by defendant from *Howell, Judge.* Judgment entered 6 June 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 February 1980.

Defendant was charged in a bill of indictment, proper in form, with the offense of first degree rape. The case was submitted to the jury on a charge of second degree rape, and defendant was found guilty of the charge submitted. From an active sentence of imprisonment of no less than 30 years and no more than 30 years, defendant appealed.

Prior to trial, defendant moved to suppress any in-court identification of prosecutrix of the defendant as the perpetrator of the offense charged on the grounds of defendant's rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The State's evidence on *voir dire* tended to show that at 4:00 a.m., Mabel Ramsey was on duty at a rest home in Asheville making her rounds. She entered the lounge which was completely dark. There were no lights on overhead in the hallway. Two large fluorescent lights were in each nurse's station, and night lights were located in the baseboard in the hallways. As she started to sit in a recliner in the lounge, she looked up. Defendant was standing very close to her and was right in her face. He was "standing partly inside the lounge angle ways from the hall." She looked in his eyes and right in his face for five or ten seconds. Light was coming from the nurses' station which was three rooms away, and the walls were white. Light was shining on defendant's face. She testified that she was certain the man she saw was defendant, and she based her identification on what she saw that night. Defendant pointed something at her and told her to get on the couch, which she did. Defendant had intercourse with her.

Later that morning and the next day, she viewed photographs of men other than defendant which looked like the man or which she thought might be the man who raped her. She picked out defendant's photograph and said he was the man who raped her. Two or three days later, without pictures or any statement from anyone, she identified defendant in a lineup at the courthouse. The trial court made findings of fact and denied defendant's motion to suppress.

Attorney General Edmisten, by Associate Attorney Thomas G. Meacham, Jr., for the State.

Public Defender Peter L. Roda, Twenty-eighth Judicial District, by Assistant Public Defender Lawrence C. Stoker, for defendant appellant.

ERWIN, Judge.

On appeal, defendant presents six assignments of error. We do not find error.

[1] Defendant contends: "The court committed error in allowing the in-court identification of the defendant by the State's witness Mabel Ramsey."

Based upon competent evidence, the trial court found that the witness had ample opportunity to observe the person (defend-

ant) at or about 4:00 a.m. on 19 December 1978 and that there was sufficient light to permit the witness to make an identification or the person (defendant) she observed. The trial court also found that there is nothing in the photographic identification procedures suggestive or conducive to mistaken identification and that the in-court identification is of independent origin based solely on what the witness saw at the time and does not result from any out-of-court confrontation. The evidence presented supports the findings of fact and conclusions drawn therefrom and are conclusive and binding upon appeal. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Stephens*, 35 N.C. App. 335, 241 S.E. 2d 382 (1978). This assignment of error is without merit.

[2] Defendant next contends that the trial court erred by allowing the State to introduce photographs into evidence which had been altered since the *voir dire* hearing. The trial court found,

> "1. That most of the photographs contain an identification number on the chest or lower portion of each subject's body.
>
> 2. That the prosecuting witness did not use such identification numbers to identify either the Defendant or the Exhibit itself.
>
> 3. That the Defendant does not contend that the photographs were not a true likeness of the Defendant."

and concluded the following:

> "BASED UPON THE FOREGOING FINDINGS OF FACT the Court concludes as a matter of law that the numbers on the photographs have been obliterated for the reason that they contain identification numbers, including a photograph of a change [sic] board or something of this nature around the persons depicted in the photographs body, and that the obliteration of these identification numbers could in no way prejudice the Defendant; and that the alteration of the photographs is not of sufficient character to justify their exclusion from this trial.
>
> BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS the objection of the Defendant to the admissibility of the photographic albums is overruled."

We do not find a distinction in the case *sub judice* from *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970), wherein our Supreme Court, when faced with a similar situation, held that the photograph, with inscription and date deleted, was properly admitted for illustrative purposes on the question of identity. We find no error.

[3] Next, defendant contends that the court committed error in allowing into evidence a photographic reconstruction of the alleged crime. The record shows that State Exhibits Nos. 6, 7, and 8 were introduced into evidence without objection. Defendant did object to the introduction of State Exhibit No. 9. This picture shows a man standing in the door facing Mrs. Ramsey with a top of a chair showing in the lounge of the rest home. The picture was admitted into evidence followed by appropriate instructions from the court that the picture was not substantive evidence and that it was to be considered for the limited purpose of illustrating the testimony. Mrs. Ramsey testified that she was present when the picture was made by Mr. Smith of the Asheville Police Department and that she was standing where she was "standing at the time I have been testifying to."

> "Q. Mr. Smith I believe you said was standing at the door, is that correct?
>
> A. In the — partly in the hallway. Just a little in the door, just like the Defendant was."

"A witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury." *State v. Lentz*, 270 N.C. 122, 125, 153 S.E. 2d 864, 867 (1967), *cert. denied*, 389 U.S. 866, 19 L.Ed. 2d 139, 88 S.Ct. 133 (1967). The record does not reveal whether or not State Exhibit No. 9 was shown to the jury after it was admitted into evidence during the course of the trial.

To warrant a new trial, defendant must show the ruling complained of was material and prejudicial to his rights, *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971), and that a different result would likely have ensued. *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970), *reversed on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 680, 91 S.Ct. 2290 (1971). Defendant has not shown prejudicial error.

[4] We do not find any error in the charge of the court in failing to instruct the jury on the lesser included offense of assault with intent to commit rape. It is the duty of the trial court in instructing the jury to "declare and explain the law arising on the evidence." G.S. 15A-1232; *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977). It is also well settled in this State that the trial court is not required to submit lesser included offenses to the jury unless there is evidence before the jury to support them. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); 4 Strong's N.C. Index 3d, Criminal Law, § 115, pp. 610-11. The prosecutrix testified that defendant "proceeded to rape me. His private parts entered my private parts." Defendant's evidence was that he was not present at the rest home. There was not any evidence to support an instruction on the lesser offense.

[5] A pretrial court order provided "that . . . defendant . . . subject his person to further identification procedures, namely submission of his head hair, pubic hair, blood, saliva, fingernail scrapings . . ." Defendant contends that his attorney had a right to argue that had the results of the order been positive, then the results would have been presented to the jury. The order was a part of the record in the case, although it was not introduced into evidence. This argument was not allowed.

"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 inlcuded in the evidence." (Citations omitted.) *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E. 2d 855, 857 (1974). In the instant case, neither the court order nor the results argued by counsel were introduced into evidence at trial and therefore, were not proper subjects of argument. Thus, this case is distinguishable from *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), where the court order had been introduced into evidence. We find no error.

Defendant has not shown prejudicial error in his trial, and we find

No error.

Judges MARTIN (Robert M.) and WELLS concur.

JUNIOR REX TAYLOR, PLAINTIFF-EMPLOYEE v. M. L. HATCHER PICK-UP AND DELIVERY SERVICE, DEFENDANT-EMPLOYER AND LUMBERMENS MUTUAL CASUALTY COMPANY, DEFENDANT-INSURANCE CARRIER

No. 7910IC803

(Filed 18 March 1980)

1. **Master and Servant § 93— workers' compensation—refusal to require independent physical examination**

The Industrial Commission did not abuse its discretion in denying defendants' request that the Commission order plaintiff employee to submit to an independent physical examination pursuant to G.S. 97-27 where defendants made the request only after the hearing had been completed and defendants knew that the sole issue for determination at the hearing was the issue of plaintiff's permanent disability.

2. **Master and Servant §§ 72, 93.3— workers' compensation—permanent partial disability rating—competency of expert's testimony**

The Industrial Commission did not err in considering a surgeon's testimony giving a 25% permanent partial disability rating to plaintiff's left hand where the surgeon testified that he "briefly" examined plaintiff just prior to the hearing, that his calibration of plaintiff's disability was on a "very subjective basis," and that if he had a longer time to evaluate plaintiff he did not think it would affect the 25% rating.

APPEAL by defendants from an opinion and award by the North Carolina Industrial Commission filed 15 May 1979. Heard in the Court of Appeals 5 March 1980.

It was stipulated that the parties were subject to the North Carolina Workmen's Compensation Act, that an employment relationship existed between plaintiff and defendant employer, that defendant Lumbermens Mutual Casualty Company was the "carrier on the risk;" that plaintiff's average weekly wage was $228.31; that on 14 June 1977 plaintiff sustained an injury by accident arising out of and in the course of his employment; that defendants admitted liability and the parties entered into an agreement for the payment of compensation for temporary total disability which was paid from the date of the accident until 27 September 1977. It was further stipulated that "The only issue for determination at this hearing is what additional compensation plaintiff may be entitled to receive for permanent disability of the left hand or disfigurement of such hand and for permanent disability or disfigurement of the left leg."

At the hearing on 19 June 1978 held before Chief Deputy Commissioner Shuford, Dr. James C. Fahl, stipulated by defendants as a medical expert specializing in surgery, testified on behalf of plaintiff. Dr. Fahl testified that he had treated plaintiff for injury to his left hand and left leg. The last time Dr. Fahl examined plaintiff prior to the hearing was 4 November 1977. At that time, plaintiff still had some stiffness in his wrist. Since it was only five months after the injury Dr. Fahl thought that there was a very good possibility that the stiffness would improve. For that reason, Dr. Fahl stated he was not prepared to give plaintiff a disability rating in the fall of 1977.

On the morning of the hearing on 19 June 1978 Dr. Fahl briefly examined plaintiff outside the hearing office with reference to giving plaintiff a disability rating. Based on that examination, Dr. Fahl testified that plaintiff had normal finger motion, still had stiffness in his wrist, lacked 40 degrees of elevation or extension of the wrist and had weakness in his grip. Dr. Fahl testified that he could give plaintiff a disability rating with reference to the injury to plaintiff's wrist and hand, but that it was an estimate since Dr. Fahl did not have his guides at the hearing and did not know what the percentages were. In response, Chief Deputy Commissioner Shuford handed Dr. Fahl a copy of the North Carolina Industrial Commission rating guide. Dr. Fahl testified that he had an opinion as to what percent of disability plaintiff sustained and that he would estimate approximately 25 percent disability to the wrist and hand. Dr. Fahl further testified that he was calibrating plaintiff's grip "on a very subjective basis." Defendant presented no evidence and the hearing was adjourned.

In a letter dated 26 June 1978 to the Chief Deputy Commissioner, defendants stated that they were " . . . completely unaware that Dr. Fahl was going to change his opinion with regard to the plaintiff-employee's permanent disability" in that Dr. Fahl had informed defendants that based on the 4 November 1977 examination Dr. Fahl was unaware of any permanent partial disability. Based on this change in opinion by Dr. Fahl and defendants' surprise at this change at the hearing, defendants requested the Chief Deputy Commissioner to enter an order pursuant to G.S. 97-27 requiring plaintiff to submit to an independent physical examination. In support of their position, defendants enclosed two

letters written by Dr. Fahl; one dated 11 April 1978 addressed to Mr. Blackwood, defendants' attorney; the other dated 8 February 1978 addressed to Mr. Smith, plaintiff's attorney. In both letters Dr. Fahl indicated that at the time of his examination of plaintiff on 4 November 1977, he had no reason to feel plaintiff would have any permanent disability.

On 10 July 1978 the Chief Deputy Commissioner denied defendants' request for an order pursuant to G.S. 97-27 and awarded plaintiff compensation based on his finding and conclusion that as a result of the injury by accident plaintiff has a 25% permanent partial disability in his left hand. Defendants appealed to the Full Commission and the Full Commission denied defendants' motion for an independent examination by another physician and adopted the decision of the Chief Deputy Commissioner. Defendants appealed.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Joseph E. Elrod III and Richard L. Vanore, for defendant-appellants.

Franklin Smith for plaintiff-appellee.

MARTIN (Robert M.), Judge.

[1] Defendants contend the Industrial Commission erred in denying their request that the Industrial Commission order plaintiff employee to submit to an independent physical examination pursuant to G.S. 97-27. G.S. 97-27 provides in pertinent part:

> After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall . . . submit himself to an examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission.

The defendant correctly argues that the language of the statute is mandatory as to the employee. The employee "shall" submit himself to an examination if it is requested by an employer or ordered by the Industrial Commission. The language of the statute, however, imposes no mandatory obligation on the Industrial Commission to order an examination. When an employee requests the Commission to order an employee to submit to an

examination, whether the Commission grants or denies the employer's request is within the discretion of the Commission.

A similar question was decided in *Cabe v. Parker-Graham-Sexton, Inc.*, 202 N.C. 176, 162 S.E. 223 (1932) in which the Court considered whether the right to require an autopsy, granted to the employer and the Industrial Commission under G.S. 97-27, is a matter within the discretion of the Industrial Commission. In *Cabe*, defendant insurance carrier requested of the administrator of the deceased employee's estate the right to have an autopsy performed after deceased employee had been interred. The request was denied. There was no formal request made upon the Industrial Commission until the case was called for hearing. The Commission in its discretion denied defendants' motion for an autopsy and the exercise of the Commission's discretion was upheld by the Supreme Court.

In the present case, defendants knew that the sole issue for determination at the hearing was the issue of permanent disability. Defendants presented no evidence at the hearing. When asked by the court, "Anything for the defendants?", defendants replied, "No, Your Honor." Defendants did not make their request for an independent examination until after the hearing had been completed. Furthermore, defendants did not show that an independent examination by another physician would change the plaintiff's disability rating. The Commission was within its sound discretion in denying defendants' request.

[2] Defendants further contend that the Commission erred in failing to strike Dr. Fahl's testimony pertaining to the 25 percent permanent partial disability rating to plaintiff's left hand as without probative value. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The court may set aside findings of fact only on the ground they lack evidentiary support. The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 215, 232 S.E. 2d 449, 452 (1977). In the case *sub judice*, Dr. Fahl was stipulated by defendants to be an expert witness. Dr. Fahl testified that he "briefly" examined the plaintiff and that his calibration of plain-

tiff's disability was on a "very subjective basis." Dr. Fahl also testified that if he had a longer time to evaluate plaintiff he did not think it would affect the 25 percent disability rating. The Commission did not err in weighing this testimony and deciding the issue of the percent of plaintiff's disability on the basis of its weight.

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. BARRY NELSON McCOY

No. 7915SC784

(Filed 18 March 1980)

Criminal Law § 142.3— submission to physical tests—probation condition reasonable—no improper search

A condition of defendant's probation requiring him to submit to physical testing or examination at the request of his probation officer for the detection of drugs or controlled substances was directly related to and grew out of the offense for which defendant was convicted and was therefore reasonable, and it was not an invalid condition of probation under G.S. 15A-1343(b)(15).

APPEAL by the State of North Carolina from *McKinnon, Judge.* Order entered 3 May 1979 in Superior Court, CHATHAM County. Heard in the Court of Appeals 18 January 1980.

This is an appeal by the State of North Carolina from an order of the court suppressing evidence discovered as a result of an examination and test of probationer's blood and urine for the detection of controlled substances pursuant to a condition of his probation and the court's determination that such search is not permitted as a valid and enforceable condition of probation.

