NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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1. Appointed 1 September 1980.
2. Appointed 1 October 1980 to succeed Thomas D. Cooper, Jr. who died 1 August 1980.
3. Appointed 29 August 1980.

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CASES

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ERNEST MOSES LAYELL v. PATRICIA HUSTON BAKER

No. 7923SC778

(Filed 1 April 1980)

Rules of Civil Procedure § 41.1— counterclaim arising from same transaction— voluntary dismissal not permitted—no consent to dismissal by defendant

Where defendant asserted a counterclaim against plaintiff arising from the same transaction, an automobile collision, alleged in plaintiff's complaint, defendant's claim for affirmative relief effectively deprived plaintiff of his right to dismiss his own claim; defendant's failure, prior to the court's discharging the jury, to bring to the court's attention the pendency of her counterclaim did not amount to an implied consent to the dismissal; and defendant's written "consent" to the voluntary dismissal of plaintiff's claim, which was expressly given "without prejudice to defendant's prosecution of her claim," at most removed the barrier which defendant's counterclaim otherwise presented to plaintiff's right under G.S. 1A-1, Rule 41(a)(1) to dismiss his own claim, but did not effect a dismissal of defendant's counterclaim, nor did it permit plaintiff simply to walk away from the litigation which he had himself begun.

APPEAL by defendant from *Rousseau, Judge.* Orders entered 9 May 1979 in Superior Court, YADKIN County. Heard in the Court of Appeals 4 March 1979.

On 28 October 1976 a truck driven by plaintiff collided with an automobile driven by defendant at a street intersection in Winston-Salem. Each party contends that the other drove through a red traffic light.

On 7 February 1977 plaintiff brought Civil Action No. 77CVS27 against the defendant in the Superior Court in Yadkin County to recover damages for personal injuries and loss of earnings suffered by him as a result of the collision, alleging in his complaint that the collision and his resulting damages were proximately caused by defendant's negligence. Defendant filed answer in which she denied that she was negligent, alleged that plaintiff was negligent, and counterclaimed for damages to her automobile. Plaintiff filed a reply to the counterclaim.

During the course of pretrial discovery proceedings, counsel for plaintiff stated that plaintiff would not seek to recover for lost time or wages for the year 1977, and on the basis of this statement the court denied defendant's motion that she be furnished a copy of plaintiff's federal income tax return for 1977. At trial before Judge Rousseau and a jury on 28 February 1979, plaintiff sought to introduce evidence concerning wages lost by him in 1977. The court sustained defendant's objection, whereupon plaintiff's counsel announced:

> All right, plaintiff takes a voluntary dismissal pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

The court thereupon dismissed the jury. When defendant's counsel brought to the court's attention that defendant had pled a counterclaim, the court dictated the following order into the minutes:

> All right, let the record show that when Mr. Smith (plaintiff's attorney) took a voluntary dismissal, the Court overlooked the fact that the defendant had a counterclaim; and no mention was made to the Court until the Court had let the jury go, this being the last case for the term. The Court, therefore, withdraws a juror and declares a mistrial as to the counterclaim and sets the case for the term of court May the 14th.

On 1 March 1979 defendant's counsel filed the following consent to the voluntary dismissal of plaintiff's claim:

> The defendant, through counsel, consents to the voluntary dismissal of plaintiff's claim taken in open court on

February 28, 1979. Such consent is without prejudice to defendant's prosecution of her claim or to any other rights of defendant herein.

This the 28th day of February, 1979.

W. K. Davis
Attorney for Defendant.

On 2 March 1979 plaintiff's counsel filed the following document in Case No. 77CVS27:

Now comes the Plaintiff pursuant to Rule 41 of the North Carolina Rules of Civil Procedure and takes a voluntary dismissal of his action without prejudice.

This the 1 day of March, 1979.

Franklin Smith
Attorney for Plaintiff

On the same date this document was filed, 2 March 1979, plaintiff commenced Civil Action No. 79CVS97 against defendant in the Superior Court in Yadkin County by filing a complaint in all material respects identical to the complaint he had previously filed in Civil Action 77CVS27.

On 5 March 1979 plaintiff filed a motion in Civil Action No. 77CVS27 to set aside the order declaring a mistrial upon defendant's counterclaim and to dismiss the counterclaim in that action. As grounds for this motion plaintiff contended that his voluntary dismissal in Case No. 77CVS27, in the absence of a timely objection by the defendant, had the effect of terminating the entire action, including the counterclaim. On 3 April 1979 defendant filed motion in Case No. 79CVS97 to dismiss that action on the ground, among others, that Case No. 77CVS27 was a prior pending action between the same parties involving the same claims. Plaintiff's motion in Case No. 77CVS27 to set aside the order declaring a mistrial of defendant's counterclaim and to dismiss the counterclaim in that action and defendant's motion in Case No. 79CVS97 to dismiss that action because of a prior action pending were consolidated for hearing. On 9 May 1979 the court entered orders allowing plaintiff's motion to dismiss defendant's counterclaim in Case No. 77CVS27 and denying defendant's motion to dismiss plaintiff's action in Case No. 79CVS97.

From these orders, defendant appeals, the two cases being consolidated for purposes of hearing the appeals.

Franklin Smith and Womble, Carlyle, Sandridge & Rice by James M. Stanley, Jr. for plaintiff appellee.

Hutchins, Tyndall, Bell, Davis & Pitt by William K. Davis for defendant appellant.

PARKER, Judge.

The parties agree that the validity of the court's order denying defendant's motion in abatement in Case No. 79CVS97 is dependent upon the validity of the court's ruling dismissing defendant's counterclaim in Case No. 77CVS27. If the court was correct in dismissing defendant's counterclaim in the earlier case, then there was no prior action pending and defendant's plea in abatement in the later case fails. On the other hand, if the court was in error in dismissing defendant's counterclaim in the earlier case, then there was a prior action pending between the same parties involving the same cause of action and defendant's plea in abatement in the later action should have been sustained. Decisions of our Supreme Court have uniformly held that "the pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having jurisdiction." *Sales Co. v. Seymour*, 255 N.C. 714, 715, 122 S.E. 2d 605, 606 (1961); *accord, Conner Co. v. Quenby Corp.*, 272 N.C. 214, 158 S.E. 2d 22 (1967). Thus, the question presented by this appeal is whether the court was correct in its ruling dismissing defendant's counterclaim in Case No. 77CVS27. We hold that the court was in error, and accordingly reverse.

G.S. 1A-1, Rule 41 provides in part:

(1) *Voluntary dismissal; effect thereof.*—

> (1) By plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . . .

Prior to the adoption of Rule 41, effective 1 January 1970, it was settled practice that the plaintiff might take a voluntary nonsuit as a matter of right at any time before the verdict. However, as the former practice was explained by McIntosh in North Carolina Practice and Procedure, § 1645, pp. 124-125 (1956):

> While the plaintiff may generally elect to enter a nonsuit, "to pay the costs and walk out of court," in any case in which only his cause of action is to be determined, although it might be an advantage to the defendant to have the action proceed and have the controversy finally settled, he is not allowed to do so when the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. *If the defendant sets up a counterclaim arising out of the same transaction alleged in the plaintiff's complaint, the plaintiff cannot take a nonsuit without the consent of the defendant; but if it is an independent counterclaim, the plaintiff may elect to be nonsuited and allow the defendant to proceed with his claim.* (emphasis added.)

Thus, under prior law, where defendant interposed a claim for affirmative relief, the plaintiff's right to a voluntary nonsuit was thereby affected, and the precise effect upon that right depended upon whether the defendant's claim arose out of the same transaction alleged in the plaintiff's complaint or was distinct from that alleged. *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170 (1887); *Whedbee v. Leggett*, 92 N.C. 469 (1885). If the defendant's claim for relief arose out of the same transaction, then the plaintiff's right to take a voluntary nonsuit was completely denied, whereas if the claim for relief was independent of the plaintiff's claim, the plaintiff could submit to a voluntary nonsuit as to his claim, but the defendant was entitled, if he desired, to keep the action before the court until his own claim was litigated. *Yellowday v. Perkinson*, 167 N.C. 144, 83 S.E. 341 (1914); *Whedbee v. Leggett, supra.* In *McCarley v. McCarley*, 289 N.C. 109, 221 S.E. 2d 490 (1976), our Supreme Court held that the adoption of G.S. 1A-1, Rule 41(a)(1) altered prior practice only to the extent that the plaintiff desiring to take a voluntary dismissal must now act before he rests his case rather than before the trial court renders the verdict, but that in other respects, prior practice continues in effect.

In the present case it is unquestioned that defendant's claim for affirmative relief arose out of the same transaction, the automobile collision, alleged in plaintiff's complaint. Applying the rules of practice still in effect in this State as modified by Rule 41, we conclude that defendant's assertion of that counterclaim, nothing else appearing, could effectively deprive plaintiff not only of his ability to escape defendant's claim against him, but also of his right under Rule 41 to dismiss his own claim. The rule precluding voluntary dismissal in a case such as is here presented is premised on the theory that the "plaintiff cannot justly complain if he is detained in court until the whole merits of his cause of action are tried and the rights of the defendant growing out of the same are settled, *if the latter shall so desire.*" *Yellowday v. Perkinson, supra* at 183, 83 S.E. at 342 (emphasis added). We reject plaintiff's contention that defendant's failure, prior to the court's discharging the jury, to bring to the court's attention the pendency of her counterclaim amounted to an implied consent to the dismissal. The question remains, however, whether defendant's written "consent" to the voluntary dismissal of plaintiff's claim, which was expressly made "without prejudice to defendant's prosecution of her claim" restored to plaintiff his right to dismiss his own claim under Rule 41(a)(1) or deprived defendant of her right to pursue her counterclaim.

In *McCarley v. McCarley, supra* at 113, 221 S.E. 2d at 493, our Supreme Court recognized that the defendant might consent to the withdrawal of plaintiff's allegations. The Court did not hold, as contended in plaintiff's brief, that "a defendant who has asserted a compulsory counterclaim cannot permit plaintiff to dismiss the complaint and proceed with his counterclaim," and that only when there is a permissive counterclaim can defendant "elect to proceed with his counterclaim" after consenting to plaintiff's dismissal. Although Rule 41(a) contemplates that civil litigation may be terminated as to all parties, both plaintiff and defendant, and as to all claims and counterclaims, upon the consent of all the parties, no such broad consent has been shown in the present case. Defendant's written "consent" to the voluntary dismissal of plaintiff's claim was expressly given "without prejudice to defendant's prosecution of her claim." Thus, at most, that consent removed the barrier which defendant's counterclaim otherwise presented to plaintiff's right under Rule 41(a)(1) to

dismiss *his own claim*. It did not effect a dismissal of defendant's counterclaim nor did it permit plaintiff simply to walk away from the litigation which he had himself begun. The court's initial ruling, when it found that it had by inadvertence discharged the jury, of declaring a mistrial of the counterclaim and setting the case for trial on the counterclaim at the next session of court, was correct. The court erred when it later reversed that ruling and dismissed the counterclaim.

Upon remand, defendant's answer alleging her claim in Case No. 77CVS27 will in effect become a complaint. Although plaintiff chose to dismiss his own claim for relief in the ealier proceedings on the assumption that the entire litigation would be ended, he should, if he so elects, be permitted to amend his pleadings in the action so as to assert his claim as a compulsory counterclaim to the claim of the defendant.

The result is that the orders appealed from both in Case No. 77CVS27 and in Case No. 79CVS97 are reversed. Defendant's motion in abatement in Case No. 79CVS97 should be allowed and judgment entered in that case dismissing it because of the prior action pending. The order dismissing Case No. 77CVS27 is vacated, and that case is remanded for trial upon the claim asserted in defendant's counterclaim and upon such response thereto as plaintiff may allege.

Reversed and remanded.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. DAVID M. ARSENAULT

No. 7915SC965

(Filed 1 April 1980)

1. Constitutional Law § 48— effective assistance of counsel—failure to cross-examine victim about certain matters

A defendant charged with crime against nature was not denied the effective assistance of counsel because of the failure of his counsel to cross-examine the victim about a letter the victim wrote to the court stating that he wished to have the charge against defendant dropped, especially since the victim's

mother had informed the court that the letter was written under duress, the State could have cross-examined the victim about such duress, and counsel's failure to cross-examine as to this matter could well have been a matter of trial strategy. Nor was defendant denied the effective assistance of counsel because his attorney did not cross-examine the victim about his failure to appear in court on an earlier occasion since the witness's answers might have been detrimental to defendant, and the failure to so cross-examine the victim could also have been a matter of trial strategy.

2. **Constitutional Law § 48— effective assistance of counsel—failure to move for nonsuit**

Defendant was not denied the effective assistance of counsel by the failure of his counsel to move for nonsuit in a crime against nature case at the close of the State's evidence and at the close of all the evidence where the State's evidence was clearly sufficient to take the case to the jury and to support defendant's conviction.

3. **Constitutional Law § 48; Criminal Law § 92.5— effective assistance of counsel—failure to move for severance**

Failure of defendant's counsel to move for a severance of his trial from that of a codefendant amounts to nothing more than a mistaken tactical decision and does not constitute such incompetency as to deny defendant the effective assistance of counsel.

4. **Constitutional Law § 48— constitutional right to undivided loyalty of counsel**

A defendant has a constitutional right to the undivided loyalty of his counsel, and where two members of the same law firm serve as counsel for codefendants with conflicting interests, a division of loyalties occurs.

5. **Constitutional Law § 48— effective assistance of counsel—codefendants represented by law partners—joint trial—conflict of interest**

The existence of an actual conflict of interest between two codefendants who are tried in a joint trial and represented by two members of the same law firm or by single counsel constitutes a denial of effective assistance of counsel when actual prejudice is shown.

6. **Constitutional Law § 48— divided loyalty of counsel—advice to codefendant represented by law partner—necessity for evidentiary hearing**

The cause of a defendant charged with crime against nature is remanded for an evidentiary hearing to determine the question of divided loyalties of his trial counsel where the record indicates that defendant's trial counsel may have advised a codefendant who was represented by his law partner not to enter a plea of guilty and not to give testimony exculpating defendant.

ON writ of certiorari to review proceedings before *Bailey, Judge*. Judgment entered 14 March 1978 in Superior Court, Alamance County. Heard in the Court of Appeals 5 March 1980.

Defendant was charged in a bill of indictment, proper in form, with the offense of crime against nature, was convicted by a jury, and was sentenced to an active term of imprisonment of ten years. Defendant gave notice of appeal, but his appeal was not timely perfected.

Attorney General Edmisten, by Assistant Attorney General Jean Winborne Boyles, for the State.

John P. Paisley, Jr., for defendant appellant.

ERWIN, Judge.

Defendant contends that he was denied his Sixth Amendment right to the effective assistance of counsel at his trial.

In *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974), Justice Branch (now Chief Justice), speaking for our Supreme Court on this subject, stated:

> "Neither the United States Supreme Court, nor this Court, has fashioned a rule to guide us in determining whether an accused was denied his Constitutional right to effective assistance of counsel due to counsel's negligence, incomptency [sic], conflicting loyalties or other similar reasons. However, there are numerous decisions from other jurisdictions and other federal courts which bear upon decision of the question here presented. A review of these decisions indicates the general rule to be that the incompetency (or one of its many synonyms) of counsel for the defendant in a criminal prosecution is not a Constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." (Citations omitted.)

In *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978), this subject was again before our Supreme Court. Justice Exum stated: "[I]t is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. *State v. Sneed, supra*, 284 N.C. 606, 201 S.E. 2d 867 (1974)." *Id.* at 498, 242 S.E. 2d at 859.

With the above rules in mind, we shall review the record to examine the "specific acts or omissions" which defendant contends denied him effective assistance of counsel.

Prior to trial, prosecuting witness, Robert Smith, wrote the following letter to Judge Allen:

> "I 'am [sic] writting [sic] in regard to the charge pending against David Arsenault for Crime against Nature. I have had some time to think it out and realize I have made a mistake. I wish to have the charge dropped against David Arsenault. I 'am [sic] very sorry for any inconveince [sic] I have caused you.
>
> Sincerely
>
> s / ROBERT L. SMITH"

At the bottom of the letter, Judge Allen made a note which reads:

> "*Note*
>
> I rec'd this on 1/4/78—on 1/2/78 Mrs. Smith—mother of Robert Smith called & stated this letter was sent under duress & asked that I disregard the letter.
>
> s / J. B. ALLEN, JR.
> 1/4/78
>
> DEFENDANT'S EXCEPTION NO. 1"

[1] Defendant's attorney did not cross-examine witness Smith with reference to the letter or the note. Defendant's attorney on appeal states that the failure of trial counsel to go into this matter amounts to a denial of effective assistance of counsel. Defendant's trial counsel was selected and employed by him. The letter does not deny that the offense was committed. (Defendant does not state or suggest what the answers to questions on this issue would be.) If defendant had raised the issue, the State could have questioned the witness with reference to the duress mentioned in the note. Failure to cross-examine as to this matter could very well have been a matter of trial strategy.

Defendant contends that the trial counsel failed to cross-examine the prosecuting witness with regard to his failure to ap-

pear in court on 7 March 1978. Counsel on appeal states: "His failure to appear, coupled with his exonerating letter, would surely have impeached his credibility in the eyes of the jury. However, the jury did not learn of either item, owing to the Defendant's counsel [sic] failure to cross-examine the prosecuting witness about them." Counsel assumes the answers given to any such questions on cross-examination would be favorable to defendant. This was not necessarily the case. The prosecuting witness could very well have testified that defendant or his agents had threatened harm to him if he appeared. Whatever the case might have been, failure to elicit such information was within the trial discretion of defendant's counsel. Counsel's use of his judgment does not deny a defendant of his Sixth Amendment right unless defendant is able to show that such use was clearly prejudicial to him. To us, defendant is questioning the "trial tactics" of his trial counsel in "hindsight" without showing any necessary prejudice.

[2] Defendant contends that motions for dismissal or nonsuit should have been made at the close of the State's case and at the close of all of the evidence, which trial counsel did not do, thereby, suggesting his ineffectiveness. Witness Smith testified:

> "When Arsenault came in, he said, 'Pull your britches down and bend over now, damn it,' and so I did it.
>
> After I dropped my trousers, he penetrated me. His private parts were erected, and my anus was penetrated. This conduct on my part was not of my own free will and choice."

This evidence, taken in the light most favorable to the State and giving to it every reasonable inference to be drawn therefrom, was clearly sufficient to take the case to the jury and support a conviction thereon. *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332 (1978). We find no error, and if the motions had been made, the court would have rightfully denied them. Trial counsels are not required to make useless motions which are without merit, as suggested here.

Defendant, in his brief, suggests that his trial counsel placed himself in a position of divided loyalties citing as proof his failure to move that the trials be severed and his failure to call codefendant Beckley as a witness.

G.S. 15A-927 provides for severance of offenses. Our courts have held that whether defendants should be tried jointly or separately is in the sound discretion of the trial court, and in the absence of a showing that a joint trial has deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

[3] Failure of defendant's counsel to move for severance amounts to nothing more than a mistaken tactical decision and does not constitute such incompetency as to deny defendant effective assistance of counsel. *United States v. Garza*, 563 F. 2d 1164 (5th Cir. 1977), *cert. denied*, 434 U.S. 1077, 55 L.Ed. 2d 783, 98 S.Ct. 1268 (1978).

As his last assignment of error, defendant contends that he was denied the effective assistance of counsel because of his trial counsel's divided loyalties. To support his contention, defendant alleges facts which tend to show that the law partner of defendant's counsel represented codefendant Grover Beckley in their joint trial. As part of the record proper, defendant included Beckley's affidavit which in the pertinent part alleged:

> "I would like it to be known that I was the only one who assaulted Robert Lee Smith, and when I was in the Alamance County Jail on or about the 6th day of March, I made the statement to Attorney J. D. Pickering that I wanted to pleaed [sic] guilty to the charge of crime against nature. But Mr. Pickering advised me not to make that plea. I wanted to bring the truth out then and testify on the innocents [sic] of David Arsenault at that time."

Though the affidavit is properly included as a part of the record, the fact that the law partner of defendant's trial counsel represented Beckley is not so included. Matters discussed in the brief outside the record ordinarily will not be considered, since the record certified to the court imports verity, and we are bound by it. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). However, we believe that the rule is not binding on us in this instance, since the State admits in its brief that the law partner of defendant's trial counsel did, in fact, represent Beckley. Thus, we feel compelled to consider the divided loyalties question.

The record before us reveals that defendant's trial counsel advised a codefendant not to enter his plea of guilty and not to testify as to exculpatory information beneficial to defendant. At the time this advice was given, trial counsel's law partner was the codefendant's counsel. While this advice was undoubtedly in the best interest of the codefendant, it was not in the defendant's best interest and clearly indicates an actual *conflict of interest* on the part of defendant's attorney, if true.

D.R. 5-105(A) of the N.C. Code of Professional Responsibility provides:

> "(A) A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(C)."

D.R. 5-105(B) of the N.C. Code of Professional Responsibility provides:

> "(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C)."

Finally, D.R. 5-105(D) of the N.C. Code of Professional Responsibility provides:

> "(D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment."

[4, 5] The rules established in D.R. 5-105 of the N.C. Code of Professional Responsibility are equally applicable in criminal matters. In fact, a defendant has a constitutional right to the undivided loyalty of his counsel. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942); *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). Where two members of the same law firm serve as counsel for codefendants with *conflicting* interests, a division of loyalties occurs. *See United States v. Donahue*, 560 F. 2d 1039 (1st Cir. 1977); *People v. Baxtrom*, 61 Ill. App. 3d 546, 378

N.E. 2d 182 (1978). For constitutional purposes, it is as though only one counsel was involved. *See Abraham v. United States*, 549 F. 2d 236 (2nd Cir. 1977). As stated in *Holloway v. Arkansas*, 435 U.S. 475, 490, 55 L.Ed. 2d 426, 438, 98 S.Ct. 1173, 1181 (1978): "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants given an informed consent to such multiple representation."

ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function, § 3.5 (1971). Although joint representation is not totally prohibited, it is a matter which should be carefully considered. The existence of an actual conflict of interest between two codefendants, tried in a joint trial and represented by two members of the same law firm or by single counsel, constitutes a denial of effective assistance of counsel when, as here, actual prejudice may be shown. Furthermore, the instant case points out the need for the trial judge to inquire prior to trial about possible conflict of interests arising from joint representation of codefendants by members of the same law firm or by single joint counsel.

[6] It appears that defendant has raised a substantial question of violation of his constitutional right which cannot be determined from the record, and evidentiary hearing pursuant to G.S. 15A-1420(c) is necessary to determine the question. The case is remanded to the Superior Court of Alamance County for an evidentiary hearing, findings of fact, and determination of the question of divided loyalties of his trial counsel. If the Superior Court should find that defendant's constitutional right has been

violated and defendant has been prejudiced thereby, the Superior Court will award defendant a new trial.

This case is

Remanded.

Judges MARTIN (Robert M.) and CLARK concur.

MIKE F. DECARLO v. GERRYCO, INC.

No. 7912DC759

(Filed 1 April 1980)

1. **Corporations § 11— adoption of contract—knowledge and acceptance of benefits**

An adoption occurs when a corporation, after coming into existence, accepts the benefits of a contract made prior to incorporation with full knowledge of the contract's provisions, and the existence of benefits under the contract's terms which are concrete and capable of accruing directly is essential to the finding that an adoption has occurred.

2. **Corporations § 11— adoption of contract—insufficient evidence of benefit to corporation**

Evidence was insufficient to show that defendant corporation adopted a contract entered into by plaintiff and an individual whereby plaintiff agreed to provide recipes and information regarding the operation of a seafood restaurant in exchange for a percentage of the profits from the individual's restaurant, though evidence tending to show that the individual assigned his interests in the restaurant to defendant corporation and became its first president was sufficient to show that defendant had knowledge of the contract at issue, since the evidence that plaintiff did not give defendant any recipes or information regarding the operation of its business but at most was simply available to defendant to provide such services if and when defendant requested his aid was insufficient to show that defendant accepted the contract's benefits.

APPEAL by defendant from *Cherry, Judge.* Judgment entered 1 June 1979 in District Court, CUMBERLAND County. Heard in the Court of Appeals on 28 February 1980.

This is an action on a written contract wherein plaintiff claims that defendant owes him two percent of its gross sales for

the last quarter of 1977 and the first and second quarters of 1978. In a verified complaint filed 30 June 1978 plaintiff alleged that the money is due him by virtue of the terms of a contract he entered into with Joe Brooks on 15 February 1972. That instrument provides in pertinent part as follows:

THAT WHEREAS party of the second part [plaintiff] is now and has been for a number of years involved in the retail seafood business . . . and over such period of time has developed certain processes and skills in the preparation and dispensing of seafood; and

WHEREAS party of the first part [Joe Brooks] has opened a seafood restaurant under the title and trade name of 220 Seafood Restaurant in Guilford County, North Carolina, and party of the first part has requested that party of the second part divulge to him recipes, methods of doing business and other skills and experience which he has acquired in the seafood restaurant business and in exchange therefor has agreed to pay to party of the second part two percent (2%) of the gross sales derived by party of the first part from the operation of the 220 Seafood Restaurant which he proposes to open and operate in Guilford County, North Carolina, and party of the second part has agreed to do so and further has agreed to be available for future consultation with party of the first part; however, party of the second part shall not be obligated to devote any of his time directly to such business; . . .

[T]he parties agree as follows:

1. That party of the second part shall make available to party of the first part recipes, methods of doing business, and other skills which he has acquired to be used exclusively by party of the first part in the operation of 220 Seafood Restaurant.

2. That party of the first part shall pay to party of the second part as compensation for such services two percent (2%) of the gross sales derived by him from the operation of said business, said two percent (2%) to be payable quarterly, . . .

3. That party of the second part shall be available for consultation with party of the first part periodically concern-

> ing the operation of said restaurant and meal preparation and shall advise party of the first part concerning general operation of said business, and in the event that said business shall expand, incorporate or move to a different location or further in the event that party of the first part (Brooks) should become involved as owner, stockholder or employee of any other seafood restaurant or seafood business, . . . the percentages herein stipulated to be paid by party of the first part shall be due and payable for such other business.

Thereafter, Brooks became involved in franchising the business and, on 2 April 1976, he and plaintiff amended their agreement to provide that plaintiff would share in the gross receipts of one of the franchise operations. The parties also added the following paragraph:

> 2. That in the event that party of the first part shall sell, assign or transfer his ownership in and to the 220 Seafood Restaurant in Greensboro, North Carolina, the sum herein stipulated to be paid shall become an obligation upon the purchaser, assignee or transferee of such business whether the same be assigned, transferred or bought by an individual, partnership or corporation, the amount to be paid by said party of the first part to party of the second part shall become an obligation of such successor to the same extent as party of the first part hereunder.

Plaintiff alleged on information and belief that Brooks had assigned all his "rights, title and interest" in the restaurant located in Guilford County to the defendant, Gerryco, Inc. He claimed that the contract between him and Brooks was binding on defendant, but that defendant had refused to pay any "franchise fees" since 31 August 1977.

Defendant filed answer wherein it admitted that it is the owner and operator of the 220 Seafood Restaurant in Guilford County and that Joe Brooks no longer owned any interest therein, but denied that the contract between plaintiff and Brooks was binding on it.

Two sets of interrogatories subsequently filed by plaintiff established the following facts:

Gerryco, Inc., was incorporated on 29 March 1976, and Joe Brooks was elected its first president, serving from 15 April 1976 until 29 April 1978. His wife, Geraldine B. Brooks, is the present president and sole director and shareholder of the corporation. She stated that she had "some vague knowledge" in 1972 about the contract between plaintiff and Joe Brooks, and "some vague knowledge" in 1976 about the amendment, but that she did not become "fully aware of the exact terms and provisions" of their agreement until March or April of 1978. She recalled signing a check in the amount of $2,345.59 made to plaintiff which her husband said "was for commissions for March and July of 1977."

Both parties moved for summary judgment. Plaintiff supported his motion with an affidavit wherein he declared that he had "always been available to Joe Brooks and . . . made available to Joe Brooks all of his formulas, recipes, methods of doing business and other valuable information to . . . Brooks when he initially went into business." He further claimed that he had "always been available" to defendant for consultation, but that "neither Joe Brooks nor any employee of Gerryco, Inc. has ever requested [him] to assist in any way in the operation and management of the Seafood Restaurant operated by the Defendant."

In support of its motion, defendant offered the affidavit of Geraldine Brooks, who stated that the defendant has neither requested nor received "any formulas, recipes, methods of doing business or any other information" from plaintiff; that the defendant has never received "information, advice, personal property, real property, money, or anything of value whatever," from plaintiff in the operation of its restaurant; and that the defendant had notified plaintiff on 6 April 1978 that "it would not assume any obligations of the contract between plaintiff and Joe Brooks."

On 4 June 1979 the court entered its Order granting summary judgment for the plaintiff and ordering that plaintiff recover of the defendant the sum of $9,585.68. Defendant appealed.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for the plaintiff appellee.

Ling & Farran, by Stephen D. Ling, for the defendant appellant.

HEDRICK, Judge.

Defendant contends that, if either party was entitled to judgment as a matter of law, it was, and thus the court erred in entering summary judgment for the plaintiff.

While summary judgment is recognized as a "drastic remedy" which must be cautiously used, *Taylor v. Lutz-Yelton Heating & Air Conditioning Corp.*, 43 N.C. App. 194, 258 S.E. 2d 399, *cert. denied*, 298 N.C. 809, 262 S.E. 2d 4 (1979), nevertheless, under Rule 56, "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," summary judgment shall be entered. G.S. § 1A-1, Rule 56(c); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). "The judge's role in ruling on a motion for summary judgment is to determine whether any material issues of fact exist that require trial." *Stroup Sheet Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 30, 258 S.E. 2d 77, 79 (1979). The burden of proving that no triable issue of fact exists is on the movant, whose papers are carefully scrutinized while those of the opposing party are indulgently regarded. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976); *Emanuel v. Colonial Life & Accident Insurance Co.*, 35 N.C. App. 435, 242 S.E. 2d 381 (1978).

We agree with the judge and the parties in the present case that the uncontradicted evidence of record discloses there are no genuine issues of fact to be tried. Thus, the only question before us, as before the trial judge, is which party is entitled to judgment as a matter of law. The trial court concluded that the plaintiff was entitled to judgment as a matter of law. We disagree and hold that summary judgment should have been entered for the defendant.

Defendant argues, and plaintiff concedes, that, since the defendant was not a party to either the original contract or the amendment thereto, the only theory upon which plaintiff could prevail is that of adoption—that is, that the defendant "adopted" as its own the contract entered into by Brooks and plaintiff. Whether a set of uncontroverted facts establishes an adoption is a question of law for the court. *See Moriarity v. Meyer*, 21 N.M. 521, 157 P. 652 (1916).

[1] An adoption occurs when the corporation, after coming into existence, accepts the benefits of a contract made prior to incorporation with full knowledge of the contract's provisions. R. Robinson, N.C. *Corporation Law*, § 2-4 (2d ed. 1974); *see also* 18 Am. Jur. 2d, *Corporations* §§ 119-123 (1965). The question of whether the corporation had knowledge of the contract is easily determined: If the sole shareholder or the "responsible officers have, or are chargeable with, knowledge" of the agreement, such knowledge will be imputed to the corporation itself. 18 Am. Jr. 2d, *Corporations* § 123 at 665 (1965); *accord, Whitten v. Bob King's AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977). When knowledge on the part of the corporate entity is made to appear, then "by accepting the benefits the company becomes bound to perform the obligations incident to [the] contract." *Beachboard v. Southern Railway Co.*, 16 N.C. App. 671, 677, 193 S.E. 2d 577, 581 (1972), *cert. denied*, 283 N.C. 106, 194 S.E. 2d 633 (1973).

[2] Reference to the record before us establishes beyond peradventure that the defendant corporation is chargeable with knowledge of the contract at issue, as it existed originally and as it was subsequently amended, since the defendant's first president, Joe Brooks, is a party to the instrument. However, the issue of whether the defendant has accepted the contract's benefits is not so readily resolved under the circumstances of this case. Research reveals that the issue most often arises in situations which present, in comparison to this case, clear-cut factual patterns. For example, a promoter of the corporation to be formed enters into a preincorporation agreement with another party to provide initial capital for the enterprise. The promoter thereafter becomes a responsible officer of the company, and the company uses the money advanced by the outside party. In that situation, the corporation will be held to have accepted the benefits of the preincorporation contract, with full knowledge of its provisions. Thus, the company will be liable to perform the obligations incident to the contract. *See Whitten v. Bob King's AMC/Jeep, Inc., supra. See also Chartrand v. Barney's Club, Inc.*, 380 F. 2d 97 (9th Cir. 1967).

Other situations similarly susceptible of relatively ready resolution involve contracts to lease property into which the corporate body ultimately moves; or to buy land which the corporation thereafter uses; or to employ a person in a particular position

at a specified salary whose services the company does indeed use. *See, e.g.*, cases cited at 18 Am. Jur. 2d, *Corporations* § 122 (1965); Annot., 123 A.L.R. 726 (1939); *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976); *McCrillis v. A & W Enterprises, Inc.*, 270 N.C. 637, 155 S.E. 2d 281 (1967). The benefits available to the corporation in such circumstances are obvious and, when the corporation avails itself of such benefits, it thereby adopts the contract to which they are incident.

[1] Although we have discovered no North Carolina case which treats the question, we believe that the existence of benefits under the contract's terms which are concrete and capable of accruing directly is essential to the finding that an adoption has occurred. At least one other jurisdiction has so held. The rule that a corporation which accepts the benefits of a contract, with knowledge of the contract, must also assume the burdens does not apply to a case in which the corporation receives "no direct, tangible benefits." *Williams v. McNally*, 39 Wy. 130, 139, 270 P. 411, 414 (1928). In *Williams*, a promoter of the corporation to be formed entered into a contract with plaintiff whereby he promised to pay plaintiff's expenses incurred in work on behalf of the prospective company. Plaintiff actually performed certain services, especially in promoting the company to others and in seeking subscriptions to shares. After the company incorporated, he submitted his bill for expenses arising out of those activities. The court found that the benefits, if any, to the corporation were too indirect and intangible, and thus the corporation could not be said to have "accepted" benefits.

[2] Plaintiff in the case before us has presented an even weaker example of benefits which this defendant could be deemed to have accepted. He has produced no evidence that he provided the defendant with any recipes or formulas for preparing its seafood. The record is devoid of proof that he at any time actually advised defendant or furnished any information regarding the operation of its business. At best, plaintiff has shown that he was "available" to the defendant to provide such services if and when defendant requested his aid. "The benefits of a contract are the advantages which result to either party from a performance by the other." *Moriarity v. Meyer, supra* at 525, 157 P. at 653. *See also Weatherford v. Granger*, 86 Tex. 350, 24 S.W. 795 (1894). Had defendant requested and plaintiff performed any of the services

which he stood ready to perform, the situation would be radically different. We do not think, however, that his availability to provide services affords any direct or tangible benefit to this defendant so as to satisfy the essential element of plaintiff's adoption theory.

We note plaintiff's argument that defendant did make one payment "for commissions for March and July of 1977." That fact does not alter our position that plaintiff has failed to demonstrate the existence of concrete benefits accruing directly to this defendant.

We hold that the trial court erred in entering summary judgment for plaintiff. Accordingly, the summary judgment for plaintiff is reversed, and the cause is remanded to the District Court for the entry of summary judgment for defendant.

Reversed and remanded.

Judges WEBB and WELLS concur.

CATHERINE B. PORTER v. SHELBY KNIT, INC., EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7910IC393

(Filed 1 April 1980)

1. **Master and Servant § 55.3— worker's compensation—back injury while removing rod from cloth—accident**

The Industrial Commission properly determined that plaintiff suffered an injury by "accident" within the meaning of the Worker's Compensation Act where the evidence supported findings by the Commission that plaintiff, in the course of her duties as a knitter, was pulling a rod out of a roll of cloth; this activity was a part of plaintiff's regular and customary job; on this occasion, the withdrawal of the rod was more difficult than usual because the roll of cloth was "extra tight"; and the extraordinary effort plaintiff exerted in her attempt to withdraw the rod injured her back and caused an onset of pain.

2. **Master and Servant § 69.1— temporary total disability—sufficiency of evidence**

A determination by the Industrial Commission that plaintiff was temporarily totally disabled was supported by plaintiff's evidence of her medical treatment involving complete bed rest and subsequent hospitalization, *i.e.* her total incapacity to work and to earn wages.

APPEAL by defendant from Opinion and Award of the North Carolina Industrial Commission filed 11 January 1979. Heard in the Court of Appeals 3 December 1979.

This is a claim for benefits under the Workers' Compensation Act for injuries suffered by plaintiff on 19 October 1976 while she was an employee of the defendant, Shelby Knit, Inc. The case was heard before Deputy Commissioner Dandelake on 21 April 1978. The parties stipulated that on the occasion of the alleged injury by accident the relationship of the employer and employee existed between plaintiff and defendant employer.

The evidence tended to show the following: Plaintiff had been employed for almost one year at the Shelby Knit plant in Shelby, North Carolina as a knitter. In addition to knitting, her duties included "doffing", a task which entailed pulling rods from rolls of cloth. On 19 October 1976, plaintiff reported to work at 11:00 p.m. for the third shift. That night she had four machines to doff. After doffing two of the machines, plaintiff started to doff the third. She testified on direct examination:

> The rod was hard to pull out, unusually hard and I strained. I had to put my knees around it and pull up on the rod and when I did, all this pain came up in my spine.
>
> * * *
>
> On this particular machine sometimes you could pull the rod out yourself and this night it seems like it was extra hard to pull out, but if it slips out, you can get it out, so I had to strain to get it out and I pulled it out myself. Some nights we have to call for [doff men] to help pull it out, but it was unusually hard to get out that night, extra tight . . . .
>
> * * * *
>
> I did not have anybody help pull it out because everyone was as busy as I was. We check our machines and do our own work. I did not call anybody because once you started to pull it, if it slips a little you feel like you can get it out, so you wrap your legs around it. You throw your leg on, or your knee and pull the rod out.

On cross-examination plaintiff testified that that particular machines was sometimes easy to doff and sometimes hard: "It

was hard to pull out more times than it was easy to pull out." However, she stated that the night the injury occurred, it was "extra hard," and the doff men were not there. Plaintiff used the same procedure which she usually used. Following the incident, plaintiff continued to experience pain in her back but continued to work through the shift. When she consulted a physician, he placed her in the hospital on 8 November 1976 for four weeks. In late November 1976 she had an operation for a ruptured disc and remained in bed until mid-February 1977. Plaintiff has not worked since 4 November 1976.

The Deputy Commissioner made findings of fact and conclusions of law denying compensation on the ground that plaintiff did not sustain an injury by "accident" within the meaning of G.S. 97-2(6). On appeal, the full Commission set aside the deputy commissioner's opinion and award and substituted its own findings of fact. Based on these findings it concluded that on 19 October 1976 plaintiff suffered an injury by accident arising out of and in the course of her employment and that, as a result of that injury, she became totally disabled on 3 November 1976. Defendant was ordered to pay plaintiff compensation at the rate of $85.97 per week for the period beginning 3 November 1976, to continue until plaintiff reaches maximum improvement. From this Opinion and Award, defendant Shelby Knit, Inc. appeals.

Lamb & Bridges, P.A., by Forrest Donald Bridges for plaintiff appellee.

Mullen, Holland & Harrell, P.A., by Thomas A. Robinson for defendant appellant.

PARKER, Judge.

Under the North Carolina Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if that injury was caused by an "accident," which must be a separate event preceding and causing the injury. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968); *Rhinehart v. Market*, 271 N.C. 586, 157 S.E. 2d 1 (1967); *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289 (1957). The initial question raised by defendant employer on this appeal is whether the Commission properly found that plaintiff's injury resulted from such an "accident."

[1] Defendant's first contention is that the evidence does not support the Commission's Findings of Fact Nos. 2 and 6. Finding of Fact No. 2 of the full Commission's Opinion and Award recites:

> 2. On 19 October 1976 the plaintiff, in the course of her duties, was pulling a rod out of a roll of cloth, this activity a part of the plaintiff's regular and customary job. On this occasion, the withdrawal of the rod was more difficult than usual. The extraordinary effort the plaintiff exerted in her effort to withdraw the rod injured her back and caused an onset of pain. Plaintiff continued to work with difficulty due to pain until 3 November 1976.

Finding of Fact No. 6 of that Award reads:

> 6. Plaintiff suffered 19 October 1976 an injury by accident arising out of and in the course of her employment. As a result, she became totally disabled 3 November 1976.

If there was any competent evidence before the Commission to support these findings they are, of course, conclusive on this appeal. *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308 (1963); *Vause v. Equipment Co.,* 233 N.C. 88, 63 S.E. 2d 173 (1951).

As to Finding of Fact No. 2, plaintiff stated several times in her testimony before the Deputy Commissioner that although the rods were sometimes hard to pull out, the night the injury occurred it was "extra hard" or "unusually hard" to doff that particular machine because it was "extra tight." She stated, that as a result, "I had to strain to get it out." Plaintiff placed her knees around the roll of cloth, pulled up on the rod and experienced pain in her spine such that she could hardly move. Although plaintiff admitted that she was doing what she normally did when a rod was hard to pull out and that this was part of her normal job, this testimony did not contradict that concerning the extra strain which she exerted to pull the rod out of that machine. Further, although defendant offered into evidence a statement made by plaintiff and recorded by defendant's insurance carrier's claim supervisor while plaintiff was hospitalized in which plaintiff stated that several of the machines were hard to doff on the night the injury occurred, the weight to be accorded that evidence was for the Commission to determine. The Commission merely chose to rely on plaintiff's testimony before the hearing examiner, and that testimony was sufficient to support Finding of Fact No. 2.

As to Finding of Fact No. 6, we also find that there was sufficient evidence to support the finding that plaintiff suffered an injury by "accident." Our Supreme Court has defined the term "accident" as used in the Workers' Compensation Act as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Hensley v. Cooperative, supra* at 278, 98 S.E. 2d at 292; *accord, Rhinehart v. Market, supra.* The elements of an "accident" are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963); *Faires v. McDevitt and Street Co.*, 251 N.C. 194, 110 S.E. 2d 898 (1959). Of course, if the employee is performing his regular duties in the "usual and customary manner," and is injured, there is no "accident" and the injury is not compensable. *O'Mary v. Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193 (1964).

In support of its contention that the facts of the present case do not satisfy the requirements of injury by "accident," defendant relies upon the decision of our Supreme Court in *Hensley v. Cooperative, supra,* and of this Court in *Smith v. Burlington Industries,* 35 N.C. App. 105, 239 S.E. 2d 845 (1978). In *Hensley,* the plaintiff had been employed for two and one-half years to "turn chickens". His duties required him, while standing, to twist and pick up a wire basket containing six chickens and then to return to a normal position and dip the basket in hot water. On one occasion, he twisted as usual and suffered an injury. On appeal from an award of the Industrial Commission granting compensation, the Supreme Court reversed on the grounds that there was no evidence of "accident" other than the injury itself.

Similarly, in the *Smith* case, the plaintiff's back was injured as he was turning to lift two brass bars. This Court held that the Commission properly denied compensation because the evidence showed that plaintiff was doing nothing unusual or different at the time of his injury.

We find each of the above cases distinguishable from that now before us. In each case, the injured employee was performing his usual duties at the time the injury occurred, and there was no extra exertion required to perform those duties at that time. That is, there was neither evidence of an interruption of the work

routine nor the introduction of unusual circumstances. In the present case, both of those elements are present. There is competent evidence in the record that, on the occasion of plaintiff's injury withdrawal of the rod was unusually difficult because the roll of cloth was "extra tight," thus interrupting what was plaintiff's normal work routine. Further, there is competent evidence that the effort which plaintiff exerted was unusual. Our Supreme Court has recognized that evidence of the necessity of extreme exertion is sufficient to bring into an event causing an injury the necessary element of unusualness and unexpectedness from which accident may be inferred. *Jackson v. Highway Commission, supra; Gabriel v. Newton,* 227 N.C. 314, 42 S.E. 2d 96 (1947). Thus, the Commission was warranted in finding as a fact and concluding as a matter of law that plaintiff suffered an injury "by accident" on 19 October 1976.

[2] In its Finding of Fact No. 6, the Commission also found that plaintiff became totally disabled 3 November 1976. Plaintiff testified that on 4 November 1976 she consulted a surgeon in Shelby, and after a few days of rest entered the hospital for four weeks. The day after Thanksgiving 1976 plaintiff underwent an operation, and after she returned home on 4 December 1976 she remained in bed until mid-February 1977. During that time she was not employed. As used in the Workers' Compensation Act, the term "disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of injury. G.S. 97-2(9); *see, Watkins v. Motor Lines,* 279 N.C. 132, 181 S.E. 2d 588 (1971). Although there is a one-day discrepancy between evidence in the record as to the exact date plaintiff ceased work because of her injury and the date referred to in the Commission's findings, that discrepancy is not crucial to the finding of total disability. That finding is adequately supported by plaintiff's evidence of her medical treatment involving complete bed rest and subsequent hospitalization, i.e. her total incapacity to work and to earn wages, and that finding in turn supports the Commission's award of compensation. As the Commission itself noted, the record is silent on the question of what date, if yet, plaintiff reached maximum recovery, and on the question of her permanent partial disability, if any. For this reason, the case must be remanded for further hearings on these questions.

That portion of the opinion and award of the full Commission determining plaintiff's entitlement to compensation is affirmed, and the case is remanded for further hearings on the issues noted.

Affirmed in part and remanded.

Chief Judge MORRIS and Judge HILL concur.

STATE OF NORTH CAROLINA v. DARRELL DELANE GATEWOOD

No. 7918SC838

(Filed 1 April 1980)

1. **Automobiles § 131.2— failure to give required information after accident—jury instructions improper**

In a prosecution of defendant under G.S. 20-166(c) for failing to give required information to the person struck or the driver or occupants of any vehicle collided with and for failing to render reasonable assistance where the evidence tended to show that, immediately after colliding with a pedestrian, defendant swerved to the left and sideswiped an approaching vehicle, the trial court erred in instructing the jury that defendant would have violated the statute if he drove the vehicle involved in an accident with the pedestrian resulting in her death and he failed to give the required information to the driver of the vehicle which defendant sideswiped immediately after striking the pedestrian.

2. **Criminal Law § 26.4— automobile accident—failure to give required information—failure to render assistance—only one issue submitted to jury—attachment of jeopardy**

Where defendant was charged under a valid indictment with a violation of G.S. 20-166(c) both by failing to give required information to people involved in an automobile accident and by failing to render reasonable assistance, but the trial court did not instruct the jury that it could find defendant guilty of violating the statute by failing to render assistance to a pedestrian whom he had struck and killed, defendant could not thereafter be tried for that offense, since he could not be put in jeopardy for any offense of which he could lawfully have been convicted under that indictment.

APPEAL by defendant from *Mills, Judge*. Judgment entered 20 April 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 January 1980.

The indictment charged that on 21 September 1978, the defendant, being the driver of a motor vehicle involved in an accident resulting in the death of Mable Jane Durham, (1) failed to immediately stop the vehicle at the scene [N.C. Gen. Stat. 20-166(a)], and (2) failed to give his name, and other required information, to the person struck and the occupants of such vehicle collided with, and failed to render aid to the person injured [N.C. Gen. Stat. 20-166(c)].

Defendant pled not guilty. The trial judge, in instructing the jury, did not charge on a violation of N.C. Gen. Stat. 20-166(a) but stated that "the defendant has been accused of failing to give the required information after an accident involving injury or death."

STATE'S EVIDENCE

Defendant, age 34, a supervisor in the telephone installation division of Southern Bell Telephone and Telegraph Company, about 5:15 p.m. on 21 September 1978, was driving a company owned and marked Ford Pinto in an easterly direction on Pleasant Ridge Road. Mable Jane Durham, age 73, walked from the north side of the road behind a car approaching the defendant across the westbound lane and into the eastbound lane in front of defendant's automobile. Defendant's automobile struck her, severed her leg, threw her head and upper body onto the windshield of the Pinto, and caused her instant death.

Defendant at impact swerved to the left, sideswiped an oncoming vehicle operated by Ben Sloan, who was not personally injured. Defendant stopped his Pinto. The accident scene was gruesome and within minutes attracted hysterical members of Ms. Durham's family and others.

Immediately after stopping, defendant went to the body of Ms. Durham, then ran to a nearby mobile home to locate a telephone. Not finding anyone there, he then went to another home where he found Ben Sloan and asked him to call the Rescue Squad. Sloan replied that he had done so. Defendant told him he was driving the company car.

Defendant left the scene. He did not provide Sloan or any other person at the scene his name, address, or driver's license.

Highway Patrol Trooper Bullard did not find defendant at the scene, but he called Southern Bell and found that the car was assigned to defendant.

The following morning Highway Patrol Trooper Patterson was advised that defendant was in the Sheriff's office. Patterson went to the office and advised defendant of his *Miranda* rights. At that time defendant told him that he had no recollection of what he did after he walked behind a house and "threw up," that when he "came to" he was in the woods about 5:00 a.m., and that he walked to a friend's house and was taken home where he called a Deputy Sheriff.

DEFENDANT'S EVIDENCE

Defendant testified that Ms. Durham suddenly appeared in front of his car and he was unable to avoid striking her. He immediately stopped and saw her mutilated body. He went to a nearby house to find a phone, saw Ben Sloan, who told him the Rescue Squad and the police had been called. He then went behind the house and vomited, and he remembered nothing after that until about 4:00 a.m. when he was walking in the woods. He then walked to a friend's house. The friend took him home where he called the Sheriff's Department. Deputy Sheriff DeBerry came to his home, and then he went to the Sheriff's office with DeBerry where he made a statement to Trooper Patterson.

Howard Clark testified that he was driving in a westerly direction on Pleasant Ridge Road, that he saw Ms. Durham at the north edge of the pavement and saw her walk from behind his car as he passed and into the path of defendant's Pinto, and that she was knocked about twenty feet high. He returned to the scene and then got sick. The scene was one of general hysteria.

Other people at the scene saw defendant and thought he was in a state of shock or sick.

Dr. Kenneth Epple, psychiatrist, testified that he examined defendant on four occasions for a total period of five hours, that defendant had a sensitive personality, and in his opinion defendant could or may have had a black-out when he left the scene of the accident. Dr. Epple also explained that a black-out is a state of unconsciousness or automatism in which an individual may use

his limbs to flee the scene but would have no recollection of doing so.

STATE'S REBUTTAL EVIDENCE

Deputy Sheriff DeBerry testified that he went to defendant's home early in the morning in response to a telephone call. While defendant was riding with him to the Sheriff's office, he said: "I know you want to know why I ran, but I just couldn't stay there and look at it."

Defendant was found guilty. He appeals from the judgment imposing a prison term of two years.

Attorney General Edmisten by Assistant Attorney General Elizabeth C. Bunting for the State.

Brooks, Pierce, McLendon, Humphrey & Leonard by L. P. McLendon, Jr., George W. House and Paul E. Marth for defendant appellant.

CLARK, Judge.

Did the trial court err in denying defendant's motion for dismissal?

[1] The bill of indictment contains two counts: first, a violation of N.C. Gen. Stat. 20-166(a) and, second, a violation of N.C. Gen. Stat. 20-166(c). The first count charges the failure "to immediately stop [his] vehicle at the scene of [the] accident . . . ." All of the evidence established that defendant immediately stopped his automobile. Proof of this charge is wholly lacking, and the trial court correctly did not submit the first count to the jury.

The trial court submitted to the jury the second count, the violation of N.C. Gen. Stat. 20-166(c), which provides as follows:

> "The driver of any vehicle involved in any accident or collision resulting in injury or death to any person shall also give his name, address, [operator's or chauffeur's license number] and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident or collision reasonable assistance, including the carrying of such person to a physician or surgeon for medical or

surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and such violator shall be punishable as provided in G.S. 20-182." [The bracketed portion has been amended to read "driver's license number," effective 1 January 1981. 1979 N.C. Sess. Laws, Ch. 667, s. 32.]

It is clear from the evidence that Mable Jane Durham was probably dead upon the impact of defendant's vehicle. Thus, it would be a useless gesture for the defendant to make any attempt to give to her the items of information enumerated in the statute. N.C. Gen. Stat. 20-166(c) does not require the doing of a vain or useless thing. *State v. Wall*, 243 N.C. 238, 90 S.E. 2d 383 (1955); *State v. Coggin*, 263 N.C. 457, 139 S.E. 2d 701 (1965).

In the case *sub judice*, however, the defendant, immediately after colliding with the pedestrian, swerved to the left and sideswiped an approaching vehicle driven by Ben Sloan. Sloan himself was not injured though his vehicle was slightly damaged. N.C. Gen. Stat. 20-166(b) requires that when there is property damage, a driver involved in the collision must stop and give to the driver of the other vehicle the items of information enumerated, but defendant was not charged with a violation of this misdemanor statute. Similarly, defendant was required by N.C. Gen. Stat. 20-166.1 to give notice of the collision to the police by the quickest means of communication, but he was not charged with a violation of this misdemeanor statute.

The trial court instructed the jury that defendant would have violated N.C. Gen. Stat. 20-166(c) if he drove the vehicle involved in an accident with Mable Jane Durham resulting in her death, and he failed to give the enumerated items of information to Ben Sloan, the driver of the vehicle which defendant sideswiped immediately after striking the pedestrian. This instruction was erroneous. The statute requires that the driver involved give the required information "to the person struck or the driver or occupants of any vehicle collided with . . . ." We interpret "the person struck" to mean a pedestrian and "the driver or occupants of any vehicle collided with" to mean a driver or passengers in a vehicle. Since the collision did not result in injury or death to the driver or any passengers in the sideswiped vehicle, we hold that defendant did not violate the felony subsection, N.C. Gen. Stat.

20-166(c), in failing to give the required information to the driver, Ben Sloan. Other than the provision that a driver is required to give the information "to the person struck," N.C. Gen. Stat. 20-166(c) is silent as to the duty of the driver to give such information if the collision with a pedestrian results in death, unconsciousness, or such condition that giving the information to the pedestrian would be useless and vain. The courts may interpret the statutes to resolve ambiguities but not legislate by adding to the statutes language which is absent. The legislature may find it appropriate to amend N.C. Gen. Stat. 20-166(c) by expanding the duty of a driver who strikes a pedestrian by requiring him to give information to a witness at the scene or some proper person who arrives at the scene.

[2] The trial court did not instruct the jury that it could find the defendant guilty of violating N.C. Gen. Stat. 20-166(c) by failing to render "reasonable assistance" to Mable Jane Durham, though the bill of indictment so charged. This factor raises the question of whether the requirement that the driver "shall render to any person injured in such accident or collision reasonable assistance" includes a person who is critically injured and either probably or obviously dead. We note that the statute does not contain specific language requiring reasonable assistance to a dead person or requiring protection of either the injured person from further injury or the body of a deceased from mutilation by vehicular traffic. We do not, however, reach this question because defendant was placed in jeopardy under a valid indictment charging him with a violation of N.C. Gen. Stat. 20-166(c) both by failing to give required information and failing to render reasonable assistance. Where one is placed in jeopardy under a valid indictment, he is then in jeopardy with reference to every offense of which he might lawfully be convicted under that indictment, and no other. He may not thereafter be put in jeopardy for any offense of which he could lawfully have been convicted under that indictment. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). *See generally*, Annot., 6 A.L.R. 3d 888 (1966).

The judgment is vacated and the charge against the defendant for violation of N.C. Gen. Stat. 20-166(c) is dismissed.

Vacated and dismissed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. BOBBY EUGENE McKENZIE

No. 7920SC673

(Filed 1 April 1980)

1. **Constitutional Law § 48— effective assistance of counsel—same attorney representing defendant and spouse—joint trial—spouse prohibited from testifying against other spouse**

There is no merit in defendant's contention that he was denied the effective assistance of counsel because he and his wife were represented by a single appointed attorney in a felonious assault case and that a conflict of interest existed in that he was prevented by G.S. 8-57 from presenting exculpatory evidence which would have tended to incriminate his wife where there was nothing in the record to indicate that a conflict of interest existed between defendant and his wife and there was nothing in the record to show what testimony defendant would have presented had separate counsel been appointed.

2. **Criminal Law § 83— statute prohibiting spouse from testifying against other spouse—conviction not unconstitutional**

Defendant's conviction of felonious assault in a joint trial with his wife was not unconstitutional on the ground that G.S. 8-57 prevented him from giving exculpatory testimony which may have incriminated his wife where the record does not disclose what defendant's testimony would have been that he claims was prohibited by G.S. 8-57.

3. **Criminal Law § 181— motion for appropriate relief**

The trial court did not err in denying defendant's motion for appropriate relief on the ground that defendant failed to raise the issues presented in the motion in a previous motion for post-conviction relief, although defendant was not represented by counsel in filing the previous post-conviction motion, where there is nothing in the record indicating that defendant requested or was denied the assistance of counsel on the prior motion or that defendant's lack of counsel impaired his right to raise adequately in that motion the issues that he now raises. G.S. 15A-1419.

ON writ of certiorari to review the order entered by *McConnell, Judge*. Order entered 27 April 1979 in Superior Court, RICHMOND County. Heard in the Court of Appeals 14 January 1980.

On 13 October 1975, defendant was convicted of assault with a deadly weapon with the intent to kill inflicting serious bodily injury, and was sentenced to a prison term of 12 years. Defendant filed a motion for appropriate relief on 15 March 1979, alleging that his conviction was unconstitutional "because of an unresolved conflict of interest in the representation by a single attorney of defendant and his wife, a codefendant, and because a joinder of

the two defendants for trial and the preclusive effect that N.C.G.S. § 8-57 had on testimony by either of the defendants tending to implicate the other." Concerning these allegations, defendant averred that "[w]hile defendant briefly took the stand to defend himself, he could not present exculpatory evidence that tended to incriminate his wife because of N.C.G.S. § 8-57" and that his wife did not testify. Defendant further averred that "[n]either the court nor defendant's attorney informed him of his right to request that he not be tried jointly with his wife, nor was defendant informed of his right to request separate counsel." Although defendant had previously petitioned for post-conviction relief wherein he challenged the consolidation of his trial with that of his wife and claimed ineffective representation of counsel, defendant averred that he was not represented by counsel and "was not sufficiently advised of his legal and constitutional rights to raise directly the issues that are raised by this motion." On hearing, Judge McConnell denied the motion on the ground that defendant failed to raise his position as to G.S. 8-57 in his earlier petition, in that "[u]nder the law in North Carolina, when a defendant was in a position to adequately raise an issue underlying the present motion but did not do so, relief will be denied." The court stated further that the issue concerning consolidated trials had been previously determined on the merits where there was found no error. Finally, the court observed that defendant made no assertion that the defendant actually intended to introduce testimony at the trial that would exculpate himself and incriminate his wife.

On 30 May 1979, defendant filed a petition for writ of certiorari pursuant to North Carolina Appellate Rule 21 and G.S. 15A-1420(c)(3), reasserting the arguments presented in his previous petition and motion. Defendant argued that because of his lack of prior representation and because his direct appeal was confined to "matters on the record", defendant, under G.S. 15A-1419(a)(1), was not "in a position to adequately raise the ground or issue underlying the present motion." We allowed defendant's petition for writ of certiorari on 18 June 1979.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for defendant appellant.

MORRIS, Chief Judge.

All of defendant's assignments of error concern various aspects of defendant's motion for appropriate relief which was denied by the trial court.

[1] Defendant first argues that his conviction was unconstitutional because of an unresolved conflict of interest by the representation by one attorney of defendant and his wife simultaneously. Defendant cites numerous federal decisions in support of his position that joint representation is constitutionally defective where there is shown a possible conflict of interest. *E.g., United States v. DeYoung*, 523 F. 2d 807 (3d Cir. 1975); *Walker v. United States*, 422 F. 2d 374 (3d Cir. 1970); *Sawyer v. Brough*, 358 F. 2d 70 (4th Cir. 1966). Defendant contends he was prevented from presenting exculpatory evidence because such evidence would have tended to incriminate his wife, contrary to G.S. 8-57.

The law recognizes that "a lawyer representing multiple defendants whose interests are conflicting cannot act with that degree of loyalty which effective representation requires." *Goodson v. Peyton*, 351 F. 2d 905, 908 (4th Cir. 1965). This rule is founded in the traditional notion that the " 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired" by a requirement that one lawyer shall simultaneously represent conflicting interests. *Glasser v. United States*, 315 U.S. 60, 70, 86 L.Ed. 680, 699, 62 S.Ct. 457, 465 (1942). However, although a defendant is entitled to the "untrammeled and unimpaired" assistance of counsel for his defense, "representation of codefendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the sixth amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a reviewing court will find the dual representation constitutionally defective." (Citations omitted.) *Walker v. United States, supra*, 422 F. 2d at 375.

In *State v. Engle*, 5 N.C. App. 101, 167 S.E. 2d 864, *cert. denied*, 275 N.C. 682, --- S.E. 2d --- (1969), defendants argued, on appeal from their convictions of robbery with firearms, that they were denied effective assistance of counsel because they did not have separate attorneys appointed to represent them. In support

of defendants' position, the Court found in the record only an undated stipulation of counsel that a request was made and denied. No motion or argument was made to the trial judge. The Court held that defendant's constitutional right to the effective assistance of counsel was not violated where there was no showing of a conflict of interest between the two defendants, and where it appeared that counsel diligently represented both parties. Quoting from *United States v. Dardi*, 330 F. 2d 316, 335 (2d Cir.), *cert. denied*, 379 U.S. 845, 13 L.Ed. 2d 50, 85 S.Ct. 50 (1964), the Court concluded:

> While the right to counsel is absolute, its exercise must be "subject to the necessities of sound judicial administration" [citation omitted]; and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant. [Citation omitted.] Such an assignment is not, in itself, a denial of effective assistance of counsel. Since *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), it has been clear that some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel.

State v. Engle, supra, 5 N.C. App. at 104, 167 S.E. 2d at 865-66.

In the present case, we have carefully reviewed the record and find nothing to indicate that a conflict of interest existed between defendant and his wife. Aside from his bald allegation of "an unresolved conflict of interest", defendant presents nothing to show that a conflict did, in fact, exist. Although defendant alleged that he was precluded from presenting exculpatory evidence because it tended to incriminate his wife, nothing indicates what testimony would have been given had separate counsel been appointed. Consequently, we are given no basis upon which to rule on defendant's contention. We, therefore, reject this argument and overrule defendant's assignment of error.

[2] Defendant argues in addition that his conviction was unconstitutional because G.S. 8-57 prevented him from giving exculpatory testimony which may have incriminated his wife. Subject to certain exceptions not relevant to this case, G.S. 8-57 provides that "[n]othing herein shall render any spouse competent or compellable to give evidence against the other spouse in any

criminal action or proceeding." Under this section, where evidence is rendered incompetent it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, regardless of whether an objection has been made. *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976). We are aware of many decisions which have applied G.S. 8-57 holding testimony incompetent. *E.g., State v. Porter*, 272 N.C. 463, 158 S.E. 2d 626 (1968); *State v. Dillahunt*, 244 N.C. 524, 94 S.E. 2d 479 (1956). Those cases are inapplicable in the present case, because here the record does not disclose what the testimony would have been that defendant claims is prohibited by G.S. 8-57. It is, therefore, impossible to discover what prejudice, if any, defendant has suffered from his alleged inability to testify against his wife. In this regard, we reject defendant's argument that the trial court erred in concluding that appeal was the exclusive remedy by which defendant could challenge the preclusive effect of G.S. 8-57 on the testimony given at the joint trial with his wife. Suffice it to say that this question is rendered moot by our holding that G.S. 8-57 is inapplicable to the facts of this case.

[3] Defendant next argues that the trial court erred by denying his motion for appropriate relief on the ground that defendant failed to raise the issues presented in the motion in a previous motion for post-conviction relief. G.S. 15A-1419 provides:

> (a) The following are grounds for the denial of a motion for appropriate relief:
>
> (1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment.
>
> (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

Defendant contends that in his previous motion, he was not represented by counsel, and was not sufficiently advised of his legal rights to raise adequately the issues raised in the present motion. It is true that an indigent is entitled to service of counsel in a proceeding involving a motion for appropriate relief. G.S. 7A-451. However, there is nothing in the record indicating that defendant requested and was denied assistance of counsel on the prior motion. Further, we cannot say, without more, that defendant's lack of counsel impaired his right to raise adequately the issues in that motion that he raises now. Defendant's assignment of error is overruled.

Defendant has provided us with no basis which would compel us to upset the trial court's ruling on defendant's motion for appropriate relief. Since we find no prejudicial error in the court's ruling, the order appealed from is

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. CECIL CLARION MOREHEAD

No. 7929SC970

(Filed 1 April 1980)

1. Criminal Law § 18— appeal to superior court—magistrate's issuance of new warrant—superior court not divested of jurisdiction

Where defendant was tried and convicted in district court, appealed to superior court, and subsequently moved to dismiss the charge pursuant to the Speedy Trial Act, the court allowed defendant's motion and ordered dismissal of the case without prejudice, on that same day the magistrate issued a new warrant charging the same offense, and the trial judge, later during the same session, reopened the matter, heard additional evidence and arguments, and dismissed the case without prejudice to the State, the superior court was not divested of jurisdiction by the magistrate's issuing the second warrant, nor did the State, by securing the second warrant, waive whatever rights to appellate review it might have had.

2. Constitutional Law § 50— Speedy Trial Act—time computed from regularly scheduled session of court

Where the Speedy Trial Act provided that trial of a misdemeanor de novo in the superior court should take place "within 120 days from the first regularly scheduled criminal session of superior court held after the defendant has given notice of appeal . . . ," a regularly scheduled criminal session did not refer to a criminal session already in progress when defendant gave notice of appeal, a mixed session with civil cases having priority, or a mixed session with criminal cases having priority.

3. Constitutional Law § 50— Speedy Trial Act—appeal from district court—time for retrial in superior court—computation

The 120-day period of the Speedy Trial Act for a trial de novo in superior court upon appeal from district court begins at the end of the first regularly scheduled criminal session of superior court which commences after defendant gives notice of appeal from the district court; therefore, there was no violation of the Act where defendant gave notice of appeal on 23 March 1979, the end of the first regularly scheduled criminal session of superior court was 1 June 1979, and defendant's motion to dismiss, filed 26 June 1979, the hearing upon it held 30 July 1979 and 2 August 1979, and the order of 2 August 1979 dismissing the case all occurred well within the applicable 120-day period beginning 2 June 1979.

4. Constitutional Law § 50— case erroneously dismissed—time within which retrial must be held

Where criminal charges are erroneously dismissed upon a defendant's motion under the Speedy Trial Act and the court's ruling is thereafter reversed by the appellate division, trial of the case must begin within 120 days (90 days beginning 1 October 1980) after the opinion of the appellate division is certified to the superior court.

APPEAL by the State of North Carolina from *Brannon, Judge.* Ordered entered 2 August 1979 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 6 March 1980.

Defendant was arrested on 16 January 1979 for driving while his license was revoked. He was tried in district court on 23 March 1979, found guilty and sentenced to prison. Defendant gave notice of appeal to superior court on 23 March 1979. On this date, a regularly scheduled criminal session of superior court in Rutherford County, that commenced on 19 March 1979, was in progress. Defendant's counsel filed a motion on 26 June 1979 to dismiss the charge pursuant to N.C.G.S. 15A-701 and 15A-703 and the provisions of the Sixth Amendment to the United States Constitution relative to defendant's right to a speedy trial. The motion was

heard Monday, 30 July 1979, and the court allowed defendant's motion and ordered dismissal of the case without prejudice. A new warrant charging the same offense was issued by a magistrate on 30 July 1979 and served on defendant the same day. Later, during the same session of superior court, on 2 August 1979, the trial judge reopened the matter, heard and received additional evidence and further argument of counsel. At the completion of the hearing, the court entered a written order finding facts, making conclusions of law, and dismissing the case without prejudice to the state. From this order the state appeals.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Hamrick, Bowen, Nanney & Dalton, by Walter H. Dalton, for defendant.

MARTIN (Harry C.), Judge.

[1] We are met with the threshold question whether the state can appeal from an order dismissing a case without prejudice for violation of the Speedy Trial Act, N.C.G.S. 15A-701 to -704. As counsel did not have the opportunity to argue or brief this interesting question, we elect, in our discretion, to treat the appeal as a petition for review by certiorari and allow the writ.

Defendant contends this Court has no jurisdiction to hear the appeal because at the conclusion of the hearing on 30 July 1979, the state caused a new warrant, charging the same offense, to be issued against defendant. Thus, defendant argues, exclusive jurisdiction of the case was in the district court and the state, by securing the new warrant, waived its right to appeal. We do not agree. The trial court's initial hearing and order was on Monday, the first day of the session. The order dismissing the case remained *in fieri* during the remainder of the session and the court had authority to reopen the hearing or change the order. *Hoke v. Greyhound Corp.*, 227 N.C. 374, 42 S.E. 2d 407 (1947); *Musgrave v. Savings and Loan Assoc.*, 5 N.C. App. 439, 168 S.E. 2d 497 (1969). In fact, this was done in this case, further hearing being held on 2 August 1979. We hold the superior court was not divested of jurisdiction by the magistrate's issuing the second warrant. We also reject defendant's contention that by securing the second

warrant, the state waived whatever rights to appellate review it might have. This assignment of error is overruled.

Although defendant's motion also alleged a violation of his right to a speedy trial under the Sixth Amendment to the United States Constitution, the hearing before the superior court and on appellate review has been addressed solely to defendant's rights under the North Carolina Speedy Trial Act.

Both the state and defendant argue in their briefs that the applicable statute, N.C.G.S. 15A-701(a1)(2), requires the trial of a defendant charged with a criminal offense to begin within 120 days from the giving of notice of appeal to the superior court for trial de novo of a misdemeanor charge. Notice of appeal was given 23 March 1979 and defendant's motion to dismiss was filed 26 June 1979, 95 days thereafter. Trial of the case had not begun on 30 July 1979 when the motion was heard, 129 days after the notice of appeal was entered.

The Speedy Trial Act applies to any person who is arrested, served with criminal process, waives an indictment, or is indicted on or after October 1, 1978. 1977 N.C. Sess. Laws ch. 787, § 2. The statute was amended by Chapter 1018, 1979 Session Laws. This amendment rewrote N.C.G.S. 15A-701(a1)(2) to read as follows:

> "(2) Within 120 days from the first regularly scheduled criminal session of superior court held after the defendant has given notice of appeal in a misdemeanor case for a trial de novo in the superior court;"

This amendment was effective upon ratification 8 June 1979.

When the 1979 amendment became effective, 8 June 1979, it applied to defendant's case. At that time, defendant had no vested or substantial rights under the statute. Only 77 days had passed since he gave notice of appeal on 23 March 1979. None of defendant's rights were affected by the amendment. It must be remembered that the Speedy Trial Act by its express terms does not affect any rights defendant may have to a speedy trial under the Sixth Amendment to the Constitution of the United States. An amendment to a statute has, from its adoption, the same effect as if it had been a part of the statute when first enacted. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105 (1946). The

North Carolina Speedy Trial Act is a procedural statute. There is no vested right in procedure and statutes affecting procedural matters may be given retroactive effect or applied to pending litigation. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952). In *Bateman v. Sterrett*, 201 N.C. 59, 62-63, 159 S.E. 14, 17 (1931), we find: "[A] change in the statutory method of procedure for the enforcement or exercise of an existent right is not prohibited by any constitutional provision, unless the alteration or modification is so radical as to impair the obligation of contracts or to divest vested rights." We find no such radical effect in the 1979 amendment. Thus the 1979 amendment controls the time the clock began to run on the 120-day period. Under its terms, the trial of the defendant shall begin within 120 days from the first regularly scheduled criminal session of superior court of Rutherford County held after he gave notice of appeal to superior court.

[2] We take judicial notice of the calendar of sessions of the superior court, promulgated by the Supreme Court (N.C. Gen. Stat. 7A-345(2)) and published in pamphlet No. 4 of the Advance Sheets of Cases in the Court of Appeals dated 12 December 1978. The first regularly scheduled criminal session of the superior court in Rutherford County held after 23 March 1979 began on 28 May 1979. A regularly scheduled criminal session of superior court that commenced on 19 March 1979 was in progress when defendant gave notice of appeal on Friday, 23 March 1979. We hold this session is not a criminal session of superior court as contemplated by the statute because it did not commence after the notice of appeal was entered. The words "held after" in the statute refer to a criminal session of superior court that commences *after* the notice of appeal is made. A mixed session, civil cases having priority, was scheduled for 16 April 1979, and a mixed session, criminal cases having priority, was scheduled for 7 May 1979, but we hold that neither of these sessions constituted a "criminal session" of superior court within the meaning of N.C.G.S. 15A-701(a1)(2) as amended by Chapter 1018 of the 1979 Session Laws.

[3] Having established that the first regularly scheduled criminal session of superior court held after 23 March 1979 began on 28 May 1979, we must now decide when the 120-day period commenced—at the beginning of the session on 28 May 1979 or at its conclusion. The statute requires that the trial begin within 120

days *from* the first regularly scheduled criminal session *held after* the notice of appeal is entered. We find the legislature, by the use of the words "from" and "held after," intended the 120-day period to start at the *end* of the first regularly scheduled criminal session of superior court which *commenced after* the defendant gave notice of appeal from the district court. Otherwise the legislature would have used the phrase "to be held," rather than "held." The use of the words "held after" indicates both that the session must commence and be concluded after the notice of appeal is given. The 28 May 1979 criminal session was a one-week session. There being nothing before us to the contrary, we find the session concluded on Friday, 1 June 1979. Therefore, the 120-day period under the statute commenced on 2 June 1979.

Defendant's motion to dismiss, filed 26 June 1979, the hearing upon it held 30 July 1979 and 2 August 1979, and the order of 2 August 1979 dismissing the case all occurred well within the applicable 120-day period beginning 2 June 1979. It follows that the trial court erred in dismissing the case prior to the expiration of the 120-day period.

[4] The question now arises, when must the defendant be tried upon the charge following the remand of this case to the superior court? The Speedy Trial Act does not address this fact situation. We are of the opinion and so hold that where criminal charges are erroneously dismissed upon a defendant's motion under the Speedy Trial Act and the court's ruling is thereafter reversed by the appellate division, trial of the case must begin within 120 days (90 days beginning 1 October 1980) after the opinion of the appellate division is certified to the superior court. It would be manifestly unfair to the state to refer back to the original start of the time period because, as in this case, a large proportion of the period ordinarily passes before a motion to dismiss is filed. 120 days (90 days beginning 1 October 1980) is not an unreasonable length of time within which to recalendar and begin the trial of a criminal charge following appellate review. We are aware that N.C.G.S. 15A-701(a)(5) requires that a retrial begin within 60 days after the action resulting in a new trial becomes final following appeal. But that section deals with a case that has been tried to a conclusion and the parties are not faced with the same task of preparation for trial as in cases that have been dismissed without

trial. We think the longer period is appropriate under the circumstances of this case.

The order of the superior court dismissing the case is reversed and the case is remanded to the superior court of Rutherford County for further proceedings.

Reversed and remanded.

Judges PARKER and HILL concur.

H. DEAN BOYER v. WILLIAM S. AGAPION, AAA REALTY COMPANY OF GREENSBORO, INC., AND ROBBIE MILLER

No. 7918SC638

(Filed 1 April 1980)

1. **Landlord and Tenant § 8— violation of city housing code—no negligence per se**

Even if the condition of steps at a leased residence violated the Greensboro Housing Code, such violation did not constitute negligence *per se* on the part of the lessor.

2. **Landlord and Tenant § 8.2— tenancy from month to month—renewal each month—ruinous condition on premises—liability of lessor for injuries to third persons**

Where premises are leased under a tenancy from month to month, there is deemed to be a renewal of the tenancy at the end of each month, and if a "ruinous condition" arises on the leased property with the knowledge of the lessor, the lessor can be held liable to third parties for injuries that occur during a subsequent rental period and are proximately caused by the defect.

3. **Landlord and Tenant § 8.2— ruinous condition when tenant takes possession—liability of landlord for injuries to third parties**

A lessor is subject to liability for injuries at a private residence to third parties caused by a ruinous condition that exists when the tenant takes possession only when (1) the tenant does not know or have reason to know of the condition or the risk involved, and (2) the lessor knows or has reason to know of the condition, realizes or should realize the risk involved, and has reason to expect that the tenant will not discover the condition or realize the risk. Therefore, defendant lessors were not liable to plaintiff postman for injuries plaintiff received when a porch step at the leased premises broke where the tenant had the opportunity to be cognizant of the danger presented by the step and defendant lessors had reason to expect that the tenant would discover the condition and realize the risk.

Boyer v. Agapion

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 17 May 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 January 1980.

Plaintiff Boyer was injured on 22 August 1975 while upon rental property owned by defendant Agapion and leased by defendant Miller and while delivering mail in the course of his employment as a postman with the U.S. Postal Service. Plaintiff injured his right leg when he stepped on the bottom porch step of the leased residence, and the step broke, causing plaintiff to fall.

There was evidence before the trial court that defendant Miller first leased the residence on 1 November 1971 from AAA Realty for a term of just two months. Miller continued to lease the property after the term was over as a month-to-month tenant and was still in possession on 22 August 1975, the day plaintiff fell. At some point before plaintiff's fall, ownership of the residence transferred from AAA Realty to defendant Agapion.

There was evidence before the trial court that the bottom step was split lengthwise and ". . . propped up on bricks." In her answer to interrogatories, defendant Miller asserted that she remembered seeing that the piece of wood holding the step up was broken and that she had informed defendant Agapion of the dangerous condition, although Miller could not remember if it was before or after plaintiff's fall.

Plaintiff brought action against Miller, AAA and Agapion claiming their negligence properly to maintain the steps proximately caused his fall. Summary judgment in favor of Agapion and AAA was granted, dismissing plaintiff's claim against them. Plaintiff appealed.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for plaintiff appellant.

Perry C. Henson and J. Victor Bowman for defendant appellees.

HILL, Judge.

Plaintiff's sole assignment of error is to the granting of summary judgment as to the lessor defendants. Plaintiff contends in his appellate brief that the lessor defendants made repairs or im-

provements to the steps in a negligent manner, that those negligent acts proximately caused his injury, and as a result the lessor defendants are liable to him.

There is no evidence of negligent repair. In response to interrogatories, Agapion stated that it was likely repairs were made on the steps before 1966. Agapion stated that the steps were painted in 1971. Miller, in response to interrogatories, stated that no repairs had been undertaken by the lessors since 1971 until after the accident. There is no basis in fact for plaintiff's claim that repairs were negligently made.

[1] Plaintiff contends the condition of the steps violated the Greensboro Housing Code and that a violation of the Code is negligence per se. In *Clarke v. Kerchner*, 11 N.C. App. 454, 181 S.E. 2d 787, *cert. denied* 279 N.C. 393 (1971), a similar interpretation of the Greensboro Housing Code was advocated. The plaintiff in that case contended that ". . . once proof of a violation is introduced, the case should go to the jury on the question of proximate cause." *Clarke, supra*, at 462.

This Court pointed out in *Clarke* that ". . . as a general rule, the owner or person in charge of property, is not liable for injuries to licensees due to the condition of the property, or as it has been expressed, due to passive negligence or acts of omission." *Clarke, supra*, at 461-2. The Court went on to state that ". . . when the premises are controlled by the tenant and the injury is caused by a defective condition of the premises, rather than by affirmative, active negligence," then "[t]he duty imposed is to refrain from doing the licensee willful injury . . . ." *See Clarke* at 462.

There are exceptions to the general rule, as when a landlord rents premises in a ruinous condition, and we discuss that exception below. With regard to plaintiff's contention regarding the Housing Code, however, it is enough for us to state that we agree with the holding in *Clarke* that the Code's purpose is not to impose a legal duty on landlords or tenants for the protection of their guests. The ordinance does not impose upon the landlord a duty to repair or maintain the premises in a safe condition. "Nor does [it] alter the duty owed by the tenant." *Clarke* at 463.

Plaintiff contends finally in his brief that the lessor defendants knowingly leased the premises in a ruinous condition, thus

rendering them liable to plaintiff if it can be shown that the ruinous condition proximately caused plaintiff's injury.

> The general and basic rule is that when third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor. [Citations omitted.] *The liability may, however, be extended to the landlord or owner — . . .* (b) where he knowingly demises the premises in a ruinous condition . . . . (Emphasis added.) (Citations omitted.) *Wilson v. Dowtin*, 215 N.C. 547, 550, 2 S.E. 2d 576, 577 (1939).

The issue becomes whether the residence was knowingly leased by the lessor defendants in a ruinous condition. The material before the Court supports a finding that the steps were in a ruinous condition on the day plaintiff was injured.

Certainly, there is no evidence that when Miller first took possession on 1 November 1971 there was any defect in the condition of the house. The lease, however, only ran for two months. After 2 January 1972, Miller was in possession of the residence as a month-to-month tenant and stated in reply to interrogatories that at some point she did inform the landlord of the defective steps.

[2] The issue now becomes whether, where premises are let under a tenancy from month to month, there is deemed to be a renewal of the lease at the end of each month. If so, and if a "ruinous condition" arises on the rental property with the knowledge of the landlord, then the landlord could be held liable to third parties for injuries that occur during a subsequent rental period and are proximately caused by the defect.

The authorities are not in agreement on this position. Some hold that the continuation of a month-to-month tenancy involves the same liability as an actual reletting. *Borman v. Sandgren*, 37 Ill. App. 160, 161 (1890); *Griffith v. Lewis*, 17 Mo. App. 605, 613 (1885). Others hold that month-to-month tenancies are of such continuing character that the landlord is not even constructively in possession at the end of each term. *Ward v. Hinkleman*, 37 Wash. 375, 381, 79 P. 956, 959 (1905).

The RESTATEMENT (SECOND) OF PROPERTY § 17.1 (1977) deals with this split between authorities and, furthermore, addresses

the issue of landlord's liability in situations such as the case *sub judice*. The section states that a landlord is subject to liability for injuries to third parties caused by a ruinous condition that exists when the tenant takes possession. Comment *i* is consistent with the Illinois and Missouri cases and states that,

> A renewal of a lease or a continuation of a periodic tenancy into a new period is treated the same as a complete termination of the lease, followed by resumption of possession by the landlord and then transfer of possession from the landlord to the tenant . . . .

Thus, the RESTATEMENT (SECOND) would subject a landlord to liability for injuries to third parties where the landlord allows a periodic tenancy to continue into the next period and at the beginning of the next period the leased property is in a condition which, if such condition existed at the time of the original leasing, would subject the landlord to liability. *See* Comment *i*.

At first blush, this analysis seems to put an onerous burden on landlords. A landlord could learn of a dangerous condition on the last day of a rental period, go to the property to correct it on the first day of the new period and still be subject to liability if someone had been injured in the meantime because of the defect.

Language in *Perez v. Raybaud*, 76 Tex. 191, 13 S.W. 177 (1890), would indicate that such a burden exists. The court in that case stated that,

> It is well settled that the owner of leased premises is liable to the public or to third persons for injuries resulting from a defective structure on the premises, when the defect existed at the time the lease was made . . . . Id. at p. 192.

Perez cites several cases as support for the statement above. *Dalay v. Rice*, 145 Mass. 38, 12 N.E. 841 (1887), is typical. There, plaintiff sued for damages suffered when he fell into an unprotected coal-hole in the sidewalk appurtenant to defendant's premises. The cover over the hole had been defective for some time, long enough for both the lessor and the lessee to notice, and was of such a character that it would tip up whenever someone stepped on it. The court stated at p. 843 that,

> [I]f a landlord lets premises abutting upon a way, which are, from their condition or construction, dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are occupied by a tenant . . . . That the tenant may also be liable is not a defense to the landlord.

Dalay citing from an English case, *Nelson v. Brewery Co.*, 2 C.P. Div. 311, goes on to say that, ". . . 'if the landlord lets premises in a ruinous condition, he is liable to strangers.' " *Dalay* at 843.

One element is common to *Dalay* and all the other cases cited by *Perez*. Each case involved an injury on leased premises used for public or quasi-public purposes. That is not the situation in the case *sub judice*. Plaintiff fell on a defective step appurtenant to a private residence.

The distinction is critical. *Sherwood Bros. v. Eckard*, 204 Md. 485, 105 A. 2d 207 (1954), recognizes and accepts the line of cases cited by *Perez*. At the same time, *Sherwood* holds, at p. 489 that,

> The general rule is that the landlord is liable for injuries to persons on leased premises, such as guests or customers of the lessee, only to the same extent as he is to the tenant himself. Accordingly, in the ordinary case, the landlord is not liable for injuries caused by defects existing at the time of the lease *except as he may have failed to inform the lessee of defects known to him, and not apparent to the lessee.* (Emphasis added.)

Sherwood involved a corporate landlord of a gas station, a tenant who operated the station, and a plaintiff-salesman who was calling on the tenant for business purposes. The plaintiff went back to the greasing room, where the public was not intended to come, and was injured when a car rolled off a lift and pinned plaintiff's right leg against the wall. The court denied recovery against the landlord. While the gas station was designed for public use, the greasing room was not held to be a place where patrons were invited. The general rule, as stated in *Sherwood*, was applied, not the public use exception.

[3] The RESTATEMENT (SECOND) OF PROPERTY adopts both rules as set forth in *Sherwood*. The general rule is set forth in § 17.1.

A landlord is subject to liability to persons on the leased property *only* if,

(a) the tenant does not know or have reason to know of the condition of the risk involved; and

(b) the landlord knows or has reason to know of the condition, realizes or should realize the risk involved, and has reason to expect that the tenant will not discover the condition or realize the risk.

Thus, except where the landlord conceals a defect, under § 17.1, a landlord remains liable only ". . . until the tenant has had a reasonable opportunity to discover [the defect] and take precautions . . . ." *See* Comment *f. Also see Swords v. Edgar et al.*, 59 N.Y. 28, 34, 17 A.R. 295 (1874).

Comment *g* adopts the language of *Sherwood* and states that,

> The liability of the landlord to those on the leased property with the consent of the tenant is the same as it is to the tenant.

We agree with the analysis presented by the RESTATEMENT (SECOND) § 17.1. Pursuant to that analysis, we find that defendant Miller had the opportunity to be cognizant of the danger presented by the step and that the lessor defendants had reason to expect that Miller would discover the condition and realize the risk. Plaintiff must look to defendant Miller.

For the reasons stated above, the opinion of the trial court is

Affirmed.

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

STATE OF NORTH CAROLINA v. WALLACE URBON FERRELL

STATE OF NORTH CAROLINA v. WILLIE MACK WORKMAN

No. 7918SC923

(Filed 1 April 1980)

1. **Criminal Law § 75— confessions—voluntariness**

Evidence was sufficient to support the trial court's ruling that confessions of defendants were freely and voluntarily given where it tended to show that defendants were apprehended around noon in Richmond, Virginia and were transported to Greensboro where they arrived around 6:00 p.m.; one defendant was given something to eat and drink and the other something to drink before they were interrogated; one defendant was advised of his constitutional rights, signed a waiver of rights form around 7:30, was interviewed by law enforcement officers, and then wrote out a statement in his own handwriting; the other defendant was advised of his rights around 9:00 and signed a waiver of those rights around 9:35; and neither defendant was under the influence of drugs or alcohol at the time.

2. **Criminal Law § 74.3— confessions implicating codefendants—sanitized versions admissible**

The trial court did not err in allowing into evidence "sanitized" versions of purported statements by the two codefendants which were inculpatory of each other.

3. **Criminal Law § 42.6— rape victim's clothing—chain of custody not shown**

In a prosecution of defendants for second degree rape and kidnapping, failure of the State to show the chain of custody of the clothes which the victim was wearing on the night of the crimes was harmless.

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

The trial judge in a prosecution of two defendants properly instructed on acting in concert when he stated, "If two or more persons act together with a common purpose to commit a crime, each of them is held responsible for the acts of others done in the commission of that crime."

APPEAL by defendants from *Smith (David I.), Judge*. Judgment entered 9 May 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 February 1980.

Each of the defendants was tried for second degree rape, kidnapping, and larceny of an automobile. Evidence presented by the State tended to show that at 2:00 a.m. on 23 December 1978, Shebra Elaine Gilmore was a passenger in her sister's car which

was parked in the parking lot of the Side Effects Club in Greensboro. While waiting for her sister, Ms. Gilmore fell asleep. Defendant Workman got in the unlocked car, drove a short distance before picking up defendant Ferrell, and then drove on further before Ms. Gilmore woke up. Notwithstanding her pleas to be set free, Ms. Gilmore was driven to an area in Guilford County where each of the defendants had sexual intercourse with her against her will. Afterward, she was driven to South Carolina. The following day was spent in Saluda, South Carolina, and the next day the three returned to Greensboro, where Ms. Gilmore was released. Two days later the defendants were arrested in Virginia. They waived extradition and were returned to North Carolina. Upon motion by the defendants, the cases were consolidated for trial. Verdicts of guilty were returned on all three counts. Defendants appealed.

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

D. Lamar Dowda for defendant appellant Workman.

Michael E. Lee for defendant appellant Ferrell.

HILL, Judge.

[1] Defendants first contend the trial court erred in ruling that purported confessions made by the defendants were freely and voluntarily given and that the defendants had knowingly and intelligently waived their right to have counsel present at the time the purported confessions were given.

An extrajudicial confession by an accused is admissible against him when it is voluntarily given, not induced by threats or fear, and when the defendant has knowingly and intelligently waived his right to have counsel present at the time the confession is given. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). Whether conduct on the part of interrogating officers constitutes a threat or induces fear and whether a purported waiver has been knowingly and intelligently given are questions of law reviewable on appeal. *State v. Biggs*, 224 N.C. 23, 29 S.E. 2d 121 (1944).

When the defendants objected to SBI Special Agent Terry Johnson's testimony concerning their purported confessions, the trial court held a voir dire hearing in which the court heard testimony from Special Agent Johnson, Officer S. M. Shaver, as well as the two defendants, concerning the circumstances under which the statements were given. The court also examined the written statements. At the conclusion of the voir dire, the court made findings of fact. These findings, based as they are on competent evidence, are conclusive on appeal. *State v. Stepney*, 280 N.C. 306, 317, 185 S.E. 2d 844 (1972).

The judge's findings on voir dire reveal the following as to defendant Ferrell:

> Ferrell was arrested at 12:00 a.m. in Richmond, Virginia, and was brought to Greensboro by Detective Shaver of the Guilford County Sheriff's Department. Upon arriving in Greensboro around 6:00 p.m., Ferrell was fed sandwiches and was given water to drink. Ferrell was fed prior to any interrogation. At 7:30 p.m. Ferrell signed a waiver of rights form after having been advised of his constitutional rights. Ferrell indicated to Detective Shaver that he understood his rights. Ferrell was then interviewed by Special Agent Johnson and Detective Shaver. Ferrell wrote out the statement in his own handwriting. Ferrell was not under the influence of alcohol or drugs during this interview.

It is clear from these facts that Ferrell's confession was voluntary and that he waived his rights under *Miranda, supra. See State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975); *State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242 (1976); *State v. Whitley*, 288 N.C. 106, 215 S.E. 2d 568 (1975).

The findings of fact reveal the following as to defendant Workman:

> Workman was arrested in Richmond, Virginia, and brought to Greensboro by Detective Shaver. He arrived in Greensboro around 6:00 p.m. He was fed and given water prior to his being questioned. He made no requests for food. At approximately 9:00 p.m., he was advised of his *Miranda* rights. At 9:35 p.m. he signed a waiver of those rights. He was not under the influence of drugs or alcohol at that time.

These findings support the court's conclusions of law that Workman's confession was voluntary. *State v. Carter, supra; State v. Williams, supra.* The confessions were properly admitted into evidence.

[2] Next, the defendants contend that the court erred by allowing into evidence "sanitized" versions of purported statements by the codefendants Ferrell and Workman which were inculpatory each to the other. We do not agree.

Defendants contend, *citing Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), that the extrajudicial confession of one codefendant which implicates his codefendant cannot be allowed into evidence where the defendant making the confession does not testify at their joint trial. The Court in *Bruton, supra,* held that to admit such evidence would constitute a denial of the codefendant's rights under the confrontation clause of the Sixth Amendment to the Constitution of the United States. In the case *sub judice* the State, by substituting singular pronouns and by attempting to eliminate from the statement any reference to the codefendant Workman, offered an altered version of what codefendant Ferrell had allegedly said. The revision process was then reversed as to Workman. Each defendant contends the State was thereby able to introduce into evidence a product of the district attorney's imagination that was not in fact the actual statement of either Wallace Urbon Ferrell or Willie Mack Workman. Each defendant contends that such a statement became a memorandum of what the accused had said, or a product of what the district attorney perceived the accused's statement to be.

The use of "sanitized" statements has been approved by the North Carolina Supreme Court as being consistent with the requirements of *Bruton, supra.* In *State v. Braxton,* 294 N.C. 446, 470, 242 S.E. 2d 769 (1978), the Court said,

> This editing made the statement somewhat incoherent but a comparison of the original statement with the edited copy fails to show any prejudice . . . resulting from the editing.

The statements were properly sanitized, the defendants were not prejudiced, and the assignment of error is overruled.

[3] Defendants next contend that the court erred by allowing into evidence the skirt, vest, shirt, slip, bra and panties which the prosecutrix was wearing on 23 December 1978. Defendants contend that no chain of custody was established, and that the prosecuting witness did not testify that the exhibits were in the same condition at trial as they were when she left them at her mother's after her attack. We find no error. The witness on recall identified the State's exhibits as the clothing she wore on the night of 23 December 1978 and further described the reasons they presently appeared torn and had missing buttons. A careful reading leaves no doubt that the clothes were the ones the prosecutrix was wearing on 23 December 1978 and that their condition had not been altered since that time. Failure in this case to offer a chain of custody into evidence is harmless.

We are not impressed with the defendant's contention that motions for nonsuit for each defendant must be allowed. There was ample evidence that the crimes charged in the bills of indictment had been committed and that the defendants committed the crimes. Nonsuit was properly denied. *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553 (1971).

[4] Finally, we hold that the court did not err in its charge of acting in concert.

On one occasion the court charged as follows:

> For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is held responsible for the acts of the others done in the commission of that crime.

The court charged similarly on all crimes for which both defendants were charged. The language used is straight from the North Carolina pattern jury instructions and is in all respects correct. *See* NCPI-Crim. 202.10. The exact language of portions of the charge has been approved in *State v. Joyner,* 297 N.C. 349, 244 S.E. 2d 390 (1979). This assignment of error is overruled.

The trial court committed no error when it refused to grant the defendant's post trial motions to set aside the jury verdict

and arrest judgment. There was no abuse of discretion by the trial judge. The assignment of error is overruled. *State v. Shepard,* 288 N.C. 346, 218 S.E. 2d 176 (1975).

In the trial we find

No error.

Judges PARKER and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE ADAMS AND LISA DIANE JACKSON ADAMS

No. 7912SC971

(Filed 1 April 1980)

1. Burglary and Unlawful Breakings § 5.8— breaking and entering and larceny—possession of recently stolen property—sufficiency of evidence

The State's evidence was sufficient to support conviction of the male defendant for breaking and entering a home and larceny of guns therefrom where it tended to show that the home was broken into and a large number of guns were taken therefrom without authority of the owner; on the night of the break-in the male defendant had these guns in his possession and traded them for heroin; prior to the break-in such defendant had an opportunity to know both that the guns were in the home and that their owner was absent; early in the evening on the date of the break-in defendant asked a drug dealer if he wanted to buy some guns later that night; and when defendant traded the guns he told the drug dealer "he had gotten the guns out of a house in Grays Creek" but that the dealer "didn't have anything to worry about because the man was out of town." However, the State's evidence was insufficient to support conviction of the female defendant for breaking and entering and larceny where it tended to show that she accompanied the male defendant, her husband, when he first inquired whether the drug dealer wanted to buy some guns later that night; she thereafter accompanied her husband and brother when they brought the guns to the drug dealer's home; she was present while her husband negotiated the trade of the guns for heroin; and during those negotiations she picked up two or three of the guns and at one point remarked that one of the guns looked like it was very old and "ought to be worth a lot of money."

2. Criminal Law § 97.1— permitting recall of witness—discretion of court

Permitting a witness to be recalled and testify, although his later testimony might be contradictory to that previously given, is a matter within the sound discretion of the trial judge and is not reviewable upon appeal absent a showing of abuse of discretion.

State v. Adams

APPEAL by defendants from *Brewer, Judge.* Judgments entered 24 May 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 March 1980.

The defendants, Jerry Wayne Adams and his wife, Lisa Diane Jackson Adams, were each charged by indictment with the felonious breaking and entering of the home of James Lovette and with the felonious larceny therefrom of a large number of specifically described rifles and shotguns. The cases were consolidated for trial and each defendant pled not guilty.

The State presented evidence to show: On the night of 25 November 1978 the home of James Lovette, a gun collector, was broken into while Lovette and his family were away on a trip to Mississippi, and a large number of rifles and shotguns were taken. On 27 November 1978 these guns, identified by Lovette as having been taken from his house, were found in the home of one Kenny Nixon when it was being searched by officers pursuant to a search warrant following Nixon's arrest for possession and sale of heroin. Nixon, called as a witness for the State, testified in substance to the following:

At approximately 6:00 p.m. on 25 November 1978 the defendant, Jerry Adams, came to Nixon's home, driving a red automobile. Jerry's wife, the defendant Lisa Adams, was with him but did not get out of the car. Jerry asked Nixon if he wanted "to buy some guns later on that night, that he was going to get some." Nixon replied that he would have to see them first, whereupon Jerry said that he would see Nixon later, and Jerry left. Later that night, Nixon responded to a knock at the door to find Jerry on the porch. He had arrived in the same red car. Lisa Adams and Donald Jackson (later identified as Lisa's brother) were in the car. Jerry told Nixon that he had fifteen to twenty guns which he wanted him to look at to see if he would buy, and Nixon told him to bring them on in. Lisa Adams came in the house, while Jerry Adams and Donald Jackson went to the "boot" of the car and got the guns out. These were wrapped in a blanket, and it took both Jerry and Donald to carry them. Lisa opened the door so that they could get in. Jerry and Donald brought the guns in, placed them on the floor, and opened the blanket. Lisa was sitting in the living room, talking to Nixon's sister.

Nixon testified:

After we opened the blanket and began looking at the guns, everybody—my sister and Jerry, Donald, my wife and me, all looked at the guns and was seeing how funny the guns looked and everything. There were some strange looking guns in there I hadn't seen before. All three of them, Jerry, Lisa and Donald, were showing the guns to us. Jerry picked up about all of the guns. Lisa Adams picked up two or three of the guns. She picked up a little small .22 that was—looked like it was about a hundred years old and she was showing that to us, saying that it ought to be worth a lot of money.

. . . Jerry Adams told me that the guns had come from Grays Creek. Grays Creek is on the outskirts of Fayetteville. He told me I didn't have anything to worry about because the man was out of town. Jerry Adams told me that. He did not say what man, he just said he knew the man was out of town and wouldn't be back for a while. Jerry did not say anything about the job they had done, he just said they had got the guns out of a house. He just said a house in Grays Creek.

After he told me he had gotten the guns out of a house in Grays Creek, I told him I would take the guns but I didn't have any money to give him. I told him I would trade him heroin for them. He wanted approximately two hundred dollars. He had about 15 to 20 guns. We were all standing right in a circle looking at the guns. When I told Jerry that I had no money but I had heroin, he and Donald discussed it for a minute and decided to take it. Lisa was standing there looking at the guns. After they discussed it between themselves they said they would take my deal I'd offered them. I told them I'd give a quarter teaspoon of heroin for it. A quarter teaspoon of heroin would be handed in a plastic bag corner [sic]. The value of a quarter teaspoon of heroin is about a hundred and seventy-five to two hundred dollars. I handed the heroin to Jerry Adams. He put it in his pocket and they all three left, Jerry, Donald and Lisa . . . .

* * *

It was after 12 o'clock, I believe, when Jerry Adams and Donald Jackson and Lisa Adams left my house that evening.

Lovette, on being recalled to the stand, testified that on one occasion prior to the break-in, Jerry Adams had been in Lovette's home when he came there to pick up a car to be serviced at the Local Auto Parts Store where Jerry Adams worked. At that time Lovette's guns were displayed over the doors and at various places in his living room. Just prior to leaving on the trip to Mississippi, Lovette took his car to be serviced at the shop where Jerry Adams worked. While there, Lovette told the shop foreman in Jerry Adams's presence that he had to leave that afternoon to go to Mississippi for an emergency.

The defendants testified and denied that they had been to the Lovette house or to the Nixon house on the night of 25 November 1978 and presented evidence to establish an alibi.

The jury found both defendants guilty as charged. Judgments were entered imposing an active prison sentence on the defendant Jerry Wayne Adams and imposing a suspended sentence on the defendant Lisa Diane Jackson Adams. Both defendants appealed.

Attorney General Edmisten by Special Deputy Attorney General W. A. Raney, Jr. for the State.

McCrae, McCrae, Perry & Pechmann by Daniel T. Perry III for the appellants.

PARKER, Judge.

[1] Defendants assign error to the denial of their motions made pursuant to G.S. 15A-1227 to dismiss the charges against them for insufficiency of the evidence to sustain the convictions. We find the evidence sufficient to sustain the convictions of the defendant Jerry Wayne Adams, but insufficient to sustain the convictions of the defendant Lisa Diane Jackson Adams.

There was uncontradicted evidence that the Lovette home was broken into and a large number of guns were taken therefrom by someone without authority of the owner. There was evidence that on the same night the break-in occurred the defendant Jerry Adams had these guns in his possession and traded them for heroin. Standing alone, the evidence showing Jerry Adams's possession of the stolen property so soon after the theft as to render it unlikely that he could have acquired the property

honestly would give rise to a reasonable inference that he was guilty both of the larceny and of the breaking and entering by which the larceny was accomplished. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). This inference was strengthened in the present case by the evidence that prior to the break-in Jerry Adams had had opportunity to know both that the guns were in the Lovette house and that their owner would be absent, that early in the evening on the date of the break-in he asked the drug dealer if he wanted "to buy some guns later on that night, that he was going to get some," and that when he traded the guns he told the drug dealer "he had gotten the guns out of a house in Grays Creek" but that the drug dealer "didn't have anything to worry about because the man was out of town." Thus, there was ample evidence to sustain the convictions of Jerry Adams, and his motions challenging the sufficiency of the evidence was properly denied.

The evidence against the defendant Lisa Adams was quite different. All that the evidence shows against her is that she accompanied her husband when he first approached the drug dealer and inquired if the dealer wanted to buy some guns later that night (though it is not clear from the evidence in the record whether she was then so situated as to have been able to hear that conversation), that later that night she accompanied her husband and brother when they brought the guns to the drug dealer's home, that she was present while her husband negotiated the trade of the guns for heroin, and that during those negotiations she picked up "two or three of the guns" and at one point remarked that one of the guns looked like it was very old and "ought to be worth a lot of money." While this evidence strongly suggests that Lisa Adams may have known that the guns had been stolen, in our opinion it falls short of supporting an inference that she was the thief. Her motion for dismissal should have been allowed.

[2] We find no merit in the contention of the defendant Jerry Adams that the court erred in permitting the State, over his objection, to recall the witness James Lovette after he had already testified on direct examination, cross-examination and re-direct examination. Permitting a witness to be recalled and testify, although his later testimony might be contradictory to that

previously given, is a matter within the sound discretion of the trial judge and is not reviewable upon appeal absent a showing of abuse of discretion. *Hunter v. Sherron*, 176 N.C. 226, 97 S.E. 5 (1918); 1 Stansbury's N.C. Evidence (Brandis Rev.) § 24. No abuse of discretion has been here shown.

The result is:

On the appeal of the defendant Jerry Wayne Adams, we find

No error.

On the appeal of the defendant Lisa Diane Jackson Adams,

Judgment reversed.

Judges MARTIN (Harry C.) and HILL concur.

DOROTHY SALTER HARDING (CREW) v. HARRY HARDING

No. 796DC895

(Filed 1 April 1980)

1. **Divorce and Alimony § 24.10— support of child past majority—parent's contract**

A parent may contract to support his or her children past the age of majority, and the court has power to enforce such a contract just as it would any other, but the court may not enlarge upon the obligation agreed to by the parties.

2. **Divorce and Alimony § 24.4— violation of child support order—contempt proceeding—invalidity of order properly raised as defense**

Defendant was entitled to raise as a defense in the present contempt proceeding the purported invalidity, for lack of subject matter jurisdiction, of portions of a child support order, even though time for appeal from that order had passed.

3. **Divorce and Alimony § 24.4— child support order—improper calculation of amount owed—contempt finding improper**

The trial court erred in finding defendant in contempt for violation of a child support order which improperly enlarged defendant's contractual obligation of support by failing to take into account a provision of the parties' consent agreement which permitted defendant to retain two-thirds of the amount

defendant would otherwise pay for a child's monthly support when defendant was supporting that child in college; but the trial court properly found that defendant was obligated to support his child until she completed four years of college, and her reaching or passing 21 years of age was not the determining factor with respect to defendant's obligation to support.

APPEAL by defendant from *Williford, Judge*. Order entered 27 June 1979 in District Court, HALIFAX County. Heard in the Court of Appeals 25 February 1980.

Plaintiff seeks to have defendant held in contempt of court for his failure to comply with court orders relating to the support of their daughter, Pattie, and son, Jeff. At the hearing on plaintiff's motion in the cause, she relied upon her motion and affidavit, which recited a court order of 23 March 1977, and she calculated from that order that defendant was indebted to her in the amount of $7,921.47. Defendant testified that at the time plaintiff filed her motion he was only indebted to her in the amount of $2,080.20, which he had since paid. Defendant sought to introduce evidence that the 1977 order upon which plaintiff relied was invalid, in that it was entered ex parte and that while purporting to rely on prior support orders, it was inconsistent with them. The court, noting that defendant had not appealed from the 1977 order, ruled that he could not introduce such evidence, and that he was bound by the 1977 order. The court then found defendant in contempt because he was delinquent in his payments to plaintiff in the amount of $5,841.27. From this order, defendant appeals.

Crew & Stevenson, by W. Lunsford Crew, for plaintiff appellee.

Braswell & Taylor, by Roland C. Braswell and Julian R. Allsbrook, for defendant appellant.

ARNOLD, Judge.

In 1969 the parties agreed to a consent order setting out defendant's child support obligations. The order also included the provision that "wilful failure to comply with this court order . . . shall subject the offending party to punishment for contempt of court." Orders pertaining to defendant's duty to support were entered in 1971, 1975, and 1977. Defendant appealed from the

1975 order, arguing that he had no duty to support his children past the age of 18, and this court found that by the original consent order he had contracted to provide such support. *Harding v. Harding*, 29 N.C. App. 633, 225 S.E. 2d 590, *cert. denied* 290 N.C. 661, 228 S.E. 2d 452 (1976). Defendant now contends that the 1977 order enlarged his contractual obligation as set out in the 1975 order; that to the extent it did so the 1977 order is invalid; and that he cannot be held in contempt of court for failure to comply with the invalid portions of the 1977 order.

[1, 2] A parent may contract to support his or her children past the age of majority, *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911, *cert. denied* 287 N.C. 465, 215 S.E. 2d 623 (1975), and the court has power to enforce such a contract just as it would any other. *Harding v. Harding, supra.* Since the duty to support after the age of majority arises in contract, however, the court may not enlarge upon the obligation agreed to by the parties. *Crouch v. Crouch*, 14 N.C. App. 49, 187 S.E. 2d 348, *cert. denied* 281 N.C. 314, 188 S.E. 2d 897 (1972). Any attempt by the court to do so would be void for lack of subject matter jurisdiction. *See Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972). We are thus presented with the question of whether defendant is entitled to raise as a defense in the present contempt proceeding the purported invalidity for lack of subject matter jurisdiction of portions of the 1977 order, or whether defendant is now bound by that order as entered because his time for appeal from it has passed. We have found no North Carolina authority on this point. A number of other jurisdictions have ruled, however, that it is not contempt to disobey an order entered by a court without jurisdiction, see 17 Am. Jur. 2d, Contempt § 42 and cases cited therein, and we believe that this is the correct view. Accordingly, to whatever extent the court in its 1977 order exceeded defendant's contractual obligation of support the order is void, and defendant cannot be held in contempt for his failure to comply with the void portions.

[3] This brings us to the question of whether portions of the 1977 order actually exceed defendant's contractual support obligations. To answer this question, we must begin with the 1969 consent order. That order provided in pertinent part:

> 1. $50.00 per month per child living in the home with the mother shall be considered child support. When a child

enters college or private school, his or her support shall be the responsibility of the father and in that event, the mother shall be entitled to only one-third (1/3) of said monthly support for said child, and said father shall be entitled to retain two-thirds (2/3) of said monthly support for said child, except that for three and one-half (3 1/2) months during the summer, said mother shall be entitled to all of the support for said child if the child is living with the mother. When a child gets married or finishes his or her fourth year in college or stops going to school (whichever shall first occur), then the duty of the father to provide support for said child shall terminate and the guaranteed payments hereunder shall be reduced proportionately.

In 1971 an order was entered and amended to "clarify" defendant's obligation to send the children to college. That order in its amended form required that child support payments continue for an older son, Jim, and for Pattie until each of them "become[s] twenty-one years of age, or married, or is less than a full-time student in high school or college or is otherwise self-supporting, whichever occurs first."

In 1975 an order was entered setting the amount of support for Pattie while she was in college. That order, which was affirmed by this court in *Harding v. Harding, supra,* quoted the "retainage" provision of the 1969 consent order and set Pattie's support at $3000 per year for college expenses and $108.33 per month for her "other general support." The order further provided that "said payments shall continue until she has completed her four years of college, her twenty-first year of age, or is married or is less than a full-time student in college or is otherwise self-supporting, whichever occurs first."

The parties were unable to agree as to what amount was actually due to plaintiff under the 1975 order, so defendant in January 1977 moved that the court determine the amount due. This led to the 1977 order which defendant now contests. The court in its 1977 order made no reference to the retainage provision, and held simply that, as the 1975 order required, defendant must pay for Pattie's support $3000 per year plus $108.33 per month, to terminate as set out in the 1975 order.

Defendant argued at the contempt hearing that the 1977 order enlarged his contractual support obligation in two ways: (1) the court in its order that he pay $108.33 per month as general support ignored the "two-thirds retainage" provision of the 1969 consent order, and (2) the court ordered him to pay $3000 per year for Pattie's college education as long as she was enrolled in college, while the 1975 order required him to pay only until she reached 21. We find merit in defendant's first argument, but not in his second.

The consent order of 1969 makes clear that while defendant supports a child in college he is entitled to retain each month two-thirds of the amount he would otherwise pay for that child's monthly support. The monthly support for Pattie having been set at $108.33 by the 1975 order, defendant is entitled to retain two-thirds of this amount for each month he supported Pattie in college, including each summer month unless Pattie was then living with plaintiff. It is clear from the record that the trial court accepted plaintiff's calculations in determining that defendant was in contempt, and since those calculations include no retainage deduction, they are erroneous. The trial court must recalculate the amount defendant is indebted to plaintiff, taking into account the retainage provision of the consent order.

Plaintiff's calculations which the court accepted also held defendant responsible for $3000 per year through 1 March 1979, since Pattie was to reach her twenty-second birthday on 15 March 1979. In support of this position plaintiff relied upon language in the 1975 order that defendant's support of Pattie was to continue until she "completed . . . her twenty-first year of age," which plaintiff argued would be on Pattie's twenty-second birthday. Defendant interpreted this language differently and calculated that he need only support Pattie until she reached her twenty-first birthday. Neither party is correct. The 1969 consent order makes no mention of any age as a termination point for support, providing instead that support will continue through four years of college unless the child marries or stops going to school. This is the obligation to which defendant agreed, and it is not changed by language relating to age in subsequent court orders. The trial court correctly found that defendant was obligated to support Pattie until she completed four years of college, which was to occur on 1 June 1979.

There is no merit in defendant's complaint that the 1977 order was entered ex parte, or in his remaining assignments of error.

To summarize: The order finding defendant in contempt is vacated and the matter is remanded to District Court. That court must recalculate the amount defendant was indebted to plaintiff at the time of the hearing, taking into account the retainage provision of the 1969 consent order. Upon the basis of this new calculation the District Court shall then determine whether defendant is in contempt of court, and enter orders accordingly.

Vacated and remanded.

Chief Judge MORRIS and Judge VAUGHN concur.