Attorney General Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

Cheshire, Bruckel & Swann, by William J. Bruckel, Jr., for the defendant.

MARTIN (Robert M.), Judge.

In its order of 3 May 1979 the Court made the following findings of fact:

1. That, at the December 5, 1977, Session of Orange County Superior Court, before the undersigned Judge of Superior Court, presiding, the defendant entered a plea of guilty to the felony of obtaining a controlled substance, hydromorphone (Dilaudid) by use of an altered or forged prescription and was sentenced to the custody of the North Carolina Department of Corrections for a period of five (5) years, which was suspended, and the defendant was placed on probation for a period of five (5) years. Furthermore that, at the June 29, 1978 Session of Chatham County Superior Court, before the Honorable Robert L. Farmer, Judge presiding, the defendant was convicted of the felony of possession of 3, 4 methylenedioxyamphetamine (MDA) with intent to sell or deliver and was sentenced to the custody of the North Carolina Department of Corrections for a period of not less than five (5) years nor more than seven (7) years, which was suspended, and the defendant was placed on probation for a period of five (5) years. The defendant has been under the supervision of Officer Crouse since entry of these judgments.

2. That, a special condition of the probationary judgment entered in Orange County in case 77CRS6986 was ". . . that the defendant not use or possess any controlled substance except with a valid prescription of a physician."

3. That, a special condition of the probationary judgment entered in Chatham County in case 76CRS3689 was ". . . that the defendant not have in his possession nor under his control any controlled substances unless duly prescribed by a physician or pharmacist; . . . that he submit to any physical test or examination at the request of his probation officer for the detection of drugs or controlled substances and pay the cost thereof; that he permit the search of his person or the place where he resides or any vehicle under his control by his probation officer upon request and without the necessity for a search warrant."

4. That, the special conditions of this judgment were announced to the defendant in open court at the time of entry of the judgment, and they were explained to defendant by the probation officer and he consented to the conditions of each judgment.

5. That, prior to February 12, 1979 the defendant had contacted Officer Crouse about a modification of a condition of probation to permit him to travel outside Chatham County for the purpose of seeking employment, and Officer Crouse had told him that he would have to go to court to seek a modification and that he should contact the district attorney. At about 8:30 a.m. on February 12, 1979 the defendant called Officer Crouse about his court date, and Officer Crouse detected that the defendant appeared to be incoherent and had difficulty in understanding the directions Officer Crouse gave. Thereafter at about 10:00 a.m. the defendant appeared in court and through his former attorney, Edward McLaurin, inquired about a hearing on his request for modification. From Officer Crouse's observation of the defendant in court and his manner of speech on the telephone, and from having previously observed other individuals who were admittedly under the influence of controlled substances, Mr. Crouse formed the opinion that the defendant might be under the influence of some drug, and he asked the district attorney and the court to defer hearing on the request in order that he might seek tests of the defendant, as permitted by the Chatham County probation judgment.

6. That, as a result of his observations, Mr. Crouse requested the defendant to accompany him to Haywood-Moncure Health Center for tests of his blood and urine, and the defendant accompanied Mr. Crouse to the clinic and submitted to the furnishing of samples of blood and urine to medical personnel there. Mr. Crouse's request and the defendant's submission to these tests was pursuant to the condition of the judgment in the Chatham County case. The samples obtained were properly identified and sent to the chemical laboratory of the State Bureau of Investigation for analysis and were there analyzed by SBI Chemist, McDade, and found to contain methaqualone (Quaalude), a Schedule II controlled substance.

7. That, the evidence of Mr. Crouse and Mr. McDade is sufficient to satisfy the court that the defendant on or about February 12, 1979, did possess and use a Schedule II controlled substance, methaqualone, and that he thereby wilfully violated a condition of his probation in each case.

8. That, the defendant had previously been found in violation of condition of his probation in the Orange County case by failing to attend school as required and by going outside of the geographical restrictions of the judgment, by order of Judge Gordon Battle on October 19, 1978, but he was then continued on probation.

9. That, if the evidence heard by this Court were admissible, the present violation, together with his previous violation, is sufficient to justify the revocation of probation and the activation of the sentences.

From its findings of fact the Court drew the following conclusions of law:

1. Officer Crouse had probable cause to believe that the defendant had used and possessed controlled substances on February 12, 1979, and to request an examination and test of the defendant's blood and urine pursuant to the condition of his probation in the Chatham County case.

2. This request and the examination and tests were made under the authority of this condition of probation, and the defendant's response to the request and his submission to the tests was a result of this condition of probation.

3. The Court is of the opinion that the requirements of this condition of probation constitute a search, and that by reason of the last sentence of G.S. § 15A-1343(b)(15) and the decision of the North Carolina Court of Appeals in *State v. Grant*, 40 N.C. App. 58 (1979), such a search is not permitted as a condition of probation.

4. Because of this statute and this opinion, the Court is of the opinion that the evidence of the defendant's use and possession of a Schedule II controlled substance was unlawfully obtained and may not be considered as proof that the defendant has violated the conditions of his probation,

and the defendant's Motion to Suppress the Evidence is allowed.

There being no admissible evidence of the defendant's violation of the conditions of probation charged, it is ORDERED that the defendant be continued on probation under the conditions of the probation judgment heretofore entered.

By its first assignment of error, the State contends the court erred in construing G.S. 15A-1343(b)(15) by finding invalid a condition of probation requiring him to submit to physical testing or examination at the request of his probation officer for the detection of drugs or controlled substances.

In the instant case, the probationer had been convicted of two prior felony controlled substance offenses. The condition requiring him to submit to physical testing or examination at the request of the probation officer were clearly directly related to and grew out of the offense for which the defendant was convicted. *See State v. Smith*, 233 N.C. 68, 62 S.E. 2d 495 (1950); *State v. Simpson*, 25 N.C. App. 176, 212 S.E. 2d 566, *cert. denied*, 287 N.C. 263, 214 S.E. 2d 436 (1975). It was designed to insure that the defendant would not use or possess illegal controlled substances during his probationary period and to further his reform. We do not think such a condition is unreasonable.

The trial court found that these conditions requiring the defendant to submit to physical testing for the detection of controlled substances to be invalid, apparently reasoning that it would be a "search that would otherwise be unlawful." The trial court also relied on this Court's holding in *State v. Grant*, 40 N.C. App. 58, 252 S.E. 2d 98 (1979), for its decision.

It is well settled that the United States Constitution is not violated by the requirement that a probationer submit to warrantless searches as a condition of probation. The courts of North Carolina and of other states, have approved of this condition. *State v. Montgomery*, 115 Ariz. 583, 566 P. 2d 1329 (1977); *People v. Mason*, 5 Cal. 3d 759, 97 Cal. Rptr. 302, 488 P. 2d 630 (1971), *cert. denied* 405 U.S. 1016, 92 S.Ct. 1289, 31 L.Ed. 2d 478 (1972); *Huffman v. United States*, 259 A. 2d 342 (D.C. App. 1969), aff'd 152 App. D.C. 238, 470 F. 2d 386 (1971), *on reh.* 163 App. D.C. 417, 502 F. 2d 419 (1974); *People v. Fortunato*, 50 A.D. 2d 38, 376

N.Y.S. 2d 723 (1975); *State v. Mitchell*, 22 N.C. App. 663, 207 S.E. 2d 263 (1974); *State v. Schlosser*, 202 N.W. 2d 136 (N.D. 1972).

In *State v. Craft*, 32 N.C. App. 357, 360, 232 S.E. 2d 282, 285, *cert. denied*, 292 N.C. 642, 235 S.E. 2d 63 (1977), we said:

> The Fourth Amendment generally requires a warrant for a search or seizure, but a party may waive this requirement and consent to the search or seizure. *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973).

As a condition to probation, defendant had waived his right to be free from warrantless searches conducted in a lawful manner by his probation officer. *State v. Mitchell*, 22 N.C. App. 663, 207 S.E. 2d 263 (1974).

We think the statement in *People v. Mason*, 5 Cal. 3d 759, 764-65, 97 Cal. Rptr. 302, 488 P. 2d 630, 633 (1971), *cert. denied* 405 U.S. 1016, 92 S.Ct. 1289, 31 L.Ed. 2d 478 (1972), is particularly applicable to the instant case:

> [P]ersons conditionally released to society . . . may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities "reasonable" which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands. (Citations omitted) Thus, a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection.

G.S. 15A-1343(b)(15) removed the authority of police officers to conduct such searches. In *State v. Grant*, 40 N.C. App. 58, 252 S.E. 2d 98 (1979), this Court held only that the requirement that probationer submit to a warrantless search by law enforcement officers, *not his probation officer*, was invalid. The official commentary to G.S. 15A-1343 states:

> This section specifies a number of conditions of probation, primarily ones that will be used fairly frequently, that may be imposed. The list is meant neither to be exclusive nor to suggest that these conditions should be imposed in all cases. Condition (15), dealing with searches, recognizes that the

ability to search a probationer in some instances is an essential element of successful probation. It includes two important limits: (1) only a probation officer, and not a law-enforcement officer, may search the probationer under this condition, and (2) the search may be only for purposes reasonably related to the probation supervision.

A warrantless search of the person of the probationer, for purposes reasonably related to his probation supervision, was accomplished by Probation Officer Crouse at the Haywood-Moncure Multipurpose Center. The Probation Officer's actions were neither unreasonable nor did it result in an unlawful search of the person of the probationer. *See State v. Robledo*, 116 Ariz. 346, 569 P. 2d 288 (1977); *State v. Culbertson*, 29 Or. App. 363, 563 P. 2d 1224 (1977). The evidence derived from the testing of probationer's blood was admissible and the court erred in excluding it. For the foregoing reasons this matter must be remanded to the trial court for further hearing and disposition in accordance with this opinion.

Remanded.

Judges ERWIN and WELLS concur.

LILLIE PITMAN PENDLEY v. JOY NADINE AYERS

No. 7924SC585

(Filed 18 March 1980)

Rules of Civil Procedure § 55.1— default judgment on liability issue—order for trial on damages issue—entry of default—motion to set aside—good cause standard

A judgment by a superior court judge which determined the issue of liability in a personal injury action and ordered a trial on the issue of damages was only an entry of default rather than a default judgment since it was not a final judgment. Therefore, the trial court erred in applying the "mistake, inadvertence, surprise or excusable neglect" standard of Rule 60(b)(1) rather than the "good cause shown" standard of Rule 55(d) in ruling on defendant's motion to set aside its judgment, and the cause is remanded for a determination of whether good cause exists to set aside the entry of default.

ON writ of certiorari to review order entered by *Howell, Judge*. Order entered 22 March 1979 in Superior Court, MITCHELL County. Heard in the Court of Appeals 18 January 1980.

Plaintiff filed this action on 15 March 1978 against defendant for damages for personal injuries arising out of an automobile collision near Burnsville. Defendant was personally served on 17 March 1978 and did not answer the complaint or otherwise plead. On 12 May 1978, plaintiff moved pursuant to G.S. 1A-1, Rule 55, of the Rules of Civil Procedure for entry of default against defendant. Entry of Default was entered by the Clerk of Superior Court. On 15 May 1978, Judge Kirby entered the following order: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment against the defendant, JOY NADINE AYERS, be entered in favor of the plaintiff, and, further, that this action be placed on the trial calendar of the Superior Court of Mitchell County for determination of damage by a jury."

On 5 September 1978, defendant moved to set aside the Entry of Default and the "purported" judgment and to grant defendant leave to file answer on the grounds that the failure of defendant to file answer within the time allowed by law was the result of mistake, inadvertence, or excusable neglect.

> "(b) There is pending in Superior Court of this county, an action styled *DUNCAN v AYERS v PENDLEY*, 78CVS10, which involves claims arising out of the automobile accident which is the subject matter of the complaint in this action. The parties to that lawsuit are parties to this action and the plaintiff herein was served with a third-party summons and complaint in the other action on or about 24 March 1978.
>
> (c) As shown by the attached answer, the defendant has a meritorious defense to the claim stated in the complaint herein.
>
> (d) By virtue of the service of the third-party summons and complaint in 78CVS10 upon the plaintiff in this cause, the plaintiff had notice of the defenses and contentions of the defendant in this action with reference to plaintiff's claims herein prior to the entry of default in this matter and it is in the interests of justice and would cause no undue hardship to the plaintiff if the default herein be set aside."

This motion was denied.

Bruce Briggs, for plaintiff appellee.

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

ERWIN, Judge.

The question before us is: Did the trial court err in denying defendant's motion to set aside default where the record shows that at the hearing on said motion, the trial court found defendant to be negligent in failing to deliver the copies of summons and complaint to either her insurance representative or her attorney and that defendant has alleged facts, which if true, would constitute a meritorious defense? We hold that error occurred for the reasons that follow.

The official comment of G.S. 1A-1, Rule 55, of the Rules of Civil Procedure states:

> "Note next that the delineation between judges' and clerks' power is not the delineation between judgments by 'default final' and those by 'default and inquiry.' This distinction indeed is not retained in literal terms in the federal rule pattern. Obviously those very limited judgments within the power of the clerk to enter are judgments by default final. But the judge may enter either type under 55(b)(2). Instead of using this terminology, however, the rule as presented approaches the matter pragmatically by providing that when in order to enter final judgment something further must be done after entry of default, e.g. when an account must be taken or a jury trial had on an issue of damages or any other, the judge orders that done which is necessary. Thus, there is no intermediate judgment by 'default and inquiry,' but an entry of default in all cases and a final judgment by default entered only after everything required to its entry has been done. The same conceptions were involved in former § 1-212."

The purported judgment entered herein was an entry of default. An entry of default is not a final order or a final judgment. *Acoustical Co. v. Cisne and Associates*, 25 N.C. App. 114, 212 S.E. 2d 402 (1975); *Trust Co. v. Construction Co.*, 24 N.C. App.

131, 210 S.E. 2d 97 (1974). *See Annot.* 8 A.L.R. 3d 1272 (1966); 4 Am. Jur. 2d, Appeal and Error, § 127 (1962).

Pursuant to Rule 21(a) of the Rules of Appellate Procedure, we will treat this appeal as a petition for writ of certiorari and will allow it, in that we have determined that error occurred.

Judge Campbell stated for this Court in *Whaley v. Rhodes*, 10 N.C. App. 109, 111-12, 177 S.E. 2d 735, 737 (1970):

> "In *Teal v. King Farms Co.*, 18 F.R.D. 447 (E.D. Pa. 1955), Chief Judge Kirkpatrick set forth some of the distinctions between setting aside an entry of default and setting aside a default judgment.
>
> > 'A default, but no judgment having been entered, the defendant's motion is governed by the first clause of Fed. Rules Civ. Proc. rule 55(c), 28 U.S.C. which is "For good cause shown the court may set aside an entry of default**." The rules evidently make a distinction between what is required to make a good case for setting aside a default and what is required to set aside a judgment. The latter specifies "mistake, inadvertence, surprise, or excusable neglect." This has been construed to mean that the mistake, inadvertence, or surprise, as well as neglect, must be excusable in order to give the Court the power to set aside the judgment.
> >
> > To set aside a default all that need be shown is good cause. There would be no reason for the distinction unless Rule 55(c) intended to commit the matter entirely to the discretion of the Court, to be exercised, of course, within the usual discretionary limits. Thus, I think that inadvertence, even if not strictly "excusable," may constitute good cause, particularly in a case like the present where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.'