H. P. LAING v. LIBERTY LOAN COMPANY OF SMITHFIELD AND ALBEMARLE

No. 795DC743

(Filed 1 April 1980)

Rules of Civil Procedure § 37— refusal to produce documents—sanctions—striking of answer—default judgment

In plaintiff attorney's action to recover contingent legal fees based on amounts collected on judgments obtained by plaintiff on 37 loans made by defendant loan company, the trial court did not err in sanctioning defendant pursuant to Rule 37(b)(2)c by striking defendant's answer and entering default judgment for plaintiff in the amount prayed for in the complaint where plaintiff sought through interrogatories to discover the amounts and dates of payments on the loans; defendant answered for all but 11 of the loans that "no monies were paid"; defendant provided an amount paid for each of the other 11 loans and stated whether the loan was refinanced, settled or charged off as a bad debt; plaintiff thereafter served on defendant a request for production of documents in which plaintiff sought to examine the "original note, security agreement and ledger cards of the note or notes" for each of the loans in question; defendant answered that the documents were unavailable because its local office had closed; plaintiff sought and obtained a court order to produce these documents to which defendant made no response; and at the sanctions hearing, defendant's attorney made the unverified statement on oral argument that the business documents sought, which were no more than four years old, were no longer in existence.

ON writ of *certiorari* to review proceedings before *Rice, Judge*. Judgment entered 2 March 1979 in District Court, NEW HANOVER County. Heard in the Court of Appeals 27 February 1980.

Plaintiff, a North Carolina attorney, instituted this action on 8 April 1978 against defendant, a former client, for breach of a contract to pay legal fees. Plaintiff alleged a contract to file suits and collect judgments on thirty-seven loans made by defendant totaling $30,326.43. Plaintiff maintains he obtained these judgments and that his fee would be a one-third contingent fee on all sums collected against the judgments. Plaintiff further alleged requests for accountings on the sums collected on the judgments which defendant continued to refuse to provide him. Defendant answered the complaint on 28 June 1978 wherein the allegations of plaintiff were "admitted in part." The answer failed to state which allegations were admitted and which were denied.

On 5 July 1978, plaintiff served interrogatories on defendant wherein he requested the "amounts and dates of all sums paid to the defendant" on the loans on which plaintiff alleged he had obtained judgments. Defendant filed an answer to interrogatories more than a month later which contained the following introductory statement.

> In answer to the Interrogatories, the following is the best information available. The local office of Liberty Loan, Inc. was closed during the month of August, 1976 and most of the files at that time were removed. The work done by the Plaintiff was issued from that office.

Thereafter, defendant stated "[n]o monies were paid," as to twenty-five of the accounts on which information was sought. For the other eleven interrogatories, defendant provided an amount paid and whether it was refinanced, settled or charged off as a bad debt. Defendant admitted more than $4,000.00 had been collected.

On 18 July 1978, plaintiff served a request for production of documents upon defendant pursuant to Rule 34 in which plaintiff sought to examine the "original note, security agreement, and ledger cards or cards of the note or notes" on each loan in question in this suit. In response to this request for production of

documents, defendant, on 9 August 1978, filed a response in which it stated,

> The attached is the best information available in answer to the Mandatory Request for Production of Documents by the Plaintiff. The Wilmington office of the defendant was closed in August 1976 and the records on the inactive accounts have been unavailable since then.
>
> . . .
>
> No other information is available on these accounts; however, prior to the Wilmington office closing, files on each of the accounts were always available to the Plaintiff.

Defendant produced information on some of the accounts, but for twenty-five, it merely stated "[i]nformation not available." These were the same twenty-five accounts on which defendant had earlier maintained in answers to interrogatories that "[n]o monies were paid." Plaintiff filed a motion for an order pursuant to Rule 37 to compel defendant to produce the documents he had earlier requested on the accounts for which defendant had made only the statement that information was not available and for several others where the information provided was incomplete. Defendant filed no response to plaintiff's Rule 37 motion. The motion was heard on 11 September 1978, and an order was entered requiring defendant to produce twenty-nine sets of documents sought by plaintiff. A specific time and place for production was provided in the order as well as a warning of sanctions pursuant to Rule 37 if the order was not heeded. Defendant did not produce the documents as ordered by the court or make any other response to the court's order.

Plaintiff also filed a request for admission on 25 August 1978. Plaintiff requested, among other things, admissions concerning the material allegations of the complaint on the contract for services and defendant's refusal to comply with its terms. No response whatsoever was ever filed by defendant to these requests for admissions.

On 1 February 1979, plaintiff made a motion for sanctions by the court pursuant to Rule 37(b)(2)c for defendant's refusal to produce. At the hearing on the motion for sanctions, defendant's at-

torney made the statement that the documents could not be produced because they had been destroyed but offered no testimony or other evidence of this. Plaintiff noted in his own behalf that he had made repeated requests since 1975 to defendant to provide the information now sought through this unheeded court order to produce documents. For this failure to comply with a discovery order, the trial court sanctioned defendant by striking its answer and entering default judgment for plaintiff in the amount prayed for in the complaint. From this judgment, defendant appeals.

Harold P. Laing, for plaintiff appellee.

Richard M. Pearman, Jr., for defendant appellant.

VAUGHN, Judge.

The issue raised by this case is whether the trial court acted properly in striking defendant's answer and entering judgment by default. We hold the trial court properly applied the discretionary powers of sanction for discovery abuse provided in Rule 37 of the North Carolina Rules of Civil Procedure.

Plaintiff has alleged performance of a contract to provide legal service, and defendant has never really denied this contract and its performance. To prove his damages, plaintiff would have to show money was collected on the thirty-seven judgments he obtained. Business records and documents consisting of notes, security agreements and payment cards held by defendant could provide this information. He sought this information through discovery procedures. To his interrogatories seeking the amounts and dates of payments on the loans, for all but eleven of the loans, defendant answered "[n]o monies were paid." Then, when the documentary evidence for those loans on which "[n]o monies were paid" was sought through voluntary production, the information sought became unavailable. Plaintiff sought and obtained a court order to produce these documents to which defendant made no response. At the sanctions hearing, defendant's attorney made the unverified statement on oral argument that the business documents sought which were no more than four years old were no longer in existence. Upon these circumstances, the trial court invoked one of the most severe sanctions pursuant to Rule 37 which provides in pertinent part the following.

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

G.S. 1A-1, Rule 37(b)(2)c. The trial court has issued an order pursuant to section (a) of Rule 37 which was ignored. The trial court sanctioned defendant for this. The rule provides that the trial court "may make such orders in regard to the failure as are just. . . ." G.S. 1A-1, Rule 37(b)(2). The issue is whether the trial court abused its discretion and entered an unjust order striking defendant's answers and entering default judgment for plaintiff.

The rule is very flexible and gives a broad discretion to the trial judge. *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 251 S.E. 2d 885, *cert. den.*, 297 N.C. 304, 254 S.E. 2d 921 (1979). If a party's failure to produce is shown to be due to inability fostered neither by its own conduct nor by circumstances within its control, it is exempt from the sanctions of the rule. The rule does not require the impossible. It does require a good faith effort at compliance with the court order. *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed. 2d 1255 (1958). In the case at hand, defendant made no good faith effort to comply with the order. No protective order was sought pursuant to G.S. 1A-1, Rule 26(c) against discovery of the material. No response was made by defendant to the motion seeking an order to produce, and the order itself was ignored. All these procedures are provided to benefit defendant. It took advantage of none of them. Defendant's own inactions and not the actions of the court in enforcing its own valid processes resulted in a failure to have the case heard on the merits or any deprivation or loss of property. There is no showing that defendant was punished for failure to do something it could not do. Defendant's counsel's unverified, unsworn statement at

oral argument is insufficient response to an order to produce. The general replies originally made to interrogatories and requests for production also present insufficient excuses for not heeding the order. Amplification and explanation is needed as to why no information on all but eleven of the thirty-seven accounts is the best information available. *See Norman v. Young*, 422 F. 2d 470 (10th Cir. 1970); Shuford, N.C. Practice § 37-10 (1975).

We also note that we have an incomplete record of the case before us. The default judgment was based in part on a request for admissions filed by plaintiff pursuant to G.S. 1A-1, Rule 36 which defendant had not admitted or denied. The trial court deemed the matters admitted as defendant had neither answered nor objected to the request. This request for admissions was not included in the record on appeal but was made a part of defendant's petition for certiorari which was allowed after defendant let his time for perfecting the appeal expire. On examination, these admissions by defendant have more of an impact than his refusal to produce the documents. By failing to respond, he has admitted every essential element of plaintiff's claim except the actual amount plaintiff is entitled to for his services.

In summary, we discern no abuse of discretion on the part of the trial court. Rather, we are presented with a defendant who committed dilatory, inconsiderate and reprehensible abuse of the discovery process for which it was justly sanctioned. Defendant was not denied due process of law.

Affirmed.

Chief Judge MORRIS and Judge ARNOLD concur.

IN THE MATTER OF THE WILL OF DAVID EVANS

No. 794SC833

(Filed 1 April 1980)

Wills § 15— caveat—statute of limitations—no tolling for intrinsic fraud—failure to show extrinsic fraud

The trial court did not err in allowing propounder's motion to dismiss a caveat as not having been brought within the three year statute of limitations

pursuant to G.S. 31-32 since the will was admitted to probate in 1972; the caveat was filed in 1978; intrinsic fraud would not toll the time limitation; the only extrinsic fraud alleged by caveators was that propounder misled them as to the contents of the will; the contents of the will were discoverable as a matter of public record from the time of probate; and caveators alleged no fact tending to show an interference with their right to attack the will by caveat.

APPEAL by caveators from *Strickland, Judge*. Order entered 2 March 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals 7 March 1980.

On 24 April 1972 a paper writing dated 26 January 1970 purporting to be the Last Will and Testament of David Evans was admitted to probate in common form in the office of the Clerk of Superior Court of Onslow County. Sudie Evans, the widow of David Evans, was appointed administratrix, C.T.A. On 20 July 1978, the caveators, daughters of the testator, filed this proceeding to caveat said will. The caveators alleged that said purported will was not the last will and testament of David Evans in that (a) said will was executed at a time when David Evans was mentally and physically incapable of executing a will and (b) that the purported will was signed by David Evans in the absence of the purported witnesses. Caveators further alleged that the purported will was presented to court with intent to perpetrate a fraud upon the court and heirs of David Evans; that the appointment of Sudie Evans as administratrix, C.T.A., was improper; that at the purported probate of the estate the caveators were led to believe that the purported will devised the property to the widow and all the children of the deceased; that the caveators did not investigate the will until the widow sought to dispose of the property; that the deceased's son, David N. Evans, misled the widow and the caveators and that his misleading constitutes fraud.

On 30 August 1978, David N. Evans, the propounder of the will, filed a motion to dismiss the caveat proceeding on the ground that the caveat proceeding was not filed within three years after the probate of the will as required by G.S. 31-32. On 11 October 1978 the caveators filed a response to the propounder's motion to dismiss wherein they alleged that the cause of action should be deemed to accrue from the time the fraud was known or should have been discovered in the exercise of due

diligence; that the caveators discovered the fraud on 8 November 1977, that the caveat was filed within three years of this discovery and that the issue of the running of the statute of limitations based on the question of fraud is a jury issue.

On 2 March 1979, the court allowed the propounder's motion to dismiss the caveat pursuant to G.S. 31-32. Caveators appealed.

Bailey, Raynor & Erwin, by Frank W. Erwin, for appellant-caveators.

Beaman, Kellum, Mills & Kafer, by James C. Mills and George M. Jennings, for appellee-propounder.

MARTIN (Robert M.), Judge.

The caveators' sole assignment of error is whether the trial court erred in allowing the propounder's motion to dismiss the caveat as not having been brought within the three year statute of limitations pursuant to G.S. 31-32. G.S. 31-32 provides in pertinent part:

> At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: . . .

The time limitation contained in G.S. 31-32 has been held to be a "substantive" limitation on the right of action.

> As the statute permitting caveats is in derogation of the common law, it must be strictly construed. (Citations omitted)
>
> In enacting the statute as it now exists, the Legislature intended to circumscribe the right rather than limit the remedy . . . G.S. 31-32. This constitutes a statutory grant of a right. The time provision is more than a mere limitation which may be waived by the parties. It is a condition attached to the right. Hence, upon the expiration of the seven-year [now three year] period specified in the Act, the right ceases to exist.

In re Will of Winborne, 231 N.C. 463, 466-67, 57 S.E. 2d 795, 799 (1950). *See generally* 51 Am. Jur. 2d Limitation of Actions § 15.

The general rule is that when a statute creating the right to contest a will and imposing a limitation of time therefor is construed as affixing an inseparable condition to the exercise of the right, that period so limited will not be tolled by fraud other than extrinsic fraud which would vitiate the probate proceeding. A contest not timely instituted based on other than extrinsic fraud is wholly barred although by reason of the wrongful conduct of the propounder, the contestants were not apprised of the situation soon enough to comply with the limitation requirement. Annot., 15 A.L.R. 2d 500, 515 (1951), 80 Am. Jur. 2d Wills § 885 (1975).

North Carolina is in accord with the general rule that intrinsic fraud will not toll the time limitation. In *In re Johnson*, 182 N.C. 522, 109 S.E. 373 (1921) after the statutory time had expired, the caveator contested the validity of the will on the grounds that the will was not executed at the time it was purported to be executed but was executed when testatrix was mentally incapable of making a valid will and that the alleged will was either an outright forgery or procured by the fraud of the propounder. In *Johnson* the caveator earnestly insisted, as do the caveators here, that in actions grounded on fraud the statutory period should commence to run only from the time when the caveator became aware of the essential facts. The Supreme Court held that ". . . the statute makes no such exception, and we are not allowed to make this addition to the statutory provisions." *Id.* at 527, 109 S.E. at 376. 3 Bowe-Parker, Page on Wills § 26.47 (rev. 3d ed. 1961).

The crucial question then is whether the allegations in the complaint and in response to the motion to dismiss constitute intrinsic or extrinsic fraud. Intrinsic fraud arises within the proceeding itself and concerns some matter involved in the determination of the cause on its merits. 8 Strong's North Carolina Index 3d, Judgments, § 27.1 (1977). In applying this principle to the probate of a will, the question of fraud in obtaining the execution of the will, undue influence, forgery, and the like may be submitted to the probate court in a direct attack on the will by caveat. Fraud of this nature is intrinsic fraud. 3 Bowe-Parker, Page on Wills § 26.20 (rev. 3d ed. 1961). Extrinsic fraud, on the

other hand, relates to the manner in which the judgment is procured. It must relate to matters not in issue and prevent a real contest in the trial. 8 Strong's North Carolina Index 3d, Judgments, § 27 (1977). Fraud practiced directly on the party seeking relief from the probate judgment which prevented him from presenting his case to the court is extrinsic fraud. *Johnson v. Stevenson*, 269 N.C. 200, 152 S.E. 2d 214 (1967). We note that a judgment can be attacked for extrinsic fraud only by independent action. *Id.* at 205, 152 S.E. 2d at 218.

In the case *sub judice*, the mental and physical capacity of the testator and administratrix, as well as the circumstances surrounding the signing of the will were known or should have been known to the caveators at the time of probate. Caveators were notified of the probate proceeding and of the appointment of their mother as administratrix. The caveators do not claim that the propounder misled them on either the capacity of testator and administratrix or on the execution of the will, the grounds on which caveators now seek to challenge the will. Any fraud relating to the validity of the will or the presentation of the will by the propounder to the court constitutes intrinsic fraud, as in *In re Johnson*, 182 N.C. 522, 109 S.E. 2d 373 (1921) and does not toll the statute of limitations.

The only alleged fraud practiced directly upon the caveators is that the propounder misled them as to the contents of the will. As a result of this misleading, the caveators ". . . did not undertake the investigation until the widow of the deceased sought to dispose of the property . . ." and caveators " . . . made no attempt to inquire into the specific status of said purported will or property." Aside from the fact that the contents of the will were discoverable as a matter of public record from the time of probate on 24 April 1972, it is apparent from the deposition of Mrs. Evans, the administratrix and mother of the caveators, that she knew enough of the contents of the will from the time it was executed to know the caveators were to receive a sum of money instead of the property. Caveators were not prevented from learning of the contents of the will. Caveators have alleged no fact tending to show their right to attack the will by caveat was interfered with.

Caveators secondly argue that the issue of whether or not the caveat was barred by G.S. 31-32 is a factual issue which can

be determined only by a jury. The caveators' reliance upon *In re Johnson*, 182 N.C. 522, 109 S.E. 373 (1921) in support of their argument is misplaced. In *Johnson* the issue of whether the caveat was barred by the statute of limitations was tried by the court with the consent of the parties not by the jury. *Id.* at 524, 527, 109 S.E. 2d at 374, 375. We note that our statement in *In re Spinks*, 7 N.C. App. 417, 425, 173 S.E. 2d 1, 6 (1970), that the question of *devisavit vel non*, as well as the question of the statute of limitations, was decided by the jury in *Johnson* is in error.

The fact that the parties in *Johnson* consented to the trial of the limitations issue by the court is not controlling as that issue was properly tried by the court as a matter of law. "While ordinarily whether a cause is barred by the apposite statute of limitations is a mixed question of law and fact, where the facts are admitted or established the question of the bar of the applicable statute pleaded becomes a question of law, and when such facts disclose that the action is barred the court may sustain the plea and dismiss the action." 8 Strong's N.C. Index 3d, Limitation of Actions, § 18 (1977). Since the facts in this case disclose that the caveat was barred by the three year statute of limitations, the court did not err in granting propounder's motion to dismiss the caveat proceeding.

Affirmed.

Judges CLARK and ERWIN concur.

LIONEL ROBERT McDONALD v. THE TRUSTEES OF FAYETTEVILLE TECHNICAL INSTITUTE

No. 7912DC500

(Filed 1 April 1980)

Master and Servant § 9; Colleges and Universities § 1— teacher at technical institute—resignation—action to recover salary

In plaintiff's action to recover his salary as an instructor at Fayetteville Technical Institute from 10 July 1976 to 23 August 1976, plaintiff was entitled to have his case submitted to the jury where his evidence tended to show that plaintiff last taught during the first session of summer school which ended on

9 July 1976; on that date plaintiff and the trustees of the Institute entered into a contract covering the period of 1 July 1976 through 30 June 1977; plaintiff resigned his teaching position on 23 August 1976; the parties intended that the acceptance of plaintiff's resignation would relieve plaintiff of his duty to teach and defendants of their duty to pay but did not intend to rescind other portions of their contract; and the contract entitled plaintiff to recover if his resignation did not take place prior to the commencement of the fall quarter, the first day of which was 23 August 1976.

APPEAL by plaintiff from *Cherry, Judge.* Judgment entered 22 February 1979 in District Court, CUMBERLAND County. Heard in the Court of Appeals 9 January 1980.

Plaintiff filed his complaint against defendants, the Trustees of Fayetteville Technical Institute (hereinafter Trustees), seeking payment of $828 for a salary for 23 days in August 1976 and leave to withdraw funds from his retirement account without further wrongful interference by the Trustees. In their answer, the Trustees alleged that plaintiff failed to comply with his contract with Trustees.

Plaintiff's evidence at trial tended to show that plaintiff worked as an instructor in business administration at Fayetteville Technical Institute from August 1971 through 9 July 1976 and signed written yearly contracts with the Trustees during this period. In July 1975, plaintiff signed a contract for a term of employment from 1 July 1975 through June 1976. The contract provided that plaintiff would work fall, winter, and spring quarters and one of two sessions of summer school. Plaintiff agreed to "discharge faithfully all of the duties imposed on faculty members of [sic] the Laws of North Carolina and the rules and regulations of the Board of Trustees of said Institution." In consideration of the agreement, the Trustees promised to pay plaintiff "for services rendered during the life of this contract the sum to which he is entitled." The contract further stated that "should this contract not be renewed by either party as of May 1 of the following year [1976], that said contract will be terminated as of May 31 of the year following the date of this contract [1976]." Pursuant to this contract, plaintiff taught the fall quarter of 1975, winter quarter of 1975-1976, and spring quarter of 1976. He also taught the first session of summer school which ran from 1 June 1976 or 9 July 1976. On 9 July 1976, plaintiff and the Trustees entered into a contract for the 1976-1977 school year. Said con-

tract was substantially the same as the prior contract except for an increase in salary and 15 days of annual leave. The beginning date of employment was 1 July 1976 and was to extend through 30 June 1977.

On 10 August 1976, plaintiff submitted his resignation from employment at the institute to be effective 10 September 1976. The fall quarter of 1976 began in August. Plaintiff admitted that he resigned his employment to go to work at Carolina Trace. On 23 August 1976, the beginning of the fall quarter 1976, plaintiff reported to the institute. He had not worked since 9 July 1976. When plaintiff arrived at the institute on 23 August 1976, he was summoned to the President's Office. Pursuant to a discussion with the president, plaintiff signed an offer of resignation to be effective the same day. The president accepted said offer on the same date. Several days later, plaintiff was told that he would not be paid for 9 July 1976 through the end of his resignation. On 24 August 1976, the dean of fiscal affairs of the institute wrote plaintiff that in accordance with school policy as set forth in the faculty handbook, plaintiff was overpaid from 10 July 1976 to 31 July 1976 in the net amount of $699.39. This amount was later recouped from plaintiff's retirement account. On cross-examination, plaintiff testified that he was not aware of the policy provisions attached as an exhibit to Trustees' answer until August 1976 and that he had been issued a faculty handbook each year. Plaintiff testified that during July and August, 1976, he was trying to learn about his new job at Carolina Trace but was not being paid.

At the conclusion of plaintiff's case, the Trustees moved for a directed verdict, which was allowed on the grounds that Trustees had not breached the contract of employment with plaintiff, but plaintiff had breached the contract. The court denied plaintiff's motion that the directed verdict be set aside and that he be granted a new trial. Plaintiff appealed.

Woodall & McCormick, by Edward H. McCormick, for plaintiff appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper, by L. Stacy Weaver, Jr., for defendant appellees.

ERWIN, Judge.

The ultimate question before us is the propriety of the trial court's entry of the directed verdict. To ascertain this answer, we must consider whether plaintiff's evidence when viewed in the light most favorable to him is sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

Plaintiff's letter dated 10 August 1976 provided in pertinent part:

"August 10, 1976

TO WHOM IT MAY CONCERN:

As of August 10, 1976, I offer my resignation as an instructor at Fayetteville Technical Institute to be effective one month hence, September 10, 1976.

Fayetteville Technical Institute has been very good to me as I hate leaving, but opportunities elsewhere force me to render my resignation at this time."

Defendant did not act upon plaintiff's letter until 23 August 1976. Thus, this letter is not the determining factor in disposing of this case in view of the events that follow.

After receiving plaintiff's letter, defendants' agent, the president of the institute, called plaintiff to his office and told plaintiff that he could resign as of that day. Plaintiff wrote a letter of resignation, which was accepted by Mr. Boudreau, the president of the institute, stating:

"August 23, 1976

TO WHOM IT MAY CONCERN:

This letter supercedes the letter dated August 10, 1976 whereby I resign my position at Fayetteville Technical Institute effective August 23, 1976."

This evidence, when viewed in the light most favorable to plaintiff, tends to show an offer by defendants and an acceptance by plaintiff creating a new contract between the parties, *i.e.*, to rescind the old one. It is clear that plaintiff and defendants in their execution of their new agreement intended to relieve plaintiff of

his duties to teach under the employment contract and to relieve defendants of their duty to pay under the same contract. It is not equally clear that the parties intended to totally rescind the agreement as to its other provisions.

To have the effect of a total rescission, a subsequent contract must either deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution, or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946). Neither requirement is met here. The original contract expressly provided that plaintiff was subject to the rules and regulations of the Board of Trustees of the institute. Plaintiff admitted that he knew that rules and regulations sometimes took the form of policy and that one of the ways in which those policies were enunciated to the faculty was through faculty handbooks. In the 1976 handbook, it was specifically stated that:

> "In the event an instructor under contract for the following school year is granted a leave of absence with pay and he either fails to honor such contract or resigns prior to commencement of the fall quarter for other than valid reasons, as determined by the President of the Institution, such absence will be classified as leave without pay and *he will be required to refund to the Institution all salary including matching funds paid to him during this period of absence.* Termination or failure to fulfill a contract to accept other employment will not be considered a valid reason." (Emphasis added.)

The subsequent agreement entered into by the parties does not expressly refer to, revoke, or rescind the provision, nor is it necessarily inconsistent with it. That the court is the proper determiner of the legal effect of a later instrument in our State was established in *Bank v. Supply Co., supra.* We hold that the provision is enforceable, because it still subsists. *See Bank v. Supply Co., supra.* We have no doubt that the 1976 contract governs the parties. Plaintiff's whole basis of recovery is based thereon, and plaintiff testified:

> "I have not been paid anything for the month of August, 1976. I have computed the amount that I contend is due me

to be $829.61. I divide 31 into $1,118.00 and then multiplied that times 3. The total of both of those figures, the $699.39 and the $829.61 comes to $1,529.00, and that is the amount that I contend is owed me by the Defendant."

The contract expressly covers the period in question. Even so, we believe that plaintiff was entitled to have his case submitted to the jury. His contract entitles him to recover if his resignation did not take place prior to the commencement of the fall quarter. Plaintiff's evidence tends to show that the first day of the fall quarter was 23 August 1976 and that he reported to work and subsequently submitted his resignation. This evidence, if believed, is sufficient to support a verdict for plaintiff, and the order entered below is

Reversed.

Judges CLARK and MARTIN (Harry C.) concur.

CYNTHIA MAHALEY HAND v. JAMES DAVID HAND

No. 7919DC992

(Filed 1 April 1980)

1. **Husband and Wife § 12— no reconciliation after separation—alimony provision not abrogated**

Plaintiff's evidence supported the trial court's determination that parties who had executed a separation agreement and consent judgment did not thereafter reconcile and resume marital cohabitation so as to abrogate defendant husband's duty under the agreement and judgment to pay alimony to plaintiff wife where plaintiff testified that she went back to live in the parties' trailer after she had a baby; defendant moved back into the trailer for a while to help her with the baby; defendant slept on the couch every night and they did not have sexual relations; the parties ate their meals in the trailer, took turns caring for the baby, and on one occasion went to church together; plaintiff at no time told defendant she would take him back as her husband; and defendant was making his alimony payments while living at the trailer.

2. **Husband and Wife § 12— reconciliation after separation—consent of the parties**

The issue of the parties' mutual consent is an essential element in deciding whether the parties have reconciled and resumed cohabitation when the evidence is conflicting.

Hand v. Hand

APPEAL by defendant from *Faggart, Judge.* Judgment entered 18 June 1979 in District Court, ROWAN County. Heard in the Court of Appeals 7 March 1980.

Plaintiff and defendant entered into a separation agreement on 19 October 1978 which required defendant to pay plaintiff, who was then pregnant, $60.00 each week plus an additional $50.00 per week until she was able to return to work. A child was born to the parties on 1 January 1979.

On 30 April 1979, plaintiff filed a motion for custody of the parties' minor child, for child support, and for medical expenses incurred due to the birth of the child. The relief prayed for was granted by the trail court in a consent decree. Plaintiff subsequently filed a motion for issuance of an order to show cause why defendant should not be held in contempt for failing to comply with the alimony provisions of the 19 October 1978 order. In his answer, defendant asserted as a defense:

> "IV. That the parties reconciled on two occasions after the Order was entered on October 19, 1978; that the parties condoned the prior separation of the parties by the reconciliation and any support provided thereafter was not a matter of obligation under the prior court order, but was a matter between the plaintiff and defendant."

After hearing the parties' evidence, the trial court made the pertinent findings of fact:

> "2. That as of the date of filing of plaintiff's Motion for contempt, defendant was in arrears in said payments in the amount of $170.00.
>
> EXCEPTION NO. 1
>
> 3. That as of the date of hearing of this cause, defendant is in arrears in said payments in the amount of $350.00.
>
> EXCEPTION NO. 2
>
> * * *
>
> 7. That the defendant has failed to show a resumption of the marital relationship between the plaintiff and the defendant at any time since the entry of said Order.
>
> EXCEPTION NO. 3

8. That the defendant's failure to make payments according to the terms of said Order has been wilful and without legal justification or excuse.

EXCEPTION NO. 4"

Based upon these pertinent findings of fact, the trial court concluded:

"1. That there has been no reconciliation of the parties hereto or condonation by the plaintiff at any time since entry of said Order.

EXCEPTION NO. 5

2. That the Order of this Court entered on October 19, 1978 is and remains valid and in full force and effect and is and has been valid and of full force and effect since the date of its entry.

EXCEPTION NO. 6

3. That the defendant is in wilful contempt of this Court for his failure to abide by the terms of the said Order.

EXCEPTION NO. 7"

From entry of an order adjudging him in civil contempt, defendant appeals.

No counsel for plaintiff appellee.

Robert M. Davis, for defendant appellant.

ERWIN, Judge.

[1] Defendant's evidence presented at trial tended to show the following.

The parties executed their separation agreement on 19 October 1978. On or about 1 December 1978, the parties resumed their marital relations for one week. Thereafter, they lived separate and apart until 8 March 1979, when they lived together in their trailer until 23 March 1979. During this period, they had sexual intercourse, went to church together on one occasion, and went shopping for an automobile. Some nights, he slept with plaintiff; on other nights, he slept on the couch.

Plaintiff's evidence tended to show that after 1 December 1978, she resided with her parents in Winston-Salem until the baby was born. She went back to live in the trailer at defendant's suggestion. Defendant came by to see the baby one day when the baby was sick; he agreed to help with the baby who was up a lot at night. On several occasions, defendant stayed until 11:00 p.m., and it was not too big a change for defendant to sleep there, and defendant moved back into the trailer. Defendant was making his payments while he was in the trailer. He slept on the couch every night, and they did not have sexual relations. At no time did she tell defendant she would take him back as her husband. They ate their meals in the trailer. They took turns caring for the child, and on one occasion, they went to church together. Defendant worked third shift.

[2] Defendant's entire appeal hinges on the determination whether he and plaintiff had reconciled and resumed their marital cohabitation. Where such a reconciliation and resumption of cohabitation has taken place, an order or separation agreement with provisions for future support and an agreement to live apart is necessarily abrogated. *Hester v. Hester*, 239 N.C. 97, 79 S.E. 2d 248 (1953); 2 Lee, North Carolina Family Law, § 200 (3rd ed. 1963), p. 420.

In *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976), our Supreme Court held that when separated spouses who have executed a separation agreement resume living together, they hold themselves out as man and wife in the ordinary meaning of that phase, and irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinds their separation agreement insofar as it has not been executed; and further, a subsequent separation will not revive the agreement. In reaching its holding, the Court quoted from *Dudley v. Dudley*, 225 N.C. 83, 86, 33 S.E. 2d 489, 491 (1945), where Justice Denny (later Chief Justice) reasoned in pertinent part:

> " 'Marriage is not a private affair, involving the contracting parties alone. Society has an interest in the marital status of its members, and when a husband and wife live in the same house and hold themselves out to the world as man and wife, a divorce will not be granted on the ground of

separation, when the only evidence of such separation must, in the language of the Supreme Court of Louisiana (in the case of *Hava v. Chavigny*, 147 La. 331, 84 So. 892) "be sought behind the closed doors of the matrimonial domicile." Our statute contemplates the living separately and apart from each other, the complete cessation of cohabitation.' "

291 N.C. at 392, 230 S.E. 2d at 546. This language, standing alone, would indicate that the actual intention of the parties to resume their marital cohabitation is not relevant to determining a resumption of the marital relationship. Later in its opinion, however, the Supreme Court indicates that the posture of the case being decided was the essential determinant:

"All the evidence offered by appellees in support of their motion for summary judgment and by appellants in opposition to it, tends to show that after the execution of the separation agreement and consent judgment on 20 December 1973, Mrs. Adamee returned to the marital home which she and Adamee had occupied prior to the separation; that thereafter the commissioners named in the consent judgment to sell the couple's joint property for division were instructed not to do so; that Adamee paid Mrs. Adamee's attorney for representing her in the litigation between them; and that from January 1974 until Adamee's death on 20 August 1974, he and Mrs. Adamee lived together continuously in their marital residence. Therefore, no issue arose for either judge or jury to decide as to their resumption of marital relations. As a matter of law they had done so.

It follows that Judge Braswell correctly denied appellees' motion for summary judgment but that he erred in refusing to affirm the clerk's order that Mrs. Adamee is entitled to qualify as administratrix of the estate of Adamee and share in his estate as his widow without prejudice by reason of the separation agreement and consent judgment of 20 December 1973. It also follows that the Court of Appeals erred when it affirmed Judge Braswell's judgment.

In its consideration of this case the Court of Appeals began with the assumption that the appeal involved a disputed fact, that is, whether a reconciliation and resumption of marital relations had actually occurred between

Adamee and Mrs. Adamee. We, however, have viewed and decided the case as presenting a question of law arising upon undisputed facts."

Id. at 393, 230 S.E. 2d at 546-47. Thus, we believe that our statement in *Newton v. Williams*, 25 N.C. App. 527, 532, 214 S.E. 2d 285, 288 (1975), that "[t]he issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation" is still the rule where the evidence is conflicting.

Where the trial judge sits as judge and juror, his findings of fact " 'have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. . . .' " *Laughter v. Lambert*, 11 N.C. App. 133, 136, 180 S.E. 2d 450, 452 (1971). Credibility, contradictions, and discrepancies are all matters to be resolved by the trier of the facts. *Laughter v. Lambert, supra.* Since there is competent evidence to support the trial court's findings of facts and these in turn support its conclusions of law, the order entered thereupon is

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

CAROLINA WIRE & CABLE, INC. v. GREGORY J. FINNICAN AND PERCIVAL'S, INC.

No. 7926SC658

(Filed 1 April 1980)

Fraud § 9; Contracts § 25.1— lease with option to purchase—fraud and breach of contract alleged—sufficiency of complaint

In an action for fraud and breach of contract where plaintiff's complaint set forth in considerable detail the factual aspects of its dealings with defendants concerning a lease, an option to purchase, and plaintiff's alleged damages, the trial court erred in dismissing plaintiff's complaint for failure to state a claim for relief, and the fact that the full extent of plaintiff's damages might be a matter of some speculation was no basis for the trial court to have denied plaintiff any relief by dismissing its complaint.

APPEAL by plaintiff from *Lewis, Judge*. Judgment entered 3 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 February 1980.

In its first claim for relief, plaintiff alleges that it had informed defendants that it was only interested in leasing property on which it could obtain an option to purchase. Plaintiff maintains that defendant Finnican, as defendant Percival's employee and agent, induced plaintiff to enter into a sublease of premises located at 100 Brookford Drive in Mecklenburg County. Plaintiff avers that Finnican represented to it that plaintiff would be able to obtain an option to purchase the property at a price not to exceed $725,000 and that Finnican had assured plaintiff that he had secured this option from the property's owner. The sublease was executed by the parties on or about 7 October 1977. The option to purchase was not delivered prior to the time of execution, plaintiff alleging that defendant Finnican had promised that although the option had not yet been executed by the owner, it would be delivered promptly. Thereafter, plaintiff maintains that it made repeated requests of Finnican to deliver the option and received Finnican's repeated assurance that it would be delivered promptly. Plaintiff also maintains that it received such an assurance from one of Finnican's supervisors at Percival's.

Plaintiff avers that in late October or early November 1977, defendant Finnican advised it that there was difficulty in obtaining the option, later informing plaintiff that the option would not be forthcoming. According to plaintiff, the representations which Finnican allegedly made regarding the availability of the option were materially false, and were made with knowledge of their falsity or with reckless indifference as to their truth or falsity, with intent that plaintiff should rely on them. Plaintiff states that it relied on these representations to its damage.

In its second cause of action, plaintiff alleges negligence on the part of defendant Finnican, as an employee and agent of defendant Percival's, in failing to obtain the option to purchase which it had promised. In its third cause of action, plaintiff avers that defendant Percival's breached its contract with plaintiff to obtain the option to purchase.

Plaintiff seeks damages for expenses it has incurred in preparing the leased premises for occupancy, lost profits during

the moving of its operations to the leased premises, and additional moving expenses it anticipates it will incur and lost profits which will result when the lease expires. Plaintiff also seeks damages for the additional cost of acquiring property which it could lease and eventually purchase comparable to the Brookford Drive property—the benefit of the bargain.

Defendants moved to dismiss plaintiff's action under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Defendant Finnican answered plaintiff's complaint, admitting that with regard to the transactions set forth in the complaint, he was acting as the employee and agent of defendant Percival's and within the scope and course of his employment. Defendant Finnican also admitted that he discussed the option to purchase with plaintiff and that after the lease had been executed, he informed plaintiff that the option could not be obtained. All of the other material allegations of plaintiff's complaint remain in dispute. From the trial court's judgment granting both defendants' Rule 12(b)(6) motions, plaintiff appeals.

William H. Ashendorf for the plaintiff appellant.

Paul L. Whitfield and Rodney W. Seaford, for defendant appellee Gregory J. Finnican.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins III, for defendant appellee Percival's, Inc.

WELLS, Judge.

Plaintiff has brought forward only one exception and only one question for our review: Did the trial court err in ruling that plaintiff's complaint failed to state a claim upon which relief could be granted?

Under the notice theory of pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of *res judicata*, and to show the type of case brought. *RGK, Inc. v. Guaranty Co.*, 292 N.C. 668, 235 S.E. 2d 234 (1977); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. The rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Sutton v. Duke, supra; Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E. 2d 640 (1979), *disc. rev. denied*, 298 N.C. 305, 259 S.E. 2d 918 (1979). For the purposes of ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978).

There seems to be no doubt here as to the sufficiency of the complaint. Plaintiff has not rested on bare-bones notice, but has set forth in considerable detail the factual aspects of its dealings and transactions with the defendants concerning the lease, the option, and plaintiff's alleged damages. The complaint provides both defendants with ample notice to enable them to respond and prepare their defenses. We also believe that plaintiff's claim for fraud has been pleaded with sufficient particularity to comply with Rule 9(b). *See, Coley v. Bank*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979).

Defendants argue that plaintiff has set out no basis for substantive relief. We disagree. At the very least, the complaint states sufficient material allegations against both defendants upon which the jury might find actual fraud, *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261 S.E. 2d 99 (1980); constructive fraud, *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E. 2d 256 (1963); and against defendant Percival's, Inc. for breach of contract, *RGK, Inc. v. Guaranty Co., supra.*

Defendants argue that plaintiff's complaint must be dismissed because the damages claimed are too speculative to measure. If it is true that the defendants induced plaintiff to enter into the lease by promising that plaintiff would receive an option to purchase on the property, it could be presumed that plaintiff would incur at least some damages, *e.g.* the value of the option as well as some incidental relocation expenses. While a trial may reveal that some of the damages which plaintiff demands are so speculative that they may not be recovered, it

does not seem to us that all of plaintiff's damages are, by their nature, so speculative as to require that its suit be dismissed at this stage. The fact that the full extent of plaintiff's damages may be a matter of some speculation is no basis for the trial court to have denied plaintiff any relief by dismissing its complaint. *Pipkin v. Thomas & Hill, Inc.*, 298 N.C. 278, 258 S.E. 2d 778 (1979). If plaintiff can prove its claim for fraud or breach of contract, it would be entitled to recover all damages as it can prove at trial it has already suffered, or that it reasonably expects to incur. *Id.*

For the reasons stated, the judgment of the trial court as to both defendants must be

Reversed.

Judges MARTIN (Robert M.) and ERWIN concur.

TRIDYN INDUSTRIES, INC. v. AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 7918SC791

(Filed 1 April 1980)

1. **Courts § 9.3— amendment of pleadings—consent judgment affected**

The power of a superior court to allow an amendment to pleadings may not be exercised so as to upset or destroy the efficacy of a validly entered and jurisdictionally sound consent decree.

2. **Courts § 9.3; Judgments § 8— consent judgment—striking defense—amendment to reassert defense improperly allowed**

A superior court judge erred in allowing defendant to amend its answer to reassert the defense of lack of timely notice of a claim, which plaintiff wanted defendant insurer to defend and pay, where the parties had earlier agreed to a consent judgment striking the late notice defense, since the judge contravened the rule that one superior court judge may not modify, overrule, or change the judgment of another superior court judge in the same action, and since the consent judgment was the binding contract of the parties which could not be modified without the parties' consent.

APPEAL by plaintiff from *Mills, Judge*. Judgment entered 29 June 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 4 March 1980.

Plaintiff originally instituted this suit by the filing of an amended complaint on 17 November 1975 wherein it alleged that defendant had issued it a comprehensive general liability insurance policy on 10 December 1971, but had subsequently failed to defend it against and thereafter to pay certain claims made against plaintiff by two construction companies to whom it had allegedly sold defective products. [A more complete statement of the facts involved in the underlying claims is set out in the opinion of our Supreme Court in an earlier appeal of this case, reported at 296 N.C. 486, 251 S.E. 2d 443 (1979)]. The defendant answered the original complaint and sought to assert, *inter alia*, two alternative defenses to the action: (1) The policy did not provide coverage for the claims made against plaintiff, or (2) if it did, plaintiff failed to give defendant timely notice of the claims.

On 22 March 1977 plaintiff moved for a "Partial Summary Judgment" as to defendant's assertion of plaintiff's failure to give timely notice as a defense, on the ground that the defendant had waived the late notice defense by otherwise denying coverage. Thereafter, the parties agreed that the late notice defense should be stricken, and a Consent Order striking that portion of defendant's answer was entered on 16 May 1977.

Both plaintiff and defendant then moved for summary judgment on the issue of liability. By a judgment dated 3 May 1978, the trial court, after concluding that the policy did cover the claims against plaintiff, allowed plaintiff's motion for partial summary judgment on the issue of liability, denied defendant's motion, and ordered a further proceeding to determine "the amount of damages suffered by plaintiff by reason of reasonable attorneys' fees, costs, expenses, and judgment and settlement amounts incurred and paid by plaintiff" resulting from the claims brought against plaintiff by the construction companies.

The defendant appealed. This Court dismissed the appeal, and the Supreme Court, per Justice Exum, affirmed, holding that a partial summary judgment on the issue of liability alone, which reserved for trial the issue of damages, was not a final judgment and therefore was not immediately appealable. *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

Upon the dismissal of its appeal, the defendant on 26 March 1979 moved to amend its Answer in order to reassert its defense of late notice. On 11 April 1979 Judge Collier entered an Order allowing the motion to amend. Plaintiff opposed the motion and duly excepted to the entry of the Order allowing it.

Defendant then moved for summary judgment on the issue of liability based on plaintiff's failure to give timely notice and filed affidavits in support thereof. On 29 June 1979 Judge Mills granted the motion and entered summary judgment for defendant. Plaintiff appealed.

Turner, Enochs, Foster & Burnley, by E. Thomas Watson, for the plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Michael E. Kelly, for the defendant appellee.

HEDRICK, Judge.

Based on three exceptions duly noted in the record, plaintiff assigns as error Judge Collier's Order dated 11 April 1979, allowing the defendant to amend its Answer to reassert the defense of lack of timely notice, and Judge Mills' Judgment of 29 June 1979, allowing the defendant's motion for summary judgment. We agree with plaintiff, for the reasons to follow, that both the Order and the Judgment were erroneously entered.

[1, 2] First, the actions of Judge Collier and Judge Mills contravene the well-established rule in this State that "no appeal lies from one Superior Court judge to another; . . . and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972); 3 Strong's N.C. Index 3d, *Courts* § 9 (1976). In the matter before us, Judge Collier's Order allowing the defendant to amend its answer results in the modification of the Consent Order entered by Judge Walker on 16 May 1977. Furthermore, his action paved the way for Judge Mills to overrule the summary judgment entered by Judge Wood on 3 May 1978. While a judge does have the power to modify interlocutory orders of another judge upon a sufficient showing of changed conditions, Strong's, *supra* at § 9.1; *accord, State v. Turner*, 34 N.C. App. 78, 237 S.E.

2d 318 (1977), the Consent Order entered in this case was a final adjudication that the defense of failure of notice would not be available to defendant in the subsequent determination of the issue of its liability, if any, to plaintiff. Equally as finally adjudicated and settled was the essential issue of liability when Judge Wood entered summary judgment for the plaintiff as to that issue, despite the fact that the question of damages remained to be tried. Although it is true that the allowance of amendments to pleadings "is an inherent and statutory power of superior courts which they may ordinarily exercise at their discretion", *N. C. State Highway Commission v. Asheville School, Inc.*, 5 N.C. App. 684, 693, 169 S.E. 2d 193, 199 (1969), *aff'd.*, 276 N.C. 556, 173 S.E. 2d 909 (1970); G.S. § 1A-1, Rule 15(a), the power is not unlimited. We are of the opinion and so hold that the power may not be exercised so as to upset or to destroy the efficacy of a validly entered and jurisdictionally sound consent decree.

Secondly, we think Judge Collier was without authority to allow the amendment to defendant's answer for the reason that the Consent Order of 16 May 1977, which was rendered feckless by the amendment, was and remains the binding contract of the parties, entered into with the approval and sanction of the court, which thereafter could not be modified without the parties' consent except upon a showing of fraud or mistake. 2 McIntosh, N.C. Practice and Procedure 2d, *Consent Judgment* § 1684 (1956); *King v. King*, 225 N.C. 639, 35 S.E. 2d 893 (1945); *N. C. State Highway Commission v. Asheville School, Inc., supra. See also* 8 Strong's N.C. Index 3d, *Judgments* § 10 (1977). Generally, a judgment or order entered by consent is conclusive on the matters it determines and precludes the parties "from maintaining an action upon any claim within the scope of [their] compromise and settlement, although such claim was not in fact litigated in the suit in which the judgment or decree was rendered." 47 Am. Jur. 2d, *Judgments* §§ 1091, 1092 at 149 (1969). The defendant in this case has neither alleged nor attempted to demonstrate that fraud or mistake induced it to enter into the consent order wherein it, in effect, agreed to forego its defense of the suit on the ground that plaintiff had failed to give timely notice. Rather, it argues that a "clarification" of the law respecting the capacity to plead both non-coverage and failure of notice resulted from the decision of this Court in *Taylor v. Royal Globe Insurance Co.*, 35 N.C. App.

150, 240 S.E. 2d 497, *cert. denied*, 294 N.C. 739, 244 S.E. 2d 156 (1978), handed down after it entered into the consent decree. Defendant contends that the resulting "clarification" represents a sufficient change of conditions for Judge Collier to allow the amendment.

This argument misses the mark by a wide margin. First, although we express no opinion on whether the decision in *Taylor* clarified the particular point of law, we emphasize our opinion that the consent order was a final and binding decree, and, therefore, the rules of law regarding the existence of changed conditions so as to permit one Superior Court judge to overrule interlocutory orders of another judge, have no application. Moreover, neither a subsequent change in the law, nor counsel's misconstruction of the law at the time the consent order was entered, is a ground for setting aside the order. *See Roberson v. Penland*, 260 N.C. 502, 133 S.E. 2d 206 (1963).

What we have in this case is the defendant's attempt, by seeking to amend its pleading, to resurrect and redetermine a matter which it agreed to remove from consideration. Furthermore, its success with Judge Collier thereafter allowed it to reopen for relitigation the issue of liability which had already gone to judgment in one Superior Court. Under the circumstances of this case, that judgment was properly reviewable only on appeal, after the question of damages had been tried, and not by another trial judge.

In our opinion, the inviolable principles of practice and procedure to which we have referred throughout this decision preclude defendant from escaping the effect of the Consent Order entered by Judge Walker on 16 May 1977. The summary judgment entered for plaintiff on the issue of liability, dated 3 May 1978, stands.

The result is: The Order of Judge Collier dated 11 April 1979 allowing defendant to amend its Answer is vacated. The summary judgment entered for defendant by Judge Mills on 29 June 1979 is likewise vacated, and the cause is remanded to the Superior Court for further proceedings in accordance with this Opinion.

Vacated and remanded.

Judges WEBB and WELLS concur.

CHARLES M. BEE v. YATES ALUMINUM WINDOW CO., INC. AND VIRGINIA MUTUAL INS. CO.

No. 7910IC692

(Filed 1 April 1980)

Master and Servant §§ 56, 60.1— workmen's compensation—riding motorcycle from job site to employer's shop—whether accident arose out of and in course of employment

A decision by the Industrial Commission as to whether plaintiff employee's injury by accident while riding his motorcycle from the job site to the employer's shop arose out of and in the course of his employment should have been based on whether the trip itself was for the employer's benefit rather than on whether plaintiff's mode of travel benefitted the employer. The cause is remanded for proper findings of fact where a finding that the trip was made necessary by plaintiff's employment, although plaintiff was also serving a purpose of his own, would have been supported by evidence that it became necessary for employees at plaintiff's job site to go back to the employer's shop to pick up some materials for the afternoon's work, that plaintiff wanted to ride his motorcycle and leave it at the shop because he had an errand to run in town after work and because it was supposed to rain, and that the three members of plaintiff's work crew agreed that plaintiff would ride his motorcycle to the shop and meet the other two members who were going in the supervisor's truck; and where a contrary finding that plaintiff was not required to make the trip at all would be supported by the testimony of plaintiff's supervisor that it was not necessary for the entire crew, consisting of the supervisor, plaintiff and a third man, to travel with the supervisor to pick up the materials.

APPEAL by plaintiff from the Full Industrial Commission. Opinion filed 9 May 1979. Heard in the Court of Appeals 7 February 1980.

The parties stipulated that the sole question for hearing before the Industrial Commission was whether plaintiff's injuries arose out of and in the course of his employment. The Deputy Commissioner found that they did not, and denied plaintiff's claim. The Full Commission found that the Commissioner's findings were supported by the evidence, and adopted his findings and award as its own.

The evidence presented can be summarized as follows: On the day of his injury plaintiff was employed by defendant Yates Aluminum Window Company as an installer of aluminum siding and gutters. That morning he rode his motorcycle directly to the

job site in Clemmons, since it was near his home. Usually he met other employees at the office in downtown Winston-Salem, and they all rode to a job site in his supervisor's truck.

It became necessary that day for employees from plaintiff's job site to go back to the shop to pick up some materials for the afternoon's work, and the three members of the crew agreed that plaintiff would ride in on his motorcycle and meet the other two, who were going in the truck. Plaintiff decided to ride his motorcycle and leave it at the shop for the afternoon because he had an errand to run in town after work, and also because it was supposed to rain and he thought it would be better to leave the motorcycle at the shop rather than at the job site.

The two employees in the truck took Interstate 40 into town, and plaintiff took Highway 158, an equally direct route which he chose because the traffic on it was lighter. On his way to the shop plaintiff was involved in a collision and injured.

From the ruling that his injury did not arise out of and in the course of his employment, plaintiff appeals.

Harper & Wood, by William Z. Wood, Jr., for plaintiff appellant.

Perry C. Henson, Jr. for defendant appellees.

ARNOLD, Judge.

Plaintiff assigns error to the Commissioner's Finding of Fact 12, and the conclusion he drew from it. The Commissioner found: "The plaintiff wished to ride the motorcycle to the shop for purely personal reasons, the plaintiff having some personal errands to perform following work that evening. In addition, it appeared that it might rain that day and the plaintiff felt his motorcycle would be better off at the shop." From this finding, the Commissioner concluded that plaintiff's injury did not arise out of and in the course of his employment. Plaintiff asserts that this finding and the resulting conclusion are not based on competent evidence.

We find, first of all, that there is ample evidence to support the Commissioner's finding that plaintiff's choice of the motorcycle as his mode of travel back to his employer's shop was made

for purely personal reasons. There is no evidence that any purpose of the employer was served either directly or indirectly by plaintiff's taking the motorcycle instead of riding in the truck with the other employees. The Commissioner, in his opinion, made clear his view that the question in the case was not "the necessity for travel, but whether the use of his motorcycle by the plaintiff was in furtherance of the performance of an express or implied duty connected with employment." Taking this view of the case, the only conclusion the Commissioner could have reached from his Finding of Fact 12 was that plaintiff was not injured in the course of his employment.

We believe, however, that the question which the Commissioner should have addressed is not whether the plaintiff's mode of travel benefitted the employer, but whether the trip plaintiff was making was for the employer's benefit. We have found no case which, on facts such as these, has rested the determination of whether an injury arose out of employment on the mode of travel of the employee. In *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608 (1962), our Supreme Court affirmed the Commission's determination that the injury there arose out of and in the course of employment, though the plaintiff was injured while riding in his personal car when he could have been riding in the employer's truck. The court said: "[T]he return trip to the place of business of the employer . . . constituted a substantial part of the services for which the plaintiff was employed. We hold that under the facts of this case, the transfer of this employee from the truck of his employer to his automobile in order that he might have it so that he could return home after he made his required report at the office of his employer, did not constitute a distinct departure on a personal errand. . . . No detour was involved. . . . When the collision occurred, the plaintiff was proceeding on [the] direct route to the place of business of his employer." *Id.* at 180, 123 S.E. 2d 611-12; see also *McManus v. Chick Haven Farms*, 4 N.C. App. 177, 166 S.E. 2d 526 (1969). In the instant case, the plaintiff had transferred from his supervisor's truck to his personal vehicle, and was on a direct route to his employer's shop at the time he was injured. The question which remains for the Commissioner is whether the trip itself was part of the plaintiff's employment.

The test to be applied where it appears that the employee may have had both personal and business purposes in making the trip is set out in *Humphrey v. Quality Cleaners & Laundry*, 251 N.C. 47, 51, 110 S.E. 2d 467, 470 (1959): " 'We do not say that the service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief in this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own.' " In the present case, the Commissioner, believing that plaintiff's mode of travel was the determinative factor, did not address himself to whether the trip itself was made necessary by plaintiff's employment. There is substantial evidence that it was, but there is also the testimony of plaintiff's supervisor that "[i]t was not necessary for the entire crew [consisting of the supervisor, plaintiff, and a third man] to travel with [the supervisor]" to pick up the additional supplies. This testimony would permit the inference that plaintiff was not required to make the trip at all. Since whether plaintiff's injury arose out of and in the course of his employment turns upon whether one of his purposes in making the trip was work-related, we must remand so that the Commissioner may make findings of fact on this question.

The order of the Commission is

Vacated and remanded.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. JULIUS BILL CARSON, JR.

No. 7923SC879

(Filed 1 April 1980)

1. Constitutional Law § 31— defendant not provided private investigator—no error

The trial court did not err in denying the indigent defendant's motion for appointment of a private investigator for assistance in locating alibi witnesses

since defendant's allegations and representations as to the identity of one of the witnesses were so vague as to suggest on their face that a search for him would be futile, and the whereabouts of the other witnesses were sufficiently known to defendant and his counsel to enable them, with due diligence, to locate him without further assistance.

2. Criminal Law § 98.2— sequestration of witnesses—failure to renew motion

Defendant waived his right to question the propriety of the trial court's failure to order sequestration of the State's witness where defendant moved for sequestration two months before trial; the court reserved ruling on the motion until trial; and when the cause came on for trial the motion to sequester was not raised by defendant's counsel, nor was any objection made to the court's failure to sequester.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 12 June 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 8 February 1980.

Defendant was tried and convicted upon an indictment charging him with felonious breaking or entering and larceny. The State's evidence showed that about 5:30 p.m. on 19 January 1979, Nelson Call heard dogs barking near a new house being built by his father, Ford Call. He went to investigate and found the defendant standing in the kitchen with a microwave oven in his hands. The oven had been previously stored in the utility room of the house. In the meantime, Nelson's brother, Ransom Call, had observed defendant drive up to the house. Nelson then proceeded to the house and joined Ransom. They talked with the defendant who told them he had been sent to repair the oven. Defendant carried the oven back to the utility room, where it had previously been stored, and after a short further conversation, left the house. Ford call testified that he kept the house locked, that he had stored the oven in the house, that the oven was worth about $500, and that he had not given defendant permission to enter the house.

Defendant testified that he had previously been to the house to compare the sheetrock work with his own work, but that he was not there on 19 January 1979. He stated that from 3:30 until 6:30 p.m. on 19 January 1979, he stayed at the B & D Quik Stop. While there, he had loaned his car to an acquaintance who returned the car at about 6:00 p.m.

The jury found defendant guilty as charged and from the trial court's entry of judgment thereupon, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Everette Noland, for the State.

Brewer & Freeman, by Paul W. Freeman, Jr., for the defendant appellant.

WELLS, Judge.

[1] Defendant assigns as error the trial court's denial of his motion for appointment of a private investigator. Defendant was arrested and arraigned on 22 January 1979. The indictment was handed down on 9 April 1979. On 3 April 1979, defendant moved through his court appointed counsel for an order requiring the State to furnish him with a private investigator to assist him in the preparation of his defense and in locating material witnesses. In his motion, defendant alleged that despite diligent efforts of defendant and his counsel, they had been unable to locate two witnesses material to defendant's defense and that the testimony of the witnesses would establish defendant's alibi. Defendant stated that he was indigent and financially unable to employ a trained criminal investigator, and that neither defendant nor his counsel had sufficient expertise in the area of criminal investigation to locate the witnesses. In *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976), our Supreme Court held that the decision as to whether to appoint a private investigator for an indigent defendant rests within the sound discretion of the trial judge, and that such an appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense.

While we recognize that in many circumstances, the help of an investigator may be critical to the preparation of an adequate defense, it does not appear that this defendant has made out such a case. Defendant's allegations and representations as to the identity of one of the witnesses were so vague as to suggest on their face that a search for him would be futile. As to the other witness, it would appear that his whereabouts were well-enough known to defendant and his counsel to enable them, with due diligence, to locate him without further assistance. Additionally, we note that defendant was arrested on 22 January 1979, three days after commission of the crimes with which he was charged. Yet, defendant offered no testimony in support of his alibi from

employees of the B & D Quik Stop, where defendant contends he spent three consecutive hours on the afternoon the crime was committed. We conclude that the trial court did not abuse its discretion by denying defendant's request.

[2] On 3 April 1979, defendant also moved the court to sequester the State's witnesses. The motion came on for hearing on 9 April 1979, at which time defendant presented three other motions to the court. The court ruled on the other three motions but, without objection, reserved ruling on the motion to sequester until trial. When the cause came on for trial on 11 June 1979, the motion to sequester was not raised by defendant's counsel, nor was any objection made to the court's failure to sequester. Under these circumstances, we believe that defendant has waived his right to raise the propriety of the trial court's failure to order sequestration. Additionally, the sequestration of witnesses is a matter of discretion on the part of the trial court. *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984, 60 L.Ed. 2d 246, 99 S.Ct. 1797 (1979). The testimony of the Call brothers reveals that each independently viewed defendant, and accordingly, the opportunity for collusion was slight. Under these circumstances we do not believe the trial court's denial of sequestration constituted an abuse of discretion. *See, State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977).

Defendant also assigns as error the denial of his motion for an order directing the court to submit to an *in camera* inspection of all statements made by the State's witnesses prior to trial, and to disclose the contents of such statements to defendant prior to defendant's cross-examination of each such witness. The trial court declined to rule on the motion when it was first heard on 9 April 1979, noting that it could be renewed at trial. Defendant agreed to this. At trial, the motion was renewed and the trial court ruled that upon defendant's request, he would permit *in camera* inspection of the statement of any witness who testified. Defendant's counsel agreed, although defendant made no request during the trial for any such inspection. No such statements are included in the record.

We agree that under the authority of *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), defendant's entitlement to have any such statements reviewed by the court for appropriate

disposition cannot be questioned. In that defendant has not shown whether any such statements existed or what they contained, we are bound to follow the directive of our Supreme Court in *Hardy*, that an appellate court cannot award a new trial based on pure speculation as to what the statements might have contained.

We have carefully reviewed defendant's remaining assignments of error, including those relating to the charge and allegedly improper statements which the court made to the jury, and find that they are without merit.

No error.

Judges MARTIN (Robert M.) and ERWIN concur.

IN THE MATTER OF: GERALD LEE LAMBERT, JR.

No. 7926DC723

(Filed 1 April 1980)

Infants § 20— undisciplined child—placement in private facility at county's expense

In considering the "available resources" for placement of an undisciplined child pursuant to former G.S. 7A-286, the trial court was not confined to a consideration only of government operated resources but had the authority to place an undisciplined child in a privately operated facility for an indefinite stay at the county's expense.

APPEAL by respondent Mecklenburg County from *Black, Judge*. Order entered 24 April 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 January 1980.

On petition by his mother, following a hearing on 29 March 1979, Gerald Lee Lambert was adjudicated an undisciplined child. His juvenile court counsellor recommended out-of-home placement for Gerald Lee, and the trial court ordered him placed in Alexander's Children's Home, a private placement facility. Custody was assigned to the Mecklenburg County Department of Social Services (DSS). He ordered that Gerald's mother arrange funding for his placement at Alexander's through "Title XX" funding. At a subsequent hearing on 23 April 1979, DSS reported that Gerald

had been accepted for placement at Alexander's, but that in order for the cost of placement to be paid through Title XX funds, he would have to take his place on a waiting list (for placement) with other similarly situated children in the custody of DSS. The trial court found that Gerald was in need of specialized therapeutic placement and psychological residential treatment and found Alexander's to be the most appropriate treatment facility for Gerald. He found that Gerald's mother was financially unable to arrange for his care at Alexander's. In the order, the court returned custody to the mother, ordered Gerald to be admitted to Alexander's on 11 June 1979, and ordered that cost of such admission be charged to Mecklenburg County pursuant to G.S. 7A-286. The parties stipulated that the cost of care at Alexander's is $1,098 per month for the first six months and $787 per month thereafter. The minimum stay is six to eight months, and the maximum stay is about two years. The trial court's order made no provision as to the length of stay.

Ruff, Bond, Cobb, Wade & McNair, by William H. McNair and Frederick W. B. Vogel, for Mecklenburg County.

Hasty, Waggoner, Hasty, Kratt & McDonnell, by Robert D. McDonnell, guardian ad litem.

WELLS, Judge.

Appellant Mecklenburg County raises two basic questions for our review. The first challenges the authority of the trial court to place Gerald Lee in Alexander's Children's Center for an indefinite stay at the County's expense. The essence of the County's argument is that the trial court did not properly balance the interest of the child and the interest of the State in considering "available resources" for placement, and that the statutory scheme does not contemplate psychological treatment, but only examination or evaluation of such cases.

The statutory authority under which the trial court acted is found in Chapter 7A, Article 23 of the General Statutes.[1] A

1. This Article, encompassing G.S. 7A-277 through G.S. 7A-289, was repealed as of 1 January 1980. 1979 N.C. Sess. Laws, ch. 815, § 1. As of this date, dispositional authority of the District Court in juvenile cases is regulated by Article 52 of Chapter 7A which grants the District Court broad discretionary authority similar to that provided under former G.S. 7A-286.

careful reading of the provisions of Article 23 indicates a clear legislative intent to give trial judges considerable latitude and discretionary authority in dealing with delinquent, dependent, neglected, or undisciplined children. The following pertinent provision of G.S. 7A-285 sets the tone:

* * *

> The juvenile hearing shall be a simple judicial process. . . .
>
> The court may continue any case from time to time to allow additional factual evidence, social information or other information needed in the best interest of the child. . . .
>
> At the conclusion of the adjudicatory part of the hearing, the court may proceed to the disposition part of the hearing, or the court may continue the case for disposition after the juvenile probation officer or family counsellor or other personnel available to the court has secured such social, medical, psychiatric, psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State. The disposition part of the hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the child. . . .
>
> In all cases, the court order shall be in writing and shall contain appropriate findings of fact and conclusions of law.

Continuing in this spirit of granting broad discretionary authority to the trial court, G.S. 7A-286 provided in pertinent part:

> The judge shall select the disposition which provides for the protection, treatment, rehabilitation or correction of the child after considering the factual evidence, the needs of the child, and the available resources, as may be appropriate in each case. . . .

The County argues that in this case, the trial court picked the "best" resource available for Gerald Lee's placement—that the term "available resources" should be construed narrowly to include only *government operated* resources. Appellant maintains

that the term should not be construed to include privately operated institutions, especially expensive ones such as Alexander's Children's Center. Appellant argues that while such a placement might well serve the best interest of the child, it cannot serve the best interest of the State because it burdens the State with unreasonable expense. Implicit in the County's argument is the proposition that "available resource" must be limited in a way that will fairly weigh and consider not only the State's ability to meet the cost of treatment involved, but the equitable apportionment of resources among children who need placement or treatment as well.

There is, of course, considerable merit to the County's position. We agree that the trial court has a duty to balance the interest of the child with that of the State. This is the fundamental thrust of juvenile management. It nevertheless remains, however, that the scales of justice in these cases have been designed by the legislature to be measured by the pound, not by the ounce. The legislature simply has not seen fit to attempt to tie the hands of trial judges in these cases. It has instead given them every reasonable tool the use of which does not assault our sense of due process. While we are cognizant of the risk of depletion of the County's resources inherent in the placement of jurisdictional children in expensive, privately operated facilities, we nevertheless believe that the legislative intent was that the trial courts have such an available resource as an alternative. While the statutory provisions make frequent reference to State institutions as appropriate for placement or treatment, we find nothing in the statute which rules out, precludes, or denies to the trial court resort to privately owned facilities in appropriate cases.

This brings us then to the next question raised by the County—whether there were sufficient findings supported by the evidence to support the placement ordered by the trial court. We believe that question deserves an affirmative response. We believe that, on the whole, there were sufficient findings based on the evidence to support the placement ordered by the court.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

LEON C. BRITT AND WIFE, RUBY BRITT; JAMES G. BRITT AND WIFE, LOUISE BRITT; AND FRONIA BRITT FREEMAN AND HUSBAND, ERTLE FREEMAN v. GEORGIA-PACIFIC CORPORATION

No. 7916SC604

(Filed 1 April 1980)

1. **Rules of Civil Procedure § 55.1— setting aside default—no good cause shown**

Defendant failed to show good cause for the setting aside of entry of default where defendant's affidavits showed that, although the legal department of defendant received the suit papers in this case on 7 June 1978, they were misplaced and not relocated until 12 July 1978, the day entry of default was made.

2. **Trespass § 8— wrongful cutting of timber—award of nominal and actual damages improper**

In an action to recover for damages to real property and for the value of timber removed, the trial court erred in awarding nominal damages to plaintiffs in addition to actual damages as a result of defendant's trespass, since nominal damages are a small sum awarded in recognition of a technical injury which has caused no substantial damage, but plaintiffs in this case sustained substantial actual damages.

3. **Trespass § 6— evidence of value of timber cut—competency**

Evidence was sufficient to support the trial court's finding of damages based upon the value of plaintiffs' timber cut by defendant where the owners of the land from which the timber was cut testified to their opinions concerning the value of the timber; furthermore, defendant waived any objection as to competence of such testimony where it failed to object.

4. **Trespass § 8.2— wrongful cutting of timber—damages—election**

Plaintiffs who sought to recover both their statutory damages for cut timber and damages for diminution in value of their property elected to recover their statutory damages when they proceeded upon that theory at trial and recovered damages thereunder, albeit the court erroneously awarded them "incidental damages." G.S. 1-539.1(a).

APPEAL by defendant from *Brannon, Judge.* Judgment entered 8 March 1979 in Superior Court, ROBESON County. Heard in the Court of Appeals 28 January 1980.

Plaintiffs own three acres of land in Robeson County. Defendant owns a much larger tract surrounding plaintiffs' property on three sides. Defendant is engaged in the timber business and, on 5 December 1977, entered upon plaintiffs' land without consent and cut and removed certain merchantable timber. Plaintiffs brought suit against defendant for this trespass, asking recovery for damages to the real property and also for the value of the timber removed. Defendant failed to plead within the required time, and default was entered against it. The trial court denied

defendant's motion to vacate the entry of default, and the case was set for trial as to damages. All parties waived jury trial and after hearing the evidence, the trial court made findings of fact, conclusions of law, and entered judgment awarding plaintiffs nominal damages of $10, incidental damages of $2,000 and $3,000 damages for double the value of timber removed, a total of $5,010. Defendant appeals from the judgment entered.

Lee and Lee, by W. Osborne Lee, Jr., for plaintiff appellees.

I. Murchison Biggs for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant first contends the trial court erred in failing to set aside the entry of default. "For good cause shown the court may set aside an entry of default, ..." N.C. Gen. Stat. 1A-1, Rule 55(d). A motion pursuant to this rule to set aside an entry of default is addressed to the sound discretion of the court. *Privette v. Privette*, 30 N.C. App. 41, 226 S.E. 2d 188 (1976). Whether "good cause" is shown by movant, who bears the burden of proof, is in the sound discretion of the trial court and the facts and circumstances of the particular case govern. *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). The exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E. 2d 889 (1977).

Defendant's affidavits show that although the legal department of defendant received the suit papers in this case on 7 June 1978, they were misplaced and not relocated till 12 July 1978, the day entry of default was made. The trial court in its discretion held this did not constitute "good cause." We find no abuse of discretion by the trial court, and this assignment of error is overruled.

[2] Appellant next contends the court erred in awarding nominal damages to plaintiffs in addition to actual damages as a result of defendant's trespass. We agree. Nominal damages are "a small, trivial sum awarded in recognition of a technical injury which has caused no substantial damage." *Wolfe v. Montgomery Ward & Co.*, 211 N.C. 295, 296, 189 S.E. 772, 773 (1937). Nominal damages are recoverable where some legal right has been violated but no actual loss or substantial injury has been sustained. *Hairston v. Greyhound Corp.*, 220 N.C. 642, 18 S.E. 2d 166 (1942). Here, plain-

tiffs have sustained substantial actual damages. They are not entitled to an award of nominal damages.

[3] Defendant contends there was no competent evidence to support the court's finding of damages for the value of timber cut. Defendant argues that none of plaintiffs' witnesses as to value knew anything about the value of standing timber or of the timber cut.

The witness Leon C. Britt testified without objection that he had an opinion as to the value of the timber on plaintiffs' property immediately before it was cut and that this value was $4,000. The trees were pine and had diameters of from ten inches down. He had sold timber off other land at a sawmill.

Ertle Freeman testified the property had seedling pines on it, growing since 1954. In his opinion the timber had a fair value of $4,000 at the time it was cut. He testified the cost to reforest or reseed the property would be $1,500.

James Britt also testified without objection that the value of the timber before cutting was $4,000.

Defendant's evidence indicated the value of any trees cut by defendant was considerably less than plaintiffs' estimates.

By failing to object to plaintiffs' evidence as to the value of the timber, defendant waived any objection as to the competence of this testimony. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, *cert. denied,* 400 U.S. 946, 27 L.Ed. 2d 252 (1970); *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895 (1951). We hold there was sufficient evidence to support the court's finding of damages based upon the value of plaintiffs' timber cut by defendant.

[4] Last, defendant contends the court erred in awarding plaintiffs "incidental damages" in addition to damages for timber cut. Where plaintiff sues for the unlawful cutting or removal of timber, there are two alternative measures of damages available. One gives the landowner the difference in the value of his property immediately before and immediately after the cutting. *Jenkins v. Lumber Co.,* 154 N.C. 355, 70 S.E. 633 (1911). The other gives plaintiff the value of the timber itself. This latter value is then doubled by reason of N.C.G.S. 1-539.1(a) which allows plaintiff to recover double the value of timber cut or removed. This statute

not only doubles the value of the timber cut but imposes strict liability as well. *See* Dobbs, *Trespass to Land in North Carolina—Part II. Remedies for Trespass,* 47 N.C.L. Rev. 334 (1969).

Here plaintiffs seek to recover both their statutory damages and damages for the diminution in value of their property. The loss of value for the timber cut is inextricably involved in the damages for diminution in value of the real property. Plaintiffs cannot recover both. We hold that plaintiffs made an election to recover their statutory damages when they proceeded upon that theory at trial and recovered damages thereunder, albeit the court erroneously awarded them "incidental damages."

Our holding today is in effect a continuation of the election of remedies a landowner had at common law to sue in *trespass de bonis asportatis* for the value of the trees (now doubled by reason of the statute) or in *trespass quare clausum fregit* for injury to the freehold.

The result is: the judgment is vacated and the case is remanded to the Superior Court of Robeson County for the entry of judgment in favor of plaintiffs for the sum of $3,000.

Vacated and remanded.

Chief Judge MORRIS and Judge HILL concur.

JOHN W. BARBER v. WILLIAM H. WHITE AND WIFE, MRS. WILLIAM H. WHITE

No. 7920DC503

(Filed 1 April 1980)

1. Accord and Satisfaction § 1— cashing of full-payment check

Plaintiff's cashing of a check with the words "painting in full" marked on the face of the check constituted an accord and satisfaction as a matter of law where plaintiff painted defendants' house on a "cost plus" basis; when the work was completed satisfactorily, plaintiff presented to defendants a bill for $2359.19 which defendants contested as too high; defendants offered plaintiff the check in the amount of $1813.19 as full payment; plaintiff was aware that the words "painting in full" were on the face of the check; and plaintiff cashed the check and demanded the balance from defendants.

2. Uniform Commercial Code § 3— U.C.C. provision inapplicable to full payment checks

G.S. 25-1-207 is inapplicable to full payment checks.

APPEAL by defendants from *Honeycutt, Judge.* Judgment entered 13 February 1979 in District Court, MOORE County. Heard in the Court of Appeals 9 January 1980.

Plaintiff seeks to recover $615 plus interest which he alleges defendants owe to him for painting their house. Defendants allege as an affirmative defense that the parties entered into an accord agreement, and that pursuant to this agreement plaintiff accepted a check in full satisfaction of their obligation to him.

Evidence was presented that plaintiff gave defendants an estimated cost of "somewhere in the neighborhood of $2,700.00" for painting their house. The parties then entered into a "cost plus" contract. When the work was completed satisfactorily, plaintiff presented to defendants a bill for $2,359.19, which defendants contested as too high. Defendants then offered plaintiff a check in the amount of $1,813.19 as full payment, with the words "painting in full" marked on the face of the check. Plaintiff was aware at the time that these words were on the face of the check. Plaintiff told defendants that he was "in a rather tight position" and needed the money, and that defendants still owed him $615.19. On the advice of counsel plaintiff then cashed the check and demanded the balance from defendants, but they have refused to pay.

The court found that there was no accord and satisfaction, and that defendants are indebted to plaintiff in the amount of $615. Defendants appeal.

Brown, Holshouser & Pate, by W. Lamont Brown, for plaintiff appellee.

Rodney W. Robinson for defendant appellants.

ARNOLD, Judge.

Defendants' counsel has failed to comply with Rules 9(b)(1)(x) and (xi), 10(a) and (b)(1), and 28(b)(3) of the Rules of Appellate Procedure. It appears from the record that defendants assign error to the denial of a motion to dismiss, but the only indication in the record that such a motion was made and denied appears upon the

face of the judgment. Neither a written motion nor an indication that an oral motion was made in open court appears. No exceptions have been set out in the record, or referred to in defendants' brief. The brief makes no reference to any assignment of error. Nevertheless, pursuant to Rule 2 of the Rules of Appellate Procedure we have considered defendants' appeal upon its merits.

[1] Defendants would be entitled to have their motion for dismissal granted only if the evidence presented established an accord and satisfaction as a matter of law. An accord is an agreement between the parties that discharges a contract or settles a cause of action, and a satisfaction is the execution of that agreement. *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E. 2d 678 (1963); *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E. 2d 85 (1969). Plaintiff argues that whether the parties intended to reach an accord and satisfaction is a question for the jury, but the cases which stand for that proposition are distinguishable from the one now before us. *See, e.g., Allgood v. Wilmington Savings & Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825 (1955) (whether a receipt signed by plaintiff for a portion of insurance benefits was an acceptance of the portion in full settlement of her claim); *Blanchard v. Edenton Peanut Co.*, 182 N.C. 20, 108 S.E. 332 (1921) (whether a check enclosed with a statement of the account marked "We enclose check to cover" was sent on condition that its acceptance would be a full settlement). The present case is concerned with what is commonly known as a "full payment check," that is, a check marked with some indication that it is tendered in full payment of a disputed claim, and in such cases the cashing of the check has been held to be an accord and satisfaction as a matter of law. For example, in *Moore v. Greene*, 237 N.C. 614, 75 S.E. 2d 649 (1953), the plaintiff creditor, having expressed to the debtor his dissatisfaction with the amount tendered in the check marked "For Settlement," proceeded to cash the check. The court said: "The plaintiff had a right to decline the proffered settlement and sue for the full amount he claimed was due. . . . We think he made his election when he cashed the check and may not now be allowed to change his position and avoid the effect of his acceptance of the check tendered him by the defendant." *Id.* at 616-17, 75 S.E. 2d 650. *Accord, Phillips v. Phillips Construction Co., Inc.*, 261 N.C. 767, 136 S.E. 2d 48 (1964); *Davis Sulphur Ore Co. v. Powers*, 130 N.C. 152, 41

S.E. 6 (1902); *Brown v. Coastal Truckways, Inc.*, 44 N.C. App. 454, 261 S.E. 2d 266 (1980).

[2] The parties argue the effect of G.S. 25-1-207 upon the facts now before us, but in the recent case of *Brown v. Coastal Truckways, Inc., supra*, we determined that this statute does not apply to full payment checks. We based this holding upon the plain words of the statute, saying: "If [G.S. 25-1-207] does apply, it would be for the reason that plaintiff assented to 'performance in a manner . . . offered by' the defendant . . . [and] [w]hen the plaintiff . . . notified defendant he would not accept the check in full payment, he did not assent to 'performance in a manner . . . offered by' the defendant. This would make G.S. 25-1-207 inapplicable. . . ." *Id.* at 457, 261 S.E. 2d at 268.

Plaintiff's cashing of the check marked "painting in full" established an accord and satisfaction as a matter of law. Defendants were entitled to have their motion to dismiss granted. The judgment of the trial court is

Reversed.

Judges CLARK and ERWIN concur.

IN THE MATTER OF CHARLENE DAWN CRADDOCK

No. 7917DC845

(Filed 1 April 1980)

Appeal and Error § 9— order awarding custody of neglected child—custody changed pending appeal—appeal moot

Questions raised by the parents of an allegedly neglected child concerning the validity of a proceeding which resulted in the placement of custody in the county department of social services were rendered moot since, pending appeal, the district court entered an order returning the legal custody of the child to her parents and terminating the custody of the department of social services.

APPEAL by defendant from *McHugh, Judge*. Order entered 4 June 1979 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 1 February 1980.

Charlene Dawn Craddock is the infant child of Debbie Craddock and Charles Cox. On 27 March 1979, Charlene was admitted to Moses Cone Hospital in Greensboro following a seizure. Upon examination by Dr. Martha Sharpless, it was determined that Charlene had a chronological age of eight months, but a developmental age of five months. She was diagnosed as suffering from hemiparesis, a slight paralysis or weakness affecting the muscles on one side or half of the body. Charlene's encephalograph was abnormal and she was suffering from a seizure disorder of unknown origin. Her condition was diagnosed as "failure to thrive." Dr. Sharpless communicated these findings to the Rockingham County Department of Social Services (DSS).

Charlene remained in the hospital for approximately one month. On 10 April 1979, the DSS filed a petition in the District Court in which it was alleged that Charlene was a neglected child as defined by G.S. 7A-278(4), and the DSS prayed for a hearing to determine whether the child was in need of the care, protection and discipline of the court. On the same day, an immediate order was issued to the DSS to take custody of Charlene and place her in a foster home, pending a hearing on the merits. Neither the petition nor the immediate custody order was served on either parent. On 13 April 1979 a juvenile order was issued by the District Court, providing that Charlene remain in the custody of the DSS until a hearing was held on the merits. On 12 May 1979, Debbie Craddock was served with a juvenile summons and a copy of the petition. On 18 May 1979, respondent appeared and moved to dismiss and to quash the summons. That motion was denied. On the same day, the court entered an order appointing George Fulp as guardian *ad litem* for Charlene.

At the 4 June 1979 hearing, the State presented the testimony of Dr. Sharpless, Donnie Lawson, an employee of DSS, and Mrs. Barbara Knight, a public health nurse in Rockingham County. They testified as to Charlene's health, the conditions in her mother's home, and the relationship between the child and her parents. There was evidence of neglect, but no evidence of abuse. The parents did not testify. Following the hearing, the trial court entered an order finding Charlene to be a dependent child within the meaning of G.S. 7A-278(3). The court found that it was in the best interest of the child that her physical custody be placed with her mother, but that legal custody remain with the

DSS. The court ordered further interviews between the parents and Dr. Sharpless, counseling between the parents and the Rockingham County Mental Health Department, and that regular reports be issued by the Department as to the progress of the counseling sessions. The court retained jurisdiction of the matter.

Attorney General Rufus L. Edmisten, by Associate Attorney Mary Elizabeth Noonan, for petitioner appellee.

Smith, Moore, Smith, Schell & Hunter, by Suzanne Reynolds, and Leigh Rodenbough, for respondent appellants.

George Fulp for the child.

WELLS, Judge.

Respondent parents have brought forward assignments of error in which they assail the proceedings as void for lack of proper notice to the parents, violating their rights to substantive and procedural due process. They also call into question the constitutionality of G.S. 7A-278(4) and former G.S. 7A-284 for "vagueness". Counsel for both respondents and the state have presented excellent briefs and arguments. We do not reach the questions presented, however, for the reason that they are now moot. Upon recommendation of the DSS, on 26 November 1979, the District Court entered an order returning the legal custody of Charlene to her parents and terminating the custody of the DSS. Pursuant to the then existing provisions of G.S. 7A-289, the trial court had jurisdiction to enter such an order. Thus, there is now no existing controversy for this Court to resolve. "When, pending an appeal to this Court, a development occurs, by reason of which the questions in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court." *Parent Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E. 2d 473, 476 (1969).

Appellants have expressed concern as to the finality of the trial court's order of 26 November 1979, thus suggesting that the matter in controversy may not have been rendered moot by that order. We hold that the order of 26 November 1979 finally

disposes of this matter and finally determines the matters in controversy in this case.

Appeal dismissed.

Judges MARTIN (Robert M.) and ERWIN concur.

HELEN G. McBRYDE, ADMINISTRATRIX OF THE ESTATE OF NELL I. STEWART v. SINA I. FEREBEE, WIDOW; JULIA I. SMITH, WIDOW; LUDIE I. BAYSDEN, WIDOW; CHURCH IPOCK; LOUIS I. IPOCK; W. A. IPOCK; VERNICE FULCHER; PAT WILSON; BONNIE BRINKLEY; RILEY O. GODLEY; JAMES ARTHUR IPOCK, WIDOW

No. 7911SC836

(Filed 1 April 1980)

Wills § 62— joint will—simultaneous death requirement for beneficiaries to take

In order for the named beneficiaries to take under the provisions of a joint will, the will required that the testator and testatrix must have been killed or suffered death in one of the ways contemplated by the Uniform Simultaneous Death Act, G.S. 28-161.1 (now G.S. 28A-24-1), and since this did not occur, the estate of the testatrix passed to her heirs at law.

APPEAL by certain of the defendants from *Preston, Judge.* Judgment entered 6 June 1979 in Superior Court, LEE County. Heard in the Court of Appeals 18 March 1980.

This is an action for a declaratory judgment construing the will of Nell I. Stewart. J. L. Stewart and his wife Nell I. Stewart executed a joint will in 1954. J. L. Stewart died 15 February 1977, and Nell I. Stewart died two months later. Under the joint will, the survivor of J. L. Stewart and Nell I. Stewart was to receive the entire estate of the other. The will also contains this provision:

"*ITEM THREE*: If J. L. Stewart and Nell I. Stewart, his wife, shall both be killed or suffer death in one of the situations contemplated by Article 17-A of Chapter 28 of the General Statutes of North Carolina, then in that event, it is the will, intention and desire of the testators that the entire estate of said parties go, share and share alike to Riley Godley and

Mrs. Helen Godley McBryde, their heirs and assigns, in fee simple and absolutely forever. . . ."

From a judgment holding Helen G. McBryde and Riley O. Godley to be the sole beneficiaries under the will of Nell I. Stewart, all defendants except Riley O. Godley appealed.

Staton, Betts, Perkinson and West, by William W. Staton and Stanley W. West, and Henderson and Baxter, by David S. Henderson, for plaintiff appellee.

Love and Wicker, by Jimmy L. Love, for defendant appellants.

WEBB, Judge.

We hold that the will of Nell I. Stewart is not ambiguous and that Helen G. McBryde and Riley O. Godley take under the will only in the event of certain contingencies which did not occur. As we read Item Three of the will, in order for Helen G. McBryde and Riley O. Godley to take under the will, J. L. Stewart and Nell I. Stewart must have been killed or suffered death in one of the ways contemplated by the Uniform Simultaneous Death Act, G.S. 28-161.1 (now G.S. 28A-24-1). This did not occur, and the estate of Nell I. Stewart passes to her heirs at law.

The superior court held and appellee argues the contingencies of Item Three should be construed in the disjunctive; that is, if J. L. Stewart and Nell I. Stewart were either killed or died in a situation contemplated by the Uniform Simultaneous Death Act, the estate of Nell I. Stewart would pass under Item Three of the will. The superior court then found the word "kill" to be ambiguous and took evidence as to the testamentary intent of Mr. and Mrs. Stewart. We hold that if this disjunctive interpretation of Item Three is correct, the phrase "shall both be killed" is not ambiguous. We believe the words "be killed," in their ordinary meaning, connotes some external force causing death. *See* Black's Law Dictionary 782 (5th Ed. 1979) for a definition of "kill." Neither J. L. Stewart nor Nell I. Stewart was killed.

We reverse the superior court and remand for an order consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. STEVEN EDWIN RICE

No. 7926SC969

(Filed 1 April 1980)

Constitutional Law § 50— 49 days between indictment and trial—Speedy Trial Act complied with

The State was in compliance with the provisions of the Speedy Trial Act where 49 days elapsed between defendant's indictment and trial. G.S. 15A-701(a1)(1).

APPEAL by defendant from *Kirby, Judge*. Judgment entered 21 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 March 1980.

Defendant was tried and convicted of felonious escape. From that conviction, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Assistant Public Defender Grant Smithson, for defendant appellant.

VAUGHN, Judge.

This appeal raises as its sole assignment of error the issue whether the State has complied with the Speedy Trial Act. G.S. 15A, Art. 35. Defendant's motion to dismiss on the ground that the State had failed to comply with the act was denied.

A warrant was issued on 13 June 1978 alleging defendant's felonious escape from prison on 11 June 1978. Defendant was arrested on 14 November 1978 on the warrant for felonious escape which was served seven days later. Defendant filed a motion for speedy trial on 27 December 1978. A probable cause hearing was waived by defendant on 5 January 1979, at which time a public defender was appointed to represent him. On 2 April 1979, de-

fendant was indicted for felonious escape. Defendant's counsel made a motion on 8 May 1979 for dismissal of the case pursuant to G.S. 15A-701(a1) and for failure to allow the defendant his Sixth Amendment right to a speedy trial. This motion was denied 11 May 1979, and the trial followed on 21 May 1979. The time span from arrest to trial was 188 days, with 133 days between service of the warrant for arrest and the date of indictment. Only forty-nine days elapsed from indictment to trial.

The Speedy Trial Act provides in pertinent part:

> (a1) Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, *whichever occurs last.*

G.S. 15A-701(a1)(1) (emphasis added). On the facts of this case, the last of the items specified in G.S. 15A-701(a1)(1) to occur was the indictment of defendant on 2 April 1979. The trial was forty-nine days later. The State, therefore, met the 120 day time frame of the statute. The State was in compliance with the statutory provisions of the Speedy Trial Act.

Defendant did not address the issue of whether in this case he was denied his Sixth Amendment right to a speedy trial and consequently we do not consider that issue which, among other things, would have required a showing of reasonable possibility of prejudice. *See State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969); *State v. Davis*, 33 N.C. App. 487, 235 S.E. 2d 416 (1977).

No error.

Chief Judge MORRIS and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. LESLIE JAMES BROCK

No. 795SC907

(Filed 1 April 1980)

Criminal Law § 153— appeal to Court of Appeals—motion for appropriate relief—newly discovered evidence—no jurisdiction in trial court

Where an incest case had been appealed from the superior court to the Court of Appeals, the superior court had no authority to consider defendant's motion under G.S. 15A-1415(b)(6) for appropriate relief on the ground of newly discovered evidence, but such motion should have been made in the appellate division. G.S. 15A-1418(a).

APPEAL by the State of North Carolina from *Reid, Judge.* Order entered 9 May 1979 in Superior Court, PENDER County. Heard in the Court of Appeals on 26 February 1980.

Defendant was convicted of incest. From a judgment dated 21 November 1978, imposing a prison sentence of 12 to 15 years, he filed notice of appeal to this Court on 30 November 1978. By order dated 30 November 1978 the Judge of the Superior Court gave the defendant 60 days within which to prepare and serve his record on appeal, and the State was given 30 days to serve exceptions or its countercase.

On 3 April 1979 the defendant filed in the Superior Court a Motion for Appropriate Relief pursuant to "Article 89, Section 15A-1411 et seq." of the General Statutes. On 9 May 1979, after a hearing, Judge Reid allowed defendant's motion and ordered a new trial. The State appealed pursuant to G.S. § 15A-1445(a)(2).

Attorney General Edmisten, by Associate Attorney Richard L. Kucharski, for the State.

Vance B. Gavin for the defendant appellee.

HEDRICK, Judge.

The State argues that, under the circumstances of this case, the Superior Court lacked authority to consider and allow defendant's Motion for Appropriate Relief and order a new trial. We agree.

G.S. § 15A-1415(a) provides that "[a]t any time after verdict, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section." G.S. § 15A-1415(b) provides that:

> The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:
>
> . . .
>
> (6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

It is clear that defendant's Motion for Appropriate Relief is brought pursuant to G.S. § 15A-1415 and, specifically, subsection (b)(6) thereof. This statute is silent as to which court has jurisdiction to hear the motion.

However, the power of a court to act on a motion brought pursuant to G.S. § 15A-1415 in a case that has been appealed to the appellate division is specifically set forth in G.S. § 15A-1418(a) which provides:

> When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, . . .

See State v. Jones, 296 N.C. 75, 248 S.E. 2d 858 (1978). Since the case had been appealed from the Superior Court to the Court of Appeals, it is clear, therefore, that Superior Court Judge Reid had no authority to consider defendant's Motion for Appropriate Relief and order a new trial.

Order vacated and cause remanded.

Judges WEBB and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 APRIL 1980

AGEE v. AGEE No. 7917DC1007	Rockingham (72CVD1425)	Affirmed
BAUGESS v. SWIFT No. 7910IC925	Industrial Comm. (G-3712)	Affirmed
DUPREE v. DUPREE No. 7911DC954	Harnett (77CVD0277)	No Error
GRAYBAR ELECTRIC v. SENTINEL SYSTEMS No. 7921DC859	Forsyth (78CVS1999)	Affirmed
GUDGER v. BAILEY No. 7924SC773	Mitchell (76CVS42)	Affirmed
HILTON v. PETERS No. 7925SC718	Catawba (79CVS828)	Affirmed
MILLS v. MILLS No. 7919DC964	Randolph (79CV449)	Reversed
PIANO CO. v. EXHIBIT WORLD No. 7925SC649	Burke (78CVS139)	No Error
ROBESON FURNITURE v. McKAY No. 7916DC815	Robeson (78CVD1300)	Reversed
SMITH v. PETERS No. 792DC422	Beaufort (78CVS129)	Affirmed
STATE v. BENNETT No. 7922SC912	Iredell (78CRS9778) (78CRS9777)	No Error
STATE v. DAVIDSON No. 7928SC1028	Buncombe (79CRS0361)	No Error
STATE v. DIAL No. 7916SC1029	Robeson (79CR3848)	No Error
STATE v. HUNEYCUTT No. 7920SC1097	Stanly (79CR05487)	No Error
STATE v. LEDFORD No. 793SC1015	Pitt (78CRS18988)	No Error
STATE v. MOORE No. 7926SC885	Mecklenburg (78CRS136583)	No Error
STATE v. NOBLES No. 793SC924	Pitt (78CRS18582)	No Error
STATE v. PARTIN No. 7910SC906	Wake (78CR15397)	No Error

STATE v. RICH No. 7921SC919	Forsyth (78CRS53452)	No Error
STATE v. SCOTT No. 7912SC1014	Cumberland (79CRS6176)	No Error
STATE v. WHITTED No. 7914SC981	Durham (77CRS9699)	No Error
STATE v. WILLIAMS No. 7912SC1022	Cumberland (79CRS1430)	Dismissed
STATE v. WILLIAMS No. 7916SC1070	Scotland (79CRS803)	No Error
STATE v. WOODS No. 7921SC1000	Forsyth (78CRS37800)	No Error
STROUPE v. STROUPE No. 7925DC948	Burke (76CVD834)	Affirmed
THOMPSON v. THOMPSON No. 7919DC1082	Rowan (79CVD619)	Vacated and Remanded

TOWN OF SCOTLAND NECK v. WESTERN SURETY COMPANY

No. 796SC504

(Filed 15 April 1980)

1. **Principal and Surety § 1— action on town clerk's bond—testimony as to term of office**

Testimony as to the term of office of a town clerk was competent in an action on the clerk's bond to show that the payment of an annual premium for the bond was for the purpose of paying for a bond covering an annual term.

2. **Principal and Surety § 5— bond of town clerk—annual premium payment—separate bond for each year—liability for amount embezzled in each year**

Where a town clerk was reappointed annually by the town commissioners, and statutes required the clerk to be bonded as an employee handling money and authorized the commissioners to set the term of office of the clerk and to vary the penal amount of the bond, the payment of an annual premium for the bond in a penal sum of $20,000 converted the bond into a new and separate bond for each year, and the surety on the bond was liable for the amount embezzled by the clerk in each year the bond was in effect up to the penal sum of $20,000 rather than for only the total sum of $20,000 for all sums embezzled by the clerk during all the years the bond was in effect.

3. **Principal and Surety § 1.1— surety on town clerk's bond—payment of restitution by clerk—extinguishment of portion of surety's liability**

Where a town clerk was given a suspended sentence in a criminal action on the condition that he make restitution to the town for amounts he embezzled by paying $15,000 cash, placing $10,000 cash in escrow, giving a $15,000 note secured by a home mortgage, and giving a $22,000 unsecured note, the liability of the surety on the clerk's bond was extinguished only to the extent of the $15,000 cash paid by the clerk to the town, since there has been no final payment of the remainder of the obligation and the possible liability of the surety for such remainder has not been extinguished.

Judge PARKER dissenting.

APPEAL by plaintiff from *Peel, Judge.* Judgment entered 1 February 1979 in Superior Court, HALIFAX County. Heard in the Court of Appeals 9 January 1980.

James Elisha Boyd, Jr. was appointed Town Clerk for the Town of Scotland Neck for a term beginning 10 September 1964 and served thereafter until 2 September 1977. On 31 August 1971, Boyd and Western Surety Company entered into an official bond as principal and surety, respectively, in favor of the Town of Scotland Neck, which provided *inter alia,*

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That whereas, the said Principal has been appointed to the office of Town Clerk for the term beginning the 10th day of September, 1966, and the term being continuous. . . .

NOW, THEREFORE, if the said Principal shall in all things faithfully perform the duties of his office and shall honestly account for all moneys and effects that may come into his hands in his official capacity during the said term, then this obligation to be void, otherwise to remain in full force and effect.

This bond is executed by the Surety upon the following express conditions, which shall be conditions precedent to the right of recovery hereunder:

* * * * * *

SECOND: This bond may be canceled by the Surety as to future liability by giving written notice, by Certified Mail, addressed to each, the Principal and the Obligee at Scotland Neck, N. C., and thirty (30) days after the mailing of said notices by Certified Mail, this bond shall be canceled and null and void as to any liability thereafter arising, the Surety remaining liable, however, subject to all the terms and conditions of this bond for any and all acts covered by this bond up to the date of such cancelation.

On 2 September 1977, Boyd confessed to the mayor of the town that he had misappropriated town funds and resigned. Boyd testified that he had embezzled a total of $70,287.10 and that the misappropriation should be charged after 1 July 1973, as follows:

November 27, 1973	$ 9,384.30
December 4, 1973	3,927.74
February 26, 1974	357.44
July 24, 1975	15,000.00
May 21, 1976	10,000.00
July 14, 1976	1,641.99
March 31, 1977	5,877.32
July 15, 1977	7,000.00
July 15, 1977	611.30
July 15, 1977	2,763.80

July 29, 1977	$ 2,366.27
August 7, 1977	50.24
August 12, 1977	2,141.51
August 16, 1977	2,320.23

The Western Surety Company tendered the Town of Scotland Neck the sum of $20,000 as payment in full of all obligations arising under the bond. The sum was refused, and suit was entered by the Town of Scotland Neck against Western Surety Company for $67,719.68. Boyd pled guilty to embezzlement, and sentence was suspended under an agreement with the court for repayment which included the following:

(1) Payment of $15,000 in cash;

(2) $10,000 placed in escrow by Boyd's wife for his benefit;

(3) $15,000 note secured by mortgage on home;

(4) $22,112.77 secured by open note.

The two notes and $10,000 are being held in escrow pending the decision in this case.

At the close of the plaintiff's evidence, the defendant tendered $20,000 and moved for directed verdict. The court granted the defendant's motion. Plaintiff appealed.

Josey, McCoy & Hanudel, by C. Kitchin Josey, for plaintiff appellant.

Battle, Winslow, Scott & Wiley, by Robert L. Spencer, for defendant appellee.

HILL, Judge.

The plaintiff contends the court committed prejudicial error by failing to allow testimony before the jury by plaintiff's witnesses concerning the term of office of the town clerk of Scotland Neck who was bonded by defendant, and thereafter allowing the defendant's motion for a directed verdict.

By stipulation of the parties, it was agreed that an annual premium was paid on the bond from 1971 through 1977, and that the defendant was promptly and properly notified of the loss. The plaintiff tendered Boyd, who would have testified that he was ap-

pointed as town clerk for a yearly term, and that no other person served as clerk from 1964 until the fall of 1977. However, such testimony was excluded by the trial judge. Likewise, the trial court excluded testimony of the present town clerk who would have testified that he was custodian of the town minute books; that he had gone through them and found the following records concerning the appointment of James Boyd as town clerk:

(a) That James E. Boyd, Jr. be sworn in as the new clerk effective September 11, 1964.

(b) That Town Clerk be appointed Town Treasurer on August 17, 1966.

(c) For the years 1965, 1967, 1968, 1969, 1970, and 1971—no record.

(d) That Clerk James E. Boyd, Jr. be appointed Tax Collector for one year, from July 1, 1972 through June 30, 1973.

(e) That Clerk James E. Boyd, Jr. be retained for the year 1973-74, and be appointed budget officer.

(f) That James E. Boyd, Jr. be appointed tax collector and town clerk for the fiscal year 1974-75.

(g) That James E. Boyd, Jr. be appointed town clerk and tax collector the next fiscal year (1975-76). (Meeting held 6 June 1975).

(h) That James E. Boyd, Jr. be appointed tax collector and finance officer for the year 1976-77.

(i) That James E. Boyd, Jr. be appointed clerk and tax collector for 1977-78.

[1] We must face the question of whether the actual term (or terms) of the office of clerk as principal on the bond is relevant. The plaintiff contends such evidence is relevant, in that it would show that payment of the annual premium was for the purpose of paying for a bond covering an annual term. The defendant contends that such evidence is irrelevant and should be excluded.

As a general rule, the liability of a surety on an official bond is to be determined by the language of the contract and cannot be enlarged beyond the scope of its definite terms. *Henry v. Wall*,

217 N.C. 365, 8 S.E. 2d 223 (1940). However, it is well settled that the statutory bond of a public officer must be written in accordance with the provisions of the applicable statute, *Washington v. Trust Co.*, 205 N.C. 382, 171 S.E. 438 (1933); and ". . . that general laws of a State in force at [the] time of execution and performance of a contract become a part thereof . . . ." *Hood, Comr. of Banks v. Simpson*, 206 N.C. 748, 757, 175 S.E. 193 (1934).

Recognizing that the duties of clerks to municipal corporations and the services rendered by the town to its citizens and the complexity of its government vary from town to town, our legislature as far back as 1917 provided:

> C.S. § 2826. *City Clerk elected; powers and duties.* The governing body shall, by a majority vote, elect a city clerk to hold office for a term of two years and until his successor is elected and qualified. He shall have such powers and perform such duties as the governing body may from time to time prescribe in addition to such duties as may be prescribed by law. He shall keep the records of the meetings. The person holding the office of the city clerk at the time when any of the plans set forth in this act shall be adopted by such city shall continue to hold office for the term for which he was elected, and until his successor is elected and qualified.

This section was expanded by G.S. 160-273.

Currently, G.S. 160A-171 provides:

> There shall be a city clerk who shall give notice of meetings of the council, keep a journal of the proceedings of the council, and be the custodian of all city records, and shall perform any other duties that may be required by law or the council.

Recognizing further the need to protect the public from wrongful acts of public officials and employees, the legislature in 1917 enacted the following statute:

> C.S. § 2828. *Bonds required.* Every official, employee, or agent of any city who handles or has custody of more than one hundred dollars of such city's funds at any time shall, before assuming his duties as such, be required to enter into bond with good sureties, in an amount sufficient to protect

> such city, payable to such city, and conditioned upon the faithful performance of his duties, and a true accounting for all of the funds of the city which may come into his hands, custody or control, which bond shall be approved by the mayor and board of aldermen or other governing body and deposited with the city.

This statute was re-codified in 1943 as G.S. 160-277. In 1971 the section was renumbered as G.S. 159-29, and in 1975 the limits of the bond were raised to $250,000. Previous amendments provided the bond premium be paid by the municipal authority. Hence, it is apparent that since 1917, our statutes have continuously required officials such as Boyd to be bonded as an employee of the town handling money, even though no bond is required to cover wrongdoing in his clerical duties.

It is well recognized that a municipality is a political subdivision of the state. Its ordinances are laws within its jurisdiction, and those living therein or doing business therein are presumed to know such laws and are bound thereby.

"This Court has consistently held that our courts of general jurisdiction and the Supreme Court will not take judicial notice of a municipal ordinance." (Citations omitted.) *Surplus Co. v. Pleasants*, 263 N.C. 587, 591, 139 S.E. 2d 892 (1965). Although there is no record of any local ordinance requiring Boyd to be bonded, nevertheless, it is of no consequence. A review of the offices to which Boyd was appointed indicates not only that he served as town clerk, but also upon different occasions as tax collector, finance officer and town treasurer. Furthermore, G.S. 160A-171 provides that the clerk shall perform such other duties as may be required by law or the council. It is clear from the offices Boyd held that he was required to be bonded, and also that he had many opportunities to embezzle large amounts of town money.

By annually appointing Boyd to the position of clerk and tax collector, or finance officer, or treasurer, the governing body of the town acknowledged that the term of office expired annually. Boyd was not holding over. His term was not continuous. Otherwise, there would have been no need to go through the formalities of such reappointment. The clerk under the law in effect when the bond was initially written (1971) served a term of "two

years and until a successor [was] qualified and elected." But the Home Rule Bill, G.S. 160A, which became effective 1 January 1972, granted town commissioners the right to elect clerks to serve at the pleasure of the board, and it is evident that the town commissioners appointed Boyd to serve *annual terms* after 1 January 1972. Evidence of Boyd's term of office and the position held were relevant and should have been admitted.

[2] Having established that the terms of office for Boyd were severable and successive, we now address the issue of whether a separate obligation was created under the bond with each new appointment and upon payment of the annual premium. We hold there was.

If the defendant had written a new bond with each reappointment, the bond so written certainly would have been cumulative; and the defendant would have been liable to the limits of the bond for defalcations occurring during the terms of each respective bond. *See generally, Fidelity Co. v. Fleming*, 132 N.C. 332, 43 S.E. 899 (1903); *Pickens v. Miller*, 83 N.C. 543 (1880); *Hughes v. Boone*, 81 N.C. 204 (1878).

In the case of *Lee v. Martin*, 186 N.C. 127 (1923), *reh. granted* 188 N.C. 119 (1924), the defendant gave bond as clerk of court and subsequently was elected to another four-year term. No new bond was written for this additional four-year term by the surety, but premiums on the bond were continually paid into the second term, when the clerk was forced to resign because of misappropriation of funds. The Supreme Court held the surety liable for the face amount of the policy for each term, based upon the surety's written acknowledgment that the bond had been renewed and was in force at the commencement of the second term, and its acceptance of the premium therefor.

The case of *Hood, Comr. of Banks v. Simpson, supra*, is remarkably similar to the case before us and is controlling. In that case the cashier of a bank was elected annually by the bank's board of directors and required to give bond in accordance with the by-laws. The cashier was reelected annually and required to give bond, but the penal sum was not altered. Upon taking office, the cashier gave the required bond, the period of the bond being indeterminate, and each year the bond was renewed. The cashier embezzled $20,000. A unanimous Court stated at page 753-4:

> The question involved: When a bond which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, does the fact that said cashier was elected at the time said bond was executed for a term of one year and was thereafter reelected each year for a like term, and was required at each reelection to give bond, all of which was expressly directed by the by-laws of said bank and in conformity with the statutes requiring the officer to give bond, constitute said bond one continuous transaction or is each and every renewal thereof a separate and distinct bond? *We think under the facts and circumstances of this case, that each and every renewal thereof is a separate and distinct bond or independent contract.* (Emphasis added.)

In explaining the reason for their decision, the Court stated at page 759 that,

> We desire to set forth what was said in *AETNA CASUALTY & SURETY CO. v. COMMERCIAL STATE BANK OF RANTOUL, ILL.*, 13 Fed (2d Series), 474 (475-6): 'Contracts of insurance guaranteeing honesty and fidelity are made for the purpose of furnishing, for an adequate compensation, indemnity to the insured, and should therefore be liberally construed. . . . Here defendant paid an annual premium for insurance. Under plaintiff's theory, if there were a loss of $10,000, the first year, not discovered until the end of the three years' period, then, though defendant had paid premiums for the second and third years, it would have no protection for those years, no insurance, for the reason that the penalty of the bond would be completely exhausted by the first year's losses and nothing would remain to cover losses in the second and third years. In such case, the second and third years' premiums would be paid by defendant for nothing whatever. No sane man would say that this was the intention of defendant, and the court is most loathe to believe that it was the intent of plaintiff, a widely known insurance company, dependent upon the good will and esteem of the public and its customers for its commercial welfare, so to frame its contract of indemnity as to extract premiums from the insured without giving anything in return. Brief indeed would be its life of business

prosperity and public esteem, were it known that it would be guilty of such a game of 'heads I win, tails you lose.'

The case of *United States Fidelity & Guaranty Company v. Crown Cork and Seal Co.*, 145 Md. 513, 125 A. 818 (1924), although not on point with the type of bond *sub judice*, addresses the extent of liability on a bond during different periods. In *U.S.F.&G., supra*, the policy provided that the insurer does not assume liability for any default or defaults in the aggregate exceeding the amount of its suretyship as determined by the original obligation of suretyship. The employee was originally covered in the sum of $20,000, which amount was changed from time to time as provided in the policy. Prior to 1 March 1922, coverage totaled $25,000. After 1 March 1922, coverage was reduced to $10,000. On 14 December 1922, it was discovered that the employee had embezzled $13,079.82 between 4 May 1921 and 1 March 1922; and $14,459.47 between 1 March 1922 and 14 December 1922. The insurer paid the $13,979.82 and denied liability as to the $14,459.47.

The annual notice of premium from USF&G to the insured contained the following language: "[Insurer] does not assume liability during any year or years, or for any default or defaults in the aggregate exceeding the amount of its suretyship as determined by the original obligation of suretyship." The insurer contended there was but one bond, originally in the sum of $25,000, and subsequently reduced to $10,000; and that it had paid its obligations arising out of defalcations while the $25,000 coverage was in effect.

The Maryland Court held that when losses occurred in separate periods, USF&G would be liable up to the amount in force in each period respectively. The premium was paid annually. At the end of any year the insured could have terminated the current contract of insurance and could have procured a new bond from the insurer. In that event it could not well be said that the insurer would not have been liable on each bond for losses during each period respectively. To hold that no further liability existed after payment of $13,079.82 to cover losses incurred prior to 1 March 1922, when the amount of the bond was $25,000 and to hold that no liability existed for losses occurring after 1 March 1922, when the bond was $10,000, would be to hold that the insured was paying for what it did not receive. A single premium, buying a

$25,000 policy had been paid. The Maryland Court held that such construction as contended by the insurer would be forced, unsubstantial, and unreasonable, for if the insured believed that under the policy he was receiving no protection for losses occurring after 1 March 1922, it is unlikely it would have continued to pay the same premiums it had paid when it did receive such protection. Nor can it be assumed that the insurer so understood it because it must have known that it could not readily sell insurance on such terms.

It is common sense to apply such reasoning to the case before us. This case is one of first impression covering the exact facts in question, and we are aware of the decisions in other jurisdictions which may reach a different result under similar circumstances. *See United States v. American Surety Co. of New York*, 172 F. 2d 135 (2d Cir. 1949), 7 A.L.R. 2d 940, *cert. denied* 337 U.S. 930 (1949), and annotations covering each side of the problem. Nevertheless, we hold that acceptance of the equal annual premiums by the defendant, together with Boyd's annual reappointments and the statutory requirement that he be bonded, acts as a renewal of the bond by the parties and estops defendant from denying coverage on an annual term basis. To hold otherwise would be to hold that Western Surety, "One of America's Oldest Bonding Companies," would be guilty of framing its contract of indemnity so as to ". . . extract premiums . . . without giving anything in return." *Simpson, supra*, at p. 759. We make the finding, fully cognizant of *Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E. 2d 198 (1946). We believe the facts in that case are not so distinguishable from the facts in *Simpson* and believe further that *Simpson* is the better reasoned opinion of the two and governs the result in the immediate case. It should be noted that in *Simpson*, Chapter 4, § 61 of the Public Laws of 1921, required the bank clerk to be bonded and enabled the board of directors to vary annually the amount of indemnity the bond would provide. Similarly, in our case, G.S. 159-29(a) requiring certain town officials to be bonded, coupled with G.S. 105-349 and G.S. 105-350 dealing with tax collection, gives the town commissioners the power to vary the extent of coverage the bond indemnifying the town clerk would provide. The Court in *Simpson* found the requirement that the clerk be bonded and the ability to vary the coverage each year important in reaching the conclusion that

there were several distinct contracts. We find the ability of the commissioners to demand and vary coverage in our case to be analagous and to mandate the result we have reached.

In the face of the General Statutes and the actions taken by the governing board of the town, we conclude the acceptance of premiums constituted part of a bilateral action and created several contracts—not one continuing agreement with one maximum sum to be recovered.

[3] Defendant further contends that the Town of Scotland Neck had made an agreement with Boyd whereby Boyd had agreed to make restitution to the town in the following amounts:

(a) $15,000 cash paid on December 14, 1977;

(b) $10,000 cash placed in escrow;

(c) $15,000 note secured by mortgage on Boyd home;

(d) $22,000 unsecured demand note.

The above amounts cover sums misappropriated by Boyd during the six-year statutory period. (G.S. 1-50) Except for the $15,000 paid in cash by Boyd, the assets are being held in escrow until the amount owed to the town by the bonding company is resolved and the final costs of auditing fees determined. Boyd was given a suspended sentence in the criminal action related to this cause, with the suspension being conditioned upon his making the payments set out above. Defendant contends such agreement extinguishes its liability to the extent of $62,000.

"The liability of the surety is extinguished by a payment of the obligation by the principal, which makes the injured party whole." 67 C.J.S., Officers § 294, p. 838.

> It is well settled that if the creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. *Deal v. Cochran*, 66 N.C. 269, 270 (1859).

Certainly, $15,000 of the total amount misappropriated by Boyd must be deducted from the amount due under the bond. However, the fact that the other payments are being held in escrow means that there has been no final payment of the obliga-

tion and that the possible liability of the surety has not been extinguished.

For the reasons set out above, the judgment entered by the trial court is vacated, and the plaintiff is granted a new trial.

New trial.

Chief Judge MORRIS concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

I do not find the opinion of Justice Clarkson in *Hood, Com'r of Banks, v. Simpson*, 206 N.C. 748, 175 S.E. 193 (1934) either as controlling or so persuasive as do my colleagues. Nor do I agree that Justice Clarkson's views represent "the better reasoned opinion" when compared with the opinion of our Supreme Court written twelve years later by Justice (later Chief Justice) Barnhill in *Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E. 2d 198 (1946).

The majority concedes that "[t]he liability of a surety on an official bond is to be determined by the language of the contract and cannot be enlarged beyond the scope of its definite terms." With that view I completely agree. My disagreement arises only when the majority proceeds to enlarge the liability of the surety beyond the scope of the definite terms of its agreement.

The contract with which we are here concerned is embodied in a single written instrument, the bond dated 31 August 1971 in the penal sum of $20,000.00. That bond recites that the principal, Boyd, had been appointed to the office of town clerk "for the term beginning the 10th day of September, 1966, *and being continuous*." (Emphasis added.) The surety's obligation under the bond is conditioned upon the faithful performance by the principal of the duties of his office and the honest accounting by him "for all moneys and effects that may come into his hands in his official capacity *during the said term*." (Emphasis added.) No other instrument was signed by the defendant Surety Company.

Despite the clear language of the one instrument which defendant did sign, in which the office of the principal is referred

to as "being continuous," the majority converts that instrument into seven separate contracts, each to apply anew to each of the years 1971 through 1977. It achieves this result by relying in part on the theory that payment of an annual premium converted the bond into a new bond each year and in part on the theory that statutes, which the majority finds applicable, must somehow be read in conjunction with the bond so as to transform it into seven separate contracts. I find neither theory persuasive.