It is clear, under the federal cases, that a determination of whether or not good cause exists rests in the sound discretion of the trial judge, and that the facts and circumstances of the particular case govern. *Elias v. Pitucci*, 13 F.R.D. 13 (E.D. Pa. 1952). See also *Mitchell v. Eaves, supra; Kulakowich*

v. A/S Borgestad, 36 F.R.D. 185 (E.D. Pa. 1964). An action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. *Welch v. Kearns*, 261 N.C. 171, 134 S.E. 2d 155 (1964)."

Judge Howell was required to find whether defendant had shown good cause for setting aside the default. The test applied by Judge Howell related to setting aside a final judgment. For this reason, his order must be vacated, and the cause is remanded for a hearing to determine whether defendant has shown good cause sufficient enough to set aside the default. The determination is for the trial judge in the exercise of his sound discretion, and such determination is interlocutory. *Whaley v. Rhodes, supra.*

The order entered is vacated and remanded in keeping with this opinion.

Vacated and remanded.

Judges MARTIN (Robert M.) and WELLS concur.

JAMES ROBERT DICKENS v. EARL V. PURYEAR AND ANN BREWER PURYEAR

No. 7910SC721

(Filed 18 March 1980)

Limitation of Actions §§ 16.1, 18.1 — assault and battery — statute of limitations not pled — claim improperly labeled — action barred

Plaintiff's claim was barred by the one year statute of limitations for actions based on assault and battery, though the statute of limitations was never pled in answer and though plaintiff's complaint sought recovery for the intentional infliction of mental distress to which a three year statute of limitations would apply, since the unpled affirmative defense of the statute of limitations could be heard for the first time on motion for summary judgment where both parties were aware of the defense, and since the action was in fact based on assault and battery, and plaintiff's label of intentional infliction of mental distress would not apply to invoke the longer period of limitation. G.S. 1-54(3).

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 29 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 25 February 1980.

Plaintiff brought this action on 31 March 1978 seeking money damages for a tort committed against him on 2 April 1975. The same occurrence gave rise to a criminal conviction of defendant Earl V. Puryear for conspiracy to commit a simple assault. That case is reported at 30 N.C. App. 719, 228 S.E. 2d 536 (1976) and contains a detailed summary of the facts which give rise to this case. Stated briefly, the facts are that plaintiff was handcuffed to a piece of farm machinery, beaten and threatened with death, castration or other bodily injury by men wielding knives and clubs. He was intructed to run to his home, tear his telephone off the wall, pack his clothes and leave the State or be killed. Defendants, who are husband and wife, did or conspired to have these things done to him because he, a man of over thirty years of age, had given drugs and alcohol to their seventeen-year-old daughter as well as engaging in sexual intercourse with her.

Defendants never filed an answer to the complaint but plaintiff's deposition was taken. Defendants moved for summary judgment. It was granted by the trial judge after he considered the complaint, plaintiff's deposition and a part of the transcript of the criminal case arising out of this occurrence. Plaintiff appeals.

Ransdell, Ransdell and Cline, by Phillip C. Ransdell and James E. Cline, for plaintiff appellant.

Ragsdale and Liggett, by Peter M. Foley and George R. Ragsdale, for defendant appellee Earl V. Puryear.

Manning, Fulton and Skinner, by Howard E. Manning and Michael T. Medford, for defendant appellee Ann Brewer Puryear.

VAUGHN, Judge.

The only issue we need address is whether the entry of summary judgment in favor of defendants was correct because plaintiff's claim is barred by the one year statute of limitations for actions based on assault and battery contained in G.S. 1-54(3). We hold the claim is so barred.

Plaintiff argues summary judgment was improper on procedural grounds because the statute of limitations had never been pled in answer as required by the Rules of Civil Procedure. G.S. 1A-1, Rule 8(c). In this case, defendants were granted an extension of time in which to answer because of a decision pending in this Court which would possibly affect defendants' answer. Meanwhile, discovery was taken followed by motions for summary judgment. The statute of limitations was not presented as a specific ground in the motions for summary judgment. However, the issue was fully briefed and argued before the trial court by counsel for both sides. This affirmative defense was clearly before the trial court. Unpled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer at least where both parties are aware of the defense. *See Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976).

Plaintiff's complaint was filed more than one year from the time the tort was allegedly committed against him by defendants but within three years of that time. Plaintiff argues his complaint seeks recovery for the intentional infliction of mental distress. If so, a three year statute of limitations, G.S. 1-52(5), and not the one year statute of limitations for assault and battery, G.S. 1-54(3), would apply. His complaint is worded so as to give this label to the tort for which he claims relief. In pertinent part, the complaint states:

> 3. On April 2, 1975 the Defendants conspired with each other and with other persons, whose identity is unknown to the Plaintiff, to lure the plaintiff, by false and deceitful statements, to a place on and near North Carolina Highway #42 in Johnston County, North Carolina, where Plaintiff would be alone in an isolated place and unable to summon help, and there to *inflict upon him severe emotional distress.* Acting pursuant to this conspiracy, the Defendants, and those with whom they conspired, did lure the Plaintiff on April 2, 1975 by false statements made to him, to the said place in the night time when no others were present upon whom he could call for aid. Upon Plaintiff arriving at said time and place, the Defendant Ann Brewer Puryear, left the scene and left Plaintiff in the presence of Defendant Earl V. Puryear and Four (4) masked men with whom the Defendants

had conspired, and, pursuant to said conspiracy, the Defendant Earl V. Puryear and the Four (4) masked men with whom they had conspired, who were then acting as the agents for both Defendants pursuant to said conspiracy, did, within the hearing of the Plaintiff and while having Plaintiff surrounded, and *with the intent to inflict upon Plaintiff severe emotional distress,* have several discussions concerning whether or not to kill Plaintiff or to castrate him. After those discussions, and *with the malicious intent to inflict severe emotional distress upon Plaintiff,* the Defendant Earl V. Puryear and the Four (4) masked men acting pursuant to said conspiracy did instruct the Plaintiff to return to his home in Raleigh, tear his telephone off the wall, pack his clothes and leave the State of North Carolina and did state to Plaintiff that unless he did so, they would have him killed. This conduct by the Defendants and the Four (4) masked men with whom they conspired and acted together was intentional, malicious, extreme and outrageous and was perpetrated by the Defendants and those with whom they conspired and acted *with the specific intention of causing the plaintiff severe emotional distress,* or in any event was perpetrated under circumstances in which the Defendants knew, or should have known, that their conduct and those who acted in conspiracy with them would cause or would be likely to *cause severe emotional distress to the Plaintiff.*

4. As the direct and proximate result of this conduct of the Defendants and those with whom they conspired, the Plaintiff suffered great fright and shock, severe and permanent mental and emotional distress, physical injuries to his nerves and nervous system, was unable to work for a considerable period of time thereafter, and has been damaged in a large amount. . . .

The label plaintiff gives to an alleged wrong is not the controlling factor. "The nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the result sought." *Hayes v. Ricard,* 244 N.C. 383, 320, 93 S.E. 2d 540, 545-46 (1956). The facts of this case present a case of assault and battery and not intentional infliction of mental distress. Where plaintiff has labeled the tort intentional infliction of men-

tal distress in his complaint, the words assault or battery or both conjoined are more appropriate.

The deposition testimony of plaintiff reinforces this characterization of the claim. Plaintiff testified in part that defendant Earl V. Puryear

> took a knife out, he jerked me around by the hair of the head and took the knife and showed me how sharp it was by cutting on my hair, and asked me did I know what he was going to do with that knife. I told him that I had a pretty good idea what he intended to do. And he stated that he was going to castrate me and at the same time he would grab me by the hair of the head and jerk my head and hit me with his knee between his (sic) legs.

This is intentional harmful and offensive contact and the threat of such contact for which the law provides causes of action for assault and battery. Plaintiff also based his claim upon the fact that, in the words of his deposition, "[t]hey instructed me to run to my home, tear my telephone off the wall, pack my clothes, leave the state, and said that if I didn't do that they would have me killed." While a threat for the future is not an assault, this cannot be described as a future threat. This is an immediate threat of harmful and offensive contact. It was a present threat of harm to plaintiff and it was a part of the one occurrence. This is not a case of two torts arising out of one occurrence.

Where the gist of a claim for relief is assault and battery, courts have applied the statute of limitations applicable to assault and battery despite allegations in the complaint that it was some other tort. This is particularly true where it appears the purpose in the use of a label different from assault and battery is to provide a different and longer statute of limitations. In such cases, courts have been particularly careful to use the statute of limitations applicable to the facts and not the label. *Maes v. Tuttoilmondo*, 31 Col. App. 248, 502 P. 2d 427 (1972); *Thomas v. Casford*, 363 P. 2d 856 (Okl. 1961); *Borchert v. Bash*, 97 Neb. 593, 150 N.W. 830 (1915); Annot. 90 A.L.R. 2d 1230 (1963). The case at hand involves such a situation.

Mental distress is a factor in this cause of action for assault and battery. It is a consequence of the assault and battery and if plaintiff had brought his action in the time allowed by law, the

mental distress he suffered would have compounded the damages he could have recovered for the assault and battery.

Affirmed.

Chief Judge MORRIS and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DEBRA PITTARD

No. 7912SC871

(Filed 18 March 1980)

Assault and Battery § 4; Parent and Child § 1— assault on child at day care center —no defense of standing in loco parentis—no defense of teacher and student relation

In a prosecution of an employee of a church day care center for assaulting a two year old child enrolled at the center by striking the child with her hands and a paddle, defendant was not entitled to assert the defense that she stood in *loco parentis* to the child since that relationship is established only when the person with whom the child is placed intends to assume the status of a parent by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance. Nor was there evidence upon which defendant could assert the defense that her conduct was privileged because her relationship with the child was that of teacher and student where defendant's duties at the day care center were entirely custodial in nature and carried none of the attributes of teaching, and the evidence did not show that she possessed any of the credentials of a teacher.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 15 May 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 February 1980.

Defendant was charged in a warrant with assaulting Valerie Beasley, a child of two years of age, in violation of G.S. 14-33(b)(3). The jury returned a verdict of guilty, and defendant was given a suspended sentence and placed on probation.

The State's evidence showed that Valerie was enrolled by her mother, Mrs. Marilyn Beasley, at the College Lakes Baptist Church Day Care Center in Fayetteville. The center is operated by the church, under the direction of Linda Smith. At approximately 7:30 a.m. on 1 March 1979, Mrs. Beasley left Valerie at

the center. At about 2:30 p.m., Mrs. Beasley picked Valerie up at the center, following a call from there. Valerie had been ill with an ear infection. Mrs. Beasley took her directly to the office of Dr. John C. Pollard. At Dr. Pollard's office, Mrs. Beasley discovered numerous bruises and contusions about Valerie's body and legs. Dr. Pollard, upon observing the marks, informed the Cumberland County Child Protective Service. As a result of his call, an investigation was conducted by Deputy Kenneth Nix of the Cumberland County Sheriff's Department. His investigation disclosed that on 1 March 1979, Valerie had been spanked or struck by five women employed at the center, using either their hands or a paddle composed of two paint sticks taped together. Defendant was one of those using both her hands and the paddle in striking Valerie. Following his investigation, Deputy Nix charged all five with assault.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

Pope, Reid, Lewis & Deese, by Marland C. Reid, for defendant appellant.

WELLS, Judge.

Defendant's assignments of error are geared to the basic proposition that a relationship of teacher-student existed between defendant and Valerie and that defendant stood *in loco parentis* to Valerie while she was present at the center. Defendant argues that in such a relationship, the punishment she administered to Valerie was justified for corrective and disciplinary reasons. Defendant maintains that if she stood *in loco parentis* to Valerie or if there was a relationship of teacher-student, the jury could not find her guilty of assault unless it found either that the punishment was administered with malice and not in good faith from motives of duty, or that it resulted in permanent injury.

Defendant admits that she spanked and struck Valerie on the day in question. We need not, therefore, dwell on the elemental aspects of the offense of assault. We will instead direct our attention to defendant's principal argument that she was Valerie's teacher and stood *in loco parentis*. Defendant offered her own testimony and that of Linda Smith, the center's director, and Rev. Bobby Glenn Smith, the minister of the church, to show that a

relationship of teacher-student existed and to show the center's policy with respect to discipline and corporal punishment. Upon objection of the District Attorney, the trial court excluded all such testimony. The excluded portion of Debra Pittard's testimony would have shown that her duties at the center were entirely custodial in nature. She offered no testimony whatsoever as to her qualifications as a teacher or as to any duty or responsibility she was given involving teaching. Linda Smith did not testify or offer any testimony as to defendant's qualifications as an employee or her duties at the center. Rev. Smith would have testified that it was the policy of the church and the center to administer physical punishment to small children in their care and that Valerie's parents were informed of this policy prior to the day she was spanked or struck by defendant. Rev. Smith offered no testimony as to defendant's qualifications or duties.

Defendant was not entitled to assert the defense that she stood *in loco parentis* to Valerie. The relationship of *in loco parentis* does not arise from the mere placing of a child in the temporary care of other persons by a parent or guardian of such child. This relationship is established only when the person with whom the child is placed intends to assume the status of a parent—by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance. *See, Shook v. Peavy,* 23 N.C. App. 230, 208 S.E. 2d 433 (1974); 67A C.J.S., Parent and Child §§ 153-156, pp. 548-553 (1978); 59 Am. Jur. 2d, Parent and Child § 88, p. 185 (1971); 3 Lee, N.C. Family Law § 238, pp. 98-100 (1963).

There was no evidence upon which defendant could assert the defense that her conduct was privileged because her relationship with Valerie was that of teacher and student. Her employment at the center carried with it none of the attributes of teaching nor did the evidence show that she possessed any of the credentials of a teacher.

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. DAVID THOMAS BARTLETT

No. 7925SC876

(Filed 18 March 1980)

1. **Burglary and Unlawful Breakings § 5.8— breaking into house—defendant not specifically forbidden entry—sufficiency of evidence**

Where the evidence tended to show that a homeowner was locked out of his house and was trying to gain entry by using a credit card when defendant approached him and opened the door with an eight inch knife, the homeowner and defendant entered the house, drank alcoholic beverages and removed some items belonging to the homeowner, and both then left the house whereupon the homeowner called the police, testimony by the homeowner that he did not forbid defendant to come into the house because he was afraid defendant had a gun or knife was evidence from which the jury could conclude defendant did not have the owner's permission to enter the house.

2. **Criminal Law § 66.11— in-court identification not tainted by show-up**

An in-court identification of defendant by the victim of a breaking and entering was based on the victim's observation at the time of the crime and not on a show-up conducted when defendant was brought from his home to a police car to be identified by the victim.