Payment of annual premiums did not suffice to convert a single bond into a new contract each year in *Indemnity Co. v. Hood, supra,* and I see no sound reason why such payments should accomplish that result in the present case in which the single bond signed by defendant covers the principal's faithful performance during a term expressed as "being continuous."

As to the statutes, the statute relating to the term of office of a town clerk which was in effect on 31 August 1971, the date of the bond here in question, was G.S. 160-273. That statute provided that "[t]he governing body [of a municipality] shall, by a majority vote, elect a city clerk to hold office for the term of two years *and until his successor is elected and qualified.*" (Emphasis added.) It is in the light of that statute that the bond here in question, which refers to the principal's term of office as "being continuous," should be interpreted. Relevant also is the undisputed fact that on the date the bond was executed the principal in this case had continuously occupied the office of town clerk since 10 September 1964 and his last appointment to that office had been made at a meeting of the town commissioners held on 17 August 1966. Thus, on the date the bond was executed the principal had occupied the position of town clerk continuously for a period of more than seven years and his latest appointment to that position had been made more than five years previously. Under these circumstances the reference in the bond to the principal's term of office as "being continuous" accurately reflected the actual situation which then existed. The parties contracted in the light of that situation, and I see no sound reason why their contract should not be enforced as written.

I recognize that G.S. 160-273 was repealed effective 1 January 1972 and that the Act of the General Assembly by which this was accomplished, Ch. 698 of the 1971 Session Laws, had

already been enacted when the bond here in question was executed on 31 August 1971. However, even if it be conceded that the parties may have executed the bond in contemplation of the new statute which was to come into effect four months later, plaintiff's position is no stronger. The new statute, G.S. 160A-171, simply provides that "[t]here shall be a city clerk," but it does not specify any term of office for that position. The majority construes the statute as authorizing the governing body of the town to fix the term of office of the clerk, and it points to the minutes of the Town Commissioners of the Town of Scotland Neck showing successive annual reappointments of defendant's principal, Boyd, as establishing that the governing body of the town had in fact and in legal effect fixed the term of office of the town clerk as a one-year period. The majority then reasons from this that the bond which defendant signed, and which referred to the term of office as "being continuous," had been amended by the unilateral action of the town governing body so as to become in legal effect no longer one bond but a series of bonds, each to cover up to its full penal sum for a new and different term of office. If the Town of Scotland Neck could achieve this result through the unilateral action of its governing board without the consent (and even, so far as this record discloses, without the knowledge) of the defendant Surety Company, then I perceive no reason why the Town Commissioners could not also have, through the simple expedient of making monthly rather than yearly appointments, imposed upon defendant Surety Company without its knowledge or consent separate and successive obligations up to the full amount of the bond for every month of every year. I do not believe that such a result is compatible with sound principles of contract law.

Certainly decision of every case of this type depends upon the language used in the particular bond involved and on the circumstances surrounding its execution. *See* Annot., 7 A.L.R. 2d 946 (1949). In this case, the defendant's obligation to plaintiff is based on a single written contract. It is controlled by the clear language of that contract. I do not agree with the majority's view that the law has given the plaintiff, as the other party to that contract, such carte blanche authority to change its terms. I agree with the trial court that the extent of defendant's obligation on the bond is exactly what it says, $20,000.00, plus interest. Accordingly, I vote to affirm.

STATE OF NORTH CAROLINA v. LEBURN HOYT LANG

No. 7928SC681

(Filed 15 April 1980)

1. **Criminal Law § 101.4— jury's request for evidence during deliberation—denial not abuse of discretion**

The trial court did not abuse his discretion in refusing the jury's request to have the testimony of defendant's alibi witness given to them during their deliberations, since the court explained the denial of the jury's request by stating that he did not allow records to be read back to the jury "because [the court reporter] may not have heard it exactly as the witness said it, and you people might have heard it differently."

2. **Criminal Law § 97.2— additional evidence not permitted—no abuse of discretion**

The trial court did not abuse his discretion in denying defendant's motion to reopen the case to put into evidence the time card from the restaurant where defendant's alibi witness worked, since the time card merely presented cumulative evidence as to when the witness left her employment on the night of the crimes.

3. **Criminal Law § 113.9— jury instructions—necessity for calling misstatements to court's attention**

Slight inadvertences by the judge in his recapitulation of the evidence must be brought to the attention of the judge in time for him to make a correction, and such inaccuracies will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction.

4. **Criminal Law § 113.3— identification testimony—instructions on untrustworthiness not required—failure to request instructions**

There was no merit to defendant's contention that the trial court erred in failing to instruct the jury as to the inherent untrustworthiness of eyewitness identification testimony, since defendant made no request for such an instruction, and since the witness in this case had sufficient opportunity to observe her assailant and his car to support her subsequent identification at trial without special instructions from the court.

5. **Constitutional Law § 31— investigation of crime**

Police officers are under no duty to take any particular course of action when investigating a crime and are not required to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error.

6. **Criminal Law § 102.9— jury argument—defendant compared with other criminals—no impropriety**

Statement by the district attorney during his closing argument that "before Jimmy Wayne Gacy, Jimmy Jones, and Judas Iscariot committed their

crimes, they had good character" was not prejudicial to defendant since defendant did not object to the remarks and therefore waived his right to complain; the statement did not amount to such a gross impropriety that it could not be corrected; and the court did not abuse his discretion in permitting the argument.

7. **Constitutional Law § 30— oral statement not disclosed to defendant—no proper request for discovery—statement not prejudicial**

There was no merit to defendant's contention that an oral statement allegedly made by him to a police officer was wrongfully withheld from defense counsel during discovery and therefore should have been excluded from evidence, since defendant made neither a written request nor a motion to compel discovery as required by G.S. 15A-902(a); the State did not waive its right to receive a written request by voluntarily producing defendant's written statement pursuant to an informal oral agreement between the prosecutor and defense counsel; and the oral statement itself was consistent with defendant's alibi defense and therefore was not prejudicial to defendant.

8. **Criminal Law § 111— jury required to return guilty verdict—instructions proper**

There was no merit to defendant's contention that, since it has been held that affirmative instructions on jury nullification are improper, it is also improper to instruct that, upon finding the evidence supportive of the charges beyond a reasonable doubt, the jury is required to return a verdict of guilty.

9. **Rape § 18.2— intent to rape—showing required**

An intent to commit rape may be inferred from the evidence without a showing of an actual physical attempt to have intercourse.

APPEAL by defendant from *Grist, Judge*. Judgment entered 11 January 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 January 1980.

On 6 November 1978, defendant was indicted on charges of kidnapping with the intent to rape and assault with the intent to commit rape. Upon his plea of not guilty, defendant was convicted by the jury on both charges. Upon his conviction for assault with the intent to commit rape, defendant was sentenced to a prison term of 15 years, and he received a suspended sentence of 25 years on the kidnapping charge, with a five-year probation period to commence at the expiration of the 15-year term. From the judgments entered defendant appeals.

Other facts pertinent to this decision are related below.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgett, for the State.

Elmore and Elmore and Tharrington, Smith and Hargrove, of counsel, and Joseph Beeler, for defendant appellant.

MORRIS, Chief Judge.

The record contains 20 assignments of error, 16 of which have been brought forward and argued in defendant's brief. Those not brought forward and argued are deemed abandoned. Rule 28, North Carolina Rules of Appellate Procedure. Defendant does not argue his assignments of error in consecutive order, and we will follow the order of argument used by defendant in his brief.

[1] By his nineteenth assignment of error, defendant contends that the trial court improperly refused the jury's request to have the testimony of defendant's alibi witness given to them during their deliberations. At trial, defendant presented Rena James who testified that she had been working as a waitress at a restaurant on the night the alleged kidnapping and assault occurred. The witness testified that defendant arrived at the restaurant shortly before 9:00 p.m., had dinner and left at around 10:00 p.m., which was the approximate interval of time in which the offenses allegedly occurred. After being excused to deliberate, the jury returned and asked if the transcript of the waitress's testimony would be available. The court answered as follows:

> No, sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of your people are expected, through your ability to hear and to understand and to recall, to establish what the testimony was. No, I hope you understand. She takes it down and the record, after she submits it to the various individuals, if it needs to be submitted is gone over and then they themselves can object to what she had in the record as not being what the witness says, and so on and so forth. For that reason I do not allow records to even be read back to the jury, because she may not have heard it exactly as the witness said it, and you people might have heard it dif-

> ferently; so for that reason you are required to recall the witness' testimony as you've heard it.

Defendant contends that the trial judge erred by refusing to exercise his discretion to rule on the request, or, if he did exercise his discretion, his denying the request constituted an abuse of discretion in light of the importance of alibi testimony to the issue of identification.

Defendant relies on the recent case of *State v. Ford*, 297 N.C. 28, 252 S.E. 2d 717 (1979), wherein our Supreme Court stated the following rule:

> It is well settled in this jurisdiction that the decision whether to grant or refuse the jury's request for a restatement of the evidence lies within the discretion of the trial court. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977), *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed. 2d 281; *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). When the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable. (Citations omitted.)

297 N.C. at 30-31, 252 S.E. 2d at 718-19. In *Ford*, the Court concluded that since the trial judge's ruling was based on a misapprehension of the law, he, therefore, erroneously failed to exercise his discretion.

Under the facts of the present case, we reach a different result. The court explained the denial of the jury's request by stating that he did not allow records to be read back to the jury "because [the court reporter] may not have heard it exactly as the witness said it, and you people might have heard it differently. . . ." It is clear from the trial judge's explanation that he did not misapprehend the law regarding his discretion, and that he did in fact exercise his discretion in ruling on the request. Nor does the statement of the trial judge compel a conclusion that the ruling was based on a predisposition on his part to ignore requests to have testimony made available to the jury. The court gave a valid reason for its ruling, and we find no abuse of discretion. This assignment of error is overruled.

[2] Defendant, by his tenth assignment of error, argues that the trial court committed reversible error in its denial of defendant's motion to reopen the case to put into evidence Rena James's time card from the restaurant where she worked on the night in question, she having testified that she left her employment at Bonanza at approximately 10:00 p.m. and arrived home at approximately 10:15 p.m. We find no error in the court's ruling. It is well settled that a motion to reopen the case in order to permit additional evidence is a matter within the discretion of the trial court. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). There was no abuse of discretion in the court's ruling in the present instance in that the time card merely presented cumulative evidence as to when the waitress left her employment that night.

[3] Defendant's contention in his eleventh, twelfth, thirteenth, fourteenth and fifteenth assignments of error is that in its charge to the jury the trial court misstated certain evidence concerning the issues of identification and defendant's alibi defense. It is settled in North Carolina that slight inadvertences by the judge in his recapitulation of the evidence must be brought to the attention of the judge in time for him to make a correction, and that such inaccuracies will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). The alleged inaccuracies in the court's recapitulation of the evidence were not brought to the attention of the trial judge, and under ordinary circumstances, an objection after verdict and upon appeal comes too late.

Defendant contends, however, that the alleged misstatements in the recapitulation of the evidence were not slight inaccuracies but were statements of material fact not shown in evidence and, therefore, the generally accepted and applied rule has no application here. *See State v. Frizzelle*, 254 N.C. 457, 119 S.E. 2d 176 (1961); *State v. Butcher*, 13 N.C. App. 97, 185 S.E. 2d 11 (1971). It will serve no useful purpose for us to discuss in detail the entire charge and each portion of the charge which defendant contends is error. Suffice it to say that on the facts of the case before us, we fail to see any prejudice to defendant from the court's recapitulation of the evidence.

[4] Defendant next argues his eighteenth assignment of error which is that the trial court erred in failing to instruct the jury as to the inherent untrustworthiness of eyewitness identification testimony. Defendant argues that where the issue of one-on-one identification by the prosecuting witness is involved, as here, the trial court is required, even in the absence of a request for a special instruction, to admonish the jury that the burden of proof is upon the prosecution to prove beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged, citing several federal decisions. *E.g., United States v. Holley,* 502 F. 2d 273 (4th Cir. 1974); *United States v. Telfaire,* 469 F. 2d 552 (D.C. Cir. 1972); *United States v. Levi,* 405 F. 2d 380 (4th Cir. 1968); *Jones v. United States,* 361 F. 2d 537 (D.C. Cir. 1966).

The trial judge is required, in instructing the jury, to declare and explain the law arising on the evidence. G.S. 15A-1232. G.S. 1-181 allows special instructions on request, and provides:

> (a) Requests for special instructions to the jury must be—
>
> (1) In writing
>
> (2) Entitled in the cause, and
>
> (3) Signed by counsel submitting them.
>
> (b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.
>
> (c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same.

A request for special instructions, properly made, imposes a duty on the court to give the instructions, at least in substance, where relevant to the case. *State v. Thomas,* 28 N.C. App. 495, 221 S.E. 2d 749 (1976). However, in the absence of such a request, no duty arises on the part of the trial court, and where the instruction is not in writing and signed pursuant to G.S. 1-181, it is within the discretion of the trial judge to give or to refuse an instruction. *State v Thomas, supra; State v. Hardee,* 6 N.C. App. 147, 169 S.E. 2d 533 (1969). In the present case, defendant made no request for a special instruction on the issue of identification.

Defendant insists, however, that under the federal decisions previously cited, the court has a duty to give an identification instruction, notwithstanding the failure of defense counsel to request such an instruction. In *United States v. Levi*, 405 F. 2d 380 (4th Cir. 1968), the Fourth Circuit approved an identification instruction in a context identical to the present case where the question of the sufficiency of one-on-one positive identification arose:

> In response to recurrent appeals questioning the sufficiency of one-on-one positive identification testimony to support a conviction, the Court of Appeals for the District of Columbia has promulgated a rule that when the defendant has placed his identification in issue, it is incumbent upon the trial court, *on request*, to specially instruct the jury (1) "that the evidence raises the question of whether the defendant was in fact the criminal actor and necessitates the juror's resolving any conflict in testimony upon this issue," and (2) "that the burden of proof is upon the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged." *Jones v. United States*, 124 U.S. App. D.C. 83, 361 F. 2d 537, 542 (1966). We approve. (Emphasis added.)

405 F. 2d at 382-83. In *United States v. Telfaire*, 469 F. 2d 552 (D.C. Cir. 1972), the Court adopted a similar instruction and without espousing a mandatory application, emphasized the care with which the instruction should be used:

> We do not qualify in any particular the importance of and need for a special identification instruction. But in evaluating the prejudice inherent in the failure of the trial court to offer one, we have taken into account that in the circumstances of a particular case, the proof, contentions and general instructions may have so shaped the case as to convince us that in any real sense the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved byond a reasonable doubt.

469 F. 2d at 555-56. The Court concluded that although such an instruction was not compulsory, "a failure to use this model, with appropriate adaptations, would constitute a risk in future cases

that should not be ignored unless there is strong reason in the particular case." 469 F. 2d at 557.

More recently, in *United States v. Holley*, 502 F. 2d 273 (4th Cir. 1974), the Fourth Circuit adopted the approach taken in *Telfaire*, and interpreted that decision as follows:

> After our decision in *Levi*, the Court of Appeals of the District of Columbia viewed our decision as "the correct approach," *United States v. Telfaire*, 152 U.S. App. D.C. 146, 469 F. 2d 552, 555 n. 5 (1972) and took it a step further. In *Telfaire* the District of Columbia Circuit in effect required that our *Levi* instruction to the district judges be given by the trial judge to the jury. We agree that to guard against misidentification and the conviction of the innocent it is not enough that the trial judge himself be specifically alerted to the detailed factors that enter into the totality of the circumstances, but that the jury should also be charged. In *Telfaire* the District of Columbia Circuit adopted generally for judges within the district of a model instruction, . . . but permitting variation and adaption to suit the proof and contentions of a particular case. We now do likewise as to the district judges in this circuit . . . Prospectively, we shall view with grave concern the failure to give the substantial equivalent of such an instruction, but it is not our purpose to require that it be given verbatim.

502 F. 2d at 275.

We need not decide at this time what effect these decisions have on the rule in North Carolina requiring written requests for special instructions. As persuasive authority, these decisions suggest that the issue of one-on-one identification is one that should be continuously scrutinized against constitutional standards. However, assuming *arguendo* that the jury's attention was significantly forcused on the issue of identity, we find that this case "exhibits none of the special difficulties often presented by identification testimony that would require additional information be given to the jury in order for us to repose confidence in their ability to evaluate the reliability of the identification." *United States v. Telfaire*, *supra*, at 556. Defendant raises no objection to the pre-trial identification procedures utilized in this case. Further, it appears that, although the prosecuting witness was told

to put her head down during most of the time she was in her assailant's car, there was sufficient opportunity to see and observe her assailant and the car he was operating to support her subsequent identification at trial. We conclude, therefore, that the lack of a special identification instruction does not constitute prejudicial and reversible error. This assignment of error is overruled.

[5] Defendant next complains, in assignment of error No. 20, that the State failed to conduct certain investigatory tests which defendant contends, if made, would have exonerated him from any involvement in the crimes alleged. We find defendant's argument totally without merit. "Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error." *State v. Noell*, 284 N.C. 670, 694, 202 S.E. 2d 750, 765 (1974), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976). *See also State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902,49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976). We overrule this assignment of error.

[6] By his ninth assignment of error, defendant contends that the court erred by failing to strike *ex mero motu* a portion of the district attorney's closing argument, asserting that the prosecutor improperly associated him with known criminals. In rebuttal to testimony given by certain character witnesses presented by defendant, the district attorney stated on final argument that "a person could commit a crime even though he had a reputation of good character." He then stated that "before Jimmy Wayne Gacy, Jimmy Jones, and Judas Iscariot committed their crimes, they had good character" and that "Jimmy Jones had Rosalyn Carter speak of his good character." Defendant argues that these statements exceeded the bounds of proper argument. We disagree.

First, it is sufficient to note that defendant did not object to the State's remarks, and, therefore, waived his right to complain. "[A]n impropriety in counsel's jury argument should be brought

to the attention of the trial court before the case is submitted to the jury in order that the impropriety might be corrected." *State v. Hunter*, 297 N.C. 272, 277, 254 S.E. 2d 521, 524 (1979); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). Second, although this rule does not apply when the impropriety is so gross that it cannot be corrected, *State v. Hunter, supra*, the alleged transgression here was certainly not in that category. Finally, "[t]he control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge and his rulings thereon will not be disturbed in the absence of gross abuse of discretion." *State v. Hunter, supra*, 297 N.C. at 278, 254 S.E. 2d at 524. We find none here. This assignment of error is overruled.

[7] Defendant next maintains (assignment of error No. 6) that the court improperly admitted into evidence testimony concerning an oral statement allegedly made by defendant while being interviewed by a police officer a few hours after the incident took place. The purport of the statement was that defendant had eaten dinner at a steak house between 9:00 p.m. and 9:30 p.m. that evening. On cross-examination, defendant did not deny making the statement, but said he "was there until later" than 9:30 p.m. and that he did not "recall saying a limited time". The police officer who had interviewed defendant stated on rebuttal that defendant had told him "that he had dinner between 9:00 and 9:30 at some steak house. . . ." Defendant argues that the existence of this oral statement was wrongfully withheld from defense counsel during discovery, and, as admitted, the statement constitutes prejudice toward defendant.

G.S. 15A-903(a)(2) provides:

> (a) Statement of Defendant—Upon motion of a defendant, the court must order the prosecutor:
>
> . . .
>
> (2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial.

This section makes clear the duty of the State with respect to discovery of oral statements by a defendant. It also makes clear that the burden is on defendant to request such discovery in writing prior to a motion to compel discovery. Defendant has

made neither a written request nor a motion to compel discovery as required by G.S. 15A-902(a). The State, therefore, has no duty to produce a defendant's statement or to notify defendant of its intention to use a defendant's oral statement at trial. In addition, we reject defendant's contention that the State waived its right to receive a written request by voluntarily producing defendant's written statement pursuant to an informal oral agreement between the prosecutor and defense counsel. Furthermore, we find little prejudice in the testimony admitted at trial. The substance of the statement was that defendant was at a restaurant between 9:00 p.m. and 9:30 p.m., which is totally consistent with defendant's alibi defense. The statement does not contradict defendant's assertion that he did not leave the restaurant until 10:00 p.m. We, therefore, reject defendant's argument and overrule this assignment of error.

[8] By his assignments of error Nos. 1 and 17, defendant contends that the trial court improperly instructed the jury that if they were to find that the elements of the charges alleged were proven beyond a reasonable doubt, "it would be your duty to return a verdict of guilty . . . ." Defendant's position is based on federal decisions recognizing that juries possess the power of "nullification"; *i.e.*, the power to acquit a defendant even where such a verdict is contrary to the law and evidence. *E.g.*, *United States v. Dougherty*, 473 F. 2d 1113 (D.C. Cir. 1972); *United States v. Simpson*, 460 F. 2d 515 (9th Cir. 1972); *United States v. Moylan*, 417 F. 2d 1002 (4th Cir. 1969). Defendant reasons that since it has been held that affirmative instructions on jury nullification are improper, *United States v. Moylan, supra*, *United States v. Dougherty, supra*, this Court should hold that it is also improper to instruct that upon finding the evidence supportive of the charges beyond a reasonable doubt, they are *required* to return a verdict of guilty.

Although defendant's argument presents an interesting question as to the operation of the jury system, we are compelled to reject defendant's position. Defendant cites no authority nor can we locate any which supports defendant's contention that the instruction given in the present case is improper. It is our opinion that inasmuch as the majority of courts have refused to permit instructions explicitly referring to the right of nullification, it would be inconsistent to hold that this instruction is inappropriate.

Although it is well settled that "[i]n a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt," *United States v. Spock*, 416 F. 2d 165, 180 (1st Cir. 1969) and cases cited therein, we do not believe the instruction in the present case invades the province of the jury in similar vein. Indeed, we find the instruction as given to be entirely consistent with the principle of law that "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence." *Sparf and Hansen v. United States*, 156 U.S. 51, 102, 39 L.Ed. 343, 361, 15 S.Ct. 273, 293 (1895).

In addition, defendant complains that the trial court misled the jury as to the duties of the parties in a criminal trial by stating in its preliminary remarks the following: "It's the State's duty and Defense Counsel's duty right here to present to you whatever you need to know to decide this case. . . ." Given the context in which they were spoken, we do not find the court's remarks offensive or improper.

[9] Finally, by assignment of error No. 4, defendant contends that the evidence presented by the State was insufficient to go to the jury on the charge of kidnapping with the intent to rape. The quantum of evidence necessary on the element of intent is aptly explained by former Chief Justice Sharp in *State v. Hudson*, 280 N.C. 74, 77, 185 S.E. 2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 39 L.Ed. 2d 112, 94 S.Ct. 920 (1974), and that discussion is applicable here. It is clear that an intent to commit rape may be inferred from the evidence without a showing of an actual physical attempt to have intercourse. *State v. Hudson, supra; State v. Sports*, 41 N.C. App. 687, 255 S.E. 2d 631, *further review denied*, 298 N.C. 205, --- S.E. 2d --- (1979). After reviewing the evidence presented, we are of the opinion that from defendant's actions as well as circumstances surrounding the incident, the jury could properly infer that the abduction was committed with an intent to commit rape. Defendant's assignment of error is overruled.

For the foregoing reasons, we find in the trial below

No error.

Judges MARTIN (Harry C.) and HILL concur.

BETTY D. LOVELL, PLAINTIFF v. ROWAN MUTUAL FIRE INSURANCE COMPANY AND GRAHAM M. CARLTON, SUBSTITUTED TRUSTEE, DEFENDANTS AND ROWAN MUTUAL FIRE INSURANCE COMPANY, THIRD-PARTY PLAINTIFF v. ROBERT J. LOVELL, THIRD-PARTY DEFENDANT

No. 7919SC508

(Filed 15 April 1980)

1. **Husband and Wife § 15; Insurance §§ 121, 134— entirety property—intentional burning by husband—no right by innocent wife to recover fire insurance proceeds**

An innocent wife could not recover under a fire insurance policy issued to her husband insuring property owned by them as tenants by the entirety when the loss by fire was occasioned by the intentional burning of the property by the husband and the policy provided that the insurer would not be liable for loss by fire caused by the neglect of the insured to use all reasonable means to "use and preserve the property, at and after a loss."

2. **Insurance § 135.1— fire insurance—no obligation to insureds—payment to mortgagee—assignment of note and mortgage**

Where an insurer had no obligation to insureds under a fire insurance policy for the intentional burning of a house but was required to pay a mortgagee named in the policy, the insurer had the right under the policy to take an assignment of the note and deed of trust from the mortgagee and to institute foreclosure proceedings upon default.

3. **Mortgages and Deeds of Trust § 26— notice of foreclosure hearing—wrong year stated—no fatal defect**

A notice of a foreclosure hearing before the clerk of court was not fatally defective because the notice, dated 8 December 1978, stated that the hearing would be held on 3 January 1978 rather than 1979. G.S. 45-21.16(a).

Judge HILL dissenting.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 6 March 1979 in Superior Court, ROWAN County. Heard in the Court of Appeals 9 January 1980.

Plaintiff alleged that she and her husband owned certain real estate in Rowan County as tenants by the entirety, the property having been conveyed to them by plaintiff's parents as a gift. The house situate on the lot and the household and personal property contained therein were insured by Rowan Mutual Fire Insurance Company in the amount of $30,000. The house was worth at least $27,000 and the value of plaintiff's personal property in the house had a value immediately before the fire of more than $3,000. The

house was destroyed by fire on 24 September 1978, at a time when the insurance policy issued by defendant Insurance Company was in full force and effect. At the time of the fire, plaintiff and her husband were indebted to Citizens Savings and Loan Association, the note evidencing the debt being secured by a deed of trust on the property. At the time of the fire, the balance due on that debt was $15,103.75. Defendant Insurance Company has paid to Citizens Savings and Loan Association the balance due on the note and has taken an assignment of the note and deed of trust. Also at the time of the fire, plaintiff and her husband were indebted to North Carolina National Bank, which debt was evidenced by a note secured by a deed of trust conveying the property. At the time of the fire, this debt was $4,331.20. Subsequent to the fire, defendant Insurance Company paid this note, and the bank assigned to it the note and deed of trust. The fire which destroyed the house was set by plaintiff's husband who pled guilty to the felonious burning of his dwelling house. Plaintiff alleges that as a result of the wrongful acts of her husband and "pursuant to the legal effect and consequence of the plaintiff owning the property as an estate by the entirety," she is entitled to all the proceeds from the insurance policy, representing the difference between the total coverage and the amounts paid Citizens Savings and Loan Association and North Carolina National Bank, specifically $10,565.05. Plaintiff further alleges that defendant Carlton, Substituted Trustee, is wrongfully and illegally attempting to foreclose the deed of trust and sell the land, even though, pursuant to the terms of the policy of insurance, the note secured by the deed of trust has been paid in full. She asks that she recover of the defendant Insurance Company $14,896.25 and that any amount realized from the foreclosure sale be paid over to her after deducting the costs of sale. Plaintiff also seeks punitive damages, a question not germane to this appeal.

Defendant, Insurance Company and Carlton, Substituted Trustee, answered admitting coverage, admitting that the property was owned by plaintiff and her husband as tenants by the entirety, that plaintiff's husband had been charged with the felonious and willful destructive fire of the house, that a foreclosure proceeding had been begun. It denied all other allegations including the allegation that the "fire was a total loss".

As a further defense, the Insurance Company averred that Robert J. Lovell, plaintiff's husband, was the only named insured in the policy, which contained a provision that the Company would not be liable for any loss by fire caused by the neglect of the insured to use all reasonable means to "use and preserve the property, at and after a loss" except to any mortgagee named in the policy. Since the named insured violated those policy provisions by intentionally burning the house, the Company was discharged of all liability except to the mortgagee.

As a second further defense, the defendant Company averred that if any amount should become payable under the policy, the check would have to be made to Robert Lovell, who has forfeited all rights to the proceeds. If the plaintiff were allowed to recover any amount, the husband would benefit since plaintiff and Robert Lovell are still married.

For its first counterclaim against plaintiff, Insurance Company alleged that it is entitled to recover of plaintiff the amount paid to Citizens Savings and Loan Association.

For its second counterclaim, Insurance Company alleged that it is entitled to recover the amount paid North Carolina National Bank.

As its first third-party claim against Robert J. Lovell, third-party defendant, the Insurance Company alleged its entitlement to recover the $15,103.75 paid to Citizens Savings and Loan Association.

As its second third-party claim, the Insurance Company seeks to recover the $4,331.20 paid to North Carolina National Bank, and for its third third-party claim, it alleges that third-party defendant Lovell is obligated to repay it for all amounts it shall be required to pay under its policy.

Defendant moved for summary judgment and filed with the motion complaint, answer, and consent judgment in an action by Betty D. Lovell vs. Robert J. Lovell, for divorce a mensa et thoro, alimony, child custody, and child support, and judgment in the criminal action against Robert J. Lovell, all properly authenticated, together with affidavit of an official of the Savings and Loan Association that all premiums for fire insurance were paid

by Betty and Robert Lovell and none was paid by the Citizens Savings and Loan Association.

The court granted the motion and incorporated in the order a finding that there is no just reason to delay ruling on this claim pending determination of the counterclaim and the third-party claim. Plaintiff appealed.

Coughenour, Linn and Short, by W. C. Coughenour, for plaintiff appellant.

Carlton and Rhodes, by Graham M. Carlton, for defendant appellees.

MORRIS, Chief Judge.

[1] This case presents a question of first impression in this State; *i.e.* whether an innocent wife can recover under an insurance policy issued to her husband insuring property owned by them as tenants by the entirety when the loss by fire was occasioned by the intentional burning of the property by the husband. The answer must be governed by the application of the law relating to tenancies by the entirety as well as the provisions of the policy of insurance.

The properties and incidents of this peculiar estate of husband and wife were concisely set out in *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). Because decision rests in large measure on the necessary application of these principles, we summarize what was said by Chief Justice Stacy in *Davis v. Bass, supra.*

> 7. A lease by the husband alone, without the wife's joinder, is valid during coverture, because he is entitled to the possession, income, increase or usufruct of the property during their joint lives. . . .
>
> 8. Where an estate is conveyed to a man and woman who are not husband and wife, but who afterwards intermarry, as they took originally by moieties, they will continue to hold said estate by moieties after the marriage. Hence, there is nothing in the relation of husband and wife which prevents them from taking originally and thereafter holding their interests as tenants in common, if they so desire. . . . The intention appearing, a conveyance may be made to husband and

wife as tenants in common; but otherwise they will take by the entirety with right of survivorship. . . .

9. An absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common. . . .

. . .

11. While the husband is entitled to the possession of an estate held by the entirety and to take the rents and profits arising therefrom during coverture, with immunity of said estate from attachment or sale under execution, yet in a proceeding for alimony without divorce under C.S., 1667, the usufruct of the property may be subjected to the payment of an award for the wife's reasonable subsistence and that of the children of the marriage, together with counsel fees as allowed by ch. 123, Public Laws, 1921. . . .

. . .

12. Neither party is entitled to partition. . . .

13. It has been held that an action by husband and wife, involving title or possession to lands held by the entirety, will not be barred by the statute of limitations as to one unless it bars both. [Citation omitted.]

14. A sale by husband and wife and a division of the proceeds ends an estate by the entirety. *Moore v. Trust Co.*, 178 N.C., 118. But it may be otherwise where sale is made and one dies before division of purchase money. [Citation omitted.]

15. A tenancy by the entirety may exist in lands whether the estate be in fee, for life, or for years, and whether the same be in possession, reversion, or remainder (30 C.J., 566); but in this jurisdiction it is held that there can be no estate by the entirety in personal property. [Citation omitted.]

16. Where land is conveyed or devised to a husband and wife for and during the term of their natural lives, or during the life of the survivor, with remainder to their heirs in fee, said husband and wife, under the rule in *Shelley's case*, take a fee-simple estate as tenants by the entirety in the property so conveyed or devised. [Citation omitted.]

> 17. The above rules apply to devises to husband and wife, and also to contracts to convey land to husband and wife. *Stamper v. Stamper*, 121 N.C., 252. They likewise apply to a gift or devise to husband and wife "during their natural lives." [Citation omitted.]

188 N.C. at 206-209, 124 S.E. at 569-571.

In *Carter v. Insurance Co.*, 242 N.C. 578, 89 S.E. 2d 122 (1955), the Court was asked to determine the ownership of the proceeds of a fire insurance policy. Plaintiff and his wife owned the property as tenants by the entirety, but they were living separate and apart at the time the policy was issued and at the time the fire occurred occasioning the loss. Plaintiff husband was in possession of the property, applied for the insurance in his name only, and paid the premium therefor. He made demand on the insurance company for the entire proceeds of $4,000. After the fire, the wife obtained an absolute divorce from plaintiff, and made claim against the insurance company for one-half the proceeds. Both demands were refused, and husband brought action against the insurance company, which, with consent of all parties, paid the proceeds into court and was dicharged from liability. The wife was then substituted as defendant and was allowed to aver her claim for one-half the money on deposit. The Court held that she was entitled to one-half the proceeds because of the divorce. In reaching that conclusion the Court held that any insurance on the interest of one tenant by the entirety inured to benefit of the other, saying:

> It may be conceded that the plaintiff husband had an insurable interest in the property of which he and his wife were seized as tenants by the entirety. *However, since the proprietary interest of the husband was an inseparable part of the single-entity title held in unity by him and his wife, his insurable interest ran to the whole of the property and covered the entire estate.* [Citations omitted.] *We conclude that the insurance policy as written and the loss benefits created thereby inured to the benefit of the entire estate as owned by both husband and wife.* (Emphasis added.)

242 N.C. at 580, 89 S.E. 2d at 124. *See also Forsyth County v. Plemmons*, 2 N.C. App. 373, 163 S.E. 2d 97 (1968).

Since neither tenant in an estate by the entirety can insure his or her interest as a separate moiety apart from the estate owned by the two of them as an indivisible estate without the insurance inuring the benefit of the entirety, it follows that each tenant must accept as an act of both of them any act of the other affecting the estate. The fact that the husband was the named insured is of no consequence.

The interests of the husband and wife are nonseparable, and where this situation exists, courts generally hold that the innocent insured may not recover under the policy following an intentional act on the part of one of the insured tenants which would otherwise require payment for a loss to the property insured. *See* Annot. 24 A.L.R. 3d 450 (1969). In *Rockingham Mutual Insurance Co., v. Hummel*, --- Va. ---, 250 S.E. 2d 774 (1979), the Court refused recovery to an innocent wife whose husband had intentionally burned property owned by them as tenants by the entirety and the two were named insureds. The action was brought by the insurer to recover funds it had paid to the couple on the loss claimed. The trial court had sustained the wife's demurrer but continued the action as to the husband. The Court held that the two had a joint obligation to refrain from defrauding the insurer, and even though the wife was entirely innocent, she was not entitled to share in the insurance proceeds. The Court cited with approval *Klemens v. Badger Mututal Insurance Co. of Milwaukee*, 8 Wis. 2d 565, 99 N.W. 2d 865 (1959), a case with the same holding on almost identical facts, and *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E. 2d 599 (1951), where the Court held that neither tenant in an estate by the entirety could sever the estate by his own act, for its holding that the legal interest in the subject matter of the policy was joint and not severable. *See also Mele v. All-Star Insurance Corp.*, 453 F. Supp. 1338 (E.D.Pa. 1978).

A well-reasoned opinion is *Matyuf v. Phoenix Insurance Co.*, 27 D. & C. 2d (Pa.) 351 (1933) [unreported until 1962]. Insurance Company has issued to Frank T. Matyuf and his wife, Julia, a policy of insurance insuring against loss by fire a building owned by them as tenants by the entirety. Less than thirty days after the policy was issued, the building was destroyed by a fire set by Frank Matyuf, who had that day purchased additional insurance in his own name without the knowledge or consent of his wife. The wife was completely innocent of any wrongdoing with respect

to the fire and knew nothing about it. Frank and Julia Matyuf brought suit to recover the insurance coverage. The policy there contained language identical to the language in the policy before us; *i.e.*. "This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: . . . (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, . . ." and "Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured."

The Court recognized that the willful burning of the building was a fraud against the wife as well as against the insurer but held that "to allow a recovery by or for the wife alone, to the extent of one-half of the value of house, upon the ground that she is entitled to be indemnified for *her* loss, would be to substitute another contract in the place of the one made, which was for an insurance to protect the indivisible ownership by entireties." 27 D. & C. 2d (Pa.) at 359. The Court further held that the effect of the provisions as to neglect to use all reasonable means to save and preserve the property in event of a fire was to impose upon the tenants jointly the duty to use all reasonable means to preserve the property in event of fire so that each became responsible not only for his own failure, if any, to so act but also became responsible for the failure to act of the cotenant.

We agree with the Court in *Matyuf* that if either of the tenants "fraudulently violated the good faith owing to the insured, . . . both are chargeable with and affected by such violation, to the extent of the operating as an obstacle to recovery. . . . Plaintiffs . . . are intimately connected together as joint tenants by entireties [sic], each of them being seized of the property as an indivisible whole, and either, when in the physical possession and control of the property, holding for and representing therein the other; . . ." 27 D. & C. 2d (Pa.) at 361-362.

While plaintiff may have an action against her husband, she cannot recover her loss from defendant insurer.

[2] Since the insurer has no liability to plaintiff, it had the right under the policy to take an assignment of the debt owed to the

Savings and Loan and initiate foreclosure proceedings upon default. The policy provides:

> Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owners, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his, her or their claim.
>
> The above Mortgage Clause DOES NOT apply to personal property.

Insurer's payment to Savings and Loan was made by reason of its obligation under the contract of insurance. It did not affect the outstanding indebtedness of plaintiff and her husband. Their debt was not extinguished, and under the specific policy provisions, the insurer is subrogated to the rights of the mortgagee.

[3] Plaintiff argues in her brief that notice of the foreclosure hearing before the Clerk was improper. The notice, dated 8 December 1978, notified her that a hearing would be had in the Clerk's office on 3 January *1978* (rather than 1979) at 11:00 o'clock a.m., and further notified her that the sale was scheduled for 25 January 1979.

G.S. 45-21.16(a) requires that a notice of hearing shall be given to

> (b)(3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time of giving notice. The term "record owner" means any person owning a present or future interest of record in the real property which interest would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mort-

gage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property.

Section (c) provides:

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument, and if different from the original holder, his name and address.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.

(6) Repealed by Section Laws 1977, c. 359, s. 7.

(7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.

(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be

mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

It is quite clear that the notice was sufficient to make plaintiff aware of all the requirements except that an obviously inadvertent error placed the date as 1978 rather than 1979, an error which is frequently made in notices, letters, and other documents in December and January of each year. It seems obvious, however, that plaintiff could not have been misled. A telephone call to the Clerk's office would have certainly cleared up any confusion. Nor does plaintiff contend that she was not made aware of any other requirement of the statute. Despite the fact that this question should properly be raised in the foreclosure proceeding, we hold that the notice was not sufficiently defective as to set aside the proceedings.

Affirmed.

Judge PARKER concurs.

Judge HILL dissents.

Judge HILL dissenting.

I must dissent in this case of first impression in our Court. I do so because the facts herein are distinguishable from those in the cases cited by the majority of this Court and because simple equity demands it.

At the time of the fire the wife was living in a state of separation from her husband and subsequent thereto brought an action for divorce from him. The arsonist husband burned the jointly owned dwelling for spite, in retaliation against his wife, and has been convicted in the criminal court for such wrongdoing. These facts present a marked difference from the cases cited by the majority where the arsonist spouse burned the premises to collect from the insurance company—and the other cotenant spouse simply was innocent of any wrongdoing.

I have no quarrel with the premise that in cases where the purpose of the arson is directed toward a recovery from an insurance company, joint tenants have a mutual obligation to preserve jointly held property from loss by fire. Such was not the intent of the arsonist in the instant case. Furthermore, there is no evidence in the record that the wife was not doing all she could to preserve the property.

Had the arsonist been a stranger, there would have been no question of liability by the insurance carrier. Similarly, in this case where the husband and wife were like strangers to each other, I cannot see that a record severance of the marriage relationship by divorce decree should be a prerequisite to obtaining insurance coverage.

In this case the property on which the dwelling was constructed was given by the wife's parents to husband and wife jointly. The insurance carrier chose not to pay the balance of the note secured by the deed of trust on the real estate to the mortgagee; rather, it chose to buy the note and foreclose the deed of trust which would further add to the loss suffered by the wife. It is argued that the insurance contract provided for this. I do not agree under the facts of this case. The mortgage indebtedness should be paid as set out below.

The proceeds of an insurance policy is cash. Cash is personal property and is separable.

I would hold under the circumstances of this case that one-half of the balance due under the note to the mortgagee should be paid as the husband's share of the note and one-half of the total fire loss should be paid to the mortgagee and the wife as their interests may appear. The carrier would then be able to proceed against the husband-wrongdoer to recover its loss.

Where equity and law have merged and are at issue, equity ought to prevail.

EQUITABLE LEASING CORPORATION v. HAROLD EARL MYERS, D/B/A MYERS TRADING POST, AND JUANITA M. MYERS

No. 7920SC583

(Filed 15 April 1980)

1. **Appeal and Error § 6— method for determining appealability**

Where the right to appeal is conferred by statute, *i.e.*, where a substantial right of the parties would be affected if immediate appeal were not permitted under G.S. 1-277 or G.S. 7A-27, the judgment is appealable whether it is final or interlocutory in nature, but where there is no such statutory right to appeal, the next question is whether the judgment is in effect final as to all of the claims and parties, and, if so, the judgment is immediately appealable; if not, the next question is whether the specific action of the trial court from which appeal is taken is final or interlocutory, and, if interlocutory, no appeal will lie whether or not certified for appeal by the trial court; but if the action is final as to fewer than all claims or the rights and liabilities of fewer than all parties, but has not been certified for appeal by the trial court under G.S. 1A-1, Rule 54(b), no appeal will lie, while, on the other hand, an appeal from such a final judgment or order will be allowed if it is properly certified under the Rule.

2. **Appeal and Error § 6; Rules of Civil Procedure § 54— appellate court's determination that judgments affect substantial rights—trial court not dispatcher of appeals**

To the extent that judgments are determined by the appellate courts of N.C. to affect a "substantial right" of one of the litigants under G.S. 1-277 and G.S. 7A-27(d), the procedure for trial court certification established in G.S. 1A-1, Rule 54(b) is bypassed and the appellate court is substituted as the true dispatcher of appeals.

3. **Rules of Civil Procedure § 54— signing of appeal entry—no certification**

The signing of an appeal entry by the trial court cannot, in and of itself, be held to satisfy the affirmative act of certification required by G.S. 1A-1, Rule 54(b).

4. **Appeal and Error § 6— summary judgment for monetary sum—substantial right affected—appealability**

The trial court's entry of summary judgment for a monetary sum against the individual male defendant affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under G.S. 1-277 and G.S. 7A-27.

5. **Damages § 9— issue of fact as to mitigation—summary judgment improper**

In an action to recover for breach of a lease agreement, the trial court improperly granted summary judgment against the individual male defendant on the issue of damages where there was a genuine issue of material fact concerning the sufficiency of plaintiff's attempt to mitigate damages.

6. Attorneys at Law § 7— action to recover for breach of lease agreement— award of attorney's fees improper

That portion of a summary judgment awarding plaintiff attorney's fees in an action to recover for breach of a lease agreement must be reversed, since a lease does not constitute evidence of indebtedness within the meaning of G.S. 6-21.2, and attorney's fees may not be allowed, even though they were expressly provided for in the contract.

APPEAL by plaintiff and defendant from *Seay, Judge.* Judgment entered 17 April 1979 in Superior Court, UNION County. Heard in the Court of Appeals 18 January 1980.

Plaintiff sued defendants alleging that defendant Harold Earl Myers defaulted on an agreement in which he had leased certain equipment from plaintiff. Plaintiff additionally alleged that Juanita M. Myers as well as said Harold Myers were personally liable for the default by reason of a written guarantee agreement which they allegedly executed in favor of plaintiff. Defendants admitted the existence of the lease but denied defendant Juanita Myers ever signed a written guarantee of the obligation and further defended on grounds that Juanita Myers lacked sufficient mental capacity to sign the guarantee and that if the signature appearing on the guarantee did belong to Juanita Myers, it had been fraudulently procured. Defendants counterclaimed for the allegedly fraudulent procurement of Juanita Myers' signature on the guarantee. Prior to trial, the trial court dismissed defendants' counterclaim.

The jury found that plaintiff was entitled to recover only one dollar from defendant Harold Myers for breach of the lease. The jury further determined that the signature of Juanita Myers on the guarantee was not genuine and that the defendants were not jointly or severally liable to the plaintiff for damages. The jury found that $16,034.31 of the loss sustained by plaintiff could have been avoided and that defendants were not liable to plaintiff for attorney's fees. On plaintiff's motion under G.S. 1A-1, Rule 59, the trial court set the verdict of the jury aside and granted a new trial on all issues. Plaintiff moved for summary judgment against both defendants. The trial court granted the motion as to defendant Harold Myers but denied it as to defendant Juanita Myers. The judgment does not recite that it is final or that there is no just reason for delay, in accordance with Rule 54(b). Defendant Harold Myers appeals from the granting of summary judgment

against him and plaintiff cross-appeals from the denial of its motion against defendant Juanita Myers.

Kluttz and Hamlin, by Malcolm B. Blankenship, Jr., for the plaintiff.

Bailey, Brackett & Brackett, P.A., by William L. Sitton, Jr., for the defendants.

WELLS, Judge.

We deal first with defendant Juanita Myers' argument that the trial court's denial of plaintiff's motion for summary judgment against her is not appealable. The denial of summary judgment is interlocutory in nature and not appealable under G.S. 1-277 and G.S. 7A-27, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970). The record does not reveal that any such substantial right is involved in the present case. Accordingly, we hold that plaintiff's appeal as to defendant Juanita Myers should be dismissed.

We next deal with the question of whether the summary judgment entered against defendant Harold Myers is appealable, since it is clear that the judgment appealed from adjudicates the rights and liabilities of fewer than all the parties. Although plaintiff does not raise the issue in its brief, it is the duty of an appellate court to dismiss an appeal on its own motion if there is no right to appeal. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). The question here involves interpretation of G.S. 1A-1, Rule 54(b), which provides in pertinent part:

> (b) *Judgment upon multiple claims or involving multiple parties.*—When . . . multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the . . . parties *only if there is no just reason for delay and it is so determined in the judgment.* Such judgment shall then be subject to review by appeal or otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment, any order or form of decision, however, designated, which adjudicates . . . the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the . . . parties and shall not then be subject to review*

either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the . . . rights and liabilities of all the parties. [Emphasis added.]

The North Carolina Rule 54(b) is substantially similar to its Federal counterpart, as that Rule was amended in 1961, and we have therefore appropriately considered Federal decisions and authorities for guidance and direction in the interpretation of our Rule. In *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974) Judge Parker, speaking for the Court, stated that the need for Rule 54(b) arose from the increased opportunity for liberal joinder of claims and parties under the Rules of Civil Procedure. The Court commented that the Rule contemplated that the trial court would act as the "dispatcher" of cases to the appellate court and would determine, in the first instance, the time at which each "final decision" disposing of less than all the claims in a multiple claim suit or the liability of less than all of the parties in a multiparty suit, is appropriate for appeal. Judge Parker explained that under the Rule, the trial court is granted the discretionary authority to enter a final judgment as to fewer than all of the parties, "only if there is no just reason for delay and it is so determined in the judgment," and that by expressing this determination in the judgment the trial judge is in effect "certifying" that the judgment is a final judgment and subject to immediate appeal. However, the Court held that under Rule 54(b), in the absence of certification by the trial court, any order or other form of decision, however designated, which adjudicates fewer than all of the claims, or the rights and liabilities of fewer than all of the parties, would be considered interlocutory and not appealable. Our opinion in *Arnold* was not reviewed by the Supreme Court. *Arnold* is in line with the interpretation given Federal Rule 54(b):

> Unlike original Rule 54(b), which did not lodge any control in the trial court over any adjudication that it rendered, the amended Rule defines finality in terms of what the [trial] court does and gives this court broad discretion in applying finality. Flexibility is introduced by giving the [trial] court, which has first hand information as to the litigation and its

> progress, power to determine that when one branch of it has been adjudicated it is or is not then ripe for appellate review.

6 Moore's Federal Practice ¶ 54.28[1], pp. 363-364 (1976).

The question was next before this Court in *Newton v. Insurance Co.*, 27 N.C. App. 168, 218 S.E. 2d 231 (1975), *rev'd*, 291 N.C. 105, 229 S.E. 2d 297 (1976). We held that since the defendant had sought recovery under two claims, one for actual damages and the other for punitive damages, an appeal from an order of the trial court dismissing the claim for punitive damages was interlocutory and not final because it had adjudicated fewer than all the claims and the trial court had certified the judgment for immediate appeal under Rule 54(b). Our Supreme Court reversed, Justice Exum reasoning that the North Carolina Rule 54(b) must be distinguished from its Federal counterpart because our Rule states an exception permitting appeal where allowed by statute, such as the exceptions stated in G.S. 1-277 and G.S. 7A-27(d) which authorize appeal from certain interlocutory orders and judgments. Justice Exum concluded that our Rule 54(b) expands, rather than restricts, the compass of review of orders and judgments, and held that a substantial right of the plaintiff would be affected if plaintiff's claim for punitive damages was not heard before the same judge and jury as heard the claim for compensatory damages. Appeal was thus allowed under G.S. 1-277 and G.S. 7A-27(d). *See also, Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967).

The issue was again before the appellate courts of our State in the case of *Investments v. Housing, Inc.*, 28 N.C. App. 385, 221 S.E. 2d 381 (1976), *rev'd*, 292 N.C. 93, 232 S.E. 2d 667 (1977). In that case the trial court had granted summary judgment in favor of the plaintiff for the monetary sum of $204,603.55, but retained for trial the issue of defendants' right to a setoff. Execution was entered to enforce the judgment and an order entered by the Clerk declaring the judgment a lien upon funds alleged to be owing to the defendant from a third party. We held that this judgment adjudicated fewer than all the claims or the rights and liabilities of fewer than all the parties, and dismissed the appeal as premature under Rule 54(b). Our Supreme Court reversed, stating that the statutory provisions available to defendant for a

stay of execution upon a money judgment under G.S. 1-269 and G.S. 1-289, as well as the authorization which Rule 62(g) grants the trial court to stay enforcement of a judgment pending its determination of other aspects of the litigation, would require defendant, even if successful, to incur a substantial expense. The Court concluded, "Thus, the existence of those procedures for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor." 292 N.C. at 99, 232 S.E. 2d at 672. The Court held that the trial court's judgment was appealable under the "substantial right" exception provided in Rule 54(b) through G.S. 1-277 and G.S. 7A-27(d). We will further discuss *Investments* later in this opinion.

The question was next before our Supreme Court in *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976). In *Nasco*, the question before the Court involved competing creditors of Mason Lumber Company, both of whom asserted an interest in a chattel which had been delivered to Mason by the plaintiff, a supplier. A third-party defendant, First Citizens Bank and Trust Company asserted a claim for the chattel based on a security agreement executed in favor of the bank. The trial court granted summary judgment for the bank. We had dismissed plaintiff's appeal in an unpublished opinion on grounds that the judgment appealed from adjudicated "fewer than all the claims or the rights and liabilities of fewer than all the parties" and did not state that there is "no just reason for delay," as required by Rule 54(b). Our Supreme Court reversed, holding that the order granting summary judgment denied the plaintiff a jury trial on the issue of its claim against the bank and, in effect, determined the action in favor of the bank. While there is language in the *Nasco* opinion indicating that the appeal was allowed under the "substantial right" exception, the Court later stated that the holding in *Nasco* instead rests on the fact that the summary judgment in that case "was, in effect, a final judgment ultimately disposing of all claims of any practical significance in the case." *Industries, Inc. v. Insurance Co., infra*, 296 N.C. at 493, 251 S.E. 2d at 448. *See also, Whalehead Properties v. Coastline Corp.*, 299 N.C. 270, 261 S.E. 2d 899 (1980).

The question was next before our Supreme Court in *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978), in which

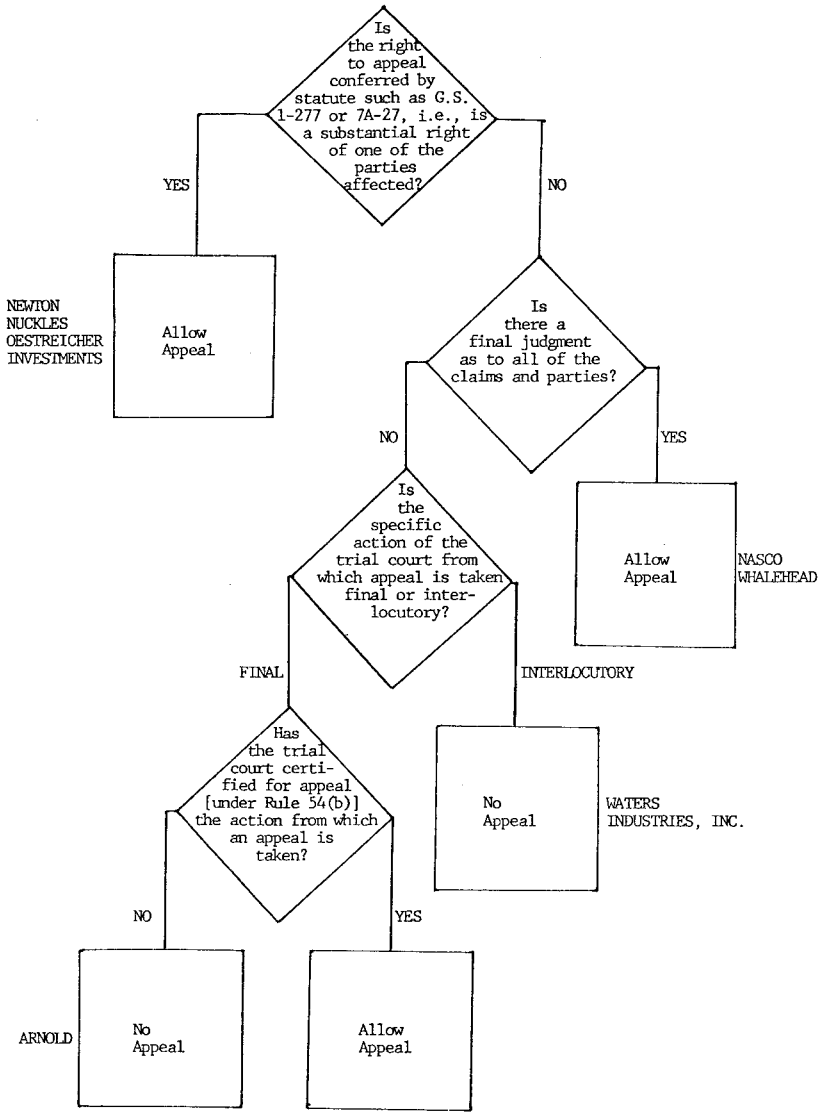
the Court held that we had erred in entertaining and not dismissing the appeal from an order of the trial court setting aside a previous trial court judgment granting summary judgment for the defendant. *Waters* involved only two parties and only one claim. Justice Exum, writing for the Court, held that the order from which the purported appeal was taken was interlocutory, in that it contemplated further proceedings on the summary judgment question at the trial level. The appellate court's failure to review the trial court's action prior to entry of a final judgment was held not to deprive the defendant of any substantial right. Justice Exum explained that our courts have consistently held that denial of a motion for summary judgment is not appealable, and that the trial court's order setting aside summary judgment for defendant was analogous to the denial of summary judgment.

The question was again before our Supreme Court in *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), in which the Court upheld an order of this Court dismissing, without opinion, defendant's appeal. The appeal was from an order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment. From the decisions of our Supreme Court in *Waters* and *Industries* it is evident that an interlocutory judgment or order which does not affect a substantial right of one of the parties or is not otherwise appealable under G.S. 1-277 or G.S. 7A-27 may not be appealed. From these cases it is also apparent that the Court in its most recent decisions is taking a restricted view of the "substantial right" exception, holding that the avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. We believe that the philosophy espoused in those later cases indirectly conflicts with the Court's earlier holding in *Investments v. Housing, Inc., supra*, which we discussed previously. On its face, *Investments* holds that a monetary judgment against the defendants which does not dispose of all of the claims of all of the parties nonetheless affects a substantial right of the defendants sufficient to permit immediate appeal.

[1] The model set out on page 170 states the correct procedure for determining whether a given case is appealable under our statutes, rules and case law. Where the right to appeal is conferred by statute, i.e., where a substantial right of the parties

would be affected if immediate appeal were not permitted under G.S. 1-277 or G.S. 7A-27, the judgment is appealable whether it is final or interlocutory in nature. Where there is no such statutory right to appeal, the next question is whether the judgment is in effect final as to all of the claims and parties. If so, the judgment is immediately appealable. If not, the next question must be whether the specific action of the trial court from which appeal is taken is final or interlocutory. If the court's action is interlocutory, no appeal will lie whether or not certified for appeal by the trial court. If the action is final as to fewer than all claims or the rights and liabilities of fewer than all parties, but has not been certified for appeal by the trial court under Rule 54(b), no appeal will lie. On the other hand, an appeal from such a final judgment or order will be allowed if it is properly certified under the Rule.

Leasing Corp. v. Myers



[2] From the model it is clear that the vitality of the Rule 54(b) procedure which establishes the trial court as "dispatcher" of cases to the appellate division is largely dependent on how narrowly the statutory exceptions to the Rule are construed. To the extent that judgments are determined by the appellate courts of our State to affect a "substantial right" of one of the litigants under G.S. 1-277 and G.S. 7A-27(d), the procedure for trial court certification established in Rule 54(b) is bypassed and the appellate court is substituted as the true dispatcher of appeals. In this regard the previously discussed *Investments* case creates the apparent anomaly of including all partial summary judgments entered for a monetary sum in the substantial right exception. We note that G.S. 1A-1, Rule 62(g) allows the trial court, after it has ordered a final judgment under the conditions stated in Rule 54(b), to stay enforcement of such a judgment until the entering of a subsequent judgment or judgments and to prescribe such conditions as are necessary to prevent harm that might result to a party if the trial court should decide not to certify a judgment for immediate appeal.

[3] We are aware that there is dictum in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976) to the effect that a trial court's appeal entry constitutes sufficient compliance with the certification requirement of Rule 54(b). However, as clarified by the Supreme Court's later opinion in *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), the *Oestreicher* holding rests solely on the substantial right exception, and accordingly the case does not stand for the proposition that there was proper certification under the Rule. Typically, an appeal entry only shows counsel's compliance with various Rules of Appellate Procedure, *e.g.*, that the appeal was duly taken, that the undertaking on appeal required by Appellate Rule 6 was approved by the trial court, or that an extension of time for serving the proposed record on appeal was granted by the court. The act of signing such an appeal entry reflects the trial court's position that the technical requirements for perfecting an appeal have been met. It is not an unequivocal act showing that the trial court has determined that the judgment appealed from is final and that there is no just reason for delay, as required by Rule 54(b). Additionally, Rule 54(b) expressly provides that this determination must be made *in the judgment.* We are accordingly convinced that the

signing of an appeal entry by the trial court cannot, in and of itself, be held to satisfy the affirmative act of certification required by Rule 54(b).

[4] In the case *sub judice*, however, we believe we are bound by *Investments* to hold that the trial court's entry of summary judgment for a monetary sum against defendant Harold Myers affects a "substantial right" of this defendant. Accordingly, we must treat the judgment as immediately appealable under G.S. 1-277 and G.S. 7A-27.

[5] We hold that summary judgment was improvidently granted against defendant Harold Myers on the issue of damages. Defendants allege in their amended answer that plaintiff failed to use due diligence to mitigate its damages before and after repossession of the equipment. Since plaintiff's affidavits do not conclusively show that such due diligence was in fact exercised, a material issue of fact remains concerning the sufficiency of plaintiff's attempt to mitigate damages. *Cf., Cotton Mills v. Goldberg*, 202 N.C. 506, 163 S.E. 455 (1932) (seller of goods has duty to exercise reasonable diligence to diminish and minimize loss from buyer's breach of contract by undertaking to dispose of the waste for the best price obtainable under all the circumstances); *cf.*, G.S. 25-2-706 (upon buyer's breach, seller who chooses to resell the goods must do so in good faith and in a commercially reasonable manner to be eligible to recover certain damages).

[6] That portion of the summary judgment granted against defendant Harold Myers which awards plaintiff attorney's fees must also be reversed. A lease does not constitute evidence of indebtedness within the meaning of G.S. 6-21.2, and attorney's fees may not be allowed, even though they were expressly provided for in the contract. *Systems, Inc. v. Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E. 2d 613 (1979).

As to plaintiff's appeal, dismissed.

As to the summary judgment entered against defendant Harold Myers, reversed.

Judges MARTIN (Robert M.) and ERWIN concur.

BEVERLY VAUGHN SWYGERT v. JOHN DAVIS SWYGERT, JR.

No. 793DC349

(Filed 15 April 1980)

1. **Rules of Civil Procedure § 41.1— action for divorce from bed and board and alimony—counterclaim for divorce—voluntary dismissal not permitted**

Because defendant-husband's counterclaim for divorce was based on the allegation that the parties had lived separate and apart since 29 April 1977, the same transaction alleged in plaintiff's complaint for divorce from bed and board and alimony, plaintiff was thereafter bound to remain in court upon her allegations and could not take a voluntary dismissal of her suit prior to a hearing on the merits; furthermore, the trial court properly concluded as a matter of law that plaintiff, by filing a notice of dismissal without defendant's consent and by refusing to offer evidence in the cause, had abandoned her claim.

2. **Divorce and Alimony § 13.5— separation for statutory period—sufficiency of evidence—proof of abandonment not required**

Where defendant alleged that the parties had lived continuously separate and apart for over a year, and he alleged constructive abandonment by his wife who refused to accompany him from Maryland to his new home in N. C., defendant's allegations were sufficient to state a cause of action under both G.S. 50-5 and G.S. 50-6; and where defendant offered proof of a year's separation with intention that the separation be permanent he was entitled to a decree of absolute divorce even in the absence of proof of abandonment.

3. **Divorce and Alimony § 2.1— verification of pleadings**

There was no merit to plaintiff's contention that a decree of divorce was improperly granted because of defective verification of defendant's pleadings, since the counterclaim in which the divorce was prayed for was verified, although the original pleadings were not.

4. **Appeal and Error § 28.2— sufficiency of evidence to support findings—no exceptions to findings—no appellate review**

The question of the sufficiency of the evidence to support the factual findings of the trial court was not before the court on appeal where plaintiff made no exceptions to any findings.

5. **Rules of Civil Procedure § 60.4— relief from judgment—motion properly made in Court of Appeals**

Since plaintiff's motion for relief pursuant to G.S. 1A-1, Rule 60(b) was filed while the case was pending on appeal in the Court of Appeals, the motion was properly filed in the Court of Appeals, but since the determination of plaintiff's motion will require the resolution of controverted questions of fact which the trial court is in a better position to pass upon, the case is remanded to district court for hearing and determination of all issues raised by plaintiff's motion for relief.

APPEAL by plaintiff from *Wheeler, Judge.* Judgment entered 6 December 1978 in District Court, CARTERET County. Heard in the Court of Appeals 22 October 1979.

Plaintiff-wife, a resident of Maryland, filed this action in the District Court in Carteret County on 30 January 1978 to obtain a divorce from bed and board and alimony. In her verified complaint she alleged that defendant-husband was a citizen and resident of Carteret County and had been such for more than six months next preceding the institution of this action; that the parties were married on 1 February 1938; that defendant abandoned her on 29 April 1977 by leaving their residence in Maryland and moving to North Carolina, and that she was the dependent and he the supporting spouse. Defendant filed an unverified answer in which he denied he had abandoned his wife. In a "Second Defense" in his answer, he alleged that prior to his retirement from the postal service in 1969 he and his wife had lived in Maryland; that after his retirement he found it difficult to continue to live there due to the high cost of living in the environs of Washington; that he bought property and built a house in North Carolina, planning to move there with his wife; that she refused to move from Maryland and accompany him to his new home in North Carolina despite his requests that she do so; and that by refusing to accompany him, she had abandoned him. He further pled the pendency of an action for alimony brought by his wife in Maryland.

On 20 July 1978 defendant obtained leave of court to file an amendment to his answer to include a counterclaim for absolute divorce. In his amended pleading, which he verified, he alleged that after their marriage on 1 February 1938, the parties had lived together as husband and wife until 29 April 1977, "when the parties separated each from the other as alleged in the Second Defense of the answer heretofore filed." Defendant further alleged that since 29 April 1977 the parties had lived separate and apart continuously, at no time resuming the marital relations that had previously existed between them, and he prayed for a judgment of absolute divorce.

The action, consisting of plaintiff's original claim for divorce from bed and board and alimony, and defendant's counterclaim for absolute divorce, was calendared for trial in the District Court on

6 December 1978. Upon call of the case, the counsel then representing the plaintiff filed on her behalf a notice of voluntary dismissal pursuant to Rule 41(a) of the Rules of Civil Procedure, to which the defendant did not consent.

The court then proceeded to hear defendant's evidence on his counterclaim for absolute divorce. Plaintiff offered no evidence. In a judgment entered that date, the court found facts, in part, as follows:

> (a) That the defendant has been a resident of the State of North Carolina since 29 April 1977 or more than six (6) months prior to the institution of this action.
>
> (b) That the plaintiff and defendant were intermarried on or about February 1, 1938, and thereafter lived together as husband and wife until 29 April 1977.
>
> (c) That prior to April 1977 and in July of 1976, the defendant established a home in Carteret County, North Carolina, and requested that the plaintiff accompany him, which she refused; and that, again in December 1976, he requested that she accompany him to said home and she refused.
>
> (d) That he returned to the plaintiff's home in April of 1977 and again requested her to move with him to Carteret County, North Carolina, and again she refused and on this occasion he separated himself from his wife with the intention that the separation would be permanent.
>
> (e) That since 29 April 1977 the plaintiff and defendant have lived separate and apart continuously and at no time have resumed the marital relationship that previously existed between them.

Based on its findings of fact, the court concluded that plaintiff, by filing a notice of dismissal without defendant's consent and by refusing to offer evidence, had effected an abandonment of her claim. Upon defendant-husband's counterclaim, the court drew the following conclusions of law:

> 4. That the defendant, by offering evidence that he has been a bona fide resident of the State of North Carolina for more than six (6) months prior to the institution of the action,

subjects the defendant and the marriage of the parties to the jurisdiction of this Court.

5. That a ground for divorce absolute is created by the separation of the parties for one year with the intention on the part of one of the parties that the separation be permanent; or

6. A ground for divorce is created by the separation of the parties when one party abandons the other and a period of one year follows said act of abandonment.

Judgment was entered (1) dismissing the cause of action as alleged by the plaintiff, and (2) granting defendant-husband an absolute divorce. Plaintiff-wife appeals from this judgment.

John V. Hunter III for plaintiff appellant.

Wheatly, Wheatly & Davis by C. R. Wheatly, Jr., for defendant appellee.

PARKER, Judge.

[1] Plaintiff first assigns error to the court's dismissal with prejudice of her claims for alimony. She contends that the court erred in refusing to allow her to dismiss her suit voluntarily prior to the hearing on the merits. We find no error. G.S. 1A-1, Rule 41(a)(1) provides that a plaintiff may dismiss his action voluntarily without order of court "by filing a notice of dismissal at any time before the plaintiff rests his case." Under the practice prior to the adoption of Rule 41(a)(1), the plaintiff had the right to take a voluntary nonsuit at any time before the verdict was rendered. However, as the former practice was explained by McIntosh in North Carolina Practice and Procedure, § 1645, pp. 124-125 (1956):

> While the plaintiff may generally elect to enter a nonsuit 'to pay the costs and walk out of court,' in any case in which only his cause of action is to be determined, although it might be an advantage to the defendant to have the action proceed and have the controversy finally settled, he is not allowed to do so when the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. *If the defendant sets up a*

counterclaim arising out of the same transaction alleged in the plaintiff's complaint, the plaintiff cannot take a nonsuit without the consent of the defendant; but if it is an independent counterclaim, the plaintiff may elect to be nonsuited and allow the defendant to proceed with his claim. (emphasis added)

In *McCarley v. McCarley,* 289 N.C. 109, 221 S.E. 2d 490 (1976), our Supreme Court held that Rule 41(a)(1) did not alter former practice in this respect. Thus, where a counterclaim is filed which arises out of the same transaction alleged in the complaint, "plaintiff thereby loses the right to withdraw allegations upon which defendant's claim is based without defendant's consent." *McCarley v. McCarley, supra,* 289 N.C. at 113, 221 S.E. 2d at 493; *accord, Layell v. Baker,* 46 N.C. App. 1, 264 S.E. 2d 406 (1980).

In the present case plaintiff's claim for alimony was based on an allegation that on 29 April 1977 defendant-husband abandoned her by leaving their residence in Maryland and moving to North Carolina. Plaintiff-wife contends that the rule as to voluntary dismissal should not apply in this case because defendant-husband's cause of action for a divorce based on the separation of the parties did not accrue until 29 April 1978, several months after defendant-husband filed his original answer. This contention is without merit. At the time plaintiff-wife attempted to take a voluntary dismissal on 6 December 1978, defendant-husband's cause of action had accrued and, by leave of court, he had pled his claim for relief. Once defendant-husband did so, the issue of whether his cause of action had accrued at the time the original answer was filed was irrelevant to her statutory right to dismiss her case, the only question being whether his cause of action arose out of the same transaction or occurrence alleged in plaintiff-wife's complaint. Because defendant-husband's claim for divorce was based on the allegation that the parties had lived separate and apart since 29 April 1977, the same transaction alleged in plaintiff's complaint, plaintiff-wife was thereafter bound to remain in court upon her allegations and could not dismiss her action *ex parte.*

Neither did the court err in concluding as a matter of law that plaintiff-wife, by filing a notice of dismissal without defend-

ant's consent and by refusing to offer evidence in the cause, had abandoned her claim. G.S. 1A-1, Rule 41(b) provides that a defendant may move for dismissal of any claim against him for failure of the plaintiff to prosecute. Although it is not apparent from the record in this case that defendant-husband ever moved for an involuntary dismissal of plaintiff-wife's claims on this ground, Federal Rule of Civil Procedure 41(b), which is substantially the same as our own rule, has been held not to abrogate the inherent power of the court to dismiss a case for want of prosecution, as where plaintiff refuses to proceed at trial. *See generally* Wright and Miller, Federal Practice and Procedure, § 2370, pp. 199-203 and cases cited therein. Here, plaintiff-wife was represented by counsel at the trial (although it should be noted not the same counsel who represents her on this appeal), and she cannot now justly complain that her action should not have been dismissed with prejudice when she refused to offer evidence.

[2] Plaintiff-wife next assigns error to the court's granting defendant an absolute divorce. She contends that this was error because the divorce was granted on a ground that defendant-husband had not pled and because defendant-husband's pleadings were improperly verified. In his amended answer defendant-husband alleged that he had been a citizen and resident of North Carolina for six months prior to the filing of his counterclaim; that the parties were married on or about 1 February 1938 and thereafter lived together as husband and wife until 29 April 1977 when they separated "as alleged in the Second Defense of the answer heretofore filed;" and that the parties had lived continuously separate and apart since that date. The "Second Defense" referred to in defendant-husband's amended answer was that of constructive abandonment based on plaintiff-wife's refusal to accompany him from Maryland to his new home in North Carolina. In the judgment granting defendant-husband an absolute divorce, the court made the following conclusions of law:

> 5. . . . . [A] ground for divorce absolute is created by the separation of the parties for one year with the intention on the part of one of the parties that the separation be permanent; or
>
> 6. A ground for divorce is created by the separation of the parties when one party abandons the other and a period of one year follows said act of abandonment.

Plaintiff-wife relies upon the reference in defendant's counterclaim to the allegations of abandonment contained in his original answer, as well as upon these conclusions of law, in support for her argument that defendant-husband was granted a divorce upon a ground not pled.

Both G.S. 50-5 and G.S. 50-6 provide that a divorce may be granted on the grounds of a voluntary separation of the parties for the period of one year. However, G.S. 50-5 unlike G.S. 50-6, requires a party seeking a divorce under that section to allege and prove that he is the injured party. *Reeves v. Reeves*, 203 N.C. 792, 167 S.E. 129 (1933). Applying the principle of notice pleading enunciated by our Supreme Court in *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), we conclude that defendant-husband's allegations were sufficiently particular to state a cause of action under both G.S. 50-5 and G.S. 50-6.

In order to prove his claim under G.S. 50-6, defendant-husband was only required to prove that he and plaintiff-wife had lived separate and apart for at least an uninterrupted one-year period, and that there was an intention on the part of either one of them to cease matrimonial cohabitation. *Beck v. Beck*, 14 N.C. App. 163, 187 S.E. 2d 355 (1972). Plaintiff-wife relies upon *Taylor v. Taylor*, 225 N.C. 80, 33 S.E. 2d 492 (1945) to support her contention that defendant-husband, having alleged abandonment, was required to prove it to obtain his divorce. In that case, the Court stated:

> Of course, the plaintiff may particularize as to the character of the separation by alleging that it was by mutual consent, abandonment, etc, in which event, *if material to the cause of action*, the burden would rest with the plaintiff to prove the case *secundum allegata*. (emphasis added).

225 N.C. at 82, 33 S.E. 2d at 494.

The language of the *Taylor* case does not require the party seeking a divorce to prove every fact alleged, only that he prove the facts necessary to his cause of action. As stated in 1 Lee, North Carolina Family Law § 51, p. 213 (1963): "[W]here the grounds are listed in the statutes for the same kind of divorce, the several grounds may be joined in one complaint, and the decree may be granted on any one of the grounds proved." Having offered proof

of separation for a year's period with intention that the separation be permanent, defendant-husband was entitled to a decree of absolute divorce. We note that the court in its Conclusions of Law Nos. 5 and 6 referred to the grounds for divorce both under G.S. 50-5 and G.S. 50-6. In light of our holding that defendant-husband properly proved his claim under G.S. 50-6, the Court's Conclusion of Law No. 6, which is relevant to the grounds for divorce set forth in G.S. 50-5, is mere surplusage and is not necessary to support the judgment.

[3] Neither was the decree of divorce improperly granted because of defective verification of defendant-husband's pleadings. The counterclaim in which the divorce was prayed for was verified, although the original pleadings were not. Defendant-husband did incorporate by reference a portion of his unverified answer relating to abandonment; however, none of the allegations referred to were necessary to his cause of action under G.S. 50-6. Even if they had been necessary, defendant-husband stated in his amended answer, which was properly verified, that he was "ratifying his answer as heretofore filed in this cause."

[4] Plaintiff's final assignments of error are directed to the insufficiency of the evidence to support the trial court's findings of fact concerning her refusal to accompany her husband to North Carolina. She concedes that no exceptions to any findings have been set out in the record as required by App. R. 10(a). She contends, however, that the rule does not absolutely preclude appellate review under the circumstances, relying upon *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). In that case the Supreme Court did permit the appellant to raise the question of the sufficiency of the evidence to support the findings of fact, even though exceptions had not been taken thereto in the record. However, at the time the notice of appeal was given in that case, the new Rules of Appellate Procedure had not yet become effective, and the opinion of the Supreme Court, upon appeal from this Court, did not consider the applicability of App. R. 10(a). That rule, which clearly does govern in the present case, provides in part that "the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments in the record," with the exception that an appeal from a final judgment permits a party to raise the question whether the judgment is supported by the findings of fact and

conclusions of law. Thus, no appropriate exception having been taken, the question of the sufficiency of the evidence to support the factual findings of the trial court is not before this Court for review.

Because the findings of fact support the court's conclusions of law with respect to defendant-husband's counterclaim for absolute divorce and with respect to the dismissal of plaintiff-wife's action, the judgment appealed from is affirmed, subject, however, to such ruling as may hereafter be made by the trial court on remand of this case for hearing of the motion hereinafter described filed by the plaintiff for relief from said judgment under Rule 60 of the Rules of Civil Procedure.

On 7 September 1979, while this appeal was pending in this Court, plaintiff filed in this Court a motion pursuant to North Carolina Rule of Civil Procedure 60(b)(1), (3) and (6) for relief from the judgment appealed from on the grounds that the same was entered against her through mistake, inadvertance, surprise and excusable neglect, without any reasonable opportunity on her part to defend against defendant's claim or to prove her own claim, and on the further ground that the judgment was obtained by fraudulent testimony of the defendant. She supported her motion by her own affidavit, by the affidavit of the attorney who represented her in an action brought by her in the State of Maryland in which she sought to obtain alimony from her husband, and by the affidavit of a daughter of the parties who is an attorney engaged in the private practice of law in Washington, D.C. Defendant filed answer opposing the relief sought in the motion.

[5] Since at the time plaintiff's Rule 60(b) motion was filed the case was pending on appeal in this Court, the motion was properly filed in this Court. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971); *Rhodes v. Henderson*, 14 N.C. App. 404, 188 S.E. 2d 565 (1972). Since, however, the determination of plaintiff's motion will require the resolution of controverted questions of fact which the trial court is in a far better position to pass upon than is this Court, *see Bell v. Martin*, 43 N.C. App. 134, 258 S.E. 2d 403 (1979), reversed on other grounds, 299 N.C. 715, 264 S.E. 2d 101 (1980), we now remand this case to the District Court in Carteret County for the purpose of hearing and passing upon all questions and is-

sues raised by plaintiff's motion filed in this Court for relief from the judgment under Rule 60(b). The Clerk of this Court is directed to prepare copies of said motion and of defendant's answer thereto, and copies of all affidavits filed in this Court in support of and in opposition to the motion, and certify the same to the Clerk of the District Court. Upon remand, the District Court shall hear and determine the motion upon said affidavits and upon such additional evidence as shall be presented to and received by the Court. For the purposes indicated, this case is

Remanded to the District Court in Carteret County.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

COUNTY OF LENOIR, EX REL. CYCONCIA FAYE COGDELL v. ERVIN O'BERRY JOHNSON

No. 798DC713

(Filed 15 April 1980)

Bastards § 10; Constitutional Law § 20— action to establish paternity—statute of limitations—denial of equal protection to illegitimates

The three-year statute of limitations set forth in G.S. 49-14(c)(1), which limits the time in which an action to establish the paternity of an illegitimate child must be commenced, is not substantially related to any permissible State interest and unconstitutionally discriminates against illegitimate children in violation of the Equal Protection Clause of the U. S. Constitution since it constitutes an impenetrable barrier to the right of some illegitimate children to receive support from their fathers, and no statute of limitations is provided for a support action instituted on behalf of a legitimate child.

APPEAL by plaintiff from *Wright, Judge.* Judgment entered 10 April 1979 in District Court, LENOIR County. Heard in the Court of Appeals 8 February 1980.

Plaintiff brought this action for the support of an illegitimate child pursuant to G.S. 49-15, G.S. 50-13.4 and Article 9 of Chapter 110 of the North Carolina General Statutes. Plaintiff alleged that Cyconcia Faye Cogdell was the mother of a child born out of wedlock and that defendant is the biological father of the child.

Plaintiff and the mother aver that they have made numerous demands upon the defendant for support of the child but that defendant has failed and refused to contribute adequate support in accordance with his ability. The mother receives funds from the Aid to Families with Dependent Children program for the support of the child. It is further alleged that defendant is a responsible parent under G.S. 110-135, as this term is defined by G.S. 110-129(3), and that the payment of public assistance to the mother created a debt due and owing by defendant to the State for the amount of the assistance provided. Plaintiff seeks an adjudication that defendant is the biological father of the child, and that he be found a "responsible parent", and prayed that defendant be ordered to support the child and pay the debt owing the State.

Cyconcia Faye Cogdell testified that defendant had fathered the child but contributed no support. Defendant admitted to having sexual relations with Cyconcia Cogdell in 1968 and in failing to contribute any more than a dollar towards the child's support. The child was born on 29 January 1969. The complaint in this action was filed on 8 January 1979. At the close of plaintiff's evidence, defendant moved for a directed verdict on grounds of the three-year statute of limitations set forth in G.S. 49-14(c)(1). Plaintiff argued that the statute is unconstitutional on equal protection grounds. The trial court found that defendant was the biological father of the child and that he had not contributed to the child's support, but held that the action was barred by the statute of limitations. From this judgment, plaintiff appeals. Defendant has not objected to or cross-appealed from the court's findings of paternity and nonsupport.

Robert E. Whitley for the plaintiff appellant.

Vernon H. Rochelle for the defendant appellee.

Attorney General Rufus L. Edmisten, by Associate Attorney R. James Lore, for the State, amicus curiae.

WELLS, Judge.

The sole question presented in this appeal concerns the constitutionality of the three-year statute of limitations set forth in G.S. 49-14(c)(1), which limits the time in which an action to

establish the paternity of an illegitimate child must be commenced. Plaintiff argues that the statute violates the Equal Protection Clause of the Constitution of the United States in that no such statute of limitations is provided for a support action instituted on behalf of a legitimate child. G.S. 49-14 provides:

> Civil action to establish paternity.—
> (a) The paternity of a child born out of wedlock may be established by civil action. . . . Such establishment of paternity shall not have the effect of legitimation.
>
> (b) Proof of paternity pursuant to this section shall be beyond a reasonable doubt.
>
> (c) Such action shall be commenced within one of the following periods:
>
> (1) Three years next after the birth of the child; or
>
> (2) Three years next after the date of the last payment by the putative father for the support of the child, whether such last payment was made within three years of the birth of such child or thereafter.
>
> Provided, that no such action shall be commenced nor judgment entered after the death of the putative father.

The purposes of Article 3 of Chapter 49 are manifestly to *enable* an illegitimate child to receive support from its biological father and prevent it from becoming a public charge.

We recently considered the question whether the statute of limitations stated in G.S. 49-14(c)(1) grants a defendant in a civil paternity action a substantive right which could not be tolled while he is out of the State. *Joyner v. Lucas*, 42 N.C. App. 541, 257 S.E. 2d 105 (1979), *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979). In *Joyner* we held that the statute could be tolled by defendant's absence from the State, since the statute is procedural and not substantive, and we declined to address the constitutional issue which defendant raised. Chief Judge Morris, speaking for the Court, stated: "We reach this conclusion not only because of the language and structure of the statute, but also out of concern resulting from the harshness of the statute in its application and the constitutional implications of more strictly limiting the rights to support of an illegitimate than those of a legitimate child." *Id.*, 42 N.C. App. at 546-547, 257 S.E. 2d at 109.

A child born in wedlock is presumed to be not only the child of its natural mother, but also the child of the mother's husband, *State v. Rogers*, 260 N.C. 406, 133 S.E. 2d 1 (1963), and thus a legitimate child is generally not burdened with having to prove paternity. Under North Carolina law, a parent's obligation to support his child continues throughout the child's minority. There is no limitation as to time within which actions for the support of children must be commenced. *See*, G.S. 50-13.4; *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31 (1947).

It seems clear that the statute does, in fact, place illegitimate children in a disadvantageous classification. The only issue which remains concerns whether this classification violates the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause and legislatures have wide discretion in passing laws which have the inevitable effect of treating some people differently from others. *Parham v. Hughes*, 441 U.S. 347, 60 L.Ed. 2d 269, 99 S.Ct. 1742 (1979). This statutory presumption of validity may be undermined, however, if a State has enacted legislation creating classes based upon certain immutable human characteristics. Classification based upon illegitimacy has been held to be one such characteristic. *Levy v. Louisana*, 391 U.S. 68, 20 L.Ed. 2d 436, 88 S.Ct. 1509 (1968), *rehearing denied*, 393 U.S. 898, 21 L.Ed. 2d 185, 89 S.Ct. 65 (1968). "The basic rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside of the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it." *Parham v. Hughes, supra*, 441 U.S. at 352, 60 L.Ed. 2d at 275, 99 S.Ct. at 1746.

Recognizing that illegitimate children are granted the same right to support from their parents as that afforded children born in wedlock, the question then becomes whether the statute of limitations provided in G.S. 49-14(c)(1) constitutes an impenetrable barrier to the enforcement of the right on the part of illegitimate children. In *Gomez v. Perez*, 409 U.S. 535, 538, 35 L.Ed. 2d 56, 60, 93 S.Ct. 872, 875 (1973), the United States Supreme Court stated:

> . . . once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is "illogical and unjust." [Citation omitted.] We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. [Citations omitted.]

From the most recent decisions of the Court it is clear that judicial review of classifications based on illegitimacy must involve less than "strict scrutiny", but more than ordinary scrutiny.

> [I]llegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. [Citation omitted.] We nevertheless concluded that the analogy was not sufficient to require "our most exacting scrutiny." [Citation omitted.] Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that the scrutiny "is not a toothless one," [citation omitted] a proposition clearly demonstrated by our previous decisions in this area.

Trimble v. Gordon, 430 U.S. 762, 767, 52 L.Ed. 2d 31, 37, 97 S.Ct. 1459, 1463 (1977). In *Lalli v. Lalli*, 439 U.S. 259, 265, 58 L.Ed. 2d 503, 509, 99 S.Ct. 518, 523 (1978), the Court held, "Although . . . classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests." *Accord, Mitchell v. Freuler*, 297 N.C. 206, 254 S.E. 2d 762 (1979). To survive the Court's test, the statute must "not broadly discriminate between legitimates and illegitimates without more, but [be] carefully tuned to alternative considerations." *Mathews v. Lucas*, 427 U.S. 495, 513, 49 L.Ed. 2d 651, 665, 96 S.Ct. 2755, 2766 (1976).

The other jurisdictions which have considered the constitutionality of statutes similar to G.S. 49-14(c)(1) have reached inconsistent results. Those jurisdictions which have upheld such

statutes have generally ruled that a statute of limitations restricting the right of an illegitimate child to bring an action for support against his natural father is not an "impenetrable barrier" to the child's receiving support, but is merely a reasonable and permissible limitation on the child's ability to prove paternity. It is also argued that illegitimate children have no constitutional right to assert paternity at any time during their minority. *See, Thompson v. Thompson,* 285 Md. 488, 404 A. 2d 269 (1979); *Texas Dept. of Human Resources v. Chapman,* 570 S.W. 2d 46 (Tex. Civ. App. 1978); *State ex rel. Krupke v. Witkowski,* 256 N.W. 2d 216 (Iowa 1977); *Cessna v. Montgomery,* 63 Ill. 2d 71, 344 N.E. 2d 447 (1976).

Those jurisdictions which have invalidated such statutes on Equal Protection grounds have generally held that they constitute an overly broad restriction on the rights of illegitimates which in fact does result in an impenetrable barrier to support actions. It has additionally been held that such statutes of limitations conflict with other significant governmental interests of the State. In *J.L.P. v. C.L.B.,* 107 Daily Wash. L. Rep. 401, 406 (Super. Ct. D.C. 1979), the Court stated:

> Instead of focusing on presumptions or procedures for proving or disproving parentage, the statute merely uses an arbitrary period of time . . . which "broadly discriminate[s] between legitimates and illegitimates without more," *Trimble v. Gordon, supra,* 430 U.S. at 772. For example, it does not set up logical rebuttable presumptions, such as that established in the Uniform Parentage Act, under which paternity is presumed if the father is named on the child's birth certificate. Nor is there any attempt to correlate a presumption of paternity with the results of medically acceptable blood tests. Such mechanisms for establishing proof of parentage would be far more rationally related to accomplishment of the legitimate governmental purpose of weeding out fraudulent claims than imposition of an arbitrary time limit which bears no rational relationship to the fact of paternity.
>
> Moreover, there is nothing in the statute's time limits which are directly related to its purposes. The mere passage of a certain amount of time before the custodial parent sues for child support has no logical connection with whether the non-custodial putative parent is or is not the actual parent.

> The absurdity (and tragedy) of the situation becomes manifest when we consider that under the statute, an out of wedlock parent could voluntarily support his or her child from the time of birth to age ten; the custodial parent could neglect or not need to seek child support for two years but desperately need it when the child turns twelve; and at that point the child would be precluded from ever establishing parentage or receiving support from its parent.

Accord, Florida v. West, 378 S. 2d 1220 (Fla. 1979); *Stringer v. Dudoich*, 92 N.M. 98, 583 P. 2d 462 (1978). We find the reasoning of these latter cases to be more persuasive. While we make no finding as to whether a child enjoys a constitutional right to seek support from its parents throughout its minority, there can be no question that the Equal Protection Clause will not permit a State to grant such a right to legitimate children and deny it to illegitimate children. *Gomez v. Perez, supra.*

In the case *sub judice*, defendant argues that G.S. 49-14(c)(1) bears a substantial relationship to the State's interest in preventing the litigation of stale or fraudulent claims. We disagree. As we stated previously, a child is entitled to support from its father throughout its minority. Therefore, a child's claim for such support at any time during its minority can never be said to be stale. Nor is G.S. 49-14(c)(1) substantially related to the State's interest in preventing the litigation of fraudulent claims. We have no reason to believe that the mere passage of time bears a direct relation to the truth of the claim asserted. Moreover, the need of a child to receive adequate support manifestly outweighs the relation the statute of limitations may have to the prevention of fraudulent claims. An especially troublesome aspect of the application of the statute here is that a child is wholly reliant on its mother or the State to bring a claim in its behalf before the statute runs. In further support of our position, it is clear that the limitation stated in G.S. 49-14(c)(1) is inconsistent with the State's interest in preventing, whenever possible, illegitimate children from becoming public charges. *See*, G.S. 49-16(2).

The need for a statute of limitations in civil paternity actions must especially be questioned in light of advances which have recently been made in blood typing, such as the HLA typing test, which in combination with other tests has been determined to be

between 95.4 and 99.4 percent accurate in determining a defendant's lack of paternity. *See*, Kateley, Codere and Maldonado, Blood Testing in Disputed Parentage: The Current Role of HLA Typing, 1 *Clinical Immunology Newsletter* (No. 4, Feb. 1980); Joint AMA-ABA Guidelines: Recent Status of Serologic Testing in Problems of Disputed Parentage, 10 Fam. L. Q. 247 (1976). In light of these considerations, it must be concluded that G.S. 49-14(c)(1) can scarcely be termed a narrow approach to the fraud problem, carefully tuned to alternative considerations, as mandated by the Supreme Court in *Mathews*. The truth of the matter is that the statute presents a broad impenetrable barrier to many illegitimate children who seek support from their natural fathers after their third birthday. It makes no difference that this statute only bars illegitimate children from proving paternity, and does not directly prohibit their obtaining support. Under our laws, to prevent a child from asserting paternity is to prevent it from receiving support from its natural father.

We therefore conclude that G.S. 49-14(c)(1) is not substantially related to any permissible State interest and that it unconstitutionally discriminates against illegitimate children in violation of the Equal Protection Clause of the Constitution of the United States.

Reversed.

Judges MARTIN (Robert M.) and ERWIN concur.

GARLAND L. STONE, ROBERT O. STONE, RAYMOND L. STONE, WILLIAM M. STONE, ALBERT ARCHIE STONE, MARGIE ANN BRYANT AND MARY FRANCES WINEBERGER v. Y. MACK CONDER AND ROSALIE W. CONDER, WAYNE S. PHILLIPS AND WIFE, NADINE C. PHILLIPS, JIMMY LOVE, TRUSTEE, SANFORD SAVINGS & LOAN ASSOCIATION, WILLIAM H. WOODY AND WIFE, GISELA S. WOODY, W. W. SEYMOUR, TRUSTEE, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SANFORD, J. ALLEN HARRINGTON, TRUSTEE, THE CAROLINA BANK, HEINS TELEPHONE COMPANY, CAROLINA POWER & LIGHT COMPANY AND CITY OF SANFORD

No. 7911SC744

(Filed 15 April 1980)

Adverse Possession § 25.1— life tenant's sale of land—sufficiency of evidence of adverse possession

Defendants offered sufficient evidence of adverse possession for seven years under color of title to defeat plaintiff's title where the evidence tended to show that the plaintiffs' father had a life interest in the property in question and plaintiffs were the remaindermen; the life tenant died in 1958 but the youngest remainderman did not reach majority until 1964; the life tenant had conveyed what purported to be a fee simple title to the property in 1950; for the next 26 years the purchasers replanted the entire tract with pine saplings, listed the property in their names, paid all taxes assessed against it, stocked it with quail, hunted on it, cut firewood from it, and planted a garden on it near the public road; in 1976 the purchasers sold it to defendant developers and home builders who had the property resurveyed; the boundary lines were well defined by clear and visible marks customarily used by surveyors and had been in place for many years; the developers listed the property in their name and paid all taxes on it; the developers subdivided the land, created public streets, caused water and electrical and telephone lines to be located throughout the development, and sold various lots in the development; and plaintiffs' occasional going onto the property to cut a Christmas tree or rake pinestraw did not interrupt the continued adverse possession by defendants and their predecessors in title. G.S. 1-42; G.S. 1-39; G.S. 1-38(b) and (c).

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 17 May 1979 in Superior Court, LEE County. Heard in the Court of Appeals 28 February 1980.

This is an action brought by plaintiffs seeking an order ejecting defendants from property allegedly owned by plaintiffs, requesting that an order issue canceling deeds of trust alleged to be clouds of title on the plaintiffs' property, and requesting an order that plaintiffs be declared the owners in fee simple of the subject property. On motion for summary judgment and by consent of the

parties, the court reviewed the file, heard evidence orally and by affidavits, examined exhibits, heard arguments of counsel, set forth uncontradicted facts, made conclusions of law and entered judgment dismissing the action as follows:

. . . .

2. The plaintiffs are the children of William Warren Stone, deceased, and by this action claim a remainder interest in Royal Pines Estates allotted to their father in the division of the lands of their grandfather, Neil A. Stone.

3. The will of Neil A. Stone probated in Lee County on January 12, 1938 provided for a life estate in his property to his wife, Nannie Catharine Stone and among other provisions contained the following devise:

> 'I give, devise and bequeath to my son William Warren Stone, to take effect after the death of my said wife, one-tenth in value of all of my real estate to have and to hold the same during his natural life and after his death the same to be equally divided among his heirs at law.'

4. On July 25, 1948, after the death of Nannie Catharine Stone, the children of Neil A. Stone petitioned the Clerk of the Superior Court of Lee County for an actual partition of the real property of Neil A. Stone and under that special proceeding commissioners were appointed, a surveyor employed, and the property physically divided and allotted in accordance with a survey and plat by the surveyor. A copy of that plat has been on file in the office of the Register of Deeds of Lee County since August 18, 1949 (Womble Exhibit B). The parcel presently known as Royal Pines Estates was designated as Lot No. 7 in the partition and was allotted to William Warren Stone by metes and bounds description which corresponds with and refers to the recorded partition plat.

5. By warranty deed recorded in Lee County Registry on June 4, 1950, William Warren Stone and wife conveyed what purported to be a fee simple title to Royal Pines Estate by the sames metes and bounds description to W. J. Womble and wife, Emily G. Womble. At the time of the purchase the seller showed Mr. Womble the boundary lines and corners of

the property which he recalls were well marked by iron stakes extending at least 18 inches above the ground and by trees corresponding to those shown on the recorded plat.

6. William Warren Stone died on August 8, 1958. At the time of their father's death, all of the plaintiffs were of age except Raymond L. Stone, born November 6, 1937, Mary Frances Stone Wineberger, born June 20, 1939, and Margie Ann Stone Bryant, born October 8, 1943. None of the plaintiffs have been under any legal disability for more than three years next preceding the commencement of this action.

7. At the time the Wombles purchased the subject property all merchantable timber had been cut. The Wombles systematically replanted the entire property with pine saplings, including the portion previously under cultivation. Twenty six years later the saplings had matured and the developer of the property named it 'Royal Pines Estates.' From the date of their purchase, the Wombles listed the property in their names and paid all ad valorem taxes assessed against it. Mr. Womble stocked the property with quail and regularly hunted it with his dogs. He cut firewood from the property for personal use and each year planted and harvested a garden in an open plot near the public road. After he acquired a nearby farm in 1966 he seeded the garden plot in pines, but continued to go upon the property frequently to protect it against encroachments or trespass by others.

8. In 1950 the public road on which the property fronted was unpaved. There was no public water or sewer systems and only a few houses in the area. During the ensuing twenty six years the surrounding areas were developed for residential purposes and the Wombles turned down the offers of a number of would-be purchasers, it being the intention of the Wombles to hold the property for investment and a possible site for the construction of a new house for their own use.

9. By warranty deed recorded September 21, 1976 the Wombles conveyed the subject property to defendants Y. Mack Conder and wife, Rosalie W. Conder, by the same metes and bounds description and map reference under which the property was conveyed to them. Mr. Conder had

been engaged in land development and home construction for many years in Lee County and purchased the property for that purpose. Within a few days after they purchased the property the Conders had it re-surveyed by a local engineering firm. Prior to commencing the re-survey, Robert J. Bracken, the engineer in charge of that work, compared the descriptions in the recorded deeds by which the property had been conveyed to the Wombles and by them to the Conders and determined that they were identical and corresponded in all respects with the 1949 partition survey and recorded plat of the property. During the course of such re-survey, the surveying party located the original corners and boundaries of the property on the ground and found that they conformed to those shown by the previously recorded plat. Mr. Bracken noted that the boundary lines were well defined by clear and visible marks customarily used by surveyors and had been in place for many years. After completing the survey of the other boundaries, the property was subdivided into residential lots and streets and a copy of the subdivision plat submitted to the Sanford Planning Board and other involved agencies for approval. After public hearing and several interior revisions, the subdivision was approved and the revised plat recorded in Lee County Registry on December 14, 1977 (Conder Exhibit B).

10. From the time of their purchase in 1976, the Conders listed the property for taxes in their names and paid all taxes subsequently assessed against it. They encumbered the property by deed of trust to The Carolina Bank which is still outstanding. They cut, paved, and dedicated public streets through the property. They subdivided and staked out by visible markers on the ground some seventeen residential lots within its boundaries. They granted easements and caused water, electrical and telephone lines to be located throughout the development and caused the same to be incorporated within the city limits of Sanford. They sold residential lot 12 to defendants William H. Woody and wife, and lot 14 to defendants Wayne S. Phillips and wife. Both buyers borrowed money from local savings and loan associations to construct new homes and recorded their deeds of trust on the lots early in 1978. The Phillipses completed and moved in-

to their house prior to the commencement of this action. The Woodys were in the process of building when they were served with the complaint.

11. Prior to the commencement of this action neither the plaintiffs nor anyone in their behalf had ever made their claim to the subject property known to the defendants or objected to its use and occupancy by the defendants and their predecessors in title.

The Court is of the opinion that there is no genuine issue as to any material fact between the parties, and that the defendants are entitled to judgment against the plaintiffs as a matter of law. The affidavits of plaintiff Garland Stone, and his three relatives, that they had never seen anyone cutting timber or planting and harvesting crops on the property, begs the question and does not rebut the prima facie evidence of defendants' possession of the entire property under known and visible lines and boundaries created by NCGS 1-38(b) in light of the undisputed evidence offered by the defendants. Nor does the occasional going on the property to cut a Christmas tree or rake pine straw for his dog house by plaintiff Garland Stone without defendants' knowledge constitute an interruption of defendants' possession or triable issue of fact in that regard. Defendants and their predecessors in title with whom they were in privity, have held and been in possession of the subject property openly and adversely under color and claim of title in their own right for more than twenty years next preceding the commencement of this action. The plaintiffs do not allege and have not offered evidence that they have been in possession of the property within twenty years before commencement of this action. The plaintiffs cannot now for the first time assert rights which they have allowed to lapse by passage of time.

It is, therefore, ORDERED, ADJUDGED AND DECREED:

1. The Motion for Summary Judgment by the within named defendants is allowed and the action of the plaintiffs with reference to these defendants is dismissed.

Thereafter, dismissal of the action was made as to the defendants, Heins Telephone Company, Carolina Power & Light

Company, and the City of Sanford, all of which had acquired easements for utilities in the property which is the subject of the controversy.

Plaintiffs appealed.

Grover C. McCain, Jr. and Robert B. Jervis for plaintiff appellants.

George M. McDermott and J. W. Hoyle for defendant appellees.

HILL, Judge.

Counsel have stipulated that the applicability of the Rule in Shelley's case shall not be presented to the Court at this time. Therefore, we do not discuss that issue.

One question is presented for our consideration. Did the trial court err in granting summary judgment for the defendants on the ground that the plaintiff's action was barred?

We note the trial judge made it clear that in summarizing the facts that he was not making findings of fact but merely reciting those material facts which he considered uncontroverted. In determining a motion for summary judgment, "the trial judge is not required to make finding of fact and conclusions of law and when he does make same, they are disregarded on appeal." Shuford N. C. Practice and Procedure § 56-6 (1979 Supp.); *see Lee v. King*, 23 N.C. App. 640, 643, 209 S.E. 2d 831, *cert. denied* 286 N.C. 336 (1974). Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. "However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." (Citations omitted.) *Mosely v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E. 2d 145, *Disc. rev. denied* 295 N.C. 467 (1978).

Plaintiffs are the grandchildren of Neil A. Stone and the children of William Warren Stone. They claim title to the lands as vested remaindermen under the will of Neil A. Stone. It must be noted that plaintiff's action was brought over 20 years after the death of the life tenant and over 14 years after the youngest child of William Warren Stone became an adult.

Plaintiffs contend the record title vests them with the legal title and cite as authority G.S. 1-42, which reads as follows:

> In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law.

Defendants contend that G.S. 1-39, readings as follows, applies:

> SEIZING WITHIN TWENTY YEARS NECESSARY.—No action for the recovery of possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law.

In fact, both statutes must be read together. *Williams v. Board of Education,* 266 N.C. 761, 767, 147 S.E. 2d 381 (1966).

> [I]t is not necessary that a plaintiff in action to recover land should allege in his complaint that he had possession within twenty years before action brought. For if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action.

Johnston v. Pate, 83 N.C. 110, 112 (1879). In the case *sub judice* the burden, therefore, is on the defendants to show superior title by virtue of adverse possession.

Plaintiff contends the defendants have not established sufficient evidence of adverse possession to defeat plaintiff's title. In the case of *Mizzell v. Ewell*, 27 N.C. App. 507, 510, 219 S.E. 2d 513, 515 (1975), Judge Arnold, quoting from Webster, Real Estate Law in North Carolina, § 258, p. 319, states that:

> There must be an *actual possession* of the real property claimed; the possession must be *hostile* to the true owner; the claimant's possession must be *exclusive;* the possession must be *open* and *notorious;* the possession must be continuous and *uninterrupted* for the statutory period; and the possession must be with *an intent to claim title to the land occupied.*

Defendants contend their evidence established all of the elements required to prove adverse possession and, in addition, rely on G.S. 1-38(b) and (c), which read as follows:

(b) If

(1) The marking of boundaries on the property by distinctive markings on trees or by the implacement of visible metal or concrete boundary markers in the boundary lines surrounding the property, such markings to be visible to a height of 18 inches above the ground, and

(2) The recording of a map prepared from an actual survey by a surveyor registered under the laws of North Carolina, in the book of maps in the office of the register of deeds in the county where the real property is located, with a certificate attached to said map by which the surveyor certifies that the boundaries as shown by the map are those described in the deed or other title instrument or proceeding from which the survey was made, the surveyor's certificate reciting the book and page or file number of the deed, other title instrument or proceeding from which the survey was made,

then the listing and paying of taxes on the real property marked and for which a survey and map have been certified and recorded as provided in subdivisions (1) and (2) above shall constitute prima facie evidence of possession of real

property under known and visible lines and boundaries. Maps recorded prior to October 1, 1973 may be qualified under this statute by the recording of certificates prepared in accordance with subdivision (b)(2) above. Such certificates must contain the book and page number where the map is filed, in addition to the information required by subdivision (b)(2) above, and shall be recorded and indexed in the deed books. When a certificate is filed to qualify such a recorded map, the register of deeds shall make a marginal notation on the map in the following form: 'Certificate filed pursuant to G.S. 1-38(b), book . . . . . (enter book where filed), page . . . . .' (Emphasis added.)

(c) Maps recorded prior to October 1, 1973 shall qualify as if they had been certified as herein provided if said maps can be proven to conform to the boundary lines on the ground and to conform to instruments of record conveying the land which is the subject matter of the map, to the person whose name is indicated on said recorded map as the owner thereof. Maps recorded after October 1, 1973 shall comply with the provisions for a certificate as hereinbefore set forth.

"The only rule of general applicability is that the acts relied upon to establish [adverse] possession must always be as distinct as the character of the land reasonably admits of and be exercised with sufficient continuity to acquaint the true owner with the fact that a claim of ownership, in denial of his title is being asserted." *Alexander v. Cedar Works*, 177 N.C. 137, 144-45, 98 S.E. 312 (1919). Defendants rely on the actions set forth in the trial judge's findings of uncontroverted fact numbers 5, 7, 9 and 10 to establish their adverse possession.

The plaintiffs, in opposition to defendants' evidence, offered the affidavits of James A. Stone, Garland L. Stone, Jesse James Stone, and Willie Frank Jones, all kinsmen or heirs at law of Neil A. Stone. Garland L. Stone cut Christmas trees on nine occasions and gathered pine needles on fifteen occasions on the subject property. None of these affiants had observed anyone cutting timber, or planting or harvesting crops on the property over the past thirty years, although each passed along the road frequently.

It is a well established rule that possession of real property cannot be adverse to remaindermen until the death of the life tenant, even though during the lifetime of the life tenant he gave a deed purporting to convey a fee. *Narron v. Musgrave*, 236 N.C. 388, 73 S.E. 2d 6 (1952); *Lovett v. Stone*, 239 N.C. 206, 79 S.E. 2d 479 (1954). William Warren Stone died September 8, 1958. It should be noted that as of that date three of the plaintiffs were minors and under disability, the youngest not reaching her majority until October 8, 1964. A statute of limitations does not run against a minor during minority. *Lovett, supra.* Hence, we must determine if seven years' adverse possession under color of title has been established since October 8, 1964.

Plaintiffs contend the defendants and their predecessors in title have not shown they *actually possessed* the land. Admittedly, what is sufficient actual possession depends on the character of the land and upon the circumstances of its use. We hold that the facts as stated in the trial judge's findings of uncontroverted facts numbers 5, 7, 9 and 10 set forth sufficient actions to establish adverse possession by defendants.

The boundary of the property fronted on a public road near the home of at least one of the plaintiffs, and the property was viewed by him and several of his kinsfolk over the years. Their affidavits do not deny adverse possession. The affiants simply say they have never seen anyone cutting timber or planting and harvesting crops on the property. The occasional going onto the property by one of the plaintiffs to cut a Christmas tree or rake pinestraw for a dog house does not interrupt the continued adverse possession by the defendants and their predecessors in title.

The defendants further rely on G.S. 1-38(b) and (c), contending they have offered prima facie evidence which serves to establish as a matter of law the fact of seven years' possession under color of title. William J. Womble testified that he had listed the property and paid taxes from 1950 through 1976; that corners were well marked with stakes 18 inches to 20 inches high. Subsequent owners offered evidence that they did likewise for subsequent years. Affidavits of the tax collector and tax supervisor corroborated this testimony for the years records were available—from 1969 to 1979. They further testified there were no back

taxes due and payable. It is undisputed that the property was surveyed by a surveyor and a map prepared therefrom, which is recorded in the office of the register of deeds, meeting all the requirements of G.S. 1-38(b)(2). All of these facts together constitute prima facie evidence of adverse possession by the defendants for more than seven years subsequent to 1964, the day when the youngest child of Neil A. Stone reached his majority. The defendants have offered nothing that effectively rebuts either the affidavits showing possession or the prima facie case of adverse possession.

For the reasons stated above, the judgment of the trial judge is

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. DAVID JUNIOR WARD

No. 8015SC128

(Filed 15 April 1980)

1. **Criminal Law § 149— appeal by State from dismissal of criminal charge—appeal as including review by certiorari**

In the statute permitting the State to "appeal" from a "decision or judgment" dismissing a criminal charge, G.S. 15A-1445(a)(1), the word "appeal" includes "appellate review upon writ of certiorari." G.S. 15A-101(0.1).

2. **Criminal Law § 149.1— Speedy Trial Act—dismissal of charge without prejudice—no right of State to appeal**

The State has no right of appeal from an order of the superior court dismissing a criminal case without prejudice upon a motion made by defendant under the Speedy Trial Act, G.S. 15A-701 *et seq.*, but must seek appellate review of such a dismissal by a writ of certiorari.

3. **Constitutional Law § 50— Speedy Trial Act—dismissal of charge without prejudice—time for trying defendant after reindictment**

Where a criminal charge is dismissed without prejudice upon a defendant's motion under the Speedy Trial Act, the trial of the defendant upon further prosecution by the State must begin within 120 days (90 days beginning 1 October 1981) from the date the order is entered dismissing the charge without prejudice.

State v. Ward

APPEAL by the State of North Carolina from *Lane, Judge.* Order entered 22 August 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 11 March 1980.

On 12 February 1979, the grand jury of Alamance County returned a true bill of indictment charging the defendant with the capital crime of murder in the first degree. At arraignment on 5 March 1979, defendant, with counsel, entered a plea of not guilty. The solicitor wrote the following letter to defendant's counsel:

June 26, 1979

Mr. John D. Xanthos
Attorney and Counselor at Law
111 South Main Street
Graham, North Carolina 27253

Dear John:

Re: David Junior Ward; Superior Court of Alamance County; Case Number 79 CRS 1031

This will confirm our telephone conversation of this afternoon.

You and I have agreed that the above captioned case will be tried during the week of August 20 and August 27, 1979 unless illness to counsel on either side occurs, in which event the State will agree with you then on a time when the case can be tried.

With kindest personal regards, I remain

Sincerely,

Herbert F. Pierce

On 14 August 1979, defendant's counsel filed a motion to dismiss the charge, alleging the state violated the requirements of the Speedy Trial Act. At the hearing of defendant's motion, the above letter was in evidence before the court. No other evidence was offered except the court papers in the case. After argument of counsel, the court allowed defendant's motion and dismissed the case without prejudice.

From this order, the state appeals.

Attorney General Edmisten, by Associate Attorney General Thomas J. Ziko, for the State.

John D. Xanthos for defendant.

MARTIN (Harry C.), Judge.

At the outset, we are faced with the question whether the state has a right of appeal from an order of the superior court dismissing a criminal case without prejudice upon a motion made by defendant under the Speedy Trial Act, N.C.G.S. 15A-701 to -704. This question was addressed by counsel at oral argument.

The Speedy Trial Act itself does not contain any provisions for appellate review. As a general rule the state cannot appeal from a judgment in favor of a defendant in a criminal case, in the absence of a statute clearly conferring that right. *State v. Harrell*, 279 N.C. 464, 183 S.E. 2d 638 (1971); *State v. Horton*, 7 N.C. App. 497, 172 S.E. 2d 887 (1970). The statutory authority permitting the state to appeal in criminal cases contains the following: "[T]he State may appeal from the superior court to the appellate division: (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C. Gen. Stat. 15A-1445(a), (a)(1).

This statute was adopted in 1977, replacing former N.C.G.S. 15-179 which allowed the state to appeal where judgment had been given for the defendant upon

1. a special verdict,
2. a demurrer,
3. a motion to quash,
4. arrest of judgment,
5. motion for new trial for newly discovered evidence,
6. declaring a statute unconstitutional,
7. motion to bar prosecution as double jeopardy.

Interpreting N.C.G.S. 15-179 in *Horton*, this Court held the state did not have a right of appeal from an order dismissing a case for violation of defendant's *constitutional* rights to a speedy

trial. The dismissal was with prejudice. Our research has failed to locate other authority in North Carolina on this question. We find no cases interpreting N.C.G.S. 15A-1445(a)(1). Therefore, we find this to be a question of first impression in North Carolina.

An examination of certain federal cases may be instructive. The Supreme Court of the United States in *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468 (1971), held the government could appeal a dismissal under the Speedy Trial Clause of the Sixth Amendment for pre-indictment delay. The appeal was pursuant to 18 U.S.C. § 3731 (1964 ed., Supp. V). This statute was amended in 1970 and now reads substantially as N.C.G.S. 15A-1445. The Court in *Marion* was careful to point out that the prosecution could not cure the dismissal in the district court as it was based upon pre-indictment delay and a reindictment would not be permissible under the court's ruling. The dismissal was in effect a dismissal with prejudice, a final determination of the cause and therefore appealable. Other decisions of the Supreme Court on this question are based upon principles of double jeopardy, and the effect of the requirement of finality of judgments on appealability is not discussed. *See Finch v. United States*, 433 U.S. 676, 53 L.Ed. 2d 1048 (1977); *United States v. Wilson*, 420 U.S. 332, 43 L.Ed. 2d 232 (1975).