3. **Criminal Law § 124.5— inconsistent verdict**

The trial court did not err in failing to set aside the jury's verdict finding defendant guilty of felonious breaking or entering and misdemeanor larceny on the ground that it was inconsistent, since jury verdicts are not required to be consistent.

APPEAL by defendant from *Wood, Judge.* Judgment entered 11 July 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals 7 February 1980.

Defendant was indicted for felonious breaking or entering and felonious larceny. The State's evidence showed that early on the morning of 20 February 1979, Otto Gienger arrived at his home in Newton. He did not have his key and was attempting to open his door with a credit card when defendant approached him from the side of his house. Defendant asked Mr. Gienger if he was trying to enter the house; when Mr. Gienger answered in the affirmative, the defendant said "Well, I'm going in this house all the time," and proceeded to open the door with an eight-inch knife. The defendant then related to Mr. Gienger the articles he had taken from the house on previous occasions. Mr. Gienger had missed these items from his home. Mr. Gienger said he did not

tell the defendant not to come in his house "because I was afraid. He could have had one of my guns or a knife."

Once inside the house, defendant proceeded to take various items of personal property and divide them with Mr. Gienger. He took some beer from the refrigerator and both defendant and Mr. Gienger drank a part of it. There was a bottle of Scotch whiskey in the house. The defendant gave Mr. Gienger a drink from this bottle and after Mr. Gienger said he did not "like that stuff," the defendant took the remainder of the bottle for himself. Both men then left the house, and Mr. Gienger excused himself and called the police. Later that day, the defendant was arrested at his home. He was escorted outside his home to a police vehicle where Mr. Gienger identified him.

Defendant was convicted of felonious breaking or entering and misdemeanor larceny. He has appealed.

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

Randy D. Duncan for defendant appellant.

WEBB, Judge.

[1] Defendant has brought forward several assignments of error. He first contends that he could not have been convicted of breaking or entering because he entered the house with the permission of the owner. The defendant has cited no cases, and we cannot find a case which is precedent for the peculiar facts of this case. We hold the testimony of Mr. Gienger, that he did not forbid the defendant to come into the house because he was afraid the defendant had a gun or knife, was evidence from which the jury could conclude defendant did not have Mr. Gienger's permission to enter the house.

[2] Defendant next contends that the in-court identification of defendant was improper because of the impermissive suggestiveness of the show-up identification of the defendant. The show-up identification was conducted when the defendant was brought from his home to the police car to be identified by Mr. Gienger. The defendant objected to the admission of this testimony, and the court conducted a *voir dire* hearing out of the presence of the jury. The court found as a fact that Mr. Gienger's

in-court identification was based on his observation of the defendant at the house and not the police car. The evidence presented at the *voir dire* as to Mr. Gienger's opportunity to observe the defendant at the house supports this finding of fact. *See State v. Sanders*, 33 N.C. App. 284, 235 S.E. 2d 94 (1977).

The defendant's next two assignments of error deal with what he contends was the admission of hearsay testimony and the admission of the fruits of a search of defendant's home without a search warrant. The defendant did not object when this evidence was offered. These two assignments of error are overruled.

The defendant also assigns error to what he contends was a comment by the judge on the evidence. The judge asked several questions of Mr. Gienger while he was on the witness stand. We hold that these questions were to clarify Mr. Gienger's testimony and were not expressions of opinion on the evidence.

[3] The defendant's last assignment of error is to the court's failure to set aside the verdict. He contends this was error because the verdict was inconsistent as the jury found the defendant guilty of felonious breaking or entering and misdemeanor larceny. Jury verdicts are not required to be consistent. *State v. Black*, 14 N.C. App. 373, 188 S.E. 2d 634 (1972).

We concede that on the facts of this case the defendant acted with a certain flair. We also hold he had a fair trial, free of prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

BEVERLY R. McLEAN v. DAVID C. HENDERSON AND JEAN SOUWEINE

No. 7918SC760

(Filed 18 March 1980)

Automobiles § 45.2; Evidence § 17— testimony that plaintiff didn't see any lights —competency

In an action arising out of a collision at an intersection, plaintiff's testimony that she stopped at a stop sign and looked both ways but saw no lights coming from either direction was competent to show that defendant's violation of G.S. 20-129 was a proximate cause of the accident and that plaintiff was not contributorily negligent in entering the intersection since plaintiff had an adequate opportunity to observe whether headlights were on.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 23 May 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 February 1980.

Plaintiff instituted this action to recover for damages and injuries resulting from an automobile accident. Plaintiff's evidence tended to show that on 13 October 1974, at approximately 9:15 p.m., she was driving a 1973 Ford Pinto on Rural Paved Road 1741 in Davidson County. She came to an intersection which had a stop sign facing her. Plaintiff stopped at the stop sign and looked both ways. She saw no lights coming from either direction and proceeded to make a right turn into the intersection. It was stipulated that, as the plaintiff entered the intersection, there was a collision between the plaintiff's vehicle and a vehicle being operated on the dominant highway by the defendant David C. Henderson and owned by defendant Jean Souweine.

From a directed verdict for defendants, plaintiff has appealed.

Hubert E. Seymour, Jr. for plaintiff appellant.

Perry C. Henson and Perry C. Henson, Jr. for defendant appellee.

WEBB, Judge.

The only question presented on appeal is whether it was error for the court to direct a verdict in defendants' favor at the close of plaintiff's evidence. If the testimony of the plaintiff, that

she did not see lights coming from either direction, is evidence from which the jury could conclude that defendant Henderson approached the intersection without lights, the jury could conclude that the defendant Henderson's violation of G.S. 20-129 was a proximate cause of the accident. The jury could also conclude from this evidence that plaintiff was not contributorily negligent in entering the intersection when she did not see approaching headlights. *See McNulty v. Chaney*, 1 N.C. App. 610, 162 S.E. 2d 90 (1968). We hold the plaintiff's testimony, that she did not see any lights approaching the intersection, is evidence from which the jury could conclude that defendant Henderson's headlights were not on. We hold the superior court committed error in directing a verdict for the defendants.

The defendants argue that a directed verdict was proper because the only evidence is the testimony of the plaintiff that she did not see approaching headlights, and this is negative evidence. *See Leisure Products v. Clifton*, 44 N.C. App. 233, 260 S.E. 2d 803 (1979). In the case sub judice, the plaintiff had adequate opportunity to observe whether headlights were on. She testified she looked both ways and did not see any headlights. This is evidence from which the jury could conclude the headlights were not on.

The defendants also argue that the plaintiff testified it was too dark for her to drive without her headlights which would have made it impossible for the defendant Henderson to drive without his headlights. We believe this is an argument which should be made to the jury.

Reversed.

Judges HEDRICK and WELLS concur.

PARKS N. AUSTIN, BOYD P. FALLS AND WALTER W. HAMEL, A PARTNERSHIP, TRADING AS AUSTIN, FALLS & HAMEL, CPA'S v. R. W. RAINES ENTERPRISES, INC.

No. 7926DC823

(Filed 18 March 1980)

Accountants § 1— fee for preparing tax return—insufficient evidence of value of services

In an action to recover for professional services provided by plaintiff in preparing defendant's corporate income tax returns, plaintiff did not meet its burden of proving the reasonable value of its services and the trial court therefore erred in directing verdict for plaintiff where the only evidence of the value of plaintiff's services was the testimony of one partner in the firm that he "felt" $16 an hour to be a "reasonable" fee, and no independent or objective evidence of the reasonable worth of such services was offered.

APPEAL by defendant from *Brown, Judge.* Judgment entered 24 April 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals on 6 March 1980.

In this civil action plaintiffs, certified public accountants, seek to recover $2,250.00 for professional services allegedly provided in preparing defendant's corporate income tax returns. Defendant filed answer wherein it admitted that it had employed plaintiff to prepare its tax returns, but denied that it was indebted in the amount claimed for the reason that it "did not authorize the extensive amount of work that Plaintiff contends that it has performed. . . ."

At trial plaintiff offered evidence tending to show that a member of the firm had spent approximately 139 hours between January and June of 1976 sorting through various documents and business records of defendant; reconciling the books previously kept by the defendant's bookkeeper; and preparing the return. Defendant was billed in January of 1977 at the rate of $16.00 per hour which plaintiff felt "was a fair and reasonable charge for that particular service," although plaintiff had not discussed the fee with anyone from defendant's company prior to sending the bill. The bill remains unpaid.

Defendant offered the testimony of its secretary, Marilyn Raines, and its president, R. W. Raines, who testified that they had employed the plaintiff in 1976 to do the tax return for the

corporation; that they had never agreed on a fee for the service, but plaintiff had assured them when they asked about a fee that "it wouldn't be too bad"; and that they had not paid the bill for $2,250.00 because they did not believe they owed "that much."

At the close of the evidence, plaintiff's motion for a directed verdict was allowed, and the court entered a judgment for plaintiff in the amount of $2,250.00. Defendant appealed.

Curtis & Millsaps, by Joe T. Millsaps, for the plaintiff appellee.

Lindsey, Schrimpsher, Erwin, Bernhardt & Hewitt, by Lawrence W. Hewitt and John W. Beddow, for the defendant appellant.

HEDRICK, Judge.

Defendant contends that the court erred in directing a verdict for plaintiff.

It is not disputed that the plaintiff rendered services to the defendant, the reasonable value of which the defendant is obligated to pay. The sole issue presented concerns the worth of the services, and the burden of proof on that issue rests on the plaintiff. The rule of law is settled in this State that the trial judge cannot direct a verdict for the party with the burden of proof when that party's "right to recover depends upon the credibility of his witnesses." *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E. 2d 297, 311 (1971). This is true even though the evidence be uncontradicted. *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726 (1961); *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614 (1961).

The only evidence of the value of plaintiff's services in this case was the testimony of one partner in the firm that he "felt" $16.00 an hour to be a "reasonable" fee. No independent or objective evidence of the reasonable value of such services was offered. Plaintiff's proof clearly depends completely upon the credibility of its witness. Although the defendant offered no evidence respecting the reasonable value of the services rendered it, it did deny that their worth as determined by the plaintiff was reasonable. Such is sufficient to raise an issue of fact as to the

reasonable value of the services, and that question is for the jury. *See Chisholm v. Hall, supra.*

It follows that the court erred in directing a verdict for the plaintiff. Accordingly, the judgment appealed from is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. ANTHONY JEROME HERMAN

No. 7926SC872

(Filed 18 March 1980)

Automobiles § 134; Larceny § 7.7— larceny of automobile—refusal to submit unauthorized use

The trial court in a prosecution for larceny of an automobile under G.S. 14-72 did not err in refusing to submit an issue of defendant's guilt of unauthorized use of a motor vehicle in violation of G.S. 14-72.2 where the evidence tended to show that defendant was seen stealing the car; the car was discovered at another location a week later; the alternator and brakes had been damaged; and the keys were not in the car, since all the evidence showed larceny of the automobile.

APPEAL by defendant from *Allen (C. Walter), Judge.* Judgment entered 14 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 February 1980.

On 8 January 1979, Ms. Catherine White parked her car on Kate Street in the City of Charlotte, leaving her keys in the car, and went into her mother's home. Ms. Shirley Etheridge, a neighbor, testified that she observed the defendant coming down the street. "He sneaked up to the car, . . . he looked around like this, then he opened the door and jumped in and that was it."

The defendant offered an alibi for his whereabouts. The jury returned a verdict of guilty of larceny, a violation of G.S. 14-72. Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick, for the State.

Assistant Public Defender Mary Chamblee for defendant appellant.

HILL, Judge.

The sole question before this Court is whether the court erred in refusing to submit to the jury an issue of guilt of unauthorized use of a motor-propelled conveyance as provided in G.S. 14-72.2 [as rewritten by the 1977 General Assembly] as a lesser included offense of the larceny of an automobile under G.S. 14-72, for which the defendant was convicted.

Assuming arguendo that the unauthorized use of a motor vehicle is a lesser included offense of larceny of an automobile, we conclude that the court was under no duty to submit the lesser offense to the jury for the reason that there was no evidence to support such a verdict.

"The trial court is not required to submit to the jury the question of a defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972)." *State v. Reese,* 31 N.C. App. 575, 230 S.E. 2d 213 (1976).

In this case the defendant was charged with the felonious larceny of an automobile. The evidence presented by the State was positive as to each and every element of felonious larceny, and there is no conflicting evidence relating to any element. The defendant was seen stealing the car. It was discovered about a week later in North Park Mall. The alternator was damaged, as were the brakes. No keys were in the car. All of this is evidence of larceny of an automobile—not unauthorized use of an automobile.

In defendant's trial we find

No error.

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

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 MARCH 1980

BAILEY v. COMR. OF MOTOR VEHICLES No. 791SC786	Dare (77CVS170)	Affirmed
CHEATHAM v. DILLAHUNT No. 793SC356	Craven (77CVS1120)	New Trial
JONES v. PROFIT SHARING RETIREMENT No. 7923DC655	Wilkes (78CVD1080)	Judgment for Plaintiff Reversed and Vacated; Remanded for Entry of Summary Judgment for Defendant
NAFTEL v. NAFTEL No. 7912DC865	Cumberland (78CVD2083)	Affirmed
STATE v. BALL No. 7921SC863	Forsyth (78CR14229)	Affirmed
STATE v. DAUGHTRY No. 796SC826	Hertford (78CRS27)	No Error
STATE v. GREEN No. 795SC987	New Hanover (79CRS1453)	No Error
STATE v. TATE No. 7926SC939	Mecklenburg (79CRS014626)	No Error
STATE v. VANN No. 795SC887	New Hanover (79CRS0792) (79CRS0793) (79CRS0794)	No Error
WEST v. HOME No. 7925SC524	Caldwell (78CVS13)	Affirmed
WILKINS v. XEROX CORP. No. 7921SC775	Forsyth (78CVS3642)	Dismissed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

ACCOUNTANTS

§ 1. Generally

In an action to recover for professional services provided by plaintiff in preparing defendant's corporate income tax returns, plaintiff did not meet its burden of proving the reasonable value of its services. *Austin v. Enterprises, Inc.*, 709.

ACTIONS

§ 11. Discontinuance and New Action

Plaintiff's prior wrongful death action against defendants was discontinued where the original summons was never served on defendants and no alias or pluries summons was issued or endorsement made, and plaintiff's attempt to dismiss her prior action voluntarily was ineffectual to give plaintiff an additional year within which to commence a new action. *Wheeler v. Roberts*, 311.

APPEAL AND ERROR

§ 6.3. Appeals Based on Jurisdiction

An adverse ruling on the jurisdiction of the court is immediately appealable. *Kahan v. Longiotti*, 367.

Defendant's appeal on the ground that the trial court lacked jurisdiction over him to enter a temporary custody order was subject to dismissal. *Broaddus v. Broaddus*, 666.

§ 14. Appeal and Appeal Entries

The trial judge directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, and the clerk should not have noted an entry of judgment on the date of the hearing. *Kahan v. Longiotti*, 367.

§ 38.1. Power of Trial Court to Settle Case on Appeal

Trial court erred in ruling that it did not have jurisdiction in settling the record on appeal to determine whether plaintiff appellee's cross-assignments of error were permitted by Appellate Rule 10(d). *Stevenson v. Dept. of Insurance*, 53.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in another state. *Lynch v. Lynch*, 391.

ARSON

§ 4.2. Cases Where Evidence Was Sufficient

In a prosecution for the unlawful burning of an automobile, an intent to injure or prejudice the owner of the burned property need not be shown by evidence other than the act of burning itself. *S. v. Wesson*, 510.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

In a prosecution of an employee of a church day care center for assaulting a two-year-old child enrolled at the center, defendant was not entitled to assert the defense that she stood in loco parentis to the child or that her conduct was privileged because her relationship with the child was that of teacher and student. *S. v. Pittard*, 701.

§ 11.3. Assault on an Officer

There was a fatal variance between a warrant which alleged that defendant shoved an officer while he was conducting a search of a residence and the evidence which tended to show that the officer whom defendant pushed was not engaged in conducting the search but was merely present at the scene. *S. v. Dudley*, 295.

ATTORNEYS AT LAW

§ 2. Admission to Practice

G.S. 84-4.1 does not permit an out of state attorney to move for admission to practice in a court of this State for a limited purpose on a conditional basis, and the trial court could properly disregard a motion conditioned on the allowance of a continuance for eight weeks. *In re Smith*, 123.

A letter from a trial judge to a criminal defendant constituted a sufficient order in response to a foreign attorney's motion for permission to appear for defendant where the judge sent a copy of the letter to the attorney and filed a copy for the record. *Ibid.*

§ 3. Scope of Authority

Plaintiff did not rebut the presumption of authority of her attorney to act for her in a second voluntary dismissal of her claim. *Greenhill v. Crabtree*, 49.

§ 5.1. Liability for Malpractice

Plaintiff's complaint was sufficient to state a cause of action against defendants based in tort where plaintiff alleged damage occurring to it as a result of an attorney's negligence in the performance of his contract with his client. *Leasing Corp. v. Miller*, 400.

§ 7.2. Fees in Cases Involving Indigent Criminal Defendants

Trial court erred in entering judgment against the indigent defendant for attorney's fees without notice or an opportunity to be heard. *S. v. Stafford*, 297.

AUTOMOBILES

§ 7.5. Allowance of Attorney Fees as Part of Costs

In order to award attorney fees in an action to recover damages for unfair and deceptive trade practices in violation of G.S. 75-1.1, the plaintiff must prove not only a violation of the statute by the defendant but that plaintiff has suffered actual injury as a result of that violation. *Mayton v. Hiatt's used Cars*, 206.

Trial court erred in allowing attorney fees to plaintiff's attorneys in an action to recover damages for misrepresentations as to the condition and history of an automobile sold to plaintiff where the jury found that defendant salesman made the false representations but that plaintiff suffered no injury as a proximate result of the representations. *Ibid.*

AUTOMOBILES—Continued

§ 2.4. Revocation of License for Failure to Take Breathalyzer Test

An officer had reasonable grounds to arrest petitioner for operating a motor vehicle while under the influence of an intoxicating liquor, and petitioner's refusal to take a breathalyzer test was willful. *Rawls v. Peters*, 461.

Petitioner willfully refused to submit to a breathalyzer test where the 30-minute time limit expired while he was waiting for his attorney. *Etheridge v. Peters*, 358.

§ 11.4. Accidents Involving Vehicles Parked on Shoulder

G.S. 20-161 does not prohibit the emergency parking of a vehicle on the shoulder of a highway, paved or otherwise, which is outside the main traveled part. *Thomas v. Deloatch*, 322.

In an action to recover for injuries sustained when defendant struck a disabled vehicle, trial court's instructions on leaving a disabled vehicle on a highway and displaying lights on such vehicle were proper. *Ibid.*

§ 45.2. Evidence of Conduct Before Accident

Plaintiff's testimony that she stopped at a stop sign and looked both ways but saw no lights coming from either direction was competent to show that defendant's violation of G.S. 20-129 was a proximate cause of the accident and that plaintiff was not contributorily negligent in entering the intersection. *McLean v. Henderson*, 707.

§ 55. Negligence in Stopping Without Signal

Evidence that defendant suddenly stopped his taxicab without giving a warning signal was sufficient for the jury to conclude that defendant's negligence was a proximate cause of the collision between defendant's taxi and a policeman's motorcycle. *Shay v. Nixon*, 108.

§ 75.2. Contributory Negligence in Connection With Disabled Vehicle

Evidence of plaintiff's contributory negligence was sufficient for the jury where it tended to show that plaintiff continued to ride as a passenger in a car on which he was responsible for the maintenance, knowing it had transmission problems. *Thomas v. Deloatch*, 322.

§ 76.1. Contributory Negligence in Following Too Closely

In an action by plaintiff policeman to recover for personal injuries sustained when his motorcycle collided with defendant's taxicab while plaintiff was in pursuit, plaintiff was not contributorily negligent as a matter of law. *Shay v. Nixon*, 108.

§ 83. Contributory Negligence of Pedestrians

Evidence was insufficient to show that plaintiff was contributorily negligent as a matter of law when he stood near but not on the highway. *Thomas v. Deloatch*, 322.

§ 134. Unlawful Taking

Trial court in a prosecution for larceny of an automobile did not err in refusing to submit an issue of defendant's guilt of unauthorized use of a motor vehicle. *S. v. Herman*, 711.

BANKS AND BANKING

§ 1. Control and Regulation Generally

The Credit Union Commission properly approved an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees. *Savings and Loan League v. Credit Union Comm.*, 19.

§ 4. Joint Accounts

A signature card signed by depositors did not comply with G.S. 41-2.1(a) where the card did not expressly provide for the right of survivorship in the certificate of deposit. *O'Brien v. Reece*, 610.

§ 11. Liability For Mistaken Payment of Check

Where the original payee of a check endorsed it without recourse to plaintiff and third party defendant, and the third party defendant represented to plaintiff that he would give the entire proceeds of the check to plaintiff in partial payment for the debt, a bank which paid the check to third party defendant on his endorsement only was liable to plaintiff for the full face amount of the check. *Builders, Inc. v. Trust Co.*, 46.

BASTARDS

§ 6. Sufficiency of Evidence and Nonsuit

Trial court in an action to establish paternity erred in directing a verdict for respondent at the close of petitioner's evidence on the ground that she was asserting a position contrary to the position she asserted in a criminal trial of her husband for nonsupport of the child. *Bunting v. Beacham*, 304.

BILLS AND NOTES

§ 19. Defenses in Actions on Notes

Defendants' statement that plaintiff forced them to execute a note and guaranty agreement to forestall a lawsuit by plaintiff to collect an amount allegedly owed by defendants for merchandise and to protect the credit of defendants' business did not raise a genuine issue of fraud or duress in the procurement of the note and guaranty. *Chemical Co. v. Rivenbark*, 517.

BROKERS AND FACTORS

§ 6. Right to Commissions

Where defendants breached a contract giving plaintiff realtor the exclusive right to sell property on behalf of defendants, plaintiff was entitled to recover expenses incurred by it prior to defendants' revocation of its authority to sell the property and a reasonabe compensation for any services rendered by plaintiff, not the amount of compensation called for in the contract for the sale of the property by plaintiff. *Realtors, Inc. v. Kinard*, 545.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence Generally

Evidence was sufficient to show that defendant was the perpetrator of a first degree burglary. *S. v. Raynor*, 181.

CONSTITUTIONAL LAW—Continued

Defendant was not prejudiced by the State's failure to disclose prior to trial oral statements made by defendant to a third party witness, but defendant was prejudiced by the State's failure to disclose documents which the State intended to use at trial. *S. v. Hill*, 136.

§ 50. Speedy Trial Generally

The Speedy Trial Act, which applied to defendants arrested or indicted after 1 October 1978, was inapplicable to defendant's case since he was indicted on 30 May and arrested on 31 May 1978. *S. v. Allen*, 417.

§ 65. Right of Confrontation Generally

There was no merit to defendant's contention that the trial court erred in failing to require the State to make an affirmative effort to locate a paid informant. *S. v. Brockenborough*, 121.

§ 67. Identity of Informants

A defendant charged with possession and sale of marijuana could not compel disclosure of the details of an informant's personal life simply because the prosecution disclosed the informant's name. *S. v. Beam*, 82.

§ 74. Self-Incrimination

Defendant's failure to provide his tax returns and a list of his assets to receivers of a corporation could not serve as a basis for finding him in contempt since defendant claimed that his privilege against self-incrimination would be violated if he were compelled to produce the documents. *Lowder v. Mills, Inc.*, 348.

CONTEMPT OF COURT

§ 2.2. Criminal Contempt for Acts Committed Outside Courtroom

Superior court had personal jurisdiction over a foreign attorney in a contempt proceeding against the attorney for failure to appear for trial to defend a criminal defendant as ordered by the court where the attorney consented to the jurisdiction of the court by presenting his motion to be admitted to the court, and where an order notifying the attorney of the contempt charges and allowing him 60 days to respond thereto was sent to the attorney by certified mail, return receipt requested. *In re Smith*, 123.

Willful and deliberate failure of a foreign attorney to appear for the trial of a criminal case as ordered by the court constituted criminal contempt. *Ibid.*

The trial judge was not required to recuse himself from presiding over proceedings to hold an attorney in contempt for his failure to appear for a criminal trial as ordered by the court because the judge mailed a proposed contempt order to respondent attorney prior to the hearing. *Ibid.*

§ 3.1. Acts Constituting Civil Contempt

A person may be guilty of civil contempt even if he does not have the money to make court ordered payments if he could take a job which would enable him to make those payments and he fails to do so. *Frank v. Glanville*, 313.

CONTEMPT OF COURT—Continued

§ 5. Orders to Show Cause

An order directing defendant to show cause why he should not be held in contempt could not lawfully be based on civil contempt since no petititon, affidavit or other proper verification served as a basis for the issuance of the order. *Lowder v. Mills, Inc.* 348.

§ 5.1. Sufficiency of Notice

Defendant's contempt, if any, in failing to provide tax returns and a list of his assets to receivers of a corporation was indirect criminal contempt, and the trial court had jurisdiction to determine whether defendant had violated its order to produce his records even in the absence of a petition or other proper verification. *Lowder v. Mills, Inc.*, 348.

§ 6. Hearings on Orders to Show Cause Generally

Inasmuch as an adjudication of contempt against defendant was based on the affidavit of a receiver of the corporation, the assets of which defendant allegedly mismanaged, the adjudication was invalid since the affiant did not testify at the contempt hearing and was not present. *Lowder v. Mills, Inc.*, 348.

Defendant's failure to provide his tax returns and a list of his assets to receivers of a corporation could not serve as a basis for finding him in contempt since defendant claimed that his privilege against self-incrimination would be violated if he were compelled to produce the documents. *Ibid.*

§ 6.3. Findings and Judgment

In order for a person to be held in civil contempt, he must be able to comply with the order or be able to take reasonable measures that would enable him to comply, and the trial court must find that defendant has the ability to comply. *Frank v. Glanville*, 313.

CONTRACTS

§ 14.2. Contract Not for Benefit of Third Person

Plaintiff's complaint was insufficient to state a claim based on the third party beneficiary contract doctrine where it alleged a contract between an attorney and his client, but the contract was not entered into for plaintiff's benefit. *Leasing Corp. v. Miller*, 400.

§ 15. Right of Third Person to Sue for Negligent Breach of Contract

Plaintiff's complaint was sufficient to state a cause of action against defendants based in tort where plaintiff alleged damage occurring to it as a result of an attorney's negligence in the performance of his contract with his client. *Leasing Corp. v. Miller*, 400.

§ 26. Competency of Evidence Generally

In an action to recover for breach of contract to construct and convey a house to plaintiffs, trial court did not err in permitting an officer of defendant corporation to testify that the individual defendant ran the business as his own personal business. *Keels v. Turner*, 213.

§ 26.3. Evidence of Damages

A list of spare truck parts delivered by defendant to plaintiff with the fair market value of each part as assigned by defendant was not inadmissible hearsay

COURTS

§ 6.1. Jurisdiction of Superior Court on Appeal of Probate Matter

In an appeal from a judgment of the clerk finding that a dissent to a will was valid, superior court did not err in failing to hear a witness subpoenaed by the executrix of the will. *In re Snipes*, 79.

§ 21.8. Conflict of Laws; Contract Specifying Applicable Law

Pursuant to the provisions of the construction bond under which plaintiff sought recovery for labor and material furnished by it, all actions for claims on the construction project could only be brought in the courts of S. C. or in a federal court for the district in which the project was located. *Harsco Corp. v. Cisne and Assoc.*, 538.

CRIMINAL LAW

§ 25.2. Withdrawal of Guilty Plea

Trial court did not err in denying defendant's motion to withdraw her plea of no contest, and defendant was not entitled to a hearing to determine if there was a factual basis for allowing the motion. *S. v. Sinclair*, 586.

§ 34.5. Admissibility of Other Crimes to Show Identity

Evidence that defendant attempted to burglarize another home in the same area on the night following the burglary in question was properly admitted for the purpose of identifying defendant as the perpetrator of the crime charged. *S. v. Armstrong*, 40.

§ 34.7. Admissibility of Other Offenses to Show Knowledge or Intent

In a prosecution for aiding and abetting in the obtaining of property by false pretenses and for corporate malfeasance, trial court did not err in permitting evidence of other instances of defendant's tacit approval of false billings. *S. v. Hill*, 136.

§ 42.6. Chain of Custody of Items Connected With Crime

Even if the chain of custody of a bullet taken from deceased's body was not sufficiently established, defendant was not prejudiced by its admission or by testimony of the doctor who removed it from deceased's body. *S. v. Watkins*, 661.

§ 43. Photographs Generally

Defendant in a rape prosecution was not prejudiced where the trial court allowed in evidence a photographic reconstruction of the alleged crime. *S. v. Patton*, 676.

§ 43.1. Photographs of Defendant

Trial court did not err in allowing the State to introduce photographs into evidence which had been altered since the voir dire hearing to delete identification numbers which appeared on them. *S. v. Patton*, 676.

§ 46. Flight as Implied Admission

Evidence that defendant left the scene of a rape and went to his dormitory room and that he attempted to evade arresting officers when they went to his room an hour later was properly admitted as bearing upon the issue of his guilt of the rape charge. *S. v. Parker*, 276.

CRIMINAL LAW—Continued

§ 66.1. Competency of Identification Witness; Opportunity for Obervation

Trial court did not err in allowing an in-court identification of defendant by a rape victim who had ample opportunity to observe her assailant at the time of the offense. *S. v. Patton*, 676.

§ 66.11. Confrontation at Scene of Crime or Arrest

An in-court identification of defendant by the victim of a breaking and entering was not based on a show-up conducted when defendant was brought from his home to a police car to be identified by the victim. *S. v. Bartlett*, 704.