In considering the federal cases, it is important to note that 18 U.S.C. § 3731 contains a clause that the section shall be liberally construed to effectuate its purposes. In contrast, North Carolina requires that statutes allowing the state to appeal must be strictly construed. *State v. Harrell, supra; State v. Horton, supra.*

Ordinarily in North Carolina an appeal will only lie from a final judgment. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Perkins v. Sykes*, 231 N.C. 488, 57 S.E. 2d 645 (1950). In criminal cases, there is no appeal as a matter of right from an interlocutory order. *State v. Black*, 7 N.C. App. 324, 172 S.E. 2d 217 (1970). An interlocutory order which does not put an end to the action is not appealable unless it seriously affects a substantial right. These cases do not involve appeals by the state, but there is no reason appeals by the state should be treated differently.

Case law in North Carolina has held that the state has no right of appeal from: an order of mistrial, *State v. Allen*, 279 N.C.

492, 183 S.E. 2d 659 (1971); a judgment granting a defendant a new trial for newly discovered evidence, *State v. Todd*, 224 N.C. 776, 32 S.E. 2d 313 (1944); an adjudication that certain duties of defendant under a probation judgment had ended, *State v. McCollum*, 216 N.C. 737, 6 S.E. 2d 503 (1940); a determination that a suspended sentence could not be revoked, *State v. Cox*, 13 N.C. App. 221, 185 S.E. 2d 31 (1971). In all these cases, the orders attempted to be appealed were interlocutory and not final.

[1, 2] The language in N.C.G.S. 15A-1445 allows the state to "appeal" from a "decision" or "judgment" dismissing a criminal charge. Appeal is defined in N.C.G.S. 15A-101(0.1): "Appeal.—When used in a general context, the term 'appeal' also includes appellate review upon writ of certiorari." Applying this definition to N.C.G.S. 15A-1445, we hold the word "appeal" in the statute includes "appellate review upon writ of certiorari." Otherwise, the legislature would have used such language as "the state shall have a right of appeal." By way of contrast, the legislature in setting out when a defendant may appeal, uses the phrase "is entitled to appeal as a matter of right." N.C. Gen. Stat. 15A-1444(a). Therefore, it becomes a matter of judicial interpretation whether "appeal" as used in the quoted portion of the statute means appeal as a matter of right, or appellate review upon writ of certiorari. The order which the state seeks to have reviewed in this case is an interlocutory order. It is a dismissal without prejudice, which does not bar further prosecution by the state. N.C. Gen. Stat. 15A-703. It does not finally dispose of the case or charge against defendant, and therefore, it is not appealable. *State v. Childs*, 265 N.C. 575, 144 S.E. 2d 653 (1965). "As a general rule an appeal will not lie until there is a final determination of the whole case." *Privette v. Privette*, 230 N.C. 52, 53, 51 S.E. 2d 925, 926 (1949). "It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant." *Id.* at 53, 51 S.E. 2d at 926. The dismissal without prejudice did not destroy, impair, or seriously injure any substantial right of the state. It has the same right and power now to prosecute defendant for the alleged crime as it did prior to the return of the indictment. The state's position is analogous to that of a defendant whose motion to dismiss a criminal charge for violation of his right to a speedy trial has been denied. Such order is interlocutory and not

reviewable by appeal as a matter of right. *United States v. MacDonald*, 435 U.S. 850, 56 L.Ed. 2d 18 (1978); *State v. Black, supra; State v. Smith*, 4 N.C. App. 491, 166 S.E. 2d 870 (1969). In each instance, the case has not been finally disposed of and the order is interlocutory.

If the state is allowed to appeal as a matter of right such order dismissing a charge without prejudice, it would defeat the very principles of speedy trial which the statute seeks to protect. "[O]ne of the principal reasons for its [the Supreme Court of the United States] strict adherence to the doctrine of finality in criminal cases is that '[t]he Sixth Amendment guarantees a speedy trial.' *DiBella v. United States*, 369 U.S., at 126. Fulfillment of this guarantee would be impossible if every pretrial order were appealable." 435 U.S. at 861, 56 L.Ed. 2d at 28. In addition to the defendant's interests in a speedy trial, there are strong policy reasons to prevent the delay of criminal trials. Society has an interest in providing speedy trials for criminal defendants. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972). Delay may increase the cost of detention of defendants pending trial and extend the period in which defendants who are on bail may commit other crimes. The deterrent effect of convictions may be weakened by the passage of time. The lack of prompt redress for injuries and damages to innocent victims of crime is manifestly unfair. "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from interlocutory orders." *State v. Childs, supra* at 579, 144 S.E. 2d at 655.

We decline to enlarge pretrial delay by intruding upon accepted principles of finality to allow appeals by the state as a matter of right to review dismissals of criminal charges without prejudice for violations of speedy trial rights. We hold the state must petition for writ of certiorari in order to seek appellate review of dismissal of criminal charges without prejudice for violation of a defendant's statutory speedy trial rights.

Because of our ruling on the state's method of appellate review, we do not discuss the merits of the case, and insofar as the questions attempted to be raised by the state are concerned, the appeal is dismissed.

The case, however, presents an important question requiring answer by this Court for the guidance of the bench and bar. Therefore, in our discretion, we treat the notice of appeal as a petition for writ of certiorari, and allow the writ for the sole purpose of resolving the question hereafter stated.

[3] The question for resolution is: When does the 120-day (90 days beginning 1 October 1981) period begin to run under the Speedy Trial Act upon criminal charges being dismissed without prejudice for a violation of the Speedy Trial Act?

The statute itself is silent upon this question. Therefore, it is a proper question for judicial determination. In so doing, we must construe the statute to carry out the intent of the legislature. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). In adopting the Speedy Trial Act the legislature enunciated a policy of appropriate promptness for the disposition of criminal cases. A legislative plan and timetable was established to effectuate this policy. In determining when the clock commences to run under the facts stated above, we should work within this legislative plan and timetable.

With these considerations in mind, we hold that where a criminal charge is dismissed without prejudice upon a defendant's motion under the Speedy Trial Act, the trial of the defendant upon further prosecution by the state must begin within 120 days (90 days beginning 1 October 1981) from the date the order is entered dismissing the charge without prejudice. It would be manifestly unfair to the state to refer back to the original start of the time period (usually the date of the original indictment), because a large portion of the time period ordinarily passes before a motion to dismiss is filed. *See* 30 A.L.R. 2d 466 (1953). 120 days (90 days beginning 1 October 1981) is not an unreasonable length of time within which to re-indict and begin the trial of a criminal charge after a dismissal without prejudice. We are aware that N.C.G.S. 15A-701(a)(5) requires that a retrial begin within 60 days after the action resulting in a new trial becomes final following appeal. But that section deals with a case that has been tried to a conclusion, and the parties are not faced with the same task of preparation for trial as in cases that have been dismissed without trial. We think the longer period is appropriate under the circumstances of this case.

Our holding here is consistent with this Court's opinion in *State v. Morehead*, 46 N.C. App. 39, 246 S.E. 2d 400 (1980). *Morehead* resolved the issue of when the clock begins to run for trial upon reversal of an erroneous dismissal of a criminal charge.

As the state did not have the benefit of this opinion at the time of the dismissal without prejudice in this case, we hold, for the purposes of this case only, that the time elapsing while this case has been on appellate review shall not be included in determining the 120-day period. Therefore, in this case the state shall have a period of 120 days from the date this opinion is certified to the superior court within which to begin the trial of defendant upon re-prosecution of this charge.

The case is remanded to the Superior Court of Alamance County.

Remanded.

Chief Judge MORRIS and Judge CLARK concur.

PINKNEY LECK HARRIS v. JAMES DANIEL BRIDGES, B & P MOTOR LINES, INC. AND MICHAEL EDWARD VAUGHN

No. 7927SC695

(Filed 15 April 1980)

1. **Automobiles § 94.7— passenger's knowledge of driver's intoxication—no contributory negligence as matter of law**

Evidence was insufficient to show that plaintiff was contributorily negligent as a matter of law by riding in a vehicle driven by defendant knowing defendant was intoxicated where the evidence tended to show that plaintiff saw defendant drink one beer prior to the time they set out in the car; in plaintiff's opinion defendant was not under the influence of alcohol; and plaintiff recalled that the car was "not going very fast" just before the accident.

2. **Automobiles § 90.1— tractor-trailer equipped with lights—lights in use—jury instructions proper**

In an action to recover for injuries sustained by plaintiff in a collision between a car in which he was a passenger and a tractor-trailer truck, the trial court properly charged the jury that by statute the trailer was required to be

equipped with a certain number of lights; if they believed the witness they would find that the trailer was properly equipped with lights; and the issue of negligence they must determine was whether the lights were lighted at the time of the collision.

3. **Automobile § 90.10— tractor-trailer driver's negligence—defendant not entitled to instructions**

In an action to recover for injuries sustained by plaintiff in a collision between a car in which he was a passenger and a tractor-trailer truck, plaintiff was not entitled to additional requested instructions on the tractor-trailer driver's negligence where there was no evidence that he failed to keep control of his vehicle or maintain a reasonable speed in that he either could have or should have accelerated when he saw a car approaching .3 mile away, since his uncontradicted testimony was that he could not accelerate the tractor-trailer while he was in a turn, and when he saw that the car was going to hit him, he did try to accelerate to get out of the way.

4. **Automobiles § 91.2; Trial § 55— contributory negligence argued but not submitted to jury—prejudice cured by setting aside verdict**

Defendant was not prejudiced by the fact that all parties argued the issue of contributory negligence to the jury but that issue was not submitted, since the jury found defendant negligent but awarded plaintiff no damages, and the court set aside the verdict on the damages issue.

5. **Trial § 48— part of verdict contrary to law set aside—other part of verdict set aside in court's discretion**

Where the jury found that plaintiff was injured by defendant's negligence but found that plaintiff was not entitled to recover any damages, and the trial court set aside the verdict with respect to damages as being contrary to law, the court acted within its discretion in also setting aside the verdict finding defendant negligent.

APPEAL by plaintiff and by defendant Vaughn from *Gaines, Judge.* Judgment entered 5 February 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 7 February 1980.

Plaintiff seeks to recover for the injuries he sustained in an automobile accident. Plaintiff was a passenger in a car driven by defendant Vaughn, which collided with a tractor-trailer driven by defendant Bridges within the scope of his employment by defendant B & P Motor Lines, Inc.

Defendants Bridges and B & P alleged plaintiff's contributory negligence in failing to protest defendant Vaughn's negligent operation of the automobile while intoxicated. Defendant B & P also cross-claimed against defendant Vaughn. Defendant Vaughn alleged that plaintiff was contributorily negligent in voluntarily continuing to ride in the automobile though he knew Vaughn was

intoxicated. Vaughn cross-claimed against the other defendants. Upon motion, the court ordered the cross-claims severed and tried separately.

At trial of the plaintiff's action, the following evidence was presented: On 3 April 1977, at about 1:50 a.m., plaintiff was a passenger in defendant Vaughn's automobile, traveling north on Highway 150. Before they set out in the car plaintiff had drunk five beers, and had seen defendant Vaughn drink one. The accident occurred where a paved road intersects the highway. Three-to four-tenths of a mile south of the intersection there is a slight curve in the highway. The posted speed limit was 55 m.p.h., and a slight misty rain was falling. Plaintiff did not see the truck before the collision, and he did not recall how Vaughn was driving, but he did remember that they were not going very fast. In his opinion no one in the car was under the influence of alcohol. Plaintiff suffered a broken jaw in the accident, and he presented evidence of the involved and lengthy treatment of his injury.

The Highway Patrolman who was called to the accident observed a strong odor of alcohol about defendant Vaughn. He saw several empty Miller bottles in the floor of the car. Plaintiff had an odor of alcohol about him, but he was not inebriated.

Dennis Dalton, who had been in the backseat of Vaughn's car at the time of the collision, saw the lights of the truck cab about 100 feet before they reached it. He did not observe any lights on the trailer. The truck appeared to be in its proper lane, the southbound lane, but actually it was partially in the northbound lane as well. The rear wheels of its trailer were in the center of the northbound lane. He estimated the Vaughn car was going 40-45 m.p.h.

Defendant Bridges testified that at the time the accident occurred he was making a sharp left turn from the paved road into the southbound lane of Highway 150. His co-driver, Steve Allen, was with him in the cab. Bridges looked, and saw no cars approaching from either direction before he started his turn. He was familiar with the intersection, which is near his home. The lights on the cab and trailer were on, and the trailer also had reflectors.

After Bridges started his turn he saw headlights around the curve four-tenths of a mile away, and he knew that a car was approaching. He could see the car when it was three-tenths of a mile away. He proceeded across the intersection in second gear, at approximately seven m.p.h.; in the turn he could not accelerate. In Bridges' opinion, Vaughn's vehicle was traveling 70 m.p.h. Bridges did not accelerate until the car was 30 feet away, at which time he knew he was going to be hit and tried to get out of the way. The car hit the trailer at the rear wheels of the trailer; it did not slow down before the collision.

Thomas Long, defendant Bridges' stepfather, and Steve Allen testified that before the accident all the truck's lights were in working order, and that they were still on after the collision. Ola Blanton, who lives near the scene of the accident, testified that in her opinion plaintiff was under the influence of alcohol.

Defendants' motions for directed verdict were denied. The court advised counsel that he would submit to the jury the issues of negligence, contributory negligence, and damages, and these issues were argued to the jury. The court then decided that he would not instruct the jury on contributory negligence. The court offered to re-open closing arguments, but counsel indicated that they felt this would put them in an even worse position. Defendants' motion for mistrial was denied. The court charged the jury without any mention of contributory negligence.

The jury answered the issues submitted to it as follows:

(1) Was the plaintiff, Pinkney Leck Harris, injured and damaged as a result of the negligence of the defendant, James Daniel Bridges?

ANSWER: NO.

(2) Was the plaintiff, Pinkney Leck Harris, injured and damaged as a result of the negligence of the defendant, Michael Edward Vaughn?

ANSWER: YES.

(3) What amount of damages, if any, is the plaintiff entitled to recover?

ANSWER: NONE.

The court set aside the answers to issues 2 and 3 and ordered that they be scheduled for retrial. From the court's judgment both plaintiff and defendant Vaughn appeal.

Frank Patton Cooke, by James R. Carpenter, for plaintiff appellant.

Hollowell, Stott & Hollowell, by Grady B. Stott, for defendant appellant Vaughn.

Hedrick, Parham, Helms, Kellam, Feerick & Eatman, by Hatcher Kincheloe, for defendant appellees Bridges and B & P Motor Lines, Inc.

ARNOLD, Judge.

Defendant Vaughn's Appeal

[1] Defendant contends that because plaintiff was contributorily negligent as a matter of law, defendant was entitled to a directed verdict on the issues of negligence. This argument is without merit. The evidence reveals that plaintiff saw defendant drink one beer prior to the time they set out in the car; that in plaintiff's opinion defendant was not under the influence of alcohol; and that plaintiff recalls the car was "not going very fast" just before the accident. This evidence does not set out circumstances which would have required plaintiff to protest defendant's continuing to drive in order to avoid being contributorily negligent. "[A] plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge . . ., either actual or constructive, of the danger of injury which his conduct involves." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E. 2d 276, 279 (1951). If defendant Vaughn was in fact driving under the influence, there is no evidence to impute knowledge of that fact to the plaintiff.

[2] Defendant argues further that he was entitled to have the verdict on the first issue set aside. He contends that the court erred by giving a peremptory instruction on defendant Bridges' negligence when in fact there was conflicting evidence. An examination of the jury charge, however, reveals that defendant has taken the portion to which he objects out of context. Defendant Bridges, his co-driver, and his stepfather all testified that the

trailer was completely equipped with the required lights, and that they were in working order and lighted at the time of the accident. Dennis Dalton, a passenger in Vaughn's car, testified that he saw the trailer as they approached it, but did not see any lights on it. The trial court charged the jury that by statute the trailer was required to be equipped with a particular number of lights, and that if they believed the witnesses they would find that the trailer was properly equipped with lights. It is this portion of the charge to which defendant Vaughn objects. The evidence is uncontradicted, however, that the trailer was so equipped. And the court went on to charge the jury that the issue of negligence they must determine was whether the lights were lighted at the time of the collision. This is a correct statement of the law. Defendant's assignment of error is without merit.

We find no error in the court's decision not to submit contributory negligence to the jury. As we have indicated above, no evidence was presented which would have supported such a charge. On his appeal, defendant Vaughn cannot prevail.

Plaintiff's Appeal

[3] Plaintiff contends that he was prejudiced by the court's refusal to give additional requested instructions on the negligence of defendant Bridges. We find no merit in this contention. There is no evidence that defendant Bridges failed to keep control of his vehicle or maintain a reasonable speed, in that he either could have or should have accelerated when he saw Vaughn's car three-tenths of a mile away. His uncontradicted testimony is that, driving a tractor-trailer, he could not accelerate in a turn, and that when he saw that Vaughn was going to hit him he did try to accelerate to get out of the way. Nor is there evidence that would support an instruction on either G.S. 20-154 or G.S. 20-148.

[4] Plaintiff assigns error to the denial of his motion for mistrial, arguing that he was prejudiced by the fact that all parties argued the issue of contributory negligence to the jury but that issue was not submitted. Had the trial court not set aside the verdict on the third issue, the possibility of prejudice to plaintiff might exist, since the fact that the jury found defendant Vaughn negligent but awarded plaintiff no damages supports an inference that the jury considered contributory negligence in assessing

damages. However, in light of the fact that the answer to the third issue was set aside by the court and scheduled for a new trial, we can see no prejudice to the plaintiff.

[5] Plaintiff argues that the court erred in setting aside the verdict on the second issue, the issue of defendant Vaughn's negligence. While we agree with plaintiff that there was plenary evidence to support this verdict, we find no error in the court's decision that in setting aside the verdict in the third issue, it should set aside the verdict in the second issue as well.

The verdict on the third issue was contrary to law, and was properly set aside. *See Robertson v. Stanley,* 285 N.C. 561, 206 S.E. 2d 190 (1974) (if the plaintiff has been injured by defendant's negligence, and did not contribute to his injury by his own negligence, he is entitled to a reasonable satisfaction for his injuries). In setting aside the verdict on the second issue as well, the court acted within its discretion, and reached a result consistent with the decision in *Robertson v. Stanley, id.* There the court indicated that an inconsistent verdict on damages should result in a complete new trial. "In our opinion, the issue of negligence, contributory negligence, and damages are so inextricably interwoven that a new trial on all issues is necessary." *Id.* at 569, 206 S.E. 2d 196.

We have considered plaintiff's further assignments of error, and we find no prejudice to him arising from them.

Defendants Bridges' and B & P Motor Lines, Inc.' Cross-Assignments of Error

These defendants present three arguments as cross-assignments of error. Since we have found no error in the court's decision to accept the verdict on the first issue, which found these defendants not negligent, we need not address these arguments. The purpose of cross-assignments of error is to set out errors which may have deprived the appellee of an alternate basis for supporting the judgment in his favor. Rule 10(d), Rules of Appellate Procedure, and Comment thereto.

We find no error in the trial court proceedings, and the judgment of that court is

Affirmed.

Judges PARKER and WEBB concur.

GAITHER M. KEENER, JR., ORA MARIE BOST KEENER, PETITIONERS v. TALMAGE ROWE KORN & WIFE, MAGGIE KORN; DOLLY EDITH KORN POPE & HUSBAND, FRED POPE; WILLIAM TOLEDO KORN, JR. & WIFE, MARGARET KORN; QUEDA VIRGINIA KORN LANEY & HUSBAND, FRED LANEY; TORY DALE KORN & WIFE, RAYNELL M. KORN; AVIS LOUISE KORN (SINGLE); W. T. KORN, SR. (WIDOWER); GRACE DARE BOST BARRINGER & HUSBAND, JOE BARRINGER; MARILYN LUCILLE BOST TURNER & HUSBAND, J. T. TURNER, SR.; JULIA CATHERINE HOYLE PEACOCK & HUSBAND, VERNON E. PEACOCK; GEORGIA MELDONA HOYLE WRIGHT (WIDOW); MARY JANE HOYLE POWELL & HUSBAND, LAVERN T. POWELL; JOHNSIE MAY BOST McKEE (DIVORCED); ERNEST WILLIAM BOST & WIFE, BERNICE BOST; JOSEPH HARBIN BOST & WIFE, FLOY BOST; CATHERINE E. BOST ABERNATHY (WIDOW); GAITHER M. (DONALD) KEENER, SR.; WANDA KEENER BOST (WIDOW); ALVA LEONA BOST (SINGLE); VIRGINIA COLEEN BOST McINTYRE; BETTY ELLEN BOST (SINGLE); JEROLD MONROE BOST & WIFE, WILLI JEAN BOST; DEWEY TATE BOST & WIFE, GLORIA JEAN BOST; CLYDE BANDY BOST & WIFE, JEANETTE E. BOST; CAROL EVELYN BOST GLOVER (DIVORCED); JOSEPHINE ALICE BOST JACKSON & HUSBAND, LAWRENCE FRANKLIN JACKSON; ROBERT STEWART BOST & WIFE, ANN L. BOST, RESPONDENTS

No. 7925SC680

(Filed 15 April 1980)

1. **Wills §§ 34.1, 40— devise by implication of life estate with power of disposition**

Testator by implication devised a life estate in his farm to his wife with a power of disposition where one item of the will provided that "after the death of my wife . . . all of my property *remaining* . . . shall be divided equally among my children," and another item of the will gave the wife a life estate in the farming tools and equipment.

2. **Partition § 1.2— life tenant with right of disposition—no right to partition**

A partition proceeding cannot be maintained where a life tenant of the land sought to be partitioned has a power to dispose of such land. G.S. 46-23.

3. **Taxation § 41— foreclosure of tax lien—extinguishment of lien—payment of attorney fees**

The statute requiring that attorney fees be paid before a tax lien is extinguished, G.S. 105-374(e), applies only to actions by taxing units and not to actions by private citizens, and the trial court properly concluded that petitioners' tax lien was extinguished where the tax plus interest was paid into

court by respondents and the court ordered respondents to pay attorney fees incurred by petitioners in the tax foreclosure proceeding.

4. **Costs § 3.2; Taxation § 41— partition and tax foreclosure proceeding—attorney fees—costs**

In a partition and tax foreclosure proceeding, the trial court did not err in awarding a fee of $150 to the male petitioner's attorney for his services in the enforcement of the male petitioner's tax lien, in requiring that attorney fees be paid by the female petitioner and respondents, and in taxing the remaining costs to petitioners.

APPEAL by petitioners from *Thornburg, Judge.* Order entered 11 June 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals 4 February 1980.

L. Tate Bost died 2 January 1956, leaving a widow, Wanda Keener Bost, seventeen children, and a will which was duly probated and recorded in Catawba County. Among the assets of his estate is a tract of land described in a deed recorded in Book 80, page 79, in the office of the Register of Deeds for Catawba County.

Petitioners, who are husband and wife, bring this proceeding to enforce a tax lien and for a sale of the property by partition. They allege that the feme petitioner is a child of the testator and a tenant in common in the land formerly owned by the testator. In open court, the respondents tendered the total amount of the tax lien, including interest, to the petitioners and paid the sum into the office of the clerk of court. On motion for summary judgment, the trial judge examined the pleadings, affidavits, the will of the testator, and heard arguments of counsel. He made findings of fact, conclusions of law, and entered judgment dismissing the proceeding without prejudice to its reinstatement after the death of Wanda Keener Bost, who was adjudged to be a life tenant. The judgment further provided for payment of attorney fees and costs, and cancellation of a lis pendens of record. The petitioners appealed.

Max Ferree, by George G. Cunningham; and Gaither M. Keener, Jr., for petitioner appellants.

Williams, Pannell & Lovekin, by Richard A Williams and Richard A. Williams, Jr.; Lefler, Gordon & Waddell, by Robert A. Mullinax; and Gaither & Wood, by Allen Wood III, for respondent appellees.

HILL, Judge.

[1] Petitioners argue in their first assignment of error that the trial court erred by determining that Wanda Kenner Bost owned a life estate in the *locus in quo* and by failing to determine correctly the respective interests of the parties in said property. Petitioners contend that the will creates a fee simple estate in the testator's children with each child's share defeasible if that child predeceases testator's widow without having conveyed the real property.

Petitioners rely on G.S. 31-38. The statute provides:

> When real estate shall be devised . . . the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

The presumption established by this section that a devise of land shall be construed in fee gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. *Roberts v. Saunders*, 192 N.C. 191, 134 S.E. 451 (1926). (Construing earlier law C.S. 4162.)

Item Four of the will provides:

> *After the death of my wife*, it is my will that all of my *property remaining, both real and personal*, shall be divided equally among my children, share and share alike, with the children of any deceased children to take their parents' share. (Emphasis added.)

It is this section to which our principal attention is directed, but we look at Item Two for some direction as to the testator's intent. Item Two provides *inter alia*:

> I give, devise, and bequeath unto my wife, Wanda K. Bost, all of my household and kitchen furniture, *farming tools* and equipment, and stock and provisions on hand, *for and during the term of her Natural Life only.* (Emphasis added)

There is no specific devise of the real estate to the widow in this case. No technical words of conveyance are required in wills. *Alston v. Davis*, 118 N.C. 202, 24 S.E. 15 (1896). Item Four of the

will, however, provides for final disposition of testator's property "... *remaining, both real and personal*, ... [a]fter the death of my wife." (Emphasis added.)

Justice Walker in the well reasoned opinion of *Whitfield v. Garris*, 134 N.C. 24, 26, 45 S.E. 904 (1903), says,

> It is also said that an estate by devise may pass by implication, without express words to direct its course; but where an implication is allowed, it must be raised by a necessary or at least a highly probable and not merely a possible implication.

Lord Mansfield, in referring to the subject, said that a necessary implication is one which leaves us no room for doubt. It is not an implication upon conjecture. We are not to conjecture what the testator would have done in an event he never thought of. *Whitfield, supra*, at 27.

When we read Item Two of the will in conjunction with Item Four, the probability of the testator's intent falls into place. Item Two gives a life estate in the farming tools and equipment. Item Four disposes of the 62 acres of land *remaining after the death of testator's wife.* A life estate in the farming tools and equipment would be of little or no value if the 62-acre farm passed to the seventeen children immediately upon testator's death, subject to division at that moment into seventeen parcels. It is the opinion of this Court that testator intended his widow to have a farming unit, composed of both land and farm tools and equipmet from which she could make a living so long as she lived.

We agree with the conclusions of the trial judge that Wanda Keener Bost is the owner of a life estate in the real property.

By their next assignment of error, the petitioners contend that the court erred by decreeing the lands could not be partitioned or sold until after the death of Wanda Keener Bost. Petitioners contend that even if the widow owns a life estate, the remaindermen would be entitled to a sale of partition of the remainder interest, and cite G.S. 46-23 as authority for their position. That statute provides for such a sale when a life estate encumbers the property. Respondent contends, however, that her life estate is coupled with a power of disposition. Again, we must construe the will to determine the validity of this contention.

Item Four of the will provides that ". . . all of my property *remaining* . . . shall be divided equally among my children . . . ." (Emphasis added.) Applying the principles of construction set out in *Whitfield, supra,* we must conclude that the testator gave by implication a power of disposition to his widow.

In *Hambright v. Carroll,* 204 N.C. 496, 498, 168 S.E. 817 (1933), the Court said: "The phrase 'what remains of her share' carries the connotation that nothing may remain; and this implies an unrestricted power of disposition." In the case *sub judice,* use of the word *remaining* carries the same connotation and implies the same power.

Generally, "[w]here real estate is given absolutely to one person with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void . . . ." *Carroll v. Herring,* 180 N.C. 369, 371, 104 S.E. 892 (1920). The first taker would take a fee. Here, however, where the estate devised is specifically limited to the life of the devisee, the power of disposition does not enlarge the estate devised or convert it into a fee. *Long v. Waldraven,* 113 N.C. 337, 18 S.E. 251 (1893); *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626 (1925); *Hardee v. Rivers,* 228 N.C. 66, 68, 44 S.E. 2d 476 (1947); *Howell v. Alexander,* 3 N.C. App. 371, 377, 165 S.E. 256 (1969). The devisee of the power may exercise it under the terms and within the limitations contained in the will and when so exercised by deed sufficient in form and substance to convey the whole estate in the land therein described, the grantee takes an indefeasible fee. *Troy v. Troy,* 60 N.C. 624, 626-7 (1864).

[2] Proceedings for partition of lands cannot be maintained where the life tenant has complete control and a power to dispose such as the life tenant has in this case. *See Makely v. Shore,* 175 N.C. 121, 124, 95 S.E. 51 (1918), where the life tenant was given complete control with power to dispose of her life estate for her own support. The Court there stated that "[a] partition of the realty by order of the court would take from her all these powers . . .," and denied the request for partition. The case *sub judice* is similar. The power of sale granted the life tenant by implication creates an exception to the right of partition set out in G.S. 46-23. Accordingly, we find no merit in petitioners' second assignment of error.

Petitioners assign as error the court's conclusion that the personal representative of W. T. Korn Sr., must be made a party to this action. Initially, W. T. Korn Sr. was joined as a party. He subsequently died. Petitioners contend that the interest of Clare Edith Bost Korn passed to her children under the will and not to her husband, W. T. Korn Sr. (now deceased). Further, the petitioners contend that W. T. Korn Sr. failed to answer the original petition within the time prescribed by law and that his estate is now estopped from making a claim.

G.S. 28A-18-1(a) provides:

> Upon the death of any person, all . . . rights to prosecute or defend any action or special proceeding, existing in favor of or against such person . . . shall survive to and against the personal representative or collector of his estate.

In view of the authority given in the statute and the discretion of the trial judge to extend the time within which a party can answer, we fail to see how a ruling determining the personal representative of W. T. Korn Sr. to be a proper party is reversible error. The personal representative of a deceased party might not be a necessary party, but he certainly might well be a proper party. Here, the inclusion of W. T. Korn Sr. served to remove any cloud on the title. Petitioners were not prejudiced, and their assignment of error is overruled.

[3] Petitioners assign as error the court's conclusion that the tax lien of Gaither M. Keener Jr. was extinguished. It is evident that the total tax plus interest was paid into court by respondents. The court ordered respondents to pay to petitioners attorney fees incurred in the tax foreclosure proceeding. This was all the court was required to do. Petitioners argue that respondents, pursuant to G.S. 105-374(e), have the burden of actually paying the attorney fees before the lien is extinguished. A study of the subsection shows that its benefits apply only to taxing units, not private citizens such as the petitioners. The assignment of error is without merit and overruled.

Petitioners also assign as error the court's cancellation of the notice of lis pendens. As we have stated above, the tax lien was properly extinguished. It was proper for the trial court to extinguish the lis pendens notice.

[4] Finally, we are not impressed with the petitioners' argument that the court erred by failing to award sufficient attorney fees to petitioners, by improperly allocating attorney fees, and by taxing the remaining court costs to petitioners. This is a discretionary matter in both the tax foreclosure and the partition proceedings. G.S. 105-374(i) provides *inter alia*:

> The word 'costs' as used in this subsection (i) shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow.

The court awarded $150 to petitioners for services involving the sum of $265.65, which was the amount due under the tax lien, including interest.

G.S. 6-21 provides:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled Partition.

The case *sub judice* is a combination of a partition proceeding and a tax foreclosure. Since there is one suit, there is one set of costs. The court, in its discretion, made allowance for payment of attorney fees and all remaining costs. Had the cases been severed, the allocation of costs may have been different. The trial judge acted properly in levying one set of costs as set out in the order.

The order entered by the trial judge is

Affirmed.

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

DEXTER YATES v. CITY OF RALEIGH; HOUSING AND NUISANCE DIVISION OF THE PUBLIC WORKS DEPARTMENT OF THE CITY OF RALEIGH; B. WAYNE CAMERON; AND BEAL BARTHOLOMEW

No. 7910SC930

(Filed 15 April 1980)

Municipal Corporations §§ 4, 12.1 — city's abatement of alleged nuisance — destruction of personal property — sufficiency of complaint to state claim

Plaintiff's complaint stated a claim for relief sufficient to survive a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) where plaintiff alleged that defendants wrongfully took and destroyed his concrete finishing equipment, personal property which was not a part of the alleged nuisance being abated.

APPEAL by plaintiff from *Godwin, Judge*. Order entered 8 May 1979 in Superior Court, WAKE County. Heard in the Court of Appeals on 27 March 1980.

In this civil proceeding plaintiff seeks to recover $5,200.00 for the alleged "wrongful taking" of his personal property by the defendants, and for "loss of income" resulting from the alleged wrongful taking of the property. In his complaint plaintiff purports to allege four separate "claims for relief" which are summarized as follows:

First, plaintiff averred that the defendants, acting under color of state law and purportedly "in furtherance of carrying out the provisions of section 12-2 of the Code of the City of Raleigh" to abate a nuisance, caused to be removed from premises rented by him a quantity of tools and equipment which he used in his business as a "concrete contractor." He claimed that the defendants had thereafter disposed of the property by depositing it in a City "refuse dump." In wrongfully removing and disposing of his private property, plaintiff contended the defendants exceeded whatever statutory authority they possessed.

Secondly, plaintiff asserted that the ordinance under which the defendants purported to act was unconstitutional in that it failed to require actual notice to him "of any actions by the Defendants on account of which the Plaintiff might forfeit his property. . . ." Such failure of notice, he charged, resulted in a deprivation of his property without due process of law.

Plaintiff's third claim posed a theory of relief based on trespass in that defendants, "without any lawful justification," entered upon his premises and unlawfully removed his property.

Finally, plaintiff asserted a claim for relief based on his allegations that the defendants had wrongfully converted his property by disposing of it in such a manner that he was unable to retrieve it.

Defendants filed an answer wherein they prayed that the "action be dismissed" for that the plaintiff had "failed to state a cause of action for which relief may be granted." Defendants generally denied the material allegations of plaintiff's complaint and further alleged that the ordinance did not require notification to the plaintiff and that, in any event, they had not removed from the plaintiff's premises the property described in his complaint.

Thereafter, the trial judge entered the following Order:

. . .

2. The complaint in this action contains allegations of tortious conduct by the City of Raleigh and its agents; more specifically trespass and conversion.

3. Plaintiff alleges the tortious behavior took place under color of law and more specifically under the provisions of Chapter 12 Section 2 of the Raleigh City Code.

4. No allegations were made which would indicated [sic] that the agents of the City of Raleigh acted beyond the scope of their authority when they entered the plaintiff's premises to abate a public nuisance or when they actually abated the nuisance.

5. The City of Raleigh has not purchased liability insurance pursuant to G.S. 160A-485 which would cover the types of tortious activity alleged by plaintiff. Because of the lack of such insurance coverage, the City of Raleigh has retained its sovereign immunity against such claims.

6. Plaintiff has also questioned the constitutionality of the notice provisions of Chapter 12 Section 2(b) of the Raleigh City Code and the resolution of that question is unaffected by the disposition of plaintiff's tort claims. Plaintiff contends

that the notice provision of Chapter 12 section 2(b) of the Raleigh City Code failed to provide notice to him of a nuisance abatement procedure and thereby deprived him of due process of law.

7. Section 51 of the Raleigh City Charter grants authority to the City of Raleigh to require that the owners of real property be responsible for the maintenance of the property in a condition free from public health hazards caused by trash, obnoxious weeds and undue growth.

The nuisance abatement authority of the City of Raleigh is an exercise of the police power and is a governmental function authorized by state law.

8. Section 12-2 of the Raleigh City Code denominates the owner of real property as the person responsible for its maintenance in a safe condition.

9. Notice of the proceedings complained of were [sic] timely given to the owner of the real property subject to this action.

CONCLUSIONS OF LAW

1. It is concluded as a matter of law that the City of Raleigh, through the exercise of its sovereign immunity, is exempt from the tort claims made in this cause by plaintiff. Defendants were acting within the scope of their legal authority.

2. It is further concluded as a matter of law that Plaintiff was not deprived of due process of law because proper notice was given to the record owner of the real property involved as required by law and that such notice should have been constructive notice to Plaintiff and does fulfill the requirement of due process.

NOW, THEREFORE, BE IT ORDERED AND DECREED THAT:

1. The plaintiff's tort claims are dismissed.

2. Chapter 12 Section 2 of the Raleigh City Code is not violative of the due process provisions of the United States Constitution or the North Carolina Constitution.

. . .

Plaintiff appealed.

Kimzey, Smith & McMillan, by Duncan A. McMillan, for the plaintiff appellant.

City Attorney Thomas A. McCormick, Jr., for the defendant appellees.

HEDRICK, Judge.

At the outset we point out that the record on appeal is remarkable in what it fails to contain. The ordinance pleaded by the plaintiff as being unconstitutional, cited by the defendants as their authority for taking plaintiff's property, and finally declared constitutional by the trial judge, is not in the record, and as far as the record discloses, was not introduced into evidence. The provisions of the City Charter to which the judge referred in his order and apparently upon which he relied to some extent to support the order of dismissal are not in the record, and as far as we can determine, were not introduced into evidence. The notice provided to the property owners pursuant to the ordinance, which is challenged by the plaintiff for its alleged inadequacy, cited by the defendants in conjunction with the ordinance for their authority in allegedly removing plaintiff's property to the city dump, and declared adequate in the judge's order of dismissal, is likewise conspicuous for its absence from the record and, supposedly, was not offered into evidence. The "oral motion" made by the defendants "to dismiss" plaintiff's claim "on the pleadings," and apparently ruled on in the order of dismissal, is not in the record for our perusal and analysis. Finally, the evidence on which defendants relied to demonstrate that the City had not waived its governmental immunity by procuring liability insurance, also recited in the order of dismissal as the primary basis for the order, and declared by defendants at oral argument to be the principal reason for the dismissal, does not appear in the record.

We think it hardly necessary to elaborate further on the deplorable deficiencies of the record. Its condition compels us, however, to treat the Order appealed from as one dismissing plaintiff's claim pursuant to Rule 12(b)(6), G.S. § 1A-1, for failure to state a claim upon which relief can be granted.

"The sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief." *Carolina Builders Corp. v. AAA Dry Wall, Inc.*, 43 N.C. App. 444, 446, 259 S.E. 2d 364, 366 (1979). If it appears to a certainty that no state of facts could be proved in support of the claim so as to entitle plaintiff to some relief, the complaint should be dismissed. 2A Moore's Federal Practice § 12.08 (1979). *Accord, Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Kelly v. Briles*, 35 N.C. App. 714, 242 S.E. 2d 883 (1978).

With respect to the claim alleging a wrongful appropriation of private property set out in this plaintiff's complaint, we find the decision of Justice (later Chief Justice) Bobbitt in *Rhyne v. Town of Mount Holly*, 251 N.C. 521, 112 S.E. 2d 40 (1960), instructive. In *Rhyne*, plaintiff alleged that agents of the defendant Town entered upon his property with a bulldozer and, in the process of cutting down weeds claimed to constitute a nuisance, they also bulldozed away more than 100 oak saplings growing on the property. The town defended its action on the grounds that a local ordinance authorized it to cut weeds in an effort to abate a nuisance and that its actions under the ordinance were performed in the exercise of a governmental function. Thus, the town claimed that it was protected by sovereign immunity. The plaintiff contended that the town had acted in excess of the authority conferred it by the provisions of the ordinance and therefore could not shield itself from liability by claiming governmental immunity. The jury rendered a verdict for plaintiff. On appeal by the defendant, Justice Bobbitt stated the relevant inquiry as follows:

> Where defendant, acting under its power to abate a nuisance constituting a menace to health, goes upon plaintiff's lot, without plaintiff's permission or consent, for the purpose of eradicating what defendant deems to be such nuisance, and in so doing destroys trees thereon that do not in fact constitute a nuisance, is plaintiff's right to recover compensation for the impairment in value of his property caused by the destruction of the trees defeated because defendant was then engaged in the performance of a governmental function?

Id. at 525, 112 S.E. 2d at 44. Justice Bobbitt answered the question with a resounding "No," and affirmed the verdict for the plaintiff. We find his reasoning as persuasive, and the principles of law on which he relied as sound, today as then. Citing numerous North Carolina cases as well as decisions from many other jurisdictions in support, he concluded:

> Where a municipal corporation, in the exercise of its governmental power to abate nuisances, enters upon and damages private property by the destruction of trees, buildings, *etc.*, thereon, it is liable for the payment of just compensation unless its acts were *in fact* necessary to remove or abate a nuisance.

Id. at 528, 112 S.E. 2d at 46 [emphasis in original]. Moreover, he quoted approvingly from 6 McQuillan, *Municipal Corporations* § 24.87 (3d ed. 1949): "[N]o one, not even the municipal corporation in which an alleged nuisance is located, is protected against suit for damages for voluntarily removing that which is not a nuisance. . . ."

It is hard to imagine a case more squarely on point with the one before us than the *Rhyne* decision.

In our opinion, the plaintiff's complaint, when considered in light of the foregoing principles of substance and procedure, clearly states a claim for relief sufficient to survive a motion to dismiss under Rule 12(b)(6). Plaintiff has alleged a claim for the defendants' wrongful taking and destruction of his personal property which was not part of the nuisance being abated. Defendants have asserted only two defenses: (1) They were authorized by ordinance to do what they did. (2) In any event, and primarily, they are fully protected from suit because they were acting under the police power to exercise a governmental function. However, in view of the controlling rules of law announced in *Rhyne*, the question whether defendants have acted *lawfully* within the police power to abate a nuisance pursuant to a constitutional ordinance has yet to be determined. Simply put, were the defendants' acts in removing the plaintiff's concrete finishing equipment *in fact* necessary to abate the nuisance allegedly existing?

Defendants urge us, however, to consider the "much more recent" case of *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885

(1970). Defendants purport to rely "heavily" on this case and contend that it is a "better statement of the law [than *Rhyne*] as it relates to compensation for nuisance abatements." They quote from the opinion, written by Justice Lake, for the proposition that "any nuisance may be removed without compensation when the municipality has the authority to abate such nuisances."

We agree. We agree that Justice Lake's opinion is a good statement of the law. We disagree that the case extends the police power so as to allow a municipality to *unlawfully* take or destroy private property under the guise of exercising a governmental function, and thereafter to hide behind the shield of sovereign immunity. Had defendants evaluated Justice Lake's opinion further, they would have discovered that "*the limit of the police power is the reasonable necessity for the action in order to protect the public.*" *Id.* at 362, 177 S.E. 2d at 891 [Our emphasis]. That statement accords fully with the principles of law laid down in *Rhyne*. Furthermore, Justice Lake thereafter even more lucidly enunciated the limits imposed on the exercise of the police power in carrying out the governmental function of abating a nuisance. He quoted from 16 Am. Jur. 2d, *Constitutional Law* § 368 as follows:

> [P]ublic necessity is the limit of the right to destroy property which is a menace to public safety or health *and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way.* [Our emphasis.]

We believe that statement is just another way of declaring, as Justice Bobbitt did in *Rhyne*, that the municipality cannot take, remove or destroy private property unless such action is "*in fact* necessary to remove or abate a nuisance." *Rhyne, supra* at 528, 112 S.E. 2d at 46 [emphasis in original].

Plaintiff in the case before us alleged that the defendants wrongfully removed and disposed of concrete finishing equipment which, in and of itself, did not constitute a nuisance and which was not *in fact* necessary to remove to abate the nuisance allegedly existing. We hold that the trial judge erred in dismissing the plaintiff's claim. His Order dated 8 May 1979 is reversed, and the cause is remanded to the Superior Court for further proceedings consistent with this Opinion.

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

GREGORY CHARLES SLIZEWSKI, EMPLOYEE, PLAINTIFF v. INTERNATIONAL SEAFOOD, INC., EMPLOYER AND THE TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7910IC822

(Filed 15 April 1980)

1. **Master and Servant § 55.3— workers' compensation—cause of fall unknown—injury by accident arising out of employment**

The evidence, or lack thereof, supported a finding that the cause of plaintiff's fall to the floor of the restaurant of which he was assistant manager was unknown, and the Industrial Commission could properly find that plaintiff was injured by accident arising out of and in the course of his employment where there was no finding that any force or condition independent of the employment caused the fall, and the evidence showed that plaintiff was engaged in the duties of his employment at the time of the fall and that the only active force involved was plaintiff's exertions in the performance of his duties.

2. **Master and Servant § 69.1— workers' compensation—hematoma suffered in fall—cause of hemiplegia and visual difficulties**

The evidence was sufficient to support the Industrial Commission's finding that a hematoma suffered by plaintiff employee in a fall caused brain damage rendering plaintiff a partial hemiplegic and reducing his visual capabilities where it tended to show that, prior to the fall, plaintiff was a healthy young man with no history of seizures, paralysis or visual disability; the day after the fall plaintiff was completely unconscious, had some movement on his right side but had no movement of his left arm and leg and had a complete left hemiplegia; a surgeon performed a craniectomy removing a hematoma from the right side of plaintiff's brain; the next thing plaintiff remembered after the fall was waking up in the hospital and being paralyzed on his left side and being unable to speak or see very well; and at the time of the hearing plaintiff had seizures under too much stress or excitement, was still paralyzed in his left hand, partially paralyzed in his left leg and face and wore glasses.

3. **Master and Servant § 69.1— workers' compensation—permanent disability**

The Industrial Commission could properly find that plaintiff suffered permanent brain damage and is permanently disabled by reason of that injury when the severe nature of plaintiff's injury is considered with a surgeon's testimony that it would be impossible to recover completely from a hematoma of the size which he removed from plaintiff's brain but that how much recovery is possible is very difficult to estimate.

APPEAL by defendants from Order of the North Carolina Industrial Commission entered 10 May 1979. Heard in the Court of Appeals 7 March 1980.

The parties stipulated that they are bound by and subject to the provisions of the North Carolina Workmen's Compensation Act; that defendant employer employed four or more employees on 25 January 1976; that an employer-employee relationship existed on 25 January 1976; that the carrier assuming the workmen's compensation risk for defendant employer on 25 January 1976 was Travelers Insurance Company and that claimant's average weekly wage was $237.77.

After hearings before Deputy Commissioner Ben E. Roney, Jr., on 7 April and 30 September 1977 and before Deputy Commissioner John Charles Rush on 15 February 1978, Deputy Commissioner Roney found the following pertinent facts:

1. Claimant fell at work on 25 January 1976. During the fall he suffered a linear fracture in the right posterior parietal region of the skull. The right hemisphere of his brain commenced to hemorrhage and a huge hematoma was evacuated by Dr. Timmons following hospitalization at Pitt County Memorial Hospital on 26 January 1976. He was admitted to the hospital on this occasion completely comatose. The massive hematoma caused permanent brain damage that has rendered claimant a left-sided partial hemiplegic. The pressure inside the skull occasioned by the massive hematoma caused permanent damage to claimant's eyes that has significantly caused a reduction in his visual capabilities.

2. Claimant attempted to return to work for defendant employer during April 1976. He worked for three days but was unable to handle the physical requirements of the job.

3. Claimant is totally and permanently disabled by reason of the injury that he suffered during the 25 January 1976 fall giving rise hereto.

4. The fall occurred in the service area between the kitchen and dining room. He fell forward with his arms across his chest, rotating counter-clockwise and landed on the right shoulder and right portion of his head. He commenced to fit following the fall.

5. Claimant was not an epileptic on the day of or any time prior to the fall giving rise hereto.

6. Claimant received surgery during October 1975 for carcinoma of the left leg. He received three intravenous chemotherapy treatments following surgery. The chemotherapy treatments were discontinued because they caused vomiting.

7. Claimant went to work as manager of defendant employer three days prior to 25 January 1976. He has experienced several seizures subsequent to the fall that usually occur during stress or exertion. He is currently taking Dilantin and Phenobarbital as measures designed to control seizure activity.

8. Claimant's memory with respect to the events following the fall is not particularly good. His memory for the cause of the fall presumes a slip. He had, however, been observed just prior to the fall leaning with his left shoulder against the wall between the kitchen and dining area looking out into the dining area. He was next observed falling forward in the manner previously described. The manner in which claimant fell does not confirm the occurrence of a slip and fall.

9. The cause of the fall giving rise hereto is unknown. The evidence of record does not compel directly or by inference a conclusion that the fall was occasioned by an idiopathic condition inasmuch as claimant was not suffering from any known idiopathic condition on or prior to 25 January 1976.

10. Claimant was injured by accident arising out of and in the course of the employment.

11. The compensation rate herein for lifetime benefits is $146.00.

Based on the foregoing findings of fact, Deputy Commissioner Roney made the following conclusions of law:

1. Without regard to any inferences favoring either party, the evidence of record herein reveals an accident (fall) without a known cause that occurred in the course of the

employment. The law under these circumstances presumes the "arising out of" requirements. (Citations omitted.)

2. Claimant was injured by accident arising out of and in the course of the employment. NC GS 97-2(6).

3. Claimant is by reason of the injury by accident giving rise hereto a lifetime case and is entitled to compensation at $146.00 per week beginning 25 January 1976. NC GS 97-29.

On appeal to the Full Commission, the Full Commission adopted as its own the Opinion and Award of Deputy Commissioner Roney. Defendants appealed.

Franklin B. Johnston for plaintiff appellee.

G. Collinson Smith for defendant appellants.

MARTIN (Robert M.), Judge.

[1] Defendants assign as error that there was no competent evidence in the record to support Finding of Fact No. 9, that the cause of the fall was unknown, and Finding of Fact No. 10, that claimant was injured by an accident arising out of and in the course of his employment, and the conclusions of law based thereon. Defendants further argue that Finding of Fact No. 4 does not support the findings of fact or conclusions of law.

The evidence in the case *sub judice* tends to show that plaintiff, the assistant manager at the Family Fish House Restaurant had completed his rounds on 25 January 1976, which included an inspection of the kitchen area where foods were being deep-fat fried. Plaintiff ended up where the witnesses usually fill glasses with drinks outside the kitchen doors. Plaintiff testified that when he walked out to the waitress area, he remembered leaning and falling and not being able to grab onto anything and after that he remembered nothing. David Louthen, a waiter at the Fish House, stated that he walked past the plaintiff who was leaning against a wall in the service area. Louthen then sat down at a table located about four feet from the service area where he was talking to a waitress and could not observe plaintiff for several minutes. The next time Louthen saw plaintiff, he observed the top portion of plaintiff's body falling in front of him with his hands clasped across his chest, plaintiff fell as a tree falls, direct-

ly forward and landed directly on his head. As soon as plaintiff fell he went into convulsions. Louthen also testified that plaintiff might have moved from his original position prior to the fall. Plaintiff's wife testified that when she received plaintiff's personal belongings at the hospital that his shoes were covered with "greasy stuff."

In regard to his physical condition prior to the accident, plaintiff testified that in 1975 he had a carcinoma of the left leg which was removed and following the surgical excision of the carcinoma he received chemotherapy but he had recovered completely from that and was not experiencing any medical problems in reference to that treatment. Several witnesses testified that prior to the accident, plaintiff was a healthy, active, sports minded young man. Dr. Timmons, who treated plaintiff for the hematoma from 26 January 1976 to 11 February 1977, stated that he did not observe any pre-existing medical difficulty which might cause a hematoma other than the fall.

Defendants do not except to the Commissioner's finding of fact that plaintiff's memory for the cause of the fall presumes a slip but that the manner in which claimant fell does not confirm the occurrence of a slip and fall. The evidence does not compel a finding that the cause of the fall was a slip nor does it reveal any other possible cause of the fall. There is no evidence that plaintiff was suffering from an idiopathic condition which caused either the fall or the hematoma. The evidence, or lack thereof, on the cause of the fall is sufficient to sustain the finding that the cause of the fall was unknown.

Having determined that the cause of the fall was unknown, the courts have found that the fall was an accident "arising out of" the employment and sustained an award in *Calhoun v. Kimbrell's Inc.*, 6 N.C. App. 386, 170 S.E. 2d 177 (1969) and the authorities cited therein. Quoting from *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963), the court in *Calhoun* stated:

> It has been suggested that this result in unexplained-fall cases relieves claimants of the burden of proving causation. We do not agree. The facts found by the Commission in the instant case permit the inference that the fall had its origin in the employment. There is no finding that any force or condition independent of the employment caused or contributed

> to the accident. The facts found indicate that, at the time of the accident, the employee was within his orbit of duty on the business premises of the employer, he was engaged in the duties of his employment or some activity incident thereto, he was exposed to the risks inherent in his work environment and related to his employment, and the only active force involved was the employee's exertions in the performance of his duties.

Id. at 390, 170 S.E. 2d at 179-80. In the present case, as in *Taylor* and *Calhoun*, there is no finding that any force or condition independent of the employment caused the fall. The plaintiff, in completing his inspection of the area, was engaged in the duties of his employment and the only active force involved was plaintiff's exertions in the performance of his duties. In such a situation, our decisions, liberally interpreting the Workmen's Compensation Act, indulge the inference that the accident arises out of his employment, and when the Commission so finds, that finding is conclusive on appeal.

The Commission's conclusion that "[t]he law under these circumstances presumes the 'arising out of' requirement" is correct to the extent that a presumption, a term often loosely used, encompasses the concept of an inference. *See Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

[2] Defendants further assign as error that Findings of Fact Nos. 1 and 3 are not supported by competent medical testimony in the record. Defendants contend that there is no evidence in the record that the hematoma caused permanent brain damage that has rendered plaintiff a partial hemiplegic as well as caused permanent damage to plaintiff's eyes and that claimant is totally and permanently disabled by reason of the injury. Defendants, by these assignments of error, apparently do not contend that the fall did not cause the hematoma. The causal relationship between the accident and the injury, the hematoma, is sufficiently established by expert medical testimony. Dr. Timmons testified that in his opinion there was a causal relationship between the fall and the hematoma which he removed from the right side of plaintiff's brain and that he did not observe any other pre-existing medical difficulty which might cause said hematoma. In addition, Dr. Michael Weaver, a diagnostic radiologist, testified

that plaintiff suffered a well defined linear non-depressive skull fracture and that he was of the opinion that the fall could have produced such a fracture and the resulting hematoma. Hence, the above assignments of error are limited to the causal relationship between the accident and the specific consequences of that injury, the partial hemiplegia and visual disability, and the permanency of those injuries.

In *Click v. Freight Carriers*, 41 N.C. App. 458, 255 S.E. 2d 192 (1979) we discussed the appropriate circumstances under which an award may be made when medical evidence on the causal relationship between the injury and the accident is unconclusive, indecisive, fragmentary or even non-existent. Larson's Workmen's Compensation Law, § 79.51, 15-246 to 247 (1976). In *Click* we quoted with approval from *Uris v. State Compensation Department*, 247 Or. 420, 427 P. 2d 753 (1967).

> In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his supervisor and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury. . . . (Citation omitted.)

Id at 462, 255 S.E. 2d at 195.

We think that the distinguishing features are present in the case at bar. Prior to the fall, plaintiff was a healthy young man with no history of seizures, paralysis or visual disability. As soon as plaintiff fell landing directly on his head, he went into convulsions which continued after he was admitted to the hospital. On 26 January 1976, the day after the fall, Dr. Timmons testified that plaintiff was completely unconscious, had some movement on his right side but had no movement of his left arm and leg and had a complete left hemiplegia. Dr. Timmons performed a craniectomy removing a hematoma from the right side of plaintiff's brain. The next thing plaintiff remembered after the fall was waking up in the hospital and being paralyzed on his left side and being unable to speak or see very well. At the time of the hearing, plaintiff had

seizures under too much stress or excitement, was still paralyzed in his left hand, partially paralyzed in his left leg and face and wore glasses. Under these circumstances, the fact that the accident caused the injuries can reasonably be inferred. We find, therefore, that the evidence was sufficient to support the Commission's finding of fact that the hematoma caused brain damage rendering plaintiff a partial hemiplegic and reducing his visual capabilities.

[3] The remaining question is whether plaintiff has presented sufficient evidence that he has suffered permanent brain damage and is permanently disabled by reason of that injury. In *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E. 2d 280 (1980) a permanent total case was defined as 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. Dr. Timmons testified that it would be impossible to recover completely from a hematoma of the size which he removed from plaintiff's brain but that how much recovery was possible was very difficult to estimate. While this medical testimony leaves open the possibility of some improvement in plaintiff's condition, given the severe nature of plaintiff's injury and the impossibility of complete recovery, there is sufficient evidence from which the Commission could find that plaintiff suffered permanent brain injury and is permanently unable to function in a work related capacity.

Affirmed.

Judges CLARK and ERWIN concur.

GREEN THUMB INDUSTRY OF MONROE, INC. v. WARREN COUNTY NURSERY, INC.

No. 7920SC894

(Filed 15 April 1980)

Process § 14.3— foreign corporation—insufficient contacts with N. C.—no jurisdiction by N. C. courts

The record did not show sufficient contacts on the part of defendant corporation in N. C. for the courts of this State to acquire *in personam* jurisdic-

tion over it where the evidence tended to show that defendant did not have any salesman who solicited in N. C.; through its routine advertising defendant mailed its price list to some N. C. addresses; over the last two years, plaintiff had received four magazines through the U. S. mail which included advertisements for defendant's nursery; two nurseries located in N. C. other than plaintiff had placed orders with defendant; plaintiff had placed six or seven orders over the last six years with defendant, four of the orders being placed by plaintiff's president while he was in Tennessee and the others being placed by phone; and the order for the shipment in question was placed by plaintiff with defendant at its place of business in Tennessee.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 3 May 1979 in Superior Court, UNION County. Heard in the Court of Appeals 21 March 1980.

Plaintiff filed its complaint against defendant seeking to recover damages for breach of certain implied warranties and for negligence on the part of defendant. The complaint alleged that plaintiff, a North Carolina corporation, had purchased certain trees from defendant, a Tennessee corporation, and that the trees were delivered to plaintiff with a root system which was not sufficient to sustain life, and all of them died. The court entered the following order, from which plaintiff appealed:

"THIS CAUSE coming on to be heard and being heard by the undersigned Judge on motion of defendant to dismiss pursuant to Rule 12(b) of the Rules of Civil Procedure for lack of jurisdiction over the person of the defendant and after hearing the evidence, the court makes the following:

FINDINGS OF FACT

(1) Plaintiff is a corporation duly incorporated under the laws of the State of North Carolina with an office and principal place of business in Union County, North Carolina.

(2) Defendant is a corporation duly incorporated under the laws of the State of Tennessee with its principal place of business at Route 2, McMinnville, Tennessee.

(3) The defendant has no salesman who solicits business in North Carolina and is not licensed to do business in North Carolina.

(4) The defendant through its routine advertising mails out its price list to a mailing list, including some North Caro-

lina addresses. This catalog has been received once a year for approximately the last six years by plaintiff. The plaintiff has received four magazines, including 'American Nurseryman' and 'Nursery Business', which magazines are published for people in the nursery business through the United States mail over the last two years. These magazines include advertisements for defendant's nursery.

(5) Jordan-Evans Associates, P. A., a landscape architect firm has received this catalog two times per year for the past three years. Ed Evans, an employee of this firm visited Warren County Nursery on Thanksgiving of 1977 and was told by an employee of that nursery that they had sold to North Carolina contractors in the past and would continue to do so in the future. He was also told that they would arrange for shipment of their product to North Carolina.

(6) G. G. Gilmore, President of Gilmore Plant and Bulb, a North Carolina Corporation, has known the president of Warren County Nursery for some twenty-five years and has done business with Warren County Nursery during the past twenty-five years. Mr. Gilmore generally picks up Warren County Nursery's catalog at a show in Atlanta. It is Mr. Gilmore's customary practice to drive one of his vehicles to Tennessee to pick up his order, but he occasionally receives a portion of his order either by UPS or common carrier at his place of business in Julian, North Carolina. This occurs maybe once per year. Most of Mr. Gilmore's orders are placed by telephone from Julian, North Carolina to Warren County Nursery in Tennessee.

(7) Land Masters, Inc., a landscaping firm in Gastonia, North Carolina has received defendant's catalog at least one time per year. This firm has placed orders with Warren County Nursery in the past one and one-fourth years. The orders were placed by telephone from Gastonia to Tennessee. On several occasions, seedlings ordered by Land Masters, Inc. from Warren County Nursery have been delivered by bus and by UPS. Land Masters, Inc. has been billed by Warren County Nursery and has made payment by checks mailed from North Carolina and drawn on North Carolina banks.

(8) Brodus Honeycutt, a person engaged in the nursery business in Union County, North Carolina, has received defendant's catalog at least once per year for the past four or five years and has never purchased any of defendant's products.

(9) The plaintiff has done business with the defendant every year for approximately the last six years. The plaintiff has placed about six or seven orders with defendant of which approximately four orders were placed by plaintiff's president while visiting the defendant's nursery in Tennessee. The other orders were placed by plaintiff's president over the telephone.

(10) In January of 1978, plaintiff's president, Mr. Lowery Smith, went to Tennessee to purchase trees and shrubs to be used in a landscaping project located in Charlotte, North Carolina. Mr. Smith visited several nurseries, including Commercial Nursery where he purchased a large number of trees and shrubs. One of the items that he wanted to purchase was a quantity of 'Golden Raintrees'. When he found that Commercial Nursery did not have a sufficient quantity of 'Golden Raintrees' to fill his order, he asked if Warren County Nursery, Inc., did not have a large quantity of that type of tree and was told that they probably did and that he should check with them. Mr. Smith then went to defendant's place of business in McMinnville, Tennessee, inspected the trees and agreed to purchase these trees while at the defendant's place of business in Tennessee. A portion of this order was picked up by Mr. Smith while in Tennessee and brought back to North Carolina. The balance of the trees were shipped 'F.O.B. McMinnville' via Tilford Trucking Company to Mr. Smith's home in Union County, North Carolina.

(11) Subsequent to the delivery, the defendant billed the plaintiff for the purchase and plaintiff paid the defendant by a check drawn on a North Carolina bank by mailing the check to the defendant.

(12) This action was commenced by plaintiff in order to recover damages from defendant for alleged defects in the 'Golden Raintrees,' which were sold by defendant to plaintiff.

Plaintiff alleges in Paragraph 11 of the complaint that the trees were defective when the delivery took place.

Based upon the foregoing Findings of Fact the Court concludes as a matter of law that:

(1) The defendant has entered a special appearance solely for the purpose of challenging jurisdiction over its person.

(2) The activities and contacts of defendant within North Carolina have been casual, incidental, and insubstantial, and defendant has insufficient ties or connections with this state to be subjected to its jurisdiction in this case. If defendant is subjected to a judgment *in personam* in this case, it would unconstitutionally deprive the defendant of its property without due process of law.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that this action is hereby dismissed for lack of personal jurisdiction over defendant.

This 3 day of May, 1979.

s / THOMAS W. SEAY, JR.
Judge Presiding"

William H. Helms, for plaintiff appellant.

Griffin, Caldwell & Helder, by H. Ligon Bundy, for defendant appellee.

ERWIN, Judge.

The only question for our determination is: Did the trial court commit error by allowing defendant's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2), of the Rules of Civil Procedure for lack of personal jurisdiction over defendant? For the reasons that follow, we answer, "No," and affirm the judgment entered by the trial court.

The resolution of the question of *in personam* jurisdiction involves a two-fold determination: (1) do the statutes of North Carolina permit the courts of the jurisdiction to entertain this ac-

tion against defendant, and (2) does the exercise of this power by the North Carolina courts violate due process of law. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). The grounds on which a court may assert personal jurisdiction over a person are set forth in G.S. 1-75.4.

G.S. 1-75.4(2) provides:

> "§ 1-75.4. *Personal jurisdiction, grounds for generally.*—A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .
>
> (2) Special Jurisdiction Statutes.—In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction."

G.S. 55-145 is just such a special jurisdiction statute; it reads in pertinent part as follows:

> "§ 55-145. *Jurisdiction over foreign corporations not transacting business in this State.*—(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> . . . .
>
> (2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or
>
> (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufac-

> tured, marketed, or sold or whether or not through the medium of independent contractors or dealers . . ."

It is generally accepted that North Carolina's long-arm statute (G.S. 1-75.4) should be liberally construed in favor of finding personal jurisdiction, subject, of course, to due process limitations. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). In a case considering G.S. 55-145(a)(1), *Byham v. House Corp.*, 265 N.C. 50, 57, 143 S.E. 2d 225, 232 (1965), our Supreme Court stated, citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957): "It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state." *See also Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974). *Parris v. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E. 2d 29, *dis. rev. denied*, 297 N.C. 455, 256 S.E. 2d 808 (1979). The due process doctrine requires that in order to subject this nonresident corporation to *in personam* jurisdiction, it must have certain minimum contacts with this State to the extent that 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).

Application of the minimum contact rule varies with the quality and nature of defendant's activities, but it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958); *Parris v. Disposal, Inc., supra.* The existence of minimal contacts is a question of fact. *Chadbourn, Inc. v. Katz, supra.*

Here, the evidence showed, and the court found: that defendant does not have any salesman who solicits in North Carolina; that defendant, through its routine advertising, mails its price list, which includes some North Carolina addresses; and that over the last two years, plaintiff has received four magazines through the United States mail, including "American Nurseryman" and "Nursery Business," which magazines are published for people in the nursery business. These magazines include advertisements for

defendant's nursery. G. G. Gilmore, president of Gilmore Plant and Bulb, testified that it is his customary practice to drive one of his vehicles to Tennessee to pick up his order, "but he occasionally receives a portion of his order either by UPS or common carrier at his place of business in Julian, North Carolina. This occurs maybe once per year. Most of Mr. Gilmore's orders are placed by telephone from Julian, North Carolina to Warren County Nursery in Tennessee."

One other North Carolina company had placed orders with defendant by telephone from Gastonia to Tennessee, was billed by defendant, and had paid by checks mailed from North Carolina and drawn on North Carolina banks. Plaintiff has done business with defendant for six years and has placed six or seven orders with defendant of which four were placed by plaintiff's president while in Tennessee. Others were placed by plaintiff's president over the telephone. The order for the shipment in question was placed by plaintiff with defendant at its place of business in Tennessee. The findings of the trial court are supported by competent evidence and are, therefore, conclusive on appeal. *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784 (1970).

The record in this case does not show sufficient contacts on the part of defendant in North Carolina for the courts of this State to acquire *in personam* jurisdiction over it. The judgment entered by the trial court was in all respects proper.

Judgment affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

CHEROKEE INSURANCE COMPANY v. AETNA CASUALTY AND SURETY COMPANY

No. 795SC661

(Filed 15 April 1980)

Insurance § 149— comprehensive general liability policy—apartments not listed in declaration of hazards—owner of apartments listed as additional insured

Defendant was liable under a comprehensive general liability insurance policy issued to Sicash Builders, Inc. for an injury to a third party on the

premises of Malibu Wilmington Apartments, although Malibu Wilmington Apartments was not listed in the declaration of hazards on the liability schedule, where the owner of the apartments, Malibu Wilmington, Inc., was listed as an additional insured; the policy did not have an endorsement that excluded Malibu Wilmington Apartments; the policy obligated the insurer to pay on behalf of the "insured" all sums which the "insured" shall become legally obligated to pay as damages because of bodily injury or property damage; and the policy provided a method for the insurer to collect the premium due for any change in coverage during the term of the policy.

APPEAL by plaintiff from *Small, Judge*. Judgment entered 7 May 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 1 February 1980.

Plaintiff's complaint alleged: that it issued an insurance policy to Sicash Builders, Inc. covering Malibu Apartments from 7 July 1972 to 7 July 1975; that in May 1975, one Jesse Cumbee, III was injured in a lawnmower accident at Malibu Wilmington Apartments and sued Sicash; that at the time of the accident, defendant Aetna Casualty and Surety Company had issued a comprehensive general liability policy to Sicash; that plaintiff called on defendant to participate in the lawsuit, and defendant refused; that plaintiff has called on defendant to pay its proportionate share, but defendant has failed to do so. Plaintiff sought to recover 75% of the settlement payment and its investigative and defense costs.

In answering plaintiff's Requests for Admissions, defendant admitted that if coverage under its policy existed at the time of the injury, then it is liable for 75% of the settlement expenses. Plaintiff moved for summary judgment and filed a supporting affidavit. The parties stipulated that the issue of damages had been admitted. Defendant also moved for summary judgment. The court denied plaintiff's motion for summary judgment and granted defendant's motion. Plaintiff appealed.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for plaintiff appellant.

Poisson, Barnhill, Butler & Britt, by Donald E. Britt, Jr., for defendant appellee.

ERWIN, Judge.

The application for the comprehensive general liability insurance policy issued by defendant to Sicash contained the following language: "This application contains a description of all hazards known to exist on this date and those which are likely to exist at some time during the policy period, unless otherwise stated herein."

The property referred to as Malibu Wilmington was not listed in the declaration of hazards on the liability schedule by Sicash, but Malibu Wilmington, Inc. was listed as an additional insured. Plaintiff contends that the property was covered by reason of the above language, since the policy did not have an endorsement that excluded Malibu Wilmington.

Defendant contends to the contrary that Malibu Wilmington (apartments) was not listed as a hazard on the liability schedule because of the express intent of the parties (Sicash and defendant) not to include it. Therefore, an endorsement to exclude it from coverage was not necessary.

To resolve the question, whether or not the trial court erred by granting defendant's motion for summary judgment pursuant to G.S. 1A-1, Rule 56, of the Rules of Civil Procedure, we must first determine whether there is any ambiguity in the language of the insurance policy in question. We find no ambiguity.

Liability insurance policies are construed in accordance with the general rule of resolving any ambiguity therein in favor of the insured. *Miller v. Caudle*, 220 N.C. 308, 17 S.E. 2d 487 (1941).

The settled rule is that where there is no ambiguity in the language used in the policy, the courts must enforce the contract as the parties have made it and may not impose liability upon the company which it did not assume and for which the policyholder did not pay. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978); *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967). If on the other hand, the language is ambiguous or reasonably susceptible to two interpretations, the courts will give it the interpretation which is most favorable to the insured, that is, in favor of coverage. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978). In addition, the terms of an insurance contract

must be given their plain, ordinary, and accepted meanings unless they have acquired a technical meaning in the field of insurance or unless it is apparent that another meaning was intended. *Grant v. Insurance Co., supra.*

As stated in 45 C.J.S., Insurance, § 791, p. 830: "[B]roadly speaking, the so-called comprehensive provision of a policy [as in this case] covers loss or damage caused by any risk or peril other than those expressly excluded or excepted from coverage."

In the policy, Malibu Wilmington, Inc. was listed as an additional insured. The policy provided: "This endorsement, issued by one of the below named companies, forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein." Listed below the above provision was the following:

> "(The information below is required only when this endorsement is issued subsequent to preparation of policy)
>
> Endorsement effective Policy No. Endorsement No.
> Named Insured
> Additional Premium $ Return Premium In Advance BI $ PD $
> 1st Anniv. $ $
> 2nd Anniv. $ $"

Defendant contends that no liability attached, because there was an agreement between it and the insured (Sicash) not to insure the property. Thus, there was no need to fill out the information required to exclude original liability, and it was their custom not to do so. We reject this argument. The language in the policy provided for coverage of the additional insured, Malibu Wilmington, Inc., the owner of the apartments, effective as of the date of the policy's inception, unless otherwise indicated. The accident for which coverage is sought occurred after the inception of the policy. Furthermore, we find other language in the policy helpful. The policy contained a declaration. The declaration provides:

> "By acceptance of this policy, the *named insured* agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and (that this policy embodies

all agreements existing between himself and the *company* or any of its agents relating to this insurance)."

The insuring agreement reads:

"I. BODILY INJURY LIABILITY COVERAGE
PROPERTY DAMAGE LIABILITY COVERAGE

The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obliged to pay as damages because of

bodily injury or
property damage

to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking damages on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."

To us, the declaration is clearly inconsistent with the contentions of the defendant—that the parties expressly omitted Malibu Wilmington from coverage. The clear language of defendant's own contract excludes any prior understanding between the parties not embodied in the policy. Chief Justice Stacy spoke for our Supreme Court in *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948):

"Policies of liability insurance, like all other written contracts, are to be construed and enforced according to their terms. If plain and unambiguous, the meaning thus expressed must be ascribed to them. But if they are reasonably susceptible of two interpretations, the one imposing liability, the other excluding it, the former is to be adopted and the latter rejected, because the policies having been prepared by the insurers, or by persons skilled in insurance law and acting in the exclusive interest of the insurance company, it is but meet that such policies should be construed liberally in

respect of the persons injured, and strictly against the insurance company. *Roberts v. Ins. Co.*, 212 N.C. 1, 192 S.E. 873, 113 A.L.R. 310; *Underwood v. Ins. Co.*, 185 N.C. 538, 117 S.E. 790; *Bray v. Ins. Co.*, 139 N.C. 390, 51 S.E. 922; *Bank v. Ins. Co.*, 95 U.S. 673."

The only question remaining relates to the payment of premium. Defendant contends that no premium was paid by Sicash for Malibu Wilmington. The following condition was provided as a part of the policy in question:

"1. *Premium*

All premiums for this policy shall be computed in accordance with the *company's* rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

Premium designated in this policy as 'advance premium' is a deposit premium only which shall be credited to the amount of the earned premium due at the end of the policy period. At the close of each period (or part thereof terminating with the end of the policy period) designated in the declarations as the audit period the earned premium shall be computed for such period and, upon notice thereof to the *named insured*, shall become due and payable. If the total earned premium for the policy period is less than the premium previously paid, the *company* shall return to the *named insured* the unearned portion paid by the *named insured*.

The *named insured* shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the *company* at the end of the policy period and at such times during the policy period as the *company* may direct."

The above language relating to adjustment of premiums provided a method for the insurer to be paid for its coverage. Defendant placed this condition in the policy in clear language. To us, the provision means that the insurer expected changes during the period of the policy to increase the insurable risk within the broad scope of the general coverage. The language of the policy is forthright. The insuring agreement includes "all sums which the *insured* [Sicash] shall become legally obliged to pay." Finally, we

conclude that defendant has a method to collect the premium due pursuant to the terms of the policy in question.

Our rules do not permit defendant (insurance company) to have a clearly written contract of insurance on one hand showing coverage of Malibu Wilmington and a verbal contract on the other hand showing no coverage.

The entry of summary judgment below is reversed, and the case is remanded for entry of summary judgment for plaintiff.

Reversed and remanded.

Judges MARTIN (Robert M.) and WELLS concur.

RICHARD W. COOPER AGENCY, INC. v. IRWIN YACHT AND MARINE CORPORATION AND SAILOR'S HAVEN, INC.

No. 796SC651

(Filed 15 April 1980)

1. **Uniform Commercial Code § 10— warranties of fitness and merchantability— no privity between buyer and manufacturer**

Where plaintiff buyer brought an action to recover for a defective boat manufactured by defendant, there was no basis for plaintiff's claims of breach of implied warranty of merchantability (G.S. 25-2-314) and breach of implied warranty of fitness for a particular purpose (G.S. 25-2-315), since those implied warranties are based on contractual theory, and there was no privity of contract between plaintiff buyer and defendant manufacturer.

2. **Uniform Commercial Code § 11— manufacturer's express warranty—privity in sale of goods not required**

Privity in the sale of goods is not necessary in a purchaser's action on a manufacturer's express warranty relating to the goods.

3. **Uniform Commercial Code § 11— breach of express warranty alleged—improper measure of damages used—directed verdict improper**

Where the measure of damages under the express warranty of defendant manufacturer was the cost of repair and replacement in correcting any defects in material or workmanship discovered and proven during the one-year warranty period, but plaintiff offered evidence of damages under the general (difference in value) rule, a directed verdict on the ground that plaintiff failed to offer evidence of repair and replacement costs would be improvident, since there was some evidence which would entitle plaintiff to recover nominal

damages at least, and since evidence of the difference in value of the property as warranted and as delivered would, in certain circumstances such as where a new good is involved, also shed some light on the cost of repair and replacement to correct the defects in materials or workmanship.

APPEAL by plaintiff from *Peel, (Elbert S.) Judge.* Judgment entered 31 May 1979 in Superior Court, BERTIE County. Heard in the Court of Appeals 31 January 1980.

Plaintiff alleged the purchase of a sailboat with an inboard motor on 2 December 1976 from Sailor's Haven, Inc., sales agent for Irwin Yacht and Marine Corporation; that the boat was delivered to plaintiff on 5 January 1977; and, that various defects were discovered, including massive leaks and failures in both the engine and the entire electrical system. Plaintiff alleged breaches of express warranty, of implied warranty of merchantability, and of implied warranty of fitness for a particular purpose. Plaintiff sought damages in the sum of $6,000.

In its answer defendant Irwin Yacht pled various defenses including exclusions from the express warranty such as the engine, which it did not make, and defects which were the responsibility of the sales agent to correct.

Defendant Irwin Yacht filed a third-party complaint against Sailor's Haven for any damages recovered by plaintiff for any defects which were its responsibility to correct.

The express warranty of defendant Irwin Yacht provided that the boat was warranted for a period of 12 months from delivery, and that parts manufactured by it proven to be defective in materials or workmanship would be repaired or replaced. Warranty exclusions included items which were the responsibility of the sales agent as well as parts not manufactured by Irwin Yacht such as the engine and marine heads. Implied warranties of merchantability and fitness for a particular purpose were limited in duration to one year.

SUMMARY OF PLAINTIFF'S EVIDENCE

Plaintiff paid $18,200 for the 26-foot boat. The boat was delivered to plaintiff at the third-party defendant's sales office in Deerfield Beach, Florida, on 2 December 1976, and was transported by truck to Edenton, North Carolina. When the boat

arrived in Edenton, the centerboard was missing. Plaintiff bought another centerboard but on 7 June 1977 the second centerboard was lost. Examination revealed that the pressure pin securing the centerboard was installed upside down and the winch spring was defective.

The entire electrical system was defective. The alternator and regulator became inoperable on 27 June, and the system had to be operated with fresh batteries. The wiring to the engine was too small and thereby created a fire risk.

There were massive leaks in the hull around the forward seacock and through the rudder shaft packing. Rain water also leaked in through the companionway hatch and through the starboard turnbuckles.

The engine emitted sludge and heavy black exhaust. The fuel line broke in September 1977, and, in October 1977, the fuel pump stopped operating.

It was the opinion of several witnesses that the fair market value of the boat when delivered in its defective condition was $8,000.

SUMMARY OF DEFENDANT'S EVIDENCE

Jerry Carlson, warranty administrator for defendant Irwin Yacht testified that the engine wiring was the responsibility of Mastery Marine; that defendant did not install the wiring; that the alternator is a part of the engine which defendant Irwin Yacht installed; that only two claims were made by plaintiff under the warranty; that the sum of $54.00 was paid by defendant to replace fuel lines and to correct the mast depth; and, that $278.00 was paid to repair the engine. Carlson also stated that the leak problems were minor and that he had not seen the boat after delivery.

At the close of all the evidence the trial court allowed defendant's motion for directed verdict.

Pritchett, Cooke & Burch by Stephen R. Burch and W. W. Pritchett, Jr., for plaintiff appellant.

Hutchins, Romanet, Thompson & Hillard by Charles T. Busby for defendant appellee Irwin Yacht and Marine Corporation.

CLARK, Judge.

In determining whether this action should be dismissed, it is noted at the outset that plaintiff is a buyer and defendant Irwin Yacht is both a manufacturer and an assembler of component parts. The seller, Sailor's Haven, was not made a party-defendant by plaintiff but was made a third-party defendant by original defendant Irwin Yacht for indemnification on the ground that some of the defects alleged by plaintiff were the responsibility of the seller.

[1] Assuming North Carolina law applies, we eliminate, first, plaintiff's claim based on breach of implied warranty of merchantability (G.S. 25-2-314), and, second, the claim based on breach of implied warranty of fitness for a particular purpose (G.S. 25-2-315), because these implied warranties are based on contractual theory and there is no privity of contract between the plaintiff-buyer and defendant-manufacturer. At least one exception to the strict rule of privity where warranty is implied has been recognized in North Carolina: when the manufacturer of food, drink and insecticides in sealed containers are introduced in commerce. *Tedder v. Bottling Co.*, 270 N.C. 301, 154 S.E. 2d 337 (1967); *Terry v. Bottling Co.*, 263 N.C. 1, 138 S.E. 2d 753 (1964). The case before us, however, does not fall within this exception.

The foregoing references to the Uniform Commercial Code (Ch. 25, Gen. Stat. of North Carolina) apply to sales contracts between the buyer and seller. The Code also has provisions dealing with express warranties (primarily G.S. 25-2-313 and 2-719) but the Code is limited in scope and direct purpose to warranties made by the seller to the buyer as part of the contract of sale. 63 Am. Jur. 2d, Products Liability § 163 (1972). There is a substantial question as to whether it would be appropriate in light of § 110(f) of the Federal Magnuson-Moss Warranty Act of 1975, 15 U.S.C. §§ 2301-2312, Pub. L. 93-637 (1975) to interpret the word "Seller" in § 2-313 of the Uniform Commercial Code to include a manufacturer (or anyone else) who issues an express warranty. *See* 3 Bender's U.C.C. Service § 6.11[6] (1976). *See generally,* Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C.L. Rev. 835 (1977).

[2] We do not, however, have to decide at this time whether § 2-313 of the Uniform Commercial Code applies in the case *sub*

judice. Plaintiff's third claim is based on the breach of an express warranty which plaintiff contends is a representation by the manufacturer directly to the plaintiff-buyer. The difficult history in North Carolina of the requirement of privity in warranty actions was reviewed recently in *Kinlaw v. Long Mfg. Co.*, 298 N.C. 494, 259 S.E. 2d 552 (1979), and it was held that privity in the sale of goods is not necessary in a purchaser's action on a manufacturer's express warranty relating to the goods. It is noted that the *Kinlaw* decision antedated the judgment in this case before us by a period of about six months.

The absence of privity between plaintiff and defendant Irwin Yacht is therefore not fatal to the claim for breach of the express warranty under North Carolina case law. The plaintiff offered evidence tending to show that it bought a new sailboat which was expressly warranted by defendant-manufacturer to be free of defects in materials or workmanship within the limits and upon the terms specified in the "Limited Warranty" furnished with the boat, that there was a breach of warranty, and that it suffered damages caused by the breach.

The recently enacted Products Liability Act of 1979, Chapter 99B of the North Carolina General Statutes, effective 1 October 1979, is not applicable to this and other actions pending at the effective date. The act expands the "buyer" horizontally to include the buyer's guest or employee and eliminates privity in the buyer's products liability action against the manufacturer for breach of implied warranty.

[3] The defendant makes the argument that directed verdict was proper because plaintiff failed to offer competent evidence of damage. We find no merit in this argument. The plaintiff offered evidence of damages consisting of the difference at the time and place of acceptance between the value of the boat accepted and the value it would have had if it had been so warranted. This measure of damages applies generally to the breach of a contract for sale of personal property. (*See* G.S. 25-2-714(2), for measure of damages for breach of warranty under the Uniform Commercial Code.) This action, however, is by plaintiff-buyer against defendant-manufacturer under an express warranty, which provides for a remedy in substitution for the general rule of damages applicable to breach of contract for sale of personal property. The

remedy provided for in the express warranty is controlling at least where such provisions meet the general tests of legality. 63 Am. Jur. 2d *Products Liability* § 227 (1972). See for analogy, the Uniform Commercial Code, G.S. 25-2-719, measure of damages where an express warranty limits the remedy.

The measure of damages under the express warranty of the defendant Irwin Yacht is the cost of repair and replacement in correcting any defects in material or workmanship discovered and proven during the one-year warranty period. The plaintiff in this case offered evidence of damages under the general (difference in value) rule. Nevertheless, since there was some evidence which would entitle plaintiff to recover nominal damages at least, a directed verdict on the ground that plaintiff failed to offer evidence of repair and replacement costs would be improvident. Further, though the measure of damages for tortious injury to personal property is the difference in the market value of the property immediately before and immediately after the injury, the cost of repairs may be shown, because the law recognizes that the cost of repairs has a logical tendency to shed light upon the question of the difference in market value. *Simrel v. Meeler*, 238 N.C. 668, 78 S.E. 2d 766 (1953). On the other hand, the difference in value of the property as warranted and as delivered would, in certain circumstances, such as where a new good is involved, also shed some light on the cost of repair and replacement to correct the defects in materials or workmanship. The judgment dismissing plaintiff's action is reversed and we remand for a new trial.

The foregoing discussion concerns the application of North Carolina law. The record on appeal, however, indicates that the sale was made in the State of Florida. As a general rule, liability is determined in accordance with the law of the place of sale, *Land Co. v. Byrd*, 299 N.C. 260, 261 S.E. 2d 655 (1980); 63 Am. Jur. 2d *Products Liability* § 213 (1972), but this general rule may be abrogated by contract. *Land Co. v. Byrd, supra.* Both parties apparently assume that North Carolina law is controlling. Since the issue of which state law should be given effect is not raised, we do not rule on the question at this time. We do note that under Florida law that plaintiff may state a claim against an assembler of component parts for breach of implied warranty. *Favors v. Firestone Tire & Rubber Co.*, Fla. App., 309 So. 2d 69 (1975).

The question of whether the law of North Carolina, the law of Florida, or the Magnuson-Moss Act are applicable are appropriate for consideration on remand for a new trial.

The judgment is

Reversed and remanded.

Judges VAUGHN and HEDRICK concur.

MINNIE LEE PARKER v. JESSIE L. PARKER

No. 794DC908

(Filed 15 April 1980)

1. **Marriage § 6— second marriage—presumption of validity**

When two marriages of the same person are shown and both parties to the first marriage are living at the time of the second marriage, the second marriage is presumed to be valid and the first marriage dissolved by divorce.

2. **Marriage § 6— second marriage—evidence sufficient to rebut presumption of validity**

The evidence was sufficient to rebut the presumption in favor of the validity of plaintiff's second marriage where there was evidence that plaintiff had not obtained a divorce from her first husband and plaintiff testified, "I went to my lawyer and asked him if [my first husband] was divorced from me, and was I also divorced, and he said no."

3. **Marriage § 2— common law marriage in S.C.—sufficiency of evidence**

Plaintiff's evidence raised an issue as to whether a common law marriage was entered into by plaintiff and defendant in South Carolina after plaintiff obtained a divorce from her first husband where it tended to show that she and defendant lived together as man and wife in South Carolina for approximately six weeks following her divorce from her first husband in 1972.

APPEAL by plaintiff from *Erwin, Judge*. Order entered 21 May 1979 in District Court, ONSLOW County. Heard in the Court of Appeals 26 February 1980.

Plaintiff sued defendant, *inter alia*, for a divorce from bed and board, custody and support of the couple's minor child, alimony *pendente lite*, and permanent alimony. Plaintiff alleged in her complaint that she and defendant were married on 5 July

1956, and listed cruel treatment and indignities under G.S. 50-7(3) and (4) as grounds for the divorce. Defendant denied all of the operative allegations of the complaint, including plaintiff's marriage to defendant. Defendant further defended and counterclaimed on grounds that plaintiff was lawfully married to one Henry Black on the date of her alleged marriage to defendant, and defendant prayed that the marriage between the parties be annulled. The plaintiff replied, admitting the prior marriage between herself and Black, but alleged in defense that, prior to her marriage to defendant, she had been informed that Black had obtained a divorce in another state. Plaintiff further alleged that at all times since the marriage ceremony between herself and defendant, the couple had lived together and held themselves out to the public as being husband and wife.

Plaintiff also alleged that: In 1972, the Marine Corps issued an order requiring all servicemen who were drawing increased allowances on behalf of a spouse who had previously been divorced, to produce documentary evidence of such divorce. Both plaintiff and defendant conducted a long but fruitless search for plaintiff's former husband, Henry Black, or documentary evidence of their divorce. Having failed in this effort, defendant employed South Carolina attorneys to represent his wife, the plaintiff herein, in a divorce action against Black. Pursuant to this design, pleadings were filed and a divorce from Henry Black was obtained by plaintiff in South Carolina on 12 May 1972. The attorneys for plaintiff and defendant informed them that under the laws of South Carolina they were and would continue to be married in the absence of a new marriage ceremony. The defendant filed the South Carolina divorce decree with the U.S. Marine Corps and thereafter continued to claim plaintiff as his wife, and drew increased allowances on her behalf, with the approval and sanction of the Marine Corps.

A hearing was held on plaintiff's motion for temporary alimony, attorney's fees, child custody and support, at which plaintiff testified that she was married to Black in 1950 in South Carolina and had two children by him prior to his desertion of her in 1953. Plaintiff testified that she was married to defendant in South Carolina on 5 June 1956, and that the couple had three children. The parties purchased a home in Jacksonville, North Carolina in 1961 which the parties continue to own. In 1972, on

defendant's request, plaintiff obtained a divorce from Black for marine purposes and for the following six weeks lived with her mother in South Carolina while defendant was attending a training program at Parris Island, South Carolina. Plaintiff's mother testified that during this six-week period, the defendant visited plaintiff on weekends and some nights, the couple living together at her house and representing themselves as husband and wife. She also stated that plaintiff and defendant visited her at other times since 1972, such as on Mother's Day and Christmas. Although plaintiff testified that she still considered herself a resident of South Carolina, she stated that she has had a North Carolina driver's license since 1961, paid North Carolina income taxes since 1974, voted for the only time in her life in North Carolina, served on a North Carolina jury, and that all of the couple's children were educated in North Carolina schools. Defendant offered no evidence.

The trial court found that plaintiff was married to Black on 15 April 1950 and did not obtain a divorce from him until 2 July 1972. The court determined that plaintiff and defendant moved to Onslow County, North Carolina in 1958 and have lived in North Carolina since that date, although plaintiff has visited with her mother in South Carolina once or twice per year since that time. The court found that neither plaintiff nor defendant have been residents of South Carolina since 1958, but have instead been residents of North Carolina since the early 1960's, and that the parties did not marry subsequent to plaintiff's divorce from Black in 1972. The trial court concluded that the plaintiff and defendant were not lawfully married, and denied plaintiff's motion for temporary alimony and attorney's fees. Plaintiff appeals.

Cameron & Collins, by E. C. Collins, for the plaintiff.

Charles S. Lanier for the defendant.

WELLS, Judge.

[1] The question presented in this appeal is whether the evidence supports the trial court's conclusion that there was no valid marriage between plaintiff and defendant. Defendant had the burden of showing by a preponderance of evidence that the South Carolina marriage ceremony between the parties was invalid. "It is presumed that a marriage entered into in another

State is valid under the laws of that State in the absence of contrary evidence, and the party attacking the validity of a foreign marriage has the burden of proof." *Overton v. Overton*, 260 N.C. 139, 144, 132 S.E. 2d 349, 352 (1963). When two marriages of the same person are shown and both parties to the first marriage are living at the time of the second marriage, the second marriage is presumed to be valid and the first marriage dissolved by divorce. *Denson v. Grading Co.*, 28 N.C. App. 129, 220 S.E. 2d 217 (1975). These presumptions are said to arise because the law presumes innocence and morality in such circumstances. *Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967); *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871 (1945); *Denson v. Grading Co., supra.* Proof that one party had not obtained a divorce is not sufficient to overcome the presumption. *Id.*

[2] Under the laws of South Carolina, where the marriage ceremony between plaintiff and defendant occurred, "All marriages contracted while either of the parties has a former wife or husband living shall be void." S.C. CODE § 20-1-80. While a spouse is still married he may not enter into a common law marriage by cohabiting with another woman. *Byers v. Mount Vernon Mills, Inc.*, 268 S.C. 68, 231 S.E. 2d 699 (1977). In the case at bar there was evidence that plaintiff had never obtained a divorce from Black. Prior to the 1972 divorce of plaintiff from Henry Black, plaintiff investigated to determine if Black had obtained a divorce from her. Plaintiff testified, "I went to my lawyer and asked him if Henry Black was divorced from me, and was I also divorced, and he said no." We believe this testimony was sufficient to rebut the presumption in favor of the validity of plaintiff's marriage to defendant in 1956.

[3] Although it is undisputed that the parties have not participated in a marriage ceremony since the 1972 divorce of plaintiff from Henry Black, plaintiff argues that since the time of this divorce a common law marriage was created between plaintiff and defendant in South Carolina. Despite the fact that plaintiff maintains she was born in South Carolina and has remained a resident of that State, there is ample evidence in support of the trial court's finding that both parties have surrendered their South Carolina residence and become residents of North Carolina. That fact is not controlling. Plaintiff's unrebutted evidence was that following the divorce from Black in 1972, she and defendant lived

together as man and wife in South Carolina for approximately six weeks. The plaintiff and defendant could have contracted a common law marriage in South Carolina during that period. Our Supreme Court stated in *Harris v. Harris*, 257 N.C. 416, 420, 126 S.E. 2d 83, 85 (1962): "If the relation of plaintiff and defendant subsequent to [one of the party's] valid divorce was sufficient to constitute a valid marriage in South Carolina, such marriage would be given full recognition in this State." *See also*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2), Comments *f*, *g* (1971).

Under South Carolina law a common law marriage is established when the parties mutually agree to assume towards one another the relation of husband and wife. *Johnson v. Johnson*, 235 S.C. 542, 112 S.E. 2d 647 (1960). While removal of an impediment to marriage, e.g. the undissolved marriage of one of the parties, does not *ipso facto* convert the party's relationship into a common law marriage, the marriage relationship may be created by a new mutual agreement to enter into a common law marriage. *Kirby v. Kirby*, 270 S.C. 137, 241 S.E. 2d 415 (1978). The agreement need not be express; it may be adduced from circumstances, such as the parties' representation to the community that they are husband and wife. *Id.* While we can find no South Carolina authority requiring a minimum period of cohabitation within the State for establishment of a common law marriage, we note that in general, where establishment of the relationship is dependent upon an agreement between the parties to act toward one another as husband and wife, no such minimum period of cohabitation has been required. *See, Bloch v. Bloch*, 473 F. 2d 1067 (3rd Cir. 1973) (agreement to be husband and wife during three-day vacation to jurisdiction recognizing common law marriage sufficient to establish the existence of such marriage).

It is incumbent upon the trial judge to make findings and conclusions determinative of the issues raised by the evidence. It is clear that in the case before us, plaintiff's evidence has raised an issue as to whether a common law marriage was entered into by plaintiff and defendant in South Carolina after the plaintiff obtained the divorce from her first husband.

Vacated and remanded for further proceedings consistent with this opinion.

Judges HEDRICK and WEBB concur.

STATE OF NORTH CAROLINA v. JEAN YVONNE MOORE

No. 795SC1045

(Filed 15 April 1980)

1. **Receiving Stolen Goods § 1.1 — money bag found on sidewalk — property actually stolen**

In a prosecution for receiving stolen property, evidence was sufficient to support a finding that the property was in fact stolen where it tended to show that defendant's companion found a bank deposit bag on the sidewalk in front of a drugstore; the bag had the name of a bank on the outside, and checks inside had the name of the drugstore on them; the owner of the bag could reasonably have been ascertained but was not sought; the finder took the bag, boarded a bus, and left the area; and the finder divided the money with her companions.

2. **Receiving Stolen Goods § 5.1 — money bag found on sidewalk — money received by defendant — sufficiency of evidence of receiving stolen goods**

Evidence was sufficient to be submitted to the jury in a prosecution for receiving stolen goods where it tended to show that defendant was present when a money bag was found on a sidewalk and was present when it was opened, though defendant never touched the bag, removed anything therefrom, or had possession of it; defendant knew the bag was not the property of the finder; and defendant nevertheless unlawfully received one-third of the money in the bag and continued to possess and conceal the money with a dishonest purpose.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 25 July 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 25 March 1980.

Defendant was tried upon an indictment which charged her with felonious larceny, G.S. 14-70, felonious receiving, G.S. 14-71, or felonious possession, G.S. 14-71.1, of a bank bag containing $1,435.00 in cash and $320.00 in checks sometime between 20 March and 29 March 1979. The State's case consisted of the testimony of three witnesses who presented the following evidence.

In March, 1979, James W. Woodard was a pharmacist at Hall's Drug Store located at the corner of Fifth and Castle Streets in Wilmington. In the daily course of business operations for the drugstore, the cashier checks the daily cash receipts against the register amount and brings the cash and checks to Woodard who puts them in a safe. Woodard later tabulates and totals the amount of cash and checks received over several days and makes out a deposit slip. He normally places the money and checks in a bank deposit bag which he takes home to his wife who then makes the deposit. Between 20 March and 29 March 1979, he thought he took such a bank bag home. When he later checked to see if he had made a deposit for sales on 14 through 19 March, he found he had not. He discovered two deposits made on the same date were missing. The deposit slips were for $467.40 and $1,435.00. Of these deposits, $771.04 was in checks and the balance in cash. Both deposits would have been in one blue bank deposit bag with a locking zipper which had "Bank of North Carolina" written on the side of it. The name of the store was on all checks contained in the deposit bag.

W. B. Prescott of the Wilmington Police Department picked up defendant on the afternoon of 3 April 1979 in connection with the investigation of this case. He gave defendant her full *Miranda* rights which she waived. Defendant was seventeen years old and in the twelfth grade in school. W. A. Elledge, a detective with the Wilmington Police Department, then questioned defendant who made a statement to the detective. The detective testified about the content of the statement at trial. In her statement to the detective and in response to his questions, defendant revealed the following.

On 21 March, Mary Brown, Earlene Brown and defendant were waiting at the bus stop located at the corner of Fifth and Castle Streets in front of Hall's Drug Store. They were going to ride the bus to the hospital. While they were waiting, Mary Brown found a bank bag on the sidewalk. She picked up the bag. The three girls then boarded the bus. When they got to the hospital, the girls went into the bathroom and divided up the money. Defendant received approximately $500.00 out of the money bag. Defendant did not have possession of or even touch the bag. She spent most of the money she received, though some was stolen from her.

The jury found defendant guilty of feloniously receiving stolen property and she appeals.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

Peter Grear, for defendant appellant.

VAUGHN, Judge.

The issue raised by this appeal is whether the evidence considered in a light most favorable to the State is sufficient to go to the jury and support the jury's verdict. We hold that the motion to dismiss was properly denied by the trial court.

Defendant stands convicted of feloniously receiving stolen property, in violation of G.S. 14-71, which makes it unlawful to receive any property, the stealing or taking whereof amounts to larceny, knowing or having reasonable grounds to believe the same to have been stolen.

[1] We will first consider whether the property involved in this case could be said to have been stolen by Mary Brown.

Larceny, according to the common law, has been defined as the felonious taking by trespass and carrying away by any person of the property of another without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. *State v. McCrary*, 263 N.C. 490, 139 S.E. 2d 739 (1964).

Some ancient cases held that lost goods were not the subject of larceny under any circumstances. As late as 1832, a member of our Supreme Court questioned whether lost as opposed to mislaid property was the subject of larceny. *State v. Roper*, 14 N.C. 473 (1832) (opinion of Henderson, C.J.). By way of contrast to *Roper* in *State v. Farrow*, 61 N.C. 161 (1867), the Court upheld defendant's larceny conviction for taking a bucket of peas which the owner had "mislaid" by leaving it at a market on a cart he mistakenly thought to be that of a friend. Notwithstanding what was said in some of the earlier cases, however, the modern view in this jurisdiction as well as others is that casually lost property may be the subject of larceny as well as that which is mislaid. No distinction is now made between property "lost" and property "mislaid."

See Annot.—*Larceny by Finder of Property*, 36 A.L.R. 372 (1925). Unquestionably, the money found by Mary Brown had been lost by the true owner. Even so, the law puts constructive possession of the property in the hands of the one who lost it until someone else takes actual possession thereof. *See* Riesman, *Possession and the Law of Finders*, 52 Harv. L. Rev. 1105, 1130-33 (1939).

> Whether the person who finds and keeps lost property for his own use is guilty of larceny depends upon whether at the time he finds the property he knows or has reason to believe that he can ascertain the owner of the property. If at the time of finding, he knows or has reasonable means of knowing or ascertaining the owner, he is deemed guilty of larceny if he keeps the property with the intent to deprive the owner thereof. Thus, if the article found bears marks or other clues known to the finder as a ready means of identifying the owner, the finder will be guilty of larceny if he appropriates it to his own use. It is not necessary that the finder should know who the owner is, but he must have such means of inquiry on that subject as to give him reason to believe that, with reasonable effort on his part, the owner will be found.

2 Wharton's Criminal Law and Procedure § 459 at 94 (1957). As another commentator has put it, there must be a "clue to ownership" before the taking by the finder can be a larceny. If under all of the circumstances the finder would have reason to believe the owner and his property could be brought together again, there is a "clue to ownership." R. Perkins, Criminal Law 249-50 (1969). In this case, there were several "clues to ownership" of the lost property sufficient to cause the finder to know that the true owner and his property could probably be reunited. The name of the depository bank was clearly printed on the outside of the bag. Within were numerous checks made out to the drugstore which was near where the property was found. The amount of money and the location are also factors which give a clue of ownership. We are not dealing here with an unidentifiable small coin that could have been lost by anyone but with a large sum of money and checks payable to a business adjacent to the sidewalk on which it was found.

When Mary Brown did not attempt to find the owner, she was guilty of larceny if it was her present intent to deprive the owner of his lost property and convert it to her own use.

> In every instance there must be an original, felonious intent, general or special, at the time of the taking or finding of lost property, in the mind of the accused, to construe larceny. If such intent be present, no subsequent act or explanation can change the felonious character of the taking. If it be not present, it is only a trespass and cannot be made a felony by any subsequent misconduct or bad faith in the taker. "The omission to use the ordinary and well known means of discovering the owner of goods lost and found, raises a presumption of fraudulent intention, more or less strong against the finder, which it behooves him to explain and obviate; and this is most readily and naturally done by evidence that he endeavored to discover the owner, and kept the goods safely in his custody. . . ."

State v. Arkle, 116 N.C. 1017, 1031, 21 S.E. 408, 408 (1895); *State v. England*, 53 N.C. 399 (1961). The felonious intent in this case probably did arise but need not have arisen at the moment Mary Brown picked up the money bag. Where a closed receptacle, container or pocketbook is found and the contents are not known until later, a finder may be guilty of larceny if a felonious intent is formed as soon as the contents are discovered. *See, e.g., State v. Hayes*, 98 Iowa 619, 67 N.W. 673 (1896). It is not clear at what point the bag was first opened, whether it was at the bus stop, on the bus or at the hospital. The evidence is that Mary Brown did not return it to the owner but instead divided the money with her companions including defendant. "Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *State v. Murdock*, 225 N.C. 224, 226, 34 S.E. 2d 69, 70 (1945). The State has proven that the owner who could reasonably have been ascertained was not sought. The bag was found in front of the owner's store, yet the finder boarded a bus and left the area. From all of the circumstances, a felonious intent can be inferred.

A similar case is *State v. Holder*, 188 N.C. 561, 125 S.E. 113 (1924), where tourists in our State inadvertently left a coat containing a pistol, pocketbook, traveler's checks, and money at the side of a road where their car had been mired in mud. The defendants, who were brothers, and others had assisted the tourists in getting free of the mud. The coat was discovered by defend-

ants after the tourists had left and the contents turned up when the pockets were searched. Defendants divided the articles, burned the checks and gave one Sam Grady a dollar to keep quiet. The tourists, discovering their loss, returned, and sought out the sheriff whose deputy obtained the coat from the defendants. All property was returned except the pistol and the destroyed checks on which payment was stopped. The case went to the jury on felonious larceny. The Supreme Court held this to be a felonious larceny. The courts specifically affirmed the trial court's instruction that

> Where property is lost and a person finds it, then the duty of the finder is to keep the property for the purpose of finding the owner and he must use reasonable means for the purpose of finding the owner. If he keeps it and keeps it intact for the owner, he has a right to do that, but if the property is not abandoned but is left by accident or lost and a person finds it and he takes it with the intention at the time of taking it to steal it, he is just as guilty of larceny as if he had gone in the night time and stolen it secretly.

Id. at 563, 125 S.E. at 113-14; *see also State v. Epps*, 223 N.C. 741, 28 S.E. 2d 219 (1943).

[2] We must at this point note that the evidence was such that it could permit the jury to find that the property was not stolen by defendant but was stolen by Mary Brown and thereafter unlawfully received by defendant. Among other things, the State's evidence tended to show that defendant never touched the bag, never went into the bag and never had possession of the bag. She, instead, unlawfully received a third of the money in the bag. *Contrast State v. Prince*, 39 N.C. App. 685, 251 S.E. 2d 631, *cert. den.*, 296 N.C. 739, 254 S.E. 2d 180 (1979).

Having established the theft of goods by someone other than the accused, the State had further to establish that the accused knowing or having reasons to know the goods were stolen received or aided in concealing the goods and continued such possession with a dishonest purpose. There is plenary evidence of these elements of the crime of felonious receiving of stolen money. Defendant was present when the bag was found and was present when it was opened. She knew it was not the property of Mary Brown. Defendant on receipt of the money used it to buy

clothes for herself. She continued to possess and conceal the money with a dishonest purpose.

The jury charge was not brought forward. We assume, therefore, that the jury was properly instructed on the foregoing principles.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

IN THE MATTER OF: WILLIAM HERNANDEZ, JR.

No. 7912DC995

(Filed 15 April 1980)

1. **Insane Persons § 1— custody order for involuntary commitment under emergency procedures**

A magistrate's order, when read with an officer's affidavit which was incorporated by reference therein, was sufficient to meet requirements for a custody order for involuntary commitment of respondent pursuant to the emergency procedures of G.S. 122-58.18 for violent persons.

2. **Insane Persons § 1— petition for involuntary commitment—violent person—no personal observation of violent act by petitioner**

An officer's petition for involuntary commitment of respondent pursuant to the emergency procedures for violent persons was not required to be dismissed because the officer did not personally observe the respondent in an act of violence but relied on information gained from others.

3. **Insane Persons § 1.2— involuntary commitment—imminent danger to others—sufficiency of evidence**

There was clear, cogent and convincing evidence before the trial court to support the court's finding that respondent was "imminently dangerous" to others and its order of involuntary commitment of respondent where the evidence tended to show that respondent appeared at the military desk at Fort Bragg, identified himself as Jesus Christ, stated that he had been sent by the Pope to procure a permit to carry a weapon, requested an automatic weapon, and insisted that he was working as an undercover agent for the Criminal Investigative Division; a doctor found a knife with a blade approximately sixteen inches long in respondent's luggage; respondent told the doctor, "You would be surprised at how many people are frightened by that knife."; it was the doctor's expert opinion that respondent could injure someone if he found them to be, in respondent's words, "dispensable"; and

respondent testified that, if you cannot reason with an agent, "you shoot him on sight because he's dangerous" and that he would use a knife "for self-preservation once in a while."

APPEAL by respondent from *Bason, Judge*. Order signed 28 June 1979 in District Court, CUMBERLAND County. Heard in the Court of Appeals 18 March 1980.

This matter came on to be heard as a special proceeding upon a petition for involuntary commitment at Dorothea Dix Hospital, Wake County, pursuant to G.S. 122-58.18. The respondent appeared at the military police desk at Fort Bragg, identified himself as Jesus Christ, and stated that he had been sent by the Pope to procure a permit to carry a weapon. Respondent thereupon requested an automatic weapon and insisted that he was working as an undercover agent for the Criminal Investigative Division. An army investigator, at the instructions of his major, escorted the respondent to the Cumberland County Mental Health Center. After examination at the mental health center, the respondent was taken to the Cumberland County Law Enforcement Center, where a deputy sheriff, after consultation with respondent, signed the petition for involuntary commitment and the additional oath by a law enforcement officer as required by the emergency provisions of G.S. 122-58.18. Thereafter, a magistrate issued an emergency custody order, and the respondent was taken to Dorothea Dix Hospital on the same day. The matter came on for hearing, pursuant to G.S. 122-58.7, eight days later. At the close of the evidence and argument, the court made findings of fact and conclusions of law and signed and entered the order of involuntary commitment, committing the respondent to the hospital for a period of ninety days. The respondent excepted to the rulings of the court and appealed to this Court.

Attorney General Edmisten, by Associate Attorney Steven F. Bryant and Leonard T. Jernigan Jr., for petitioner appellee.

Dorothy E. Thompson for respondent appellant.

HILL, Judge.

The respondent argues that the trial judge erred by failing to dismiss the petition in this cause. Respondent contends such petition must include specific facts upon which the magistrate

may find by clear, cogent, and convincing evidence that the requisite criteria are present to justify the issuance of an emergency order.

The magistrate in this matter issued the custody order pursuant to the special emergency procedure of G.S. 122-58.18 which provides in part:

> When a person subject to commitment under the provisions of this Article is also violent and requires restraint, and delay in taking him to a qualified physician for examination would likely endanger life or property, a law-enforcement officer may take the person into custody and take him immediately before a magistrate or clerk. The law-enforcement officer shall execute the affidavit required by G.S. 122-58.3, and in addition shall swear that the respondent is violent and requires restraint, and that delay in taking the respondent to a qualified physician for an examination would endanger life or property.
>
> If the clerk or magistrate finds by *clear, cogent, and convincing evidence* that the facts stated in the affidavit are true, and that the respondent is in fact violent and requires restraint, and that delay in taking the respondent to a qualified physician for an examination would endanger life or property, he shall order the law-enforcement officer to take the respondent directly to a community or regional mental health facility designated for the custody and treatment of such persons under this Article. (Emphasis added.)

The affidavit to be executed by the law enforcement officer and referred to in the statute above is required by G.S. 122-58.3(a). That subsection provides that:

> (a) Any person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others, or who is mentally retarded and, because of an accompanying behavior disorder, is imminently dangerous to others may appear before a clerk or assistant or deputy clerk of superior court or a magistrate of district court and execute an affidavit to this effect and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a qualified physician. The affidavit shall include the facts on which the affiant's opinion is based.

We note that the word "imminently" was deleted by amendment effective 1 October 1979.

This Court has held that the requirements of G.S. 122-58.3 must be followed diligently. *In Re Reed*, 39 N.C. App. 227, 249 S.E. 2d 864 (1978). Respondent contends that G.S. 122-58.18 was intended by the legislature to be used only in rare, carefully specified circumstances; and, since a patient's rights and liberties are more drastically curtailed than by the customary procedure set forth in G.S. 122-58.3, must be construed as narrowly as possible.

"It is a cardinal rule of statutory construction that the intent of the legislature controls the interpretation of statutes." (Citations omitted.) *State v. Williams*, 291 N.C. 442, 230 S.E. 2d 515 (1976). The statute under which the respondent was committed (G.S. 122-58.18) is entitled "Special emergency procedure for violent persons." It is not intended to be used indiscriminately and clearly defines the limited time and circumstances for such use.

G.S. 122-58.18 requires that the law enforcement officer who takes a violent person requiring restraint into custody must make an affidavit as required by G.S. 122-58.3. The affidavit must set out facts upon which the affiant's opinion is based. Such facts must be sufficient to establish to the affiant's satisfaction that the patient is imminently dangerous to himself or others. In addition, G.S. 122-58.18 requires the law enforcement officer to swear that the patient is violent, requires restraint and that delay in taking the patient to a qualified physician for an examination would endanger life or property. The clerk or magistrate must find by clear, cogent and convincing evidence that the facts contained in the affidavit are true; that the patient is in fact violent and requires restraint; and that delay or taking the patient to a qualified physician for an examination would endanger life or property.

[1] Respondent submits that there must be a mechanism for review of the magistrate's findings in order for the respondent's rights to be protected. An examination of the magistrate's order reveals that it is directed to any sheriff, deputy sheriff, police officer, or highway patrolman. The court found as fact that the proceeding was before the magistrate upon the petition of Deputy

Ronald Matthews; that the deputy took the respondent into custody pursuant to the special emergency procedure for violent persons; that *there are reasons to believe the facts alleged in the petition are true*; and that the respondent is probably mentally ill and imminently dangerous to himself or others. Hence, by reference, the magistrate incorporated into his custody order for involuntary commitment facts in the affidavit, and we must read the order and affidavit together.

The affidavit stated *inter alia* that the respondent was mentally ill and was imminently dangerous to himself or others; that the respondent went to the military police station at Fort Bragg, told the desk sergeant he was Jesus Christ and asked for credentials in that name and for a permit to carry a weapon. Respondent was taken to a mental health clinic at CFB Hospital. Dr. Morriss, the attending physician, recommended that the respondent not be released into his own custody and further said that the respondent needed medical attention. When we read the affidavit and the magistrate's order together, we find them to be sufficient to meet statutory requirements for involuntary commitment.

The forms are not models of legal draftsmanship. However, it must be remembered that magistrates for the most part are laymen, not lawyers, and must act in such circumstances as are before their court with compassion and in a humane manner—but at the same time, expeditiously, this being an emergency situation. Legal niceties must not be expected in all such instances.

Nevertheless, the legislature has provided further protection for the respondent in circumstances such as the one before us by requiring that a hearing shall be held in district court within ten days of the day the respondent is taken into custody, at which time the legislature has made adequate provision for protection of the respondent's rights. We recognize that the respondent has rights, and our federal courts have held that the North Carolina 10-day custody period prior to a full adversary hearing does not constitute a denial of due process and the standard of proof required by our statutes is constitutional. *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977), *affirmed* 61 L.Ed. 2d 869 (1979).

We find no merit in the respondent's first assignment of error.