§ 73. Hearsay Testimony in General

In a prosecution for possession and manufacture of marijuana, trial court properly excluded as hearsay testimony by a witness that a third person told her that the contraband in question belonged to him. *S. v. Thacker*, 102.

§ 73.2. Statements Not Within Hearsay Rule

Statements by a paid informant were not hearsay, and the trial court erred in excluding them in a prosecution for possession with intent to sell and sale of heroin. *S. v. Brockenborough*, 121.

§ 75.3. Effect on Confession of Confronting Defendant With Evidence

Defendant's in-custody statements were not rendered involuntary by an officer's statement to defendant concerning his girl friend, his fingerprints and a stolen television set found in his home. *S. v. Armstrong*, 40.

§ 76.5. Voir Dire Hearing, Necessity for Findings

Trial court did not err in failing to make appropriate findings of fact in an order at the close of a voir dire hearing to determine the competency of defendant's incriminating statements. *S. v. Thacker*, 102.

§ 86.4. Cross-Examination of Defendant as to Prior Arrests or Indictments

In a prosecution of defendant prison inmates for engaging in a riot, trial court erred in allowing the district attorney to ask defendant how many robberies he had committed, but defendant was not prejudiced where the record did not show that he answered the question. *S. v. Riddle*, 34.

§ 86.5. Cross-Examination of Defendant About Specific Acts

Defendant who was accused of receiving stolen property could properly be asked for impeachment purposes if he had conspired to break into a named house to steal guns. *S. v. Allen*, 417.

§ 87. Direct Examination of Witnesses; What Witnesses May Be Called

Defendant was not prejudiced where the trial court permitted a witness whose name was not on the list of potential witnesses given to defendant before voir dire of the jury to testify. *S. v. Allen*, 417.

§ 89.7. Impeachment; Mental Capacity of Witness

Trial court in a rape case properly permitted the prosecutor to ask defendant on cross-examination whether he had ever received any psychiatric treatment. *S. v. Parker*, 276.

CRIMINAL LAW—Continued

§ 89.10. Impeachment; Prior Criminal Conduct

Trial court did not err in refusing to allow defendant to ask an assault victim questions concerning an assault charge pending against him. *S. v. Hammonds*, 495.

§ 91.7. Continuance on Ground of Absence of Witness

Trial court properly granted the State's motion to continue in order to obtain the presence of a witness who was out of the State at the time defendant's case was called. *State v. Raynor*, 181.

§ 92.4. Consolidation of Counts for Trial

There was no merit to defendant's contention that the trial court erred in granting the State's motion for joinder of the charges against defendant because the State's motion was not timely. *S. v. Street*, 1.

Though the sexual offenses against his stepchildren with which defendant was charged occurred over a five-month period, trial court could properly find that they were part of a single scheme or plan and the court did not err in permitting joinder of the charges. *Ibid.*

§ 99.7. Expression of Opinion by Court in Admonition to Witness

Defendant was not prejudiced when the trial judge told defendant, "Just answer the question asked and we'll get along better." *S. v. Daye*, 316.

§ 102.9. Prosecutor's Jury Argument; Comment on Defendant's Character

Defendant is entitled to a new trial because of the prosecutor's reference to him in the jury argument as a "mean S.O.B." *S. v. Davis*, 113.

§ 111.1. Instructions in General

Trial court erred in reading the indictments to the jury. *S. v. Hill*, 136.

§ 124.5. Inconsistency of Verdict

Trial court did not err in failing to set aside the jury's verdict finding defendant guilty of felonious breaking or entering and misdemeanor larceny on the ground it was inconsistent. *S. v. Bartlett*, 704.

§ 128.2. Mistrial

Trial court did not abuse its discretion in declaring a mistrial where the session of court at which defendant's case was called was interrupted by two snowfalls which prevented jurors from getting to the courthouse and where one juror became ill. *S. v. Raynor*, 181.

§ 139. Sentence to Maximum and Minimum Terms

Where the trial court sentenced defendant to minimum and maximum terms, additional language in the judgment stating the intent of the trial judge with respect to parole of defendant was mere surplusage. *S. v. Bonds*, 62.

§ 142.3. Particular Conditions of Probation

A condition of defendant's probation requiring him to submit to physical testing or examination at the request of his probation officer was not an invalid condition of probation. *S. v. McCoy*, 686.

§ 144. Modification of Judgment in Trial Court

A trial court upon a motion for appropriate relief does not have the authority to resentence a criminal defendant for discretionary reasons after expiration of the session of court in which he was originally sentenced. *S. v. Bonds*, 62.

CRIMINAL LAW—Continued

§ 157.2. Effect of Omission of Necessary Part of Record

Defendant's purported appeal is dismissed where the indictment, verdict and judgment were not included in the record on appeal. *S. v. Harvell*, 243.

§ 162.4. Objection to Answer; Motion to Strike

Defendant waived objection to a witness's unresponsive answer where defense counsel interposed no motion to strike the answer at the time he objected to it. *S. v. Beam*, 82.

DAMAGES

§ 11. Punitive Damages

Trial court erred in dismissing plaintiff's claim for punitive damages where plaintiff sufficiently alleged a claim for fraud as part of breach of a contract by defendant dentist in refusing to cap plaintiff's tooth after grinding away the original tooth. *Mesimer v. Stancil*, 533.

§ 16.3. Loss of Earnings or Profits

In an action to recover for injuries sustained in an automobile accident, a verdict of $175,000 was not excessive as a matter of law because the evidence was insufficient to establish plaintiff's loss of future earning capacity. *Griffin v. Griffin*, 531.

DEEDS

§ 19.4. Violations of Restrictive Covenants

Restrictive covenants and reservations placed in deeds conveying lands from plaintiffs to four defendants were not violated by the reservation of a 15-foot driveway easement along the boundary of a lot sold by the four defendants to the remaining defendants. *Bank v. Morris*, 281.

DIVORCE AND ALIMONY

§ 2.4. Right to Jury Trial

Trial court erred in failing to grant defendant's request for a jury trial in an action for absolute divorce based on a one year separation. *Morris v. Morris*, 69.

§ 5. Recrimination

The defense of recrimination based on abandonment or indignities cannot be asserted in an action for absolute divorce on the ground of separation of the parties instituted after 31 July 1977. *Morris v. Morris*, 69.

§ 20.1. Effect of Absolute Divorce on Right to Alimony

Defendant husband's obligation under a consent judgment to make support payments to the wife until her death or remarriage did not terminate when plaintiff wife initiated and obtained a divorce on the ground of separation for one year. *Haynes v. Haynes*, 376.

DIVORCE AND ALIMONY—Continued

§ 23.4. Notice in Child Custody and Support Proceeding; Service of Process

Trial court had authority to enter an order for temporary custody of a minor child who was physically present in this State, but such order was not binding on defendant since she was not served with summons. *Lynch v. Lynch*, 391.

Where defendant brought an action for child custody in Durham County but there was no service of process on plaintiff, the action was discontinued when the time for service of summons lapsed, and the action was not revived when plaintiff subsequently filed a motion in the Durham County action praying for a change of venue or that the action be dismissed. *Robertson v. Smith*, 535.

§ 23.5. Jurisdiction; Absence or Presence of Child

Where the parties' children were present in N.C., the trial court had subject matter jurisdiction to enter a temporary custody order. *Broaddus v. Broaddus*, 666.

§ 23.9. Evidence and Findings in Child Custody Proceeding

Opinion testimony by plaintiff's present wife as to whether plaintiff should be awarded child custody was not prejudicial to defendant. *Pritchard v. Pritchard*, 189.

§ 25. Child Custody Generally

The trial court in a child custody proceeding did not show bias and prejudice against defendant when defendant's counsel offered to qualify a witness as an expert "if the court wishes" and the court stated, "It's up to you, I don't care anything about it frankly." *Pritchard v. Pritchard*, 189.

§ 25.9. Where Evidence of Changed Circumstances is Sufficient in Child Custody Action

Trial court did not err in concluding that there had been a material change in circumstances since a prior custody order which justified a change in custody of the parties' younger son from mother to father. *Pritchard v. Pritchard*, 189.

§ 25.12. Child Visitation Privileges

Trial court's findings were insufficient to support an order restricting respondent's visiting privileges with her child which were limited to one weekend a month and to occasions only when petitioner father or his designated representative was present. *Johnson v. Johnson*, 644.

DURESS

§ 1. Generally

Defendants' statement that plaintiff forced them to execute a note and guaranty agreement to forestall a lawsuit by plaintiff to collect an amount allegedly owed by defendants for merchandise and to protect the credit of defendants' business did not raise a genuine issue of fraud or duress in the procurement of the note and guaranty. *Chemical Co. v. Rivenbark*, 517.

EJECTMENT

§ 1. Nature and Scope of Remedy

The statutory summary ejectment procedures are not unconstitutional because the statutes provide no defense to a residential tenant of commercially owned prop-

ESTOPPEL

§ 3. Estoppel by Record

Trial court in an action to establish paternity erred in directing a verdict for respondent at the close of petitioner's evidence on the ground that she was asserting a position contrary to the position she asserted in a criminal trial of her husband for nonsupport of the child. *Bunting v. Beacham*, 304.

EVIDENCE

§ 17. Negative Evidence

Plaintiff's testimony that she stopped at a stop sign and looked both ways but saw no lights coming from either direction was competent to show that defendant's violation of G.S. 20-129 was a proximate cause of the accident and that plaintiff was not contributorily negligent in entering the intersection. *McLean v. Henderson*, 707.

§ 22.2. Evidence of Acquittal in Prior Criminal Case

Trial court properly refused to permit plaintiffs to elicit testimony from an SBI agent who testified as an expert in fire investigation that no criminal charges had been filed against the individual plaintiff. *Fowler-Barham Ford v. Insurance Co.*, 625.

§ 40.1. Inadmissible Opinions and Conclusions

Plaintiff's testimony that when she sought a refund of her security deposit on one occasion, she thought defendant landlord went to get a gun and she left constituted prejudicial opinion testimony. *Taylor v. Hayes*, 119.

§ 50.2. Expert Testimony as to Cause of Injury

An expert witness is not disqualified from giving an expert opinion as to the cause of physical injury simply because he is not a medical doctor, and the trial court erred in refusing to permit a nurse specially trained in intravenous therapy to state that burns on plaintiff's hand were caused by the improper intravenous administration of potassium chloride into the tissue of the hand. *Maloney v. Hospital Systems*, 172.

EXECUTORS AND ADMINISTRATORS

§ 13. Sales of Real Property

Neither a will nor G.S. 32-27 gave the executor the authority to sell real property devised to testator's minor son without prior court approval. *Montgomery v. Hinton*, 271.

FALSE PRETENSE

§ 3. Evidence

In a prosecution of defendant for aiding and abetting in the obtaining of property by false pretenses where the evidence tended to show that defendant approved the payment of freight bills which had been prepaid, trial court erred in excluding testimony competent to show the absence of felonious intent. *S. v. Hill*, 136.

§ 3.1. Nonsuit

In a prosecution of defendant, former executive director of a city housing authority, for aiding and abetting in the obtaining of property by false pretenses,

HOMICIDE

§ 5. Second Degree Murder

Charges of child abuse and child neglect were not merged into a charge of second degree murder. *S. v. Mapp*, 574.

§ 20. Real and Demonstrative Evidence Generally

Even if the chain of custody of a bullet taken from deceased's body was not sufficiently established, defendant was not prejudiced by its admission or by testimony of the doctor who removed it from deceased's body. *S. v. Watkins*, 661.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

Evidence in a second degree murder case was sufficient for the jury where it tended to show that defendant's five-year-old child who suffered from the battered child syndrome died as a result of suffocation caused by a blood clot from a wound in her mouth. *S. v. Mapp*, 574.

State's evidence was sufficient for the jury in a prosecution of defendant for second degree murder of her husband. *S. v. Watkins*, 661.

§ 21.9. Sufficiency of Evidence of Manslaughter

Defendant who was accused of shooting his wife was entitled to a dismissal of the charges against him where the evidence tended to show that his wife was killed during defendant's efforts to prevent her suicide. *S. v. Lindsay*, 514.

§ 28.1. Duty of Court to Instruct on Self-Defense

Evidence that defendant stated that she "did not mean to shoot" deceased and that deceased had threatened her on another occasion did not require the court to instruct on self-defense. *S. v. Watkins*, 661.

HUSBAND AND WIFE

§ 11.2. Operation and Effect of Separation Agreement

Under the terms of a separation agreement a husband had the right to purchase the wife's interest in the parties' homeplace at the termination of the dependency of the parties' children, and a jury question arose as to whether the children ceased to be dependent during the wife's lifetime and therefore were entitled only to the proceeds of the sale of the house. *Nolan v. Nolan*, 163.

INCEST

§ 1. Generally

Trial court did not err in refusing to merge charges against defendant for second degree rape of and incest with his 12-year-old daughter, and the State's evidence was sufficient for the jury on both of those charges. *S. v. Harvell*, 243.

INDEMNITY

§ 2. Construction and Operation of Agreement Generally

An agreement between the Department of Transportation and a contractor that the contractor would indemnify the Department for any claims caused by the contractor's blasting operations did not affect plaintiffs' right to sue both the Department and the contractor for damages allegedly caused by the contractor's blasting operations. *Cody v. Dept. of Transportation*, 471.

INDICTMENT AND WARRANT

§ 7.1. Formalities

An indictment returned by the grand jury is not defective or insufficient because the foreman failed to mark the box indicating a true bill or not a true bill where the court minutes show that all bills were returned true bills. *S. v. Midyette*, 87.

§ 8.4. Election Between Offenses

Trial court did not err in refusing to require the State to elect between the charges of aiding and abetting the obtaining of property by false pretense and charges of malfeasance by a corporate officer. *S. v. Hill*, 136.

§ 9.9. Allegations of Intent

Indictments charging defendant with corporate malfeasance must be quashed where the statute requires that they allege an intent to injure, defraud, or deceive an officer of the corporation, but the indictments alleged an intent to defraud or deceive a housing authority. *S. v. Hill*, 136.

§ 17. Variance Generally

There was a fatal variance between a warrant which alleged that defendant shoved an officer while he was conducting a search of a residence and the evidence which tended to show that the officer whom defendant pushed was not engaged in conducting the search but was merely present at the scene. *S. v. Dudley*, 295.

INFANTS

§ 5. Jurisdiction to Award Custody of Minor

Trial court had authority to enter an order for temporary custody of a minor child who was physically present in this State, but such order was not binding on defendant since she was not served with summons. *Lynch v. Lynch*, 391.

§ 5.1. Jurisdiction to Award Custody; Effect of Foreign Decree

Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in another state. *Lynch v. Lynch*, 391.

Trial court did not err in refusing to give full faith and credit to an Illinois divorce decree awarding child custody to defendant mother where it appeared that the child custody portion was only interlocutory. *Ibid.*

§ 16. Juvenile Delinquency Hearings Generally

The respondent in a juvenile delinquency hearing who was represented by counsel was denied due process by the trial judge's examination of the witnesses for the State because of the absence of the district attorney or other counsel for the State. *In re Thomas*, 525.

INJUNCTIONS

§ 16. Liabilities on Bonds

Where superior court improperly entered an injunctive order against the Insurance Department, the Department's recovery was limited to the amount of plaintiff's bond even though its damages were greater. *Stevenson v. Dept. of Insurance*, 53.

INSANE PERSONS

§ 1.2. Findings Required by Involuntary Commitment Statutes

Under G.S. 122-56.7(b) before a court can concur with a voluntary commitment of an incompetent, it must find that the incompetent is mentally ill or an inebriate and is in need of further treatment at the treatment facility. *In re Hiatt*, 318.

§ 12. Sterilization of Mental Defective

In a proceeding for sterilization of a mentally defective person, there can be no presumption of unfitness founded solely on mental retardation. *In re Johnson*, 649.

Evidence was sufficient for the jury in a proceeding for sterilization of respondent on the ground she would probably be unable to care for a child because of a mental deficiency which is not likely to improve materially. *Ibid.*

INSURANCE

§ 19.1. Life Insurance; Imputation to Insurer of Knowledge of its Agent

Knowledge by defendant insurer's agent of possible charges against insured for driving under the influence was imputed to defendant insurer and precluded defendant from avoiding a life insurance policy on the ground that such charges were not listed in the application. *Willetts v. Insurance Corp.*, 424.

§ 87.2. Liability Insurance; Proof of Permission to Use Vehicle

In an action to recover under an automobile liability policy for damages in excess of the statutory minimum coverage, the evidence presented a jury question as to whether the driver of the insured vehicle had permission to use it for the actual use to which he put it at the time of the accident. *Caison v. Insurance Co.*, 30.

§ 106.1. Liability Insurance; Conditions Precedent to Maintenance of Action Against Insurer

A trial which results in findings or a verdict against a non-appearing defendant does not take the resulting judgment for the appearing party out of the default category within the meaning of G.S. 20-279.21(f)(1) so that plaintiff is not required to give the insurer of assigned risk or reinsurance facility individuals notice of actions brought against such person. *Love v. Insurance Co.*, 444.

§ 121. Fire Insurance; Provisions Excluding Liability

Defendant insurer's evidence was sufficient to support a jury finding that plaintiffs were not entitled to recover on a fire insurance policy because they increased the hazard insured against by intentionally burning the insured property. *Fowler-Barham Ford v. Insurance Co.*, 625.

JUDGES

§ 5. Disqualification

The trial judge was not required to recuse himself from presiding over proceedings to hold an attorney in contempt for his failure to appear for a criminal trial as ordered by the court because the judge mailed a proposed contempt order to respondent attorney prior to the hearing. *In re Smith*, 123.

Trial judge erred in failing to refer a motion for recusation to another judge for consideration and disposition. *S. v. Hill*, 136.

JUDGMENTS

§ 25.3. Grounds for Attack; Imputation to Litigant of Attorney's Failure to Attend Trial

Defendants' failure to appear for trial before a jury was not excusable, and the trial judge did not abuse his discretion in the denial of defendants' Rule 60(b)(1) motion to set aside the judgment entered against them in their absence, where defendants' counsel received notice by a trial calendar that the case would be heard that session but failed to appear for the calendar call and made no inquiry of either the court or opposing counsel to determine where his case had finally been placed on the calendar for trial. *Chris v. Hill*, 287.

JURY

§ 6.3. Scope of Voir Dire Examination Generally

In a prosecution for assault with a deadly weapon and discharging a firearm into occupied property, trial court properly refused to allow defendants to examine prospective jurors as to whether they owned firearms or weapons. *S. v. Hammonds*, 495.

LANDLORD AND TENANT

§ 19.1. Recovery Back of Payment of Rent

Plaintiff's testimony that when she sought a refund of her security deposit on one occasion, she thought defendant landlord went to get a gun and she left constituted prejudicial opinion testimony. *Taylor v. Hayes*, 119.

LARCENY

§ 6.1. Competency of Evidence; Value of Property Stolen

In a prosecution for breaking and entering and felonious larceny, any error in the admission of testimony which overstated the value of the property taken was harmless since the larceny in this case was a felony without regard to the value of the property taken. *S. v. Stafford*, 297.

§ 7.3. Sufficiency of Evidence of Ownership of Property Stolen

There was no fatal variance between an indictment charging larceny of suits owned by "J. Riggings, Inc., a corporation" and evidence showing the suits were owned by "J. Riggings, a man's retailing establishment," "J. Riggings store," and "J. Riggings." *S. v. Daye*, 316.

§ 7.7. Sufficiency of Evidence of Larceny of Automobile

Trial court in a prosecution for larceny of an automobile did not err in refusing to submit an issue of defendant's guilt of unauthorized use of a motor vehicle. *S. v. Herman*, 711.

LIMITATION OF ACTIONS

§ 16.1. Sufficiency of Plea or Answer

Plaintiff's claim was barred by the one year statute of limitations for actions based on assault and battery though the statute of limitations was never pled in answer and though plaintiff's complaint sought recovery for the intentional infliction of mental distress to which a three-year statute of limitations would apply. *Dickens v. Puryear*, 696.

MALICIOUS PROSECUTION

§ 2. Prosecutions Which Will Support Action

An action for malicious prosecution would not lie where defendants challenged plaintiff's right to vote. *Hurow v. Miller*, 58.

MASTER AND SERVANT

§ 29. Liability of Employer for Injury to Employee; Negligence or Wilful Act of Fellow Employee

In an action to recover for injuries sustained by plaintiff while he and defendant's son were cropping a field of tobacco, the fellow servant rule applied to bar recovery. *Thornton v. Thornton*, 25.

§ 35.2. Employer's Liability to Third Persons; Sufficiency of Evidence of Deviation from Employment

The evidence presented a jury question as to whether an armed security guard employed by defendant was engaged in horseplay when he shot plaintiff's intestate, thereby deviating from the scope of his employment and absolving defendant from liability under the doctrine of respondeat superior. *Thomas v. Poole*, 260.

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

An employee's injury to his back while lifting the tongue of a trailer to attach it to a truck resulted from an accident within the meaning of the Workers' Compensation Act. *O'Neal v. Blacksmith Shop*, 90.

§ 60. Workers' Compensation; Injury Sustained While Performing Service Outside Regular Employment

The death of a service station employee who was electrocuted while installing a CB radio antenna in his home after working hours arose out of and in the course of his employment where the radio equipment was purchased by the station owner so he could contact the employee when he could not be reached by telephone. *Brown v. Service Station*, 255.

§ 60.4. Workers' Compensation; Injuries Sustained During Recreation

Plaintiff was not entitled to workers' compensation for a broken ankle suffered while playing volleyball at an annual picnic for faculty members and new residents in the radiology department of defendant school. *Chilton v. School of Medicine*, 13.

§ 62.1. Workers' Compensation; Injuries on Employer's Premises on Way to Work

Plaintiff grocery store employee sustained an injury by accident arising out of and in the course of her employment when she slipped and fell on ice in a loading zone in front of defendant employer's store in a shopping center while she was walking to her work site after parking her car in the shopping center parking lot. *Barham v. Food World, Inc.*, 409.

§ 67. Workers' Compensation; Heart Disease

Where it was clear from the evidence in a workers' compensation case that the injury to plaintiff deputy sheriff's heart occurred suddenly and immediately after the foot chase of a suspect, and that overexertion experienced during the chase caused the injury to his heart, it was not necessary for plaintiff to show that the overexertion occurred while he was engaged in some unusual activity. *King v. Forsyth County*, 467.

MASTER AND SERVANT—Continued

§ 68. Workers' Compensation; Occupational Diseases

Findings by the Industrial Commission were insufficient to support its conclusion that plaintiff who suffered from byssinosis did not suffer from an occupational disease, and the Industrial Commission erred in discounting testimony by a pulmonary specialist concerning plaintiff's condition. *Harrell v. Stevens & Co.*, 197.

§ 72. Workers' Compensation; Partial Disability

The Industrial Commission did not err in considering testimony of a surgeon who briefly examined plaintiff just prior to the hearing that plaintiff had a 25% permanent partial disability of his left hand. *Taylor v. Delivery Service*, 682.

§ 75. Workers' Compensation; Medical Expenses

Superior court had no authority to order defendants to pay medical bills incurred by plaintiff for treatment of her work related injury since the bills in question had not been submitted to or approved by the Industrial Commission. *Weydener v. Carolina Village*, 549.

§ 79.2. Workers' Compensation; Persons Entitled to Payment, Spouse

There was sufficient evidence to overcome the presumption of the validity of the deceased employee's purported second marriage, and the Industrial Commission properly found that the deceased employee was still married to his first wife at the time of his purported second marriage and that his second wife was not his "widow" and entitled to share in workers' compensation death benefits. *Ivory v. Greer Brothers, Inc.*, 455.

§ 81. Workers' Compensation; Construction of Policy as to Coverage

An insurance policy providing workers' compensation insurance coverage for James William Brown t/a Jim Brown's Service Station covered the business operating as Jim Brown's Service Station even though evidence showed the station was a partnership consisting of Brown and his wife. *Brown v. Service Station*, 255.

§ 90. Workers' Compensation; Notice to Employer of Accident

The Industrial Commission properly ruled that plaintiff's failure to give written notice pursuant to G.S. 97-22 did not bar his claim to workers' compensation. *Chilton v. School of Medicine*, 13.

§ 93. Workers' Compensation; Proceedings Before Commission Generally

The Industrial Commission did not abuse its discretion in denying defendant's request that plaintiff be ordered to submit to an independent physical examination after the hearing was completed. *Taylor v. Delivery Service*, 682.

§ 94.1. Workers' Compensation; Sufficiency of Findings of Fact by Commission

The Industrial Commission's finding that the duration of plaintiff's disability was temporary was erroneous since plaintiff's uncontradicted evidence was that he was permanently disabled and that his condition likely would not improve. *Gamble v. Borden, Inc.*, 506.

§ 110. Unemployment Compensation; Proceedings Before Employment Security Commission

A claimant for unemployment benefits was not denied a fair hearing because the Employment Security Commission lost the recording of a hearing before a claims deputy. *Evans v. Fran-Char Corp.*, 94.

MUNICIPAL CORPORATIONS

§ 9. Rights and Duties of Officers and Employees

In a prosecution of a town finance officer for failure to preaudit an obligation of the town, trial court should have granted defendant's motion to dismiss since the obligation in question was defendant's personal obligation and was never intended to be an obligation of the town. *S. v. Davis*, 72.

§ 22.2. Invalid and Illegal Contracts

An alleged contract by plaintiff to pave a town street in exchange for the town's opening of another road was ultra vires and void, and plaintiff could not recover money expended by it in paving the street and thereby executing its part of the agreement. *Shopping Center v. Town of Madison*, 249.

§ 39.3. Power of Municipality to Issue Bonds

An action based on alleged errors in bond orders for water and sewer bonds was barred by the statute of limitations. *Citizens Assoc. v. City of Washington*, 7.

A water and sewer bond election did not violate due process because the published notice of the water bond election contained an erroneous reference to a "sanitary sewer bond issue" and the water bond ballot erroneously stated the bond issue would not exceed "$1,500,00." *Ibid.*

Where no action was commenced to test the validity of a city water and sewer bond election within 30 days after newspaper publication of a sufficient statement of the election results, any claim to test the validity was extinguished under G.S. 159-62 and could not be revived by the publication of a corrected statement of the election results. *Ibid.*

§ 42. Action Against Municipality for Personal Injury; Notice

The statutory requirement that written notice of a tort claim against a city be given to the city council was substantially complied with where plaintiff's attorney sent written notice of plaintiff's claim to the city manager and to the city attorney. *Jenkins v. City of Wilmington*, 528.

§ 45. Mandamus Against Municipal Corporations

A letter sent by plaintiff to the mayor of defendant city constituted a sufficient notice of claim to the city to give plaintiff standing to institute a suit to require defendant city to pay penalties for overtime parking into the county school fund. *Cauble v. City of Asheville*, 152.

NARCOTICS

§ 6. Forfeitures

Petitioner carried his burden of proving that he did not know and had no reason to believe that his car was being used by two other persons to transport narcotics, and petitioner was therefore entitled to the return of his car which had been seized by the sheriff's department. *S. v. Meyers*, 672.

NEGLIGENCE

§ 29. Sufficiency of Evidence of Negligence Generally

Trial court erred in directing verdict for defendant tenant where there was a jury question as to defendant's negligence in using a gasoline soaked rag to clean the fire box in a house belonging to plaintiff landlords. *Goode v. Harrison*, 547.

NEGLIGENCE—Continued

§ 30.3. Particular Cases Where Summary Judgment is Proper; Foreseeability

In an action to recover for the wrongful death of plaintiff's intestate who was shot by a security guard at her place of employment, trial court properly granted summary judgment for defendant security guard whose shift preceded that of defendant who shot deceased, since the first security guard was under no duty to warn that he had placed an extra bullet in the gun when he transferred the gun to the second guard. *Thomas v. Poole*, 260.

§ 57.3. Sufficiency of Evidence in Actions by Invitees; Falling Objects

In an action to recover for injuries sustained to plaintiff's leg when a 32-ounce Coke bottle fell from a display and exploded on the floor of a grocery store, plaintiff's evidence was insufficient to show negligence by either the store owner or the Coke distributor who prepared the display. *Skinner v. Piggly Wiggly*, 301.

PARENT AND CHILD

§ 1. The Relationship Generally

In a prosecution of an employee of a church day care center for assaulting a two-year-old child enrolled at the center, defendant was not entitled to assert the defense that she stood in loco parentis to the child. *S. v. Pittard*, 701.

§ 2.1. Liability of Parent for Injury or Death of Child

Evidence was sufficient for the jury in a prosecution for child neglect. *S. v. Mapp*, 574.

§ 2.2. Child Abuse

Evidence was sufficient for the jury in a prosecution for child abuse. *S. v. Mapp*, 574.

Charges of child abuse and child neglect were not merged into a charge of second degree murder. *Ibid.*

PARTNERSHIP

§ 1.2. Existence of Partnership; Indicia; Particular Applications

Evidence was sufficient to submit to the jury an issue as to the existence of a partnership between the parties, and there was no merit to defendant's contention that because he and his associates never achieved a profit in their business there could be no partnership. *Reddington v. Thomas*, 236.

§ 3. Duties of Partners Among Themselves

Evidence was sufficient to be submitted to the jury in an action to recover for defendant's breach of duty which he owed a partnership when he purchased apartments in his own name. *Reddington v. Thomas*, 236.

§ 4. Rights and Liabilities of Partners as to Third Persons ex Contractu

Defendant's withdrawal from a partnership did not constitute a defense to plaintiff's action on a note which had been entered into while defendant was still a partner. *Hotel Corp. v. Taylor*, 229.