[2] Respondent next contends the petition must be dismissed because the deputy sheriff who acted as petitioner had not personally observed the respondent in an act of violence. Such a reading of G.S. 122-58.18 is unduly restrictive. The statute requires that the petitioner be a law enforcement officer. Rarely are law enforcement officers witnesses to acts of violence. Their very presence is a deterrent. Most often they must act on information gained from others. The respondent was initially met by an army investigator who had made an investigation. The law enforcement officer, Mr. Matthews, had every right to rely on the statements made by Mr. Lorenzo, the initial investigator, as a part of his investigation. The situation is not novel. Physicians, likewise, may rely on the statements of others in an examination of a mental patient. This assignment of error is overruled.

[3] Respondent next contends there is insufficient competent evidence to find that respondent is *imminently dangerous to others*; that even assuming some evidence of imminent danger is present, the evidence is not "clear, cogent and convincing." Respondent, without stipulating to the finding of mental illness, concedes there is sufficient evidence to support the court's finding on that issue.

"The questions for our determination then become (1) whether the court's ultimate findings are indeed supported by the 'facts' which the court recorded in its order as supporting its findings, and (2) whether in any event there was competent evidence to support the court's findings." *In Re Hogan*, 32 N.C. App. 429, 433, 232 S.E. 2d 492 (1977).

In finding one to be "imminently" dangerous, it has been held that there is no requirement of an "overt act." *In Re Salem*, 31 N.C. App. 57, 228 S.E. 2d 649 (1976); *In Re Hogan, supra.* Commenting upon this rule, the Court stated in *In Re Ballard*, 34 N.C. App. 228, 229, 237 S.E. 2d 541 (1977), that:

> The thrust of respondent's argument appears to be as follows: It is very difficult to predict potentially dangerous behavior. The Court should, therefore, require that any potentially dangerous behavior be evidenced by a recent overt act.
>
> This Court has previously rejected respondent's argument.

Applying the above rules to the facts of this case, petitioner contends there was evidence upon which the trial judge properly concluded that respondent was "imminently" dangerous to others and that these facts were properly recorded in the trial judge's order.

Dr. Lenora Stephens testified that when she searched respondent's luggage she found a knife with a blade approximately sixteen inches in length. The respondent stated to Dr. Stephens, "You would be surprised at how many people are frightened by that knife." It has been held that concealing a potentially dangerous weapon is evidence of imminent danger. *In Re Ballard, supra.*

Dr. Stephens further testified that respondent had admitted seeking a permit to carry a gun in connection with his job as an undercover agent. Finally, it was Dr. Stephens' expert opinion that the respondent could injure someone if he found them to be, in respondent's words, "dispensable."

Mr. James Lorenzo testified that respondent was seeking to obtain the permit to carry a weapon on instructions from the Pope. Respondent also stated that he wanted an automatic weapon and that previously he had been in possession of an illegally concealed weapon.

In addition, during the respondent's own testimony, he stated in response to a question concerning what he would do if ordered to shoot someone that, if you cannot reason with an agent, "[y]ou shoot him on sight because he's dangerous." Respondent also said he would use a knife ". . . for self-preservation once in a while."

This Court concludes that there was clear, cogent and convincing evidence that respondent was imminently dangerous to others and that the trial judge properly recorded the facts to support the order.

Based on the reasons set out previously and the evidence, we conclude the judge did not err in signing the order of involuntary commitment.

The judgment of the trial judge is

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

GENE DAVIS v. WILMA M. MITCHELL, EXECUTRIX OF THE ESTATE OF PAUL C. MITCHELL, JR. AND DR. RICHARD R. VENSEL

No. 7929SC479

(Filed 15 April 1980)

Rules of Civil Procedure § 55.1 — claim against defendant not clearly stated — entry of default properly set aside

The trial court did not err in setting aside entry of default against defendant in plaintiff's action to recover the balance due on a promissory note, since plaintiff's complaint alleged that a third person was indebted to plaintiff upon a promissory note and had executed a security agreement in which defendant's aircraft was included as collateral for the note, and defendant was the registered owner of the airplane; but the complaint did not allege any contractual or other obligation of defendant to plaintiff; and the complaint did not make it clear that defendant's ownership in the aircraft was at stake.

APPEAL by plaintiff from *Riddle, Judge.* Order entered 26 February 1979 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 8 January 1980.

Plaintiff instituted this action against the defendant executrix of the estate of Paul C. Mitchell to recover the balance due on a promissory note signed by the deceased and secured by a Rallye MS894 aircraft. Plaintiff joined defendant Dr. Richard R. Vensel as a defendant to the action, alleging Vensel was listed as the registered owner of the aircraft and that plaintiff was unable to determine Vensel's interest, if any, in the plane. Plaintiff prayed for a temporary restraining order and injunction maintaining and securing the aircraft in Rutherford County until the dispute between the parties was settled, an order entitling plaintiff to possession and ownership of the plane, and for the balance due of $27,000 on the note together with interest and attorney's fees from Mitchell's estate.

Defendant Vensel, a resident of the State of Pennsylvania, was served with a copy of the summons and complaint by registered mail on 12 April 1978. Vensel failed to answer plaintiff's complaint or otherwise appear in the action within thirty days as required by G.S. 1A-1, Rule 12(a)(1). Upon plaintiff's affidavit, the Clerk of Superior Court entered default against defendant pursuant to Rule 55(a) on 17 May 1978. On plaintiff's motion, judgment by default was entered against Vensel under Rule 55(b)(2),

the judgment reciting that plaintiff was entitled to all of defendant Vensel's interest in the aircraft. Defendant Mitchell answered plaintiff's complaint admitting all of plaintiff's allegations, and upon plaintiff's motion, judgment on the pleadings was entered against the estate on 5 September 1978 in the sum of $27,000, together with interest, costs, attorney's fees and for all of the estate's interest in the aircraft, less any excess which sale of the plane would bring.

Defendant Vensel filed a motion pursuant to Rule 55(d) to set aside the entry of default and default judgment on grounds defendant had acted with mistake, inadvertence, and excusable neglect, and that he had a meritorious defense to plaintiff's action. Vensel submitted an affidavit in support of the motion in which he stated that he had received no formal legal education and that his reading of plaintiff's complaint disclosed that the action related to the interests of the defendant estate only, and that his interest in the aircraft would not be affected. Vensel's attorney submitted an affidavit stating that Vensel had meritorious defenses to plaintiff's action, listing: lack of jurisdiction; failure of plaintiff to allege privity between plaintiff and defendant; and failure of the complaint to state a cause of action against Vensel.

Following a hearing on defendant's motion, the trial court made extensive findings of fact, finding, *inter alia*, that defendant did not understand that plaintiff was attempting to deny or terminate his ownership in the aircraft and that from an examination of the pleadings initially filed in the cause, it was not readily apparent as to why defendant Vensel was brought into the action, nor what relief specifically was sought. Upon his findings, the trial court concluded that the failure of defendant Vensel to file an answer or other pleadings in the action was the result of inadvertent and excusable neglect and that he had a number of meritorious defenses to the action. From the trial court's order setting aside the entry of default and default judgment against defendant Vensel and allowing him an additional thirty days in which to file an answer, plaintiff appeals.

Raymer, Lewis, Eisele & Patterson, by Walter B. Patterson, for plaintiff appellant.

Robert W. Wolf for defendant appellee.

WELLS, Judge.

While disposing of this appeal on its merits, we deem it nevertheless appropriate to comment briefly on its interlocutory nature. The frequency with which the appellate courts of our State are confronted with appeals which may be deemed interlocutory or fragmentary causes us some considerable concern. The Federal courts as well as a majority of the courts of other jurisdictions have concluded that the setting aside of a default judgment is not ordinarily appealable. *See, Murphy v. Helena Rubenstein Co.*, 355 F. 2d 553 (3rd Cir. 1965); 15 Wright & Miller, Federal Practice and Procedure: Civil § 3914, p. 586 (1976); 7 Moore's Federal Practice ¶ 60.30[3], pp. 431-432 (2d ed. 1979); Annot., Appealability of Order Setting Aside, or Refusing to Set Aside, Default Judgment, 8 A.L.R. 3d 1272 (1966). Our appellate courts have, however, historically entertained such appeals. *See*, e.g., *Shackleford v. Taylor*, 261 N.C. 640, 135 S.E. 2d 667 (1964); *Howard v. Williams*, 40 N.C. App. 575, 253 S.E. 2d 571 (1979). The practice has not escaped criticism. *See*, Comment, Survey of Developments in North Carolina Law, 1978, 57 N.C. L. REV. 827, 914-918 (1979). Normally, an interlocutory order which does not affect a "substantial right" of one of the parties under G.S. 1-277 and G.S. 7A-27(d) is not appealable, and the avoidance of a rehearing or trial is not considered to be such a "substantial right." *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). As indicated in our opinion filed today in *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980), we perceive that our Supreme Court in *Industries, supra*, and *Waters, supra*, has raised the flag of caution to the bench and bar with respect to interlocutory or fragmentary appeals.

Plaintiff's assignments of error present the question of whether Judge Riddle had authority to set aside the judgment of default entered by the clerk, and, if so, whether the evidence supports the findings of fact and the conclusions of law entered thereon.

G.S. 1A-1, Rule 55(d), provides:

> For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

The judgment entered by the clerk followed entry of default, and therefore was a final judgment which may be set aside pursuant to the provisions of Rule 60(b), which provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect
>
> . . . .

Although the facts found by the trial court are conclusive on appeal if they are supported by any evidence, whether or not these findings of fact constitute excusable neglect is a matter of law and is reviewable upon appeal. *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978); *Doxol Gas v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971). Even if there is evidence from which a finding of excusable neglect can be made, our case law requires a finding of meritorious defense before the judgment may be set aside. *Doxol Gas v. Barefoot, supra.*

Our review of the record indicates that the trial court's findings of fact, which were quite extensive, were amply supported by the evidence. We also find that the trial court properly concluded that defendant Vensel has shown excusable neglect and has asserted a meritorious defense. Judge Riddle went to the heart of the matter in his finding that based upon the complaint alone, defendant simply did not understand that his ownership of the aircraft was at stake. The complaint contains no allegation of any contractual relationship between plaintiff and defendant Vensel, nor any obligation of Vensel to plaintiff. In fact, it is alleged in the complaint that Vensel was the registered owner of the aircraft. While the complaint does allege that defendant Mitchell's deceased husband was indebted to plaintiff upon a promissory note and had executed a security agreement in which the aircraft was included as collateral for the note, the complaint does not, nevertheless, appear to set forth any claim upon which relief might be granted against the defendant Vensel. Under such circumstances, we find that the defendant's failure to respond to this action until judgment was entered against him declaring that plaintiff was entitled to all Vensel's right, title, and interest in the aircraft, was excusable. From defendant Vensel's answer it is

abundantly clear that he had a meritorious defense to plaintiff's action.

The order of the trial court setting aside the entry and judgment of default against the defendant Richard R. Vensel is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

AMERICAN HOME PRODUCTS CORP., D/B/A AMERICAN HOME FOODS v. HOWELL'S MOTOR FREIGHT, INC.

No. 7926SC762

(Filed 15 April 1980)

Carriers § 10.1— damage to goods being transported—negligence of carrier

Plaintiff's evidence was sufficient for the jury on the issue of negligence on the part of defendant common motor carrier in an action to recover for damages to frozen pizzas being transported by defendant to plaintiff's consignee where it tended to show that the pizzas were delivered to defendant at plaintiff's warehouse; notations on the bill of lading showing that the goods were frozen food and must be maintained at 0°F temperature were sufficient to overcome the statement on the bill of lading that "contents of package unknown," and the bill of lading was thus evidence that the goods were delivered in good condition to defendant; the pizzas were refused by the consignee because they were damaged; defendant subsequently retained possession of the pizzas for an undisclosed length of time and ultimately returned the goods to plaintiff's warehouse; and, when returned to plaintiff, the pizzas were damaged and not salable.

APPEAL by defendant from *Grist, Judge.* Judgment entered 6 April 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 February 1980.

Plaintiff brought this civil action to recover for damage to frozen foods being transported by defendant for plaintiff to plaintiff's consignee, Thomas & Howard Company. Plaintiff alleged that: Defendant was engaged in interstate transportation for hire by motor carriage of various types of property and merchandise. On or about 29 August 1973, 650 cases of frozen food were delivered to defendant in Norfolk, Virginia for delivery to plain-

tiff's customer, Thomas & Howard Company, in Fayetteville, North Carolina. Upon tender of the shipment, Thomas & Howard refused delivery because of the unfit condition of the goods. Plaintiff alleged that defendant received and accepted the goods in good condition, but handled the goods negligently and carelessly so as to render them worthless when they reached their destination. Plaintiff claimed damages in the amount of $5,491.50, duly filing claim of loss with defendant, but defendant failed and refused to pay plaintiff's loss. Defendant answered, denying the essential allegations of the complaint. The jury returned a verdict answering the issue of negligence in favor of plaintiff and awarded damages in the sum of $4,966. From judgment on the verdict, defendant appeals.

O. W. Clayton for the plaintiff appellee.

Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt, P.A., by Lawrence W. Hewitt, for the defendant appellant.

WELLS, Judge.

In its first assignment of error, defendant argues that the trial court erred in denying its motion for a directed verdict at close of plaintiff's evidence under G.S. 1A-1, Rule 50(a). This assignment must be overruled. On a motion for directed verdict at the close of the plaintiff's evidence in a jury case, the evidence must be taken as true and considered in the light most favorable to plaintiff, and the motion may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). 5A Moore's Federal Practice ¶ 50.02[1] (2d ed. 1971). All the evidence which tends to support plaintiff's claim must be taken as true and viewed in the light most favorable to it, giving it the benefit of every reasonable inference which may legitimately be drawn therefrom. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969); *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). Plaintiff presented two witnesses: Kroeper, its traffic manager of frozen food products; and Smatlak, its director of quality control. Kroeper testified that in the summer and fall of 1973, his company was using Jackson Atlantic Freezer Company facilities to warehouse and store frozen pizzas. The pizzas were required to be stored at zero degrees Fahrenheit or lower. Pizzas are shipped

from the warehouse upon a bill of lading from the warehouse evidencing shipment. Regarding the shipment on 29 August 1973, he first learned of the problems with the shipment through a telephone call from defendant's president, Norris. The call was made during the first week of October 1973. Norris informed Kroeper that Thomas & Howard had refused the shipment because of time of day and high temperature. During the conversation, Kroeper authorized Howell's to return the shipment to Jackson Atlantic Freezer warehouse. Norris did not explain where the pizzas had been between 29 August 1973 and the first week of October, the time of the conversation. Kroeper identified the bill of lading under which the pizzas were shipped, delivery tickets showing initial delivery of the pizzas to the warehouse, and plaintiff's notice of claim. During Kroeper's testimony, plaintiff and defendant stipulated that the amount of damage to the pizzas was $4,966.

Smatlak testified that plaintiff requires storage of their products at or below zero degrees Fahrenheit at all times between manufacture and ultimate disposal at the store, and that storage above zero could damage the quality of the product and render it inedible and a health hazard. He learned of the problems with the shipment from the traffic department. He subsequently inspected the pizzas at Jackson Atlantic warehouse in the presence of the warehouse manager and defendant's Norfolk terminal manager. His examination disclosed that many of the cartons had been crushed, some were open at the ends, many of the pizzas were in a condition which showed they had been allowed to thaw and had subsequently been refrozen, and that the pizzas were not salable.

The defendant interstate carrier's liability for damage to the frozen pizzas is governed by 49 U.S.C. § 20(11). Plaintiff's evidence clearly showed that the goods were delivered to defendant at the warehouse, that defendant subsequently attempted delivery to the consignee, that the goods were refused by the consignee as unacceptable, and that the defendant subsequently retained possession of the goods for an undisclosed length of time and ultimately returned the goods to the warehouse, the point of origin. Plaintiff's evidence tending to show delivery of the goods to the defendant carrier in good condition and the delivery of the goods to the consignee in a damaged condition made out a *prima facie* case of negligence. *Federated Dept. Stores, Inc. v. Brinke,*

450 F. 2d 1223 (5th Cir. 1971); *Bennett v. R.R.*, 232 N.C. 144, 59 S.E. 2d 598 (1950). The bill of lading is evidence of the fact that the goods were delivered in good condition in the absence of notation or entry thereon to the contrary. *U.S. v. Mississippi Val. Barge Line Co.*, 285 F. 2d 381 (8th Cir. 1960); *Brown v. Express Co.*, 192 N.C. 25, 133 S.E. 414 (1926). In *Deal v. Motor Express Corp.*, 4 N.C. App. 487, 167 S.E. 2d 79 (1969) this Court held that while a non-notated bill of lading was some evidence of good condition at time of receipt, it was not sufficient alone to survive a motion for directed verdict where the bill of lading contained the words "in apparent good order, contents and condition of package unknown." While the bill of lading in the case *sub judice* contained the same limitation as to condition, it also contained the following notations: "Food, prepared, frozen." "0 [degrees] F. temperature must be maintained." We believe that these notations show the frozen condition of the goods at delivery to the carrier sufficiently to overcome the negative import of the standard entry of "contents of package unknown." Plaintiff's evidence clearly showed that upon its first inspection of the goods subsequent to their receipt and transportation by defendant, the goods were damaged beyond use. This evidence was sufficient to take the case to the jury on the issues of negligence and damages.

In passing upon defendant's motion for a directed verdict at the close of all the evidence, any of the defendant's evidence which tends to contradict or refute the plaintiff's evidence is not considered, but the other evidence presented by a defendant may be considered to the extent that it clarifies the plaintiff's case. *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). The issue is the same with respect to the trial court's denial of defendant's motion for judgment NOV. *Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979). Defendant presented the testimony of its Norfolk terminal manager, whose testimony clarified the plaintiff's evidence of the delivery of the load of pizzas to defendant for ultimate delivery to the consignee, Thomas & Howard Co., and that the pizzas were returned undelivered to defendant's terminal. His testimony tended to support plaintiff's evidence of damage to the shipment. For the foregoing reasons defendant's second and third assignments of error are overruled.

Defendant's remaining assignment of error relates to the court's charge to the jury on the aspect of plaintiff's *prima facie* case as being sufficient to go to the jury. We have examined the charge and find it to be without error.

No error.

Judges HEDRICK and WEBB concur.

MARGARET C. HAZARD v. FRED HAZARD

No. 7915SC734

(Filed 15 April 1980)

1. **Appeal and Error § 28.1; Contracts § 6— consent judgment—illegal contract as defense—failure to except to conclusion**

In an action to recover damages for failure to comply with a consent judgment, defendant's argument that the contract was illegal and therefore unenforceable was not properly before the court on appeal because illegality was not pled as an affirmative defense, and there was no exception to the conclusion of the trial court that "as between the parties [the judgment] was a contract"; furthermore, the consent judgment was not an illegal and unenforceable contract since it was not immoral or criminal in itself or contrary to public policy, but merely provided for the assignment or transfer of a right or benefit which federal law or regulation would not recognize.

2. **Contracts § 20.1— consent judgment—impossibility of performance—no defense for failure to perform**

In an action to recover damages for failure to comply with a consent judgment requiring defendant to convey ownership of certain insurance policies to plaintiff and to make plaintiff an irrevocable beneficiary of certain U. S. Army and Civil Service Survivor Benefit Plans, defendant could not rely on impossibility of performance, though one of the insurance policies and other benefits were not assignable or transferable under federal law and regulations, since plaintiff gave up her right to alimony in exchange for the benefits set out in the consent judgment, and defendant made no effort to determine if federal law or regulations would not permit performance.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 12 March 1979 in Superior Court, ORANGE County. Heard in the Court of Appeals 27 February 1980.

Plaintiff seeks to recover damages for breach of Consent Judgment wherein defendant promised to convey ownership of certain insurance policies to plaintiff and to make plaintiff an "irrevocable beneficiary" of certain United States Army and Civil Service Survivor Benefit Plans.

In his answer defendant pled a good faith effort to perform under the terms of the Consent Judgment but that performance was impossible because of the rules and regulations promulgated by the Veterans Administration, the Civil Service System and other pertinent organizations.

In 1975 plaintiff filed action in the District Court of Orange County against her husband of 32 years, the defendant herein, for temporary and permanent alimony. A settlement was reached and a Consent Judgment was entered on 1 December 1975 which provided in pertinent part as follows:

> "b. Transfer to Plaintiff his interest in the following Life insurance policies, so that the Plaintiff will be the owner of said policies. Hereafter Defendant shall not be responsible for the payment of any premiums on said policies.
>
> (1) Southern Life Insurance Company, Policy No. B126400, insuring the life of Ann Arnot Hazard in the principal amount of $10,000.
>
> (2) Southern Life Insurance Company, Policy No. B126399, insuring the life of Alan Fred Hazard, in the face amount of $10,000.
>
> (3) The United States of America National Service Life Insurance, Policy No. V16634578, insuring the life of Fred Hazard in the face amount of $10,000.
>
> (4) AVEMCO Insurance Company, Policy No. 203793, insuring the life of Fred Hazard in the face amount of $20,000.
>
> (5) Federal Employer's Group Life Insurance Program, Certificate—Regular Insurance, insuring the life of Fred Hazard, employee, in such amounts as are applicable under the Group Policy, which provides the insurance referred to in the individual certificate.

c. That Fred Hazard shall name Margaret C. Hazard as irrevocable beneficiary to all Survivor's Benefits or Annuities under the following plans:

(1) The United States Civil Service Retirement System.

(2) Survivor's Benefit Plan, Department of the Army."

In August 1976 defendant filed an action for absolute divorce on grounds of one-year separation. Plaintiff sought unsuccessfully to contest the divorce due to defendant's failure to perform under the Consent Judgment. *See Hazard v. Hazard*, 35 N.C. App. 668, 242 S.E. 2d 196 (1978).

At trial without jury the evidence tended to show, and the trial court found, that when the Consent Judgment was entered on 1 December 1975 neither party was aware that the National Service Life Insurance policy, the Federal Employer's Group Life Insurance Program, the Survivor's Benefits of the U.S. Civil Service Retirement System, and the Survivor Benefit Plan, Department of the Army, were not assignable or transferable under federal law and regulations, and defendant-husband had made no effort to determine whether he could carry out the terms of Paragraphs 1b and 1c of the Judgment.

The trial court concluded that there was a breach of the contract resulting from defendant's inability to perform, and that plaintiff is entitled to be restored to her original position, and this position must be measured by the value of the interests which the defendant agreed to transfer to the plaintiff, as they existed at the time of the Judgment. The trial court determined the value of these interests and entered judgment for plaintiff for the sums so determined.

Manning, Jackson, Osborn & Frankstone by David R. Frankstone and Frank B. Jackson for plaintiff appellee.

John A. Northern for defendant appellant.

CLARK, Judge.

The defendant makes two arguments: First, that the contract was illegal and therefore unenforceable, and, second, that defendant is excused by impossibility of performance. We find neither argument convincing.

[1] It does not appear that defendant's illegal contract argument is properly before this Court on appeal because illegality was not pled as an affirmative defense, G.S. 1A-1, Rule 8(c), and there was no exception to the conclusion of the trial court that "[a]s between the parties [the judgment] was a contract. . . ." Rule 10(a), N.C. Rules of Appellate Procedure. Nevertheless, it is clear that the consent judgment was not an illegal and unenforceable contract. The contract was not immoral, or criminal in itself, or contrary to public policy, but merely provided for the assignment or transfer of a right or benefit which federal law or regulation would not recognize. *See, Marriott Financial Services, Inc. v. Capitol Funds,* 288 N.C. 122, 217 S.E. 2d 551, 77 A.L.R. 3d 1036 (1975); 17 C.J.S. *Contracts* § 190 (1963).

[2] Next, the defendant relies on the doctrine of impossibility of performance. We find his reliance misplaced. The defendant made a promise to transfer and assign to the plaintiff certain rights and benefits; he made no effort to determine if federal law or regulation would not permit performance. Plaintiff has executed her promise and given up a valuable right to alimony, a right which has been extirpated by divorce. Now defendant argues that the impossibility existed at the time the contract was made and made the contract unenforceable. There is authority to support this general principle of contract law. See 17A C.J.S. *Contracts* § 462 (1963); 17 Am. Jur. 2d *Contracts* § 404 (1964); Corbin on Contracts § 1326 (1962). We do not, however, find that this general principle applies to the case *sub judice.*

"A promisor should not be excused from responding in damages for breach of contract on the ground of impossibility of performance due to a mistake in a situation, where due to his own negligence, he had failed to discover at the time of entering into the contract the nonexistence of the fact or thing which made performance by him impossible." *In re Zellmer,* 1 Wis. 2d 46, 82 N.W. 2d 891, 894 (1957).

In *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964), defendant promised performance knowing that his ability to perform would depend on the cooperation of a third party. Subsequently, the third party refused to cooperate and defendant's performance became impossible. It was held that defendant could not avail himself of the defense of impossibility of performance. Similarly,

in *Helms v. Investment Co.*, 19 N.C. App. 5, 198 S.E. 2d 79 (1973), the plaintiffs purchased a tract of land upon the warranty of defendant that water and sewer facilities would be made available within six months. The governing authorities of the City of Charlotte and Mecklenburg County prohibited the installation of the facilities because of pollution problems. The trial court granted summary judgment for plaintiffs on the issue of liability. This Court held that the defendant under the terms of its guaranty to the plaintiffs assumed the risk that the governing authorities might interpose objections, and defendant was liable to the plaintiffs for any damages sustained by their failure to perform the contract, citing 17 Am. Jur. 2d *Contracts* §§ 418, 419, 423 and 17A C.J.S. *Contracts* § 463(1). *See also*, 17 Am. Jur. 2d *Contracts* §§ 406, 407 (1963).

The promise made by plaintiff has been executed and her marital rights cannot be restored. The value of her rights has been established by the parties *inter se* as equal to the market value of the benefits defendant agreed to confer on her. Since defendant could not confer these benefits he must respond in damages, damages based on the fair market value of the benefits. The trial court so determined. The amount awarded was not contested or argued on appeal.

The judgment is

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

STATE OF NORTH CAROLINA v. WILLIAM ALLEN HARRIS

No. 7915SC910

(Filed 15 April 1980)

1. Criminal Law §§ 75.5, 75.9— incriminating statements—Miranda warnings—volunteered statements

Defendant's incriminating statements to officers were competent where the evidence showed that defendant was given the *Miranda* warnings and signed a written waiver of his rights before making in-custody statements, and

that inconsistent statements made by defendant to the investigating officer at the crime scene were volunteered and not the result of interrogation.

2. **Criminal Law § 89.2— prior statements of witnesses—admissibility for corroboration**

Testimony by officers as to what certain witnesses had told them was properly admitted for the purpose of corroborating the previous testimony of those witnesses, and defendant had a duty to point out to the court any part of the officers' testimony which he contended did not tend to corroborate the witnesses.

3. **Criminal Law § 112— erroneous instruction on State's burden of proof—error cured by further instructions**

The trial court's erroneous instruction at the outset of the charge that a defendant is presumed to be innocent until the State has shown the jury "from the evidence and by its greater weight" all of the essential elements of his guilt was not prejudicial to defendant in this case where the court on fifteen occasions thereafter properly instructed the jury that the State had the burden of proving defendant's guilt beyond a reasonable doubt.

APPEAL by defendant from *Riddle, Judge*. Judgment entered 17 May 1979 in Superior Court, CHATHAM County. Heard in the Court of Appeals 4 March 1980.

Defendant was tried and convicted of murder in the second degree. The state's evidence showed the defendant was in the house of Mary Elizabeth Jones with John Yarborough and several other persons. There was a shotgun "sitting beside the wall" inside the house. There was no argument, a shot was heard and Yarborough was hit. The defendant was standing in the room with the shotgun in his hands. Yarborough was sitting down when he was shot. The defendant, who was also called "Bird," told Deborah Taylor he had shot Yarborough and demonstrated to her how he did it. Yarborough was shot in the stomach and died as a result of the wound.

Defendant's evidence indicated the fatal shot was fired while defendant and Elwood Taylor were scuffling over the gun. Defendant testified the gun fired when he tried to grab it from Elwood Taylor. The defendant said the gun belonged to his boss, Larry Greene, and that he had borrowed it and brought it to Mary's house.

Defendant appealed from a judgment of imprisonment.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Gunn & Messick, by Robert L. Gunn, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant contends his incriminating statements to the officers were incompetent. The evidence shows an officer advised defendant of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), and he signed a written waiver before making any statements. The defendant also made two inconsistent statements to another officer, Charles Hinton. Although Officer Hinton advised defendant and others who were present when he arrived at the scene of their rights, he did not ask defendant any questions. Defendant and others volunteered statements to the officer. Defendant first said he had dropped the gun and it fired. Later, he said he had bumped it against the stove and it went off.

The record is not entirely clear as to what part of the testimony concerning defendant's statements was out of the hearing of the jury. The court did not enter a formal order finding facts with conclusions of law concerning the voluntariness of defendant's statements. This, of course, is the best practice for a trial judge to follow. When, as in this case, no conflicting testimony is offered on voir dire, it is not error for the judge to admit defendant's incriminating statements without making specific findings. *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971). We find no prejudicial error in this assignment.

[2] Defendant objected to testimony by the officers relating what the witnesses Ernest Lee, Elwood Taylor and Deborah Taylor told them. Judge Riddle properly instructed the jury in each instance that the evidence was only competent to corroborate the previous testimony of the witness, if indeed it did so corroborate. Such testimony is competent for this purpose. An unbroken line of cases beginning with *Johnson v. Patterson*, 9 N.C. 183 (1822), sustains this rule. Where defendant contends part of the testimony does not tend to corroborate the prior witness's testimony, he has a duty to point out to the court the objectionable part. *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). This, defendant failed to do. The assignment is overruled.

[3] Last, defendant argues the court erred in the following portion of the charge:

> In North Carolina when a defendant enters a plea of not guilty, he is presumed to be innocent at the outset and all—at all stages of the trial until the State has shown you from the evidence and by its greater weight all of the essential elements of his guilt.

Clearly, this is error. The question is whether it was prejudicial to defendant in this case. The state's evidence as adopted by the jury is overwhelming proof of defendant's guilt of the crime charged.

The erroneous instruction was given at the very outset, in the third paragraph of the court's charge. It occurred in the preliminary portion of the charge, being the seventh sentence in the charge. Thereafter, the court summarized the evidence for four pages in the record, then turned to the explanation of the law in the case. Following are portions of these instructions:

> I charge if you find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt.
>
> If the State proves beyond a reasonable doubt that the defendant intentionally killed
>
> The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion
>
> For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt.
>
> The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the 6th of January, 1979, the defendant intentionally and with malice and without justification or excuse shot the deceased with a deadly weapon,
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things,

If you find from the evidence beyond a reasonable doubt that on or about the 6th of January, 1979, the defendant intentionally and without justification or excuse shot

but the State has failed to satisfy you beyond a reasonable doubt that the defendant acted with malice

because it failed to satisfy you beyond a reasonable doubt

However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about January 6, 1979, the defendant shot the deceased in a criminally negligent way

However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

When the defendant asserts that the victim's death was the result of an accident, he is in effect denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him.

The State must satisfy you beyond a reasonable doubt that the victim's death was not accidental before you return a verdict of guilty.

Fifteen different times the court properly told the jury that the state was required to satisfy them beyond a reasonable doubt before the defendant could be convicted. In the all-important mandate on each charge, the court's instructions were correct.

Three North Carolina cases are particularly instructive on this question. In *State v. Johnson*, 227 N.C. 587, 42 S.E. 2d 685 (1947), the trial court twice gave the jury the incorrect quantum of proof, the second time occurring when the jury returned for further instructions after reporting they were "tied up on" an issue in the case. The Supreme Court held the errors required a new trial, even though the correct rule of proof had been given by the court at other times in the charge.

"[A]n erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the

point." *State v. Harris*, 289 N.C. 275, 280, 221 S.E. 2d 343, 347 (1976). This holding by the Supreme Court arose from an instruction by the trial judge that erroneously placed upon defendant the burden of proving accident as a defense to a murder charge.

As the Court stated, *ordinarily* a subsequent correct instruction will not correct an erroneous charge on burden of proof. An example of an exception to this rule is found in *State v. Moore*, 37 N.C. App. 248, 245 S.E. 2d 898, *cert. & disc. rev. denied*, 295 N.C. 651, 248 S.E. 2d 254, 255 (1978). In *Moore*, the trial judge in preliminary instructions to the prospective jurors told them that the state's burden of proof was by the greater weight of the evidence. Thereafter, in defendant Moore's trial the court properly instructed the impanelled jury that the burden was beyond a reasonable doubt. The Court held the prior instruction was without prejudice to defendant, concluding that the subsequent correct instruction was sufficient to overcome any possible prejudice caused by the incorrect statement.

Even as the Court in *Moore* provided the cutting edge for realistic appraisal of the effect of jury instructions, we now continue this effort toward realism in the examination of the relationship between instructions by the trial judge and the jury.

We hold, therefore, that here, as in *Moore*, the incorrect instruction was not prejudicial to defendant. The later fifteen instances in which the court properly charged the state's burden of proof were sufficient to remove any possible prejudice caused by the earlier single *lapsus linguae*. The charge as a whole presented the law of burden of proof to the jury in such a manner as to leave no reasonable cause to believe that the jury was misled. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967).

In defendant's trial we find no prejudicial error.

No error.

Judges PARKER and HILL concur.

CHARLES R. WELLONS v. ISABELLA R. HAWKINS AND MECHANICS AND FARMERS BANK, EXECUTOR OF THE ESTATE OF JAMES T. HAWKINS, DECEASED

No. 7914SC751

(Filed 15 April 1980)

1. **Husband and Wife § 5— property owned by husband—wife's joinder in deed—no obligations incurred by wife**

When a wife joins her husband in the execution of a deed to convey property owned solely by him merely to release her inchoate right of dower, she neither is a grantor of the premises nor incurs any obligation by representations or covenants in the deed.

2. **Husband and Wife § 5— property owned by husband—wife's joinder in deed—whether wife received proceeds—no issue of material fact**

Where plaintiff alleged that he purchased land from defendant and her husband who subsequently sold the land to another purchaser, and it was undisputed that the husband only owned the land and that defendant wife joined in the execution of the deed, but the question of whether defendant received any portion of the purchase price from plaintiff was disputed, defendant's motion for summary judgment was properly granted since the issue as to whether defendant received any portion of the proceeds was not a material fact.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 8 May 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 February 1980.

James T. Hawkins and his wife, Isabella R. Hawkins, jointly executed a deed to a tract of land owned solely by Mr. Hawkins to Charles R. Wellons on 20 November 1961. The deed, not filed until 26 August 1963, is recorded in Deed Book 295, page 148, Durham County Registry. By a subsequent deed, dated 14 August 1963 and filed 16 August 1963, prior to recordation by Mr. Wellons, Mr. and Mrs. Hawkins conveyed to Roberts Construction Company, Inc. the same real property. This deed is recorded in Deed Book 294, page 702, Durham County Registry.

Mr. Wellons began this action against Mr. and Mrs. Hawkins in August 1966, alleging that he had purchased land from them with full covenants of warranty, that he had taken possession of the property and made improvements, and that while he was in the process of building a house on the property, defendants conveyed the same property to another party. He sought damages of $75,000 from defendants.

Four years later defendants answered, admitting the deed to Roberts Construction Company, Inc. but denying they deeded the

lot to Mr. Wellons. They further answered that he never gave any consideration for the alleged deed. Mr. Hawkins died testate 22 February 1977, seven years later, and his executor, Mechanics and Farmers Bank, was substituted as a party defendant. Two years later, Mrs. Hawkins moved for summary judgment on the grounds that she had no interest in the property except her potential right to an elective life estate in it, and that she had only signed the deed in compliance with N.C.G.S. 39-7 to release his inchoate right. On the basis of affidavits, other documents and argument of counsel, Judge Farmer granted Mrs. Hawkins's motion for summary judgment and dismissed plaintiff's action as to her. Plaintiff appeals.

Nye, Mitchell, Jarvis & Bugg, by Jerry L. Jarvis, for plaintiff appellant.

Malone, Johnson, DeJarmon & Spaulding, by LeMarquis DeJarmon, for defendant appellee.

MARTIN (Harry C.), Judge.

Once again, we are asked by an appellant to review the decision of the trial court granting an appellee's motion for summary judgment. In this case, we agree that the decision was appropriate, and affirm. This action, instituted in 1966, proceeded for fourteen years at a somewhat leisurely pace through the courts of Durham County.

It is an uncontested fact that prior to his marriage to Mrs. Hawkins, Mr. Hawkins was the owner in fee simple of the property conveyed to appellant. It is also undisputed that Mrs. Hawkins joined in the execution of the deed.

[1] In *Maples v. Horton*, 239 N.C. 394, 80 S.E. 2d 38 (1954), the Supreme Court of North Carolina recognized the legal principle that when a wife joins her husband in the execution of a deed to convey property owned solely by him, merely to release her inchoate right of dower, she neither is a grantor of the premises nor incurs any obligations by representations or covenants in the deed. The Court quoted the following passage from an Indiana case:

> "Her joinder in the deed operated, not as a conveyance, but as a release of her inchoate right (of dower). The whole title

> was in the husband. His deed without the wife joining therein would have carried the whole and the perfect legal title. If the husband make a deed of his lands, that deed carries the perfect legal title; and hence the joinder of the wife therein is of no consequence at all, unless she survives the husband. Her joinder in the deed is a release of her right to claim one-third of the land in case she survives the husband, and nothing more."

Id. at 400-01, 80 S.E. 2d at 43.

Appellant acknowledges that the case *sub judice* is not an action for breach of covenants. His argument is that Mrs. Hawkins joined in the execution of the deed for a reason other than merely to release her inchoate right to elect a life estate in one-third of her husband's real property as her intestate share. He contends that Mrs. Hawkins received part of the purchase price and other considerations paid by him. He relies upon his affidavit in opposition to Mrs. Hawkins's motion for summary judgment, in which he controverts her sworn assertion that she had received none of "any purchase money or other consideration which may have been given for said deed." His sworn statement included the assertions that he had delivered to "them" the balance of the purchase price and that he personally made a cash payment of $3,000 to "both defendants" at the time of the execution and delivery of the deed.

[2] Both parties admit in their briefs that the question whether Mrs. Hawkins received any portion of the purchase price from appellant is "disputed in the opposing affidavits." Appellant contends that on appellee's motion for summary judgment, it must be assumed and even "deemed admitted" that Mrs. Hawkins shared in the proceeds of the conveyance. Therefore, he argues, the summary judgment motion should have been denied and a jury should have the opportunity to decide whether Mrs. Hawkins signed the deed for a reason other than merely to waive her inchoate rights.

A motion for summary judgment should not be granted if a genuine issue exists as to any material fact. Here, apparently an issue is presented by the affidavits whether Mrs. Hawkins received any portion of the proceeds of the conveyance to appellant, but even assuming that she did, is that a material fact? We do not think so.

Central to appellant's argument is his position that the principle recognized in *Maples v. Horton, supra*, that the wife who joins with her husband in the execution of a deed to convey property owned solely by him does so merely to release her inchoate rights, is a rebuttable presumption. As authority, he refers to a Wisconsin case which adopted the rule earlier enunciated by the Supreme Court of Michigan:

> [T]his presumption, that the wife joined in the land contract solely to release her inchoate right of dower, is clearly a rebuttable one, because it is only to be accorded effect "in the absence of a showing to the contrary."

Estate of Fischer, 22 Wis. (2d) 637, 645, 126 N.W. 2d 596, 600 (1964).

Assuming that this presumption is rebuttable, which we do not concede, we think appellant's case falters in the face of the language which directly follows the sentence just quoted:

> Evidence sufficient to rebut the presumption would necessarily have to be either special language inserted in the contract tending to establish an agreement between the husband and wife vendors that the wife was to share in the ownership of the payments to be made by the vendee thereunder, or evidence dehors the contract tending to prove such an agreement.

Id. at 645, 126 N.W. 2d at 600.

Appellant's assertions in his affidavit that he made payments to both husband and wife simply do not satisfy this evidentiary requirement upon which he apparently relies. The record is totally silent on any such agreement between Mrs. Hawkins and her husband that she was to share in the ownership of the payments made by appellant.

For this reason, we think that no genuine issue as to any material fact was presented to the trial court, and defendant was entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Affirmed.

Judges PARKER and HILL concur.

MACK ERVIN NICHOLS v. STATE EMPLOYEES' CREDIT UNION

No. 793DC821

(Filed 15 April 1980)

1. **Appeal and Error § 6; Rules of Civil Procedure § 54.1—interlocutory order—substantial right affected**

The "substantial right" exception to Rule 54(b) certification of an appeal of an interlocutory order is limited to those situations where the substance of the appealing party's claim or defense would be reduced or the appealing party would incur some other direct injury if the appeal were not heard prior to the entry of a final judgment disposing of all the claims of all of the parties.

2. **Appeal and Error § 6.6— partial summary judgment dismissing some claims—no right of appeal**

In an action to recover funds allegedly negligently paid by defendant credit union from plaintiff's checking and savings accounts between 16 October 1977 and 27 December 1977, plaintiff had no right to appeal from an order of the trial court granting defendant's motion for partial summary judgment dismissing plaintiff's action as to all forged checks debited to plaintiff's account from 25 October 1977 through 18 November 1977 and as to a savings withdrawal on 14 November 1977.

Judge WEBB dissenting.

APPEAL by plaintiff from *Aycock, Judge.* Judgment entered 21 May 1979 in District Court, PITT County. Heard in the Court of Appeals 6 March 1980.

Plaintiff instituted this action to recover for funds which he alleges were misapplied or negligently paid by defendant from his savings and checking accounts. Plaintiff alleged defendant had paid a series of forged checks on his account. He alleged these checks were paid commencing 16 October 1977 with the last check being paid on 27 December 1977. The defendant filed an answer and moved for partial summary judgment. The motion for partial summary judgment asked that plaintiff's action be dismissed as to all forged checks debited to plaintiff's account from 25 October 1977 through 18 November 1977. It also asked that the action be dismissed as to a savings withdrawal made on 14 November 1977 in the amount of $800.00 on the ground that $800.00 was deposited to plaintiff's account on the same day.

Affidavits and depositions filed in regard to the motion for summary judgment show the following facts are not contradicted.

In September 1977, plaintiff began residing at Lot 63, Shady Knoll Trailer Park, Greenville, North Carolina. A bank statement with checks enclosed was mailed by defendant to plaintiff at his home address no later than 23 November 1977. The statement showed the forged checks which had been debited to plaintiff's account from 25 October 1977 through 18 November 1977. Defendant testified by deposition that he did not receive the statement. The agents of defendant stated that the signatures on checks received are not verified before they are charged to the accounts of customers. Agents of Wachovia Bank and Trust Company, N.A. and First Citizens Bank and Trust Company testified by deposition that this is consistent with the current and accepted banking practices in North Carolina. Eva B. Little testified by deposition that she was a secretary-loan clerk of the defendant in November 1977. She identified a share withdrawal form dated 14 November 1977 on the account of Mack Nichols. She said, "The two d's in the left-hand corner means two draft deposits which means that there should be another document along with this similar to this document." She did not testify as to what the share withdrawal form showed to be withdrawn, and no evidence was introduced as to what a draft deposit showed was deposited to plaintiff's checking account. The plaintiff discovered the forgeries on 1 January 1978 and notified the defendant two days later.

The court granted defendant's motion for partial summary judgment, without certifying it for appeal under G.S. 1A-1, Rule 54(b). Plaintiff appealed.

Williamson, Herrin and Stokes, by Mickey A. Herrin, for plaintiff appellant.

Lawrence S. Graham for defendant appellee.

WELLS, Judge.

[1, 2] Although the parties have not raised the issue of the appealability of the trial court's order, it is nonetheless our duty to do so if we believe the appeal is premature. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). We believe that for the same reasons we have today held that the granting of summary judgment as to less than all the parties in a multiple party suit is normally not appealable [*see, Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980)], the present appeal may not be

entertained. Plaintiff will not be denied a "substantial right" under G.S. 1-277 and G.S. 7A-27 by delaying his appeal until all matters in issue have been resolved at trial. *Waters v. Personnel, Inc., supra; accord, Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). We believe that the "substantial right" exception to Rule 54(b) certification has been limited by the Court to those situations where the substance of an appealing party's claim or defense would be reduced, or where the appealing party would incur some other direct injury, if the appeal were not heard prior to entry of a final judgment disposing of all of the claims of all of the parties. We see no such substantial right of the plaintiff affected here.

As can be seen via the model we adopted in *Leasing Corp. v. Myers, supra*, --- N.C. App. at ---, --- S.E. 2d at ---: (1) the right to appeal has not been conferred by statute—no substantial right of the defendant has been affected; (2) there has not been a judgment as to all of the claims; (3) the specific action of the trial court from which appeal has been taken is final in nature; and (4) the trial court has failed to certify, under Rule 54(b), that the judgment is final and that there is no just reason for delay. Accordingly, the present appeal is premature.

Appeal dismissed.

Judge HEDRICK concurs.

Judge WEBB dissenting.

Judge WEBB dissenting.

I dissent from the majority opinion. The problem of the appealability of interlocutory orders and judgments has been faced in the following cases. *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Whalehead Properties v. Coastland Corporation*, 299 N.C. 270, 261 S.E. 2d 899 (1980); *Beck v. Assurance Co.*, 36 N.C. App. 218, 243 S.E. 2d 414 (1978). The majority has concluded from these cases that the " 'substantial right' exception

to Rule 54(b) certification has been limited by the Court to those situations where the substance of an appealing party's claim or defense would be reduced, or where the appealing party would incur some other direct injury, if the appeal were not heard prior to entry of a final judgment disposing of all of the claims of all of the parties." The substance of the plaintiff's claim in the case sub judice has been reduced prior to final judgment. This should make it appealable.

The law as to the appealability of orders and judgments has been difficult to apply. It has been said that whether an interlocutory judgment affects a substantial right and will work injury to the appealing party, if not corrected before the appeal from final judgment, must be determined by "considering the particular facts of that case . . . ." *See Whalehead Properties v. Coastland Corporation, supra* at 277. It is understandable that the majority would try to draw some rule from the decided cases as to which interlocutory judgments and orders are appealable. From a reading of the cases, I believe an interlocutory order or judgment which affects the merits of a case in such a way that the final judgment cannot stand if the order is wrong, affects a substantial right and will work injury to the appealing party if not corrected before an appeal from a final judgment. This seems to me to be the distinguishing feature in *Nuckles, Oestreicher, Newton, Nasco* and *Beck.* On the other hand, if the whole question of liability is determined adversely to defendant and the amount of damages is not determined, the defendant can wait until final judgment before appealing. This is the rule of *Industries, Inc.* In the case sub judice, if the partial summary judgment is not corrected before appeal from the final judgment and the partial summary judgment is reversed on appeal, the final judgment from which the appeal is taken will not stand. I would hold that this makes the partial summary judgment appealable.

WILFORD HOOD v. GRACE L. HOOD

No. 7918SC825

(Filed 15 April 1980)

Equity § 1.1; Trusts § 13.5– equitable action to establish parol trust—unclean hands

Plaintiff's unclean hands barred him from maintaining an equitable action to impose a resulting trust on real property conveyed solely to his former wife based on her parol agreement to convey the property to plaintiff when he was no longer engaged in unlawful activities where plaintiff's evidence showed that the funds used to purchase the property were derived from plaintiff's sale of illegal liquor and that the property was conveyed solely to his wife to shield it from forfeiture if plaintiff should be convicted of bootlegging.

APPEAL by plaintiff from *Mills, Judge.* Judgment entered 24 May 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 March 1980.

Plaintiff has brought this action for title to and possession of certain real property located in Jamestown Township, Guilford County. Plaintiff alleged: he and defendant were married on 3 December 1955 and that on or about that time the parties had negotiated for the purchase of the above property as a home for them and defendant's three children. At that time he was engaged in the sale of illegal whiskey and the parties agreed that title to the property would temporarily be recorded in the name of defendant, so as to avoid loss of the home in case plaintiff was convicted of bootlegging. Defendant agreed to deed the property to him at a later date when plaintiff was no longer engaged in unlawful activities. The property was purchased with his funds and, in accordance with the agreement, title was taken in the name of defendant, as evidenced by a recorded deed. Plaintiff advised defendant in 1962 that he had permanently ceased his illegal activities and requested that defendant deed the property to him, but the defendant refused to do so. Marital problems later developed between the parties and they separated in January 1963 and were divorced on 21 August 1978. Plaintiff asked the court for an adjudication that defendant was holding title to the disputed property as trustee for the use and benefit of plaintiff.

Defendant denied the operative allegations of the complaint, further defending on grounds that the action was barred by the

statute of limitations, laches, statute of frauds, and the doctrine of "clean hands". Defendant counterclaimed for ejectment of the plaintiff from the disputed property, and the parties stipulated that if judgment should be entered for the defendant on plaintiff's claim for relief, defendant would be entitled to the remedy of ejection.

At trial, plaintiff testified that he purchased the property for $1,000 with his own funds, the parties agreeing that title to the land would be taken in the name of defendant to avoid forfeiture if plaintiff were to be convicted of bootlegging, and that defendant would deed the property to plaintiff at a later time. Plaintiff stated that he constructed a house and paid taxes on the property, and that he was convicted of the illegal sale of liquor several times. Plaintiff stated that the disputed property had a value of no more than "a couple of thousand dollars." At the conclusion of plaintiff's evidence defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50(a), stating as grounds: insufficient evidence; the statute of limitations; laches; and the doctrine of "clean hands". From the trial court's entry of judgment for the defendant upon defendant's motion, plaintiff appeals.

Morgan, Post, Herring & Morgan, by J. V. Morgan, for plaintiff appellant.

Wyatt, Early, Harris, Wheeler & Hauser, by William E. Wheeler, for defendant appellee.

WELLS, Judge.

We affirm the trial court's granting of defendant's motion for a directed verdict under G.S. 1A-1, Rule 50(a) on grounds that plaintiff's unclean hands barred him from maintaining this equitable action for a resulting trust based on an alleged parol agreement. When a husband purchases realty and causes it to be conveyed to his wife, the law presumes the property is a gift to the wife, and in order to overcome this presumption and establish the existence of a resulting trust, the husband must produce clear, cogent and convincing proof. *Bass v. Bass*, 229 N.C. 171, 48 S.E. 2d 48 (1948). An action to establish the existence of a resulting trust is equitable in nature. *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954).

We do not reach plaintiff's argument that his evidence was sufficient to meet this burden, since plaintiff's complaint and testimony unquestionably show that the trust had the unlawful purpose of shielding plaintiff's illegal income, derived from his bootlegging activities, from forfeiture to the State. "An intended trust to carry on an unlawful business, such as that of selling intoxicating liquor in violation of law . . . is invalid." RESTATEMENT (SECOND) OF TRUSTS § 61, Comment *a* (1959). In *Penland v. Wells*, 201 N.C. 173, 159 S.E. 423 (1931) the plaintiff had conveyed land to his daughter for the admitted purpose of defeating certain threatening litigation which he alleged was without merit. The plaintiff sought equitable relief on the theory that a trust had been created in the property in his favor. Our Supreme Court held that the doctrine of "clean hands" precluded plaintiff's resort to equity:

> In *York v. Merritt, supra* [77 N.C. 213, 215 (1877)], the Court said: "[W]here both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores*, the courts will not enforce it in favor of either party." The entire doctrine is based upon the "clean hands" concept of equity. The plaintiff alleges "that prompt action was necessary in order to defeat such litigation and thereby preserve his property for his own use and benefit." While the plaintiff denies that there was any merit in the threatened litigation, it is quite obvious that he was attempting to get his fodder out of the field before the storm broke.

201 N.C. at 175-176, 159 S.E. at 424.

In the case at bar plaintiff's evidence unquestionably shows that the funds used to purchase the property were derived from his sale of illegal liquor and that his purpose of shielding the property from possible seizure by the State was against the public policy on the State, and *contra bonos mores*. The trial court properly prohibited plaintiff from invoking the equity jurisdiction of the court to enforce the alleged resulting trust.

Affirmed.

Judges HEDRICK and WEBB concur.

GLORIA JEANETTE CHAPPELL MONDS v. JAMES OLIVER MONDS

No. 791DC942

(Filed 15 April 1980)

Divorce and Alimony § 21.3— enforcement of alimony award—sufficiency of evidence to support findings

In a hearing on plaintiff's motion to compel defendant to comply with a child support and alimony order, evidence was sufficient to support the trial court's findings that (1) defendant was able-bodied, earned $125 per week as an employee of his son-in-law, had not sought other employment, had decreased his indebtedness during the previous year by $8000 and his net worth was therefore greater, and was possessed with the means and was able to comply with the orders of the court, and (2) defendant had willfully failed to comply with prior support orders.

APPEAL by defendant from *Chaffin, Judge.* Order entered 26 June 1979 in District Court, CHOWAN County. Heard in the Court of Appeals 4 March 1980.

This action was brought by plaintiff Gloria Monds to require defendant to show cause why he should not be punished for contempt of court for his failure to abide by the terms set forth in two previous court orders. Plaintiff, in June 1978, petitioned for alimony pendente lite, child custody, child support and counsel fees. The court granted plaintiff's motion, and on 15 June 1978 ordered defendant *inter alia* to:

a. Pay plaintiff $350 per month as child support;

b. Maintain a hospital insurance plan for the couple's minor children;

c. Pay plaintiff $300 per month as alimony pendente lite;

d. Pay an annuity on the homeplace so as to insure the minor children's occupancy; and

e. Pay plaintiff's counsel $369.50 for legal services.

As of January 1979, defendant had not complied with the terms of the order set out above. On 2 January 1979, another order was signed apparently granting plaintiff a divorce from bed and board and amending the order by directing defendant to:

a. Pay plaintiff $125 per month for her support;

b. Pay plaintiff's counsel $900 for legal services; and

c. Reimburse plaintiff for all of her court costs.

Defendant failed to comply with the second order, and on 24 March 1979 plaintiff made motion before the court requesting that ". . . defendant be ordered to comply in all particulars . . ." with the June 1978 judgment as amended by the 1979 judgment. On 26 June 1979, the trial court granted plaintiff the relief she requested and held defendant in contempt of court, with the proviso that defendant could purge himself by paying the total arrearage of $5,994.50 and by complying with the two former judgments. Defendant appealed.

Twiford, Trimpi & Thompson, by Jack H. Derrick, for plaintiff appellee.

Earnhardt & Busby, by Max S. Busby, for defendant appellant.

HILL, Judge.

Defendant first assigns as error four of the trial court's findings of fact, contending they are not supported by the evidence. This Court is bound by the trial court's findings where there is competent evidence to support them. *Scott v. Shackleford*, 241 N.C. 738, 86 S.E. 2d 453 (1955). "If different inferences may be drawn from the evidence, [the judge sitting without a jury] determines which inferences shall be drawn . . .", and the findings are binding on the appellate court. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368 (1975).

The trial court found as fact that defendant is able-bodied, earns $125 per week as an employee of his son-in-law and that defendant has not sought any other employment. Defendant contends the finding is in error because of evidence that he did talk to one man about a farming job. We find no error. The conversation was casual at best. Defendant has not made a genuine effort at finding any work other than that at which he is presently engaged. The trial court's finding of fact was proper.

Defendant excepts to the trial court's finding of fact that ". . . the defendant's net worth as indicated by his own financial statements . . . is greater now than at the time of . . . trial . . . and

that his total outstanding indebtedness has decreased markedly . . . ." Evidence presented at trial showed defendant's indebtedness decreased from $39,651.50 on 26 April 1978 to $31,711 on 13 April 1979. The evidence, which was competent, clearly shows a decrease in defendant's indebtedness and an increase in his net worth as that term is commonly understood.

Defendant excepts to the trial court's finding of fact that he ". . . was possessed with the means to comply with the orders of . . ." the trial court, has been able, and continues to be able to comply with the trial court's orders. We find no error in the finding. It is true that defendant presently works as a laborer for the sum of only $125 per week. It is interesting to note, however, that defendant works for his son-in-law who at one time worked for defendant at $125 per week. Furthermore, the son-in-law and defendant's daughter have purchased a store in Elizabeth City and own farming equipment that defendant purchased in 1977 for $376,000.

A person is in continuing civil contempt as long as he has the ability ". . . to take reasonable measures that would enable him to comply with the order," G.S. 5A-21(3), and fails to do so.

Defendant is an able-bodied man who is capable of earning more than $500 per month. Defendant rents farmland to his son at $1,500 per year, and in 1978 had a short-term gain of $26,000 on a floating loan. Defendant transferred valuable farm equipment to his father in exchange for his father's assumption of indebtedness on the equipment. That equipment has passed back to defendant since his father's death and then on to defendant's daughter and son-in-law. No consideration was given for the final transfer except the assumption of the debt on the equipment. We find that despite the fact that much of defendant's property is heavily encumbered, the trial court did not err in its finding that he is able to comply with the support order.

In his second assignment of error defendant contends the trial court erred in its conclusion of law that defendant has wilfully failed to comply with the prior support orders. We find no error. On 15 June 1978, plaintiff was subject to the first court order. Since that time, defendant has divested himself of farmland—claiming a gain of $18,549 and shifting indebtedness on the land to his father. He sold valuable machinery, taking a loss

for tax purposes of $12,002 and shifted indebtedness on the property to his father. In total, defendant's father paid at least $52,826 of the indebtedness. Furthermore, defendant has erected a $25,000 building on farmland leased to his daughter and son-in-law and retired at least $5,000 of his indebtedness. Other facts upon which the trial judge based his conclusion have been set forth above. The conclusion was based on findings of fact supported by competent evidence. Defendant's second assignment of error is overruled.

Defendant's third assignment of error is vaguely worded. Defendant appears to contend that the trial judge failed properly to interpret the evidence and that the order is not supported by the evidence. When the trial judge sits as the jury, ". . . the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." (Citation omitted.) *Williams, supra* at 342. There was sufficient competent evidence to support the trial court's findings. The findings of fact supported the judgment. Defendant's third assignment of error is overruled.

Defendant's fourth assignment of error alleges error in the entry of the trial court's order in that the findings of fact are not supported by the evidence, the conclusions of law are not supported by findings, and the findings and conclusions are insufficient to support the order. Such an exception is a broadside exception and as such is ineffectual except to present the question of whether the facts found support the judgment and whether error of law appears on the face of the record. *City of Kings Mountain v. Cline*, 281 N.C. 269, 188 S.E. 2d 284 (1972). The facts as found are sufficient, and there is no error on the face of the record. Defendant's fourth assignment of error is overruled.

The order of the trial court is

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

FREIDA MAE HINTON, ADMINISTRATRIX OF THE ESTATE OF RICKY NAPOLEAN HINTON v. THE CITY OF RALEIGH, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA: ROBERT GOODWIN, CHIEF OF POLICE OF THE CITY OF RALEIGH POLICE DEPARTMENT; WOODROW W. HAYES, P. J. McCANN, T. W. GARDNER, E. O. LASSITER, G. W. BLACK, D. C. WILLIAMS, E. D. WHITLEY, J. M. GLOVER, J. C. HOLDER, L. A. EDWARDS, R. A. HOGG, P. E. BRASWELL, J. S. BURGE, E. M. LEFLER, L. ZETTLEMAIER, J. THARRINGTON, R. D. MOORE, POLICE OFFICERS OF THE CITY OF RALEIGH; AND JAMES RICHITELLI, A POLICE AGENT/INFORMER

No. 7910SC951

(Filed 15 April 1980)

Arrest and Bail § 5.1; Death § 3.6; Municipal Corporations § 10— shooting of robber by police—inducement to participate in robbery by paid informant—no liability by city and police officers

Plaintiff could not recover from defendants, a city and its police officers, for the death of deceased who was shot and killed by city police officers while attempting to escape after an armed robbery at a motel, even if deceased was induced to participate in the armed robbery by the city's paid informant, where the evidence showed that officers ordered deceased to halt, deceased went into a crouching position and pointed toward the officers, and an officer then shot and killed deceased, since (1) the officer was justified in shooting deceased under G.S. 15A-401(d)(2)(a); (2) deceased contributed to his own death by his negligence in participating in the robbery, refusing to surrender when ordered to do so, and pointing toward the officers; and (3) there was no evidence that deceased was killed because of his race.

APPEAL by plaintiff from *Braswell, Judge*. Judgment entered 14 June 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 28 March 1980.

This is an action by the mother of Ricky Hinton who was shot and killed by a member of the City of Raleigh Police Department while Hinton was escaping from a robbery at a Holiday Inn in Raleigh. Plaintiff alleged in her complaint that Ricky Hinton was induced to participate in the robbery by James Richitelli, a paid informant of the City of Raleigh Police Department; that the informant provided the plans, the gun and the automobile used to commit the robbery; and that the informant drove Ricky Hinton and another man, Rush Higgins, to the Holiday Inn where Hinton and Higgins went into the lobby with a gun provided by the informant. Plaintiff further alleged that Higgins demanded and received money from two Raleigh police officers who were posing

as motel clerks, and that as Hinton and Higgins left the Holiday Inn, a "confrontation ensued" which ended when defendant Woodrow W. Hayes shot and killed Higgins and Hinton. Plaintiff alleged that some of the defendants deliberately planned a fake robbery with the intention of killing Ricky Hinton, and the other defendants were negligent in training and supervising the officers. Plaintiff alleged that Ricky Hinton was killed because of his race; that the defendants were acting under the color of law; that he was deprived of his life without due process of law or the equal protection of the law; that his death violated G.S. 28A-18-2, G.S. 15A-401(d)(2) and 42 U.S.C. §§ 1981, 1983, 1985, and all this was done pursuant to a conspiracy by the defendants.

Extensive discovery was had. Several of the officers were deposed and each denied the robbery was planned by the City of Raleigh Police Department. The plaintiff made a motion for the production of the memorandums of the Raleigh Police Department pertaining to the killing which motion was denied. On 12 June 1979, the court granted the defendants' motion for summary judgment. Plaintiff appealed.

Irving Joyner for plaintiff appellant.

Haywood, Denny and Miller, by George W. Miller, Jr., and Police Attorney Kurt C. Stakeman, for defendant appellees.

WEBB, Judge.

We affirm the judgment of the superior court. The pleadings, depositions and documents relied on by the court reveal, in the light most favorable to the plaintiff, that Ricky Hinton was induced to commit an armed robbery by a paid informant of the City of Raleigh Police Department with the intention on the part of the police of killing Ricky Hinton; that as Ricky Hinton and his companion left the lobby of the Holiday Inn after committing the robbery, they were ordered to halt by members of the City of Raleigh Police Department; that Hinton and Higgins refused to halt and Higgins pointed a gun at a Raleigh policeman who killed him; that Hinton went into a crouching position and raised his arm toward the same Raleigh policeman who killed Higgins. It is hard to believe the allegations as to the motives of the City of Raleigh policemen, but even if they are true, we hold the plaintiff cannot recover on the facts of this case. We have found no prece-

dent for the case sub judice. We do not believe we should hold that a person who voluntarily commits an armed robbery, although persuaded to do so by a police informant, may then sue the policemen who used proper procedures in attempting to arrest that person after the robbery.

Plaintiff either deposed or had a chance to depose all the witnesses to the shooting. All the evidence showed that Ricky Hinton robbed the Holiday Inn. All the evidence showed the officers ordered him to halt, and he went into a crouching position and pointed toward the officers. He had just participated in a robbery in which a gun was used. G.S. 15A-401 provides in part:

> (d) Use of Force in Arrest.—
>
> (1) Subject to the provisions of subdivision (2), a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:
>
> * * *
>
> b. To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.
>
> (2) A law-enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:
>
> a. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;
>
> b. To effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay . . . .

When Ricky Hinton participated in the armed robbery, even if he was persuaded to do so by the State's paid informant, this did not eliminate the duty of Ricky Hinton to submit when ordered to do so by the officers. Nor did it eliminate the right of self-defense of Mr. Hayes as set forth in the statute. According to all the evidence, Mr. Hayes had the right to shoot Ricky Hinton under G.S. 15A-401(d)(2)(a). If any of the defendants were negligent in training or supervising the officers, Ricky Hinton, by his own negligence in participating in the robbery, refusing to surrender when ordered to do so, going into a crouching position and pointing toward the officers, contributed to the killing. *See* 9 Strong's N.C. Index 3d, Negligence § 13.1 (1977).

On the forecast of evidence we hold that a court would have to find that Woodrow Hayes was justified in shooting Ricky Hinton under G.S. 15A-401(d)(2)(a); that Ricky Hinton by his own negligence contributed to his death; that there is no evidence that Ricky Hinton was killed because of his race; and that his death did not violate G.S. 28A-18-2, G.S. 15A-401(d)(2) or 42 U.S.C. §§ 1981, 1983, or 1985. Summary judgment in favor of the defendants was proper.

We hold that nothing the plaintiff could discover by examining the internal memorandums of the City of Raleigh Police Department could change the outcome of this case. For that reason, we do not pass on the plaintiff's assignment of error as to the denial by the superior court of plaintiff's motion to compel the production of these documents.

Affirmed.

Judges MARTIN (Robert M.) and HILL concur.

OTTWAY BURTON v. DAVID PAUL KENYON AND CHARLES "RED" DELK

No. 7919DC846

(Filed 15 April 1980)

Contracts § 4.1— employee's debt to third person—employer's agreement to deduct from paycheck—sufficiency of consideration

An agreement entered into by an employer to deduct from an employee's pay and forward a sum of money to a creditor to induce performance of an obligation owed by the creditor to the employee, who is in default of his obligation to pay the creditor, is not void because of lack of consideration; therefore, the trial court erred in entering summary judgment for defendant employer where plaintiff attorney had been hired to defend defendant employee pursuant to two fee agreements; the employee had defaulted in payment but had induced his employer to agree to deduct and forward weekly payments so that plaintiff would continue to defend him; the employer would continue to receive defendant's service as an employee; and the employer failed to deduct and forward payments as agreed.

APPEAL by plaintiff from *Hammond, Judge.* Judgment entered 24 May 1979 in District Court, RANDOLPH County. Heard in the Court of Appeals 19 March 1980.

Plaintiff filed this action alleging the following.

On 14 November 1975, defendant David Paul Kenyon was charged with operating a motor vehicle while under the influence of intoxicating liquor. Defendant hired plaintiff, an attorney, to represent him and agreed to pay plaintiff $500. To secure this obligation, defendant signed a promissory note under which payment was due 28 January 1976.

On 18 July 1976, defendant Kenyon was charged with exceeding a safe speed, refusing upon demand to produce his operator's license and exhibit it to an officer, and delaying an arrest. Defendant retained plaintiff to represent him and delivered to plaintiff another promissory note. Payment on this note was due 24 March 1977. Plaintiff began defending Kenyon in all four cases.

On 16 November 1976, defendant Kenyon authorized his employer, defendant Charles Delk, to deduct from his pay $50 per week and forward this sum to plaintiff until full legal fees owed plaintiff were paid, and Delk agreed to do so. Two days later, plaintiff completed his legal employment. Defendant Kenyon was

found not guilty of the charge of driving under the influence, but was found guilty in the other three cases.

Plaintiff filed suit to recover an indebtedness of $719.17. Defendant Delk was made a party, because he failed to deduct and forward payments as agreed.

Defendant Delk filed answer, wherein he admitted the agreement to deduct, but alleged a lack of consideration.

From summary judgment entered in favor of defendant Delk, plaintiff appeals.

Ottway Burton, pro se.

T. Worth Coltrane, for defendant appellee, Charles Delk.

ERWIN, Judge.

Where the record on appeal contains no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base decision, the motion for summary judgment will be considered as though made under G.S. 1A-1, Rule 12(c), of the Rules of Civil Procedure for judgment on the pleadings. *Reichler v. Tillman,* 21 N.C. App. 38, 203 S.E. 2d 68 (1974).

When a motion for judgment on the pleadings is made, the trial court is required to view the facts and permissible inferences in the light most favorable to the non-moving party, and all well pleaded factual allegations in the non-moving party's pleadings must be taken as true. *Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974).

When plaintiff's allegations are viewed in that light, taking into consideration all permissible inferences, they tend to show that prior to 16 November 1976, he had agreed to represent defendant Kenyon in four criminal cases; that one of the two promissory notes executed for security of payment by Kenyon was due and unpaid; that some professional services had been rendered to that point; and that two days prior to completion of his services, he, defendant Delk, and defendant Kenyon agreed to a plan where Delk would deduct and forward plaintiff $50 weekly from Kenyon's pay until the debt was paid.

The sole question arising from these facts is whether an agreement entered into by a third person to deduct and forward a sum of money to plaintiff in order to induce performance of an obligation owed by plaintiff to another person, who is an employee of the third person making the promise, but who is in default of his obligation to pay, is void because of lack of consideration. We answered, "No."

It is generally established that a promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party, *Sinclair v. Travis*, 231 N.C. 345, 57 S.E. 2d 394 (1950); *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972), and undoubtedly, this is sound policy. But the same factors do not come into play where a third person is involved.

Restatement of Contracts § 84 (1932) provides in pertinent part:

> "Consideration is not insufficient because of the fact
>
> * * *
>
> (d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration . . ."

The rationale of the Restatement rule is best set forth in 1A. Corbin on Contracts § 176 (1950) wherein it is stated:

> "But suppose that the pre-existing duty is owed to a third person and not to the promisor. Is the performance of this kind of duty a sufficient consideration for a promise? The American Law Institute has stated that it is sufficient. This should be supported for two reasons: (1) the promisor gets the exact consideration for which he bargains, one to which he previously had no right and one that he might never have received; (2) there are no sound reasons of social policy for not applying in this case the ordinary rules as to sufficiency of consideration. The performance is bargained for, it is beneficial to the promisor, the promisee has forborne to seek a rescission or discharge from the third person to whom the duty was owed, and there is almost never any probability

> that the promisee has been in position to use or has in fact used any economic coercion to induce the making of the promise. There is now a strong tendency for the courts to support these statements and to enforce the promise. The reasons that may be advanced to support the rule that is applied in the two-party cases, weak enough as they often are in those cases, are scarcely applicable at all in three-party cases." (Footnote omitted.)

Nowhere is the reason for such a rule exemplified as here.

Taking plaintiff's allegations and inferences arising therefrom as true, plaintiff, an attorney, had been hired to defend defendant Kenyon pursuant to two fee agreements. Defendant had defaulted in payment, but had induced his employer to agree to deduct and forward weekly payments so that plaintiff would continue to defend him. Defendant would receive legal services, plaintiff would continue to defend, and the employer would continue to receive Kenyon's services as an employee. This is not a situation where the employer agreed gratuitously to perform a service. If plaintiff's allegations and inferences arising therefrom are taken as true, plaintiff and defendants assiduously bargained for this exchange. In 17 C.J.S., Contracts, § 113, p. 835, it is stated: "Where one party to a contract has the right to terminate it because of the default of the other, his completion of the contract is a sufficient consideration for the promise of a third person." (Footnote omitted.)

Here, if plaintiff's allegations are believed, a bargained for exchange has taken place, *i.e.*, plaintiff would complete his services, and Delk would insure weekly liquidation of debt as long as Kenyon was entitled to pay. Such allegations render judgment on the pleadings inappropriate.

The judgment entered below is

Reversed.

Judges MARTIN (Robert M.) and CLARK concur.

FREDERICK ALAN SPIVEY v. WHITE MOTOR CORPORATION

No. 7921SC765

(Filed 15 April 1980)

Automobiles § 6.3; Sales § 22.2— defective brakes—seller's liability—insufficient evidence

The trial court properly entered summary judgment for defendant in an action to recover for injuries allegedly caused by defendant's negligent installation of the brake system on a truck sold to plaintiff's employer and defendant's failure to use reasonable care in maintaining the brake system where defendant presented evidence that it had inspected the brake system but had discovered no defects and that the only reported problem with the brake system was the staying on of the anti-skid light and this had been repaired, and plaintiff failed to come forward with evidence of the prior existence of some specific defect in the brake system which was the proximate cause of plaintiff's injury.

APPEAL by plaintiff from *Walker (Hal H.), Judge.* Judgment entered 28 June 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 February 1980.

Plaintiff filed this action to recover damages for injury sustained in an accident on 3 February 1978. Defendant is the manufacturer and seller of the tractor (truck) involved in the accident.

In his complaint, plaintiff alleged the following occurrence of events.

Defendant sold the truck to plaintiff's employer, Priority Freight Systems (Priority), for use in its business. The truck was equipped with a 121-type anti-lock brake system. Priority complained to defendant about problems in the brake system, which defendant attempted to remedy. On or about 3 February 1978, plaintiff was injured while driving the truck. The proximate cause of his injury was defendant's negligence in installing the brake system which it knew or should have known was defective and in failing to use reasonable care in maintaining the system.

Defendant filed an answer denying the material allegations of negligence and asserted as a defense plaintiff's contributory negligence. One week later, defendant filed a motion for summary judgment, supported by an affidavit of its branch manager as to

the validity of its business records, and the business records. Defendant's business records revealed that the only complaint it received about the brake system was about the anti-skid light staying on. Defendant also offered the affidavit of James Hutchens, the purchaser of the truck, which stated in pertinent part:

> "That on or about July 14, 1977 he purchased a 1977 White tractor from the White Motor Corporation; that on or about August 2, 1977 the truck was returned the Kernersville branch office of the White Motor Corporation for warranty work to have, among other things, the anti-skid light and system checked out; that attached to this affidavit and by reference incorporated herein is a copy of the purchase invoice for that truck and of the work order of August 2, 1977; that following the repair work performed August 2, 1977 to the tractor the undersigned knows of no problems or difficulties experienced with the braking system of the tractor; from that time until the date of the accident on February 3, 1978 the undersigned reported no problems or difficulties with the braking system of the tractor to the White Motor Corporation nor, to his knowledge, were any reported by any other person . . ."

Plaintiff moved to amend its complaint so that it would allege that Hutchens bought the truck and leased it to Priority for use in its business and that subsequent to the sale of the truck, complaints had been filed with defendant about problems in the brake system by Priority, its employees, or Hutchens.

In opposition to defendant's summary judgment motion, plaintiff offered the affidavit of Walter Eric Kivett, a tractor-trailer mechanic employed by Hutchens as a driver, which revealed that he had driven the truck exclusively after its purchase until the last week of December 1977. He had complained during this period to an employee of defendant, its shop foreman, approximately three times regarding problems with the computer portion of the braking system, particularly its making clicking noises, but this problem was not corrected. On 3 February 1978, Kivett arrived at the scene of the accident within five minutes and noticed that the tractor brakes had no smell and were not smoking, and the trailer brakes did have a smell, which indicated failure of the tractor brakes.

The trial court granted defendant's motion for summary judgment. Plaintiff appealed.

Wilson & Redden, by W. M. Speaks, Jr., for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Daniel W. Donahue, for defendant appellee.

ERWIN, Judge.

> "In ruling on a motion for summary judgment, the Court does not resolve issues of fact but goes beyond the pleadings to determine whether there is a genuine issue of material fact. The moving party has the burden of establishing the absence of any triable issue, and the Court in considering the motion carefully scrutinizes the papers of the moving party and, on the whole, regards those of the opposing party with indulgence. This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing."

Zimmerman v. Hogg & Allen, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974). In the instant case, defendant presented evidence that it had inspected the brake system, but had discovered no defects. Plaintiff did not produce any evidence that defendant failed to use reasonable care in its inspection or that the specific, alleged defect was discoverable. Once defendant came forward with its evidence, it became incumbent for plaintiff to come forward with some specific evidence to support his claim, *Moore v. Fieldcrest Mills*, 296 N.C. 467, 251 S.E. 2d 419 (1979), and he could not rest upon the bare allegations in his complaint. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971). Moreover, plaintiff was required to prove the prior existence of some specific defect in the brake system, which was the proximate cause of his injury. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960); *Coakley v. Motor Co.*, 11 N.C. App. 636, 182 S.E.

2d 260, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 244 (1971). The affidavit of Walter Kivett is not sufficient. It merely alleges that there had been prior problems with the computer portion of the braking system. It does not intimate that a defect in the computer portion of the brake system was the immediate cause of brake failure and the proximate cause of plaintiff's injury. Plaintiff's allegations as to lack of reasonable maintenance of the brake system are deficient for the same reason. The truck was repaired only once for a problem with the brake system. The specific problem, the staying on of an anti-skid light, was remedied. Assuming, as we must, that reports were made concerning problems of the computer portions of the brake system, there is still no evidence that this defect was the proximate cause of plaintiff's injury or the brake's failure, as required. *See Funeral Home v. Pride*, 261 N.C. 723, 136 S.E. 2d 120 (1964); *Wyatt v. Equipment Co., supra; Coakley v. Motor Co., supra.*

The judgment is

Affirmed.

Judges MARTIN (Robert M.) and CLARK concur.

JOHNNIE LANCE JOHNSON, EDDIE RAY JOHNSON, AND EDSEL W. JOHNSON, INDIVIDUALLY, AND AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ILA J. BAREFOOT, DECEASED v. JOE BEN JOHNSON

No. 7911SC732

(Filed 15 April 1980)

Wills § 28.4— intent determined from will—nephew excluded from taking under will

The trial court properly concluded that defendant received nothing under testatrix' will where the will provided that she left all her property "to—Edsel W. Johnson, Eddie Ray Johnson, Johnnie Lance Johnson and Joe Ben Johnson [defendant] is to receive," followed by a blank space with a question mark above it, since testatrix had devised all her property to the plaintiffs, three nephews, and had nothing left to give defendant, another nephew, and since the language of the will indicated testatrix' intention to sever defendant from the group named immediately before.

APPEAL by defendant from *Preston, Judge.* Judgment entered 24 April 1979 in Superior Court, JOHNSTON County. Heard in the Court of Appeals on 26 February 1980.

This is an action under the Declaratory Judgment Act. G.S. § 1-253 *et seq.*, to construe the will of Ila J. Barefoot. Plaintiffs, executors and beneficiaries under the will, seek to have a clause wherein defendant's name appears, declared ineffective and void. The holographic will, which has been duly admitted to probate, provides as follows:

Mrs. Ila J. Barefoot
Fuquay-Varina, N. C.
P. O. Box # 595

Fuquay Varina
North Carolina, Wake County

I, Ila J. Barefoot of the aforesaid county and State, being of sound mind, but considering the uncertainty of my earthly existence do make and declare this my last will and testament.

First: It is my will & desire that my body shall be given a decent burial. and my just debts be pd out of the first moneys which may come into the hands of my executors. Belonging to my estate.

Second: I hereby will & bequeath all property both real & personal, belonging to me at my death, to—Edsel W. Johnson, Eddie Ray Johnson, Johnnie Lance Johnson and Joe Ben Johnson is to receive ___?___ To be used by them as they may see fit.

Witness:

In testimony whereof I do hereby appoint my beloved nephews (3) not Joe B my only executors to execute this my last will & testament.

Signed __ Mrs. Ila J. Barefoot

April 5, 1967

Add to this—Put double stone to our graves (C B & mine) and keep our graves cleaned off.

4/5/67
Last will & testament
of Ila J. B.
Ila J. Barefoot

April 5, 1967

1967

The matter came before Judge Preston who, in construing the will, which was the only evidence offered, made the following pertinent findings of fact;

11. That in the Second Item, Testatrix expressly "willed and bequeathed all property both real and personal, belonging to me at my death."

12. That Testatrix severed Joe Ben Johnson from the other devisees by the singular language "and Joe Ben Johnson is to receive".

13. That Testatrix before describing what, if anything, Joe Ben Johnson was to receive drew a blank line and wrote something, marked it out and then placed in its place a question mark.

14. That Testatrix expressly excluded Joe Ben Johnson from the appointment as an executor. . . .

15. That Testatrix underlined Joe Ben Johnson's name each time it was used in the will.

16. That the last manifestation of intent by Testatrix applying to what Joe Ben Johnson would be devised was a question mark.

17. That by placing a period in the Second Item of the will as follows: "I hereby will and bequeath all property both real and personal belonging to me at my death to Edsel W. Johnson, Eddie Ray Johnson, and Johnnie Lance Johnson." the will is sufficient to devise all of said estate to the three named beneficiaries, and the severable clause "and Joe Ben

> Johnson is to receive $? $ " containing [sic] no dispositive words and fails to devise to him anything, and the said words are surplusage and indicate no completed dispositive intent.

Thereupon, Judge Preston concluded that Joe Ben Johnson "receives nothing" under the will. From a judgment declaring plaintiffs the sole beneficiaries of Mrs. Barefoot's estate, defendant appealed.

L. Austin Stevens and Grady & Shaw, by Philip C. Shaw, for the plaintiff appellees.

Yeargan & Mitchiner, by Joseph H. Mitchiner, for the defendant appellant.

ARNOLD, Judge.

The intention of the testator as gathered from the four corners of his will controls the interpretation and construction of the will by the court. This cardinal principle of law has guided our courts since it was laid down in *Blount v. Johnston*, 5 N.C. 36 (1804). As so aptly stated by Chief Justice Stacy in the leading case of *Richardson v. Cheek*, 212 N.C. 510, 511, 193 S.E. 705, 706 (1937):

> The guiding star in the interpretation of wills, to which all rules must bend unless contrary to some rule of law or public policy, is the intent of the testator, . . . To find this is to solve the problem.

Justice Stacy also recognized that adjudicated cases lend little aid to the interpretation of the will before the court since no two testators are exactly alike, nor can any two wills be expected to express identical intentions. For this reason, the Chief Justice observed that every will, " 'must stand on its own bottom.' " *Id.* [Citations omitted.] We agree with the rule of law therein enunciated, if not with the metaphor employed. Moreover, in construing the will, it must be remembered that "substance rather than form" dictates the divination of the testator's intent. 80 Am. Jur. 2d, *Wills* § 1127 at 237 (1975). To that end, and in order to clarify the content of the will, "the court will add, change, or disregard punctuation, phrases, and clauses." 1 N. Wiggins, *Wills and Administration of Estates in N. C.* § 133 at 415 (1964). While it is not

within our province to rewrite the will or to fill in blanks for the testator, *Howell v. Gentry*, 8 N.C. App. 145, 174 S.E. 2d 61 (1970), it is permissible "to transpose words, phrases, or clauses . . . [or to] disregard, or supply, punctuation. . . ." *Entwistle v. Covington*, 250 N.C. 315, 319, 108 S.E. 2d 603, 606 (1959).

We think that the will before us, standing on its own, plainly manifests this testatrix' intention regarding the disposition of her property. "The intention which controls is that which is manifest, expressly or impliedly, from the language of the will." *First Union National Bank v. Moss*, 32 N.C. App. 499, 503, 233 S.E. 2d 88, 91, *cert. denied*, 292 N.C. 728, 235 S.E. 2d 783 (1977). There can be no doubt that she willed and bequeathed "all property both real & personal, belonging to me at my death, to—Edsel W. Johnson, Eddie Ray Johnson, Johnnie Lance Johnson," and we agree with Judge Preston that, by placing a period at the end of that sentence, the intention of the testatrix as well as the whole substance of her disposition is made precise. Having devised all her property to these three nephews, she had nothing left to give to the defendant, whom Judge Preston correctly concluded "received nothing" under her will.

This construction of the will is bolstered by the wording of the clause wherein the defendant's name is written. As Judge Preston found, the use of the singular language, "and *Joe Ben Johnson* is to receive," clearly demonstrates testatrix' intention to "sever" this individual from the group named in the completed sentence immediately preceding this incomplete clause. The inescapable impact of the separated clauses is this: Testatrix did not intend for Joe Ben Johnson to share equally in her estate with Edsel, Eddie Ray and Johnnie Lance Johnson. If she ever intended that he receive any part of her property, she never expressed that intent within the four corners of her will. In our opinion, a blank space with a question mark pencilled in above it indicates a contrary intention, *i.e.*, Joe Ben Johnson "receives nothing."

We hold that the trial judge properly construed the will of Ila J. Barefoot. His judgment dated 30 April 1979 is affirmed.

Affirmed.

Judges WEBB and WELLS concur.

EVELYN HAYWORTH POSTON, PLAINTIFF v. MORGAN-SCHULTHEISS, INC., A CORPORATION; HIGH POINT BANK & TRUST COMPANY; ELIZABETH WILLARD McINNIS AND J. V. MORGAN, DEFENDANTS

No. 7918SC935

(Filed 15 April 1980)

Fraud § 12.1— fraud in procurement of deed—statute of limitations pled—summary judgment proper

Defendants were entitled to summary judgment in plaintiff's action for damages or a decree voiding a deed she had executed where plaintiff alleged that she was induced by fraud to sign a warranty deed and that defendants conspired to obtain her property for less than its true value; defendants answered that the transaction in which plaintiff conveyed her property to one defendant occurred more than five years before filing of the complaint; and plaintiff made no reply alleging that she first discovered facts about the transaction which would constitute fraud within the three years prior to the filing of the action.

APPEAL by plaintiff from *Collier, Judge*. Orders entered 26 March, 2 April and 5 April 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 March 1980.

The factual background of this action is set out at length in our opinion in *Trust Co. v. Morgan-Schultheiss*, 33 N.C. App. 406, 235 S.E. 2d 693, *cert. denied* 293 N.C. 258, 237 S.E. 2d 535 (1977), *cert. denied* 439 U.S. 958, 58 L.Ed. 2d 350, 99 S.Ct. 360 (1978). Briefly, plaintiff owned a tract of land which she wished to use as security for a loan. Defendant Morgan was her attorney at the time she entered into an agreement with defendant Morgan-Schultheiss, Inc. by which she received in exchange for the property $60,000 and a six-month option to repurchase. Morgan-Schultheiss borrowed the $60,000 from defendant High Point Bank & Trust Co. (the Bank) with the land as security.

The previous appeal arising from these facts involved an action by the Bank for the principal and interest on the $60,000 loan to Morgan-Schultheiss and for foreclosure on the property, and an action by the plaintiff here to reform the warranty deed she had given Morgan-Schultheiss into a mortgage. The summary judgments entered at the trial level were partially reversed, since we found that material questions of fact existed as to whether the transaction between plaintiff and Morgan-Schultheiss was a sale

of the land or a mortgage. Plaintiff's action to reform the warranty deed was subsequently dismissed with prejudice for failure to prosecute.

Pursuant to the judgment in its action, the Bank obtained a writ of possession and ejectment to remove plaintiff from the property. Plaintiff signed an "Acknowledgement and Consent" recognizing the Bank's right to possession of the land and agreeing to remove her property from it.

Plaintiff then instituted the present action, alleging among other things that she was induced by fraud to sign a warranty deed; that defendants conspired to obtain her property for less than its true value; and that defendant McInnis harassed her with anonymous and threatening telephone calls. She seeks damages, trebled under the Unfair and Deceptive Trade Practices Act, or a decree voiding the deed, and from defendant McInnis she seeks damages.

Defendants answered and moved for dismissal under Rule 12(b)(6). They also moved for summary judgment, which was granted as to each defendant. Plaintiff appeals.

Plaintiff appellant Evelyn Hayworth Poston appearing pro se.

Haworth, Riggs, Kuhn, Haworth & Miller, by John Haworth for defendant appellees McInnis and High Point Bank & Trust Co.

Bynum M. Hunter and Alan W. Duncan for defendant appellee Morgan.

Frank B. Wyatt for defendant appellee Morgan-Schultheiss, Inc.

ARNOLD, Judge.

Plaintiff argues on appeal that each defendant has failed to show that no genuine issue of material fact exists.

Defendant Morgan-Schultheiss raised as its fifth defense the statute of limitations. G.S. 1-52(9) establishes a three-year statute of limitations for actions grounded in fraud or mistake, and the present action was brought more than five years after the transaction in which plaintiff conveyed her property to defendant.

Where it clearly appears that plaintiff's claim is barred by the running of the statute of limitations, defendant is entitled to judgment as a matter of law, and summary judgment is appropriate. *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971), *cert. denied* 280 N.C. 180, 185 S.E. 2d 704 (1972).

Plaintiff points to the second clause of G.S. 1-52(9)—"the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake"—and argues that defendant has failed to "set out facts which the plaintiff knew or should have known [presumably at the time of the conveyance on 30 July 1974] to put her on notice of fraud." This burden is not upon defendant, however. In its affidavit in support of its motion for summary judgment, defendant, by its president, testified that the single transaction between plaintiff and defendant took place on 30 July 1974, and that more than three years have passed since that transaction. This is a sufficient forecast of evidence to entitle defendant to summary judgment. *Id.* Once defendant made this showing, the burden shifted to plaintiff to forecast evidence which would show that defendant was not entitled to judgment as a matter of law. *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979). In this case, plaintiff would have needed to show that she first discovered facts about the transaction which would constitute fraud within the three years prior to the filing of this action. Since she did not respond to defendant's motion at all, she clearly has not done so. "[O]nce the defending party forecasts evidence . . . which tends to establish his right to judgment as a matter of law, the claimant must present a forecast of the evidence . . . which will tend to support his claim for relief. . . . If the claimant does not respond at that time . . . , summary judgment should be entered in favor of the defending party." *Id.* at 110, 254 S.E. 2d 284. Summary judgment for defendant Morgan-Schultheiss was proper.

The same reasoning applies to the summary judgment granted to defendants Bank and Morgan, and to that granted to defendant McInnis on plaintiff's first cause of action. Plaintiff's third cause of action, against defendant McInnis alone, fails to state a claim upon which relief can be granted. Therefore, any issue of fact which exists would not be material, see *Lowe v. Murchison*, 44 N.C. App. 488, 261 S.E. 2d 255 (1980), and summary

judgment for defendant on this cause of action also was appropriate.

Summary judgment for all defendants was proper. The orders of the trial court are

Affirmed.

Judges HEDRICK and ERWIN concur.

PAUL R. JENNEWEIN AND WIFE, VIRGINIA N. JENNEWEIN, PETITIONERS v. THE CITY COUNCIL OF THE CITY OF WILMINGTON, NORTH CAROLINA, BEN B. HALTERMAN, MAYOR, J. D. CAUSEY, JOSEPH DUNN, MARGARET F. FONVIELLE, RALPH W. ROPER, WILLIAM SCHWARTZ, AND J. RUPERT BRYAN, COUNCILPERSONS, RESPONDENTS

No. 795SC926

(Filed 15 April 1980)

Appeal and Error § 6.2— application for special use permit—remand for hearing de novo—nonappealable order

An order remanding the case to the Wilmington City Council for a hearing de novo upon petitioners' application for a special use permit was a nonappealable interlocutory order.

APPEAL by petitioners and respondents from *Reid, Judge.* Order entered 23 May 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 26 March 1980.

By amendment to its zoning ordinance adopted 22 November 1972, the Wilmington City Council created a Historic District Zone within the city. Petitioners are owners of a house and lot located within that zone. On 20 July 1977 petitioners initiated a request for a Special Use Permit to allow them to use a portion of their house for an antique shop. After the Historic District Commission, the Planning Commission, and the professional planning staff of the city had each given a favorable recommendation to petitioners' request, the Wilmington City Council held an evidentiary hearing on 22 August 1978 at which witnesses testified in favor of and in opposition to the request. No decision either to grant or to refuse the request was made at the 22 August 1978

meeting. At a meeting held 26 September 1978 the Council voted to deny petitioners' application for a Special Use Permit.

On 26 October 1978 petitioners filed the present proceeding in the Superior Court to obtain review of the Council's action and to obtain an order directing issuance of the permit. The respondents, who are the Wilmington City Council, filed answer opposing the petition and seeking an injunction enjoining petitioners from the further operation of an antique shop on their premises.

After a hearing in the Superior Court, the Court entered an order finding, among other facts, that the member of the City Council who made the motion to deny petitioners' application had not been present at the evidentiary hearing previously conducted by the City Council and that such council member was thereby deprived of the opportunity to observe the demeanor of witnesses and to judge their reliability from personal observation. The Court also found from a review of the record that insufficient evidence had been presented at the evidentiary hearing before the Council to support its conclusions that an antique shop would substantially injure the value of adjoining or abutting property and would not be in harmony with the area. The court concluded that the City Council in exercising quasi-judicial powers was required to adhere to higher standards than in exercising its legislative functions, that the absence of the Council member who made the motion to deny petitioners' request from the evidentiary hearing held to determine whether the request should be granted violated fundamental concepts of due process, and that for this reason and because of the failure of the record to disclose competent evidence sufficient to support the City Council's findings of fact, there must be a hearing de novo upon petitioners' application for a Special Use Permit. Accordingly, the court ordered the case remanded to the Wilmington City Council for a hearing de novo upon petitioners' application.

The court subsequently incorporated into its order, as additional findings of fact, findings that petitioners had commenced use of their property for the retail sale of antiques on 13 November 1972, at which time the property was zoned R-3; that under the zoning ordinance in effect on 13 November 1972 the use of property for retail sales was prohibited in an R-3 district; and

that on 22 November 1972 petitioners' property was rezoned from R-3 to Historic District zoning. As additional conclusions of law, the court concluded that petitioners' use of their property on 22 Novmeber 1972 was already in violation of the then existing Zoning Ordinance in that the property was used for retail sales in an R-3 district, and that because there was such a violation at the time of the amendment on 22 November 1972, petitioners did not and do not have a permitted nonconforming use. The court did not amend the portion of its order by which it had remanded the case to the City Council for a de novo hearing.

From the order remanding the case for a de novo hearing, both petitioners and respondents appealed.

Brown & Culbreth by Stephen E. Culbreth for petitioners appellants-appellees.

John C. Wessell III, Assistant City Attorney, for respondents appellants-appellees.

PARKER, Judge.

The order from which both petitioners and respondents have attempted to appeal is interlocutory. An appeal does not lie from an interlocutory order unless it affects some substantial right of the appellant and will work an injury to him if not corrected before an appeal from the final judgment. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950); *Leak v. Covington*, 95 N.C. 193 (1886); *Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). The order in the present case remanded the case to the city council for hearing de novo. It did not affect a substantial right of either party which cannot be corrected upon appeal from final judgment without either party suffering injury in the meantime.

The attempted appeals are premature and are

Dismissed.

Chief Judge MORRIS and Judge WELLS concur.

STATE OF NORTH CAROLINA v. JAIRUS GENE EVANS

No. 7812SC1173

(Filed 15 April 1980)

Criminal Law § 146— no appeal from order dismissing appeal

No appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari.

APPEAL by defendant from *Herring, Judge.* Order entered 3 October 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 March 1979.

Upon defendant's convictions in Superior Court on charges of disorderly conduct and resisting arrest, judgments were entered on 28 June 1978 sentencing him to jail for consecutive terms of 15 and 60 days. On 29 June 1978 he gave notice of appeal, and the judge signed appeal entries allowing him 60 days to prepare and serve a proposed record on appeal. He failed to do so, and by motion dated 13 September 1978 and served on the defendant on the following day, the State moved to dismiss the appeal for defendant's failure to serve a record on appeal within the time allowed. After hearing on the motion, Judge Herring entered an order dated 3 October 1978 making findings of fact and conclusions of law, on the basis of which he dismissed the appeal. From this order, defendant now attempts to appeal.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Mathis and Assistant Attorney General Acie L. Ward for the State.

Blackwell, Thompson, Swaringen, Johnson & Thompson by E. Lynn Johnson for defendant.

PARKER, Judge.

No appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari. *Lightner v. Boone*, 221 N.C. 78, 19 S.E. 2d 144 (1942); *Chozen Confections, Inc. v. Johnson*, 220 N.C. 432, 17 S.E. 2d 505 (1941). Accordingly, this purported appeal is dismissed.

In order to afford defendant a review of the trial court's order which dismissed his appeal, we have elected to treat defendant's attempted appeal in this case as a petition for a writ of certiorari and have examined the merits of the contentions made. So treated, we find the petition without merit and the same is denied.

The record reveals the following: At trial and at the time of giving notice of appeal on 29 June 1978, defendant appeared *pro se.* After the trial he approached the court reporter and inquired about a transcript of his trial. She informed him that a deposit of $150.00 would be required. He did not make any deposit. Subsequently he employed counsel to perfect his appeal. On 13 September 1978, before the State's motion to dismiss was served, defendant's newly retained counsel requested a transcript from the court reporter and represented that they held monies in their trust account to cover the cost of preparing the transcript. At the hearing on the State's motion to dismiss, defendant's counsel relied on G.S. 15A-1448(a)(4) as that section had been originally enacted by Ch. 711, Sec. 1, of the 1977 Session Laws. As so enacted, the section read as follows:

> (4) For the purpose of computing time limitations for settling of the record on appeal, docketing the appeal, or other steps in the appellate process, the appeal is considered as "taken" on the date the jurisdiction of the trial court is divested under subsection (3), or the date a transcript is delivered to the clerk of court, whichever is later.

In his order allowing the State's motion to dismiss defendant's appeal, Judge Herring ruled that the above-quoted statute was unconstitutional because it conflicted with the North Carolina Rules of Appellate Procedure adopted by our Supreme Court as authorized by Art. IV, Sec. 13(2) of the Constitution of North Carolina, which grants to the Supreme Court "exclusive authority to make rules of procedure and practice for the Appellate Division."

Although we completely agree with the court's view that the statute was unconstitutional for the reason stated, the ruling was not necessary in the present case. In enacting the statute, the General Assembly provided that it was to become effective 1 July 1978. Ch. 711, Sec. 39, 1977 Session Laws. Before that date ar-

rived, the General Assembly enacted Ch. 1147 of the 1977 Session Laws at its Second Session held in 1978. By Sec. 29 of the Act, the above-quoted section of the statute, which Judge Herring found to be unconstitutional, was amended and completely rewritten. The amending statute became effective on 1 July 1978. Thus, the General Assembly itself eliminated the constitutionally offensive statute before its stated effective date. Because of the delay by the publisher in distributing the 1978 Interim Supplement to the General Statutes, neither Judge Herring nor the attorneys who appeared before him were aware that the statute, upon which defendant's counsel attempted to rely and which Judge Herring held to be unconstitutional, had already been repealed when the ruling was made.

Defendant neither served any proposed record on appeal within apt time nor applied for any extension of time within which to do so. Under Rule 25 of the North Carolina Rules of Appellate Procedure his appeal was properly dismissed.

His attempted appeal from the order dismissing his appeal is dismissed. Considered as a petition for a writ of certiorari, it is denied.

Appeal dismissed.

Petition for writ of certiorari denied.

Judges ERWIN and MARTIN (Harry C.) concur.

FRANCINE LA GRENADE v. DWIGHT GORDON, BETSY GORDON AND ROBERT GORDON

No. 7921SC903

(Filed 15 April 1980)

1. Parent and Child § 6.2— father's common law right to custody of child

The father of a minor child is its natural guardian at common law, and his right of control over the child is superior to that of the mother in the absence of a court's contrary determination of custody.

2. Abduction § 1; Parent and Child § 6.2— father's agreement that mother have child custody—mother's action for abduction of child

Where defendant father contracted away his common law right to custody of his minor child by executing an agreement giving custody to plaintiff mother but reserving his right to institute a custody action, plaintiff's right to custody was superior to that of defendant until a subsequent court determination of custody, and plaintiff had a right to institute an action against defendant and his parents for abduction of the child while he was in her custody.

APPEAL by plaintiff from *Rousseau, Judge.* Orders entered 20 August 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 March 1980.

Plaintiff filed this suit against defendant Robert Gordon, her estranged husband, and his parents for damages arising from an alleged conspiracy to abduct the minor child of plaintiff and defendant Robert Gordon. The events giving rise to the cause of action are alleged as follows.

Plaintiff and defendant Robert Gordon were married 28 December 1976, and they lived in Quebec, Canada. On 30 April 1979, plaintiff and defendant Robert Gordon executed an agreement which indicated that he was going to the United States to find suitable employment; that his absence would not be interpreted as desertion; that his action would not be held against him so far as determining ultimate custody of or visitation rights with their child; but that in the meantime, plaintiff would have custody of the child.

On 1 May 1979, defendant Robert Gordon telephoned his father, Dwight Gordon, who advised him to bring the child to the parents' home in Winston-Salem. Defendant Robert Gordon, acting at the urging of his parents, took the minor child and surreptitiously departed. Defendant Betsy Gordon, his mother, met him in Boston, and they embarked for Winston-Salem. Upon discovering the foregoing events, plaintiff, along with her father, ventured to Winston-Salem to retrieve her child. Her attempts to reobtain the child were thwarted. Defendants took the child to the Holiday Inn in Lexington on 3 May 1979.

On 4 May 1979, plaintiff filed suit in the District Court in Forsyth County and obtained a temporary custody order. By the time the order had been entered, defendants had absconded to Myrtle Beach, South Carolina with the child. On 7 May 1979,

defendant Robert Gordon filed a civil action in the Circuit Court in Horry County, South Carolina seeking custody of the child. The South Carolina Court awarded plaintiff custody of the child. Plaintiff subsequently filed this action in Superior Court in Forsyth County to recover expenses of $12,394.74 incurred in reobtaining custody of the child, to recover $100,000.00 for emotional and mental suffering, and to recover $250,000.00 for punitive damages. The trial court dismissed her action pursuant to G.S. 1A-1, Rule 12(b)(6), of the Rules of Civil Procedure. Plaintiff appealed.

House, Blanco & Randolph, by Clyde C. Randolph, Jr. and Ronald A. Matamoros, for plaintiff appellant.

Wilson & Redden, by Harold R. Wilson and John W. Sherrill, for defendant appellees.

ERWIN, Judge.

The sole question presented for review is whether plaintiff's complaint states a claim for which relief can be granted. We answer, "Yes."

[1] The father of a minor child is its natural guardian, at common law, and his right of control over the child is superior to that of the mother, in the absence of a court's contrary determination of custody. *Tyner v. Tyner*, 206 N.C. 776, 175 S.E. 144 (1934); *Patrick v. Bryan*, 202 N.C. 62, 162 S.E. 207 (1932). Thus, a father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or by harboring the child after he has left the house. *Howell v. Howell*, 162 N.C. 283, 78 S.E. 222 (1913). In *Howell v. Howell, supra*, plaintiff husband had entered into a contract with his wife and her father that the parties' minor daughter might remain with the wife until the child was six years old. The husband subsequently obtained a divorce but no mention was made of custody of the child. When the child became six, according to plaintiff's complaint, the mother, with the aid of her father, removed the child from the State. The Supreme Court held that a cause of action existed for abduction.

[2] Since the father at common law has the right to control of the child, he cannot be held liable for abduction of the child in

this instance unless he has surrendered his common law right. For purposes 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). When so viewed, the evidence before us is that defendant Robert Gordon contracted away his common law right to custody of the minor child, but reserved a right to institute a custody action. Thus, plaintiff was vested by contract with legal custody of the child. By contractual agreement, her right was superior to his until a subsequent court determination of the matter of custody, and it was she who had the right to institute a cause of action for abduction, even against him. Accordingly, her complaint states a claim upon which relief can be granted against both her husband and his parents.

The orders entered below are

Reversed.

Judges HEDRICK and ARNOLD concur.

ANNE MARLETTE TEACHEY v. WILLIAM GRANGER TEACHEY

No. 7921DC902

(Filed 15 April 1980)

1. **Divorce and Alimony § 24.4— enforcement of child support order—civil contempt**

Defendant may be punished for civil contempt by imprisonment until he complies with a child support order only if he has the present ability to comply with the order or the present ability to take reasonable measures that will enable him to comply with the order.

2. **Divorce and Alimony § 24.4— arrearage in child support—imprisonment until payment—insufficient findings**

The trial court erred in ordering that defendant be imprisoned for civil contempt until he paid a $4825 arrearage in court ordered child support payments where the court found only that "defendant has possessed the means with which to comply with the Order for child support subsequent to the date said Order was registered in the State of North Carolina" but made no finding that defendant had the present ability to pay the arrearage by either making immediate payment or by taking reasonable measures to pay the arrearage, such as borrowing the money, selling certain property, or liquidating other assets.

Teachey v. Teachey

APPEAL by defendant from *Freeman, Judge*. Order signed 14 June 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 26 February 1980.

Defendant appeals from an order imprisoning him for civil contempt for failing to comply with the terms of a support order for his minor children. The order was based upon a South Carolina judgment for support which was registered with the Clerk of Superior Court of Forsyth County pursuant to the Uniform Reciprocal Enforcement of Support Act, N.C.G.S. Chapter 52A.

At the hearing, defendant and his counsel were present and the parties stipulated defendant was $4,825 in arrears through June 1979. The court concluded defendant was in willful contempt and ordered his imprisonment until he paid the sum of $4,825 to the clerk of superior court or was otherwise released according to law.

Pfefferkorn & Cooley, by David C. Pishko, for plaintiff appellee.

House, Blanco & Randolph, by Clyde C. Randolph, Jr., and Reginald F. Combs, for defendant appellant.

MARTIN (Harry C.), Judge.

This contempt proceeding is governed by N.C.G.S. 5A-21(a) which provides in pertinent part: "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 trial court found as a fact that "[d]efendant has possessed the means with which to comply with the Order for child support subsequent to the date said Order was registered in the State of North Carolina, December 14, 1978." Defendant excepted to this finding and argues the evidence does not support it. This finding is essential to a valid contempt order.

> Hence, 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 must find not only failure to comply but that the defendant presently possesses *the means* to comply.

Mauney v. Mauney, 268 N.C. 254, 257-58, 150 S.E. 2d 391, 393-94 (1966) (emphasis in original).

"Manifestly, one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered." *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E. 2d 403, 404 (1948). To support a finding of willfulness, there must be evidence to establish as an affirmative fact that defendant possessed the means to comply with the order for support at some time after the entry of the order. *Id.*

[1] Where the evidence supports a finding that defendant did have the ability to comply with a support order at some time while it was effective but failed to do so, the question remains whether he can be punished for civil contempt by imprisonment until he complies with the order, or whether his behavior is only punishable as criminal contempt by imprisonment for a maximum of thirty days. The answer lies in the above quoted portion of N.C.G.S. 5A-21. For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order. Mauney, *supra*. The Official Commentary on the statute, 1979 Cumulative Supplement to Volume 1B, supports this view. In it we find:

> Subsections (a) and (b) make clear that civil contempt is appropriate only so long as the court order is capable of being complied with. . . . [B]y specifying that the contempt continues while the person is "able to take reasonable measures that would enable him to comply," is intended to make clear, for example, that the person who does not have the money to make court-ordered payments but who could take a job which would enable him to make those payments, remains in contempt by not taking such a job. In most cases, a person in civil contempt may be held for so long as his civil contempt continues; he holds the keys to his own jail by virtue of his ability to comply.

[2] In this case, the court failed to find facts that defendant had the present ability to pay the arrearage of $4,825 by either making immediate payment or by taking reasonable measures, such as borrowing the money, selling defendant's mountain property in Virginia, or liquidating other assets, in order to pay the arrearage. The finding by the court quoted above falls short of a finding of present ability to comply as contemplated under N.C.G.S. 5A-21(a) and will not support the order of civil contempt.

The order must be vacated and the case remanded to the District Court of Forsyth County for further proceedings.

Vacated and remanded.

Judges PARKER and HILL concur.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, PLAINTIFF v. GALLOS PLASTICS CORPORATION, HUSKY INJECTION MOLDING SYSTEMS, LTD., AND AETNA INSURANCE COMPANY, DEFENDANTS

No. 7921SC805

(Filed 15 April 1980)

Insurance § 121— fire in rented premises—no coverage

Provision of an insurance policy issued by plaintiff excluding from coverage "property owned or occupied by or rented to the insured . . ." applied to the loss in question so as to exclude coverage where it was uncontradicted that the premises damaged by fire were both occupied by and rented to the insured.

APPEAL by defendant Gallos Plastics Corp. from *Walker (Hal H.), Judge.* Judgment entered 16 May 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 March 1980.

Plaintiff brings this declaratory judgment action to determine whether it is liable under a Special Multi-Peril insurance policy it issued to defendant Gallos Plastics Corporation (Gallos). Plaintiff insurer alleges that in April 1975 Gallos was lessee of the building which housed its manufacturing operations, and that building was damaged by fire. Defendant Aetna Insurance Com-

pany (Aetna), which insured the owner of the building, brought suit against Gallos and defendant Husky Injection Molding Systems, Ltd., alleging that their negligence caused the fire. Gallos demanded that plaintiff provide coverage under its policy and assume the defense of the suit by Aetna. Plaintiff seeks a judgment that under the terms of the policy it has no duty to defend or to provide coverage to Gallos.

The trial court found facts and concluded that Exclusion (i) of Coverage C, Section II of plaintiff's policy issued to defendant Gallos excluded the loss from coverage. Gallos appeals.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Kenneth R. Keller, for plaintiff appellee.

Whiting, Horton & Hendrick, by Philip B. Whiting and Hamilton C. Horton, Jr., for defendant appellant Gallos.

ARNOLD, Judge.

We find no error in the trial court's interpretation of the policy here. The clause which grants coverage reads in pertinent part:

> I. COVERAGE C—BODILY INJURY AND PROPERTY DAMAGE LIABILITY:
>
> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies . . . arising out of the . . . use of the insured premises . . . and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage. . . .

Exclusion (i), upon which the court relied in determining that coverage does not extend to the present loss, provides: "This insurance does not apply . . . (i) to property damage to (1) property owned or *occupied by or rented to* the insured . . . ." (Emphasis added.)

It is uncontradicted that the premises which were damaged by the fire were both occupied by and rented to the insured, defendant Gallos. Defendant nevertheless argues that the word

"property" in the exclusion refers only to personal property, or in the alternative that the granting clause and the exclusion read together create an ambiguity which must be resolved in defendant's favor. We are unpersuaded.

Defendant's argument that "property" means only personal property is not a reasonable interpretation of the word in context. Property "occupied by" the insured, a corporation engaged in manufacturing, ordinarily would be understood to mean realty, not personalty. "[I]n the construction of an insurance policy, nontechnical words, not defined in the policy, are to be given the same meaning they usually receive in ordinary speech . . . ." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E. 2d 894, 897 (1978).

Nor do we find that the granting clause and the exclusion, read together, create an ambiguity. The granting clause provides coverage for all liability for bodily injury and property damage arising out of the use of the insured premises. Exclusion (i)(1) removes from coverage property with a particular relationship to the insured. It does not, as defendant argues, make the granting clause a nullity, since coverage remains for liability arising out of bodily injury and damage to other property. "[A] contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean . . . ." *Id.* at 43, 243 S.E. 2d 897. We believe that a reasonable person in Gallos' position would have understood that Exclusion (i)(1) removed from coverage the premises involved here.

Defendant's further argument regarding exceptions in Exclusions (a) and (e) is without merit. And while it is true, as defendant argues, that Exclusion (i)(1) removes from coverage "a substantial risk . . . for which liability coverage is needed," plaintiff points out that coverage to lessees for leased premises is available in a separate policy which defendant did not purchase. "Where there is no ambiguity in the language used in the policy, the courts must enforce the contract as the parties have made it and may not impose liability upon the company which it did not assume and for which the policyholder did not pay." *Id.* at 43, 243 S.E. 2d 897.

The judgment of the trial court is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. REGINALD ALEX ROSS

No. 796SC943

(Filed 15 April 1980)

Automobiles § 134— unauthorized use of vehicle—lesser included offense of automobile larceny

The crime of unauthorized use of a motor vehicle in violation of G.S. 14-72.2(a) is a lesser included offense of larceny of an automobile. The trial court in this prosecution for larceny of an automobile erred in refusing to instruct on unauthorized use of a motor vehicle where there was evidence that a car was taken from a garage where it had been taken for repairs; defendant was later found in the car by an officer; defendant had no permission to take or operate the car; and defendant's testimony tended to show that he had no intent to steal the car.

APPEAL by defendant from *Smith (David I.), Judge.* Judgment entered 30 May 1979 in Superior Court, HERTFORD County. Heard in the Court of Appeals 4 March 1980.

Defendant was charged with and convicted of felonious larceny of an automobile. The state's evidence showed Deputy Sheriff Holloman saw defendant in a blue Volkswagen car about 2:30 a.m. parked near a store. A check of the car revealed it was owned by Revelle Builders of Murfreesboro and had been left by the owner at Edwards Garage for repairs. As the officer was making his investigation, the defendant tried to "pull the car away" but it was out of gas and choked off before it reached the street. The officer then took the keys. No one gave the defendant permission to take or use the car and it had a fair market value of about $800.

Defendant's evidence showed he was out walking his dogs and four or five guys picked him up for a ride. They rode off, stopped and picked up another car. Defendant with his dogs got in the other car and went home to change clothes. Then defendant and the other guys went riding around for about a mile and a half

and ran out of gas. The others left to go get some gas, but he stayed at the car as he thought he could arouse someone at the service station where the car had stopped. Shortly after the others left, the officer arrived. The defendant did not know anything about the car being stolen; keeping the car wasn't on his mind; he didn't care anything about the car.

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

Rosbon D. B. Whedbee for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant's counsel, in apt time, requested the trial judge to instruct the jury on the crime of unauthorized use of a motor vehicle, N.C.G.S. 14-72.2(a), as a lesser included offense.

The court declined so to do and defendant assigns this as error. We agree with defendant and for this reason a new trial must be ordered.

It is true that the Supreme Court in *State v. Wall*, 271 N.C. 675, 157 S.E. 2d 363 (1967), held that a violation of former N.C.G.S. 20-105, sometimes referred to as "temporary larceny" of a vehicle, was not a lesser included offense of larceny. *See State v. Covington*, 267 N.C. 292, 148 S.E. 2d 138 (1966); *State v. McCrary*, 263 N.C. 490, 139 S.E. 2d 739 (1965); *State v. Stinnett*, 203 N.C. 829, 167 S.E. 63 (1933). Effective 1 January 1975, N.C.G.S. 20-105 was repealed and N.C.G.S. 14-72.2 was adopted. The legislature thereby removed the offense from the chapter on motor vehicles and placed it in Chapter 14, Criminal Law, immediately following N.C.G.S. 14-72, the statute on larceny. Although the legislature did not expressly so state, we find it intended N.C.G.S. 14-72.2(a) to be a lesser included offense of N.C.G.S. 14-72 where the evidence would support it. This view is also adopted in the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 216.10 (1979).

All of the essential elements of the crime of unauthorized use of a conveyance, N.C.G.S. 14-72.2(a), are included in larceny, N.C.G.S. 14-72, and we hold that it may be a lesser included offense of larceny where there is evidence to support the charge. *State v. Reese*, 31 N.C. App. 575, 230 S.E. 2d 213 (1976).

Here the evidence does support the charge. There is no eyewitness testimony as to who took the Volkswagen car. Defendant is later found in the car by the officer. He had no consent to take or operate the car. Defendant's testimony tends to show he had no intent to steal the car. This evidence is sufficient to require the submission of the lesser included offense to the jury.

We note that the state relied upon the doctrine of possession by defendant of recently stolen property. The court, however, failed to instruct the jury upon this theory. We do not pass upon this and defendant's other assignments of error as they may not occur upon retrial.

New trial.

Judges PARKER and HILL concur.

JESSIE BOTTOMS MABE v. RANDY DILLON, D/B/A WALKERTOWN EXXON

No. 7921DC941

(Filed 15 April 1980)

1. **Trover and Conversion § 3; Rules of Civil Procedure § 8.2— answer not filed—allegations of complaint admitted**

Where plaintiff alleged that she owned a car, that defendant wrongfully took possession of the car, and that he deprived plaintiff of possession of the car, such allegations were deemed admitted by defendant's failure to answer, and the trial court erred in directing verdict for defendant.

2. **Bailment § 5; Estoppel § 4.4— bailment of car—no indicia of ownership—no estoppel to assert ownership**

Plaintiff was not estopped to assert her title to a car against defendant, even if he were an innocent purchaser, merely because she left it in the possession of a third person, since she did not give the third person any indicia of ownership of the automobile.

APPEAL by plaintiff from *Alexander (Abner), Judge.* Judgment entered 28 June 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 27 March 1980.

Plaintiff filed a verified complaint, which was personally served on defendant on 2 April 1979, alleging she is the owner of

a 1967 Chrysler automobile and that defendant has wrongfully taken possession of it and converted it to his own use. Defendant has not filed any answer to the complaint.

Upon the hearing on 27 June 1979, plaintiff's evidence showed she owned the Chrysler car and had left it parked on the property of Ronald and Stella Church. Stella Church decided to separate from Ronald, so plaintiff and Stella left in Stella's car, leaving plaintiff's car. The car had a radiator leak and plaintiff had acquired another radiator which Ronald Church had promised to install. Plaintiff's certificate of title to the car was introduced into evidence. Ronald Church testified he wanted to get rid of the car and called defendant to come and get it. He did not tell defendant he was the owner of the car and defendant did not ask him any questions. Church did not have a title or key to the car and defendant towed the car to his service station. The next day or so, Church told defendant that the car was not his. Defendant had started to strip the car the day he got it as he wanted to use it in a "demolition derby." The car had a value of $500 before defendant took it and has no value now.

At the close of the evidence, defendant moved for a directed verdict, which was allowed by the court.

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

Wright and Parrish, by Carl F. Parrish, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] Defendant failed to file any answer or other responsive pleading to plaintiff's verified complaint. Plaintiff alleged (1) she is a citizen and resident of Forsyth County, (2) she is the owner of a 1967 Chrysler car, certificate of title attached as an exhibit, (3) on 12 March 1979 defendant wrongfully took possession of plaintiff's car and has deprived plaintiff of possession of the car, (4) plaintiff's car has a value of $500. Plaintiff's complaint states a good cause of action; defendant does not contend otherwise. The allegations in plaintiff's complaint cast upon defendant the burden to file a responsive answer or suffer the effect of the failure to deny the allegations. Allegations in a complaint to which a respon-

sive pleading is required are admitted when not denied by defendant. Rule 8(d), N.C.R. Civ. Proc.; *Clary v. Board of Education*, 286 N.C. 525, 212 S.E. 2d 160 (1975).

In *Fagan v. Hazzard*, 29 N.C. App. 618, 225 S.E. 2d 640 (1976), plaintiff sought damages for conversion of personal property. Defendant failed to file answer and plaintiff did not request entry of default or a default judgment. Our Court held that Rule 8(d) of the North Carolina Rules of Civil Procedure applied and that the averments of the complaint with respect to the conversion were admitted, leaving only the issue of damages to be resolved.

It is obvious in this case that the trial judge was not cognizant that defendant had failed to answer plaintiff's complaint. Nor do counsel address this question in their briefs. Nevertheless, we are bound by the record on appeal. *Griffin v. Barnes*, 242 N.C. 306, 87 S.E. 2d 560 (1955).

We hold the allegations of plaintiff's complaint, except that of damages, are admitted by defendant's failure to answer and the only issue for resolution at trial is that of damages. The trial court erred in granting defendant's motion for directed verdict.

[2] In addition, the judgment must be reversed because the evidence, when considered in the light most favorable to plaintiff, establishes a wrongful conversion by defendant. Even assuming arguendo, which we do not concede, that the evidence establishes as a matter of law a bailment of the car between plaintiff and Ron Church, plaintiff can maintain an action for damages for conversion of the property by defendant. *Peed v. Burleson's, Inc.*, 242 N.C. 628, 89 S.E. 2d 256 (1955). Plaintiff is not estopped to assert her title to the car against defendant merely because she left it in the possession of Church, unless she clothed him with some indicia of title. This is true even though the defendant may have been an innocent purchaser. *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953). Plaintiff did not give Church any indicia of ownership of the automobile, such as the key or the certificate of title.

When Church transferred possession of plaintiff's car to defendant without authority, defendant did not acquire any title to the car as against plaintiff. Plaintiff may recover the car from defendant or hold him liable for its value. *Id.*; 8 Am. Jur. 2d Bailments § 86 (1963).

The judgment of the trial court is reversed, and the cause remanded to the District Court of Forsyth County for trial on the issue of damages.

Reversed and remanded.

Judges VAUGHN and CLARK concur.

SPARTAN EQUIPMENT COMPANY, INC. v. TROITINO AND BROWN, INCORPORATED

No. 7926SC918

(Filed 15 April 1980)

Appeal and Error § 24.1— exceptions not properly set forth—abandonment

Exceptions not preserved and set forth as required by the Rules of Appellate Procedure are deemed abandoned.

APPEAL by defendant from *Johnson, Judge.* Order filed 8 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 March 1980.

Grier, Parker, Poe, Thompson; Bernstein, Gage & Preston, by Gaston H. Gage and Christian R. Troy, for plaintiff appellee.

Snyder, Leonard, Biggers & Dodd, by Gary Dodd, for defendant appellant.

HILL, Judge.

Appellant violated Rule 10(b) and (c) of the Rules of Appellate Procedure by failing to number its exceptions in the record and by failing to list the exceptions after the assignments of error identified by their number and by pages in the record at which they appear. It further violated Appellate Rule 28(b)(1) by failing to give a statement of questions presented for review in its brief. It likewise failed to present the pertinent assignments of error and exceptions after each argument in its brief as required by Appellate Rule 28(b)(3). For these reasons, the appeal is subject to dismissal.

Exceptions not preserved and set forth as required by the Rules are deemed abandoned. The Rules of Appellate Procedure are mandatory. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979); *State v. Brown*, 42 N.C. App. 724, 257 S.E. 2d 668 (1979).

For the reasons stated above, the appeal is

Dismissed.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. ANTONIA DEBORAH AFFLERBACK

No. 7910SC1075

(Filed 15 April 1980)

1. **Criminal Law §§ 23, 84, 146.5— suppression motion denied—notice of appeal required before plea bargain completed**

Defendant's appeal from denial of his motion to suppress was not properly before the court on appeal where defendant entered a bargained plea of guilty but gave the State no notice at any time of his intention to appeal. G.S. 15A-979(b).

2. **Criminal Law § 84; Constitutional Law § 28; Searches and Seizures § 3— officer's search beyond territorial jurisdiction—no violation of due process**

It is not fundamentally unfair or prejudicial to a defendant, and therefore violative of his right not to be deprived of his liberty or property without due process of law, that evidence is obtained by police officers outside their territorial jurisdiction while conducting an undercover investigation.

APPEAL by defendant from *Lee, Judge.* Judgment entered 28 June 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 27 March 1980.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Kyle S. Hall, for defendant appellant.

VAUGHN, Judge.

Defendant moved to suppress evidence pursuant to G.S. 15A-974 based on violations of the due process clauses of the

State and Federal Constitutions. N.C. Const. art. I, § 19, U.S. Const. amend. V. The motion was heard on the following stipulated facts.

> 1. That Raleigh Police Officer, K. N. Privette, in a separate and unrelated investigation, had received information that the defendant was trafficking in drugs, but he received no specific information that such trafficking was being done in Raleigh.
>
> 2. That the defendant was, and is, a resident of Zebulon, North Carolina, a town located more than twenty miles east of the city limits of Raleigh.
>
> 3. That all alleged drug transactions between the defendant and Raleigh Police Officers, K. N. Privette and D. C. Williams, took place outside the territorial jurisdiction of the City of Raleigh and more than one mile beyond the city limits thereof.
>
> 4. That the alleged drug transactions were not an extension of any undercover campaign going on within the City of Raleigh, or within one mile beyond said city limits.
>
> 5. That at the time of the alleged drug transactions Officers K. N. Privette and D. C. Williams were on duty as Raleigh Police Officers.
>
> 6. That neither of the officers, K. N. Privette or D. C. Williams, were operating at the request of any other law enforcement agency having territorial jurisdiction within G.S. 160A-288.

The trial court found the facts to be as stipulated and further found "that on September the 20th, 1978, the defendant was encountered in Knightdale by Officers Williams and Privette and on January the 3rd, 1979, in Zebulon; that both Knightdale and Zebulon are beyond the territorial jurisdiction of Raleigh Police Officers." Upon these findings of fact, the trial court concluded that

> nothing in the laws or Constitution of the State of North Carolina, nor anything in the Fifth Amendment of the Constitution of the United States, or the Fourteenth Amendment to the Constitution of the United States requires that the

> evidence sought to be suppressed be suppressed, and, therefore, the defendant's motion is denied.

Defendant then entered a plea of guilty to one count charging the sale and delivery of marijuana which was accepted and upon which a suspended sentence was entered.

[1] Appeal is pursuant to G.S. 15A-979(b) which permits appellate review of a final order denying a motion to suppress even though judgment has been entered upon a plea of guilty.

> [W]hen a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute. We cannot believe that our legislature, in adopting G.S. 15A-979(b), intended any less fair posture for appeal from a guilty plea.

State v. Reynolds, 298 N.C. 380, 397, 259 S.E. 2d 843, 853 (1979). There is no evidence in the record that the State or the trial court was aware at the sentencing hearing that defendant intended to appeal the denial of the suppression motion. In the plea, it was made clear by the State that upon entry and acceptance of this bargained plea of guilty, the State would dismiss five related charges. There is no notice by defendant in the plea or anywhere else in the record that it was his intent to appeal denial of his motion to suppress evidence. Such notice must be given under G.S. 15A-979(b) as interpreted by our Supreme Court. Consequently, the appeal is not properly before us.

Because this is a recent interpretation of the statute which gives defendant his right to appeal and which was handed down just before this appeal was docketed, we will, nevertheless, discuss defendant's claim on its merits. Defendant seeks to have evidence suppressed because of the action of the officers outside of their territorial jurisdiction. Defendant has no statutory authority on which to base the suppression even if the officers' actions were contrary to statutory authority which we do not concede. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706, *reh. den.*, 285 N.C. 597 (1973); *State v. Matthews*, 40 N.C. App. 41, 251 S.E. 2d 897 (1979). Evidence will be suppressed only if defendant's constitutional rights have been violated and the sanction for such a violation is suppression.

If this case were before us as a Fourth Amendment search and seizure, that is to say on these facts that the undercover officers had arrested defendant outside their territorial jurisdiction, no violation of defendant's constitutional rights would have occurred. That issue has been resolved in *State v. Mangum*, 30 N.C. App. 311, 226 S.E. 2d 852 (1976), where this Court held that not withstanding a technical violation of a police officer's jurisdictional statute, the officer had probable cause to arrest the defendant and evidence seized incident thereto was admissible.

[2] In the case at hand, defendant bases his constitutional claims on a violation of his right not to be deprived of his liberty or property without due process of law. U.S. Const. amend. V and amend. XIV; N.C. Const. art. 1, § 19. The due process clauses of both the State and Federal Constitutions guarantee to all criminal defendants that any trial and any resulting conviction will be consonant with fundamental principles of liberty and justice. *State v. White*, 274 N.C. 220, 162 S.E. 2d 473 (1968). It is not fundamentally unfair nor prejudicial to a defendant that evidence is obtained by police officers outside of their territorial jurisdiction while conducting an undercover investigation. It is not a violation of defendant's constitutional right embodied in the due process clauses of either the State or Federal Constitutions.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 APRIL 1980

BANKS v. YANCEY COUNTY No. 7924SC946	Yancey (78CVS103)	Affirmed
BECKER v. BECKER No. 793DC1062	Craven (77CV845)	Affirmed
BUSHNELL v. BUSHNELL No. 798DC1043	Wayne (79CVD684)	Affirmed
CASE v. SANFORD No. 7927DC812	Gaston (77CVD1568)	No Error
COLVIN v. SHERMAN No. 7912SC937	Cumberland (77CVS232)	Dismissed
CRAVER v. CRAVER No. 7912DC676	Cumberland (74CVD2945)	Affirmed
CUSTOM BUILDERS v. MINICK No. 7912DC806	Cumberland (77CVD836)	Affirmed
HAMMON v. HAMMON No. 7910DC1040	Wake (77CVD79)	Affirmed
HEKHUIS v. HEKHUIS No. 795DC807	New Hanover (78CVD1718)	Appeal Dismissed
IN RE BOWERS No. 7920SC947	Stanly (74SP141)	Affirmed
IN RE JACKSON No. 7923DC722	Ashe (76J56)	Appeal Dismissed
IN RE JENKINS No. 7918DC728	Guilford (72J525)	Affirmed
IN RE MULLIGAN No. 799DC605	Granville/Guilford (79SP256)	Reversed
POLLETTE v. WAGGONER No. 7926DC758	Mecklenburg (78CVD1859)	Reversed
SPEER v. SPEER No. 7910DC265	Wake (77CVD4853)	Affirmed
STATE v. ADAMS No. 7917SC1130	Rockingham (79CR1742) (79CR1743)	No Error
STATE v. BERGER No. 7928SC700	Buncombe (78CRS27853) (78CRS27854)	Affirmed

STATE v. BURGESS No. 791SC827	Dare (78CRS2060)	No Error
STATE v. BYRD No. 7912SC771	Cumberland (78CRS45791)	No Error
STATE v. CASH No. 7918SC796	Guilford (78CRS13550)	New Trial
STATE v. CRAWFORD No. 7926SC1073	Mecklenburg (79CRS17895)	Vacated and Remanded for Resentencing
STATE v. GRANBERRY No. 7923SC897	Wilson (78CRS9910) (78CRS9921)	Vacated
	(78CRS9907) (78CRS9917) (78CRS9918) (78CRS9922)	Vacated and Remanded for Resentencing
STATE v. McCASKEY No. 7912SC961	Cumberland (79CRS6450)	No Error
STATE v. McGHEE No. 7915SC1016	Alamance (78CRS15248)	No Error
STATE v. MANNS No. 7918SC1017	Guilford (78CRS17357)	No Error
STATE v. PERRIN No. 7921SC1042	Forsyth (79CR5664)	No Error
STATE v. PHILLIPS No. 7926SC659	Mecklenburg (78CRS104018)	No Error
STATE v. PHILLIPS No. 7917SC1068	Surry (78CR1402) (78CR1403)	No Error
STATE v. SANDERLIN No. 783SC1153	Craven (78CR1621)	No Error
STATE v. WOODARD No. 794SC1151	Duplin (79CRS2583)	No Error
TAYLOR v. TAYLOR No. 7911DC1044	Harnett (79CVD0536)	Affirmed

ORANGE COUNTY, SENSIBLE HIGHWAYS AND PROTECTED ENVIRONMENTS, INC. (SHAPE), DARRELL DAWSON, ROSA ANN DAWSON, CURTIS R. BOOKER, MARY M. BOOKER, MAURICE A. LESAGE, ROWLAND E. FULLILOVE, CHARLES W. JOHNSTON, CAROLYN C. JOHNSTON, GERALD M. WOMBLE, KARLEEN S. WOMBLE, APPELLANTS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, THOMAS W. BRADSHAW, JR., INDIVIDUALLY, AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, AND AS CHAIRMAN OF THE NORTH CAROLINA BOARD OF TRANSPORTATION, T. L. WATERS, INDIVIDUALLY, AND AS MANAGER OF PLANNING AND RESEARCH, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, BILLY ROSE, INDIVIDUALLY, AND AS ADMINISTRATOR, DIVISION OF HIGHWAYS, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, MARC BASNIGHT, JACK E. BRYANT, DAVID W. BUMGARDNER, JR., JOHN QUINCY BURNETTE, JEANETTE D. CARL, ILEY L. DEAN, MICHAEL B. FLEMING, JOHN K. GALLAHER, GARLAND B. GARRETT, JR., JAMES B. GARRISON, JOHN M. GILKEY, GEORGE G. HARPER, WILLIAM C. HERRING, MARTHA C. HOLLERS, DAVID W. HOYLE, CHARLES R. JONAS, JR., T. G. JOYNER, OSCAR LEDFORD, HELEN H. LITTLE, MARVIN R. PHILLIPS, MOSES A. RAY, JOSEPH E. THOMAS, ARTHUR WILLIAMSON, ALL INDIVIDUALLY, AND AS MEMBERS OF THE NORTH CAROLINA BOARD OF TRANSPORTATION, APPELLEES

No. 7910SC522

(Filed 6 May 1980)

1. **Administrative Law § 4; Highways and Cartways § 1; State § 1— government action—environmental impact**

It is the policy of this State and the Federal Government that environmental impacts be considered before major governmental actions involving the expenditure of public funds are taken; nonetheless, once these environmental factors are properly taken into consideration, pursuant to prescribed procedures, governmental agencies may effect the completion of a proposed project notwithstanding the fact that adverse environmental consequences may occur.

2. **Administrative Law § 8— review of agency decision—environmental consequences**

A court may review the manner in which an agency decision has been made to ensure that environmental consequences have been considered in the manner prescribed by law.

3. **Administrative Law § 5; Highways and Cartways § 1— location of highway—decision of State Board of Transportation—plaintiffs as aggrieved parties**

Plaintiffs were all "aggrieved" by a decision of the State Board of Transportation on the location of an interstate highway within the meaning of G.S. 150A-43 where the individual plaintiffs are property owners within the proposed corridor of the highway, the members of plaintiff nonprofit corporation are citizens and taxpayers who live in or near the proposed corridor, and

plaintiff county's tax base and planning jurisdiction will be affected by the proposed highway. Furthermore, the individual plaintiffs as taxpayers are "aggrieved" persons under G.S. 150A-43.

4. **Administrative Law § 5; Highways and Cartways § 1— failure of agency to prepare environmental impact statement—procedural injury—aggrieved party**

The "procedural injury" implicit in the failure of an agency to prepare an environmental impact statement is itself a sufficient "injury in fact" to support standing as an "aggrieved party" under G.S. 150A-43 as long as such injury is alleged by a plaintiff having sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have.

5. **Administrative Law § 5; Constitutional Law § 7.1— unconstitutional delegation of legislative power—no judicial review of agency decision**

Plaintiffs cannot obtain judicial review under G.S. 150A-43 of their claim that G.S. 143B-350(f)(8) unconstitutionally delegates legislative power to the State Board of Transportation since the claim involves no agency "decision," but such claim may be heard pursuant to Art. IV, § 1 of the N.C. Constitution.

6. **Administrative Law § 5; Highways and Cartways § 1— denial of hearing to plaintiffs—final agency decision—judicial review**

A decision by the State Board of Transportation to deny plaintiffs a hearing before the Board concerning the location of an interstate highway was a "final" decision within the meaning of G.S. 150A-43 since the decision affected a right which plaintiffs had pursuant to the Board's own administrative regulations.

7. **Administrative Law § 5; Highways and Cartways § 1— federal-aid highway—adequacy of environmental impact statement—judicial review—necessity for federal location approval**

Appellants cannot obtain judicial review under G.S. 150A-43 of a claim pertaining to the inadequacy of the environmental impact statement for a proposed federal-aid highway under either federal statutes or the N.C. Environmental Protection Act unless they show that the State Department of Transportation has requested and received location approval for the highway from the Federal Highway Administration.

8. **Administrative Law § 5; Highways and Cartways § 1— location of interstate highway—N.C. Environmental Protection Act involved—contested case**

The decision of the State Board of Transportation as to the location of an interstate highway constitutes a "contested case" within the meaning of G.S. 150A-43 where the North Carolina Environmental Protection Act is involved.

9. **Administrative Law § 5; Highways and Cartways § 1— right to petition State Board of Transportation—exhaustion of administrative remedies—substantial compliance**

Appellants complied with the substance of the right of petition to the State Board of Transportation through the county commissioners given by G.S. 136-62 concerning the location of a highway when they joined with Orange

County to present their grievances to the Board and subsequently to bring this lawsuit.

10. Administrative Law § 5; Highways and Cartways § 1— location and environmental impact of highway—failure to appeal to hearing officer—administrative regulations not readily available—judicial review

Appellants' failure to exhaust their administrative remedy of appeal to a hearing officer appointed by the Governor did not bar judicial review of a decision of the State Board of Transportation concerning the location and environmental impact of a proposed highway since the administrative remedy prescribed by environmental regulations is inadequate because (1) the administrative regulations have not been published as required by G.S. 150A-63; (2) over 18,000 pages of regulations exist; (3) anyone seeking the regulations would have to sift through the files of regulations in the Attorney General's Office in Raleigh; (4) the regulations which have been officially codified are not indexed by the corresponding statutory reference; and (5) even the most skilled attorney would at best have only a random chance of discovering the existence or absence of the regulations for which he is looking.

11. Highways and Cartways § 9; State § 4.3— sovereign immunity—action against State Board of Transportation

The doctrine of sovereign immunity did not bar plaintiff's action against the State Board of Transportation alleging that the Board made a decision as to the location of the route for an interestate highway in an unlawful manner since the doctrine of sovereign immunity does not bar an action (1) when public officers invade or threaten to invade the personal or property rights of a citizen in disregard of law or (2) when plaintiffs assert their status as taxpayers to prevent the expenditure of money unauthorized by statute or in disregard of law.

12. Constitutional Law § 7.1; Highways and Cartways § 1— authority of Department and Board of Transportation to plan highways—no unlawful delegation of legislative authority

The delegation of the authority to the N.C. Department of Transportation and the Board of Transportation to plan and construct an interstate highway did not constitute an unlawful delegation of legislative authority to an administrative body which was unrestrained by legislative standards or sufficient procedural safeguards or political accountability in violation of Art. I, § 6 and Art. II, § 1 of the N.C. Constitution.

13. Highways and Cartways § 9— action to enjoin Department and Board of Transportation—denial of hearing—federal and Board regulations—claim for relief

Plaintiffs stated claims under federal regulations to enjoin the Department of Transportation and Board of Transportation from taking further action on plans for an interstate highway without observing the statutory and constitutional rights of plaintiffs based on (1) denial of a right to be heard by the Board or other hearing officer in the area affected by the highway construction project and (2) inadequate public notice of the highway corridor meetings held by the Board of Transportation and the Department of

Transportation. Furthermore, plaintiffs stated a claim for injunctive relief based on failure of the Board to grant them a hearing in violation of the Board's regulation in effect at the time plaintiffs sought to be heard which stated that "any person having business with the Board of Transportation *shall* be heard by the Board."

14. Highways and Cartways § 9— location of federal-aid highway—no final environmental impact statement—no claim for injunctive relief against Board of Transportation

Plaintiffs' contention that a final environmental impact statement had not been prepared prior to a decision by the Board of Transportation as to the location of a proposed federal-aid highway stated no claim for injunctive relief against the Board since federal regulations require that the state highway agency select a highway corridor based on the draft environmental impact statement, and a final statement is not required until federal location approval has been obtained.

15. Highways and Cartways § 9— inadequacy of environmental impact statement—claim for injunctive relief against Board of Transportation

The appellate court cannot say as a matter of law that plaintiffs have failed to state a claim for injunctive relief against the State Board of Transportation concerning its decision as to the location of an interstate highway based on plaintiffs' allegation that the environmental impact statement relied on by the Board was materially misleading in that it presented two alternative routes which were not real alternatives since they were going to be built regardless of the route selected for the interstate highway.

16. Injunctions § 3; Mandamus § 3.1; Public Officers § 8— public officers—in personam orders requiring performance of ministerial duties

The courts of this State have the power, pursuant to Art. IV, § 1 of the N.C. Constitution, to issue *in personam* orders requiring public officials to act in compliance with their ministerial or nondiscretionary public duties, and it makes no practical difference whether such orders are called writs of mandamus or preliminary injunctions.

17. Highways and Cartways § 9; Injunctions § 3— State Board of Transportation—hearing, notice, environmental impact statement—mandatory injunction

While the duty to decide where a highway corridor will be located is a discretionary duty for which no mandatory injunction will lie against the Secretary of Transportation, the Manager of the Planning and Research Branch of the Department of Transportation, the Administrator of the Division of Highways, and members of the Board of Transportation in their individual capacities, the duties of such officials to hear the plaintiffs, to provide notice, and to provide an environmental impact statement are ministerial duties which can be enforced by a mandatory injunction.

APPEAL by plaintiffs from *Braswell, Judge.* Order entered 1 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 11 January 1980.

The plaintiffs fall into three categories. In the first category are three local units of government: Orange County, the Town of Chapel Hill, and the Town of Carrboro. Of these, only Orange County is an appellant herein. The second category includes the Dawsons, the Bookers and the Wombles who are citizens, taxpayers and residents of Durham County, and Fullilove, Lesage, and the Johnstons, who are all citizens, taxpayers, residents, and landowners in Orange County, all of whom would have land taken from them by the proposed highway project. The third category includes a North Carolina nonprofit corporation, Sensible Highways and Protected Environments, Inc. (SHAPE), some members of which would have lands, farms, homes and businesses taken for the right-of-way of the proposed project, and other members of which are citizens, taxpayers and residents of Orange and Durham Counties who live near the proposed project and who claim they would be adversely affected by it.

The defendant appellees are the North Carolina Department of Transportation (NCDOT), the Secretary of NCDOT, the NCDOT Manager of Planning and Research, the NCDOT Administrator of Highways, and the North Carolina Board of Transportation. With the exception of the NCDOT, all defendants are sued in their representative and individual capacities.

The appellants' complaint, filed 8 August 1978, seeks judicial review pursuant to G.S. § 150A-43 and further seeks temporary and permanent injunctive relief to restrain defendants from exceeding their constitutional and statutory authority in connection with the approval process for Interstate Route 40, from Interstate Route 85 west of Durham to Interstate Route 40 southeast of Durham in Durham and Orange Counties. The appellants contend that they are threatened with immediate and irreparable injury in the following manner:

"a) disruption of town and county planning for an orderly process of development of southern Orange County,

b) the permanent destruction of hundreds of acres of prime farmlands, woodlands and wildlife habitats,

c) increased levels of water, air and noise pollution,

d) the taking of the property, homes, farms and businesses of the members of SHAPE and many of the citizens and residents of Orange County,

e) injury to historical sites within and immediately adjacent to the 1-B corridor in southern Orange County,

f) the disruption of existing communities and social intercourse and patterns in the area,

g) increasing pressure on scarce community services such as water, sewer, fire and police protection that would be necessary to accommodate the expected increase in population caused by the highway project, and

h) the unnecessary expenditure of state and federal tax monies."

The appellants contend that defendant appellee North Carolina Board of Transportation and its individual members acted in an arbitrary and capricious manner and in violation of statutory and constitutional provisions when they formally approved the construction of "Alternative 1-B" for Interstate Route 40 from Interstate Route 85 west of Durham through Orange County to Interstate Route 40 southeast of Durham. In particular, appellants assert (relevant to this appeal) that: (1) no final Environmental Impact Statement (EIS) had ever been prepared; (2) the Revised Draft Environmental Impact Statement of 5 May 1976 relied upon by the Board was materially misleading in that it presented "Alternatives 3 and 4" to Interstate Route 40 as alternative routes to Route 1-B when Alternatives 3 and 4 were already in various stages of planning and construction and would be built regardless of "Alternate 1-B"; (3) the delegation of the planning and construction of Interstate Route 40 to the North Carolina Department of Transportation was an unconstitutional delegation of legislative authority because there are no standards to guide administrative action and inadequate procedural safeguards to protect the rights of citizens; (4) the Board of Transportation denied appellants a right to be heard by the Board, including their right to be heard in the area of the State affected by the highway construction project and in so doing violated their own administrative rules; (5) the Board of Transportation failed to make a transcript or keep adequate minutes of the

September 9, 1977 meeting; (6) the Board of Transportation was asked by the chairman to "concur" rather than to "decide" on Alternative 1-B; (7) no information developed by opponents to Alternative 1-B was presented to the Board until a few seconds before their approval vote; (8) there was no adequate public notice of the September 9 meeting of the Board; (9) the Board spent less than five minutes of debate on this $84 million dollar expenditure of public funds; and (10) the form of approval of Alternative 1-B was so vague and meaningless as to leave the Department of Transportation free to make whatever changes it may in its sole discretion deem necessary.

For these reasons the appellants seek a preliminary injunction against any further action by appellees on Alternative 1-B for Interstate 40 and seek a permanent injunction mandating that appellees observe the statutory and constitutional rights of appellants.

On 7 September 1978 appellees moved to dismiss pursuant to N.C. Rules Civ. Proc. 12(b)(1) and 12(b)(6). In their answer, filed 22 December 1978, the appellees deny any liability in their individual capacities and assert sovereign immunity with respect to their representative capacities. As a further answer and defense the appellees make the following assertions:

(1) For over nine years the North Carolina Department of Transportation and its predecessor agencies, the North Carolina State Highway Commission, the North Carolina Board of Transportation, and the Federal Highway Administration have been in the process of planning for the eventual construction, with federal financial assistance, of a segment of the Interstate System of Highways from the terminus of I-40 in the Research Triangle Park southeast of Durham, North Carolina to Interstate Highway 85 west of Durham;

(2) As a part of the planning process, the North Carolina Department of Transportation, with the Federal Highway Administration, has prepared and circulated for comment, in accordance with federal regulations, two draft Environmental Impact Statements, the most recent of which is dated 10 May 1976;

(3) Under federal highway regulations location approval is a precondition to federal authorization to the North Carolina

Department of Transportation to proceed with engineering design, and that design approval is in turn a precondition to federal authorization for a right-of-way acquisition;

(4) Consistent with federal regulations the North Carolina Department of Transportation and its predecessor agencies held two public hearings with respect to the location of the general corridor for the proposed segment of the Interstate Highway;

(5) Federal regulations provide that the draft environmental statement should indicate that all alternatives are under consideration and that a specific alternative will be selected by the state highway agency following a public hearing, that the final environmental impact statement will be prepared for the selected alternative, and, pursuant to these regulations, the North Carolina Department of Transportation has been revising the Draft Environmental Impact Statement to incorporate the comments received from circulation of the statement and the public hearings which have been held;

(6) Prior to the 9 September 1977 meeting of appellee North Carolina Board of Transportation, a copy of the Draft Environmental Impact Statement was furnished to each member of the Board and at the meeting a summary of the comments recorded at the Corridor Public Hearing along with copies of letters and resolutions expressing the views of local institutions and government agencies were handed out to members of the Board;

(7) At the meeting of 9 September 1977, after hearing the recommendations of Staff Administrator Rose, and a discussion of the alternatives by T. L. Waters, the Manager of the Planning and Research Branch, the Board approved the Alternate 1-B corridor location "subject to approval of the Environmental Impact Statement and subject to such modifications as may be necessary and appropriate in the final location and design of the project"; and

(8) Prior to the 9 September 1977 meeting appellants had ample opportunities to express their views to defendants regarding the highway in question and that many of the appellants have fully availed themselves of these opportunities.

On 27 February 1979 the Town of Chapel Hill gave Notice of voluntary dismissal in this action.

Plaintiffs now appeal from the 1 March 1979 order of the lower court dismissing each count of appellants' complaint pursuant to Rules 12(b)(1) and 12(b)(6), N.C. Rules Civ. Proc.

Attorney General Edmisten by Special Deputy Attorney General James B. Richmond for defendant appellees.

Coleman, Bernholz & Dickerson by Roger B. Bernholz for plaintiff appellants.

CLARK, Judge.

I. QUESTIONS PRESENTED

This appeal raises numerous issues of first impression in this jurisdiction involving the interrelationship between North Carolina and federal legislation and regulations pertaining to highway construction, environmental law and administrative procedure. We regret that the determination of these issues has required so much time and that this opinion now requires so much space.

[1] It is the policy of this State and the Federal Government that environmental impacts be considered before major governmental actions involving the expenditure of public funds are taken. Nonetheless, once these environmental factors are properly taken into consideration, pursuant to prescribed procedures, governmental agencies may effect the completion of a proposed project, notwithstanding the fact that adverse environmental consequences may occur. In such cases, it is not for this Court to "substitute its judgment for that of the agency as to the environmental consequences of [the agency's] actions" for it is well established that a court "cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " *Kleppe v. Sierra Club*, 427 U.S. 390, 410, 96 S.Ct. 2718, 2730, 49 L.Ed. 2d 576, 590 (1976) at fn. 21. (Citations omitted.)

[2] A court may, however, review the manner in which an agency decision has been made to ensure that environmental consequences have been considered in the manner prescribed by law. Given the procedural context of this appeal, we do not answer the question of whether the Board of Transportation has in fact failed to comply with the prescribed procedures. Instead we only

answer the question of whether, assuming the facts pled by the appellants are true, appellants have asserted claims which are recognized under the law. The proof of facts to support any of the claims which are legally cognizable is a matter for further determination by the trial court.

We must first address the question of the extent to which the parties and issues are now properly before this Court. Only when this is done can we address the substantive questions as to whether the plaintiffs have stated a claim for which injunctive relief can be granted.

II. JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Appellants assert a right of judicial review under the North Carolina Administrative Procedure Act (NCAPA). G.S. 150A-43 of the NCAPA provides as follows:

> "*Right to judicial review.*—Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article." (1973, c. 1331, s. 1.)

Appellants' claims fall within three categories: (1) appellants' right to a hearing on the proposed highway location, including concomitant rights such as notice and convenient forum; (2) the adequacy of the environmental impact statement (EIS); and (3) the constitutionality of the legislative delegation of powers to the Board of Transportation. We must consider each of these claims individually in light of the capacity of this Court to review them under G.S. § 150A-43. We hold that appellants: (1) have a right under G.S. § 150A-43 to obtain judicial review of the "right to hearing" claim pursuant to the Board's administrative regulations; (2) cannot obtain judicial review under G.S. § 150A-43 of their claim pertaining to the adequacy of the environmental im-

pact statement unless it can be shown to the trial court that the North Carolina Department of Transportation has requested and received location approval for Alternate 1-B from the Federal Highway Administration; and, (3) cannot obtain, under G.S. § 150A-43, judicial review of the unconstitutional delegation claim but that said claim may be reviewed pursuant to Article IV, Section 1 of the North Carolina Constitution. This holding compels explanation of the four initial requirements of G.S. § 150A-43: (1) an "aggrieved" party; (2) a "final agency decision"; (3) a "contested case"; and, (4) "exhaustion" of administrative remedies. *See generally*, Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833 (1975) (hereinafter "Daye.")

A. *Aggrieved Person.*

[3] Before any person may seek review under G.S. § 150A-43 he must be "aggrieved." The NCAPA defines "person aggrieved" as "any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision." G.S. § 150A-2(6). In interpreting the Judicial Review Act (N.C. Gen. Stat. Ch. 143, Art. 33, repealed effective 1 February 1976), the predecessor to the NCAPA, our Supreme Court gave the following definition of "person aggrieved":

> "The expression 'person aggrieved' has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: 'Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.' "

In re Halifax Paper Company, Inc., 259 N.C. 589, 595, 131 S.E. 2d 441, 446 (1963), (citations omitted).

Following these definitions, we hold that the plaintiffs are all "aggrieved" persons under the Administrative Procedure Act. The individual plaintiffs are property owners within the proposed corridor of the highway. The members of SHAPE are citizens and taxpayers who live in or near the proposed highway corridor.

Orange County is also "aggrieved" in that its tax base and planning jurisdiction would also be affected by the proposed highway.

In addition, the requirement that a person be aggrieved is quite similar to the concept of "standing," *Daye, supra,* at 901, and in this regard we hold that the appellants have " 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Stanley, Edwards, Henderson v. Department of Conservation and Development,* 284 N.C. 15, 28, 199 S.E. 2d 641, 650 (1973), [quoting from *Flast v. Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed. 2d 947, 961 (1968)].

Similarly, the individual plaintiffs have asserted their position as taxpayers. The courts have consistently ruled that a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally. *Green v. Eure,* 27 N.C. App. 605, 608, 220 S.E. 2d 102, 105 (1975), *cert. denied,* 289 N.C. 297, 222 S.E. 2d 696 (1976). As we explained in *Texfi Industries, Inc. v. Fayetteville,* 44 N.C. App. 269, 270, 261 S.E. 2d 21, 23 (1979), this rule "does not apply where a taxpayer shows that the tax levied upon him is for an unconstitutional, illegal or unauthorized purpose, *Wynn v. Trustees,* 255 N.C. 594, 122 S.E. 2d 404 (1961), that the carrying out of all the challenged provisions 'will cause him to sustain personally, a direct and irreparable injury,' *Nicholson v. State Education Assistance Authority,* 275 N.C. 439, 448, 168 S.E. 2d 401, 406 (1969), or that he is a member of the class prejudiced by the operation of the statute, *Appeal of Martin,* 286 N.C. 66, 209 S.E. 2d 766 (1974)." Consequently, we hold that the plaintiffs as taxpayers are "aggrieved" persons within the meaning of G.S. § 150A-43. *See generally,* Annot. 11 A.L.R. Fed. 556 (1972); Annot. 17 A.L.R. Fed. 33 § 8 (1973).

[4] Finally, the "procedural injury" implicit in agency failure to prepare an environmental impact statement is itself a sufficient "injury in fact" to support standing as "aggrieved parties" under G.S. § 150A-43 as long as such injury is alleged by a plaintiff having "sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmen-

tal consequences the project may have." *City of Davis v. Coleman*, 521 F. 2d 661, 671 (1975). Based on their pleadings, the appellants in this case satisfy this "geographical nexus" requirement.

B. *Final Agency Decision.*

[5] Merely being "aggrieved" is not enough to sustain judicial review under the NCAPA; the party must also be aggrieved by a "final" agency "decision." Appellants' unconstitutional delegation claim is a challenge to the facial validity of G.S. 143B-350(f)(8) and since the claim involves no "decision" at all, G.S. 150A-43 does not apply to the claim. The claim may, however, be heard pursuant to Article IV, Section 1 of the North Carolina Constitution.

Appellants' hearing claim and their EIS claim do involve "agency decisions," but a question remains as to whether the agency decisions with respect to these claims are sufficiently "final" to allow judicial review. As aptly explained by Professor Daye, the finality requirement:

> ". . . is an implementation of a general policy against piecemeal judicial involvement in agency processes. This policy is designed to conserve judicial resources, avoid delay that would be occasioned by premature judicial intervention, and prevent judicial intervention when agency action has not 'crystalized' into a settled or 'ripe' controversy, but remains 'hypothetical, intermediate, provisional or preliminary.' "

Daye, supra, at 902. *See also*, 2 Am. Jur. 2d *Administrative Law* § 583 (1962).

In the instant case, the Board of Transportation adopted the staff's recommendation to utilize the Alternate 1-B corridor location "*subject to* the approval of the Environmental Impact Statement and subject to such modifications as may be necessary and appropriate in the *final* location and design of the project." (Emphasis supplied.) It is apparent from defendants' answer, that at the time the answer was filed, the highway in question was still in the stage of preliminary engineering and planning, *federal location approval had not been obtained*, right-of-way plans were incomplete, acquisition of right-of-way had not been authorized by any of the defendants or the Federal Highway Administration, and construction contracts had not been advertised for bids.

Whether this action was sufficiently "final" may vary with respect to the issue involved. We must, therefore, consider the hearing claim and the EIS claims separately. The resolution of both of these questions turns upon the relative timing of the action in the context of the elaborate state and federal scheme for planning and constructing federal-aid highways. Steps pertaining to environmental review are also by necessity included. We take the time to explain each of these tedious procedural steps because they also bear upon the question of whether appellants have stated a claim.

1. *Procedure Under North Carolina Law.*

We start with the requirements of the North Carolina Environmental Policy Act (NCEPA). G.S. 113A-1 through 113A-10 (1971). Section 3 of NCEPA sets forth the "Declaration of State environmental policy":

> "The General Assembly of North Carolina, recognizing the profound influence of man's activity on the natural environment, and desiring . . . to assure that an environment of high quality will be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the State to seek, for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to preserve the important historic and cultural elements of our common inheritance."

To give effect to this policy, section 4 of the Act provides "that, to the fullest extent possible":

> "(2) Any State agency shall include in every recommendation or report on proposals for legislation and actions *involving expenditure of public moneys* for projects and programs *significantly* affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:

a. The environmental impact of the proposed action;

b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;

c. Mitigation measures proposed to minimize the impact;

d. *Alternatives to the proposed action*;

e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and

f. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has either jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such detailed statement and such comments shall be made available to the Governor, to such agency or agencies as he may designate, and to the appropriate multi-county regional agency as certified by the Director of the Department of Administration, shall be placed in the public file of the agency and shall accompany the proposal through the existing agency review processes. A copy of such detailed statement shall be made available to the public and to counties, municipalities, institutions and individuals, upon request." (Emphasis supplied.)

The NCEPA further provides that all "policies, regulations and public laws of this State should be interpreted and administered in accordance" with the Act, G.S. 113A-4(1), and that the "policies, obligations and provisions of this Article are supplementary to those set forth in existing authorizations of and statutory provisions applicable to State agencies and local governments." G.S. 113A-10. The NCEPA will be complied with,

however, where a State agency is required to file and does file an EIS pursuant to federal law. *Id.* Consequently, nothing in the NCEPA detracts from statutory obligations of any State agency "[t]o act, or refrain from acting *contingent upon* the recommendations or certification of any other State agency or federal agency." G.S. 113A-7(3). (Emphasis supplied.)

Pursuant to Section 4(3) of the NCEPA, the North Carolina Department of Administration has promulgated regulations which may be found in Title 1, Chapter 25 of the North Carolina Administrative Code. Section 25.0102 of these environmental regulations provides that any agency which "plans to utilize public moneys" supporting projects involving, *inter alia*, grading or land disturbing activities, must "file" an environmental impact statement (EIS). Such a filing can be accomplished pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4331 to § 4335, or the North Carolina Environmental Protection Act. Significantly, such a filing shall include preparation and dissemination of *both* a *draft* and a *final* EIS. 1 N.C.A.C. § 25.0102.

Sections 25.0206 and 25.0207 of the regulations provide that: "(a) *Prior to the release of any funds other than design funds*, an assessment of the potential environmental impact of the proposed action must be *completed.*" (Emphasis supplied.) To be completed, however, the following actions must be taken: (1) copies of the *draft* EIS must be sent to the State Clearinghouse maintained either by the Department of Administration or the Governor's office; (2) the Clearinghouse must solicit comments from interested parties and agencies, and such comments are to be submitted within 15 working days of the date the EIS is first submitted for public review; (3) the Clearinghouse must then prepare a summary of all the comments received on the draft EIS and submit the summary along with the comments to the lead agency (in this case the Department of Transportation); (4) the agency proposing the action then must "address," in the *final* EIS, the comments received on the draft EIS; and (5) copies of the final EIS must be filed with the Clearinghouse and be sent to all interested parties and agencies.

As to requirements pertaining to hearings under state law we must look at environmental and transportation statutes and

regulations separately. First, NCEPA has no language providing that any citizen has a right to be heard on a draft environmental impact statement. Similarly, the regulations issued pursuant to NCEPA, do not require that hearings must always be held on a proposed governmental action, even one significantly affecting the environment. Nonetheless, 1 N.C.A.C. § 25.0106 does provide that a public agency or private person who, *inter alia*, challenges the adequacy of the EIS or the lack of appropriate alterations thereunder, *may* petition the Governor or his designee, who, upon notification, *shall* appoint a hearing officer under the North Carolina Administrative Procedure Act to review the party's objections and to present recommendations to the Governor.

In contrast, the State transportation legislation, G.S. 136-62 (1979 Cum. Supp.), expressly provides that the "citizens of the State shall have the *right to present petitions* to the board of county commissioners, and through the board to the Department of Transportation, *concerning additions to the system* [see G.S. 136-45] and improvement of roads. The board of county commissioners shall receive such petitions, forwarding them on to the Board of Transportation with their recommendations." (Emphasis supplied.) No timetables are attached to this provision, and there is no allegation that the State failed to consider the appellants' petitions, if any did in fact exist.

The transportation statutes also provide that the Board of Transportation "*may*, from time to time, provide that one or more of its members or representatives shall hear any person or persons concerning transportation." G.S. 143B-350(a). Pursuant to this authority the Department of Transportation issued regulations, effective 1 February 1976, which provided as follows:

".0501 PERSONS SHALL BE HEARD

Any person having business with the Board of Transportation *shall* be heard by the Board.

* * * *

.0502 AGENDA

The Chairman of the Board *shall* provide for an agenda position for such items of business.

* * * *

.0503 PROCEDURE

The chairman *shall* prepare a procedure for the disposition of such business by the Board." (Emphasis supplied.)

19 N.C.A.C. § 2A .0501 to § 2A .0503. We can find no procedures which were ever published pursuant to 19 N.C.A.C. § 2A .0503. On 1 July 1978, after the 9 September 1977 action of the Board of Transportation, Title 19 of the N.C.A.C. was rewritten and former section 2A .0501 is now codified as 19A N.C.A.C. 1A .0302(1) and reads as follows:

".0302 FUNCTIONS, POWERS AND DUTIES; GENERAL

The Board of Transportation, as its general function:

(1) *may* hear any person or persons on any transportation matter; . . ."

(Emphasis added.)

In this case the State relies upon the amended language; the appellants, the former. It is the former language which was in effect at the time appellants sought to be heard and which is dispositive of this issue.

[6] We now hold that the decision of the Board of Transportation to deny appellants a hearing before the Board on 9 September 1977 was a "final" decision within the meaning of G.S. § 150A-43. The decision affected a right which appellants had due to the agency's own regulations and which existed independent of both the state and federal scheme for constructing federal-aid highways and the state and federal scheme for review of environmental impact statements.

More analysis is needed, however, in order to determine the ripeness of appellants' environmental challenges.

2. *Procedure Under Federal Environmental and Transportation Laws.*

Were this a case in which only state highway funds were involved, an action to challenge the sufficiency of the environmental impact statement would be ripe when the Board of Transportation approved the location of the highway corridor following the preparation of a final environmental impact statement.

The proposed I-40 segment, however, is a project which requires federal aid and thus requires compliance with the federal environmental statutes and regulations. Technically speaking, these federal requirements are binding *only* on *federal* agencies. *City of Davis v. Coleman, supra.* Nonetheless, the North Carolina Board of Transportation would be acting within the *North Carolina* environmental protection act if it were complying with *either* the state or federal environmental regulations or procedural requirements, G.S. 113A-7(3); G.S. 113A-10; 1 N.C.A.C. § 25.0102, and to the extent that the federal environmental law is relied upon to meet the requirements of NCEPA, the federal requirements are by reference enforceable against North Carolina agencies as state law.

Nonetheless, even if, for the purposes of this litigation, the North Carolina Department of Transportation chose to rely upon compliance with the North Carolina Environmental Protection Act, it must as a practical matter of cooperation with the Federal Highway Administration, ultimately comply with the National Environmental Policy Act, 42 U.S.C.A. §§ 4331-4335, and the Federal Highway Act, 23 U.S.C.A. §§ 101-136, as well as the regulations promulgated pursuant to these authorities: 23 C.F.R. Part 771 (environmental impact and related statements); 23 C.F.R. Part 790 (public hearing and Location/Design Approval); and Part 795 (Process Guidelines for Development of Environmental Action Plans). For this reason, we must outline the federal scheme for planning and construction of federal-aid highways.

There are two modes of administrative procedures that may be utilized in federal-aid highway projects. The first, described in 23 C.F.R. Part 795, involves an "Action Plan" which is prepared by the State highway agency and which must be approved by the Federal Highway Administrator. Under the Action Plan a state highway agency may redefine the "stages" in the processing of a proposed highway project, but if not so redefined, the regulations provide for three different stages: (1) system planning stage; (2) location stage; and (3) design stage. 23 C.F.R. §§ 795.2(e), 795.12, 795.14(a). The Action Plan must, among other things, provide for review of alternatives, 23 C.F.R. §§ 795.9, 795.10(b)(1)(i) and environmental impacts. 23 C.F.R. §§ 795.3(a), 795.8, 795.10(b)(7)(iv). Under the Action Plan, the public must be able to "participate in an open exchange of views throughout the system planning, loca-

tion and design stage," 23 C.F.R. § 795.10(b)(3), and a *draft* environmental impact statement must be available for inspection and copying *before public hearings*. 23 C.F.R. § 795.10(7)(iv). Also, "*[d]ecisions* at the system and project stages shall be made with consideration of their social, economic, environmental and transportation effects to the extent possible at each stage." 23 C.F.R. § 795.13.

At the present time this Court has nothing before it from which it can ascertain that the proposed I-40 project was being administratively processed pursuant to an approved Action Plan; without such an Action Plan before us or knowledge of the absence of an Action Plan, we cannot, in the instant case, make a determination as to the finality of the Board's action, because we do not know the "stage" in the Action Plan at which the Board's action was taken. This is a question for further determination by the trial court.

If no Action Plan is involved, the state highway agency must nonetheless comply with the following procedures set out in 23 C.F.R. Part 790. 23 C.F.R. § 790.2(a). First, a "corridor public hearing" must be held (or an opportunity must be afforded for such hearing), 23 C.F.R. § 790.5, "*before* the route location is approved and *before* the State highway department is committed to a specific proposal." 23 C.F.R. § 790.3(a)(1). (Emphasis supplied.) If location approval is not requested within three years of the date of the last corridor hearing (such as might be true in the instant case), a new hearing must be held. 23 C.F.R. § 790.5(e). Notice of the hearing (meeting the requirements of 23 C.F.R. § 790.7(a)(3)-(15)) must be published twice, once within 30 to 40 days of the hearing and once within 5 to 12 days of the hearing, in a newspaper of general circulation in the vicinity of the proposed undertaking. 23 C.F.R. § 790.7(a)(1). In addition, copies of the notice shall be sent to appropriate news media and planning agencies and to those who request to be on the State's mailing list. 23 C.F.R. § 790.7(a). The hearings must be conducted at a "*place and time generally convenient for persons affected by the proposed undertaking*," as set out in 23 C.F.R. § 790.7(b). (Emphasis supplied.) In particular, location alternatives and environmental effects of the alternate locations must be considered. 23 C.F.R. § 790.3(a)(3). Having conducted the corridor hearing and decided upon a corridor location, the State Highway Department must for-

mally request "location approval" from the Federal Highway Administration (FHWA), 23 C.F.R. § 790.7(b)(9) and at the same time publish a notice of the proposed location pursuant to 23 C.F.R. § 790.9(d). In order to obtain location approval the state highway agency must submit a transcript of the public hearing, 23 C.F.R. § 790.9(e)(iii), and a "location study report" which must include, among other things, a description of the alternatives to and the environmental effects of the project. 23 C.F.R. §§ 790.9(b), 790.8(b)(2).

Federal location approval will be given only after the *final* environmental impact statement has been completed, 23 C.F.R. § 771.5(b), and, regardless of whether or not the state highway agency is operating under an Action Plan, the FHWA must ensure compliance with the procedural and substantive requirements of 23 C.F.R. Part 771 pertaining to processing environmental impact statements. These regulations provide, *inter alia*, that no public hearing is required for the sole purpose of presenting and receiving comments on a draft EIS as long as the draft EIS is circulated so that the public and governmental agencies may express their views on the proposed action. 23 C.F.R. § 771.12(n). Nonetheless, the FHWA Division Administrator must approve the draft EIS before it is released for comment, 23 C.F.R. § 771.12(b) and when corridor location hearings are required (apparently always unless operating under an Action Plan, 23 C.F.R. § 790.5) the draft EIS shall be prepared prior to the public hearing. 23 C.F.R. § 771.5(c). Public review must then be allowed in compliance with the following comment and hearing notice timetables: (1) the draft EIS shall be circulated to the entities described in 23 C.F.R. §§ 771.12(h), 771.12(i), by the state highway agency on behalf of the FHWA for comment and shall be made available to the public at least 30 days before the public hearing and no later than the publication of the first notice for the hearing or opportunity therefor, 23 C.F.R. § 771.12(c); (2) private groups, individuals and governmental agencies which are furnished copies of the draft EIS by the state highway agency must be given a minimum of 45 days, as set out in the Federal Register, to review the statement and return comments, 23 C.F.R. §§ 771.12(f), 771.12(g); (3) for major actions such as the proposed project in the instant case, see 23 C.F.R. § 771.9(d)(1), (2), (5), the highway agency cannot proceed with the design (other than such

design work necessary to make engineering and environmental decisions) and right-of-way acquisitions (other than hardship cases), or construction until at least 90 days have elapsed since the *draft* EIS was circulated for comment and furnished to the Council on Environmental Quality. 23 C.F.R. § 771.5(e). In addition, actions contained in the draft EIS which involve, among other things, projects that involve natural, ecological, cultural, scenic, historic or park and recreation resources of national significance must be reviewed by the FHWA Washington Headquarters. 23 C.F.R. § 771.21(c).

The final EIS is to be prepared *only after* any required public hearings have been held, the alternatives in draft EIS have been considered, and the state highway agency has selected a specific alternative. *The final EIS will then be prepared for the specific alternative.* 23 C.F.R. § 771.18(j)(3). The final EIS shall include a copy and a summary of the comments received on the draft EIS. 23 C.F.R. § 771.18(o). Once completed, *the final EIS is then submitted to the FHWA Regional Office where it is reviewed for legal sufficiency and content.* 23 C.F.R. § 771.14(b). Where the proposed project involves, among other things, a new controlled access freeway or the opposition of a local governmental agency, the final EIS must be sent to the FHWA Washington Headquarters for prior approval. 23 C.F.R. § 771.14(c). The final EIS must then be distributed and made available for public review as presented in 23 C.F.R. § 771.14(d) to (h). Major design, construction or right-of-way acquisition activities may not begin until at least 30 days have elapsed since the final EIS has been sent to the Council on Environmental Quality. 23 C.F.R. § 771.5(e).

3. *Conclusion of the Finality Issue.*

[7] We have so far only explained the procedural requirements through the location stage of the project. These regulations put into effect the provision in the National Environmental Policy Act which requires that the environmental impact statement and the comments thereon "accompany the proposal through the existing agency review process." 42 U.S.C. § 4332(2)(c). Appellants' rights to enforce these federally prescribed procedures, however, are triggered only at the point in time at which the "final" statement is submitted and a recommendation or report on a proposal for federal action is made. *Aberdeen & Rockfish R. Co. v. SCRAP,*

422 U.S. 289, 320, 95 S.Ct. 2336, 2356, 45 L.Ed. 2d 191, 215 (1975). This is the point in time at which the project becomes a *federal* one, *City of Boston v. Volpe*, 464 F. 2d 254, 258-59 (1st Cir. 1972), and at which "an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption." *Kleppe v. Sierra Club*, 427 U.S. 390, 406, 96 S.Ct. 2718, 2728-29, 49 L.Ed. 2d 576, 588 (1976) at n. 15. For federal-aid highway projects, this point in time is when federal location approval has been obtained. *City of Boston v. Volpe, supra; Indian Lookout Alliance v. Volpe*, 484 F. 2d 11, 16-17 (8th Cir. 1973); *National Wildlife Federation v. Snow*, 561 F. 2d 227, 234 (D.C. Cir. 1976).

Despite the statements in defendants' pleadings, dated 22 December 1978 that "Federal location approval has not been obtained" we do not know, given the procedural posture of this case, whether federal location approval had been made at the time of the proceeding below on 28 February 1979 or whether federal location approval has since been granted. If upon remand, the trial court should make a determination that federal location approval has not, at the time of the hearing upon remand been granted, then, because of lack of ripeness or finality, appellants may not assert any claims pertaining to notice, hearings, and review of the sufficiency of the EIS arising under the *federal* statutes and regulations. If the proposed I-40 project is being processed pursuant to an Action Plan, the trial court should look at the stages in the Action Plan to see if, consistent with this opinion, the federal action is sufficiently final to permit judicial review.

Similarly, appellants may not bring suit pertaining to a federal-aid highway project under the *North Carolina* Environmental Protection Act unless the Board of Transportation has formally requested and received location approval from the FHWA. At that point in the process a final environmental impact statement must have been prepared pursuant to NCEPA, and at that point the Board of Transportation's commitment to the Federal Government on the issue of location of the highway corridor is sufficiently final as to the issue of location to allow judicial review. Were we to hold otherwise in the context of a federal-aid highway project, we would invite staggered, piecemeal litigation of the same issues, under the state and federal environmental acts, in both state and federal courts. In addition, we

would invite judicial review of an EIS before federal authorities had reviewed the EIS to evaluate its legal sufficiency and content. In sum, this holding is consistent with NCEPA's provisions for coordinating state and federal efforts, G.S. § 113A-7(3) and § 113A-10, ensures that environmental matters are properly considered, and eliminates unnecessary delay due to premature involvement of the courts in the administrative process.

This result is also consistent with the rulings of this Court in *Davis v. North Carolina Department of Transportation*, 39 N.C. App. 190, 250 S.E. 2d 64 (1978), *cert. denied*, 296 N.C. 735, 254 S.E. 2d 177 (1979), and *Stevenson v. Department of Insurance*, 31 N.C. App. 299, 229 S.E. 2d 209 (1976), *cert. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1977).

There is some question as to whether 1 N.C.A.C. § 25.0206(a), which provides that the final EIS need not be completed "prior to the release of any funds *other than design funds*," means, by implication, that an action under NCEPA pertaining to a federal-aid highway would not lie until both the "location" and "design" stages were completed. We do not, however, think that the word "design" in the North Carolina environmental regulations has the same technical meaning as "design" in the context of the elaborate federal highway regulations. Rather, we think that "design" in the NCEPA regulations means no more than "preliminary planning" or "preliminary project formulation" and we note that the act of obtaining federal location approval involves a commitment of time and resources sufficiently beyond the preliminary planning stage to make the question of the adequacy of the environmental impact statement ripe for determination. *See, e.g.*, 23 C.F.R. § 771.5(e).

Even though we must remand this case to the trial court to make a determination as to whether federal location approval or the equivalent under an Action Plan has been given, we will nonetheless proceed with this opinion under the assumption that location approval has been given.

C. *Contested Case.*

[8] The next prerequisite for judicial review under G.S. 150A-43 is that the final agency decision be made in a "contested case." G.S. 150A-2 defines "contested case" as follows:

"150A-2. *Definitions.*—As used in this Chapter.

* * * *

(2) 'Contested case' means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include, but are not limited to proceedings involving rate-making, price-fixing and licensing. Contested cases shall not be deemed to include rule making, declaratory rulings, or the award or denial of a scholarship or grant."

Were this case one which did not involve the North Carolina Environmental Protection Act we would have no doubt that the highway location decision did *not* involve a "contested case." Generally speaking, the Board of Transportation does not hold adjudicatory proceedings. Its power and decision to locate a highway within a certain corridor are purely executive in nature. True, landowners will have property rights affected once a decision to locate a highway has been made; those rights, however, are not the subject of the Board's proceedings, but rather the subject of condemnation proceedings which follow. *Schloss v. Highway Commission*, 230 N.C. 489, 492, 53 S.E. 2d 517, 519 (1949).

Nonetheless, one statute may expand upon a right granted in another statute, and, where possible, it is the duty of the Appellate Courts to interpret statutes so as to be consistent with each other. Consequently, for four reasons we hold that this controversy involves a "contested case" within the meaning of G.S. 150A-43.

First, the North Carolina Environmental Protection Act provides the Governor with authority to develop plans and procedures to implement the Act. G.S. 113A-4(3). As discussed above, pursuant to this statutory authority a set of regulations was promulgated, including a regulation providing for an appeal of an agency environmental determination to a hearing officer appointed by the Governor "under the Administrative Procedure Act." 1 N.C.A.C. § 25.0106. In turn, Article 3 of the Ad-

ministrative Procedure Act provides for administrative hearings of "contested cases." G.S. 150A-23. Consequently, by broadening the type of controversy which may be heard under Article 3, the NCEPA and the regulations effectively broaden the definition of "contested case" and expand the scope of procedural remedies available under the Administrative Procedure Act, including the right to judicial review provided in G.S. 150A-43. This reasoning, we think, is consistent with G.S. 113A-4(1) and 113A-6 which require that the policies and procedures of all state agencies be made consistent with NCEPA.

Second, this result is consistent with the notion that the purpose of the Administrative Procedure Act is to provide only "basic minimum procedural requirements" which can be supplemented by other means. *See, e.g.*, G.S. 150A-9. As we have just explained, such supplementation has been provided by the North Carolina Environmental Policy Act and the regulations issued pursuant to this authority.

Third, the General Assembly has stated that the purpose and intent of the entire Administrative Procedure Act is to "establish as nearly as possible a uniform system of administrative procedures for State agencies." G.S. 150A-1(b). By broadly construing "contested case" in the context of environmental challenges to state action, we do in fact further a uniform system of administrative procedure and subsequent judicial review of administrative action. Consequently, we do not feel compelled to undertake a restrictive interpretation of "contested case" where there is an environmental challenge to State action under the North Carolina Environmental Policy Act.

Finally, the language in the North Carolina Administrative Procedure Act which provides that Articles 2 and 3 of the Act shall not apply to the Department of Transportation in rulemaking or administrative hearings only applies to actions taken by the Department pursuant to Chapter 20 of the General Statutes. Chapter 20 only refers to regulation of motor vehicles. In contrast, Chapter 136 and Chapter 143B provide the Department of Transportation and the Board of Transportation with their respective powers and duties to engage in the planning and construction of the state highway system. It is implicit, therefore, that had the General Assembly wanted to exclude actions of the

Department and Board of Transportation under Chapter 136 from the requirements of Articles 2 and 3 of the Administrative Procedure Act, the General Assembly would have done so with the same specificity that it excluded actions taken pursuant to Chapter 20.

D. *Exhaustion of Administrative Remedies.*

[9] The final major requirement of G.S. 150A-43 is that the aggrieved party exhaust "all administrative remedies made available to him by statute or agency rule." As explained above there are at least two administrative remedies under state law available to the appellants in the instant case. First, G.S. 136-62 (1979 Cum. Supp.) provides in relevant part that "[t]he citizens of the State shall have the right to present petitions to the board of county commissioners, and through the board to the Department of Transportation, concerning additions to the system and improvement of roads. The board of county commissioners shall receive such petitions, forwarding them on to the Board of Transportation with their recommendations." The "system," as used herein, refers to the "statewide system of hard-surfaced and other dependable highways" described in G.S. 136-45 (1979 Cum. Supp.) and would include the proposed segment of I-40. Since the appellants joined with Orange County to present their grievances to the Board of Transportation and, subsequently, to bring this lawsuit, we think that for all practical purposes they have complied with the substance if not the pure letter of the statutory right of petition found in G.S. 136-62.

[10] Appellants' second administrative remedy, as also discussed above, is their right to petition to the Governor for a hearing, as set forth in Title I, Chapter 25, Section .0106 of the North Carolina Administrative Code. The failure to exhaust such an administrative remedy, however, will not bar judicial review if that remedy has been shown to be inadequate. *See generally, Daye, supra,* at 904-08. In the instant case the administrative remedy prescribed by the environmental regulations is inadequate because the regulations were not published as required by the "Registration of State Administrative Rules Act," now codified as Article 5 of the Administrative Procedure Act. G.S. 150A-58 to -64. *See generally,* Bell, *Administrative Law: The Proposed North Carolina Statutes for Registration and Publication of State Ad-*

ministrative Regulations, 8 Wake Forest L. Rev. 309 (1972) (hereinafter "Bell"). G.S. 150A-63, in particular, provides that: (1) the Attorney General shall compile, index in a manner conforming to the organization of the General Statutes, and publish all rules filed and effective pursuant to Article 5 of the NCAPA; (2) that cumulative supplements are to be published at least annually; (3) that copies of the compilation, supplements and recompilations shall be distributed by the Attorney General to, among other persons and entities, each Justice of the Supreme Court, each Judge on the Court of Appeals, each district attorney, the Clerk of Superior Court or a county law library in each county, each federal district court operating in the state, the Fourth Circuit Court of Appeals and the United States Supreme Court.

We take judicial notice that: (1) the administrative regulations have not been published as required by G.S. 150A-63; (2) over 18,000 pages of regulations exist; (3) anyone seeking to find the regulations would have to go to the Administrative Law Division of the Attorney General's Office in Raleigh and sift through the files of regulations; (4) the regulations which have been officially codified are not indexed by the corresponding statutory reference; and, (5) the situation is such that even the most skilled and diligent attorney would at best have a random chance of discovering the existence or absence of the regulations for which he was looking. While it is generally said that ignorance of the law is no excuse for a failure to comply with the law, such a rule does not apply where the citizen is, as a matter of practicality, denied a reasonable means for finding out what the law is in the first place. Consequently, we hold that, *under the facts of this case*, it would contravene the most rudimentary principles of due process for this Court to deny the appellants a right of judicial review because they had not exhausted an administrative remedy codified in 1 N.C.A.C. § 25.0106 which is effectively hidden in the catacombs of the state bureaucracy.

III. SOVEREIGN IMMUNITY

[11] The State argues that under the doctrine of sovereign immunity the exercise of discretionary powers by the Department of Transportation and its Board of Transportation in selecting the location of the route for an interstate highway is not subject to judicial review unless its action is so clearly unreasonable as to

amount to abuse of administrative discretion. We agree with this proposition. In fact, G.S. 136-59, set forth below, explicitly bars judicial review of the decision of the Board of Transportation to locate a highway in a certain place:

> "136-59. *No court action against Board of Transportation.* —No action shall be maintained by any of the courts of this State against the Board of Transportation to determine the location of any State highways or portion thereof, by any person, corporation, or municipal corporation."

In the instant case, however, appellants do not challenge the location of the proposed highway, but rather the alleged unlawful manner in which the decision was made. Consequently, appellants may seek review under two well-established exceptions to the doctrine of sovereign immunity, which would by necessity, also be exceptions to G.S. 136-59: (1) "When public officers whose duty it is to supervise and direct a State agency attempt to enforce an invalid ordinance or regulation, or invade or threaten to invade the personal or property rights of a citizen *in disregard of law*," *Schloss v. Highway Commission*, 230 N.C. 489, 492, 53 S.E. 2d 517 (1949); *Teer v. Jordan*, 232 N.C. 48, 59 S.E. 2d 359 (1950); *Lewis v. White*, 287 N.C. 625, 216 S.E. 2d 134 (1975); and, (2) where plaintiffs have asserted their status as taxpayers and are trying to prevent the expenditure of money unauthorized by statute or in disregard of law. *Lewis v. White, supra; Teer v. Jordan, supra.* Both of these exceptions apply in the instant case.

IV. APPELLANTS' CLAIMS FOR RELIEF

We now address the question of whether appellants have stated a claim which would entitle them to the injunctive relief they seek. The well-known standard for evaluating the legal sufficiency of a claim for relief is whether the pleadings "[give] sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining a pretrial discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E. 2d 161, 167 (1970). In addition, the pleadings must state enough to satisfy the substantive elements of at least some legally recognized claim or defense, *Stan-*

back v. Stanback, 297 N.C. 181, 254 S.E. 2d 611 (1979). A claim should be dismissed under N.C. Rule Civ. Proc. 12(b)(6) where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven. *Newton v. Standard Fire Insurance Company*, 291 N.C. 105, 229 S.E. 2d 297 (1976), and such will occur when there is want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Federal Deposit Insurance Corporation v. Loft Apartments*, 39 N.C. App. 473, 250 S.E. 2d 693 (1979), *cert. denied* 297 N.C. 176, 254 S.E. 2d 39 (1979); *North Carolina National Bank v. McCarley & Company*, 34 N.C. App. 689, 239 S.E. 2d 583 (1977); *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). We will apply these standards to each of the three bases for which appellants seek relief.

A. *Unlawful Delegation of Legislative Powers.*

[12] The appellants challenge the action of the Board of Transportation by asserting that the action was a delegation of legislative authority to an appointed administrative body which was unrestrained by legislative standards, sufficient procedural safeguards or political accountability in violation of Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution. We do not agree with this assertion of the appellants and hold that the trial court's grant of appellees' motion to dismiss under N.C. Rule Civ. Proc. 12(b)(6) was proper as to this aspect of appellants' claim.

There are more than adequate standards established by the General Assembly to guide the decisions of the Board of Transportation and the actions of the Department of Transportation. G.S. 136-44.1 (1979 Cum. Supp.) provides that the Department of Transportation shall develop and maintain a statewide system of roads "commensurate with the needs of the State as a whole and it shall not sacrifice the general statewide interest to the purely local desires of any particular areas." G.S. 136-45 (1979 Cum. Supp.) states where and for what reasons a statewide system of roads is to be constructed and maintained:

> "[A] statewide system of *hard-surfaced* and other *dependable* highways *running to* all county seats, and to all principal towns, State parks, and principal State institutions, and *link-*

ing up with state highways of adjoining states and with national highways into national forest reserves by *the most practical routes, with a special view of the development of agriculture, commercial, and natural resources* of the State, and for the further purpose of permitting the State to assume control of the State highways, repair, construct and reconstruct and maintain said highways *at the expense of the entire state*, and to relieve the counties and cities and towns of the State of this burden." (Emphasis supplied.)

G.S. 136-42.1 (1979 Cum. Supp.) further requires that the Department of Transportation "shall" consult with the Department of Cultural Resources "when objects of scientific or historical significance might be anticipated or encountered in a highway right-of-way" so that a determination can be made as "to the national, State, or local importance of preserving any or all fossil relics, artifacts, monuments or buildings."

Similarly, the Board of Transportation and Department of Transportation are both subject to the requirements of the North Carolina Environmental Policy Act which has already been discussed in detail. Independent of the North Carolina Environmental Protection Act, the Board of Transportation has the specific statutory duty to "*ascertain* the transportation *needs* and the *alternative means* to provide for these needs through an *integrated system* of transportation taking into consideration the *social, economic* and *environmental impacts* of the various alternatives." G.S. 143B-350(f)(3). (Emphasis supplied.) The Board of Transportation must also formulate policies "with due regard to farm-to-market roads and school bus routes." G.S. 136-44.1 (1979 Cum. Supp.).

Moreover, G.S. 136-44.4 (1979 Cum. Supp.) requires the Board of Transportation to approve an annual construction program, prepared by the Department of Transportation and made available to all members of the General Assembly. The plan shall include, *inter alia*, criteria for determining priorities of the projects as well as a statement of the immediate and long-range goals for all primary and urban system highways and for all federal-aid construction programs in the State.

In addition to the above-described standards, the provisions of G.S. 136-10 to 136-12 (1979 Cum. Supp.) insure that annual

reports of all of the projects, accounts, disbursements, liabilities, and expenses of the Department of Transportation are made to both the Governor and General Assembly—all of whom are politically accountable.

Consequently, we see no merit in this constitutional argument of the appellants. *N.C. Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E. 2d 319 (1965).

B. *Right to a Hearing.*

[13] We have already explained in great detail the hearing procedures prescribed in Parts 771, 790 and 795 of Title 23 of the Code of Federal Regulations. Any violation of these procedural requirements would constitute a legally cognizable claim for relief. In the instant case, assuming no Action Plan which alters these procedures is involved, plaintiffs have as a minimum asserted facts which might support the following claims for relief arising under *federal* regulations: (1) denial of a right to be heard (by the Board or other hearing officers) in the area affected by the highway construction project, 23 C.F.R. § 790.7(b); and, (2) inadequate public notice of the highway corridor meetings (whether held by the Board of Transportation or the Department of Transportation), 23 C.F.R. § 790.7(a). We are aware that the State's answer asserts the State's full compliance with these federal regulations, but given the procedural context of this case in which we are ruling on a Rule 12(b)(6) motion and not a Rule 12(c) motion for judgment on the pleadings, or a Rule 56 motion for summary judgment, we can only look at the plaintiffs' pleadings and we must leave the questions raised by defendants' answer for further determination by the trial court.

The appellants are correct in asserting that the Board of Transportation and the Department of Transportation are bound by their own regulations. *Humble Oil and Refining Company v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). As we have already explained, the regulations in effect on 9 September 1977 provided that "[a]ny person having business with the Board of Transportation *shall* be heard by the Board," 19 N.C.A.C. § 2A.0501, and since the Board apparently published no "procedure for the disposition of such business by the Board," 19 N.C.A.C. § 2A.0503 (effective between 1 February 1976 and 1

July 1978), appellants have stated a claim for which relief can be granted.

We note, however, that such a claim will not be cognizable for any claim arising after 1 July 1978 when the new regulations found in Title 19A of the North Carolina Administrative Code became effective. Furthermore, there are no state constitutional or statutory requirements which would require the Board of Transportation to hear any citizen on any particular transportation matter, *see, e.g.*, G.S. 143B-350(a), particularly since we have found that the Board is subject to adequate legislative standards, and since citizens have both the rights of participation provided in G.S. 136-62, *supra*, and 1 N.C.A.C. § 25.0106. While we believe that a formal procedure under State law allowing citizens to be heard by the Board of Transportation with respect to major highway actions would be desirable in the interest of democratic values and due process, that determination is one for the legislative and executive branches of our State Government.

We do note, however, that if appellants are to be entitled to an injunction, they must show not only that technical violations have occurred, but that they have been prejudiced by the violation. Appellants would not be entitled to an injunction, for example, if the State could show that appellants have in fact been heard by members of the Board at a public meeting at which the contested issues were discussed and that these comments were in fact presented to the remaining members of the Board. Appellants must bear in mind that injunctive relief has its roots in equity, that "equity regards substance rather than form" and that to this end "equity will not lend its aid to one whose sole ground for seeking its aid is based on a technicality." 30 C.J.S. *Equity* § 107 (1965).

C. *Environmental Impact Statement.*

[14] Appellants' first contention is that a *final* environmental impact statement had not been prepared prior to the Board of Transportation's decision on 9 September 1977. We have already explained that appellants' claim in the context of a federal-aid highway would not be ripe until federal location approval had been obtained. At that point the final environmental impact statement must have been prepared and evaluated by federal authorities. Consequently, unless federal location approval has

been obtained, this aspect of appellants' claim would be premature. Even if this claim were ripe, however, the federal transportation regulations explicitly require that the state highway agency select a highway corridor location based on the draft EIS so that a final EIS can be prepared for the selected location. 23 C.F.R. § 771.18(j)(3); the State authorities were therefore doing exactly what they were supposed to do. This aspect of appellants' environmental claim will not withstand a Rule 12(b)(6) motion. The result might be otherwise if this were not a federal-aid highway project.

[15] Appellants' complaint also contends that the environmental impact statement was inadequate and materially misleading in that it presented two alternative routes which were not real alternatives since the two highway routes were going to be built regardless of whether Alternative 1-B was built. We cannot say at this stage of the proceeding as a matter of law that appellants have not herein stated a claim. The primary purpose of both the state and federal environmental statutes is to ensure that government agencies seriously consider the environmental effects of each of the reasonable and realistic alternatives available to them. The standards for the content and adequacy of the EIS are articulated in 1 N.C.A.C. § 25.0201 and 23 C.F.R. § 771.18. The courts have subjected such standards to a "Rule of Reason" and have not required highway officials to consider every one of the "infinite variety" of "unexplored and undiscussed alternatives that inventive minds can suggest." *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F. 2d 1021, 1027 (4th Cir. 1975), *cert. denied* 423 U.S. 912, 96 S.Ct. 216, 46 L.Ed. 2d 140 (1975). This Court, however, does not sit as a trier of fact. Nor does it have the contested environmental impact statement before it. Consequently, this is a matter for further determination by the trial court in the event that this question is shown to be ripe for determination.

If the environmental impact statement is not consistent with these standards, injunctive relief tailored to remedy any inadequacies or to require necessary hearings would be appropriate. *See, e.g., Environmental Defense Fund, Inc. v. Froehlke*, 477 F. 2d 1033 (8th Cir. 1973). A court may not justify a failure to issue an injunction based upon delay and concomitant cost increases alone; rather, the trial court must consider these factors in deciding whether interruption of a project in process would

severely prejudice the public interest. *See, e.g., Shiffler v. Schlesinger*, 548 F. 2d 96 (3d Cir., 1977); *Reserve Mining Company v. United States*, 498 F. 2d 1073, 1076-1077 (8th Cir.), *application for stay denied*, 419 U.S. 802, 95 S.Ct. 287, 42 L.Ed. 2d 33 (1974). The exercise of such discretion of the trial court will not be disturbed on appeal unless it can be shown that the trial court abused its discretion.

V. SUIT AGAINST INDIVIDUAL DEFENDANTS

It was improper for the trial court to dismiss the claims for injunctive relief against the North Carolina Secretary of Transportation, the Manager of the Planning and Research Branch of the Department of Transportation, the Administrator of the Division of Highways, and the members of the Board of Transportation in their individual capacities. This holding requires more explanation.

The appellants seek two types of injunctive relief: (1) that the defendants be enjoined from taking any further steps toward the approval or construction of the proposed highway; and (2) that the Court issue a permanent injunction mandating defendants to rescind their approval of said Alternative 1-B pending full observance of their constitutional and statutory rights. In essence, appellants are asking for the court to require the public officials to recognize appellants' procedural rights before any further action on the highway project can be taken.

[16] The type of injunctive relief sought by appellants in this case is quite similar to that afforded by a writ of mandamus. The technical distinction between the two remedies is that the writ of mandamus will not ordinarily issue unless there has been an actual default of a clear legal duty, as distinguished from a threatened or anticipated omission to act, in which case injunction, and not mandamus, is the appropriate remedy. 52 Am. Jur. 2d *Mandamus* § 9 (1970). Also, the "mandatory injunction is distinguished from a *mandamus* in that the former is an equitable remedy operating upon a private person, while the latter is a legal writ to compel the performance of an official duty." *Ingle v. Stubbins*, 240 N.C. 382, 390, 82 S.E. 2d 388, 395 (1954) (citations omitted). When applied to actions against public officials in the context of modern jurisprudence, we find these distinctions to be "distinctions without a difference." First, neither a mandamus nor

an injunction is effective against the public office; rather, they both use the *in personam* contempt power of the court to coerce the individual public officer in the performance of a plain duty, 52 Am. Jur. 2d *Mandamus* § 8 (1970); 42 Am. Jur. 2d *Injunction* § 3 (1969), or to prevent the official from taking actions outside of his legal authority. We therefore can see little practical difference between issuing a writ of mandamus to require a public officer to act in accordance with or to carry out, for example, certain procedural requirements, and, enjoining an individual official who is purportedly acting under color of law from failing to comply with the same procedural requirements. *See*, for example, the majority and dissenting opinions in *Stafford v. Briggs*, 48 U.S.L.W. 4138 (1980) for dictum illuminating this elusive distinction in the context of the history of the federal Mandamus and Venue Act. Second, given the abolition of the distinction between actions at law and in equity under the modern rules of civil procedure, and the fact that in North Carolina there is a right to jury trial in actions arising at law and in equity, there is no justification for maintaining the distinction between the legal and equitable natures of the remedy. Even at common law the legal remedy of mandamus was adjudicated by reference to basic principles of equity. 52 Am. Jur. 2d *Mandamus* § 32 (1970). Indeed, Professor Dobbs in his distinguished treatise on remedies has suggested that today the writ of mandamus can be thought of merely as a special form of an injunction. Dobbs, *Remedies* § 2.10 at 112 (1973). *See also*, 42 Am. Jur. 2d *Injunctions* § 19 (1969). We therefore see no modern justification for the anachronistic rule that equity will not grant an injunction where there is an adequate remedy by mandamus, 42 Am. Jur. *Injunctions* § 43 (1969), and we see no merit in the State's contention that the question is moot merely because the relief sought is in the nature of a mandamus. In sum, regardless of which theory or legal fiction is used, the courts of this State have the power, pursuant to Article IV, Section 1 of the North Carolina Constitution, to issue *in personam* orders requiring public officials to act in compliance with their ministerial or non-discretionary public duties. In this regard, our Supreme Court in *Schloss v. Highway Commission, supra*, held that an injunction would not lie against the State Highway and Public Works Commission as an entity, but that plaintiffs therein could seek relief against the public officers who acted under assumed authority of the State. *See also, Lewis v. White, supra; Teer v. Jordan, supra.*

[17] We now turn to the nature and scope of the judicial coercive action which can be taken against the individual public officers in this case. Traditionally, a writ of mandamus would not be issued to enforce a duty involving judgment and discretion. Each duty is viewed independently, and although a public officer may have many executive, administrative or discretionary duties, only those duties which are purely ministerial may be enforced by mandamus. 52 Am. Jur. 2d *Mandamus* § 81 (1970). In the instant case, the duty to decide where a highway corridor will be located is a discretionary duty against which a writ of mandamus will not be issued. Nonetheless, the duties to hear the appellants, the duties to provide notice, and the duties to prepare an environmental impact statement are ministerial duties which can be enforced by a writ of mandamus. The writ of mandamus, however, is effective as against each individual officer only as long as the officer remains in that public office, 52 Am. Jur. 2d *Mandamus* §§ 1, 8, 387 (1970) and in certain circumstances the mandamus may be effective as against a successor in office. 52 Am. Jur. 2d *Mandamus* §§ 85, 387 (1970). 63 Am. Jur. 2d *Public Officers* § 547 (1972). We see no reason for applying different standards to the injunctive relief as against public officials sought by appellants herein.

We therefore hold that (assuming appellants prove their case) the appellants' suit for injunctive relief will lie as against the respective named members of the Board of Transportation and the named officers of the Department of Transportation in their individual capacities as long as they remain in their official capacities and no longer. We note that we do not now address the more difficult question of suits against the public officials in their individual capacities for money damages.

VI. CONCLUSION

The actions of the trial court in dismissing appellants' constitutional challenge (unlawful delegation of legislative powers) and in dismissing appellants' claim that no "final" environmental impact statement had been prepared at the time the Board of Transportation met on 9 September 1977, are affirmed.

The judgment of the trial court dismissing the remainder of appellants' claims against all defendants is reversed and remand-

ed to the trial court. Appellants' claim that they had a right, pursuant to the then-existing state regulations, to be heard by the Board of Transportation is ripe and constitutes a claim for injunctive relief, and injunctive relief would be appropriate if the appellants carry their burden of showing, in conformity with the usual standards for the issuance of an injunction, that this hearing right has been denied, that appellants have not waived this right, and that appellants have not in substance and as a matter of practicality had an opportunity to present their claims to the Board at other hearings pertaining to the proposed highway segment.

As to the claims pertaining to the adequacy or sufficiency of the environmental impact statement, this case is remanded to the trial court for a determination as to whether, at the time of the proceeding upon remand, federal location approval has been obtained, or if an Action Plan is involved, whether the stage of the planning and decision process is sufficiently "final" to warrant judicial intervention. If federal location approval has not been obtained, then these claims must be dismissed for want of ripeness. If federal location approval has been granted, then injunctive relief would be appropriate if appellants can carry their burden of showing: (1) that their hearing rights under the above-described federal transportation regulations have been infringed; or (2) that the final environmental impact statement (or the draft statement if the primary discussion of alternatives is in the draft and not the final statement) does not contain an adequate discussion of environmental impacts and alternatives to the proposed action (the construction of Alternate 1-B to connect I-40 with I-85 in Orange and Durham Counties).

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

T. C. STANFORD AND WIFE, PHYLLIS A. STANFORD, AND SILAS CREEK STATION, INC. v. EDWARD P. OWENS AND WIFE, NANCY P. OWENS, J. R. YARBROUGH, SUZANNA R. GWYN, COLEMAN ENGINEERING LABORATORIES, INC., AND ALLEN G. MILLS

No. 7921SC915

(Filed 6 May 1980)

1. **Uniform Commercial Code § 11— express warranty—inapplicability to sale of real property**

The warranty provisions of the Uniform Commercial Code were inapplicable to the present action which involved the sale of real property, not goods.

2. **Vendor and Purchaser § 6— condition of land—representations by seller—no express warranty**

Defendants' alleged representations that a piece of property which they proposed to sell to plaintiffs was suitable for a restaurant building, that a portion of the lot had been filled, but that the fill was of proper composition and compaction to support a restaurant building amounted to nothing more than the expression of an opinion on the part of defendants and did not rise to the level of affirmations of facts or promises required for the creation of an express warranty.

3. **Vendor and Purchaser § 6— land unsuitable for construction—inapplicability of implied warranty**

Plaintiffs, who claimed that a tract of land sold to them by defendants and said by defendants to be suitable for construction of a restaurant, could not recover on a claim for breach of an implied warranty, since that right of action exists only in the sale of a new residential dwelling to a consumer-vendee.

4. **Fraud § 9— filled land—suitability for construction—insufficient allegation of fraud**

Where plaintiffs alleged that defendants sold them a tract of land which was not suitable for the construction of a restaurant because of the composition and compaction of fill on the land, plaintiffs' complaint was insufficient to state a claim for fraud in that it lacked the requisite allegation that defendants made the false representation concerning the fill knowing it to be false or with reckless indifference as to its truth.

5. **Negligence § 2— condition of land—negligent misrepresentation in sale—sufficiency of complaint**

Plaintiffs' complaint was sufficient to state a valid claim based upon negligent misrepresentation where plaintiffs alleged that defendants, by their acts of filling their land, knew or should have known of the land's inability to support a building of the type plaintiffs would place upon it, and plaintiffs alleged that they suffered damages from cracking and stated the amount of the damages.

6. Negligence § 1.1— filling of lot—no legal duty owed by defendants to plaintiffs —no negligence

Plaintiffs' complaint was insufficient to state a claim based on defendants' negligence in filling their land prior to sale to plaintiffs, since defendants filled the lot as part of a partnership agreement to develop and sell the land and then had the land zoned for commercial use, and these acts were both taken prior to the eventual sale to plaintiffs so that no legal duty was owed to plaintiffs at the time of the alleged negligent acts.

7. Parties § 2; Rules of Civil Procedure § 8.1— different names used in complaint—no variance

Where the plaintiff in one claim was denominated as The Station of Silas Creek, Inc., a North Carolina Corporation with its principal place of business in Winston-Salem, Forsyth County, but the caption of the complaint included as a party plaintiff a corporation named Silas Creek Station, Inc., the doctrine of *idem sonans* applied to resolve any question of variance between the two corporate names.

8. Damages § 12— loss of profits—special damages—sufficiency of complaint

In an action to recover damages sustained by plaintiffs in their operation of a restaurant on land which defendants had sold to plaintiffs and which defendants allegedly knew had been filled so that it would not support a restaurant building, plaintiffs' allegations that cracks in the floors and walls were shown on local TV news, that sales volume substantially decreased after the news program, that sales volume had been steadily increasing prior to the TV coverage, and that plaintiffs had been damaged in the sum of $60,000 were sufficiently detailed fairly to inform defendants of plaintiffs' demand for special damages.

9. Professions and Occupations § 1; Negligence § 2— negligence in soil condition report—sufficiency of complaint

Plaintiffs' complaint was sufficient to state a claim for relief against defendant engineering company for negligence in the preparation of a subsurface examination of a tract of land upon which plaintiffs relied in building a restaurant, though there was no privity of contract between plaintiff and the corporate defendant, since the examination was obtained by the individual defendants, sellers of the property to plaintiffs.

APPEAL by plaintiffs from *Washington, Judge.* Orders entered 24 and 27 April 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 March 1980.

By a deed dated 30 April 1975, plaintiffs T. C. Stanford and Phyllis A. Stanford acquired certain real property located in Forsyth County. They planned to build a restaurant on the property. The land, a portion of which had been used by Winston-Salem as a sanitary landfill, was purchased by plaintiffs from Edward P. Owens, his wife, Nancy P. Owens, J. R. Yarbrough and Suzanna

R. Gwyn, individual defendants in this case. Prior to negotiations between plaintiffs and defendants for the sale of the property, defendants had filled, with dirt and other materials, a portion of the tract which was below the grade of abutting streets to raise it to an acceptable grade. The land was then zoned for commercial use. When plaintiffs viewed the property they were told that part of it had been filled.

During the period after the purchase but before plaintiffs began to build, they were furnished with a report prepared by Coleman Engineering Laboratories, Inc., the corporate defendant in the case, which had conducted a subsurface examination of the tract. After receiving the report, plaintiffs commenced construction of their restaurant. In the fall of 1976 the structure developed cracks in the floors and walls.

Plaintiffs Stanford and a corporation, Silas Creek Station, Inc., brought this action to recover damages to their building caused by the instability of the supporting ground and expenditures necessitated by efforts to halt further sinking. Their complaint consisted of nine claims of relief. In addition to the individual defendants already mentioned and Coleman, the corporate defendant, the architect with whom plaintiffs had contracted was also named as a defendant. All defendants except the architect filed Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted. After hearing on the motions, Judge Washington allowed them and denied plaintiffs' oral motion to amend. Plaintiffs appealed.

White and Crumpler, by Harrell Powell, Jr., G. Edgar Parker and Edward L. Powell, for plaintiff appellants.

Hatfield and Allman, by Weston P. Hatfield, Michael D. West, and C. Edwin Allman III, for defendant appellees Edward P. Owens, Nancy P. Owens, J. R. Yarbrough and Suzanna R. Gwyn.

Hutchins, Tyndall, Bell, Davis & Pitt, by Richard Tyndall, for defendant appellee Coleman Engineering Laboratories, Inc.

MARTIN (Harry C.), Judge.

We are asked on this appeal to determine whether the trial court correctly decided the Rule 12(b)(6) motions in defendants'

favor and correctly denied plaintiffs' motion to amend. The court dismissed seven of the claims of plaintiffs' complaint for failure to state a claim upon which relief can be granted. For the following reasons we conclude that the court was without error in dismissing the first, third and seventh claims and in denying plaintiffs' motion to amend. We think, however, the court erred in dismissing the second, fourth, fifth and sixth claims.

A complaint may be dismissed on a Rule 12(b)(6) motion if it is clearly without merit. This lack of merit may consist of either an absence of law to support a claim of the type asserted, an absence of facts to make a good claim, or the disclosure of a fact which will necessarily defeat the claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690, *cert. denied*, 277 N.C. 251 (1970). The allegations of the complaint are to be taken as true on the motion to dismiss. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). With these familiar principles in mind, we review the seven claims of relief seriatim.

FIRST CLAIM OF RELIEF

Plaintiffs Stanford bring this claim against the individual defendants from whom they purchased the property. Pertinent allegations of the claim follow:

> V. . . . During the winter of 1975 defendants Yarborough and Gwyn informed plaintiffs Stanford that they had a tract on Silas Creek Parkway that was suitable for a restaurant building of the type located on the first tract purchased from defendants, Yarborough and Gwyn. Defendants, Yarborough and Gwyn then showed the plaintiffs the tract described in Exhibit B, that tract being located with the boundaries of Exhibit A. The defendants, Yarborough, Gwyn and Owens represented that a portion of the lot described in Exhibit B had been filled, but the fill was of proper composition and compaction to support a restaurant building and that they would furnish proof of these facts. They further represented the fill was far enough back on the lot that none of the restaurant should be located on the filled portion.
>
> VI. At all times prior to the purchase, defendants, Yarborough, Gwyn and Owens knew that plaintiffs, Stanford were purchasing this tract for purposes of constructing a

restaurant of the type constructed on the site previously purchased from defendants Yarborough and Gwyn. Defendants Yarborough, Gwyn and Owens made numerous representations that the land was fit for plaintiffs, Stanford's intended use and purpose. In reliance on these warranties and representations, plaintiffs Stanford purchased that tract described in Exhibit B from defendants by deed from defendants, Owens.

VII. That shortly after purchasing the tract described in Exhibit B, but before construction commenced, defendants, Yarborough, Gwyn and Owens furnished to plaintiffs Stanford as further evidence that the soil would be adequate support for the proposed building, a report from Coleman Engineering Laboratories, Inc. (Exhibit C). Said report disclosed that the soil located on the tract was of sufficient soil bearing qualities to support a building of the type that plaintiffs Stanford proposed to construct. That at the time of the furnishing of the said report, the defendants, Yarborough, Gwyn and Owens knew that the plaintiffs were going to construct a restaurant upon the said premises and knew that the plaintiffs would act in reliance upon the said report in constructing a restaurant upon the said premises and in fact, the plaintiffs did act in reliance upon the furnishing of the said report and did commence the construction of the restaurant as hereinabove set out.

[1] Plaintiffs argue in their brief that this portion of their complaint states a valid claim for breach of express warranty. They recognize that the warranty provisions of the Uniform Commercial Code do not apply because the sale involved real property, not goods. They seek, however, to utilize the provisions of N.C.G.S. 25-1-103, that, as they state, "supplemental principles of law are not displaced by the enactment of the Code," and maintain that application of general warranty principles is authorized by this statute. The cases they cite, however, involve sales of goods.

[2] Plaintiffs contend that they "clearly allege the making of an express warranty," pointing to the following excerpts from the complaint:

> Defendants . . . informed plaintiffs Stanford that they had a tract on Silas Creek Parkway that was suitable for a restaurant building of the type located on the first tract purchased from defendants.
>
> Defendants . . . represented that a portion of the lot . . . had been filled, but the fill was of proper composition and compaction to support a restaurant building.
>
> Defendants represented the fill was far enough back on the lot that none of the restaurant should be located on the filled portion.
>
> Defendants . . . made numerous representations that the land was fit for plaintiffs' Stanford intended use and purpose.

We, however, have concluded that these alleged representations amount to nothing more than the expression of an opinion on the part of defendants. They do not rise to the level of "affirmation of fact or promise" required for the creation of an express warranty.

> Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property. Affirmations concerning the value of land or its adaptation to a particular mode of culture or the capacity of the soil to produce crops or support cattle are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially.

Williamson v. Holt, 147 N.C. 515, 522, 61 S.E. 384, 387 (1908).

[3] We also take note that neither could a claim for breach of an implied warranty succeed under this fact situation, because to date this right of action exists only in the sale of a new residential dwelling to a consumer-vendee. *See Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974).

[4] Defendants, according to their brief, initially believed this first claim was premised on fraud. Even though plaintiffs do not presently argue fraud, if the complaint sufficiently alleges fraud it should not be dismissed. The necessary elements of fraud are well

recognized. "To constitute fraud, there must be false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with intent to deceive." *Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 52, 127 S.E. 2d 759, 761 (1962). The test for sufficiency of pleading fraud is the following: "A pleading setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive plaintiff, or must allege facts from which such intent can be legitimately inferred." *Calloway v. Wyatt*, 246 N.C. 129, 133, 97 S.E. 2d 881, 884 (1957). We think plaintiffs' complaint does not meet this standard. It lacks the requisite allegation or inference that defendants made the false representation knowing it to be false or with reckless indifference as to its truth. To the contrary, plaintiffs alleged that defendants represented they would furnish proof of the fact that the "fill was of proper composition and compaction to support a restaurant building."

The trial court's decision to dismiss the first claim is affirmed.

SECOND CLAIM OF RELIEF

[5] Plaintiffs Stanford bring this claim against the same individual defendants; they argue that a valid claim is stated based upon negligent misrepresentation. The pertinent allegations are as follows:

> X. That defendants Yarborough, Gwyn and Owens by their acts of filling the land knew or should have known of its ability to support a building of the type plaintiffs Stanford would place upon it. That because of this knowledge and their knowledge of the type of building the plaintiffs Stanford would construct, defendants Yarborough, Gwyn and Owens are guilty of negligently misrepresenting to plaintiffs Stanford that the land was fit for the purpose intended. That as a consequence of this negligent misrepresentation plaintiffs Stanford have suffered the following damages:
>
> (a) The sum of $53,775.00, representing funds already expended to halt the cracking.
>
> (b) The sum of $340,000.00 representing the difference in the fair market value of the plaintiffs' land and building as it

had been represented and warranted by the defendants, Owens, Yarborough and Gwyn, and its present fair market value.

We hold the trial court erred in dismissing this claim. North Carolina now expressly recognizes a cause of action in negligence based on negligent misrepresentation. *See Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580, *disc. rev. denied*, 298 N.C. 295 (1979), which found the Restatement of Torts, § 552, to be in accord with North Carolina law. To be adequate to survive a motion to dismiss, a complaint alleging negligence must allege facts which constitute the negligence charged and the facts which establish such negligence as the proximate cause of the injury. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). We think sufficient facts are alleged here by plaintiffs. We disagree also with defendants' position that the second claim of relief is fatally defective because it does not allege that the asserted negligent misrepresentation was a proximate cause of the damage. Defendants point out that the claim "merely states that the alleged damage occurred as 'a consequence' of said alleged negligent misrepresentation." It is not fatal, however, that the words "proximate cause" are not specifically used in the complaint. *Casualty Co. v. Oil Co.*, 265 N.C. 121, 143 S.E. 2d 279 (1965).

Defendants further contend that according to Section 552(b)(ii) of the Restatement of Torts, there must be an element of justifiable reliance by plaintiffs on information negligently supplied by defendants for a cause of action to exist, and because this jurisdiction has long observed the caveat emptor doctrine in commercial real estate transactions, the general rule is that "one has no right to rely on representations as to the condition, quality, or character of such real estate, or its adaptability to certain uses." We think that this question of justifiable reliance is analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether plaintiff reasonably relied upon representations made by defendant. *Whitaker v. Wood*, 258 N.C. 524, 128 S.E. 2d 753 (1963). Certainly any question of justifiable reliance here should survive the motions to dismiss.

THIRD CLAIM OF RELIEF

[6] Plaintiffs Stanford allege in their third claim the following:

X. That defendants Yarborough, Gwyn and Owens through their duly authorized agents, servants and employees were negligent in their construction of the lot described in Exhibit B in that they failed to ascertain whether the soil on which they placed the dirt and other fill materials was of sufficient compaction and prior composition to support the fill and any structures which may be placed thereon; failed to properly compact the fill material to halt any significant settling; and further failed to fill the lot in accordance with the required standards.

XI. That the negligence of the defendants, Yarborough, Gwyn and Owens and their duly authorized agents, servants and employees as herein complained of was the proximate cause of the damage to the plaintiffs Stanford; and that as a proximate result of defendants' above mentioned negligence, the plaintiffs Stanford have suffered the following damages: . . .

Negligence has been defined as the failure to exercise proper care in the performance of a legal duty which defendant owed plaintiff under the circumstances surrounding them. *Dunning v. Warehouse Co.*, 272 N.C. 723, 158 S.E. 2d 893 (1968). In this case, at the time of the alleged negligent "construction of the lot," did defendants owe a duty of care to plaintiffs Stanford? We think that plaintiffs' complaint clearly answers this question in the negative. Paragraph IV of the first claim, incorporated within the third claim, alleges that defendants Yarbrough and Gwyn filled the lot as part of their partnership agreement with Owens to develop and sell the land. They then had the land zoned for commercial use. These acts were both taken at some time prior to the eventual contract of sale and sale to plaintiffs. We agree with defendants' argument that no legal duty was owed to these particular plaintiffs at the time of the alleged negligent acts. The trial court correctly dismissed this claim.

FOURTH CLAIM OF RELIEF

This claim purports to be based upon negligent misrepresentation by the individual defendants and seeks damages for reduction in plaintiff's sales volume. The allegations are as follows:

I. Plaintiff, "The Station" realleges Paragraphs II through VIII of the First Claim of Relief and incorporates these paragraphs in this Fourth Claim of Relief as Paragraphs II through VIII as if fully set out herein.

IX. That upon completion of the improvements located on the land described in Exhibit B, the plaintiffs, Stanford leased the land and the building to "The Station." The Stanfords own 100% of the stock in that corporation and incorporated it for the purpose of operating a restaurant on the property. As a result of the negligent misrepresentations of defendants Owens, Yarborough and Gwyn to plaintiffs Stanford, alleged in the Second Claim of Relief, and the resulting sinking and cracking of the building, the plaintiff The Station suffered much adverse publicity. This adverse publicity came after its customers saw the cracks in the floors and walls in the building and these same cracks were shown to the entire television viewing audience of Channel 12, on a 6:00 o'clock news program shown during August of 1976. As a direct result of this adverse publicity the sales volume of The Station has been substantially reduced from September, 1976 and has not returned to the level achieved prior to that date. Prior to this time the sales volume had been steadily increasing.

Defendants Yarborough, Gwyn and Owens should have foreseen that these types of damages would have occurred, when they made the representation that the land described in Exhibit B was suitable for the construction of a building of the type constructed by plaintiffs, Stanford, and that the building would be occupied by the plaintiff, The Station. The negligent misrepresentations were the proximate cause of The Station's damages and those damages are equal to the sum of $60,000.00.

We think the trial court acted improperly in dismissing the fourth claim.

[7] The plaintiff in this claim is denominated The Station of Silas Creek, Inc., a North Carolina corporation with its principal place of business in Winston-Salem, Forsyth County. The caption of the complaint in this action includes as a party plaintiff a corporation named Silas Creek Station, Inc. We think that any question which

might be raised concerning the variance between these two corporate names is resolved by application of the doctrine *idem sonans.* The names, The Station of Silas Creek, Inc. and Silas Creek Station, Inc., sound sufficiently similar to be covered under this doctrine. *State v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832 (1943).

[8] Defendants contend that this claim was subject to dismissal on their Rule 12(b)(6) motion because plaintiff failed to allege its loss of profits "specifically and in detail." We do not agree. Lost profits are included under the rubric of special damages. Rule 9(g), North Carolina Rules of Civil Procedure, requires that "[w]hen items of special damage are claimed each shall be averred." Facts giving rise to special damages must be alleged so as to fairly inform defendant of the scope of plaintiff's demand. *Rodd v. Drug Co.,* 30 N.C. App. 564, 228 S.E. 2d 35 (1976). An often repeated statement of this rule has been that special damages must be pleaded with sufficient particularity to put defendant on notice. *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894 (1943); *Conrad v. Shuford,* 174 N.C. 719, 94 S.E. 424 (1917); *Windfield Corp. v. Inspection Co.,* 18 N.C. App. 168, 196 S.E. 2d 607 (1973). After reviewing plaintiff's fourth claim, we hold that it satisfies these pleading requirements. Plaintiff, of course, must still satisfy evidentiary requirements to prove these special damages.

FIFTH CLAIM OF RELIEF

[9] Plaintiffs Stanford bring this claim against Coleman Engineering Laboratories, Inc., the corporate defendant. The essential allegations are as follows:

> III. That defendants Yarborough, Gwyn and Owens acting on their own behalf and as agents of the plaintiff retained Coleman for the purposes of conducting a sub-surface examination on that tract of land described in Exhibit B. That pursuant to an oral contract Coleman through its duly authorized agents, servants and employees conducted a study and submitted its findings in a report labeled "Report of Test Borings and Sub-Surface Investigations," dated June 27, 1975, a copy of which is attached as Exhibit C. In that report defendant Coleman stated, ". . . the purpose of this work was to determine the sub-surface soil conditions of the pro-

posed construction area and to obtain information on the varying qualities of the underlying areas." It further stated that, "we have been informed that this proposed structure is to be a single-story building and therefore expect light to moderate loading conditions. Based upon the results of this investigation, it is our opinion that this site is satisfactory for the proposed construction if the soils in and on uninvestigated areas is similar to those encountered in our test borings." Defendant Coleman at all times had knowledge that the contents of its report be relied upon by the plaintiffs and other third-parties.

IV. That this report was submitted to plaintiffs Stanford by defendants Owens, Yarborough and Gwyn and in reliance on its contents plaintiffs Stanford commenced construction of the restaurant building on the land described in Exhibit B. Within three months after completion of construction the rear portion of the building began to sink and the building developed several cracks, the largest of which was located approximately in the middle of the building and ran down both side walls and across the floor. As a result of this cracking and Geo Technical Engineering Company of Research Triangle, North Carolina was retained to examine the building and the subsoil condition. Results of that company's findings are attached in Exhibit D. These findings disclosed that the land on which the building was located was of inadequate compaction and composition to support the building located thereon.

V. That at all times complained of the defendant Coleman was guilty of the following negligent acts and omissions that proximately caused damage to the plaintiff:

(a) The boring logs do not indicate whether the subsoil material was man-made fill or residual.

(b) The sub-surface investigation was not of sufficient depth to encounter the previous landfill nor to determine the composition underlying material and residual soil.

(c) The sub-surface investigation failed to determine whether the soil underlying the fill had sufficient capabilities to withstand the weight of the filled material itself.

(d) The work was not done in accordance with established engineering standards.

VI. That the negligence of the defendant, Coleman and its duly authorized agents, servants, and employees as herein complained of was the proximate cause of the damage to the plaintiffs, Stanford; and that as a proximate result of defendant Coleman's above mentioned negligence plaintiffs, Stanford have suffered the following damages:

(a) The sum of $53,775.00 representing funds expended to halt the existing cracking.

(b) The sum of $250,000.00 representing the fact that the building as constructed was reasonably worth the sum of $250,000.00 but that after the construction, the said building had a fair market value of $.0.

Plaintiffs contend that these allegations state a valid claim for negligence against Coleman. We agree with plaintiffs and hold that the trial court erroneously dismissed this claim. We think that this Court's decision in *Davidson and Jones, Inc. v. County of New Hanover, supra,* clearly embraces the factual situation alleged by plaintiffs:

> A surveyor or civil engineer is required to exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury. [Citation omitted.] Such liability is based on negligence, and lack of privity of contract does not render [defendant] immune from liability to the general contractor or the subcontractors for damages proximately resulting from submitting a bid or conducting work in reliance on negligently prepared soil test reports. [Citation omitted.]

41 N.C. App. at 668, 255 S.E. 2d at 585.

Coleman seeks to distinguish *Davidson,* arguing that it differs greatly from this case. It points out that in *Davidson* "there was never any doubt about what the soil report would be used for. . . . The report was rendered for the *purpose* of having contractors submit bids." But the language from *Davidson* quoted in

the above paragraph does not limit liability for damages resulting from only submission of bids; it specifically includes "or conducting work in reliance on negligently prepared soil test reports." Coleman also places emphasis on the timing factor, arguing that because its report is dated almost one month after plaintiffs purchased the land, plaintiffs could in no way have relied upon the report in deciding to buy the land. We think this emphasis is ill-placed. Plaintiffs allege that they commenced construction of the building, not purchased the property, in reliance on the contents of the report. Finally, Coleman urges us to find this case to be on "all fours" with *Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 248 S.E. 2d 444 (1978). This Court in *Drilling Co.* held that defendant could not be held liable for negligence in the absence of privity of contract. We agree, however, with Judge Erwin's statement in *Davidson* that the decision in *Drilling Co.* does not preclude us from reaching our decision. We are being consistent with the trend of abolishing the privity requirement in cases with factual situations similar to that in *Davidson.* We hold that at this procedural point, plaintiffs have sufficiently alleged a cause of action against Coleman based upon negligence.

SIXTH CLAIM OF RELIEF

Plaintiff "The Station of Silas Creek, Inc." incorporates paragraphs II through VI of the fifth claim into this claim, alleging negligence on the part of Coleman and seeking damages of $60,000 in lost profits. For the same reasons we set forth in the section entitled Fourth Claim of Relief, we think the trial court incorrectly dismissed the sixth claim.

SEVENTH CLAIM OF RELIEF

Plaintiffs Stanford argue that this claim states a valid claim for breach of a third-party beneficiary contract. They allege that "upon information and belief defendants Yarborough, and Gwyn entered into an oral contract with defendant Coleman" and that "defendant Yarborough and Gwyn agreed to pay defendant Coleman an agreed upon price for its services."

We think that plaintiffs' own complaint discloses a fact which necessarily defeats this claim. Exhibit C, which is attached to the complaint, is a copy of the report completed by Coleman Engineering Laboratories, Inc. On its face, it reveals that the

client for which the report was prepared was Piedmont Land and Development Co., Inc. Perhaps the individual *defendants* could be called third-party beneficiaries of the contract between Coleman and Piedmont, but certainly plaintiffs could not be. The trial court correctly dismissed this claim.

DENIAL OF MOTION TO AMEND

Plaintiffs' counsel in open court made a motion to amend all claims of relief after the judge announced his intention to grant defendants' motions to dismiss. Plaintiffs' motion was denied. Because we have held that the court erred in dismissing the second, fourth, fifth and sixth claims of relief, plaintiffs are not prejudiced by the refusal of the court to allow amendment of these four claims. Furthermore, a motion to amend a pleading is addressed to the discretion of the trial judge; his ruling is not reviewable absent a clear showing of abuse of discretion. *Vending Co. v. Turner*, 267 N.C. 576, 148 S.E. 2d 531 (1966). Such abuse of discretion does not appear from the record before us.

We affirm the trial court's dismissal of the first, third and seventh claims of relief in plaintiffs' complaint and denial of the oral motion to amend. We reverse the dismissal of the second, fourth, fifth and sixth claims of relief and remand to the Superior Court of Forsyth County for further proceedings.

Affirmed in part. Reversed and remanded in part.

Judges VAUGHN and CLARK concur.

SEBASTIAN LEE COLSON, BY HIS GUARDIAN AD LITEM, CLARENCE V. MATTOCKS, AND PATRICIA ANN COLSON v. MAMIE MACON SHAW AND DAN R. DOUGLASS

No. 7818SC631

(Filed 6 May 1980)

1. Automobiles § 63.1— child darting into road—insufficient evidence of negligence

In an action to recover for injuries sustained by a child who was struck by a car driven by one defendant, the trial court properly allowed defendant's mo-

tion for directed verdict where the evidence tended to show that the pavement at the scene of the accident was wet; numerous people were standing around; cars were parked on both sides of the street; it was dark when the accident occurred; there was no evidence that defendant in any way failed to drive in a careful and prudent manner; she was not speeding; her headlights were burning; she was looking straight ahead as she drove beside the car from behind which the child suddenly ran into her path; and although defendant was unable to apply her brakes before the collision occurred, she brought her car to a stop immediately after the accident, confirming that she was driving slowly, maintaining a proper lookout, and keeping her vehicle under proper control.

2. **Automobiles § 92.4— minor passenger—duty of driver—no duty to supervise crossing of street**

In an action to recover for injuries sustained by a child who alighted from one defendant's car and ran into the path of the other defendant's car, the defendant in whose car the child had been a passenger was under a duty to let the child out at a safe place and not to stop his car in such a way as to create a hazard, but defendant driver was not under a duty to supervise the child in crossing the street, since defendant was strictly a volunteer in offering the child a ride, and two other adults besides defendant were in the car, one of whom had accepted primary responsibility for the safety of the child.

Judge MARTIN (Harry C.) dissenting.

APPEAL by plaintiffs from *Crissman, Judge.* Judgment entered 5 April 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 March 1979.

On 18 June 1976 the minor plaintiff, Sebastian Lee Colson, then five years old, was severely injured when he was struck by an automobile driven by the defendant, Mamie Macon Shaw, as he was attempting to cross a city street after getting out of an automobile driven by the defendant, Dan R. Douglass. This action was brought to recover damages for his injuries and for medical expenses incurred for his treatment by his mother, the plaintiff Patricia Ann Colson. The plaintiffs alleged that the child's injuries were caused by the joint and concurrent negligence of the defendants. The defendants denied they were negligent.