A release entered into by plaintiff and a partnership, which included defendant, did not discharge defendant from liability on a promissory note which the partnership had entered into for the building of a motel. *Ibid.*

PROCESS

§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test

Superior court had personal jurisdiction over a foreign attorney in a contempt proceeding against the attorney for failure to appear for trial to defend a criminal defendant as ordered by the court where the attorney consented to the jurisdiction of the court by presenting his motion to be admitted to the court, and where an order notifying the attorney of the contempt charges and allowing him 60 days to respond thereto was sent to the attorney by certified mail, return receipt requested. *In re Smith*, 123.

Neither the parties' contract nor any activities by defendant provided sufficient minimum contacts with this State so as to give the trial court personal jurisdiction over defendant. *Globe, Inc. v. Spellman*, 618.

PROPERTY

§ 4. Criminal Prosecutions for Wilful or Malicious Destruction of Property

In a prosecution for the unlawful burning of an automobile, an intent to injure or prejudice the owner of the burned property need not be shown by evidence other than the act of burning itself. *S. v. Wesson*, 510.

RAPE

§ 1. Nature and Elements of Offense

Trial court did not err in refusing to merge charges against defendant for second degree rape of and incest with his 12-year-old daughter. *S. v. Harvell*, 243.

§ 4. Relevancy and Competency of Evidence

In a prosecution for rape, evidence of a discussion between the complainant and defendant concerning the complainant's sexual problems was not admissible under G.S. 8-58.6(b)(1), and evidence of sexual activities between complainant and third persons was not admissible under G.S. 8-58.6(b)(3). *S. v. Smith*, 501.

§ 5. Sufficiency of Evidence

State's evidence was sufficient for the jury on issues of defendant's guilt of second degree rape of and incest with his 12-year-old daughter. *S. v. Harvell*, 243.

State's evidence was sufficient for the jury in a prosecution for second degree rape of a college student in a dormitory room. *S. v. Parker*, 276.

The State's evidence of force was sufficient to support defendant's conviction of second degree rape. *S. v. Smith*, 501.

§ 6.1. Instructions on Lesser Degrees of Crime

Where the prosecutrix testified that defendant raped her and that his private parts entered her private parts, trial court properly submitted an issue of second degree rape and did not err in failing to instruct on assault with intent to commit rape. *S. v. Patton*, 676.

§ 11. Carnal Knowledge of Female Under Twelve; Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution of defendant for first degree rape of his 11-year-old niece. *S. v. Summitt*, 481.

In a prosecution for rape of an 11-year-old child, failure of the State to prove the crime was committed on the specific date given in the indictment was not fatal. *Ibid.*

RAPE—Continued

§ 11.1. Carnal Knowledge of Female Under Twelve; Instructions

In a prosecution for first degree rape of a virtuous female under the age of 12, trial court did not err in instructing on second degree rape where there was some evidence that the victim was not a virtuous child. *S. v. Summitt*, 481.

§ 18.2. Sufficiency of Evidence of Assault with Intent to Commit Rape

In a prosecution for assault with intent to commit rape, evidence was sufficient to show that defendant was the victim's assailant. *S. v. Raynor*, 181.

§ 18.3. Instructions on Assault With Intent to Commit Rape

Trial court erred in instructing on assault with intent to commit rape upon a female under 12 years of age where the indictment charged defendant with assault with intent to commit rape but did not allege that the victim was under 12 years of age. *S. v. Penn*, 551.

RECEIVING STOLEN GOODS

§ 1. Nature and Elements of Offense

The State was not required to show that defendant had absolute knowledge that television sets which he received were stolen. *S. v. Allen*, 417.

§ 5.1. Sufficiency of Evidence

Evidence that defendant knew television sets were stolen at the time he received them was sufficient to be submitted to the jury. *S. v. Allen*, 417.

RIOT AND INCITING TO RIOT

§ 1. Nature and Elements of Offense

G.S. 14-288.2 making it a crime to engage in a riot is not unconstitutionally vague. *S. v. Riddle*, 34.

While an assemblage of prison inmates is involuntary, the involuntariness does not negate the fact of an assemblage within the meaning of G.S. 14-288.2(a). *Ibid.*

§ 2.1. Evidence and Instructions

In a prosecution of defendants for engaging in a riot, evidence was sufficient to show participation by three or more persons at the time of defendants' actions. *S. v. Riddle*, 34.

In a prosecution of defendants for engaging in a riot, trial court was not required to define the word "engaging." *Ibid.*

RULES OF CIVIL PROCEDURE

§ 4. Process

Summons delivered to each of two defendants directing the other defendant rather than the defendant to whom delivered to appear and answer were fatally defective. *Stone v. Hicks*, 66.

Plaintiff's attempted service of process on defendant in Illinois by registered mail, return receipt requested, was insufficient where plaintiff failed to file the affidavit required by Rule 4(j)(9)(b). *Lynch v. Lynch*, 391.

RULES OF CIVIL PROCEDURE—Continued

§ 4.1. Service of Process by Publication

Service of process by publication was not void since the affidavit of publication showed the newspaper in question met the requirements of G.S. 1-597 and since the affidavit was signed by the legal advertising manager of the newspaper. *Love v. Insurance Co.*, 444.

§ 13. Counterclaims

Plaintiff's claim for summary ejectment was not a compulsory counterclaim in defendant's prior action for breach of a lease agreement, breach of covenants of fitness and habitability, and violation of the unfair trade practices statute. *Apartments, Inc. v. Landrum*, 490.

§ 15.1. Discretion of Court to Grant Amendment

Trial court did not abuse its discretion in denying plaintiff's motion made at the end of its evidence to amend its reply to allege the statute of frauds as a defense to defendant's counterclaim. *Industries, Inc. v. Cox*, 595.

§ 24. Intervention

An intervenor party who is granted permission to intervene is not required to issue a summons and complaint pursuant to Rule 4, but the service pursuant to Rule 5 of the motion to intervene accompanied with the complaint is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading. *Kahan v. Longiotti*, 367.

§ 41.1. Voluntary Dismissal

Plaintiff's prior wrongful death action against defendants was discontinued where the original summons was never served on defendants and no alias or pluries summons was issued or endorsement made, and plaintiff's attempt to dismiss her prior action voluntarily was ineffectual to give plaintiff an additional year within which to commence a new action. *Wheeler v. Roberts*, 311.

§ 55. Default

Entry of default by the clerk was not prerequisite to plaintiff's obtaining judgment against a non-appearing defendant. *Love v. Insurance Co.*, 444.

A trial which results in findings or a verdict against a non-appearing defendant does not take the resulting judgment for the appearing party out of the default category within the meaning of G.S. 20-279.21(f)(1) so that plaintiff is not required to give the insurer of assigned risk or reinsurance facility individuals notice of actions brought against such person. *Ibid.*

§ 55.1. Setting Aside Default

Trial court erred in denying defendant's motion to set aside entry of default on the ground that defendant failed to show excusable neglect since all that defendant was required to show in order to have entry of default set aside was good cause. *Realty, Inc. v. Hastings*, 307.

The clerk of court had no power to enter a default judgment in a breach of contract action since nothing in the complaint made it possible to compute the amount of damages to which plaintiff was entitled. *Ibid.*

Trial court erred in failing to apply the good cause shown standard in ruling on a motion to set aside an entry of default. *Bailey v. Gooding*, 335.

RULES OF CIVIL PROCEDURE—Continued

A judgment which determined the issue of liability in a personal injury action and ordered trial on the issue of damages was only an entry of default and could be set aside under the "good cause shown" standard of Rule 60(b)(1). *Pendley v. Ayers*, 692.

§ 56.7. Summary Judgment in Negligence Cases

The appellate court is unable to say that the trial court erred in entering summary judgment for defendant where plaintiff appellant failed to include in the record on appeal his answers to interrogatories which the trial court had before it in ruling on defendant's motion for summary judgment. *Vassey v. Burch*, 222.

§ 58. Entry of Judgment

The trial judge directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, and the clerk should not have noted an entry of judgment on the date of the hearing. *Kahan v. Longiotti*, 367.

§ 60. Relief from Judgment or Order

A superior court judge had no authority under Rule 60(b) to set aside a default judgment entered by another judge which determined the issue of liability and ordered a jury trial on the issue of damages. *Bailey v. Gooding*, 335.

§ 60.2. Grounds for Relief from Judgment or Order

Defendants' failure to appear for trial before a jury was not excusable, and the trial judge did not abuse his discretion in the denial of defendant's Rule 60(b)(1) motion to set aside the judgment entered against them in their absence, where defendants' counsel received notice by a trial calendar that the case would be heard that session but failed to appear for the calendar call and made no inquiry of either the court or opposing counsel to determine where his case had finally been placed on the calendar for trial. *Chris v. Hill*, 287.

SCHOOLS

§ 1. Establishment and Maintenance in General

Money collected by a city for overtime parking was properly payable to the county school fund as penalties collected for breach of the penal laws of the State. *Cauble v. City of Asheville*, 152.

§ 14. Criminal Liability of Parents for Failure to Send Children to School

Defendants were not exempt from liability for failing to cause their school-age children to attend the public school to which they had been assigned because of their good faith belief that as American Indians they were exempt from school board attendance guidelines. *State v. Chavis*, 438.

SEARCHES AND SEIZURES

§ 11. Warrantless Search and Seizure of Vehicles; Probable Cause

An officer who searched defendant's car completely failed to follow the standard procedures for towing and inventory established by the Charlotte Police Department, and the search therefore could not be upheld as a valid inventory search. *S. v. Vernon*, 486.

SEARCHES AND SEIZURES—Continued

§ 24. Application for Warrant; Sufficiency of Showing of Probable Cause

Probable cause existed for the issuance of a warrant to search defendant's apartment for narcotics based on information given by a confidential informant although defendant was named in the warrant because he was the tenant of the apartment and was reported by another officer to match the person described, and defendant's roommate but not defendant met the description of the person who had given the narcotics to the informant. *S. v. Kramer*, 291.

§ 34. Plain View Rule; Search of Vehicle

An officer who pursued armed robbery suspects could properly seize without a warrant a .22 caliber pistol which was on the floorboard of the suspects' car and which he saw when he shone his flashlight through the open passenger door. *S. v. Wynn*, 267.

§ 40. Items Which May Be Seized Under Warrant

An officer lawfully seized a stolen television set during a search of defendant's home pursuant to a warrant to search for evidence of another crime. *S. v. Armstrong*, 40.

STATE

§ 12. State Employees

The State Personnel Commission erred in ordering that defendant be reinstated to her position in the Department of Labor on the ground that her dismissal was too harsh in view of her long tenure where the record showed that her dismissal was justified. *Brooks, Comr. of Labor v. Best*, 540.

TAXATION

§ 11.1. Irregularities in Issuance of Bonds

An action based on alleged errors in bond orders for water and sewer bonds was barred by the statute of limitations. *Citizens Assoc. v. City of Washington*, 7.

A water and sewer bond election did not violate due process because the published notice of the water bond election contained an erroneous reference to a "sanitary sewer bond issue" and the water bond ballot erroneously stated the bond issue would not exceed "$1,500,00." *Ibid.*

Where no action was commenced to test the validity of a city water and sewer bond election within 30 days after newspaper publication of a sufficient statement of the election results, any claim to test the validity was extinguished under G.S. 159-62 and could not be revived by the publication of a corrected statement of the election results. *Ibid.*

§ 22.1. Exemption of Particular Properties and Uses

Where a religious association made a loan to respondent nursing home to expand its facilities, the nursing home's payment of an amount equivalent to the interest on the loan and the depreciation on the property did not prevent the nursing home from occupying the property gratuitously, and the property was exempt from ad valorem taxation. *In re Taxable Status of Property*, 632.

TRIAL

§ 10.3. Expression of Opinion by Court; Remarks Respecting Expert Witness

Trial court in a child custody proceeding did not show prejudice against defendant when defendant's counsel offered to qualify a witness as an expert "if the court wishes" and the court stated, "It's up to you, I don't care anything about it frankly." *Pritchard v. Pritchard*, 189.

TRUSTS

§ 13.4. Implied Contracts; Effect of Domestic Relationship Between Grantee and Payor

The trial court correctly ruled that the parties held certain property as tenants by the entirety and that no purchase money trust resulted in favor of plaintiff wife who furnished over half of the purchase price from her personal savings account. *Tarkington v. Tarkington*, 476.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

In order to award attorney fees in an action to recover damages for unfair and deceptive trade practices in violation of G.S. 75-1.1, the plaintiff must prove not only a violation of the statute by the defendant but that plaintiff had suffered actual injury as a result of that violation. *Mayton v. Hiatt's Used Cars*, 206.

Trial court erred in allowing attorney fees to plaintiff's attorneys in an action to recover damages for misrepresentations as to the condition and history of an automobile sold to plaintiff where the jury found that defendant salesman made the false representations but that plaintiff suffered no injury as a proximate result of the representations. *Ibid.*

Defendant's failure properly to label drums of antifreeze constituted a misbranding which was a deceptive practice under G.S. 75-1.1. *Edmisten, Attorney General v. Chemical Co.*, 604.

UNIFORM COMMERCIAL CODE

§ 36. Collection of Checks and Drafts

Each time plaintiff depositor sought to make a withdrawal against uncollected funds, defendant was entitled to choose whether to stand on or waive its right to refuse to allow such withdrawal, and defendant's waiver of that right on earlier occasions did not operate prospectively. *Auto Mart v. Bank*, 543.

§ 43. Transfer of Security Interests or Collateral

In an action to determine whether plaintiff lender was entitled to possession of personal property used to secure a loan which was subsequently sold to a third party, trial court erred in granting summary judgment for plaintiff where a genuine issue of fact existed as to whether plaintiff and defendant borrower intended their loan transaction of June 1977 to renew, enlarge or extinguish the note executed in April 1976 by borrower which was secured by the property in question. *Credit Union v. Smith*, 432.

WEAPONS AND FIREARMS

§ 3. Pointing, Aiming, or Discharging Weapon

Evidence was sufficient for the jury in a prosecution for shooting into occupied property. *S. v. Hammonds*, 495.

WILLS

§ 1.4. Definiteness and Certainty of Testamentary Disposition of Property

Items of testator's will in which he attempted to devise to named devisees separate tracts of land were void for vagueness and uncertainty in the description of the property attempted to be devised. *Taylor v. Taylor*, 449.

§ 9.2. Collateral Attack on Probate

A clerk's probate order cannot be attacked in a second proceeding where there was no showing that the clerk's order allowing defendant's dissent showed on its face that the clerk lacked jurisdiction to enter it. *Jeffreys v. Snipes*, 76.

§ 61. Dissent of Spouse

A clerk of superior court had exclusive original jurisdiction to determine the validity of a dissent by a surviving spouse to the will of a deceased spouse. *In re Snipes*, 79.

WITNESSES

§ 1. Competency

Trial court did not err in permitting the 12-year-old prosecutrix in an incest case to testify without first hearing testimony as to her competency. *S. v. Harvell*, 243.

WORD AND PHRASE INDEX

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