At trial before a jury, the plaintiffs presented evidence to show the following: On 18 June 1978, Patricia Ann Colson, together with three of her children, Sebastian, Effrim, and Verlanda, were visiting at the home of Patricia's mother, Ola Mae Campbell, on East Commerce Avenue in High Point. East Commerce Avenue runs east and west and a short distance east of the Campbell residence is intersected by Meredith Street, which runs

north and south. East Commerce Street is 32 feet wide and is paved with a coarse blacktop surface. The Campbell residence was located on the north side of East Commerce Avenue, the front porch of the house being 78 feet westward from the west margin of Meredith Street. There was at least one house between the Campbell house and Meredith Street. There was a street light on a pole located on the north side of East Commerce Avenue 70 feet west from the Campbell house.

About seven or eight o'clock in the evening, Fanny Douglass, the mother of the defendant, Dan Douglass, came to the Campbell house with two of her grandchildren, Kevin and Renee, the children of Dan Douglass. These children were approximately the same age as the Colson children, and the children played together every day. Verlanda Colson was then seven years old, Effrim was six, and Sebastian was five. Fanny Douglass asked Patricia Colson if her daughter, Verlanda Colson, could go with Mrs. Douglass and her two grandchildren down the street to a friend's house. Patricia said that she could. The two little Colson boys, Effrim and Sebastian, started crying that they also wanted to go, because Fanny Douglass had her little grandson with her. Patricia Colson told her boys that Mrs. Douglass had not asked for them to go. Mrs. Douglass then said, "Well Pat, let them go. Let all of them go. I got my two grandkids with me. I wouldn't let nothing happen to them." Patricia Colson then allowed her children to go with Fanny Douglass.

Later that evening, about 9:00 o'clock when it had become "dusk dark," Dan Douglass, while driving his two-door Chevrolet automobile eastward on East Commerce Avenue, saw his mother, Fanny Douglass, with his own children and the Colson children, walking eastward along the south side of the Avenue toward Meredith Street. They were accompanied by Eli Lindsey, an adult friend of Mrs. Douglass's. Dan Douglass stopped and offered them a ride. They accepted, Kevin Douglass and Sebastian Colson getting into the front seat, and Mrs. Douglass, Eli Lindsey, and the remaining children getting into the back. Sebastian Colson was seated in the front seat next to the front door, and Kevin Douglass, who was about the same age as Sebastian, was seated just to his left. After all were in the car, Dan Douglass learned from his mother that the Colson children were to be taken back to their grandmother Campbell's house, just a little less than a

block away. He drove forward on East Commerce Avenue, proceeding eastwardly toward the Meredith Street intersection. He stopped his car on the right hand, or south, side of East Commerce Avenue directly across the street from the Campbell house and in front of another car, which was already parked on the same side of the street. There was no car parked on the south side of East Commerce Avenue between the Douglass car and Meredith Street. There were cars parked along the north edge of East Commerce Avenue, but none was parked directly in front of the Campbell house. There were a lot of people standing in the front yard of the house on the corner next to the Campbell house, and a few people were standing in front of the Campbell house.

Sebastian Colson got out of the car first, followed by the other passengers, except for Kevin Douglass, who remained in the car with his father. After getting out of the car, Sebastian went around to the back of the Douglass car and then started to run across East Commerce Avenue toward his grandmother Campbell's house. As he did so he ran into or was hit by the car driven by the defendant, Mamie Macon Shaw. Just prior to the accident, defendant Shaw had driven her car around the corner from Meredith Street and was driving westward on East Commerce Avenue when the collision occurred. As a result of the collision, Sebastian was severely injured.

Sebastian's mother, the plaintiff Patricia Ann Colson, was standing on the porch of the Campbell house and saw her son get hit. She testified:

> "[W]hen I first came out on the porch . . . I saw Sebastian, running around from the back of Dan Douglass's car. As to what happened as he ran, well, he was running from around the back of the car. At first when I saw him, he had got out of the car on the passenger side of Dan's car, and he was coming from around the car. And I heard somebody scream—Red Kelly scream, 'Babe, don't run out in the street.' And all of a sudden he was already out in the street; and he had gotten hit.
>
> . . . When I first saw Sebastian getting out of the passenger side of Dan Douglass's car, I did not see any other person in the area of Dan Douglass's car outside the car. I did see my other children at some time. When I saw my

other children, that would be Verland (sic) and Effrim. When I saw them, they were already out of the car and was waiting at the front of Dan's car to cross the street; but they didn't cross the street until after the accident. I didn't at any time while I saw Sebastian moving from the passenger side and crossing the street in the path of the Shaw car see either Fanny Douglass or Eli Lindsey get out of the Douglass car. There was no other person during any of that time standing outside of the car."

Dan Douglass testified:

"When I stopped there at the Campbell house, I did not at any time get out of my car before Sebastian Colson did. I did not at any time make any effort to determine for Sebastian Colson whether or not there was any traffic coming up or down the street, I just pulled up beside the curb. My mother didn't suggest to me that it would be better for me to pull over to the other side of the street and let the kids out in front of the Campbell house. I am denying that.

Before Sebastian got out of the car, I made no attempt to see what traffic was coming. I didn't tell Sebastian to be careful. I did pay some attention to who got out of the car first. Sebastian got out first. As to who opened the door for him, if I'm not mistaken, he opened it himself. He or my son, one opened the door.

* * *

When Sebastian got out of my car, there wasn't anybody holding his hand. And I didn't get out of my car to help him across the street."

At the conclusion of plaintiffs' evidence, both defendants moved for directed verdicts on the grounds that plaintiffs' evidence, taken in the light most favorable to the plaintiffs, failed to establish any negligence on the part of either defendant. From judgment granting the motions of both defendants, plaintiffs appeal.

Schoch, Schoch and Schoch, by Arch Schoch, Jr., attorneys for plaintiffs appellants.

Brinkley, Walser, McGirt, Miller & Smith by Charles H. McGirt and D. Clark Smith, Jr., attorneys for defendant appellee, Mamie Macon Shaw.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., attorneys for defendant appellee Dan R. Douglass.

PARKER, Judge.

Defendants' motions for directed verdict present the question whether the evidence, considered in the light most favorable to plaintiffs, is sufficient to justify a verdict in their favor as against either defendant. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). We shall so consider the evidence as it relates to the plaintiffs' claims of negligence against each defendant separately.

EVIDENCE AS TO NEGLIGENCE ON THE PART OF THE DEFENDANT MAMIE MACON SHAW

[1] Plaintiffs alleged that defendant Shaw was negligent in failing to keep a proper lookout, in failing to maintain her vehicle under proper control, in driving at a speed greater than was prudent under existing circumstances, and in failing to reduce speed when special conditions of hazard existed, to wit: a wet pavement, cars parked on both sides of a narrow street in a heavily populated area, and numerous people standing around the immediate area of impact. The evidence does not support any of these allegations of negligence. While there was evidence to show that the pavement was wet, that the area was heavily populated, that numerous people were standing around, that cars were parked on both sides of the street, and that it was dark when the accident occurred, there was no evidence that defendant Shaw in any way failed to drive in a careful and prudent manner in the face of these conditions of special hazard. On the contrary, the uncontradicted evidence shows that she was not speeding, that her car was "going very slow as it turned and came down into Commerce Street," that its headlights were burning, and that she was looking straight ahead as she drove beside the Douglass car from behind which the child suddenly ran into her path. Although she

testified that she was unable to apply her brakes before the collision occurred, the evidence shows that she brought her car to a stop immediately after the accident, confirming that she was driving slowly, maintaining a proper lookout, and keeping her vehicle under proper control.

"[N]o presumption of negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street or highway in the path of his approaching vehicle." *Winters v. Burch*, 284 N.C. 205, 210, 200 S.E. 2d 55, 58 (1973). To justify a verdict finding the driver actionably negligent in such a case, there must be some evidence that he could have avoided the accident by the exercise of reasonable care under the circumstances. *Daniels v. Johnson*, 25 N.C. App. 68, 212 S.E. 2d 245 (1975). No such evidence appears in the present case, nor was there any evidence that defendant Shaw failed in any way to exercise reasonable care in the manner in which she operated her vehicle. Her motion for directed verdict was properly allowed.

EVIDENCE AS TO NEGLIGENCE ON THE PART OF THE DEFENDANT DAN R. DOUGLASS

[2] Plaintiffs do not allege, nor was there any evidence to show, that defendant Douglass was negligent in the manner in which he operated his vehicle. On the contrary, the evidence shows that after picking up his passengers he drove forward and stopped his car on the right hand side of the street next to the curb at a place where it was lawful for him to stop and where his passengers could get out of his car at a place of safety. Plaintiffs' allegations of negligence on the part of defendant Douglass are that he "failed to supervise the minor plaintiff in unloading and alighting from his car" and that he "failed to supervise the minor plaintiff in crossing the street." There was no evidence that the minor plaintiff was injured while alighting from the Douglass car. On the contrary the evidence shows that he got out of the car safely and at a place of safety on the right hand side and away from the traveled portion of the street. Thus, any failure on the part of defendant Douglass "to supervise the minor plaintiff in unloading and alighting from his car" was not a cause of the minor plaintiff's injuries. There remains the question whether defendant Douglass can be held liable for failing to supervise the minor plaintiff in crossing the street. The real question presented is

whether, under all of the circumstances of this case, he had a duty to do so. In our opinion he did not.

As respects the Colson children, including the minor plaintiff, defendant Douglass was strictly a volunteer in offering them a ride. As such, his only duty with respect to letting the children out of his car at their destination was to let them out at a safe place and not to stop his car in such a way as to create a hazard. This he did. When the minor plaintiff was getting out of the car, there were, in addition to defendant Douglass, two other adults present in the car. One of these, defendant Douglass's mother, had accepted primary responsibility for the safety of the Colson children when she had assured their mother that she "wouldn't let nothing happen to them." Once the Colson children were safely out of his car and at a safe place, defendant Douglass owed them no greater duty to warn them to be careful in crossing the street or to supervise the manner of their crossing than did any other adult who was present at the time, and he did not owe as great a duty in this regard as did his mother who had accepted responsibility for their safety. Under all of the circumstances of this case, we hold that the evidence, considered in the light most favorable to the plaintiffs, fails to disclose the breach by defendant Douglass of any duty owed by him to the minor plaintiff which was a proximate cause of the latter's injuries.

In so holding we do not suggest that a driver who has deposited a passenger at a place of safety may not under any circumstances be held liable for subsequent injuries sustained by that passenger on crossing the street. We hold only that under the circumstances of this case defendant Douglass may not be so held. In this regard each case must be decided on the basis of its own facts, as the cases collected in Annot., 20 A.L.R. 2d 789 (1951) will illustrate. It is on the basis of their facts that the cases cited and relied upon by the plaintiffs are distinguishable from the present case. For example, in *Nelson v. Williams*, 300 Minn. 143, 218 N.W. 2d 471 (1974), the motorist parked his automobile on the shoulder of a dual lane high-speed divided highway and allowed his eight year old son to walk over into the median to retrieve an object which had fallen from a boat which the motorist's automobile was towing. The child was struck by a passing vehicle as he was attempting to recross the highway to return to his father's car. There was evidence that the father could have driven

to a cross-over and from thence to a place where he could have parked on the median near the spot where the object was believed to have fallen. Under these circumstances the Minnesota Supreme Court held that the jury was justified in finding that the father in the use of his automobile failed to exercise that degree of care for the protection of his minor son that should be expected of a reasonably prudent person. In *Riley v. Board of Education, Central Sch. Dist. No. 1,* 15 A.D. 2d 303, 223 N.Y.S. 2d 389 (1962), the motorist, after letting an eight-year-old boy out of her car, undertook to direct him across the road in safety. In so doing, she gave the child a confusing signal which caused him to enter upon the paved portion of the road where he was struck and killed. In affirming judgment for the plaintiff, the court held that "[t]he affirmative act of waving her hand to direct the discharged passenger, under the circumstances, was negligence." 15 A.D. 2d at 305, 223 N.Y.S. 2d at 391. In *Crane v. Banner,* 93 Idaho 69, 455 P 2d 313 (1969) the motorist discharged an eight year old girl on the side of a country road in the dark, knowing she would have to cross the road to reach her home and without dimming his lights. She was struck and killed by a vehicle approaching from the direction in which the lights were shining and whose driver was partially blinded by the bright lights. In reversing a summary judgment for the defendant motorist who had discharged the passenger from his vehicle, the Supreme Court of Idaho held that under the circumstances of that case whether there was a duty and breach of duty by the motorist were issues for resolution by the jury. The court stated that whether the motorist's negligent failure to dim his lights was a proximate cause of the accident was also an issue for the jury's determination.

It will be seen that in each of these cases there was some circumstance in addition to merely letting the child out of the car at a place of initial safety which caused the court to find the presence of a jury issue. In *Nelson* it was the father's action in allowing his young son to cross and recross the dual lanes of a high speed highway when, by a small extra effort on the part of the father, the child could have accomplished his mission without ever entering upon the highway. In *Riley* it was the motorist's affirmative action in negligently giving a confusing signal which caused the child to step in front of approaching traffic. In *Crane* it

was the motorist's failure to dim his bright lights which increased the hazard to the child. No such additional circumstance appears in the present case.

The facts of the present case are very similar to those in *Employers Liability Assur. Corp., Ltd. v. Smith*, 322 S.W. 2d 126 (Ky. Ct. of App. 1959). In that case a country school teacher had volunteered to give some of her small pupils a ride toward their home at the close of school. She let them out on the right side of a narrow, graveled country road, as far off the road as possible, when there was no approaching traffic, and her automobile was not in such a position as to create a hazard. She knew, however, that some of the children lived on the opposite side of the road and that it would be necessary for them to cross the road to reach their home. One of these children, age 5, after getting out of the car, ran from behind it into the road and was struck by a passing truck which had come around a curve after the children had gotten out of the car. In affirming a directed verdict for the teacher, the court found no duty on the teacher either to warn the small children of the danger of the approaching truck or to take precautions to see that they could cross the road in safety. The court held that under the circumstances of that case the teacher's only duty, with respect to letting the children out of the car at their destination, was to let them out at a safe place and not to stop her car in such a way as to create a hazard. We find the reasoning of the court in that case persuasive under the circumstances of the present case, and we hold that directed verdict for defendant Douglass was properly entered.

Affirmed.

Judge ERWIN concurs.

Judge MARTIN (Harry C.) concurs as to Defendant Shaw and dissents as to Defendant Douglass.

Judge MARTIN (Harry C.) dissenting.

I concur in Judge Parker's opinion with respect to the directed verdict in favor of the defendant Mamie Macon Shaw. However, I find there is sufficient evidence to enable plaintiff to overcome the motion for directed verdict by defendant Dan R.

Douglass and must dissent from that portion of the majority's opinion.

The majority holds that Douglass, the driver of the car, had no duty toward plaintiff other than to let him out at a safe place and not to stop his car so as to create a hazard. The majority holds as a matter of law defendant complied with these duties.

I find there is sufficient evidence to require a jury determination of whether defendant complied with the duty to let plaintiff out of the car at a safe place. What is a safe place for a mature adult may not be safe for a five-year-old child. Defendant let plaintiff exit his car unattended in the nighttime on a busy street, when he knew plaintiff had to cross this street to go to the home of his grandmother. Defendant's car was a two-door car and Fanny Douglass, who had charge of plaintiff and the other children before they got into the car, was in the back seat, unable to get out of the car until after plaintiff left it. This prevented her from being able to attend plaintiff as he exited.

Defendant knew that Fanny Douglass from her position in the back seat of the car could not control this five-year-old lad as he got out of the car. He knew the boy was going to cross the street to go to his grandmother's home. Defendant had a duty to recognize the likelihood of plaintiff's running across the street in obedience to childish impulses. *Yokeley v. Kearns*, 223 N.C. 196, 25 S.E. 2d 602 (1943). Under these circumstances, due care by Douglass must be proportionate to the plaintiff's incapacity adequately to protect himself. *Id.* In considering the alternatives available to Douglass in choosing a place to allow plaintiff to exit the car, it is difficult to conceive of a more dangerous place than the one he selected.

Likewise, I find the evidence of Douglass's stopping his car in the dark on the busy street across from plaintiff's destination is sufficient to allow a jury to decide whether defendant created a hazard for this five-year-old boy. Defendant could have easily driven the short distance required to park on the north side of East Commerce Street with the passenger side of the car adjacent to the curb and thereby allowed plaintiff and the other small children to go to the grandmother's house without crossing the street. A jury could reasonably find that when defendant stopped the car on the opposite side of the street, he created the hazard

of requiring this five-year-old child to cross a dangerous street to reach his grandmother's house.

In addition, under the facts of this case, I find defendant also had the duty to supervise or control plaintiff as he left the car, until Fanny Douglass was in position to resume her control over him. To hold defendant had no further duty to such a young child once he got out of the car is to disregard the rule in *Yokeley* that due care by defendant is proportionate to plaintiff's incapacity adequately to protect himself. Because of his tender years, plaintiff could not adequately protect himself from harm when placed in these circumstances.

> A motorist must recognize that children, and particularly very young children, have less judgment and capacity to avoid danger than adults, that their excursions into a street may reasonably be anticipated, that very young children are innocent and helpless, and that children are entitled to a care in proportion to their incapacity to foresee and avoid peril. [Citations omitted.]
>
> "Experience demonstrates that children of tender years in or about streets and highways are likely in obedience to impulse to run into or across such streets and highways suddenly and without warning. Motorists must know and recognize this fact and govern themselves accordingly else the criminal and civil laws must be called upon to turn professor." *Fox v. Barlow*, 206 N.C. 66, 173 S.E. 43. In other words, due care may require a motorist in a certain situation to anticipate that a child of tender years unmindful of danger will dart into a street in front of an approaching automobile.

Pavone v. Merion, 242 N.C. 594, 594-95, 89 S.E. 2d 108, 108-09 (1955); *see* 30 A.L.R. 2d 1 (1953). Defendant had a duty to take such actions as a reasonably prudent person would take under those circumstances to prevent injury to plaintiff. Such actions might include telling Sebastian not to go into the street, getting out of the car with him, and holding him or preventing him from darting into the street until Mrs. Douglass was able to resume supervision of plaintiff. Defendant failed to so do.

I vote to reverse the directed verdict in favor of defendant Douglass.

THE MUNCHAK CORPORATION (DELAWARE) AND RDG CORPORATION, A JOINT VENTURE D/B/A THE CAROLINA COUGARS AND THE MUNCHAK CORPORATION (GEORGIA) v. JOE L. CALDWELL

No. 7918SC814

(Filed 6 May 1980)

1. **Evidence § 22.1— trial of defendant's counterclaim—admissibility of record of plaintiff's claim**

In a trial on defendant's counterclaim for specific performance of a contract, the trial court did not err in permitting defendant to introduce into evidence the entire record from an earlier trial of plaintiffs' claim for reformation of the contract where the complaint and counterclaim were filed in the same lawsuit and constituted two parts of the same action, and the claims for reformation and specific performance were severed for trial.

2. **Contracts § 16.1; Pensions § 1— pension provisions—time of funding—amount, frequency, duration of payments—definiteness of agreement**

Pension benefit provisions of the contract of defendant professional basketball player was not too indefinite as to the time of funding to be specifically enforced where it is clear that the pension plan was to be funded at least by the time defendant ceased playing for the Carolina Cougars. Nor were the pension provisions too ambiguous as to amount, frequency and duration of retirement benefits to be specifically enforced where the only term contested by plaintiff—the amount of the monthly payment—has been conclusively determined by the courts of this State in plaintiffs' action for reformation, and the contract provisions show that, upon reaching age 55, defendant will be entitled to receive each month for the rest of his life the sum of $600 multiplied by the number of years he played professional basketball.

3. **Specific Performance § 1— portion of contract unenforceable—specific performance of other portions**

Specific performance of a portion of a contract may be granted even where certain other portions are impossible to perform and cannot be enforced.

4. **Pensions § 1; Specific Performance § 3— pension provisions of contract—inadequacy of remedy at law**

Defendant's remedy at law was inadequate so that he was entitled to specific performance of the pension provisions of his contract as a professional basketball player where defendant would have to wait until he was 45 years old if he wished to exercise the early retirement provision of the contract or otherwise until he was 55 years old; if plaintiffs failed to comply with the provisions, defendant would be put in a position of continually going to court as the pension payments became due; and plaintiffs may not be financially solvent, in existence or able to fund the pension when defendant reaches the age of 45.

5. Pensions § 1; Specific Performance § 2— pension provisions of contract—alleged misunderstanding of terms by plaintiffs

There is no merit in plaintiffs' contention that specific performance of the pension provisions of the contract of a professional basketball player should not be granted because plaintiffs did not understand that the pension provisions might mean what the superior court decreed they mean where the contract was negotiated, prepared and examined by businessmen experienced in the area of player contracts and professional basketball franchises, and the courts have conclusively and finally determined that both parties executed the contract in accord with their intentions.

6. Pensions § 1; Specific Performance § 1— specific performance of pension provisions—sufficiency of complaint

Defendant's counterclaim was sufficient to state a claim for specific performance of the pension provisions of his contract as a professional basketball player.

7. Evidence § 13; Courts § 9— ruling on attorney-client privilege—no authority by another judge to set aside

A superior court judge could not set aside the ruling of another superior court judge in the same action that documents from the file of defendant's former lawyer were protected from disclosure by the attorney-client privilege.

8. Pensions § 1; Contracts § 20.1— pension provision—impossibility of performance

The trial court did not err in ruling that a contract provision requiring plaintiffs to provide defendant basketball player with "life insurance in an amount equal to one hundred (100) times the *cash value* of the pension described above from the date he ceases to play professional basketball until the date that he commences drawing retirement" was impossible to perform and could not be specifically enforced since the cash value would range from approximately $360,000 when defendant ceased playing basketball to approximately $910,000 at the time defendant became eligible to draw retirement, and it is commercially impossible to insure an individual for an amount ranging from $36 million to $91 million (100 times the cash value). Furthermore, the trial court had no authority to modify the contract so that plaintiffs would be liable to provide life insurance at 100 times the amount of the monthly pension benefit.

9. Attorneys at Law § 7.1— attorney fees—provision in contract—applicability to actions involving third parties

Provision of a basketball player's contract in which plaintiffs agreed to indemnify the player for claims resulting from the player's execution of the contract and to pay all legal expenses in connection with such claims applied only to actions involving third parties and not to actions between the parties to the contract.

APPEAL by plaintiffs from *Mills, Judge.* Cross-appeal by defendant. Judgment entered 6 April 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 March 1980.

This is an action on defendant's counterclaim for specific performance of a contract whereby defendant agreed to play basketball for the now defunct Carolina Cougars professional team. Article 5 of the contract, which dealt with defendant's pension benefits, was the subject of this controversy.

This action originally consisted of two parts: plaintiffs' claim for reformation of the contract and defendant's counterclaim. The parts were severed, and the claim for reformation was heard on 3 January 1977 in Superior Court, Guilford County. The trial court refused to reform the contract and held that plaintiffs were obligated to pay defendant $600 each month for each year defendant played professional basketball, such payments to begin upon defendant's retirement at age 55 and continue throughout defendant's life. Defendant has the option of taking early retirement at age 45, in which event the amount due would be actuarily determined.

Plaintiffs appealed the trial court's decision. This Court affirmed the trial court (37 N.C. App. 240, 246 S.E. 2d 13 (1978)). Discretionary review was denied by our Supreme Court (295 N.C. 647, 248 S.E. 2d 252 (1978)).

Subsequently, the second part of the action—defendant's counterclaim for specific performance—was heard. On 6 April 1979, Judge Mills gave judgment ordering plaintiffs to procure an insurance policy or a commitment to issue an insurance policy from an insurance carrier acceptable to defendant.

The court held that the policy must be sufficient to provide monthly benefits of $6,600 per month beginning at defendant's age 55 and continuing thereafter for his life, and reserved to defendant the right upon reaching age 45 to elect to receive monthly benefits in a lesser amount to be actuarily determined. In effect, the trial court granted specific performance of paragraphs 5(a) and 5(b) of the contract. Paragraph 5(c) was held to be impossible to perform.

Plaintiffs appealed to this Court, and defendant has cross-appealed the trial court's holding in reference to paragraph 5(c).

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey, Edward C. Winslow III, and Paul E. Marth; Powell, Goldstein, Frazer & Murphy, by Frank Love, for plaintiff appellant Munchak Corporation (Delaware); and Younce, Wall & Chastain, by Percy L. Wall, for plaintiff appellant Munchak Corporation (Georgia).

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter, James L. Gale, Jeri L. Whitfield, and Alan W. Duncan, for defendant appellee.

HILL, Judge.

[1] At the trial on defendant's counterclaim for specific performance, the trial court allowed defendant to introduce into evidence the entire record from the earlier hearing on plaintiffs' claim for reformation. Plaintiffs contend the court's action was in error.

It is clear that in most circumstances, testimony from a former trial is hearsay and inadmissible in a subsequent trial. "[P]reviously recorded testimony is authorized if it be shown that: (1) The witness is unavailable; (2) the proceedings at which the testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at that time and represented by counsel." (Citations omitted.) *State v. Smith*, 291 N.C. 505, 524, 231 S.E. 2d 663 (1977).

In the case *sub judice*, however, we are presented with an exception. It is important to remember that there was only one action. The complaint and counterclaim were filed in the same lawsuit and constitute two parts of the same action. Both claims were heard in the superior court. If the claim had been heard on the same day, the parties and the judge would have been cognizant of and able to rely on evidence presented on the claim for reformation.

The record from the prior reformation hearing was properly admitted. To hold otherwise would be to destroy the ability of trial judges to exercise discretion by severing complicated cases into more understandable issues. Plaintiffs' first assignment of error is overruled.

Plaintiffs argue the trial court erred by decreeing specific enforcement of paragraphs 5(a) and 5(b) of the October 30, 1970 contract between the parties. Plaintiffs state several grounds for their position. The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. *Bell v. Concrete Products, Inc.*, 263 N.C. 389, 390, 139 S.E. 2d 629, 630 (1965). The remedy rests in the sound discretion of the trial court, *Bradshaw v. Millikin*, 173 N.C. 432, 92 S.E. 161 (1917); and is conclusive on appeal absent a showing of a palpable abuse of discretion. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967).

Paragraph 5 of the contract states that:

> At the time of the rendering of services to Club by Player, Player shall be eligible for and shall receive entitlement to pension benefits from an insurance carrier acceptable to Player at least equal to the following:
>
> (a) The sum of Six Hundred Dollars ($600.00) per month for each year of services as a professional basketball player, which sum shall be paid at age fifty-five (55); and
>
> (b) The right of early retirement at age forty-five (45) in which event the sum received shall be actuarily determined; and
>
> (c) Life insurance in an amount equal to one hundred (100) times the cash value of the pension described above from the date that he ceases to play professional basketball and until the date that he commences drawing retirement.

[2] Plaintiffs argue the contract is too ambiguous to be specifically performed, first contending that the contract does not establish a specific time by which funding is required. We disagree. Defendant was entitled to have his pension funded *at least* by the time it was clear he would never again play basketball for the Cougars.

It is clear from the actions of the parties to the contract and from the language of the instrument that the parties meant to provide an ascertainable monthly benefit to defendant upon retirement for the rest of his life. It is clear that at the time

defendant rendered services to the Cougars, he was entitled to the pension benefits. It is clear that defendant would not have bargained so as to place himself in a situation where he might retire from basketball and have to wait two decades for his pension to be funded. After all, defendant had played basketball in the National Basketball Association (NBA) and was familiar with that league's established and protective pension plan. Finally, we cannot believe that businessmen as experienced as plaintiffs would plan to fund a pension with an insurance carrier when defendant reaches 55 years of age rather than when he was a younger man. The difference in the amount of the premiums is significant. We find that it is abundantly clear that the pension plan was required to be funded at least by the time defendant ceased playing for the Cougars.

Plaintiffs' second contention in their argument that the contract is too ambiguous to be specifically enforced is that amount, frequency and duration of the retirement benefit are stated too ambiguously. We disagree.

"A court of equity is not authorized to order the specific performance of a contract which is not certain, definite and clear, and so precise in all of its material terms that neither party can reasonably misunderstand it." (Citations omitted.) *Morris v. Yates*, 226 Ga. 43, 45, 172 S.E. 2d 428 (1970). We agree with the statement of the Georgia Supreme Court cited above, and find that there is only one logical interpretation of Paragraph 5.

This issue has already been decided. A jury found in 1977 that *both* parties to this action agreed defendant should receive "[t]he sum of *Six Hundred Dollars* ($600.00) per month for each year of service as a professional basketball player, which sum shall be paid at age fifty-five (55)." This Court affirmed the trial court, and our Supreme Court denied certiorari. We find that the logical interpretation to be given to Paragraph 5(a) is that upon reaching age 55 defendant will be entitled to receive each month for the rest of his life the sum of $600 multiplied by the number of years he played professional basketball.

Plaintiffs' own actions indicate they would agree with our holding. During the reformation phase of this hearing, plaintiffs argued that the term in Paragraph 5(a) should be sixty dollars, not six hundred, and that the maximum they would ever be

obligated to pay defendant under the contract would be $600 per month. The issue was decided against plaintiffs. Plaintiffs did not argue that the frequency and duration of the retirement benefit were ambiguous, only that there had been a mistake in the amount.

Furthermore, in 1973, plaintiffs purchased an annuity policy with the insured being defendant Caldwell. The policy provided for a pension of $696.75 per month, beginning at age 55, for the remainder of defendant's life. As of 1973, three years after the parties signed the contract in dispute, plaintiffs' actions indicate that they understood they owed *some* amount of money to defendant every month of his life after he reached age 55. The only term plaintiffs seemed to have any doubt about—the amount of the monthly payment—has been conclusively established by the courts of this State.

" '[I]f either party knows that the other understand him as speaking . . . with one meaning, he will not be allowed to say that he . . . intended a different meaning . . . .' " (Citation omitted.) *Gaddy v. Bank*, 25 N.C. App. 169, 174, 212 S.E. 2d 561 (1975). By their actions, plaintiffs have demonstrated that they understood the frequency and duration of the retirement benefit. The legitimate disagreement over the amount has been resolved by our courts. No ambiguity with respect to the amount, frequency, or duration exists.

[3] Plaintiffs argue that the contract must be enforced according to its terms or not at all. They argue that the trial court cannot enforce paragraphs 5(a) and 5(b) while holding 5(c) to be impossible to perform. "Equity can only compel the performance of a contract in the precise terms agreed on. It cannot make a new or different contract for the parties simply because the one made by the parties proves ineffectual. " (Citation omitted.) *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44 (1952). In *McLean*, the plaintiffs wanted the Court to *imply* a contract term and specifically enforce that term. Such is not true in our case. In the case *sub judice* the trial judge simply struck a clause that was impossible to perform. A new contract was not made.

Plaintiffs also cite *Lawing v. Jaynes* and *Lawing v. McLean*, 20 N.C. App. 528, 202 S.E. 2d 334 (1974), *modified on other grounds*, 285 N.C. 418, 206 S.E. 2d 162 (1974), as authority for

their position. In *Lawing*, plaintiffs sought specific performance by defendant Joyner of an option to purchase real estate. Joyner had already conveyed a portion of the property to defendant McLean. This Court stated that ". . . specific performance may be decreed for the portion retained." (Emphasis added.) *Lawing* at 537. In a sense, this Court held in *Lawing* that specific performance of a contract *may* be granted even where certain parts are impossible to perform and cannot be enforced. We agree and find plaintiffs' argument to be without merit.

[4] Plaintiffs argue next that defendant is not entitled to specific performance because he has made no showing that he does not have an adequate remedy at law. We disagree.

> An adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice in its prompt administration as the remedy in equity.

Sumner v. Staton, 151 N.C. 198, 201, 65 S.E. 902, 904 (1909).

Defendant's remedy at law is to wait until he is 45 years of age. At that point, if he wishes to exercise the early retirement provisions set forth in clause 5(b), defendant must demand that plaintiffs fund his pension. If plaintiffs fail to comply, then defendant would have to ". . . file suit for the amount of accrued arrearage, reduce [his] claim to judgment, and, if the [plaintiffs] [fail] to satisfy it, secure satisfaction by execution." *Moore v. Moore*, 297 N.C. 14, 17, 252 S.E. 2d 735 (1979).

As *Moore* points out, parties often persist in their refusal to comply with judgments. Defendant would be put in the position of continually having to go to court as the pension payments became due and plaintiffs failed to comply. "The expense and delay involved in this remedy at law is evident," *Moore* at 17; and we feel, inadequate.

Furthermore, there is no guarantee that plaintiffs will be financially solvent, in existence, or able to fund the pension when defendant reaches the age of 45. To force defendant to wait until the age of 45 before having any remedy would frustrate the intent of the parties in providing for pension benefits. After all, the

whole purpose of a pension is to *guarantee* a known and steady source of income for the time when a person is no longer able to earn at his peak level, or earn a living at all.

"Adequacy is open ended; it does not exist as a matter of rule, but as a matter of fact. Whether a legal remedy is adequate or not, and how it compares with equity remedies, is a matter of analysis in each case." Dobbs, Law of Remedies 61 (1973). Defendant in the case *sub judice* is in a situation similar to that in which the plaintiff in *Moore, supra,* found herself. Our Supreme Court held plaintiff's remedy at law in that case to be inadequate, and citing from McClintock on Equity, § 46, p. 110 (2d ed. 1948), observed that even if the remedy at law which the plaintiff in that case might eventually receive was adequate, the intervention of equity was not prevented "'. . . if the procedures which must be followed at law would make the remedy less efficient and practical to meet the plaintiff's needs.'" *Moore* at p. 17.

Defendant Caldwell showed that his remedy at law is inadequate. The plaintiffs' argument is without merit.

[5] Plaintiffs further argue that specific performance of the parties' contract should not have been granted because it works an injustice in this case. We do not agree. It is true that,

> The general rule may be laid down that a court of equity in the exercise of its discretion granting such relief will refuse to grant a decree of specific performance of a contract where the performance will produce hardship or injustice to the defendant [plaintiff here] not reasonably within the contemplation of the parties at the inception of the contract; . . . . 49 Am. Jur., Specific Performance § 59, P. 74.

Furthermore, if a person, from whom specific performance is sought, entered into the contract in question without understanding it, such performance will not be enforced. *Pendleton v. Dalton,* 62 N.C. 119 (1866).

Plaintiffs contend in their brief that defendant's actions were ". . . calculated to deceive and mislead plaintiffs' representatives and to take advantage of their misunderstanding of the contract." Plaintiffs further assert in their brief that evidence at trial tended to show that,

> [W]hile there may have been no mutual mistake and while it may have intended to sign the contract it signed, including the terms of paragraph 5 as they appear, it is clear that [they] never understood . . . that the terms of paragraph 5 might mean what the Superior Court decreed they mean . . . .

This Court and probably no other court will ever know if plaintiffs meant to contract for a pension of only $60 per month times the number of years defendant played professional basketball, or whether defendant, a highly skilled basketball player, employed an equally skilled negotiator who was able to guarantee, with a large pension, the safety of his client's jump from the established NBA to the fledgling American Basketball Association.

Such knowledge is immaterial, however. All we need to know is that the subject contract was negotiated, prepared and examined by professionals who were businessmen experienced in the area of player contracts and professional basketball franchises. Furthermore, and more importantly, we know that the courts of this State have conclusively and finally decided that *both* parties executed paragraph 5(a) of the contract in accord with their intentions. Plaintiffs belittle their own intelligence when they argue that they never understood a court might interpret the language, ". . . sum of Six Hundred Dollars ($600.00) per month for each year of services as a professional basketball player . . ." to mean that defendant is entitled to the pension our courts have already decreed he is to receive.

[6] Plaintiffs argue next that defendant's counterclaim for specific enforcement never should have been heard by the trial court. Plaintiffs contend the trial court erred by denying their motion to dismiss defendant's counterclaim for failure to state a claim. Plaintiffs' argument is without merit.

Defendant's counterclaim for specific performance states that:

> The defendant avers that the contract of October 30, 1970, as written, was the agreement of the parties. The defendant asks the Court to enter judgment requiring the plaintiff to specifically perform all of the terms and provisions of the

contract of October 30, 1970, and in particular the provisions of Article 5 of the contract as written.

Since the passage of the North Carolina Rules of Civil Procedure, in particular G.S. 1A-1, Rule 8(a)(1), which took effect on 1 January 1970, the State has followed the concept of notice pleading. No longer must a pleading detail the facts which constitute the cause of action. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

In explaining its interpretation of Rule 8(a)(1), Justice Sharp (later Chief Justice), speaking for our Court in *Sutton*, stated that, "The North Carolina Rules of Civil Procedure are modeled after the federal rules." *Id.* at 99. Justice Sharp went on to state that the Court would examine federal case law for guidance in developing the philosophy of the State's Rules of Civil Procedure. The *Sutton* court then cited *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed. 2d 80, 78 S.Ct. 99 (1957), for the proposition that ". . . all the [Federal] Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Sutton* at p. 102. The *Sutton* court went on, at p. 102 citing *Conley*, stating that " ' . . . a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "

It is clear that defendant's counterclaim meets the requirements of G.S. 1A-1, Rule 8(a)(1). The trial court did not err by dismissing plaintiffs' motion.

[7] Plaintiffs further assign as error the trial judge's order on 6 April 1979 that documents from the file of Mr. Kenneth Goldman, one of defendant's former lawyers, remain under seal. Superior Court Judge William Z. Wood had examined the documents in 1973, *before this action was severed from the reformation action*, and had ruled that the documents were protected from disclosure by the attorney-client privilege. Plaintiffs did not appeal Judge Wood's order, only the trial judge's recognition of it. Plaintiffs' exception is ineffectual. One superior court judge cannot modify, reverse or set aside a judgment of another superior court judge. *In Re Burton*, 257 N.C. 534, 541, 126 S.E. 2d 581 (1962). Judge Mills was bound by Judge Wood's action. plaintiffs excepted to the wrong order.

[8] Defendant cross-appeals in this case, arguing that the trial court erred by refusing to specifically enforce paragraph 5(c) of the contract. Paragraph 5(c) states that:

> At the time of the rendering of services to Club by Player, Player shall be eligible for and shall receive entitlement to pension benefits from an insurance carrier acceptable to Player at least equal to the following:
>
> (c) Life insurance in an amount equal to one hundred (100) times the *cash value* of the pension described above *from the date that he ceases to play* professional basketball and *until the date that he commences* drawing retirement. (Emphasis added.)

The trial court was correct in its holding that this section is impossible to perform and cannot be specifically enforced.

It is important to note that "cash value" has a distinct meaning in the insurance industry. The cash value of a pension plan would be an amount quite different from the monthly benefits. If paragraph 5(c) had stated that plaintiffs were obligated to purchase life insurance in an amount equal to one hundred times the monthly benefits ($6,600), paragraph 5(c) could be specifically enforced. Plaintiffs would be obligated to purchase $660,000 worth of life insurance. As the paragraph reads, however, plaintiffs would be tied to a cash value that would range from approximately $360,000 when defendant ceased playing basketball to approximately $910,000 at the time defendant was eligible to draw retirement.

Uncontradicted testimony at trial makes it clear that it is commercially impossible to insure an individual for an amount ranging from $36 million to $91 million. "[A] court of equity will not do a useless thing . . ., specific performance will not, as a rule, be decreed against a defendant who is unable to comply with his contract." *Lawing, supra*, at 537. Furthermore, a court of equity will not often grant specific performance where by doing so it is placed in the position of constantly supervising performance. Such would be the case here because each year between the time defendant ceased to play basketball and the time he became eligible for his pension, the cash value would rise, thus requiring plaintiffs to purchase additional life insurance.

Defendant would have us modify paragraph 5(c) so that plaintiff would be bound to provide life insurance at 100 times the amount of the monthly benefit. This we cannot do. "Equity can only compel the performance of a contract in the precise terms agreed on. It cannot make a new or different contract for the parties simply because the one made by the parties proves ineffectual." (Citation omitted.) *McLean, supra,* at 71.

[9] Defendant's second argument on its cross-appeal is that the trial court erred when it refused to grant defendant's request for attorney's fees. The trial court did not err.

Defendant bases his claim upon paragraph 8 of the contract which essentially states that:

> The Club agrees to *indemnify* Player, . . . and hold [him] harmless from all liabilities and claims of whatever nature resulting from Player's entering into this Agreement. . . . In addition, the Club will pay *all legal expenses in connection with any and all such claims,* . . . . Player shall have the right to select his own attorney, . . . Which *attorney shall be reasonably approved by the Club.* (Emphasis added.)

Testimony at trial indicates that paragraph 8 applied to expenses defendant might incur in actions involving third parties—not with a party to the contract. Furthermore, the language of paragraph 8 clearly indicates that it only applied to actions involving third parties. Surely plaintiffs would not presume to have the right to approve defendant's lawyers in an adverse action between the two parties. Defendant's assignment of error is without merit.

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

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

GREAT AMERICAN INSURANCE COMPANY v. C. G. TATE CONSTRUCTION COMPANY

No. 7910SC904

(Filed 6 May 1980)

1. **Insurance § 96.1— notice of accident to insurer—reasonable time—prejudice to insurer**

In deciding whether an insured has complied with a notice provision in an insurance policy requiring notice to the insurer "as soon as practicable," the finder of facts must determine whether notice was given within a reasonable time considering all the facts and circumstances of the particular case, and, if not, whether the insurer has suffered prejudice from the insured's delay in giving notice.

2. **Insurance § 96.1— notice of accident to insurer—prejudice to insurer—factors to be considered**

In determining whether an insurer has been prejudiced by an insured's failure to give timely notice of an accident, the inquiry is whether the delay has frustrated the purpose of the notice provision to afford the insurer an opportunity to conduct an adequate and timely investigation, and among the factors to be considered are the availability of witnesses to the accident, the ability to discover other information regarding the conditions of the locale where the accident occurred, any physical changes in the location of the accident during the period of the delay, the existence of official reports concerning the occurrence, the preparation and preservation of demonstrative and illustrative evidence such as the vehicles involved in the occurrence or photographs and diagrams of the scene, and the ability of experts to reconstruct the scene and the occurrence.

3. **Insurance § 96.1— automobile liability insurance—notice of accident to insurer—delay unjustified—failure to find insurer not prejudiced**

Evidence that plaintiff insurer was not notified of defendant insured's possible involvement in a collision of 6 April 1978 until 3 May 1978 and evidence of the circumstances of the case was sufficient to support the trial court's determination that defendant's delay was unjustified, but the trial court erred in failing to consider whether plaintiff was prejudiced by such delay where there was ample evidence that plaintiff had identified and obtained statements from all witnesses; plaintiff had available to it voluminous photographs of the scene which showed one of the vehicles still burning and the roadway after the accident; the accident report prepared by the investigating officer was accessible and newspaper accounts of the accident were obtainable; and statements obtained by plaintiff from witnesses were substantially the same as statements the witnesses had given the investigating officer shortly after the collision and plaintiff was therefore not prejudiced because it was unable to contact witnesses immediately after the accident when everything was fresh in their minds.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 17 May 1979 in Superior Court, WAKE County. Heard in the Court of Appeals on 25 March 1980.

Great American Insurance Company (Great American) instituted this declaratory judgment action seeking a determination that it was not liable under a comprehensive general liability insurance policy issued by it to C. G. Tate Construction Company (Tate) for any damages for which Tate might be liable arising out of an accident which occurred on 6 April 1978. Great American did not dispute that the policy was in force at that time. Its contention that coverage did not exist was based solely on the fact that it had no notice of the accident until approximately 30 days after the accident occurred.

Answering the complaint, Tate conceded that it had not notified the plaintiff of the accident at the time it happened, but in explanation of its failure to notify, alleged the following:

> (b) That at the time and place of the accident . . ., none of the defendant's personnel or equipment was injured or damaged and was not involved in any manner or wise in the direct collision.
>
> (c) That the officers and directors of the defendant received several reports from the job site immediately after the accident which indicated that the defendant was not involved, directly or indirectly, in the cause of the accident . . . .
>
> (d) That until advised by the plaintiff several weeks after the accident, the officers and directors of the defendant were under the firm belief that the defendant was not involved in the accident and had no exposure or liability in connection therewith.
>
> (e) That had the officers and directors of the defendant [had] any information and belief that the defendant had any responsibility in the accident, it would have immediately reported the same to the plaintiff. . . .

Defendant alleged further that all its witnesses to the accident were still available; that various pictures were made of the accident and were still available; and that an accident report

prepared by the highway patrolman who investigated the scene of the occurrence was still available.

Thereafter, the depositions of numerous witnesses were taken, and the following evidence was thereby developed:

On 6 April 1978 defendant was engaged in a construction project in South Carolina to widen U. S. Highway 221. The accident in question occurred at the intersection of 221 and South Carolina State Road 42-243 and involved a collision between a 1963 Chevrolet Impala operated by Norma Rider Pegg of Cowpens, South Carolina, and a 1973 International tractor tanker carrying petroleum, operated by Robert Allen Thomas of Wellford, South Carolina. A number of defendant's employees, including its job foreman A. G. Foster, Jr., were working in the area and witnessed the collision.

Officer Carl C. Cole of the South Carolina State Highway Patrol investigated the accident. He testified that he initially talked with two of defendant's employees who told him that the tractor tanker and the Chevrolet were both travelling north on Highway 221 and that the tanker had overrun the Chevrolet, striking it from the rear. Upon impact, the tanker had become disconnected from the tractor, rolled over the Chevrolet and burst into flames. Another eyewitness who saw the accident from her home near the road subsequently corroborated this account of what had happened.

Approximately 45 minutes to an hour later, Officer Cole interviewed Mrs. Pegg at the hospital. She told him that she had been travelling south and the tanker was headed north. As they approached the accident site, a bulldozer, apparently belonging to defendant, had backed out from the side of the road and into the northbound lane. The tanker swerved into her lane to avoid hitting the bulldozer and collided head-on with her car. Officer Cole obtained the same version of the accident from Mr. Thomas, the driver of the tanker, when he talked to him the next day. In his official report, Officer Cole "took the version of Mrs. Pegg and Mr. Thomas." He said that, after obtaining Mrs. Pegg's statement, he returned to the scene of the accident and confronted defendant's foreman, A. G. Foster, with her version of the collision. Foster denied discussing the matter with Cole.

The president of Tate Construction, C. G. Tate, Sr., testified that he was informed of the fact that the accident had happened, but was told that the company was not involved. He was not aware of the possibility that his company might be involved, he said, until he received a letter from Great American so indicating dated 12 May 1978. His son, C. G. Tate, Jr., vice president of the company, said that it was also his understanding from reports he received that none of the company personnel or equipment was involved in the accident. He testified, "If I had had any information direct or indirect that Tate was involved I would have absolutely reported it to Great American."

The company's general superintendent, William Robertson, testified that he first heard about the accident the day after it happened from the project foreman, Foster, who told him the company was not involved in any way. A few days later, he said he talked to other people who had been present at the time of the collision, "and they assured me that we weren't involved." It was not until 12 May 1978 that he became aware of the possibility of Tate's involvement.

Several Tate employees, including Foster, who were present at the scene and witnessed the accident, testified that Tate was not involved in the collision and that the accident had not been reported to Great American for that reason. Although initial newspaper accounts and television news reports alerted Foster within 24 to 36 hours of the accident "that somebody was contending Tate was involved," he claimed the reports were erroneous and had been corrected by the media the next day.

Great American found out about the possibility of Tate's involvement on 3 May 1978 when counsel for Mr. Thomas telephoned Donald Quick, Great American's claims manager in Columbia, South Carolina, to report that Thomas was contemplating a lawsuit against its insured, Tate. However, Great American was notified of the occurrence of the accident on 11 April 1978 since it also carried the workers' compensation coverage on Thomas. Quick testified that he had received a report concerning the accident from Thomas' employer on that date which, although it did not mention Tate by name, specified the date, time and place of the accident and stated that "he [Thomas] was injured in an

automobile accident (bulldozer pulled out in front of truck and truck turned over)."

Thereafter, on 17 May 1979 Judge Bailey entered a judgment wherein he found facts and drew conclusions in pertinent part as follows:

FINDINGS OF FACT

. . .

22. Under the circumstances of this case, defendant knew, or in the exercise of ordinary and reasonable prudence should have known, that claims might be filed against it as a result of the accident on April 6, 1978.

23. Defendant did not give plaintiff notice of the accident and these potential claims against it "as soon as practicable," as required by the terms and conditions of its policy of insurance with plaintiff. In fact, defendant never gave plaintiff notice of the accident and these potential claims. Plaintiff found out about the accident and the potential claims from its own independent source.

24. Defendant's failure to notify plaintiff of the accident was not justified or excusable under the circumstances in this case.

. . .

27. Plaintiff, because of defendant's failure to give it notice of the accident on April 6, 1978 "as soon as practicable," as required in the terms and conditions of its policy of insurance with defendant, has denied coverage to defendant for any and all claims made against defendant as a result of the accident.

28. Defendant contends that its failure to give plaintiff notice of the accident on April 6, 1978 "as soon as practicable" was justified and excusable since, in its opinion, it was not responsible for the accident.

. . .

CONCLUSIONS OF LAW

. . .

3. Defendant failed to give plaintiff notice of the accident on April 6, 1978 "as soon as practicable," as required by the terms and conditions of its policy of insurance with plaintiff.

. . .

6. Defendant's unjustified and inexcusable failure to give plaintiff notice of the accident on April 6, 1978 "as soon as practicable" constituted a violation of a condition precedent to coverage under plaintiff's policy of insurance, and, as such, releases plaintiff from its obligation under the policy for the accident on April 6, 1978.

From a judgment that Great American "has no responsibility to indemnify or defend defendant against [any] claims or lawsuits" arising out of the accident between the Chevrolet and the tanker, defendant appealed.

Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Sumner, for the plaintiff appellee.

Nye, Mitchell, Jarvis & Bugg, by Charles B. Nye, for the defendant appellant.

HEDRICK, Judge.

The policy of insurance issued by Great American to Tate, which was concededly in force during the period at issue in this lawsuit, contains the following provision:

4. Insured's duties in the event of occurrence, claim or suit:

(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

Notice provisions such as this one, which are common if not universal, seek to protect the insurer's rights by affording it an opportunity to conduct timely and adequate investigations of the circumstances surrounding the occurrence which gave rise to the claim against its insured. *State Farm Mutual Automobile Insurance Co. v. Milam*, 438 F. Supp. 227 (S.D.W.Va. 1977); *accord, Peeler v. United States Casualty Co.*, 197 N.C. 286, 148 S.E. 261 (1929). It has been observed by Professor Appleman that requiring timely notice from the insured so as to provide the insurance companies this opportunity promotes early settlements and prevents fraudulent claims. 8 J. Appleman, *Insurance Law and Practice* § 4731 (1962) (1973 Cum. Supp.; 1979 Supp.). *See also* 68 Harv. L. Rev. 1436 (1955); *Muncie v. Travelers Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960) (Parker, J., concurring).

Bearing in mind this purpose of the notice requirement, we think it also vital that we keep in mind the general principle of legal analysis that insurance policies should be given a reasonable construction in accordance with their terms and should be interpreted to provide coverage when rationally possible to do so, rather than to defeat it. Ambiguities in language are resolved in favor of the insured, and exceptions to liability are not favored. 7 Strong's N.C. Index 3d, *Insurance* §§ 6.1, 6.2, 6.3 (1977), and cases cited therein.

The resolution of the instant appeal revolves, we think, around the meaning of the phrase in the policy requiring notice "as soon as practicable." Whether the requirement has been met in a given case obviously cannot be determined by setting a precise period of time within which notice must be communicated. To the contrary, the phrase embodies a fluid concept which can only take shape from the facts and circumstances of the particular case. Thus, "as soon as practicable" means as soon as is reasonably possible, considering the situation. Although we have found no North Carolina case which so holds, recent decisions from a number of our sister jurisdictions have interpreted insurance policies requiring notice "as soon as practicable" to mean notice within a reasonable time. *See, e.g., State Farm Mutual Automobile Insurance Co. v. Milam, supra; Falcon Steel Co., Inc. v. Maryland Casualty Co.*, 366 A. 2d 512 (Del. Super. 1976); *Lumbermens Mutual Casualty Co. v. Oliver*, 115 N.H. 141, 335 A. 2d 666 (1975); *Greer v. Zurich Insurance Co.*, 441 S.W. 2d 15 (Mo.

1969). Moreover, we believe such an interpretation is not only inherent in the language of the phrase, but also implicit in the decision of our Supreme Court in *Muncie v. Travelers Insurance Co., supra,* and Justice Parker in his concurring opinion said as much. The insured, of course, bears the burden of proving compliance with the notice provisions. *Id.; accord, Lumbermens Mutual Casualty Co. v. Oliver, supra.*

In the case before us, the question whether notice was given within a reasonable time was answered negatively by Judge Bailey, and he found facts purporting to support that determination. Those facts are supported by some competent evidence of record, even though the evidence would support contrary findings. For the reasons to follow, however, and despite the arguments advanced on appeal, we do not think the inquiry ends with that determination.

First of all, in holding as he did, Judge Bailey stated to counsel prior to entering judgment that he was relying "primarily on the doctrine of the Muncie case." Although *Muncie* appears to be the leading case in this jurisdiction with respect to the interpretation of the phrase "as soon as practicable," in the context of the instant case we are satisfied that the decision is inapposite, or at least, distinguishable. As the subsequent opinion of the Court in *Fleming v. Nationwide Mutual Insurance Co.*, 261 N.C. 303, 134 S.E. 2d 614 (1964), made clear, the holding in *Muncie* was simply and narrowly this: Notice given eight months or at any time after the happening of an accident, *without any explanation of or justification for the delay, as a matter of law* is not given "as soon as practicable." *Accord, Buckeye Union Casualty Co. v. Perry,* 406 F. 2d 1270 (4th Cir. 1969), wherein Judge Sobeloff for the Court held that a 70-day delay was an unreasonable delay as a matter of law *only because the delay was unexplained.*

However, once the insured tenders an explanation for its delay in giving notice, as Tate did in the case at bar, whatever length of time the delay comprises, the issue whether the notice provisions of the policy have been complied with becomes a question of fact to be determined by the finder of the facts. *Id.; see also* 8 J. Appleman, *Insurance Law and Practice, supra; State Farm Mutual Automobile Insurance Co. v. Murnion,* 439 F. 2d 945 (9th Cir. 1971) (three-year delay, where adequate explanation was

offered, held excusable). Justice Parker, concurring in *Muncie*, intimated as much when he observed that, since the facts were not in dispute there as to why notice had not been given, then whether notice had been given "as soon as practicable" was a question of law for the court. *See also First Citizens Bank and Trust Co. v. Northwestern Insurance Co.*, 44 N.C. App. 414, 261 S.E. 2d 242 (1980) (when the facts are in dispute, the question whether notice was given "as soon as practicable" is a jury matter). This distinction also follows naturally from our interpretation of the language of the policy to permit flexibility in determining whether notice was given "as soon as practicable" by reference to the surrounding facts and circumstances.

Intrinsic in this approach is our belief that the determination of reasonable notice as a question of fact depends on the prejudice to the insurer precipitated by the delay, as well as on the length of and reasons for the delay. *See* 13 G. Couch, *Cyclopedia of Insurance Law* 2d, § 49:88 (R. Anderson ed. 1965). "Prejudice to the insurer is a material element in determining whether notice is reasonably given." *Wendell v. Swanberg*, 384 Mich. 468, 478, 185 N.W. 2d 348, 353 (1971). Thus, the mere fact of failure of notice, or of notice given after an unreasonable delay, where such failures are explained, will not *ipso facto* provide the insurer with a sufficient legal reason for avoiding its obligations under the policy. Nor does it matter from what source the insurance company eventually receives notice. *Bibb v. Dairyland Insurance Co.*, 44 Mich. App. 440, 205 N.W. 2d 495 (1973). We think the rationale for requiring the insurer to show prejudice was succinctly capsulized by the Court in *State Farm Mutual Automobile Insurance Co. v. Milam, supra* at 232:

> It must be remembered, too, that in all of these "lack of notice" cases, the insurer, sooner or later, does receive notice of the occurrence. In order then for the insurer to successfully avail itself of the "lack of notice" defense, it must show that it was prejudiced by reason thereof. The test to apply is whether the insurer would be in a better position with regard to the investigation of the circumstances surrounding the event which resulted in the claim being made either against it or its insured had it been furnished notice within a reasonable time of the occurrence which gave rise to such claim. [Citations omitted.]

We are persuaded also by reasons of policy to conclude that the insurer must demonstrate in what particulars it was prejudiced by its insured's delay in giving notice before it can escape its duties under the policy. Insurance contracts are not negotiated agreements between parties of equal bargaining strength. They are written by the insurance companies, and thus the notice provision is hardly a matter of choice. Furthermore, where the penalty paid by the insured is a forfeiture of coverage, we believe the insurer must advance good reasons to avoid its undertaking. Since the notice provision is designed to allow the insurer an opportunity to conduct a timely and adequate investigation in order to gather and preserve evidence and to protect its ability to defend the claim, if that opportunity is afforded despite the failure of timely notice, the insurer has suffered no prejudice from the delay and no good reason is evident to permit it to escape liability. As the Pennsylvania Supreme Court observed in the well-reasoned opinion of *Brakeman v. Potomac Insurance Co.*, 472 Pa. 66, 76, 371 A. 2d 193, 198 (1977):

> Allowing an insurance company, which has collected full premiums for coverage, to refuse compensation to an accident victim or insured on the ground of late notice, where it is not shown timely notice would have put the company in a more favorable position, is unduly severe and inequitable.

[1] Specifically, we hold that, in deciding whether an insured has complied with a notice provision in an insurance policy requiring notice to the insurer "as soon as practicable," the finder of the facts must determine: (1) Was notice given within a reasonable time considering all the facts and circumstances of the particular case, and (2) if not, has the insurer suffered prejudice from the insured's delay in giving notice? In so holding, we are confident that our decision accords with the weight of authority wherein the question has arisen and that it represents the better-reasoned judgment. *See, e.g.*, in addition to the cases hereinabove cited, *American Record Pressing Co. v. United States Fidelity & Guaranty Co.*, 466 F. Supp. 1373 (S.D.N.Y. 1979); *ACF Produce, Inc. v. Chubb/Pacific Indemnity Group*, 451 F. Supp. 1095 (E.D. Pa. 1978); *Sager v. St. Paul Fire & Marine Insurance Co.*, 461 S.W. 2d 704 (Mo. 1971); *St. Paul Fire & Marine Insurance Co. v. Petzold*, 418 F. 2d 303 (1st Cir. 1969); *Atlantic Mutual Insurance Co. v. Cooney*, 303 F. 2d 253 (9th Cir. 1962).

[2] In determining whether the insurer has been prejudiced, the obvious inquiry is whether the delay has frustrated the purpose of the notice provision to afford the insurer an opportunity to conduct an adequate and timely investigation. That is, in what respects is the insurer in a less advantageous position to defend itself or its insured? Among the factors to be considered are the availability of witnesses to the accident; the ability to discover other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of the delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the occurrence; and so on.

[3] The record before us discloses that the parties sought to and did elicit evidence relevant to the question of whether Great American had been prejudiced by the fact that it was not notified of Tate's possible involvement in the collision of 6 April 1978 until 3 May 1978. Moreover, we are of the opinion that ample evidence was presented from which the court could have found that the company had in no wise been prejudiced by the delay, despite the court's finding that the delay was "unjustified." For example, Donald Quick, the company's claims manager in Columbia, South Carolina, testified that he was "reasonably sure" all witnesses had been identified; that the company had obtained statements from all witnesses; and that the company had available to it "voluminous photographs made of the scene during the fire while the tanker was still burning and of the roadway after the accident." In addition, the accident report prepared by Investigating Officer Cole was accessible, and newspaper accounts of the accident were obtainable. Although Quick contended that the company had suffered prejudice in that "we were unable to contact the witnesses immediately after the accident when everything was fresh in their minds," he admitted that the statements obtained from them by company adjusters were substantially the same as the statements they gave Officer Cole shortly after the collision. Quick's further contention that the company was prejudiced because the skid marks on the highway had been erased by the time of its investigation was rebutted by his concession

that "[t]he best . . . and the most reliable witness concerning the location of the skid marks and how long they were would be [Officer] Cole."

Although the evidence is plenary on the issue of prejudice, it is necessary that we remand this case to the Superior Court for further proceedings since the record shows that the trial judge refused to consider and determine this question on the basis that, in his opinion, the issue of prejudice "does not arise." Moreover, because the question heretofore has not been squarely presented, nor the rule of law clearly enunciated by the courts of this State, we think it only fair that these parties be given an opportunity to present any other available evidence on the issue of prejudice and to argue the matter in light of the standards herein announced.

As we noted earlier, the trial judge has answered the question of whether Tate gave notice to Great American within a reasonable time under all the circumstances of the case. His resolution of this question in favor of the plaintiff is supported by the evidence, and need not be determined again.

For the reasons stated the judgment of the trial court entered 17 May 1979 is reversed, and the cause is remanded for further proceedings in accordance with this Opinion.

Reversed and remanded.

Judges ARNOLD and ERWIN concur.

NANCY H. TAYLOR v. WILLIAM F. TAYLOR

No. 782DC452

(Filed 6 May 1980)

1. **Divorce and Alimony § 16.9— lump sum payment to dependent spouse—punishment—division of estate**

The trial court has no power to order the supporting spouse to make a lump sum payment to the dependent spouse either to punish the supporting spouse or to divide his estate.

2. **Evidence § 3.7— judicial notice—market value, liquidity of realty**

The trial court could not take judicial notice of the market value and liquidity of tracts of real property.

3. Divorce and Alimony § 16.9— lump sum payment to wife—division of husband's estate

The trial court erred in ordering defendant husband to make a lump sum payment of $50,000 to plaintiff wife where it is apparent that the effect of the court's order would be to force defendant to liquidate, either by sale or mortgage, his only remaining assets having any substantial value, not for the purpose of paying for the maintenance and support of defendant, but in order to effect a division of his estate with her.

4. Divorce and Alimony § 16.8— finding of dependency by wife—failure to consider husband's inability to maintain accustomed standard of living

The trial court's conclusion that plaintiff wife is the "dependent spouse" entitled to support was not supported by the findings of fact where the court found that defendant husband's income "is very significantly lower than same has been in the past" and also that "plaintiff is unable to continue to maintain her accustomed station in life," there was no finding or evidence that defendant deliberately depressed his income in an effort to avoid his obligations, and it is apparent that the trial court disregarded defendant's own inability to maintain the station in life to which he was formerly accustomed in its determination of dependency.

5. Divorce and Alimony § 20.3— attorney fees in alimony action—insufficient findings

The trial court erred in awarding attorney fees to plaintiff wife in an alimony action where the court made no finding that the wife had not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof, and the evidence in the record would not support such a finding had it been made.

APPEAL by defendant from *Ward, Judge.* Judgment entered 30 December 1977 in District Court, BEAUFORT County. Heard in the Court of Appeals 26 February 1979.

Plaintiff-wife brought this action to obtain alimony without divorce. Defendant-husband counterclaimed for divorce from bed and board. Plaintiff waived hearing on her motion for pendente lite relief, and the parties consented to trial without jury. Evidence presented at the hearing on the merits held 12 December 1977 shows the following:

The parties, both in their fifties at the time of the hearing, married in 1949 and thereafter lived together until March 1977, when they separated. Their three children are grown. Plaintiff-wife is a graduate of the University of North Carolina with a degree in pharmacy and is licensed as a pharmacist in this State. While she was married and living with defendant, she worked sporadically as a pharmacist on a part-time basis but during that

time was never employed on a full-time basis. Defendant-husband also graduated from the University of North Carolina, with a degree from the School of Commerce, finishing in December 1948. At first, he worked as a traveling salesman. Later, he owned and operated a retail clothing store in Washington, N.C.

The parties own as tenants by the entirety a two-story four-bedroom brick veneer dwelling in Washington, N.C., where they lived for approximately twenty-four years prior to the separation. At the time of the hearing the home was subject to a deed of trust securing a balance of approximately $10,000.00 payable in monthly installments of $189.80. So long as they lived together, defendant-husband paid all family living expenses, including all expenses of the home and of rearing the three children and providing for their college educations. He provided and paid the wages of a maid, who at the time of the hearing had worked for the plaintiff for nineteen years. He paid all dues and expenses for family membership in a country club until he resigned from the club in October 1976. While the parties lived together, plaintiff's earnings from her occasional employment as a pharmacist were spent for gifts and non-essential purposes.

For many years prior to the separation defendant at times drank alcoholic beverages to excess. In September 1976 plaintiff petitioned to have him involuntarily committed as an inebriate to Cherry Hospital, where he remained for eight or nine days and from which he was released after a hearing. He deeply resented plaintiff's initiation of the involuntary commitment proceedings.

In January 1977 defendant sold his retail clothing store for $55,000.00 without previously telling his wife of his intention to sell. In March he left the home in Washington, N.C., and moved to Hookerton, N.C. Plaintiff-wife continued to live in the Washington, N.C. home, and was still living there at the time of the hearing. After the separation and continuing until the time of the hearing defendant-husband continued to pay all monthly mortgage payments and insurance premiums on the home and to pay premiums on liability insurance on the car used by plaintiff-wife and on major medical insurance for her benefit. After their separation he also provided her with $500.00 per month until July 1977, when he ceased making these payments. Plaintiff commenced this action in August 1977.

Following the separation, plaintiff-wife unsuccessfully sought full-time employment as a pharmacist in Washington and in Williamston. At the time of the hearing she was employed one day a week as a licensed pharmacist at the hospital in Williamston, for which she received $153.05 take-home pay every two weeks. She also worked occasionally as relief pharmacist at Revco in Washington, N.C., for which she was paid $72.00 a day, but that employment "would not amount to two weeks a year." In addition to her earnings as a pharmacist and to the $500.00 monthly payments she received from her husband until July 1977, plaintiff had income in the form of rents, interest, and dividends. She owned a 325-acre farm in Bertie County, valued for ad valorem tax purposes at $103,000.00, stocks having a stipulated value of $32,000.00, a passbook savings account containing about $2,000.00, and other bank accounts totalling about $600.00. There was also a $5,000.00 savings and loan certificate in plaintiff's name, but she recognized this as belonging to her 82-year-old mother. Plaintiff received annual rental from her Bertie County farm in the amount of $4,500.00, about $1,000.00 of which was required to pay income taxes and insurance and taxes on the farm. She received dividends from her stocks of approximately $2,000.00 annually.

Defendant testified that he and his wife separated on 2 March 1977 because of marital differences. After his release in 1976 from the involuntary commitment initiated by his wife, he began looking for other employment, although at that time he did not intend to sell his retail clothing business. As dislcosed by his tax returns, that business made a net profit in 1974 of $1,203.00, in 1975 of $6,497.75, and in 1976 of $1,253.15. When a buyer offered him $55,000.00, he sold the business in January 1977. After paying various debts he owed for the store, the monthly mortgage payments on the house, the $500.00 monthly payments to his wife which he made until July 1977, medical and hospital insurance and various other types of insurance, taxes, and his own living expenses of about $6,000.00 in 1977, he had only $30,000.00 left from the sale of his store. This he invested in two certificates of deposit, each in the amount of $15,000.00, one for four years in Seaboard Savings and Loan, and one for six years in North Carolina National Bank.

After selling his retail clothing business, defendant worked for a short time as a sales consultant, from which employment he was fired due to drinking. He then took the examination and received a license to sell insurance and, at the time of the hearing, was working to establish himself in the insurance business. His earned income in 1977 from the new employment totalled about $600.00 or $700.00. In 1973 he inherited from his mother a one-third interest in a farm in Greene County. He had also been given by his father an undivided interest in farm properties in Lenoir County, referred to by defendant as "three-eights of a contract in conjunction with a partnership with my father and sister." Between 1974 and 1977 his annual net income from his farming interests ranged between $9,000.00 and $12,000.00. His other assets included two $1,000.00 bonds and forty shares of stock worth approximately $3.00 per share. In addition to the balance of $10,000.00 owed on the mortgage on the home, he owed $6,000.00 which he had borrowed on his life insurance policies. At the time of the hearing he was living with his father in Hookerton, N.C., contributing his share of the bills but not paying rent. His father had given him an old store building in Hookerton where his grandfather had years ago conducted business. This building, which was unoccupied, was insured for $5,000.00.

Following the hearing, the court entered an order dated 30 December 1977 making extensive findings of fact on the basis of which the court made the following conclusions of law:

1. Defendant is an excessive user of alcohol and has thereby, without provocation by Plaintiff, rendered Plaintiff's condition intolerable and life burdensome.

2. Defendant has, without just cause or provocation, abandoned Plaintiff.

3. Defendant has wilfully failed to provide Plaintiff with necessary subsistence according to his means and condition in life so as to render the condition of Plaintiff intolerable and her life burdensome.

4. Plaintiff is a dependent spouse.

5. Defendant is a supporting spouse.

6. Plaintiff is entitled to recover alimony without divorce of Defendant in an amount reasonably necessary to

provide Plaintiff's maintenance and support in her accustomed station in life and her counsel fees with due regard to the estates, incomes, conditions, capacities and abilities of the parties and the circumstances of this case.

On these conclusions of law, the court awarded plaintiff-wife sole use of the residence and ordered defendant to pay when due all installments on the mortgage indebtedness and all taxes assessed against the residence, to maintain insurance on the residence, to deliver to plaintiff title to the automobile he had previously provided for her use, and to pay plaintiff alimony in a lump sum of $50,000.00, payable $30,000.00 within ten days of entry of the judgment and the balance of $20,000.00 within four months thereafter. The court further ordered defendant to pay counsel fees incurred by plaintiff in the sum of $1,500.00.

From this judgment, defendant appealed.

Carter, Archie & Grimes by W. B. Carter, Jr. for plaintiff appellee.

Mattox & Davis by Fred T. Mattox and Gary B. Davis for defendant appellant.

PARKER, Judge.

By appropriate assignments of error based on exceptions duly noted, defendant challenges certain of the court's crucial findings of fact as being unsupported by the evidence and challenges in turn all of the court's conclusions of law as being unsupported by the factual findings. Although a number of these assignments of error have merit, we find it unnecessary to pass upon them seriatim. We find the judgment itself, when viewed in the light of all of the evidence, so affected by errors of law that it must be vacated.

G.S. 50-16.1(1) defines "alimony" for purposes of G.S. Ch. 50 as follows:

> "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

G.S. 50-16.7(a), in pertinent part, provides:

> Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order.

[1-3] Although these statutes authorize the court, in a proper case, to order alimony to be paid in a lump sum, such an award can only be made for "alimony," that is, for "payment for the support and maintenance of a spouse." G.S. 50-16.1(1). The court has no power to order such a payment either to punish the supporting spouse or to divide his estate. *See Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968); *Taylor v. Taylor*, 26 N.C. App. 592, 216 S.E. 2d 737 (1975). The lump sum payment of $50,000.00 ordered by the court in the present case appears to be more a division of defendant's estate than it is an award of alimony. Compliance with the order would require not only that defendant pay over to his wife all of his cash assets, being the $30,000.00 remaining from the sale of his business, but would also require that he raise an additional $20,000.00 in cash from his remaining assets. From the evidence, defendant's remaining assets consist primarily of his one-third undivided interest in a farm in Greene County and in his interest in "three-eights of a contract in conjunction with a partnership" with his father and sister in farm properties in Lenoir County. There is no evidence in the record to indicate either what the value of these farm properties might be or how readily defendant's undivided interests therein could be converted into cash. The order appealed from contains the statement "[t]hat the Court takes judicial notice that the above mentioned farm properties not only have a substantial fair market value but afford a ready and accessible source of capital." The market value and liquidity of tracts of real property are not matters of which a court may take judicial notice, and it was error for the court in this case to do so. Moreover, even had there been competent evidence to support factual findings by the court of the matters of which it purported to take judicial notice, it is apparent that the effect of the court's order would be to force defendant to liquidate, either by sale or mortgage, his only remaining assets having any substantial value, not for the purpose of paying for

the support and maintenance of his wife, but in order to effect a division of his estate with her. This the court had no power to do.

In other respects also the court committed error in the order appealed from. G.S. 50-16.1 defines the terms "dependent spouse" and "supporting spouse" as follows:

> (3) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.
>
> (4) "Supporting spouse" means a spouse, whether husband or wife, upon whom such other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support.

In a recent case, *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980), decided after the trial of the case before us, our Supreme Court discussed the provisions of G.S. 50-16.1 *et seq.* as they relate to a determination of dependency in suits for alimony. The factual situation presented in *Williams* was somewhat unusual, in that two parties of considerable wealth were involved; however, the opinion emphasized that "the principles established by this decision apply to parties of all economic status." 299 N.C. at 189, 261 S.E. 2d at 859.

Interpreting the legislative intent in the enactment of G.S. 50-16.1, subsections (3) and (4), the court held in *Williams* that interpretation of the definition of the term "dependent spouse" contained in G.S. 50-16.1(3) requires that that provision be read *in pari materia* with G.S. 50-16.5, the statute for determining the amount of alimony. G.S. 50-16.5(a) provides that "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." The court then applied the factors of G.S. 50-16.5 to establish guidelines to be used by trial courts in the determination of dependency:

> (1) The parties must have been legally married to each other and one spouse must have been adjudged to have committed one of the grounds for alimony under G.S. 50-16.2 or

have stipulated that one of the grounds is present. These are findings of fact which must be entered into the record by the trial court.

(2) The incomes and expenses measured by the standard of living of the family as a unit must be evaluated from the evidence presented. If this comparison reveals that one spouse is without means to maintain his or her accustomed standard of living, then the former would qualify as the dependent spouse under the phrase "actually substantially dependent." G.S. 50-16.1(3).

(3) If the comparison does not reveal an *actual* dependence by one party on the other the trial court must then determine if one spouse is "substantially in need of maintenance and support" from the other. In doing so, these additional guidelines should be followed:

A. The trial court must determine the standard of living, socially and economically, to which the parties *as a family unit* had become accustomed during the several years prior to their separation.

B. It must also determine the present earnings and prospective earning capacity and any other "condition" (such as health and child custody) of each spouse at the time of hearing.

C. After making these determinations, the trial court must then determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation. This would entail considering what reasonable expenses the party seeking alimony has, bearing in mind the family unit's accustomed standard of living.

D. The financial worth or "estate" of both spouses must also be considered by the trial court in determining which spouse is the dependent spouse. We do not think however, that usage of the word "estate" implies a legislative intent that a spouse seeking alimony who has an estate sufficient to maintain that spouse in the manner to which he or she is ac-

> customed, *through estate depletion,* is disqualified as a dependent spouse. Such an interpretation would be incongruous with a statutory emphasis on "earnings," "earning capacity," and "accustomed standard of living." It would also be inconsistent with plain common sense. If the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain *any* standard of living.
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> * * * *
>
> E. We further note that G.S. 50-16.1(3), read *in pari materia* with G.S. 50-16.5, in defining dependency, provides for a trial court's consideration of "other facts of the particular case" when awarding alimony. Under this statutory rubric, we feel that consideration should be given to the length of a marriage and the contribution each party has made to the financial status of the family over the years.

299 N.C. at 182-185, 261 S.E. 2d at 855-857.

[4] Applying these principles to the present case, it is apparent from the findings of fact and conclusions of law made that the trial court did consider the standard of living of the parties during the marriage and did make findings as to their earnings as of the time of hearing. However, read together, Finding of Fact No. 23, "[t]hat the Defendant's income from his personal endeavors for the year 1977 is very significantly lower than same has been in the past" and Finding of Fact No. 47, "[T]hat Plaintiff is unable to continue to maintain her *accustomed station in life* and to support herself without assistance from the Defendant" (emphasis added), render it apparent that the trial court disregarded defendant-husband's own inability to maintain the station in life to which he was formerly accustomed. That the trial court did so is also apparent from that portion of the Court's Conclusion of Law No. 6 stating that "[p]laintiff is entitled to recover alimony without divorce of Defendant in an amount *reasonably necessary to provide Plaintiff's maintenance and support in her accustomed station in life.* (Emphasis added.)" The court made no finding, and the evidence would support none, that defendant-husband deliberately depressed his income in an effort to avoid his obligations. Cf.,

Beall v. Beall, 290 N.C. 669, 228 S.E. 2d 407 (1976). In the absence of such a finding, the principle which governed the application of the law to the facts in *Williams*, that the accustomed standard of living of the parties measures the needs of the wife in determining dependency, acquires less importance in the present case, the more important principle here being "the present earnings and prospective earning capacity . . . of each spouse at the time of hearing." *Williams* at 183, 261 S.E. 2d at 856. To find on the one hand that defendant-husband's income "is very significantly lower than same has been in the past" and to find on the other that "[p]laintiff is unable to continue to maintain her accustomed station in life", and based thereon to conclude as a matter of law that plaintiff-wife is the "dependent spouse" entitled to support, has the effect of imposing an onerous duty upon defendant-husband to continue to provide his spouse with a style of life which he himself is no longer able to enjoy.

We are, of course, aware that the Court in *Williams* referred to the question of fault in the marital separation and stated that, where the dissolution of the family as an economic unit works hardship on both parties, "the burden of contending with diminished assets should, in all fairness, fall on the party primarily responsible . . . ." 299 N.C. at 188, 261 S.E. 2d at 858-859. We do not, however, construe that language to mandate the conclusion that a party at fault is a "supporting spouse" without regard to the possibility that he or she must now endure a diminished standard of living because of reduced earnings. Thus, although the pre-existing standard of living is certainly a significant factor in determining dependency, the present earnings, earning capacity, reasonable expenses and other conditions of each party which may have modified that standard certainly must be taken into account.

[5] We also find error in the court's award of attorney fees. "The clear and unambiguous language of G.S. 50-16.3 and 16.4 require that to receive attorney's fees in an alimony case it must be determined that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof." *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E. 2d 719, 724 (1980). All three of these determinations must be made in order to sup-

port an award of attorney fees. The court in the present case, however, failed to make the third finding. The evidence in the present record would not support such a finding had it been made. It was error to make any award of attorney fees in this case.

The order appealed from is vacated, and the case is remanded for further proceedings not inconsistent herewith and consistent with the guidelines noted in *Williams v. Williams.*

Vacated and remanded.

Judges HEDRICK and ERWIN concur.

EDGAR BLACKBURN MOORE AND WIFE, DOROTHY PARKER MOORE v. CHARLES A. HUNTER; LOUISE MOORE NELSON AND HUSBAND, BRUCE NELSON; DOROTHY MOORE CASH AND HUSBAND, ARTHUR CASH; MARGARET MOORE LAWRENCE AND HUSBAND, WILLIAM H. LAWRENCE, III; RICHARD HARDESTY; PAULINE H. HARDESTY; CHARLES TRIPLETT HARDESTY, JR. AND WIFE, ELIZABETH MALONE HARDESTY; ROBERT HUNTER HARDESTY AND WIFE, MARY NELSON HARDESTY; CHARLES TRIPLETT HARDESTY, III AND WIFE, NELL JANE HARDESTY; FAIRFAX HARDESTY MONTGOMERY AND HUSBAND, RAY DUNCAN MONTGOMERY; RICHARD LOCKE HARDESTY AND WIFE, BARBARA HARDESTY; ANN HARDESTY BURGIN AND HUSBAND, H. C. BURGIN, JR.; SANDRA HARDESTY STEIN AND HUSBAND, JERRY STEIN; CHARLES TRIPLETT HARDESTY, IV; WAYNE NELSON HARDESTY; ROBIN JANE HARDESTY; THE MINOR AND UNBORN CHILDREN OF LOUISE MOORE NELSON, DOROTHY MOORE CASH AND MARGARET MOORE LAWRENCE, THROUGH THEIR GUARDIAN AD LITEM, PARKER WHEDON; THE MINOR AND UNBORN CHILDREN AND HEIRS AT LAW OF ALL THOSE CLAIMING UNDER AND THROUGH MARY MOORE HARDESTY, THROUGH THEIR GUARDIAN AD LITEM, DURANT WILLIAMS ESCOTT; AND ALL OTHER PERSONS, WHOSE NAMES ARE UNKNOWN, IN BEING OR NOT IN BEING, AND WHO HAVE OR MAY HAVE ANY INTEREST, PRESENT OR FUTURE, IN THE ESTATE OF EDGAR B. MOORE, DECEASED, THROUGH THEIR GUARDIAN AD LITEM, WILLIAM F. HULSE

No. 7926SC756

(Filed 6 May 1980)

Wills § 35— vesting of fee unless plaintiff died without issue—time of vesting—testator's death determinative

The trial court properly determined that, pursuant to testator's will which devised a tract of land in trust for plaintiff "to be his in fee simple unless he

shall die without leaving issue; and in the event he shall die without leaving issue, then the said land is to go to the children of my only sister, or their heirs," it was the intention of testator to devise a fee simple interest in the property to plaintiff, his son, subject only to the right of testator's wife to live on the property and to receive certain of the income from the property and subject to the stipulation that plaintiff not predecease testator without leaving issue; and where it was expressly and plainly declared on the face of the will that the limitation concerning plaintiff's death without issue was to take effect upon the death of the testator, G.S. 41-4 did not apply to make the limitation take effect at plaintiff's death.

APPEAL by defendants Hunter, Hardesty heirs and William F. Hulse, guardian ad litem, from *Griffin, Judge.* Judgment entered 21 June 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 February 1980.

The plaintiffs brought this action for specific performance of a contract to convey real estate and for a declaration of rights of Edgar Blackburn Moore under the will of the late E. B. Moore. In a contract dated 13 July 1973, the plaintiffs agreed to sell, and the defendant Charles A. Hunter agreed to buy, a parcel of land in Charlotte, North Carolina, "upon delivery of a Deed conveying good, fee-simple, marketable title to the buyer." At the time and place for closing of the agreement, the plaintiffs duly tendered to the defendant Hunter a warranty deed to the premises pursuant to the agreement, but the defendant Hunter, contending that the plaintiffs were unable to convey fee simple, absolute and marketable title to the premises, refused to accept the deed or to pay the balance of the purchase price.

The plaintiff Edgar Blackburn Moore obtained his interest in the land, a part of which he now seeks to convey to the defendant Charles A. Hunter, under the will of his father, E. B. Moore, who died 25 November 1916. Item IV of the will provided as follows:

> Item IV. I give and devise to my executors hereinafter mentioned that tract or parcel of land in Mecklenburg County, North Carolina, known as the Selwyn Farm, made up of several tracts of land bought by me from Marsh and others, and containing about one hundred sixty-five (165) acres, and also that tract or parcel of land in Clarke County, Virginia near the West Virginia line, and containing about one hundred seventy (170) acres, which was purchased by me from Clark Purcell, to have and to hold the said land as trustees

upon the following trusts: That the entire income thereof shall be paid to my wife Beulah H. Moore until my son Edgar Blackburn Moore attains the age of twenty-one (21) years; that my said wife shall have the right to live upon either of the said places as she may choose and for such part of the time as she desires and shall be paid one-third (1/3) of the income of the said lands for and during the term of her natural life.

Subject to the foregoing provisions for my said wife my executors are hereby directed to hold the said land as trustees for my said son Edgar B. Moore to be his in fee simple unless he shall die without leaving issue; and in the event he shall die without leaving issue, then the said land is to go to the children of my only sister, or their heirs, to be divided among them equally, share and share alike, in fee simple.

The foregoing devise to my son is subject to the condition that the said land and any part thereof shall not be sold or encumbered for twenty-five (25) years from my death.

The trial court heard the case upon stipulated facts. The parties entered into the following stipulations:

1. The plaintiffs, Edgar Blackburn Moore and Dorothy Parker Moore, are husband and wife and are citizens and residents of the State of Virginia.

2. The defendant, Charles A. Hunter, is a citizen and resident of Mecklenburg County, North Carolina.

. . . .

6. All named parties to this action are over 18 years of age, are not under legal disability and are *sui juris*.

7. All parties are properly before the Court, and the Court has jurisdiction of the parties and of the subject matter, with the exception of the defendant, Arthur Cash, who since the inception of this litigation became absolutely divorced from Dorothy Moore Cash.

. . . .

9. Edgar B. Moore died a citizen and resident of Mecklenburg County, North Carolina, on November 25, 1916,

leaving a Last Will and Testament dated May 19, 1913, which was duly probated before the Clerk of Superior Court of Mecklenburg County on December 4, 1916, and is recorded in Book of Wills "R" at page 181 in the Office of the Clerk of Superior Court for the General Court of Justice of Mecklenburg County, North Carolina. A copy of said will is attached hereto and marked Exhibit A. Item IV of the will devised a tract of land in Mecklenburg County, North Carolina, known as the Selwyn Farm, in trust for the plaintiff, Edgar B. Moore, "to be his in fee simple unless he shall die without leaving issue; and in the event he shall die without leaving issue, then the said land is to go to the children of my only sister, or their heirs; to be divided among them equally, share and share alike, in fee simple."

10. At his death Edgar B. Moore was survived by a widow, Beulah H. Moore, a son, Edgar Blackburn Moore, who is one of the plaintiffs herein, and a sister, Mary Moore Hardesty. The said Beulah H. Moore subsequently died on December 23, 1948, and left by will her entire estate to the plaintiff, Edgar B. Moore.

11. The plaintiff, Edgar Blackburn Moore, is 81 years of age, having been born April 26, 1897, and he and his wife, Dorothy Parker Moore, have living three children, nine grandchildren, and one great-grandchild.

12. The names and marital status of the plaintiffs' three children are as follows:

Name	Marital Status
Louise Moore Nelson	married to Bruce Nelson
Margaret Moore Lawrence	married to William H. Lawrence, III
Dorothy Moore Cash	divorced

13. The only sister of Edgar B. Moore was Mary Moore Hardesty, who died February 20, 1934, and who had five children.

. . . .

17. Beulah H. Moore and Fergus Stikeleather were appointed Trustees under the will of Edgar B. Moore, deceased, but they never qualified as such and both of them are deceased.

. . . .

22. Approximately 149 acres remain of the property described as the "Selwyn Farm" in the will of E. B. Moore. The property lies inside the City of Charlotte, is zoned "R-9" for single-family residential purposes (9000 sq. ft. minimum lot size), is no longer suitable for farming, and is presently vacant, unproductive land.

23. On July 13, 1973, the plaintiffs, Edgar Blackburn Moore and Dorothy Parker Moore, entered into an agreement in writing with the defendant, Charles A. Hunter, whereby the plaintiffs agreed to sell and the defendant agreed to purchase a portion of the land heretofore referred to as the Selwyn Farm. . . .

24. The said contract required the plaintiffs to deliver a deed "conveying good fee simple, marketable title to the buyer or his assigns on closing date."

25. At the time and place for closing of the agreement, the plaintiffs were ready and willing to fulfill and perform the agreement in all respects on their part. The plaintiffs duly tendered to the defendants a warranty deed of the premises pursuant to the agreement, duly signed, sealed and acknowledged by the plaintiffs and demanded of said defendant the balance of the purchase price in accordance with the terms of said agreement, but the defendant, Charles A. Hunter, refused to accept the same and to pay the balance of the purchase price, contending that the plaintiffs are unable to convey fee simple absolute and marketable title to the premises.

The trial court ruled that plaintiff Edgar Blackburn Moore obtained a fee simple absolute title to the real property in question under the will of his father and ordered specific performance of the contract by defendant Hunter. The defendants Hunter, Hardesty heirs and William F. Hulse, guardian ad litem for all unknown persons having an interest in the property, appeal.

Henderson, Henderson & Shuford, by David H. Henderson, for plaintiff appellees Moore.

Parker Whedon for defendant appellee Whedon, Guardian Ad Litem.

Williams, Kratt & Parker, by Neil C. Williams, Jr., for defendant appellant Hunter.

Durant Williams Escott for defendant appellants Hardesty heirs.

William F. Hulse for defendant appellant Hulse, Guardian Ad Litem.

MARTIN (Harry C.), Judge.

This appeal presents the question whether plaintiffs can convey to defendant Hunter a good, fee simple, marketable title to the property described in the contract of sale. In order to answer this question, we must interpret the will of E. B. Moore. Although the specific provision in question is Item IV of the will, previously set out, in construing a will we are required to view it from its four corners. *Campbell v. Jordan*, 274 N.C. 233, 162 S.E. 2d 545 (1968).

The intention of the testator, gathered from the four corners of the instrument, is the "polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E. 2d 465, 468 (1960).

> Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared, so as to ascertain the general plan and purpose of the testator, if there be one. Ordinarily nothing is to be added to or taken from the language used, and every clause and every word must be given effect if possible. Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. If words or phrases are used which have a well-defined legal significance, established by a line of judicial

> decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent. If, when so considered, the intention of the testator can be discerned, that is the end of the investigation.

Id. at 521, 117 S.E. 2d at 468-69.

The epigram of Sir William Jones, "no will has a brother," remains true today. Little or no aid can be derived by a court in construing a will from prior decisions in other will cases. It is not sufficient that the same words in substance, or even literally, have been construed in other cases. It often happens that identical words require very different constructions according to context and the peculiar circumstances of each case. *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957). "Probing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor." *Gatling v. Gatling*, 239 N.C. 215, 221, 79 S.E. 2d 466, 471 (1954). When engaging in this task, we should give effect to every clause, phrase and word in accordance with the general purpose of the will, where possible. *Morris, supra.* "Every string should give its sound." *Edens v. Williams*, 7 N.C. 27, 31 (1819).

In applying these rules of construction to the will of E. B. Moore, we are of the opinion that the result reached by the trial court is correct. We find that with respect to the property in Item IV of the will, the Selwyn Farm property and the Clarke County, Virginia, land, it was the intention of the testator to devise a fee simple interest in the property to his son, Edgar Blackburn Moore, subject only to the right of testator's wife, Beulah, to live on the property and to receive certain of the income from the property and to the stipulation that Edgar not predecease testator without leaving issue. The devise to Edgar was also subject to the condition that the land and any part thereof shall not be sold or encumbered for twenty-five years after the death of testator. The will was executed in 1913, when Edgar was sixteen years old. At that time the property was a working farm and testator made provisions in his will for several of his farm employees. The testator realized his son was only sixteen years old and would likely receive the farm when he was still a young man. Knowing Item IV of the will would give Edgar a fee simple title to the farm and desiring both to provide an in-

come for his wife and protect Edgar from losing his estate by inexperience, he attempted to restrict the alienation of the property. This shows his intent that Edgar would have the fee upon the death of testator. The words "in fee simple" are technical words and shall be given their technical meaning in the absence of a clear expression of a contrary intention in the will itself. *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301 (1970).

Defendants contend that testator's use of the words "unless he shall die without leaving issue," followed by a contingent devise to testator's nieces and nephews, is such a clear expression. They rely upon these pertinent provisions of N.C.G.S. 41-4: "Every contingent limitation of any . . . will, made to depend upon the dying of any person . . . without issue . . . shall be held and interpreted a limitation to take effect when such person dies not having such . . . issue . . . living at the time of his death." The statute contains this condition: ". . . unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the . . . will creating it."

We hold the intent of E. B. Moore that the limitation is to take effect upon the death of testator is expressly and plainly declared on the face of the will and the statute is not applicable. If Edgar had predeceased testator without leaving issue, then the property would have gone to the contingent devisees. However, Edgar survived his father. The law favors early absolute vesting of estates, and in the interpretations of wills with conditional expressions, which render a testamentary devise defeasible, their operation should be confined to as early a period as the words of the will allow so that it becomes an absolute interest as soon as the language of the testator will permit. *Elmore v. Austin*, 232 N.C. 13, 59 S.E. 2d 205 (1950). Where there is ambiguity in a will whether the contingent limitation is to occur at the death of the testator or that of the first taker, the law favors the early vesting of estates and it will be held to occur at the death of the testator. Where it clearly appears from the words of the will and surrounding circumstances that the testator so intended, the statute, N.C.G.S. 41-4, will not apply. *Westfeldt v. Reynolds*, 191 N.C. 802, 133 S.E. 168 (1926).

Chief Justice Stacy in *Westfeldt* was construing a will with a like question to the one at bar. Testatrix in her will left half of

her property to Jenny Westfeldt, "to revert to Lulie Westfeldt in case of Jenny Fleetwood Westfeldt's decease." What the great Chief Justice said in *Westfeldt* is persuasive in our case:

> We now come to the first real battleground of debate between the parties, but from the reasoning in all the decisions on the subject, the question would seem to be involved in no serious doubt as to its proper solution. Jenny Fleetwood Westfeldt survived the testatrix. The limitation that her interest under the second devise is "to revert to Lulie Westfeldt in case of Jenny Fleetwood Westfeldt's decease," has reference to the death of Jenny Fleetwood Westfeldt during the lifetime of the testatrix. This not having occurred, the devise to Jenny Fleetwood Westfeldt, under the second clause, became absolute upon her survival of the testatrix. *Goode v. Hearne,* 180 N.C., 475; *Bank v. Murray,* 175 N.C., 62.
>
> It is the recognized rule of testamentary construction, here and elsewhere, that, in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, when a defeasible estate is created by devise, with no definite time fixed for the same to become absolute, and the alternative is either to adopt the time of the testator's death, or the death of the devisee, at which the estate may fairly be relieved of the contingency and become absolute, the time of the testator's death will ordinarily be adopted, unless prohibited by some statutory provision, as this makes for the early vesting of estates, which the law favors.

Id. at 806, 133 S.E. at 170-71.

The other half of the Westfeldt property was devised to Lulie Westfeldt, "and should Lulie Westfeldt die without heirs the property to go over to Overton Westfeldt Price's children." Here the Court held the statute (now N.C.G.S. 41-4) did not affect the general rule of interpretation (set out with respect to Jenny's devise) as a contrary intent clearly appeared upon the face of the will.

The testator, E. B. Moore, had three primary beneficiaries in mind as expressed in his will: his wife Beulah, who received his residuary estate and certain interests under Item IV of the will;

his son Edgar, who received the property described in Item IV subject to the interests of his mother; and his collateral heirs. It is proper to consider the state of his family and the nature of his property in determining testator's intent as expressed in his will. *Edens v. Williams, supra.* E. B. Moore intended his son to have the farms if he survived him. He intended his son to hold this property for at least twenty-five years after testator's death and use the income for the benefit of Beulah and Edgar. Testator knew that time changes all things and that after twenty-five years from his death it might be necessary and wise to sell the property or parts of it for the benefit of Edgar or Beulah. Without a fee simple title in Edgar, this was a practical impossibility.

Edgar's estate was limited by his surviving the testator. He did so. We hold Edgar took a fee simple title to the property described in Item IV at the death of his father, subject only to the interests of Beulah, Edgar's mother. She died 23 December 1948 and her interests in the subject property terminated at her death. Edgar Blackburn Moore now owns a fee simple title to the subject property and plaintiffs can convey the land described in the contract of sale by good, marketable fee simple title to defendant Hunter.

We agree with plaintiffs that the Court should not at this time determine matters beyond those raised by plaintiffs' complaint and Hunter's answer, and we will not undertake to determine the rights and interests of the Hardesty heirs as raised in their brief.

The judgment of the superior court ordering specific performance of the contract between plaintiffs and defendant Hunter is

Affirmed.

Judges PARKER and HILL concur.

REV. ELBERT WILLIAMS v. BURROUGHS WELLCOME CO. AND JAMES ROSTAR

No. 783SC394

(Filed 6 May 1980)

1. **Process § 4— proof of service—officer's return—additional proof—amendment of return**

Although G.S. 1-75.10 provides that an officer's return shall constitute proof of service in fact, and the better practice is for officers to make their return specifying in detail upon whom and in what manner process was served, the statute does not preclude a plaintiff, in a case where the return on its face does not affirmatively disclose facts showing nonservice, from offering additional proof to establish that service was made as required by law. Alternatively, the officer may be permitted to amend the proof of service unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process is issued. G.S. 1A-1, Rule 4(i).

2. **Process § 12— service on corporation—person apparently in charge of office—office of managing agent**

The evidence was sufficient to support the court's determination that service of process was made on a person "apparently in charge" of an office of the corporate defendant within the meaning of G.S. 1A-1, Rule 4(j)(6) where it showed that the person on whom the process was served worked as a secretary to the personnel manager of the corporate defendant's Greenville plant; when the deputy arrived to serve process, the personnel manager was not present in the office; and the secretary told the deputy that "she was in charge of the office" in the absence of the personnel officer. However, the court's conclusion that the office was that of a "managing agent" within the meaning of G.S. 1A-1, Rule 4(j)(6) was not supported by its finding that the personnel manager "was an employee in a management position," since whether such a person is a "managing agent" within the meaning of the statute can only be determined with reference to his specific duties and the degree of discretion granted by his employer.

APPEAL by defendant from *Bruce, Judge*. Order signed 24 February 1978 in Superior Court, PITT County. Heard in the Court of Appeals 6 February 1979.

This civil action was brought by plaintiff against the corporate defendant Burroughs Wellcome Co. and against James Rostar, individually, personnel manager of the corporate defendant, to recover damages allegedly resulting from the individual defendant's wrongful termination of plaintiff's employment with defendant corporation on 4 October 1976 and the publication of libelous and slanderous remarks concerning plaintiff. The action

was commenced on 3 October 1977 by issuance of summons and an order extending the time in which to file a complaint. The sheriff's return recited that the summons and order were served as follows.

> On James Rostrar [sic], Defendant, on the 7th day of Oct., 1977 by leaving a copy with Carol Allen at the following place: Burroughs Wellcome Co., Greenville.
>
> On Burroughs Wellcome Co., Defendant, on the 7th day of Oct., 1977, by leaving a copy with Carol Allen at the following place: Burroughs Wellcome Co., Greenville, N.C.
>
> * * *
>
> RALPH L. TYSON, Sheriff of Pitt County, N.C.
> By: s / Billy Tripp
> Date: 10-7-77.

On 24 October 1977, within the time granted by the order extending time, plaintiff filed his complaint, which was properly served on 26 October 1977 on G. H. Leslie, plant manager of Burroughs Wellcome Co., Greenville, N.C. and on James Rostar.

On 3 November 1977 both defendants moved pursuant to G.S. 1A-1, Rule 12(b)(5) to dismiss the complaint upon the grounds of insufficiency of service of process. Following a hearing on the motion, the trial court entered an order dismissing the action as to the individual defendant, James Rostar, for lack of personal jurisdiction. As to the corporate defendant, the court made the following findings of fact:

> 1. That a Summons was issued in this action on the 3rd day of October, 1977, running to the defendants, Burroughs Wellcome Co. and James Rostar;
>
> * * *
>
> 3. A copy of said Summons was purportedly served on Burroughs Wellcome Co. on the 7th day of October, 1977, by leaving a copy with Carol Allen at Burroughs Wellcome Co., Greenville, North Carolina.
>
> 4. That James Rostar did not on the 7th day of October, 1977, reside at Burroughs Wellcome Co. but was an employee in a management position of Burroughs Wellcome Co.;

5. That Billy Tripp, Deputy Sheriff of Pitt County, went to Burroughs Wellcome Co. on the 7th day of October, 1977, and upon inquiry, was told by Carol Allen that the Plant Manager of Burroughs Wellcome Co. was not there and that neither was James Rostar and that in the absence of the Plant Manager and James Rostar that the said Carol Allen was in charge of the office at Burroughs Wellcome Co.;

Based on these findings, the court concluded as a matter of law that summons was properly served in accordance with G.S. 1A-1, Rule 4(j)(6) upon defendant corporation and denied its motion to dismiss. From the portion of the order denying defendant Burroughs Wellcome Co.'s motion to dismiss, the corporate defendant appealed.

Braswell & Taylor by Roland C. Braswell, for plaintiff appellee.

Speight, Watson & Brewer, by W. H. Watson for defendant appellant.

PARKER, Judge.

The issue presented on this appeal is whether the trial court properly denied defendant corporation's motion to dismiss on the grounds of insufficiency of service of process.

Where a civil action is commenced by issuance of summons and an order extending the time to file a complaint, the summons and the court's order are to be served in accordance with the provisions of G.S. 1A-1, Rule 4. G.S. 1A-1, Rule 3. G.S. 1A-1, Rule 4 provides in pertinent part:

(j) *Process—manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

* * *

(6) Domestic or Foreign Corporation.—Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation

> or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office . . .

Under G.S. 1-75.10(1)(a), where the defendant appears in the action and challenges the service of summons by the sheriff of the county where the defendant was found, proof of service shall be "by the officer's certificate thereof, showing place, time and manner of service." When the return upon its face shows legal service by an authorized officer, that return is sufficient, at least *prima facie*, to show service in fact. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977); *Harrington v. Rice*, 245 N.C. 640, 97 S.E. 2d 239 (1957).

[1] The officer's return in the present case stated that the summons and order were served on Burroughs Wellcome Co. on 7 October 1977 "by leaving a copy with Carol Allen at the following place: Burroughs Wellcome Co., Greenville, N.C." Defendant contends that the return is defective on its face in that it fails to recite in what capacity, if any, Carol Allen acted on behalf of the corporate defendant when service was purportedly made. Assuming that this return is incomplete in that it fails to specify in detail the agency of Carol Allen and the manner in which service upon her constituted compliance with G.S. 1A-1, Rule 4(j)(6), the significant factor in determining whether the court acquired jurisdiction over the corporate defendant here is whether the manner of service itself, rather than the return of the officer showing such service, complied with the applicable statute. "It is the service of summons and not the return of the officer that confers jurisdiction." *State v. Moore*, 230 N.C. 648, 649, 55 S.E. 2d 177, 178 (1949). Although G.S. 1-75.10 provides that the officer's return shall constitute proof of service in fact, and the better practice is for officers to make their return specifying in detail upon whom and in what manner process was served, we do not construe that statute as precluding the plaintiff, in a case where the return on its face does not affirmatively disclose facts showing nonservice, from offering additional proof to establish that service was made as required by law. *See, Crawford v. Bank*, 61 N.C. 136 (1867). Alternatively, the sheriff may be permitted to amend the proof of service unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. G.S. 1A-1, Rule 4(i).

[2] Proceeding to the question of the sufficiency of the service itself, we consider whether the court's findings of fact support its conclusion that defendant Burroughs Wellcome Co. was properly served in accordance with the provisions of G.S. 1A-1, Rule 4(j)(6). The validity of service in the present case must rest upon compliance with that portion of G.S. 1A-1, Rule 4(j)(6) which permits delivery of summons "to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office." The trial court concluded as a matter of law that the summons "was, in fact, served upon Burroughs Wellcome Co. in that Carol Allen was on the 7th day of October, 1977, pursuant to N.C.G.S. 1A-1, Rule 4(j)(6), a person apparently in charge of the office of a managing agent of Burroughs Wellcome Co." This conclusion is based on Findings of Fact Nos. 4 and 5 as follows:

> 4. That James Rostar did not on the 7th day of October, 1977, reside at Burroughs Wellcome Co. but was an employee in a management position of Burroughs Wellcome Co.;
>
> 5. That Billy Tripp, Deputy Sheriff of Pitt County, went to Burroughs Wellcome Co. on the 7th day of October, 1977, and upon inquiry, was told by Carol Allen that the Plant Manager of Burroughs Wellcome Co. was not there and that neither was James Rostar and that in the absence of the Plant Manager and James Rostar that the said Carol Allen was in charge of the office at Burroughs Wellcome Co.

Defendant has assigned error to Finding of Fact No. 5 on the ground that it is unsupported by competent evidence in the record. The corporation contends that the testimony of the deputy sheriff that Carol Allen told him at the time he served the summons and order that "she was in charge of the office" in the absence of the personnel officer was inadmissible hearsay, upon which Finding of Fact No. 5 cannot be based. This contention is without merit. G.S. 1A-1, Rule 4(j)(6)(a) does not require that the person upon whom summons is served be in fact in charge of the office of the officer, director or managing agent of the corporation, merely that the person be "apparently in charge". Evidence presented at the hearing disclosed that Carol Allen worked in the Personnel Department as a secretary and that James Rostar, per-

sonnel manager of the corporate defendant's Greenville plant was her immediate supervisor. On 7 October 1977 when the deputy arrived to serve process, James Rostar was not present in the office. Thus, evidence as to what the sheriff was told by Carol Allen at that time was competent to show that she was "apparently in charge" and forms a sufficient basis for finding of fact No. 5. That finding, in turn, is sufficient to support the portion of the court's conclusion of law that service was made on a person "apparently in charge of the office." The question remains, however, whether the office of which Carol Allen was apparently in charge was that of a "managing agent" of Burroughs Wellcome Co., as required by Rule 4(j)(6)(a). The court's conclusion that the office was that of such an agent rests solely upon its finding that James Rostar "was an employee in a management position." We hold that this finding is insufficient in itself to support the conclusion that James Rostar was a "managing agent" of defendant Burroughs Wellcome Company within the meaning of G.S. 1A-1, Rule 4(j)(6). The service of process upon a corporation by service upon a "managing agent" thereof was authorized by statute in our state as early as 1868 under Sec. 82, Code of Civil Procedure. In *Furniture Co. v. Furniture Co.*, 180 N.C. 531, 105 S.E. 176 (1920), our Supreme Court discussed the meaning of the term "managing agent" as used in a predecessor statute to G.S. 1A-1, Rule 4(j)(6):

> "As a general rule, a managing agent of a foreign corporation, within the contemplation of a statute authorizing service of process on such an officer, is one whose position, rank, and duties make it reasonably certain that the corporation will be appraised of the service made; in other words, one who stands in the shoes of the corporation in relation to the particular business managed by him for the corporation (citations omitted).
>
> It may be said, however, that the later decisions are more liberal in interpreting the term "managing agent" than were the earlier ones. While no general rule can be stated which will serve to assist in determining the matter, such managing agent must be in charge, and have the management of some department of the corporation's business, the management of which requires of the agent the exercise of an independent judgment and discretion; not that he shall not be under the general direction of the corporation; all agents are subject to

> the general control of their principals, but in the management of his particular department he shall have authority to manage and conduct it at [sic] his discretion and judgment direct."

180 N.C. at 533-534, 105 S.E. at 177. *See*, Annot. 71 A.L.R. 2d 178 (1960).

Thus, it is apparent that the question of who may be a "managing agent" upon whom service of process is authorized depends upon the facts and circumstances of the particular case. The court's finding in the present case, that James Rostar was an employee in a "management position" of defendant Burroughs Wellcome Co., however, does not resolve that question. Through the years the structure of corporate organization has become increasingly complex, such that the body of persons who are classified as "management" in any particular corporation is large indeed. "Management" may encompass all individuals who hold positions as high as that of chief executive officer of the corporation and as low as that of production foreman. As to the latter, whether such a person would be a "managing agent" within the contemplation of the statute could only be determined with reference to his specific duties and the degree of discretion granted by his employer. Thus, the fact that a production foreman might technically hold a management position within the corporate hierarchy would not alone support a conclusion that he was a person upon whom service of process could properly be made. Similarly, the bare finding here that James Rostar was an employee in a management position cannot support such a conclusion, and for this reason, the case must be remanded. We express no opinion, of course, as to whether James Rostar is in fact a "managing agent," but hold only that, upon rehearing, the facts of the case be considered in light of the applicable legal principles.

That portion of the order appealed from denying defendant Burroughs Wellcome's motion to dismiss plaintiff's complaint for insufficiency of service of process is vacated and this cause is remanded to the Superior Court in Pitt County for further proceedings not inconsistent herewith to determine the validity of the service of process upon the corporate defendant.

Order vacated and cause remanded.

Judges ARNOLD and WEBB concur.

GEORGIA RAILROAD BANK & TRUST COMPANY v. JOSEPH M. EWAYS

No. 7929SC570

(Filed 6 May 1980)

Constitutional Law § 24.7; Process § 9.1— nonresident individual—minimum contacts—ownership of property in N. C.—no personal jurisdiction

The application of either G.S. 1-75.4(1)(d) or G.S. 1-75.8(5) to assert jurisdiction over the Pennsylvania defendant or his N. C. property would offend traditional notions of fair play and substantial justice, since plaintiff, a Georgia banking corporation, sought to enforce the obligation of defendant, a Pennsylvania resident, upon his guaranty of payment of a debt of an S. C. corporation of which defendant was president; the debt was incurred to finance the development of real property located in S. C.; no portion of the contract was negotiated or executed in N. C. and the laws of another state would govern its interpretation; defendant's only contacts with N. C. were his execution of deeds to property in the State and the institution of suit to regain his title thereto; and defendant's mere ownership of property in N. C. was insufficient to establish the minimum contacts necessary to satisfy the requirements of due process, since the property in question was in no way affected by the contract of guaranty which plaintiff sought to enforce.

APPEAL by plaintiff from *Ferrell, Judge.* Order entered 24 April 1979. Heard in the Court of Appeals 17 January 1980.

Plaintiff, a Georgia banking corporation, filed this action in superior court in Rutherford County against defendant, a citizen and resident of Pennsylvania. Plaintiff alleged in its complaint that on or about 20 May 1977 plaintiff and Wildwood, Inc., a South Carolina Corporation, entered into an agreement whereby plaintiff agreed to lend up to $500,000.00 to Wildwood, Inc. At the same time, defendant, the president of Wildwood, Inc., executed a written guaranty as part of that agreement, personally guaranteeing the obligation of Wildwood, Inc. Allegedly in reliance upon that guaranty, plaintiff bank loaned funds to Wildwood, Inc. Thereafter, Wildwood, Inc. defaulted on its loan payments and refused to pay, and plaintiff bank made demand upon the defendant to pay according to his guaranty agreement, which defendant refused to do. Plaintiff bank prayed for judgment in the amount of $486,441.51 plus interest, that sum being the amount due and payable on Wildwood, Inc.'s debt to plaintiff.

Prior to the filing of the complaint, plaintiff sought an order of attachment against the property of the defendant in North

Carolina. Order of attachment was issued by the assistant clerk of superior court in Rutherford County on 15 August 1978. Thereafter, the sheriff of Rutherford County levied on certain real property owned by defendant and located in Rutherford County.

Defendant, through counsel, made special appearance and moved the court, pursuant to G.S. 1A-1, Rule 12(b)(2), to dismiss the action on the grounds that the court lacked personal jurisdiction over him, for the reason that the cause of action, if any, arose outside of North Carolina, that the realty which plaintiff sought to attach bore no relationship to the subject matter of the action, and that defendant lacked the minimum contacts with the State of North Carolina necessary to support the exercise of jurisdiction.

A hearing on the motion was held on 17 April 1979. The trial court found that the action was to enforce a guaranty agreement by which defendant personally guaranteed payment of the loan to Wildwood, Inc. and that the loan documents disclosed on their face that they were executed for the purpose of acquiring funds to develop real estate located in South Carolina. Concluding that the court lacked jurisdiction over the person or property of the defendant, the court granted defendant's motion to dismiss. From this order plaintiff appealed.

A. Clyde Tomblin for plaintiff appellant.

C. Frank Goldsmith, Jr. for defendant appellee.

PARKER, Judge.

Plaintiff contends on this appeal that the trial court erred in failing to find sufficient facts to support the dismissal of this case. G.S. 1A-1, Rule 52(a)(2) provides that findings of fact and conclusions of law are necessary on decisions of any motion "only when requested by a party and as provided by Rule 41(b)." The record reveals no such request by either party. In fact, the trial judge did file an Opinion and Memorandum of Decision in this case in which he made factual findings upon which he concluded as a matter of law that the court lacked jurisdiction over the person or property of the defendant. The facts found, which were essentially undisputed at the hearing, adequately reflect the material evidence presented at the hearing. Thus, the principal question

presented by this appeal is whether, on the basis of the essentially undisputed facts, the trial court erred in granting defendant's motion to dismiss under G.S. 1A-1, Rule 12(b)(2), on the grounds that jurisdiction over the person of the defendant was lacking.

In *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977), our Supreme Court adopted a two-step analysis to be used in determining whether a trial court has acquired jurisdiction over the person of a nonresident defendant. The first step is to determine whether the statutes of North Carolina permit the courts of this jurisdiction to entertain the action against the defendant. If so, the next step is to determine whether the exercise of this power by the North Carolina courts violates due process of law. G.S. 1-75.4(1)(d) provides that a court has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure as follows:

> (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> * * *
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

The legislative intent in the enactment of G.S. 1-75.4(1)(d) was to extend to the North Carolina courts the full jurisdictional powers permissible under federal due process. *Dillon v. Funding Corp., supra.* Similarly, the effect of G.S. 1-75.8(5) is to permit the exercise of *quasi in rem* jurisdiction over the property interest of a defendant who has been served with process pursuant to Rule 4(k) of the Rules of Civil Procedure in any action where constitutionally permitted. There is no question in this case that the Superior Court in Rutherford County had jurisdiction of the subject matter or that process was properly served under Rule 4. Thus, as applied in the present case, the two-step analysis required by *Dillon, supra,* becomes limited to the question of whether the assertion of jurisdiction over the person of the Pennsylvania defendant or over his interest in North Carolina property violates the principles of due process established by the U.S.

Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977). That principle, applicable to the exercise of both personal and *quasi in rem* jurisdiction, is well established:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

326 U.S. at 316, 66 S.Ct. at 158, 90 L.Ed. at 102.

Whether minimum contacts exist is not to be determined by the application of per se rules; rather, their presence depends upon the particular facts of each case, with particular scrutiny being given to the quality and the nature of defendant's contacts with the State of North Carolina. *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). In each case it is essential "that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed. 2d 1283, 1298 (1958); *applied in Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974). Other factors to be considered are: (i) any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant; (ii) an estimate of the inconveniences to the defendant in being forced to defend a suit away from his home; (iii) the location of crucial witnesses and material evidence; and (iv) the existence of a contract which has a substantial connection with the forum state. *Byham v. House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965).

Plaintiff contends in effect that the exercise of jurisdiction here does not violate due process because defendant has had contacts with North Carolina which evidence that he has availed himself of the laws and benefits of this state. Applying the above stated principles of law to the facts presented, we conclude that the application of either G.S. 1-75.4(1)(d) or G.S. 1-75.8(5) to assert jurisdiction over the Pennsylvania defendant or his North Carolina property does offend traditional notions of fair play and

substantial justice. Plaintiff, a Georgia banking corporation, seeks to enforce the obligation of defendant, a Pennsylvania resident, upon his guaranty of payment of a debt of a South Carolina corporation of which defendant was president. The debt was incurred to finance the development of real property located in South Carolina. Clearly, the material witnesses and relevant evidence necessary to establish plaintiff's right to recover have no connection with this State. No portion of the contract was negotiated or executed in North Carolina, and the laws of another state would govern its interpretation. Plaintiff bank, a nonresident itself, has not demonstrated that this State has any interest in encouraging the litigation of this suit within its borders.

As to the evidence presented by plaintiff bank at the hearing on defendant's motion to dismiss concerning defendant's contacts with this State, plaintiff's exhibits showed only that defendant owns a substantial amount of real property in Rutherford County and McDowell County. Between 1974 and 1978, defendant and his wife executed several deeds to the North Carolina property which were duly recorded in both counties in this state. In May 1977 defendant brought an action against certain Panamanian defendants in the Superior Court in Rutherford County seeking to rescind a contract of sale for the real property and to have certain deeds conveying his North Carolina property to the Panamanian defendants set aside. Upon motion by the foreign defendants in that action, that case was removed to the United States District Court for the Western District of North Carolina, the litigation ultimately resulting in the entry of judgment declaring the deeds executed null and void and revesting title in Joseph Eways, the defendant herein. Apart from the execution of deeds to the property and the institution of suit to regain his title thereto, defendant has apparently had no other contacts with the State of North Carolina. Although plaintiff contends that these activities evidence that defendant has availed himself of all of the rights and privileges of a citizen of North Carolina by conveying land and by invoking the jurisdiction of its courts, we cannot agree that such activities constitute the requisite "minimum contacts" either for the exercise of *in personam* jurisdiction or *quasi in rem* jurisdiction in this particular suit. This is not a case such as that presented in *Dillon v. Funding Corp., supra,* in which the defendant is a foreign corporation which has purposefully initiated con-

tacts in North Carolina in an attempt to solicit new business, and in which hardship would be imposed in requiring the plaintiff to litigate elsewhere. In fact, the record shows that at the time this suit was filed, a substantially similar action was pending in South Carolina. Neither is it a case such as that presented in *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640, *cert. denied.* 297 N.C. 300, 254 S.E. 2d 920 (1979), in which the individual nonresident defendants were engaged in a regular business of selling products in the ordinary course of trade in this state. We note that each conveyance by defendant involved a transfer of title to the same real property, thus negating any inference that he was engaged systematically in the business of conveying parcels of real property in this state. Neither is there any showing upon the record of purposeful development of the property for business or other use.

The assertion of jurisdiction, if appropriate at all, then, must rest solely upon defendant's ownership of real property in this state. In *Shaffer v. Heitner, supra*, the U.S. Supreme Court held that the mere ownership of property in the forum state is insufficient to establish the "minimum contacts" necessary to satisfy the requirements of due process. The Court stated:

> This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.

433 U.S. at 207-208, 97 S.Ct. at 2581, 53 L.Ed. 2d at 700.

Although plaintiff bank contends that the property is substantially related to the controversy over defendant's guaran-

ty agreement, the facts do not disclose that any such relationship exists. Plaintiff did obtain an order of attachment against defendant's real property prior to filing this suit. The attachment proceeding in itself, however, did not establish any relationship between the property and the underlying controversy, *see, Balcon, Inc. v. Sadler,* 36 N.C. App. 322, 244 S.E. 2d 164 (1978), and an examination of the contract of guaranty discloses that it did not purport to affect either possession or title to defendant's North Carolina property in any manner. At most it provided a means by which plaintiff could recover judgment against defendant for its breach in a court having jurisdiction over defendant's person. Having obtained an adjudication that defendant is its debtor, plaintiff would then be free to invoke the jurisdiction of the North Carolina courts to entertain an action on the judgment in order to reach defendant's real property located in this state. At present, however, defendant's connection with this state is too attenuated to justify imposing upon him the "burden and inconvenience" of defending a suit in North Carolina to determine the validity of the guaranty agreement and the existence of an enforceable debt. *See Kulko v. California Superior Court,* 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed. 2d 132 (1978). Thus, the trial court properly granted defendant's motion to dismiss, and the order appealed from is

Affirmed.

Judges ARNOLD and WEBB concur.

BOYCE L. BRANDON v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 7927SC860

(Filed 6 May 1980)

1. Insurance § 130— fire insurance—proof of loss—tender by insured—no absolute discretion by insurer

An insurance company cannot exercise sole discretion in accepting or refusing a proof of loss tendered under the provisions of a fire insurance policy, and the trial court erred in submitting to the jury an issue as to whether plaintiff filed with defendant insurance company a proof of loss as re-

quired by the insurance contract where the uncontroverted evidence showed that written proofs of loss were filed, defendant did not deny liability but stated only that the forms were incomplete, and an adjuster was on the job within days after a fire occurred and took insured's sworn statement as to the loss.

2. **Insurance § 130.1— fire insurance—failure to file timely proof of loss—waiver and estoppel**

There were sufficient allegations in the complaint admitted by defendant and sufficient evidence in the record to carry the case to the jury on the issue of waiver and estoppel by defendant insurer to assert plaintiff insured's failure to file proof of a fire loss.

3. **Insurance § 130— fire insurance—failure to file timely proof of loss—instruction on statute excusing such failure**

The evidence in an action on a fire insurance policy was sufficient to require the court to charge the jury on the provisions of G.S. 58-180.2, which allows a plaintiff to overcome a defense of failure to render timely proof of loss by showing that such failure was for good cause and that defendant insurance company was not substantially harmed thereby.

Judge MARTIN (Harry C.) dissenting.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 7 December 1978 in Superior Court, GASTON County. Heard in the Court of Appeals 20 March 1980.

This is an action on contract arising out of loss by fire to property insured by the defendant appellee. Two fires occurred at the insured's residence—the first on 11 June 1975 and the second on 18 June 1975.

The policy of insurance provides *inter alia*:

> The insured shall give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged, and undamaged property showing in detail quantities, costs, actual cash value, and amount of loss claimed, and within sixty days after the loss unless such time is extended in writing by this company, the insured shall render to this company a proof of loss signed and sworn to by the insured . . . .

The insured submitted proof of loss on the 11 June 1975 fire to the insurer, which the insurer contended was incomplete under

the requirements of the insurance policy. Notice was given to the policyholder of the deficiencies, and request was made for corrections. In September 1975 a subsequent proof of loss was submitted regarding the 11 June 1975 fire which the insurer adjudged to be incomplete. The proof of loss on the 18 June fire was not supplied until sometime in March 1976. This filing was adjudged by the defendant to be incomplete in that it failed to include the required inventory and cost particulars. The insured mailed partial inventories and other incomplete documents to the company, and requests were made by the insured for additional forms. The plaintiff finally secured the services of a lawyer who filed proof of loss forms which were rejected by the defendant.

Upon trial, the court submitted the following issues to the jury which were answered as follows:

1. Did the plaintiff sustain damage to his property as the result of fires which occurred on June 11, 1975 and June 18, 1975?

ANSWER: Yes

2. Did the plaintiff file with the defendant insurance company a proof of loss as required by the insurance contract?

ANSWER: No

3. What amount, if any, is the plaintiff entitled to recover for damage to:

(a) Real property

AMOUNT: $_____

(b) Personal property

AMOUNT: $_____

(c) Additional living expense

AMOUNT: $_____

Judgment was entered for the defendant, and plaintiff appealed.

Jim R. Funderburk for plaintiff appellant.

Hollowell, Stott & Hollowell, by Grady B. Stott, for defendant appellee.

HILL, Judge.

[1] Four questions are submitted to this Court for review. Although all appear to merit consideration, we conclude another issue is dispositive of the case at this time: Can an insurance company exercise sole discretion in accepting or refusing a proof of loss tendered under the provisions of the policy. We think not.

The plaintiff appellant in his complaint alleged:

> Paragraph 9. That on several occasions prior to August 17, 1975, employees and adjusters of the defendant examined the residence of the plaintiff referred to above and requested information of the plaintiff which he supplied them.

In answer to paragraph 9, the defendant in its answer admitted that one of its adjusters examined the residence and that he conferred with the plaintiff regarding information.

> Paragraph 10. That prior to August 17, 1975, the agents, employees, or adjusters of the defendant had supplied Proof of Loss Forms to the plaintiff; that said forms were incomplete and said agents promised to supply additional needed forms which they never did.

In its answer to paragraph 10 of the complaint, the defendant admitted that proof of loss forms were furnished to the plaintiff and they were incomplete.

As a part of paragraph 12, the plaintiff appellant alleged ". . . the plaintiff filed an additional proof of loss which the defendant attempted to reject."

In its answer the defendant stated ". . . it is admitted that the plaintiff attempted to file a proof of loss on forms supplied by the defendant . . . ."

As a part of paragraph 13 of the complaint, plaintiff appellant alleged "[t]hat of [sic] September 26, 1975, plaintiff again filed proof of loss forms . . . provided by the local agent of the defendant . . . ."

In its answer to this paragraph the defendant stated "it is admitted that if a proof of loss was submitted, the same was not in proper form and rejected."

Plaintiff further alleged in paragraph 21 of his complaint:

> That plaintiff signed various papers for various employees of the defendant and believes that he signed a proof of loss for these claims for said employees prior to sixty days after said loss; however the plaintiff is not sure what papers he did sign; however the employees of the defendant adjusting these claims changed three times and each would promise to provide the proper forms at a later date and each promised the plaintiff that the defendant would pay these claims; that the defendant by the conduct of its employees as heretofore alleged is estopped to assert that said proof of loss was not filed in strict accordance with the terms of its policy.

This allegation was denied.

An examination of the record reveals the following evidence:

(1) Boyce L. Brandon, the plaintiff appellant, testified as follows *without objection*:

> The premium on the insurance policy was paid covering the period June 20, 1974 to June 20, 1975. I had an insurance policy with Nationwide Insurance Company for fire insurance for several years. During the period of this insurance policy, I had a fire at my house on two occasions. I notified Nationwide Insurance Company about the fires and they sent Mr. Dease or Denise who wanted to know if me and my wife would talk to him and make the statement that happened, and so, he asked us to sit down in his car where he had his tape machine, and he taped the conversation of what we knew or what we didn't know at the time of the fire, and then, three or four weeks later, another man came from the company. I made a sworn oral statement to the first man and signed some papers. He told me he would be back in a few days and bring me the sufficient papers—additional papers that I should sign.
>
> Prior to the time I gave him the oral statement on the tape recorder, he swore me and it was a sworn statement

just like we do here. He asked my wife at the same time to give a sworn oral statement and she did. He has it on all on tape.

(2) *Without objection,* Wilbur Covington McKinsey, a commercial adjuster with Nationwide Insurance Company, testified:

"A proof of loss was filed by Mr. Brandon in this claim, but I don't know exactly when."

Later, after reading a letter and refreshing his memory on the stand, Mr. McKinsey testified that he did not know if a proof of loss *in proper form* was filed within the time prescribed by the contract. "Because the letter speaks for itself and it doesn't indicate that he filed a proof of loss. It says in the letter that there was a paper that he filed. I can't answer whether he filed a proof of loss."

Upon recall, Mr. Brandon further testified without objection:

Plaintiff's Exhibit #2 [the letter Mr. McKinsey had referred to on the stand] is a letter from the insurance company. The letter is just stating that my proof of loss was not acceptable until I get more proof and more information and I did that several times. I even called Raleigh.

* * * * * * * * *

I believe I gave this gentleman here (a man in the courtroom with Nationwide Insurance Company) the key to my house. He said he wanted to go in and take some pictures . . . . The man in the courtroom gave me some pink slips but there wasn't enough and he was supposed to bring me some more. He never did bring any more to me, . . . So I had to take the other form on the paper and go to the Sears Roebuck Catalog and itemize room by room, piece by piece, what was burned. . . . [I] did fill them out the best I knew how.

Admittedly, the forms so filled out were excluded from the record on objection as to form of question, but the oral testimony is evidence of an effort on the plaintiff's part to furnish proof of loss.

On cross-examination, the plaintiff testified without objection:

I sent to Nationwide Insurance Company an itemized list of property in that house. I also sent them a registered letter for the proof of loss. I sent them a list of what was in the house; a list of all of that stuff. I sent the list by registered mail and I think it was in July or something. It was a month or so or maybe two months after the fire. They kept promising to bring me papers, and they didn't, and I even called Raleigh on them, and they were supposed to bring them to me, and I sent it to them registered mail. I mailed the company a copy of those pink sheets that I testified about this morning. I don't remember the exact day but it wasn't long after the fire. I just sent them copies of estimations.

I assume State's Exhibit #3 is the letter I received from Nationwide Insurance Company after I sent them a letter. I filed several, and I filed so many that I don't remember if I swore to it or not but I sent it a registered letter so they could get it within a sixty day period.

I did send a registered letter within the sixty day period of time, and they corresponded later, and I took the papers over and turned them over to Mr. Puett and told him I needed some help on the papers. I sent the letter by registered mail; I don't know the date, but it was within the sixty days. It was a sworn, true policy, yes, sir. If I had it notarized, I can't say, sir.

THE COURT: Well, Mr. Stott, I—Mr. Brandon, he asked you, I thought, a fair and clear question. He asked you again if you on that first piece—first document that you mailed in—if you can swear now that you were sworn to that information as the policy required. That's the essence of the question. All you can do is say yes, I did; no, I did not; or I just simply don't remember, I guess. I don't know what other—

A. Yes, sir, I did. To my memory, I did. I can't swear to that date, sir.

THE COURT: All right, you don't—the best you can recall, you did, but you don't remember the date?

A. I don't know the dates that was on there.

THE COURT: Okay. All right, that's the answer.

Later the plaintiff was recalled, and he testified as follows:

> As far as I know, I swore to Plaintiff's Exhibit #8 before a Notary Public, Jerrie Gloria Clonister on March 10, 1976. On June 18, 1975 I had another fire. Both fires occurred at 5:00 in the morning. I swore to Exhibit 15 before a Notary and said that a fire happened at 5:00 a.m. on June 11th, 1975. I swore to all of them and they are all true statements. I don't remember specific dates. I sent them letters and letters and I do not remember how many.
>
> I got a letter from Nationwide dated March 23, 1976 (Exhibit #17) that stated, 'unable to accept the paper as a sworn proof of loss.' And the letter also said it doesn't comply with the provisions of the policy for furnishing a sworn proof of loss.

There is testimony that several months after the fire plaintiff retained an attorney who attempted to file a proof of loss, which was rejected.

[1] Although we do not have the written forms which the insured designated as proof of loss before us, it is uncontroverted that proofs of loss were filed. The defendant only contends they were incomplete. There was an adjuster on the job within days after the fire who took the insured's sworn statement. The insurer received over a period of time several purported proof of loss forms. It did not deny liability upon receipt, but only stated the forms were incomplete.

The second issue, as it is phrased, should not have been tendered to the jury.

[2] Further, we find that there are sufficient allegations in the complaint, admitted by the defendant, and evidence in the record to carry the case to the jury on the question of waiver and estoppel, *Meekins v. Insurance Company*, 231 N.C. 452, 57 S.E. 2d 777 (1950).

[3] We also believe there are sufficient facts to require the court to charge the jury under the provisions of G.S. 58-180.2. Such issues as raised under that statute are also a matter for the twelve.

New Trial.

Judge PARKER concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

I respectfully dissent from the majority opinion. It turns upon the holding that the second issue was improper and should not have been submitted to the jury. Any defects in the issue are not set forth or discussed. Defendant Nationwide denied that proper proof of loss was filed by plaintiff and submitted evidence tending to support its denial. Plaintiff produced evidence tending to prove the contrary. This created an issue of fact to be resolved by the jury upon proper instructions. The filing of proof of loss as required by the policy is essential to plaintiff's cause of action. *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957). By denying liability within the sixty-day period after the fire on grounds other than failure to file proof of loss, insurer can waive the policy requirement for filing proof of loss. *Zibelin v. Insurance Co.*, 229 N.C. 567, 50 S.E. 2d 290 (1948); *Williams v. Insurance Co.*, 209 N.C. 765, 185 S.E. 21 (1936). Here, defendant did not deny liability on any basis other than failure to file proof of loss, until it filed answer, long after the expiration of the sixty-day period. Defendant did not waive the policy defense of lack of proof of loss. *Gorham v. Insurance Co.*, 214 N.C. 526, 200 S.E. 5 (1938).

The majority finds the court should have instructed the jury on the application of N.C.G.S. 58-180.2 to the second issue. This statute allows a plaintiff who is faced with a failure to render timely proof of loss to overcome that defense by showing that such failure was for good cause and that the insurance company has not been substantially harmed thereby. Although the court did not specifically mention the statute, it did charge as to the substance of it. The instruction was more favorable to plaintiff than the statute requires, as the court did not instruct the jury that it was necessary for plaintiff to prove the failure to timely file the proof of loss was for good cause. The court also told the jury that as a matter of law defendant had not suffered any substantial injury or prejudice.

I hold there is no error in this trial. The issues were fairly presented to the jury and the twelve has resolved them.

ELLEN CRISTEEN HATCHER DANIELS v. ERVIN H. HATCHER

No. 7918DC1072

(Filed 6 May 1980)

1. **Divorce and Alimony § 25.10— modification of custody order sought—no showing of changed circumstances**

Evidence was sufficient to support the trial court's findings that the parties' children who resided with plaintiff were healthy, above average in school, properly cared for, and happy in their environment, and that defendant had failed to show any substantial change of circumstances warranting modification of an earlier order giving custody to plaintiff.

2. **Divorce and Alimony § 24.8— child support increased—insufficiency of findings**

The trial court erred in increasing the amount of child support defendant was required to pay without first making findings as to actual past expenditures for the children, present reasonable needs of the children, and present expenses of plaintiff and defendant.

3. **Divorce and Alimony § 27— child support order vacated—order awarding attorney fees also vacated**

Because the order increasing child support payments is being vacated, the order awarding plaintiff attorney's fees must also be vacated, and the question of attorney's fees must be reconsidered only when and if the issue of whether plaintiff is entitled to an award of increased child support is determined in her favor.

4. **Divorce and Alimony § 25.3— child custody—children's statements to third persons—exclusion as hearsay—children not permitted to testify**

The trial court in a child custody proceeding properly excluded as hearsay statements allegedly made by the children to third parties, and the court did not abuse its discretion in refusing to place the children on the witness stand to testify as to where they wanted to live and why.

APPEAL by defendant from *Cecil, Judge.* Order entered 23 April 1979 in District Court, GUILFORD County. Heard in the Court of Appeals on 27 March 1980.

The following chronology of events appears to be without controversy:

1. On 3 November 1975 plaintiff, Ellen Cristeen Hatcher Daniels (formerly Ellen Cristeen Hatcher), and defendant, Ervin H. Hatcher, entered into a consent order whereby plaintiff was given primary custody of Jerri Ellen Hatcher, born 28 April 1966; Mary Cristeen Hatcher, born 31 December 1969; and Jonathan Ervin Hatcher, born 20 February 1971. The defendant was given certain visitation privileges and ordered to pay child support in the amount of $250.00 per month.

2. On 14 February 1977 plaintiff filed a motion in the cause seeking increased support payments for the children and, on 24 February 1977 served a set of interrogatories on defendant designed to elicit detailed information regarding his financial standing.

3. Defendant responded on 30 March 1977 and moved for a change of custody. He also filed objections to many of the interrogatories propounded by plaintiff, answered others, and served a set of interrogatories on her.

4. On 30 October 1978 defendant moved for summary judgment on the issue of custody and supported his motion with numerous affidavits respecting his and his second wife's fitness to have custody of the children.

5. Thereafter, following a series of hearings, the trial court entered an Order dated 23 April 1979 wherein it (1) dismissed defendant's motion for change of custody; (2) allowed plaintiff's motion for additional child support and ordered defendant to pay $390.00 per month plus all medical and dental bills for the children; (3) ordered extensive and specifically designated visitation privileges for defendant; (4) ordered defendant to pay plaintiff's attorney's fees in the amount of $2,350.00; and (5) found plaintiff in contempt of a previous order relating to defendant's visitation rights and ordered her to "forfeit to defendant the sum of one hundred dollars ($100) for contempt."

Defendant appealed.

Charles R. Brown for the plaintiff appellee.

Max D. Ballinger for the defendant appellant.

HEDRICK, Judge.

Defendant challenges those portions of the trial court's Order dismissing his motion for change of custody, increasing the amount of child support he must pay, and awarding plaintiff attorney's fees. We consider first his argument that the judge erred in denying his motion for custody and in concluding thereafter that the plaintiff is a fit and proper person to have the continued permanent custody of the three minor children.

[1] Primary custody of the children was initially awarded to the plaintiff by the consent order entered on 3 November 1975. While an order awarding custody is not permanent in its nature, such order may be modified only upon a sufficient showing of changed circumstances. G.S. § 50-13.7(a); *accord, Clark v. Clark,* 294 N.C. 554, 243 S.E. 2d 129 (1978). The party moving for the modification has the burden of showing a substantial change of circumstances affecting the welfare of the child. "It must be shown that the circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified; . . ." *Searl v. Searl,* 34 N.C. App. 583, 587, 239 S.E. 2d 305, 308 (1977). While the court must make findings of fact to support its order, the court is not required to make findings in addition to a finding that the moving party has failed to prove a change in circumstances sufficient to warrant modification of the custody order. *Id.* Moreover, such a finding is conclusive on appeal if supported by competent evidence in the record. *In re Williamson,* 32 N.C. App. 616, 233 S.E. 2d 677 (1977).

In the present case the Order denying the defendant's motion for change of custody contains the following findings:

> The Court [finds] from the evidence that the three minor children are healthy; they are above average in school, and that they are properly cared for and are generally happy in their present environment.
>
> The Court further [finds] that the defendant has failed to show by the greater weight of the evidence any significant change of circumstances concerning the custody of the three minor children which would cause the Court to remove the children from the custody of the plaintiff and entrust the same to the custody of the defendant.

We have examined the extensive evidence in this case and have determined that it fully supports these findings. Furthermore, the findings are clearly more than ample to support the court's conclusion thereafter that the defendant had failed to carry his burden and that his motion for a change of custody should be dismissed. That portion of the Order denying defendant's motion for change of custody is affirmed.

[2] We next consider defendant's challenge to that portion of the Order decreeing an increase in child support payments. Here, we must agree that the Order is deficient.

As with the question of custody, the consent order entered 3 November 1975 determined the matter of child support by directing that defendant pay a specified monthly sum. Again, a modification of that order must be firmly founded upon a sufficient showing of changed circumstances by the moving party, here the plaintiff. G.S. § 50-13.7(a); *accord, Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974); *Ebron v. Ebron,* 40 N.C. App. 270, 252 S.E. 2d 235 (1979). However, before the district court can order a change in the amount of the support payments, it "must make findings of *specific* facts as to what actual past expenditures have been to determine the amount of support necessary to meet the reasonable needs of the child for health, education, and maintenance." *Ebron v. Ebron, supra* at 271, 252 S.E. 2d at 236. [Emphasis added.] *See also Steele v. Steele,* 36 N.C. App. 601, 244 S.E. 2d 466 (1978). Additionally, the court must make findings as to the relative abilities of the parties to provide support. *Steele v. Steele, supra.*

The Order before us contains no findings as to actual past expenditures for the children. It contains no specific findings as to the present reasonable needs of the children. Although the court considered and made findings as to the respective incomes of plaintiff and defendant, the Order contains no findings as to the defendant's or the plaintiff's present expenses. Without definitive findings regarding the past and present needs of the children, and the abilities of the plaintiff and the defendant to meet these needs, it is impossible to understand how the court concluded that the monthly financial needs of the children "would be in an approximate amount of two hundred dollars ($200) for each

child, . . .", or to comprehend by what formula the court divided the total amount between the parties.

We are cognizant that, as children grow older, their financial needs most probably increase. Too, common sense dictates that their financial needs must increase rapidly in these days of runaway inflation and constantly rising costs. But, our law requires, and we think justly so, that the actual financial needs of the children be specifically determined in the order providing for their support. Parents also suffer the pangs of decreased spending power and increased living costs brought on by the spiraling inflation rate. While such pangs will not relieve a parent of his or her duty to support the child, we think the least the court can do, if it is going to increase the amount that a noncustodial parent must pay for the child's support, is to tell that parent why the increase is necessary.

The record before us is replete with evidence comparing the needs and expenses of the children at the time of the consent order with their needs and expenses at the date of the filing of the motion for increased support and the time of the several hearings leading to the Order. Likewise, there is evidence that the plaintiff's circumstances have changed, and that the defendant's expenses have increased. The court's failure to make specific findings from this evidence to resolve these matters necessitates that we vacate that portion of the Order increasing the award of child support. The cause must be remanded for the court to make the requisite definitive findings from the evidence in the present record to support any order increasing the amount of child support which the defendant must pay.

[3] Lastly, defendant attacks that portion of the Order requiring him to pay the plaintiff's attorney's fees. Because the Order increasing the child support payments is being vacated, we think the Order with respect to attorney's fees must also be vacated. The question of attorney's fees must be reconsidered only when and if the issue of whether plaintiff is entitled to an award of increased child support is determined in her favor. At such time, upon reconsideration the trial court must be guided by the principles of law stated in the statute, G.S. § 50-13.6, which requires in relevant part:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

In our opinion, the court would abuse its discretion if, after determining that an increase in the award of child support was not warranted under the circumstances, it nevertheless proceeded to award attorney's fees to plaintiff. Moreover, the trial court cannot order the defendant to pay plaintiff's attorney for the time spent in representing her on the contempt citation stemming from her violation of the defendant's court-ordered visitation rights.

[4] We shall address but briefly defendant's contentions that the trial judge erred in refusing to require sworn testimony from these three children, who were seven, eight and twelve years of age at the time of the several hearings regarding their custody and support. Defendant implores this Court to "send a message" to the district court. He apparently wishes us, first, to rule that extrajudicial statements made by the children to third parties are admissible. To the contrary, such statements are clearly hearsay and inadmissible. 1 Stansbury's N.C. Evidence, *Hearsay* § 138 (Brandis rev. 1973). We think it unwise at best to carve out another exception to the hearsay rule which would ultimately permit the noncustodial parent and his allies to testify as to what the children have told him regarding the custodial parent. We think so not only for the reason that hearsay is intrinsically weak in probative value, but primarily because we believe the "tattle-tale" statements made by children of estranged or divorced parents to one parent about the other parent are even more suspect for their unreliability than is ordinary hearsay. A child who must cope with the frictions that usually abound between alienated adults vying for the child's attention and affection will curry favor from the party with whom he or she perceives favor to lie at the time. That is, in order to secure advantage, the child will say to the parent presently within earshot what he or she thinks that parent wishes to hear. Moreover, the child in such a situation is more likely to speak out of anger or fear or consternation or bitterness, and, for these reasons, too, his

or her statements to one parent about the other lose reliability and become more suspect for their truthfulness. Finally, and most important, we think it grossly unfair to subject innocent children, who are the true victims of custody disputes, to any more of the sordid bloodletting between their parents than is absolutely necessary. The threat that their statements might be used publicly to hurt someone whom they love exposes them to too much of the battle. We hold that the trial judge correctly excluded as hearsay statements allegedly made by these children to third parties.

By the same token, the judge correctly and wisely refused to bring these children into the courtroom, put them on the witness stand, make them face their mother on the one side and their father on the other, and "swear to tell the truth" about where they wanted to live and why. Allegations of misconduct and unfitness were hurled by this defendant-father at the plaintiff-mother. We shudder to imagine the questions these children might have been asked. Just as mightily, we shudder at the prospect of publicly placing these young children in the middle of their parents' hotly-contested fight for their custody. The record discloses that the judge talked in chambers with each child individually. Their responses were recorded, and counsel for each side was present. Even this relatively unobtrusive procedure was discomfiting for the children. Nevertheless, it is clear from their discussions with the judge and from the evidence as a whole that these children genuinely love and enjoy being with both of their parents, that they are relatively happy with their lot in life, and that they are well cared for. It is well and soundly settled in this State that the trial judge's decision whether to hear the children in open court or in chambers is broadly committed to his discretion. *See Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966); *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971). We hold that the trial judge correctly chose to exercise his discretion to keep these children off the witness stand.

Defendant has brought forward other assignments of error which we have considered. We find them repetitious and meritless.

The result is: That portion of the Order dismissing the defendant's motion for a change of custody is affirmed; those por-

tions of the Order awarding plaintiff increased child support and attorney's fees are vacated. The cause is remanded to the District Court to make definitive findings of fact with respect to the motion for increased child support and attorney's fees from the present record, to draw appropriate conclusions from such findings, and to enter the appropriate order consistent with this Opinion.

Affirmed in part; vacated and remanded in part.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND SPRINGDALE WATER COMPANY OF RALEIGH, INC. APPELLEES v. SPRINGDALE ESTATES ASSOCIATION INTERVENOR-APPELLANT

No. 7910UC783

(Filed 6 May 1980)

1. **Utilities Commission § 56— order of Utilities Commission—judicial review**

A rate order of the Utilities Commission will be affirmed if, upon consideration of the whole record as submitted, the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn.

2. **Utilities Commission § 57— water rates—sufficient evidence**

The order of the Utilities Commission in a water rate case was based upon competent, material and substantial evidence when the record as a whole is considered.

3. **Utilities Commission § 32— water rates—no contributions in aid of construction**

There was no evidence in a water rate case to sustain a finding that consumers of the water company made contributions in aid of construction of the water system in a subdivision through the purchase of their lots in the subdivision, and the Utilities Commission did not err in establishing rates for the water company by utilizing the "rate base" method. G.S. 62-133(b).

4. **Utilities Commission § 42— water rates—fair return**

Rates fixed by the Utilities Commission which would permit a water company to earn a rate of return of 11.85% on original cost net investment were supported by the record as a whole.

Utilities Comm. v. Springdale Estates Assoc.

APPEAL by intervenor from order of North Carolina Utilities Commission entered 15 May 1979 in Docket No. W-241, Sub 2. Heard in the Court of Appeals 4 March 1980.

This is an appeal by Springdale Estates Association, Intervenor, (hereinafter Estates Association) from a final order of the North Carolina Utilities Commission. Springdale Water Company of Raleigh, Inc. (hereinafter Water Company) filed application pursuant to N.C.G.S. 62-130 on 25 August 1978 with proposed new rates for water service to customers in applicant's service area, Springdale Estates Subdivision. The Commission declared the application a general rate case and set a public hearing for 5 December 1978. Estates Association was allowed to intervene in the general rate case. A hearing was held on the proposed rate increase, where evidence was taken concerning Water Company's financial status, particularly with respect to an outstanding debt shown to be owed by Water Company to Springdale Estates, Inc. for the installation of the water system in the Springdale Estates community. This debt was used to calculate the return on investment necessary in order for Water Company to realize a reasonable profit. Pursuant to Water Company's request, the Commission used a "rate base" formula provided for by N.C.G.S. 62-133 in determining the propriety of a rate increase rather than an "operating ratio" formula also provided by this statute. Water Company's application for a rate increase was approved. On 15 May 1979 a final order was filed by the Commission finding the Water Company's original cost net investment to be $95,696, determining that the rate of return methodology was the appropriate basis for fixing rates for applicant in this proceeding, determining that 11.85 percent was a fair and reasonable rate of return to the applicant, Water Company, and fixing rates deemed necessary to produce such rate of return. From this order Estates Association appealed.

G. Clark Crampton for North Carolina Utilities Commission —Public Staff.

Parker, Sink & Powers, by Henry H. Sink, and Poyner, Geraghty, Hartsfield and Townsend, by David W. Long, for applicant appellee.

Allen, Steed and Allen, by Arch T. Allen III and Charles D. Case, for intervenor appellant.

MARTIN (Harry C.), Judge.

The Utilities Commission and Water Company filed a motion to dismiss this appeal for the reason that the appellant violated the rules concerning the form and contents of assignments of error, arguing that it failed to comply with Rule 10(c) of the North Carolina Rules of Appellate Procedure. This Court found that appellant had violated App. R. 10(c) but nevertheless denied the motion to dismiss under the provisions of App. R. 2, exercising its discretion in allowing appellate review because of the public interest matters arising upon the appeal.

Three questions arise for review upon this appeal: (I.) Is the order of the Utilities Commission based upon competent, material and substantial evidence considering the entire record? (II.) Did the Utilities Commission commit error in establishing rates for the water company by utilizing the "rate base" method? (III.) Did the Utilities Commission by its order establish excessive rates for the applicant? We will discuss the three questions separately.

I. THE SUFFICIENCY OF THE EVIDENCE

[1, 2] The legislature has made the "whole record test" applicable to proceedings before the Utilities Commission by the following language of N.C.G.S. 62-65(a):

> When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, but no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record.

This test requires the Commission's order to be affirmed if, upon consideration of the whole record as submitted, the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977); *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion. *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977). Procedure before the Commission in the trial of utilities matters, and particularly in the admission of evidence, is not so formal as litigation conducted in the superior court. *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966). The Commission allowed the application of Water Company, Exhibit 3, to be admitted into the evidence. We find no error in this as the testimony revealed that the witness Holland prepared the application but it was verified by Lester C. O'Neal, president of Water Company, who swore that the "data contained in this application and in the exhibits attached hereto and made a part hereof are true to the best of his knowledge and belief." If appellant had desired to attempt to impeach the accuracy of the report, it could have cross-examined Mr. O'Neal concerning it. Although it is true that the applicant, Water Company, had the burden of proof in the proceeding before the Commission, the Commission very properly could consider the evidence produced by the Public Staff in determining whether the applicant had carried such burden of proof. We hold that upon consideration of the whole record there is sufficient competent, material and substantial evidence to sustain the order of the Commission. *Utilities Commission v. Telegraph Co., supra.*

II. THE USE OF THE "RATE BASE" METHOD

[3] We find no error in the Utilities Commission's establishing rates for the Water Company utilizing the "rate base" method. Appellant contends the rate base method used by the Commission was overstated because of the inclusion of amounts paid by homeowners through the purchase of their lots. Appellant contends that in the purchase of the lots there was included certain amounts, estimated by them to be approximately $750 per lot, which went to the repayment of the cost of the water system. This argument would lead to the conclusion that since the water system was already paid for when the Water Company began operating as a utility, the figure adopted by the Commission as the original cost net investment is overstated and therefore the rate base was artificially inflated to produce the supposed need for increased revenues. The Water Company has produced evidence indicating that as of the date of the transfer of the water system to it, the Water Company owed a debt to Springdale Estates of $99,074.62, representing a running account be-

tween the two companies, and that thereafter a promissory note evidencing a debt in that amount was executed by the Water Company for the benefit of Springdale Estates.

In this proceeding, the Water Company requested that the rates be fixed under N.C.G.S. 62-133(b), the pertinent provisions being:

> In fixing such rates, the Commission shall:
>
> (1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection shall be included subject to the provisions of subparagraph (b)(5) of this section.
>
> (2) Estimate such public utility's revenue under the present and proposed rates.
>
> (3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.
>
> (4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

. . . .

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

Water Company had a right under N.C.G.S. 62-133.1(a) to make this request and the Utilities Commission adopted this method in fixing the rates of the Water Company in this proceeding. This is consistent with the prior orders of the Commission in setting the rates for the applicant in 1974.

Appellant relies upon *Utilities Comm. v. Utilities, Inc.*, 288 N.C. 457, 219 S.E. 2d 56 (1975), which stands for the proposition that a public utility cannot claim as a part of its rate base any portion of the cost of its utilities system for which it is not obligated or charged or has not paid. We find that the evidence in this case is not sufficient to sustain a finding that any of the purchasers of lots in Springdale Estates thereby contributed anything to the cost of the water system. Several of the witnesses testified that they felt that they had paid more for their property than they would have paid if no water system were available to the property, but all of the evidence indicates that there was no breakdown between the cost of the land and the alleged amount to be applied as a part of the cost of the water system. In this case the Water Company has been charged with and is responsible for the entire cost of the water system and has not received any contribution to this cost from any of the purchasers of property in the subdivision who are its consumers. Under the evidence before the Commission in this proceeding, we hold that the question of contribution in aid of construction of the water system set out in *Utilities Comm. v. Utilities, Inc., supra*, is not applicable in this case.

III. THE EXCESSIVENESS OF THE RATES

[4] As stated above, we find there is no evidence to sustain a holding that there were in fact contributions by consumers of the Water Company in aid of construction of the water system, either directly or indirectly. The question remains whether the rates

fixed by the Commission are fair both to the public utility and to the consumer. N.C. Gen. Stat. 62-133(a). Upon appeal, rates fixed by the Commission are deemed prima facie just and reasonable. N.C. Gen. Stat. 62-94(e). If the rates are reasonable upon an application of the whole record test, we are bound by the findings of fact establishing them and may not reach a different finding merely because we could have reached another determination upon the evidence. *Thompson v. Board of Education, supra.* In the review of orders from the Commission by this Court, our action is guided by N.C.G.S. 62-94, and where the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence. We look to the findings of fact and conclusions of the Commission and determine whether the Commission has considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record. *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974); *In re Duke Power Co.*, 37 N.C. App. 138, 245 S.E. 2d 787, *disc. rev. denied, appeal dismissed*, 295 N.C. 646 (1978).

We hold the findings of fact and conclusions of law and the order of the Commission are fully supported by competent, material and substantial evidence in view of the whole record. There is no showing that the Commission has established excessive rates or that there is any material error in the proceedings.

The order of the Utilities Commission is

Affirmed.

Judges PARKER and HILL concur.

VERNON P. GORDON v. JANICE JARMAN GORDON

No. 798DC933

(Filed 6 May 1980)

1. **Divorce and Alimony § 25.8— child custody—parent's change of residence—modification on basis of substantial change**

The mere fact that either parent changes his residence is not a substantial change of circumstance, and the effect of the change on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstances.

2. **Divorce and Alimony §§ 24.1, 27— amount of child support—insufficiency of evidence—attorney's fees improperly awarded**

The trial court erred in awarding child support where defendant offered evidence of the monthly expenses for her and her sixteen year old daughter, but there was no evidence offered tending to show the amount necessary to meet the reasonable needs of the four year old boy whose custody was in question; furthermore, the court erred in ordering plaintiff to pay attorney's fees of $250 when no evidence was offered tending to show the nature of the legal services rendered or the amount of the fees, and there were no findings of fact as to the amount or reasonableness of the attorney's fees incurred.

APPEAL by plaintiff from *Wright, Judge.* Judgment entered 13 June 1979 in District Court, LENOIR County. Heard in the Court of Appeals 29 February 1980.

This is an appeal from an order modifying a custody decree on the basis of change of circumstances. Pursuant to an order entered on 2 November 1977 in the original custody action, plaintiff father was awarded custody of the minor child, Vernon Bradley Gordon, age 33 months. Defendant mother was awarded custody of the minor child, Rebecca Susan Gordon, age 16. In the 2 November 1977 order, with regard to the minor child, Vernon Bradley Gordon, whose custody is in issue, Judge Patrick Exum found the following facts:

> 10. That both plaintiff and defendant are fit and proper persons to have the care, custody and control of the children of the marriage, to wit, Rebecca Susan Gordon, age 16, and Vernon Bradley Gordon, now age 33 months, but considering all of the circumstances, the best interests and general welfare of the children would be promoted and served by the awarding of custody of the youngest child, Vernon Bradley

Gordon, age 33 months, to the plaintiff, and by awarding of the custody of the oldest child to the defendant, the mother.

* * *

12. That defendant has moved a mobile home to a mobile home park in Wayne County where the same has been set up at a point close to an elementary school located in Wayne County. . . . That the home in which plaintiff and the youngest child of the marriage, Vernon Bradley Gordon, resides is a three-bedroom, brick home, with a living room, a den, a dining room, a kitchen with dinette and a utility room, with two baths and with a fenced in back yard, located in a nice neighborhood a short distance from a good elementary school and other needed facilities.

13. That during the time that plaintiff is at work, the youngest child stays with the babysitter, Becky Barnette, in a mobile home which is adequately furnished and in a proper environment.

14. That the home of the defendant is a mobile home located at Camelot Trailer Park located next to Eastern Wayne Elementary School in a rural area approximately four miles from Goldsboro. The trailer park is not densely populated and it has approximately 40 trailers in the trailer park. The trailer park is well kept but the nature of the neighbors is not known. That said mobile home is a three-bedroom mobile home with a living room and dining room combination, a kitchen and a portico with one bath. Said mobile home is neat and attractively furnished and the kitchen is adequate.

15. That the youngest child has lived in the home in which he and his father now reside since said child was adopted and it would prove to be disruptive to remove him from said environment. That the child would actually receive more love and attention if he were left with his father in a familiar situation and environment than he would if he were removed from said environment and placed in a new, strange environment in Wayne County in a strange neighborhood and with a strange and unfamiliar nursery or babysitting arrangement.

* * *

17. That the home of the plaintiff and the home of the defendant are both located in areas where they are adequately served by schools, shopping center and other related activities. It is not known who resides in the other mobile homes located in Camelot Trailer Park where the mother resides but that in the neighborhood where the father and said child presently resides, there are many children of fine families who reside there of approximately the same age as said youngest child.

On 22 August 1978, defendant wife filed a motion in the cause seeking a change of custody of her son based on material change in circumstances since the entry of the 2 November 1977 order. After a hearing on 20 May 1979, in the order of 13 June 1979, Judge Paul M. Wright made the following findings of fact pertinent to change of circumstances:

6. That one of the reasons for the Court's award of custody of the younger child to the plaintiff was the stated finding of the Court in paragraph 15 of its findings (Page 5) that it would be disruptive to the child to remove him from the home in which he had been living and that the child would actually receive more love and attention if he were left with his father in a familiar situation and environment than he would if removed from said environment and placed in a new, strange environment in Wayne County in a strange neighborhood with a strange and unfamiliar nursery or babysitting arrangement.

7. That subsequently to the entry of the order of November 2, 1977, the plaintiff, while living in the residence with his minor son, defaulted upon the payments secured by deed of trust on said residence and the property was thereafter foreclosed necessitating the moving of the plaintiff and his minor son from the home.

8. That since the foreclosure and sale of the former residence of the parties, the plaintiff and his minor son have lived in three separate residences in three separate neighborhoods, to wit:

1. A mobile home in a mobile home park.

2. The home of one of the plaintiff's sisters.

3. A rented home, which they now occupy.

9. That there has been a substantial change in the circumstances that led to the Court's award of custody of Vernon Bradley Gordon to the plaintiff, inasmuch as the default by the plaintiff in the payment of the secured indebtedness on the residence of the parties has frustrated the Court's intention, as expressed in the order of November 2, 1977, to have the child remain in the home in which he has been living throughout his life; and that the movement of the child since the foreclosure sale of said residence has resulted in the placement of the child in strange neighborhoods which the Court's order of November 2, 1977, sought to avoid.

* * *

13. That because of the change in the living conditions of the child, Vernon Bradley Gordon, since the entry of the order of November 2, 1977, and because of his tender years, the Court finds that it is in the best interest of said child that custody be split or divided between the parties hereto with the primary custody awarded to the defendant, and the plaintiff awarded custody as follows: . . .

From the order dividing the custody of Vernon Bradley Gordon among plaintiff and defendant and awarding defendant child support and attorneys fees, plaintiff appeals.

White, Allen, Hooten, Hodges & Hines, by John M. Martin, for plaintiff appellant.

Hulse & Hulse, by Herbert B. Hulse, for defendant appellee.

MARTIN (Robert M.), Judge.

Plaintiff contends that the trial court erred in entering the order modifying a previous custody order without a finding of substantial change in circumstance affecting the welfare of the child. This contention has merit.

G.S. § 50-13.7(a) provides that an order of a court of this State providing for the custody of a minor child may be modified upon a showing of changed circumstances. "However, the party moving for modification of a custody order has the burden of showing that there has been a *substantial* change of circum-

stances affecting the *welfare of the child.*" (Citations omitted.) *King v. Allen,* 25 N.C. App. 90, 92, 212 S.E. 2d 396, 397, *cert. denied* 287 N.C. 259, 214 S.E. 2d 431 (1975). It must be shown that the 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, 170 S.E. 2d 140 (1969).

[1] This is a closely contested case in which the court found that both parents were fit and proper persons to have custody of the child. Upon a report from the Department of Social Services, the trial judge carefully weighed and made detailed findings of fact concerning the home, neighborhood and surroundings which each parent could offer the child. In awarding custody to the father, the trial judge found that it would be disruptive to remove the child from the home in which he and his child had resided since the child was adopted and that the child would actually receive more love and attention if he were left with his father in a familiar situation and environment than if he were placed in a new environment and in a strange, unfamiliar neighborhood and nursery.

Upon the hearing on modification, Judge Wright, in removing primary custody from the father, found that "there has been a substantial change in the circumstances that led to the Court's award of custody . . . to the plaintiff, inasmuch as the default by the plaintiff . . . has frustrated the Court's intention . . . to have the child remain in the home in which he has been living throughout his life . . ." Assuming *arguendo* that remaining in the homeplace was the decisive factor in favor of placing custody with the father, that reason no longer exists. Neither party can retore the child to the familiar homeplace they once shared. Frustration of the court's intention, however, is not in itself a proper finding upon which to modify a custody award. *See In re Poole,* 8 N.C. App. 25, 173 S.E. 2d 545 (1970) (the finding of a wilful, intentional, heedless violation of a direct order in a custody award that the children not associate with a certain person is not a substantial change of circumstance where there is no finding that said association with the child's mother is immoral or detrimental to the children's welfare). The welfare of the child, not the frustration of the court order is the determinative factor.

In the case *sub judice*, the only finding of change of circumstance is that the child has moved from his original home to "strange," i.e. unfamiliar neighborhoods. There are no findings that the moves proved disruptive or detrimental to the child's welfare; that the home and surrounding neighborhood in which the child presently lives differs from his original home, is inadequate, or has an adverse effect on the child's welfare or that the placement of the child in an unfamiliar neighborhood has had any impact on the child's adjustment. The mere fact that either parent changes his residence is not a substantial change of circumstance. *See Harrington v. Harrington*, 16 N.C. App. 628, 192 S.E. 2d 638 (1972) (where the only finding of change of circumstance was that defendant, the party seeking custody, "is now residing in Mecklenburg County, North Carolina," held not a *substantial* change of circumstance). *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E. 2d 140 (1969) (more must be shown than a removal by one parent of a child from a jurisdiction which may enter an adverse decision to the removing parent), *accord, Searl v. Searl*, 34 N.C. App. 583, 239 S.E. 2d 305 (1977). Where a parent changes his residence, the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstance.

The facts found, therefore, do not support the conclusions that there has been a "substantial change in conditions" and that it is "in the best interest of the child that custody be split or divided among the parties." "[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E. 2d 77, 80 (1967). (Citation omitted.)

[2] Plaintiff further contends that the court erred in awarding child support when no evidence was offered tending to show the individual needs and expenses of the minor child who was the subject of the custody hearing. We agree. Although defendant offered evidence of the monthly expenses for her and another minor child, there was no evidence offered tending to show the amount necessary to meet the reasonable needs of the child, Vernon Bradley, for his health, education and maintenance pursuant to G.S. 50-13.4. The expenses of a teenage daughter bear no relation-

ship to those of a four year old son. The court's finding of fact that $50.00 a month is a reasonable and necessary amount for the plaintiff to pay for the support of said child while he is in the custody of defendant is not supported by competent evidence. *Martin v. Martin*, 35 N.C. App. 610, 242 S.E. 2d 393, *cert. denied* 295 N.C. 261, 245 S.E. 2d 778 (1978). Similarly the court erred in ordering plaintiff to pay attorney's fees of $250.00 when no evidence was offered tending to show the nature of the legal services rendered or the amount of the fees and there were no findings of fact as to the amount or reasonableness of the attorney's fees incurred. *Rogers v. Rogers*, 39 N.C. App. 635, 251 S.E. 2d 663 (1979).

We do not consider other errors contended for by plaintiff as they may not occur upon a new hearing.

The order is vacated and remanded for detailed findings of fact on the issue of change of circumstance from the record as it is now constituted or for such further hearing as the court may deem advisable.

Vacated and remanded.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. ADOLPHUS LANE

No. 7921SC1056

(Filed 6 May 1980)

Criminal Law § 48.1— in-custody silence about alibi—cross-examination at trial—absence of Miranda warnings

Where an arrestee is the focus of suspicion, has been held in custody for a significant period of time without being advised of his *Miranda* rights, is aware of his right to remain silent, and makes it clear that he is relying on his right to remain silent, his in-custody silence concerning an alibi about which he testified at trial cannot be the subject of cross-examination.

Judge WEBB dissenting.

APPEAL by defendant from *Hairston, Judge.* Judgment entered 19 July 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 26 March 1980.

Defendant was arrested on 25 April 1979 and indicted for possession with intent to sell heroin and for the sale of heroin. The indictments had been issued on 23 April 1979.

The State presented evidence which tended to show that an undercover police agent, Lee Walker, went to a lounge in Winston-Salem on the night of 4 April 1979, and at approximately 11:00 p.m., while at the lounge, purchased fifty dollars worth of heroin from defendant. Defendant's evidence tended to show that he had not been in Winston-Salem at the time of the drug transaction. Defendant testified that he and his employer were in Charlotte at the time of the transaction and that upon leaving Charlotte, had traveled to Darlington, South Carolina. The alibi was corroborated by the employer's testimony.

Defendant was convicted on both charges, and has appealed.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Alexander, Hinshaw & Schiro, by C. J. Alexander II, for defendant appellant.

HILL, Judge.

We have examined the four issues defendant has brought forth on appeal. We find one to be of merit and dispositive of this case.

Upon his arrest, defendant was taken to the Winston-Salem Police Department and brought into the Vice and Narcotics Office where Officer Gary Lloyd began reading the grand jury indictments to him. During the reading, defendant interrupted Officer Lloyd and asked him: "Well, who I supposed to have sold heroin to?" Lloyd replied, "Lee Walker," and defendant retorted, "Well, I don't know no Lee Walker." A brief conversation followed with defendant stating that he had sold heroin in the past; had served a prison sentence for selling heroin; and that he had never seen Detective Lee Walker or Officer Lloyd before the time he was arrested on the charges which are the basis for the conviction now appealed from. It was not until after Officer Lloyd finished reading the indictment and after defendant had been in custody for a significant period of time that defendant was advised of his *Miranda* rights.

At trial, on direct examination, defendant testified that on 3 April 1979 he went to Charlotte with his employer to attend an automobile auction; that they returned to High Point, arriving around 11:30 p.m.; that they left for Darlington, South Carolina, soon afterwards, arriving around 3:00 a.m. on 4 April 1979; and that he stayed in Darlington until the morning of 5 April 1979.

On cross-examination, the district attorney asked defendant several questions concerning his alibi. The district attorney asked why defendant had not informed Officer Lloyd of the alibi and why he had not informed the district attorney of the alibi. Defendant's lawyer objected to the questions, was overruled and brought the objections forward in an assignment of error. We hold the court's action in overruling the objections and failing to give a curative instruction constituted prejudicial error.

Defendant relies on *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976). In that case, at p. 613-14, the prosecutor asked the defendant:

Q. [Federal agent] Beamer did arrive on the scene?

A. Yes, he did.

Q. And I assume you told him all about what happened to you?

. . . .

A. No.

Q. You didn't tell Mr. Beamer?

. . . .

A. No.

Q. You didn't tell Mr. Beamer [your alibi]?

. . . .

A. No, sir.

Q. [I]f that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene, why didn't you tell him?

. . . .

Q. But in any event you didn't bother to tell Mr. Beamer anything about this?

A. No, sir.

The defendant in *Doyle* had received the *Miranda* warnings before agent Beamer arrived on the scene. The defendant chose to exercise his right to remain silent and did not give his explanation of circumstances until his trial. The Supreme Court stated in regard to the prosecutor's questions that, ". . . it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle*, at p. 618.

Similarly, in our case, defendant Lane was asked by the prosecutor on cross-examination:

Q. [A]t the time you were telling these officers that you didn't sell to this gentleman, Mr. Lee Walker, here—

A. Yes.

Q. —Did you tell them that you had been to the sale at Charlotte . . . on the date certain?

. . . .

A. No. . . .

. . . .

Q. Did you tell them that thereafter you had went to Darlington . . .?

A. I didn't tell nothing. . . . *I wasn't going to make no statement* to him. That's what I told him. (Emphasis added.)

. . . .

Q. Did you come up and tell any of the district attorneys [about your alibi]?

. . . .

A. No.

The holding in *Doyle* seems to be based on the position that the prosecutor was asking the defendant about his silence *after* he received his *Miranda* warnings.

> After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right. *Doyle*, at 619, fn. 10.

Defendant in our case, for some unexplained reason, was not given his *Miranda* rights until after the indictments had been read to him, even though he had been in custody for a significant period of time and obviously the focus of the police department's suspicion. Defendant failed to give his alibi to the police *before* he heard his *Miranda* warning. For this reason, *Doyle* might not apply to that particular silence.

Even under a restrictive reading of *Doyle*, defendant's federal due process rights were violated. The district attorney also asked defendant why he had not approached any district attorney with his alibi. Defendant had been given his *Miranda* warnings by the time any exchange with a district attorney could have taken place. The prosecutor clearly violated defendant's due process rights when he sought to impeach defendant with regard to that particular silence.

It strikes this Court that the United States Supreme Court may be reluctant to strike down state court convictions, such as in *Doyle*, when the impeachment on cross-examination relates to a defendant's silence *before* he receives his *Miranda* warnings. For analytical purposes, the reading of the warning to an arrestee provides an easily recognizable signpost. It is clear from that point on that the arrestee *knows* he has the right to remain silent. The arrestee may not then be penalized at trial for exercising that right.

Of course, the whole reason for bringing out a defendant's silence on cross-examination is that the silence constitutes a prior "statement," inconsistent with his alibi. The reasoning is that silence in the face of accusation and possible prosecution is inconsistent with innocence, particularly where the arrestee has an alibi which he later reveals at trial.

This inconsistency, which is ambiguous at best, *see United States v. Hale*, 422 U.S. 171, 45 L.Ed. 2d 99, 95 S.Ct. 2133 (1975), vanishes altogether when a defendant's silence during the

custodial interrogation can be taken to indicate reliance on the *right* to remain silent. *Hale*, at p. 177. The right to remain silent does not arise when an arrestee is given his *Miranda* warnings. It is a right which he possesses at all times under the Fifth Amendment of the United States Constitution and under Article I, § 23 of the North Carolina Constitution. Our Supreme Court has repeatedly held that ". . . a defendant's constitutional right to remain silent while in custody precludes the admission of testimony that defendant remained silent in the face of accusations of his guilt." *State v. Williams*, 288 N.C. 680, 693, 220 S.E. 2d 558 (1975), *citing State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974). *Also see State v. Fuller*, 270 N.C. 710, 714, 155 S.E. 2d 286 (1967).

In all of the above cases, it appears that the defendant had been advised of his right to remain silent. We do not interpret the cases to mean, however, that such a recitation *must* be made before defendant may rely on his right to remain silent. Such an interpretation would exalt form over substance. Therefore, despite the Supreme Court's seeming timidity to do so, we hold that where an arrestee is the focus of suspicion, has been held in custody for a significant period of time *without* being advised of his *Miranda* rights, is aware of his right to remain silent (defendant had been arrested at previous times), and makes it clear that he is relying on his right to remain silent ("I wasn't going to make no statement."), that in-custody silence cannot be the subject of cross-examination. Such questions by the prosecutor would, in this Court's view, violate defendant's right against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and, in addition, *most certainly* would violate defendant's right under Article I, § 23 of the North Carolina Constitution.

For the reasons stated above, defendant must be granted a

New trial.

Judge MARTIN (Robert M.) concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. The record discloses that while defendant was in custody and before an interrogation began, he stated to the officer that he had not sold any heroin to Lee Walker. When asked by the district attorney on cross-examination if he had told the officers of his alibi evidence, he said "I didn't tell nothing . . . . I wasn't going to make no statement to him. That's what I told him." As I read *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976), the thrust of that case is that if a person exercises his right to remain silent, it is an ambiguous act and cannot be used to impeach his testimony. In this case, the defendant did not exercise his right to remain silent. He told the officers before interrogation began that he did not sell to Mr. Walker. It was proper to question him as to why he did not tell the officers at that time that he had an alibi. If it was error to allow this question, the defendant cured it by his answer. He testified he told the officers he would make no statement, which he had a right to do. He was not prejudiced by letting the jury hear this testimony. I vote to affirm.

STATE OF NORTH CAROLINA v. ROBERT FERNANDO SPENCER

No. 7919SC1083

(Filed 6 May 1980)

1. Arrest and Bail § 3.8— warrantless arrest of drunk defendant—probable cause

An officer had probable cause to make a warrantless arrest of defendant where the officer observed defendant in a grocery store; there was an odor of alcohol about defendant and on his breath; his face was red and his eyes were watery; defendant mumbled and was swaying about in circles; and defendant's arrest was reasonable as well as in the best interest of both defendant and the public. G.S. 15A-401(b)(2).

2. Criminal Law § 75.15— confession of drunk defendant—voluntariness

In a prosecution for driving under the influence, the trial court did not err in admitting defendant's confession made to a police officer where the court found that defendant was properly advised of his rights; he knowingly waived his rights; he pointed to or told the officer of the wreck and described the location where he had the wreck; his answers to the questions were free, voluntary, and not coerced by the officer; and the fact that defendant was intoxicated at the time of his confession did not require its exclusion.

3. **Automobiles § 126.4— breathalyzer operator's questioning of defendant —Miranda warnings not required**

In a prosecution for driving under the influence, the trial court did not err in allowing into evidence questions asked by the breathalyzer operator and defendant's answer as to whether defendant was operating the vehicle when it was involved in an accident, since the questioning did not affect the impartiality of the breathalyzer operator, and since the operator was not required to remind defendant of his *Miranda* rights, as the breathalyzer test did not constitute evidence of a testimonial nature.

4. **Criminal Law § 75.8— questioning one hour after Miranda warnings given— repetition of warning unnecessary**

The arresting officer was not required to advise defendant fully concerning his *Miranda* rights a second time before questioning defendant where the officer had read the *Miranda* warnings to defendant an hour earlier, and he advised defendant that his *Miranda* rights still pertained before he asked defendant questions.

5. **Automobiles § 127.1— driving under the influence—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for driving under the influence where it tended to show that defendant had been "nipping" all day; his breathalyzer test indicated a blood alcohol level of .23%; the fact that the test was given some time after the accident in question would indicate that defendant was less intoxicated than at the time of the accident; defendant testified that he had been driving; the car belonged to defendant's wife; and defendant testified that he did not see the mail truck he ran into.

APPEAL by defendant from *Wood, Judge*. Judgment entered 28 June 1979 in Superior Court, ROWAN County. Heard in the Court of Appeals 28 March 1980.

Defendant appeals from conviction of driving a motor vehicle on a public street in the City of Salisbury on 16 December 1978 while under the influence of intoxicating beverage. Defendant was first observed by a Salisbury police officer shortly after 6:00 p.m. inside the Circle Food Store. He appeared to the officer to be under the influence of an intoxicating beverage. The police officer advised the defendant of his *Miranda* rights, using the standard form, by reading the document in its entirety. The officer then asked the defendant if he understood his rights, and defendant answered "yes." The defendant then examined the waiver of rights form and signed it in the presence of the police officer and the store operator.

The officer further testified that the defendant appeared to understand his rights. The officer asked defendant questions, and defendant gave appropriate answers in response to the questions.

Defendant indicated to the officer he had been in an automobile accident at the intersection of two streets, indicating the location with a "V" sign made by his hand. The police officer and defendant went outside the store where the defendant was requested to perform some field sobriety tests. Defendant almost fell while attempting to walk "heel to toe"; and was caught by the officer who assisted defendant to the patrol car. The defendant struck his head when getting into the vehicle. Thereafter, the defendant remained in the car.

At the scene of the accident the officer asked the defendant if he had been driving, and the defendant stated he had been. The officer took the defendant to the police station where the defendant was given a breathalyzer test. The result was a blood alcohol level of .23%. Defendant was convicted of driving under the influence and appealed to this Court. Other facts appear in the opinion.

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

Robert M. Davis for defendant appellant.

HILL, Judge.

We hold that the court did not err in its findings that the defendant was properly advised of his rights and in allowing the answers to the officer's questions into evidence.

The defendant contends the court erred by allowing his statements to the police officer into evidence on two grounds: (1) that he was illegally arrested by the officer and any subsequent statement was a product of that illegal arrest; and (2) that he was so intoxicated that he was unable to understandingly, knowingly and voluntarily waive his *Miranda* rights.

[1] The police officer testified that he made the arrest at the store. The arrest was made without a warrant, and any driving by the defendant had occurred at a previous time and out of the presence of the arresting officer.

G.S. 15A-401(b)(2) provides: "An officer may arrest without a warrant any person who the officer has probable cause to believe: (b) Has commited a misdemeanor, and: (2) May cause physical in-

jury to himself or others, or damage to property unless immediately arrested."

This Court has addressed defendant's contention and upheld similar arrests by police officers in cases involving charges of driving under the influence which did not occur in the presence of the officer. *See In re Pinyatello*, 36 N.C. App. 542, 245 S.E. 2d 185 (1978). *Also see In re Gardner*, 39 N.C. App. 567, 251 S.E. 2d 723 (1979). Investigating officers have a responsibility to take reasonable precautions to protect the safety of persons and property lawfully on highways. In *Gardner, supra*, at p. 572, this Court stated that ". . . in view of the well known propensity of intoxicated persons to engage in irrational and erratic behavior . . . the officer . . . had reasonable cause to believe . . . the petitioner might cause physical injury to himself or others or damage to property unless immediately arrested." In *Pinyatello, supra*, at p. 545, Judge Clark noted that an arrest under this situation was warranted to prevent one who was intoxicated from operating his car and also for the purpose of ". . . protecting him from traffic hazards on a public street . . . ."

The arresting officer found the defendant in the Circle Food Store in the City of Salisbury. There was the odor of alcohol about defendant and on his breath; his face was red; his eyes watery; his speech mumbled; and defendant was swaying about in circles. The presence of the defendant in a public place together with his obvious physical condition were sufficient evidence to show probable cause under G.S. 15A-401(b)(2). Defendant's arrest was reasonable as well as in the best interest of both the defendant and the public. We find no constitutional problem with the arrest under the facts of this case.

[2] Next, the defendant contends the trial court erred in admitting the defendant's confession. At the conclusion of the voir dire, the court found that the defendant was properly advised of his rights; that he knowingly waived his rights; that he pointed to or that he told the officer of the wreck; described the location of where he had the wreck; and that his answers to the questions were free and voluntary, and not coerced by the officer. Defendant contends that he was under the influence to the extent that he could not understandingly and voluntarily make such a confession.

From the totality of the circumstances the trial judge properly found a free, voluntary and knowing waiver of rights consistent with the minimum requirements of *Miranda* as reiterated by the North Carolina Supreme Court recently in *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234 (1979). The fact that the defendant was intoxicated does not require the exclusion of this evidence.

In *State v. Atkinson*, 39 N.C. App. 575, 579, 251 S.E. 2d 677, 680 (1979), this Court indicated: "An admission by an intoxicated defendant is admissible unless the defendant is so intoxicated as to be unconscious of the meaning of his words." *See State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); *also see State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, *cert. denied*, 384 U.S. 1013, 16 L.Ed. 2d 1032, 86 S.Ct. 1983 (1966). "The trial court did not find that the defendant was unconscious of the meaning of his words. We therefore find no error in the trial court's conclusion that the defendant's statements were freely, understandingly and voluntarily made and were admissible in evidence." *Atkinson, supra*, at 579. This assignment of error is without merit.

[3] Neither do we conclude that the court erred by allowing into evidence questions asked by the breathalyzer operator and the defendant's answer. The breathalyzer operator, Officer Tucker, stated that he asked the defendant if he was operating the vehicle at the time the vehicle was involved in an accident. The defendant answered that he was. The defendant objected to the question and answer and moved to strike, but was overruled. The defendant contends the admission of the evidence operates to sustain the arrest and that the questioning does not leave the defendant with an impartial breathalyzer operator. G.S. 20-139.1(b) provides *inter alia* ". . . that in no case shall the arresting officer or officers administer said test." Defendant further argues that the breathalyzer operator failed to remind him of his *Miranda* rights. Such a reminder is not *required* since the test does not constitute evidence of a testimonial nature. *State v. Flannery*, 31 N.C. App. 617, 230 S.E. 2d 603 (1976).

The decisions of this Court make it clear that an officer cannot administer the breathalyzer test if he was at the scene of a crime and participated in the arrest. *State v. Stauffer*, 266 N.C. 358, 145 S.E. 2d 917 (1966). The breathalyzer operator was not the arresting officer and did not participate in the arrest. The ques-

tion asked by the breathalyzer operator dealt with whether or not the defendant was driving the vehicle. It had nothing to do with the defendant's level of intoxication which was the subject of that officer's impartial test. Furthermore, we note that no objection was taken by the defendant as to the admissibility of the breathalyzer test. The assignment of error is without merit and overruled.

[4] At the time of the defendant's statement to the breathalyzer operator, Officer Tucker, both were in the presence of Officer Shuping, the arresting officer. Officer Shuping was preparing an Alcohol Influence Report Form. Shuping testified that he did not again read the *Miranda* warning, but advised the defendant that his *Miranda* rights still pertained before asking the defendant any questions. Although the defendant stated he did not remember his rights having been given him at the Circle Food Store, his signature on the form indicates he had heard and understood them. About an hour elapsed between the reading of the rights at the store and the questioning at the police station.

Former Chief Justice Sharp has addressed the question in *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *modified as to death penalty* 428 U.S. 904 (1976), in which she said:

> The consensus is that although Miranda warnings, once given, are not to be accorded 'unlimited efficacy or perpetuity,' where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required. (Citations omitted.)

The facts of the case before this Court are devoid of any compelling reason requiring that the defendant be fully re-advised of his *Miranda* rights in the breathalyzer room beyond what the arresting officer had already done.

Further, we conclude that the trial judge did not err in denying the defendant's motion to dismiss at the close of all the evidence.

[5] Defendant concedes that he was under the influence at the scene of the accident and at the police department, but contends

there is no evidence as to when he was driving. The State's evidence, however, need not show exactly when the driving which caused the accident occurred so long as the circumstances are sufficient to warrant a reasonable inference to be drawn by the jury that at the time of the accident the defendant was intoxicated and was driving. Conviction of driving under the influence based on circumstantial evidence has been affirmed many times in North Carolina. *See State v. Newton*, 207 N.C. 323, 177 S.E. 184 (1934); *State v. Snead*, 35 N.C. App. 724, 242 S.E. 2d 530 (1978); *affirmed* 295 N.C. 615, 247 S.E. 2d 893 (1978); *State v. Griggs*, 27 N.C. App. 159, 218 S.E. 2d 200 (1975); *State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972).

Here the defendant testified that he had been "nipping" all day. His breathalyzer test indicated a blood alcohol level of .23%. The fact that the test was given some time after the accident would indicate that he was less intoxicated than at the time of the accident. Defendant testified he had been driving. The State and defendant stipulated the car belonged to defendant's wife although the defendant told the officer it was his car at the time of the investigation, and that he had not seen the mail truck he ran into.

Taking the evidence in the light most favorable to the State on motion of nonsuit, we conclude there is sufficient evidence to be considered by the jury, and the motion should have been overruled.

Finally, we are not impressed with defendant's argument that the trial judge erred in its charge to the jury in summarizing the evidence and by failing to state any of the contentions of the parties.

When we review the charge as a whole, we find the court summarized the evidence, but did not state the contentions of either party to the litigation. There is no requirement that the judge state the contentions of the litigants to the jury. *Trust Co. v. Insurance Co.*, 204 N.C. 282, 167 S.E. 854 (1933); *State v. Kluckhorn*, 243 N.C. 306, 90 S.E. 2d 768 (1956).

The judge summarized the evidence presented by the State. The defendant offered no evidence, and none was summarized. Defendant contends that evidence was offered on cross-examina-

tion which should have been summarized. We have examined the evidence referred to by the defendant on cross-examination and do not find its omission to be prejudicial.

Further, our courts have often held that any error or omission in the statement of the evidence by the trial court in its jury charge must be brought to the attention of the court by the defendant at trial to avail himself of relief thereby upon appeal. *State v. Brower*, 289 N.C. 644, 661, 224 S.E. 2d 551 (1976). Also, objections to statements of contentions should be brought to the trial court's attention; otherwise, they are waived. *State v. Sanders*, 288 N.C. 285, 299, 218 S.E. 2d 352 (1975); *cert. denied* 423 U.S. 1091. This assignment of error is without merit.

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

No error.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. HENRY SCOTT MARTIN

No. 7920SC997

(Filed 6 May 1980)

1. Criminal Law § 91.4— employment of new counsel—denial of continuance

The trial court in a driving under the influence of intoxicants case did not abuse its discretion in refusing to grant defendant a continuance because he had employed new counsel an hour before the trial where the record shows that defendant was ably represented by defense counsel in a relatively uncomplicated case which involved few witnesses and even fewer disputed facts.

2. Criminal Law § 18.3— trial de novo in superior court—trial on "statement of charges"

Defendant was properly tried upon a "statement of charges" pursuant to G.S. 15A-922(c) at his trial *de novo* in the superior court after his appeal from his conviction in the district court of driving under the influence of intoxicants where the superior court judge found that the citation upon which defendant was tried and convicted in the district court was insufficient because it was not signed by a magistrate.

3. **Automobiles § 126.3— breathalyzer test—machine set up in absence of attorney**

The results of a breathalzyer test were not inadmissible because the breathalyzer operator performed preliminary steps of setting up the machine before defendant's attorney arrived to view the testing procedure.

4. **Automobiles § 126.3— breathalyzer test—maintenance of machine—no showing required**

The State was not required to establish that it had followed certain procedures to maintain breathalzyer equipment before evidence of tests conducted with the equipment was admissible in a prosecution for driving under the influence of intoxicants. G.S. 20-139.1(b).

APPEAL by defendant from *Lupton, Judge.* Judgment entered 12 February 1979 in Superior Court, STANLY County. Heard in the Court of Appeals on 18 March 1980.

Defendant was convicted in the District Court of Stanly County on 22 May 1978 of operating a motor vehicle on the public highway while under the influence of an intoxicating beverage. He appealed to the Superior Court for a trial *de novo* whereupon the State produced evidence tending to show the following:

Shortly after midnight on 8 January 1978, State Highway Patrolman Coy Blackman and Albemarle Auxiliary Police Officer Jack Blakenship were on patrol in Richfield, North Carolina, when they observed a 1976 Chevrolet truck proceeding north on Highway 49 at a slow rate of speed, approximately 30 miles per hour in a 55-miles-per-hour zone. The truck was pulling a trailer on which was loaded a "Pizza Place" sign. Patrolman Blackman recognized it as the same truck he had observed some two hours earlier parked on the shoulder of the highway about seven miles west of the point it was then travelling. He testified that, when he first saw the parked truck, defendant was standing alongside it and that he [Blackman] pulled up to inquire if he could be of assistance. The defendant indicated that everything was all right and got back inside the truck.

Later that night, about 11:30, the officer observed the truck still parked on the roadside. Defendant "was laid off toward the right of his vehicle," and, in Blackman's opinion, "was a drunk driver parked inside the pickup truck sleeping it off." It was only some thirty minutes later when Blackman saw the truck travelling down the road. It "crossed the center line three or four times

and it was weaving from the center line to the edge." Upon stopping the defendant, Blackman detected a strong odor of alcohol about the defendant's person, noticed that his movements were slow, his face was flushed, and that he was unsteady on his feet. Blackman arrested defendant for driving under the influence and took him to the Stanly County Jail where they were met by Trooper Charles Cook, a duly licensed breathalyzer operator. Officer Cook read the defendant his rights pursuant to G.S. § 20-16.2(a), and defendant was allowed to call an attorney. The attorney arrived some 35 minutes after the defendant was brought to the station and conferred with the defendant upon arriving. Trooper Cook then administered the breathalyzer test to defendant in the presence of his attorney. The test showed a reading of .26%.

Officer Cook testified further that, based on his observations of the defendant, he had an opinion independent of the test results that defendant "was very much under the influence of alcoholic beverages."

Defendant testified that on 8 January 1978 he was on his way to Raleigh from Charlotte to deliver a sign. He said he had experienced battery problems and a blow-out and, for those reasons, was unable to leave Charlotte until late that evening, "approaching 10" o'clock. He had drunk one can of beer around 1:00 or 2:00 that afternoon, but by the time he left on his trip that evening, he "felt no effects whatsoever . . . from any of the beer. . . . One can is all I drank that evening."

Defendant said he had pulled off the highway and parked on the shoulder because he was "very tired" and his back "was in extreme pain." He testified he had had back problems since he was a teenager. His intention was to sleep in his truck that night and continue on to Raleigh the next morning. Before retiring, he retrieved "a piece of a fifth of Vodka" from the back of the truck and drank the contents "straight" to help him relax and to ease his back pain. He then locked himself in the cab of the truck, "laid down across the seat on my right side and proceeded to go to sleep."

According to defendant he was awakened sometime later by someone pounding on the door of the truck and shining a flashlight in his face. Defendant testified that the person iden-

tified himself as a law enforcement officer and told defendant to move his truck "on down the road" immediately, that he was too close to the road and could not sleep there. Defendant did not know who the officer was, but he thought it was Officer Blackman. He said he pulled onto the highway and drove down the road "because he told me to do it and for no other reason . . . . I did not willfully and intentionally operate my truck on the highway in that condition."

The defendant admitted that he had been convicted, upon guilty pleas, of driving under the influence of intoxicants in this State on three other occasions, specifically, 8 March 1972, 27 July 1973, and 27 July 1974.

The jury found him "Guilty of driving a motor vehicle on a highway of this State while under the influence of an intoxicating liquor," in violation of G.S. § 20-138. From a judgment imposing a jail sentence of six months, suspended for three years on stated conditions, the defendant appealed.

Attorney General Edmisten, by Associate Attorney Barry S. McNeill, for the State.

Gerald R. Chandler for the defendant appellant.

HEDRICK, Judge.

[1] Based upon approximately 65 exceptions noted in the record, defendant brings forward and argues 30 assignments of error. First, he contends that the trial court erred as a matter of law by refusing to grant him a continuance before proceeding to trial in the Superior Court. Although defendant concedes that the granting of a continuance is a matter within the discretion of the court, he argues that the court abused its discretion in this case for the reason that "new counsel . . . [was] employed about 1 hour before the case was called for trial," and did not have adequate time to prepare the case.

Had counsel been afforded more time to prepare this case, the record on appeal might have been even more voluminous than its present 182 pages, 100 pages of which constitute evidence adduced primarily by defendant's counsel on direct and cross-examination. We disagree that the defendant was prejudiced in the trial of his case by Judge Lupton's refusal to allow a contin-

uance. To the contrary, the record establishes to our satisfaction that defense counsel more than ably represented his client in a relatively uncomplicated case which involved few witnesses and even fewer disputed facts, but which nevertheless required more than three days' court time. Defendant has failed to show that the court abused its discretion by denying his motion. This assignment of error is patently without merit.

[2] Defendant's next five assignments of error relate to his trial in the Superior Court upon a "misdemeanor statement of charges." The record discloses that, when this case came on for trial *de novo* in Superior Court, Judge Lupton found that the citation upon which the defendant was tried and convicted in the District Court was insufficient for that it was not signed by a magistrate. He thereupon ordered that the district attorney prepare, and the defendant be tried upon, a "statement of charges" pursuant to G.S. § 15A-922(c). Upon defendant's motion to dismiss the "misdemeanor statement of charges" thereafter filed, the court found that the statement "makes no material change in the pleadings in that it charges the identical offense theretofore charged" in the insufficient citation. The judge denied defendant's motion and ruled that the State could proceed to trial on the statement as filed. Defendant excepted and argues on appeal that trial on the misdemeanor statement could only have been had in District Court.

We disagree. The provisions of Chapter 15A, specifically G.S. § 15A-922, pertinent to the resolution of this question, provide as follows:

> (b) Statement of Charges.
>
> (1) A statement of charges is a criminal pleading which charges a misdemeanor. . . .
>
> . . .
>
> (e) . . . If the defendant by appropriate motion objects to the sufficiency of a criminal summons, . . . at the time of or after arraignment in the district court *or upon trial de novo in the superior court*, and the judge rules that the pleading is insufficient, *the prosecutor may file a statement of charges*, but a statement of charges filed pursuant to this authorization may not change the nature of the offense. [Emphasis added.]

It is clear that the statement of charges filed in this case upon trial *de novo* in Superior Court fully complied with the procedure contemplated by the foregoing statutory provisions. Moreover, only when a proceeding is *initiated* in the Superior Court—not when it arrives there by way of appeal, as here—is the State required to proceed upon information or indictment. *See* G.S. §§ 15A-922(g), 15A-923. Defendant's assignments of error based on the denial of his motion to dismiss the misdemeanor statement of charges are likewise without merit.

[3] Next, defendant assigns error to the admission into evidence of the breathalyzer test results. At the outset he contends that the evidence should have been suppressed because the breathalyzer operator, Officer Cook, performed preliminary steps of setting up the machine before his attorney arrived to view the testing procedure. He argues that he had an absolute right to have his attorney view all the procedures necessary to give the test.

G.S. § 20-16.2(a)(4) prescribes that a person arrested for driving under the influence "has the right to call an attorney . . . 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."

Our Supreme Court has recently concluded that the thirty-minute time limit referred to in the statute is absolute, and that a person enjoys no constitutional right to confer with counsel before deciding whether to submit to the breathalyzer test. *Seders v. Powell*, 298 N.C. 453, 259 S.E. 2d 544 (1979). "[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." *Etheridge v. Peters*, 45 N.C. App. 358, 263 S.E. 2d 308 (1980). If an accused has no constitutional or statutory right to delay taking the test beyond the thirty-minute limit for the purpose of conferring with an attorney, *a fortiori* he or she has no absolute right to demand that an attorney view the entire process involved in administering the test, including the preliminary steps necessary to ready the machine itself.

Moreover, the record in this case shows that the defendant was allowed to have his attorney present for the actual taking and recording of his breath sample, even though the test was

thereby delayed past the thirty-minute limit. This defendant surely has no room to complain.

[4] Defendant's remaining four arguments by which he attacks the admissibility of the breathalyzer reading relate to evidence regarding compliance by the State with "preventive maintenance procedures." He contends that the State was required to establish that it had followed certain procedures to maintain the breathalyzer equipment before evidence of test results was admissible, and that the State's evidence in this case was insufficient to establish complaince. We deem it unnecessary to consider the sufficiency of the evidence because we do not believe the State is required to offer such proof. What the State must establish under the Statute, G.S. § 20-139.1(b), are (1) that the person administering the test possessed "a valid permit issued by the Department of Human Resources for this purpose" and (2) *that the test was "performed* according to methods approved by the Commission for Health Services". These requirements were fully met in this case. Officer Cook testified that he was duly licensed and his permit was introduced into evidence. Moreover, he testified extensively, primarily on cross-examination, that he followed the procedures promulgated by the Department of Human Resources in *performing* the test. The "breathalyzer operational check list" issued by the Department, which he was required to and did follow when he administered the test to the defendant, was introduced into evidence. This evidence clearly establishes the admissibility of the breathalyzer test results under the requirements of the statute, and the State need not offer proof of "preventive maintenance procedures." *See State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973); *State v. Powell*, 279 N.C. 608, 184 S.E. 2d 243 (1971).

By several assignments of error, the defendant challenges the court's rulings denying his motions for judgment as of nonsuit and for appropriate relief. We think it obvious that the evidence was plenary to require its submission to the jury and to support the verdict.

Defendant has brought forward and argued other assignments of error which we have not discussed. However, we have carefully considered these assignments of error and the ex-

ceptions upon which they are based, and find them to be meritless.

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

No error.

Judges WEBB and WELLS concur.

KATHRYN G. HEIST v. SARA W. FAIRCLOTH HEIST

No. 7921SC896

(Filed 6 May 1980)

1. Rules of Civil Procedure § 50— motion for directed verdict—statement of grounds mandatory

Although the provision in G.S. 1A-1, Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefor is mandatory, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties.

2. Husband and Wife § 24— alienation of affections—no sexual misconduct—requirement of malice

In an action for alienation of affections where there is no element of sexual defilement of plaintiff's husband, malice must be shown, and malice in such an action means unjustifiable conduct causing the injury complained of.

3. Husband and Wife § 25— alienation of affections—sufficiency of evidence

In an action for alienation of affections evidence was sufficient to be submitted to the jury where it tended to show that plaintiff and her husband had a loving and affectionate relationship for thirty years; such love and affection was destroyed after plaintiff's husband began seeing defendant; when plaintiff confronted her husband about his relationship with defendant, he abused her and cursed her; defendant, despite plaintiff's protests, continued to see plaintiff's husband on a regular, frequent basis; and defendant's conduct in allowing plaintiff's husband unlimited access to her residence with knowledge of the marital discord which these visitations produced and in reckless disregard of plaintiff's marital rights was sufficient to establish the tort.

4. Husband and Wife § 26— alienation of affections—measure of damages

In an action for alienation of affections, the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by plaintiff through defendant's wrong.

5. Husband and Wife § 26— alienation of affections—punitive damages—showing required

In order for plaintiff to recover punitive damages in an action for alienation of affections, she must show circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in causing the separation of plaintiff and her husband which was necessary to sustain a recovery of compensatory damages.

APPEAL by defendant and plaintiff from *Washington, Judge.* Judgment entered 26 June 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 21 March 1980.

On 18 October 1974 plaintiff filed an action for alienation of affections against defendant seeking actual and punitive damages. Defendant filed her responsive pleadings on 20 December 1974 which contained a general denial and counterclaim for defamation of character. A jury trial was held during the 21 May 1979 civil session of Forsyth County Superior Court. At the close of plaintiff's evidence and at the close of all the evidence, defendant's motions for a directed verdict were denied.

Upon deliberation, the jury determined that the defendant alienated the affections of plaintiff's husband and awarded plaintiff actual damages of $25,000.00 and punitive damages of $25,000.00. The jury rendered a verdict against the defendant on her counterclaim for defamation of character.

After return of the jury's verdict, the defendant filed a "motion for judgment notwithstanding the verdict" pursuant to Rule 50(b). Defendant also filed a motion for a new trial pursuant to Rule 59, although the motion was denominated a "motion to set aside the verdict."

On 26 June 1979 the trial court entered a judgment in which it ordered that the verdict for punitive damages be set aside and the award for actual damages be allowed to stand. Plaintiff and defendant appealed.

Nelson & Boyles, by Laurel O. Boyles, for the plaintiff.

Badgett, Calaway, Phillips, Davis & Montaquila by Susan Rothrock Montaquila and Richard G. Badgett for the defendant.

MARTIN (Robert M.), Judge.

[1] Defendant by her first assignment of error contends that the trial court erred in failing to grant her motion for a directed verdict at the close of plaintiff's evidence. Defendant failed to state specific grounds for her motion for a directed verdict as required by Rule 50(a), N.C. Rules of Civ. Proc. Although the provision in Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefore is mandatory, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974). Because it is obvious in the instant case that the motion challenged the sufficiency of the evidence to carry the case to the jury, we elect to review the denial of defendant's motion for a directed verdict.

[2] In order to sustain a cause of action for alienation of affections, the plaintiff must show the following facts:

(1) that she and her husband were happily married and that a genuine love and affection existed between them;

(2) that the love and affection so existing was alienated and destroyed;

(3) that the wrongful and malicious acts of defendant produced and brought about the loss and alienation of such love and affection.

Warner v. Torrence, 2 N.C. App. 384, 163 S.E. 2d 90 (1968). Where, as here, there is no element of sexual defilement of plaintiff's husband, malice must be shown. "Malice as used in an action for alienation of affections means 'unjustifiable conduct causing the injury complained of.' (Citation omitted.) Malice also means 'a disposition to do wrong without legal excuse (citation omitted), or as a reckless indifference to the rights of others.' " (Citation omitted.) *Sebastian v. Kluttz*, 6 N.C. App. 201, 206, 170 S.E. 2d 104, 106 (1969). "The wrongful and malicious conduct of the defendant need not be the sole cause of the alienation of affections. It suffices, according to the rule in the large majority of the cases, if the wrongful and malicious conduct of the defendant is the controlling or effective cause of the alienation, even though there were other causes, which might have contributed to the aliena-

tion." *Bishop v. Glazener*, 245 N.C. 592, 596, 96 S.E. 2d 870, 873 (1957).

[3] Defendant contends that plaintiff's evidence failed to show that any genuine love and affection existed between plaintiff and her husband or that defendant was the controlling cause of the alienation.

The evidence of the plaintiff tended to show that she and her husband were married in 1937 and they have two adult children. Plaintiff testified that prior to the problems that caused the separation she and her husband had a very good happy marriage; that they were very close and that they were never separated. William R. Davis, who had been acquainted with plaintiff and her husband for approximately thirty years, testified that in his opinion plaintiff and defendant enjoyed a happy marriage. In 1968 Mr. Davis was not aware of problems between them although at this time it had been about ten years since he had seen both of them socially together. Maxine Woosley, who had known plaintiff for twenty-six years and who prior to the separation saw plaintiff and her husband together once a week, thought plaintiff and her husband had a good marriage prior to "this other situation." Jimmy Woosley stated that it was his opinion that prior to the problems, they had a good marriage and it appeared to be a happy marriage.

Plaintiff further testified that the love and affection so existing was destroyed. In the late 1960's plaintiff observed a change in their marriage and in her husband. Her husband was cool toward plaintiff, did not want to have sex with her and he lied to plaintiff about his whereabouts. After plaintiff discovered the fact that her husband was spending time at the apartment of defendant and confronted him with it, their marital relationship deteriorated and plaintiff's husband began to curse and abuse her. Plaintiff stated that her husband said "You goddamn bitch, I wish you would die and rot in hell. I need Sara. She is kind to me. She had a soft voice. Your voice is not soft." At another time her husband said, "Living with you is too painful to me. I need Sara. I cannot stand living with you any longer. I am going to leave."

Finally plaintiff offered evidence tending to show that defendant's conduct was the controlling and effective cause of the separation of plaintiff and her husband. Although plaintiff may

have been rather argumentative, overbearing and domineering of conversation while her husband was a quiet, patient mild mannered man, for thirty years, until the relationship with defendant, plaintiff and her husband managed to have an affectionate marital union. Plaintiff's evidence tends to show that defendant, despite plaintiff's protests, continued to see plaintiff's husband on a regular, frequent basis from the time plaintiff discovered her husband's presence at defendant's apartment in April, 1970 until plaintiff's husband left in January, 1972. These visitations culminated in the ultimate separation of plaintiff and her husband. After observing her husband's car parked in defendant's driveway, plaintiff drove her husband's car home. When plaintiff's husband returned home, he assaulted plaintiff. Thereafter, when plaintiff refused to drop the assault charges against her husband, her husband moved out on the day of the trial.

Defendant asserts that there were no instances in which she contacted plaintiff's husband and that all of the contact between the parties was initiated by plaintiff's husband. This, however, is no defense in the present case. The wrongful conduct of defendant in allowing plaintiff's husband unlimited access to her residence with knowledge of the marital discord which these visitations produced and in reckless disregard of plaintiff's marital rights is sufficient to establish the tort.

[4] On the issue of compensatory damages, defendant contends that there is no evidence of loss of support caused by the defendant or of the value of such loss of support. "In a cause of action for alienation of affections of the husband from the wife, the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by her through the defendant's wrong. In addition, thereto, she may also recover for the wrong and injury done to her health, feelings, or reputation." (Citations omitted.) *Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E. 2d 104, 115 (1969). Hence, loss of support is only one element of damages in a cause of action for alienation of affection. The burden of proof is on plaintiff to show by direct or circumstantial evidence a loss of support as an element of the damages sustained. *Id.* at 214, 170 S.E. 2d at 112. Plaintiff has carried her burden in showing a definite pecuniary loss of income, life and health insurance, stock benefits and pension benefits which she has suffered as a result of the tort.

There is ample evidence, when viewed in the light most favorable to the plaintiff on each element of the cause of action for alienation of affections and on compensatory damages to overcome defendant's motion for a directed verdict at the close of plaintiff's evidence.

Defendant has not brought forward her second and third assignments of error in her brief and they are deemed abandoned pursuant to Rule 28(a), N.C. Rules App. Proc.

Defendant by her fourth assignment of error contends that the court erred in not allowing or not ruling upon defendant's motion for judgment n.o.v. and alternative request for a new trial pursuant to Rule 50(b). Defendant moved under Rule 50(b) for judgment notwithstanding the verdict and in the alternative for a new trial and under Rule 59(a)(6) and (7) for a new trial. The judgment of the court does not rule upon defendant's request for a new trial as required by *Hoots v. Calaway*, 282 N.C. 477, 193 S.E. 2d 709 (1973). Defendant, however, does not properly raise the question of the failure of the trial court to rule on a new trial in her assignment of error and the exception upon which it is based. Defendant's exception No. 5 and assignment of error No. 4 are addressed only to the denial of defendant's motion for judgment notwithstanding the verdict as to actual damages. Therefore, pursuant to Rule 10(a), N.C. Rules App. Proc., the scope of review on appeal is limited to the question of whether the court erred in denying defendant's motion for judgment notwithstanding the verdict as to actual damages. The same test is to be applied on a motion for judgment notwithstanding the verdict as is applied on a motion for a directed verdict. *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872, *cert. denied* 279 N.C. 727, 184 S.E. 2d 886 (1971). For the reasons stated above we are of the opinion plaintiff's evidence was sufficient for submission to the jury and that the court correctly denied defendant's motion.

[5] Plaintiff, having abandoned her first and second cross assignments of error, contends by her third cross assignment of error that the court erred in granting defendant's motion to set aside the verdict as to punitive damages. Punitive damages may be awarded in an action of alienation of affections. The plaintiff may also have awarded by the jury, in their sound discretion, a reasonable sum as punitive damages for the wilful, wanton, ag-

gravated or malicious conduct of defendant towards her. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104 (1969). It is incumbent on the plaintiff to show circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in causing the separation of plaintiff and her husband which was necessary to sustain a recovery of compensatory damages. *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769 (1920). In the present case, the wrongful conduct of defendant in permitting plaintiff's husband to visit her at her residence with knowledge of the marital discord which these visitations produced and over plaintiff's protests was sufficient to establish the tort. However, we are of the opinion that plaintiff has not shown such circumstances of aggravation in addition to the above conduct of defendant to justify the submission of the punitive damage issue to the jury. The error in submitting this issue to the jury was cured when the trial judge set the verdict aside.

As noted above, the judgment of Judge Washington failed to rule on defendant's motion for a new trial. This error is harmless as plaintiff is not entitled to a new trial on the issue of punitive damages.

Affirmed.

Judges CLARK and ERWIN concur.

PHOENIX AMERICA CORPORATION v. WILLIAM BRISSEY AND WIFE, GRACE M. BRISSEY, D/B/A THE FIREPLACE AND THINGS AND GRABIL, INC.

No. 7928DC817

(Filed 6 May 1980)

Constitutional Law § 24.7; Process § 9.1 — goods delivered outside N.C. — nonresident defendants — insufficient minimum contacts for *in personam* jurisdiction

The courts of this State had jurisdiction under G.S. 1-75.4(5)(d) of an action to recover the purchase price of goods shipped by plaintiff from North Carolina to defendants in South Carolina. However, the nonresident defendants had insufficient minimum contacts with this State so that the assumption of *in personam* jurisdiction over defendants by the courts of this State would violate due process where defendants dealt with plaintiff on only one other occasion prior to the transaction in question; the purchase in issue involved only

$2,700; defendants have not been within North Carolina for at least two years; the order was solicited by plaintiff and accepted by defendants in South Carolina; payment by check for the goods was made to the driver of plaintiff's delivery truck and payment on the check was stopped through a bank in North Carolina; defendants have never done business in or engaged in solicitation or mail order sales within North Carolina; and defendants have not taken any action to avail themselves of the benefits and protection of the laws of North Carolina.

APPEAL by defendants from *Israel, Judge*. Order entered 20 July 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals on 6 March 1980.

Plaintiff is a North Carolina corporation with its principal place of business in Asheville, Buncombe County, North Carolina. Defendants William and Grace Brissey are residents of Anderson, South Carolina, where they operate a retail business known as the Fireplace and Things, which is a division of Grabil, Inc., a South Carolina corporation. In an unverified complaint filed 26 April 1979, plaintiff alleged that defendants ordered ten fireplace inserts from it in November 1978; that plaintiff shipped the order on or about 7 November 1978; and that defendants issued a check in payment for the order on 7 November, but subsequently stopped payment on the check. Defendants have since refused to pay for the goods, and plaintiff claims that defendants thus remain indebted to it in the amount of $2,700.00.

Responding, defendants filed a motion to dismiss for lack of personal jurisdiction and defective service of process. They supported their motion with the affidavit of Grace and William Brissey, wherein they avowed the following:

Neither the Brisseys individually nor the Fireplace and Things nor Grabil, Inc. has ever done business in or engaged in catalog or mail order sales within the State of North Carolina. None of them owns property in this State. The individual defendants have not been within the State of North Carolina for at least two years prior to 21 June 1979 and have not been in Asheville for at least five years prior thereto. With respect to the transaction at issue, defendants declared that Jerry Landreth, an agent for the plaintiff who resides in Seneca, South Carolina, initiated the sale to them of a quantity of stoves by approaching them at their place of business in Anderson with an offer of sale.

Defendants accepted in Anderson. Thereafter, the stoves were delivered to the Fireplace and Things "by truck and unloaded and accepted in Anderson, South Carolina, . . ." Defendants stated further that they paid the driver of the truck for the stoves upon delivery and that he then accepted payment. The only other contact they had had with the plaintiff was a previous, similar sale of stoves to them which Landreth also had solicited from them at their Anderson store, and in which the stoves were delivered and the truck driver paid in Anderson.

Plaintiff offered no opposing affidavits.

After a hearing, Judge Israel made findings of fact, concluded that the constitutional and statutory requisites for exercising personal jurisdiction over these defendants had been met and that service of process was proper, and entered an Order dated 26 July 1979 denying the defendants' motion to dismiss the plaintiff's complaint.

Defendants appealed.

Gray, Kimel & Connolly, by David G. Gray, for the plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Davis, by Albert L. Sneed, Jr., for the defendant appellants.

HEDRICK, Judge.

Although the denial of a motion to dismiss ordinarily is not immediately appealable, defendants in this case properly proceed pursuant to the provisions of G.S. § 1-277(b), which prescribes a right of immediate appeal where there has been "an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . ." Since defendants are safely before us, we confront the crucial issue presented by their appeal, *i.e.*, were statutory and constitutional requirements satisfied so as to permit the courts of North Carolina to exercise jurisdiction *in personam* over these South Carolina defendants?

To resolve that issue, we must consider first whether a basis for asserting jurisdiction exists under the statute, G.S. § 1-75.4, commonly referred to as the "long-arm" statute, the provisions of which are recognized as a " 'legislative attempt to assert *in per-*

sonam jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution.'" *Sparrow v. Goodman*, 376 F. Supp. 1268, 1270 (W.D.N.C. 1974). To that end, the statute is accorded a liberal construction in favor of finding personal jurisdiction, subject only to due process limitations. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *see also Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Here, the statute clearly affords grounds for the exercise of jurisdiction by our courts. Subsection (5)(d) of § 1-75.4 provides for jurisdiction in any action which "[r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." It is not disputed that the goods in question were shipped from North Carolina. Thus, the initial inquiry in the determination whether jurisdictional grounds are present must be answered affirmatively.

Even so, we must further answer the question whether the exercise of jurisdiction offends or comports with due process. *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979); *Dillon v. Numismatic Funding Corp., supra; Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978). This is the crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the "long-arm" statute. *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974); *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E. 2d 859 (1980). The "litmus standard" for judging when a state may exercise *in personam* jurisdiction over a nonresident defendant is well-known and was established 35 years ago by the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945): Due process requires that a nonresident defendant 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." *Id.* at 316, 66 S.Ct. 158, 90 L.Ed. 102. *See also O'Neal v. Hicks Brokerage Co.*, 537 F. 2d 1266 (4th Cir. 1976). Helpful criteria for analyzing whether minimum contacts are present include:

> [T]hree primary factors, namely, the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts, . . . and . . . two others, interest of the forum state and convenience. . . .

Aftanase v. Economy Baler Co., 343 F. 2d 187, 197 (8th Cir. 1965) [per Justice (then Judge) Blackmun]. *See also Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977); *McCoy Lumber Industries, Inc. v. Niedermeyer-Martin Co.*, 356 F. Supp. 1221 (M.D.N.C. 1973). Moreover, the analysis requires that the interests of and fairness to both the plaintiff and the defendant be carefully weighed and considered. *Dillon v. Numismatic Funding Corp., supra.* The determination cannot be effected by using a "mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances." *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E. 2d 492, 497 (1963); *see also Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).

Applying these standards to the facts of the case before us, the quantity of the contacts which the Brisseys had with North Carolina is insubstantial. Their uncontradicted affidavit settled that they had dealings with the plaintiff on only one other occasion prior to the transaction giving rise to this lawsuit. Moreover, their undisputed claim is that they have not been within the State of North Carolina for at least two years, nor within Buncombe County for at least five years.

In our opinion, the nature and quality of the defendants' contacts with this State, on the record before us, is likewise *de minimus*. The purchase at issue involves only one sale, for a total amount of $2,700.00. [*Cf. Fieldcrest Mills, Inc. v. Mohasco Corp., supra*, which involved a contract amount in excess of $400,000.00.] Moreover, we think the sole thread linking the Brisseys to North Carolina is the processing of their order for stoves through the home office of the plaintiff in Asheville. The order, according to uncontradicted evidence, was solicited by plaintiff and accepted by defendants in South Carolina. The goods, while shipped from North Carolina, were accepted in South Carolina. Payment for the goods was made to the driver of plaintiff's delivery truck in South Carolina. Plaintiff appears to rely on the fact that payment on the

check was stopped through a bank in North Carolina, but we find that circumstance merely fortuitous and, in any event, insufficient to establish the requisite substantial connection between the transaction and this State. *Cf. World-Wide Volkswagen Corp. v. Woodson*, --- U.S. ---, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980).

We are aware that a single contract can furnish the basis for the exercise of jurisdiction over a nonresident. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957); *Chadbourn, Inc. v. Katz, supra.* If the contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974). However, the mere act of entering into a contract with a forum resident, as here, will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendants' performance, as here, are to take place outside the forum. *See, e.g., Iowa Electric Light and Power Co. v. Atlas Corp.*, 603 F. 2d 1301 (8th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3552 (26 February 1980). Furthermore, in cases of contract disputes, "the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state." *Fieldcrest Mills, Inc. v. Mohasco Corp., supra* at 428; *see also Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958); *Chemical Realty Corp. v. Home Federal Savings & Loan Assoc. of Hollywood*, 40 N.C. App. 675, 253 S.E. 2d 621 (1979), *appeal dismissed*, 48 U.S.L.W. 3517 (19 February 1980). Neither from the allegations of plaintiff's complaint nor from the averments of the Brisseys' affidavit could we conclude that either the individual or the corporate defendants in this case have undertaken any action by which they could avail themselves of the benefits and protections of our laws. They have declared, and the uncontested evidence confirms, that at no time have they carried on any business activity, including solicitation and mail order or catalog sales, in the State of North Carolina. Clearly, the only relevant activity occurring in North Carolina with respect to this transaction was actually carried on by the plaintiff, not the defendants, and that activity in our opinion was primarily ministerial in nature. Substantial performance of the contract, from its inception to its

conclusion, occurred in South Carolina. Any connection between defendants and this State existing by virtue of this contract is far too tenuous to satisfy "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, supra.*

Consideration of the factors of convenience and interest of the forum state, when weighed in light of our interpretation of due process requirements, does not persuade us to change our decision to decline jurisdiction. While North Carolina certainly has an interest in providing a forum for its residents, such interest cannot be asserted to override the mandates of due process. As far as convenience to the parties is concerned, we think it just as convenient for plaintiff to pursue its cause against these defendants in South Carolina, especially in view of the fact that its agent who initiated and negotiated the sale is a South Carolina resident.

Defendants have argued other assignments of error which, because of our disposition of this issue, we find unnecessary to discuss.

We hold that the assertion of *in personam* jurisdiction over these defendants violates due process. We accordingly reverse and remand to the District Court for the entry of an Order dismissing the complaint.

Reversed and remanded.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. JESSE EVERETTE McNEIL AND ROBERT EARL McNEIL

No. 797SC993

(Filed 6 May 1980)

1. Criminal Law § 101— note taking by jury—control by court proper

The trial judge had the authority to instruct the jury not to take notes, even in the absence of an objection by the parties. G.S. 15A-1228.

2. Criminal Law § 117.1— corroborative evidence—jury instructions proper

The trial court's instructions on the weight and effect of corroborative evidence which followed the N.C. Pattern Instructions were proper and complied with defendant's request that the court instruct the jury regarding the limited scope of the evidence presented for corroboration.

3. Criminal Law § 62— polygraph test results—inadmissibility

The trial court did not err by refusing testimony from each defendant to the effect that each had taken a polygraph examination, the results of which would have shown that each defendant was truthful in denying that he was guilty of the crimes charged, since there was no stipulation of admissibility between the parties.

4. Criminal Law § 80— bus ticket—personnel registry—copies admissible for illustration

The admission of copies of a bus ticket and a personnel registry signed by defendant for illustrative purposes only was not prejudicial to defendant and did not amount to suppression of the evidence, since defendant testified in his own behalf concerning his purchase of the ticket and his signing of the personnel registry; he illustrated his testimony with the copies in question; and the records were in fact before the jury.

5. Kidnapping § 1.2; Rape § 5; Robbery § 4— sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for kidnapping, rape and robbery where it tended to show that the victim drove her car onto a college campus at 11:30 p.m.; she opened her door, gathered her things, and found defendant standing at the door; he asked for a light and she turned to find matches; when she turned again to her door, she found a gun at her head; defendants threatened to kill the victim if she did not move over and let them into her car; they later seized the victim by both arms, pulled her into the back of the car and forcibly undressed her; and defendants then raped the victim, took her money and fled.

APPEAL by defendants from *Barbee, Judge.* Judgment entered 25 May 1979 in Superior Court, WILSON County. Heard in the Court of Appeals 18 March 1980.

Defendants were indicted for the kidnapping, rape, and robbery of Ann Gilbert Berkeley, a student at Atlantic Christian College. Jesse McNeil was convicted on all three charges, and Robert McNeil was convicted of kidnapping and rape. Both defendants gave notice of appeal to the Court of Appeals.

Ms. Berkeley testified that on 10 September 1978 she drove her car onto campus at about 11:30 p.m., opened the car door and started gathering her things. A black male, later identified as Jesse McNeil, came up and asked her for a light. She turned to

her car for matches, and, upon turning back around, found a gun at her head.

The man threatened to kill Ms. Berkeley if she did not move over. Ms. Berkeley refused, and the man pushed her over in the seat. He unlocked the door on the passenger side, and another black male, later identified as Robert McNeil, got in the car. The two males proceeded in Ms. Berkeley's car to an isolated spot where they raped her, took her money, and fled.

The prosecuting witness identified the two defendants as her attackers. Both defendants offered alibi defenses. Jesse McNeil testified that on the date in question he had been taken to the bus station in Wilson early in the evening where he had purchased a bus ticket and traveled by bus to Fort Benning in Columbus, Georgia. Jesse McNeil offered several witnesses in corroboration of his alibi.

Defendant Robert McNeil offered evidence that he was at the home of his girl friend in Wilson. Both defendants offered further evidence, which was suppressed by the court, that they had taken polygraph examinations. The tests tended to support the defendants' alibis and refuted the State's witnesses' identification of defendants as the perpetrators of the crimes. The State then presented rebuttal evidence which placed Jesse McNeil on the campus of Atlantic Christian College the night of the alleged crimes. Further facts will be stated in the opinion.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, Assistant Attorney General Mary I. Murrill, and Associate Attorney General Jane P. Gray, for the State.

Farris, Thomas & Farris, by Robert A. Farris, for defendant appellants.

HILL, Judge.

[1] The defendants contend the trial judge erred in his instructions to the jury during the trial of the case. Soon after the trial of the case began, the court instructed jurors not to take notes during the trial of the case. Neither party objected at that time. G.S. 15A-1228 provides that, "[j]urors may make notes and take them into the jury room during their deliberations. Upon ob-

jection of any party, the judge must instruct the jurors that notes may not be taken."

This statute does not limit the authority of the trial judge to control the taking of notes by the jury during the course of the trial in the absence of objection by counsel. Our Supreme Court has long recognized the authority of the trial judge to control the action of the jury with respect to taking notes. *State v. Shedd*, 274 N.C. 95, 161 S.E. 2d 477 (1968); *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964); *Cowles v. Hayes*, 71 N.C. 230 (1874).

It is well established that the function of a trial judge is to guide the progress of the trial to insure all parties a fair and impartial presentation of the evidence. Therefore, we hold the trial judge had authority to instruct the jury not to take notes.

[2] Next, the defendants contend the court erred in its instruction to the jury regarding the weight and effect of corroborative evidence during the trial. The court allowed two witnesses to testify regarding conversations they had with the prosecuting witness. The defendants asked for instructions, and the court instructed the jury that:

> [E]vidence has been received as corroboration tending to show that at an earlier time the witness, Miss Ann Berkeley, made a statement consistent with her testimony at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time, because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent with the testimony of Miss Ann Berkeley at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness Miss Ann Berkeley's truthfulness in deciding whether you will believe or disbelieve her testimony at this trial.

Defendants contend that although the instructions were taken from the standard form, they did not adequately prepare the jury to receive and properly consider the statements which were allowed for corroboration. We do not agree. The language is plain.

The admission of corroborative evidence rests largely in the discretion of the trial court to keep its scope and volume within

reasonable bounds. *Gibson v. Whitton*, 239 N.C. 11, 17, 79 S.E. 2d 196 (1953). The defendants requested the trial court to instruct the jury regarding the limited scope of the evidence presented for corroboration. The trial judge complied by reciting the standard instructions. *See* N.C.P.I.-Crim. 105.05. The assignment of error is without merit.

[3] Defendants contend the trial judge erred by refusing testimony from each defendant to the effect that each had taken a polygraph examination, the results of which would have shown that each defendant was truthful in denying that he was guilty of the crimes charged. In North Carolina it is well settled that, absent a valid stipulation of admissibility between the parties, results of polygraph examinations are inadmissible in state court proceedings. *State v. Foye*, 254 N.C. 704, 707, 120 S.E. 2d 169 (1961); *State v. Brunson*, 287 N.C. 436, 445, 215 S.E. 2d 94 (1975); *State v. Jackson*, 287 N.C. 470, 480, 215 S.E. 2d 123 (1975). Even where there is a valid stipulation of admissibility, the results of polygraph examinations are admissible only in the discretion of the trial judge. *State v. Milano*, 297 N.C. 485, 499, 256 S.E. 2d 154 (1979). Our rule on polygraph evidence is in substantial accord with most other states; *see* Annot., 53 A.L.R. 3d 1005 (1973); and with the position the federal courts that have examined the issue have taken. *See United States v. Grant*, 473 F. Supp. 720, 723 (D.S.C. 1979); Annot., 43 A.L.R. Fed. 68 (1979).

We do not propose in this case to examine the reliability of polygraph machines, but we must note that the Eighth Circuit in *United States v. Alexander*, 526 F. 2d 161, 166 (8th Cir. 1975), stated, "[t]here is an insufficient degree of assurance that polygraph machines and operators are capable of discovering and controlling the many subtle abnormalities and factors which affect test results." The defendants went before the jury and offered testimony denying their involvement in the crimes charges. We believe the jury is still the better forum, when presented with the facts, to determine guilt or innocence. It is well known that the polygraph—popularly known as a lie detector— does not detect lies, but merely records physiological phenomena which are assumed to be related to conscious deception, all of which must yet be interpreted by the operator. The assignment of error is overruled.

[4] During trial, defendant Jesse McNeil was permitted to introduce into evidence a photostat of a personnel registry indicating that he signed in at Fort Benning, Georgia, on 11 September 1978 at 3:30 p.m. Jesse McNeil also introduced a photostat of a bus ticket providing for passage from Wilson to Columbus, Georgia, allegedly purchased by him and dated 9 September 1978 (but sold on 10 September 1978). Both photostats were admitted for illustrative purposes only.

Jesse McNeil testified the photostat was of the ticket used for the trip and contends that he should have been permitted to introduce the copies of the bus ticket and personnel registry as substantive (real) evidence. Defendant contends that failure to permit the introduction of the copies of the bus ticket and personnel registry was tantamount to suppression by the prosecution of evidence, which was requested by the accused and favorable to him, and that such withholding violated his right to due process. Defendant contends the withholding materially affected his assurance of a fair trial and cites *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), as authority. We do not agree.

The defendant testified in his own behalf, contending that he rode the bus from Wilson, leaving at 7:40 p.m., and arriving in Columbus, Georgia, the following day at 2:50 p.m. Jesse McNeil stated he personally signed in at Fort Benning at 3:30 p.m. It is undisputed that defendant purchased the ticket and signed the registry sheet. He illustrated these facts with photostats of the bus ticket and the personnel registry. Such records were before the jury. In fact, the records were obtained by the State and delivered to the defendant. Defendant complains that he had no money to subpoena or interview out-of-state witnesses. Nowhere in the record is there an indication that the presence of such witnesses would have added any further evidence in the defendant's behalf. The assignment of error is without merit.

[5] In their next assignment of error, the defendants contend the trial judge erred by denying the motions of nonsuit at the end of the State's evidence and again at the end of trial. By introducing evidence in their own behalf, the defendants were precluded from raising on appeal the denial of their motion for nonsuit at

the close of the State's evidence. G.S. 15-173. *State v. Davis*, 282 N.C. 107, 113, 191 S.E. 2d 664 (1972).

Defendants again moved to dismiss at the conclusion of all the evidence, contending that the defendants exerted no threat of force toward Ms. Berkeley and that the prosecuting witness did not speak out when her money was taken. Further, the defendants contend that the relationship between the prosecuting witness and her assailants was surprisingly congenial.

"On a motion for nonsuit, the evidence must be considered in the light most favorable to the State, giving such evidence the benefit of every reasonable inference to be drawn from it." *State v. Bowden*, 290 N.C. 702, 716, 228 S.E. 2d 414 (1976).

> [I]t is for the trial court to determine whether substantial evidence which will support a reasonable inference of the defendant's guilt has been introduced. The trial court having found that such evidence has been introduced, it is *solely* for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty. (Citations omitted.)

State v. Smith, 40 N.C. App. 72, 79-80, 252 S.E. 2d 535 (1979).

"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 [for nonsuit] and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *Smith* at 79.

There was evidence that the attackers pointed a gun to Ms. Berkeley's head. The rape occurred late at night. The attackers threatened to kill Ms. Berkeley if she did not move over and let them into the car, and later seized her by both arms, pulled her into the back of the car and forcibly undressed her. Any one or more of these acts by two adult males toward a young college girl would have placed her in fear; all of the acts would have compounded the original fear she experienced when a gun with a three or four-inch barrel was placed against her head.

We have examined the record in detail and conclude there is ample evidence of the elements in each crime for which each

defendant was charged for consideration by the jury. The trial court did not err in denying each defendant's motion for nonsuit.

Each defendant submits that the trial judge erred in his instructions to the jury as to the facts and law in the case. Comparison of the charge given by the trial judge with the instructions requested by defense counsel regarding reasonable doubt, character evidence and alibi tends to show that, although the two are not in exact comformity, the charge, as given, materially and adequately charges on all aspects of the requested instructions. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). Although the defendants complain that at the close of the charge they were not given the same opportunity as the State to tender additional instructions, the defendants had given their requested instructions prior to the charge and the instructions had been given materially by the court. It was incumbent on defendants to either object to the lack of opportunity to tender further instructions or to tender any additional instructions they desired. Defendants' assignment of error is overruled.

As to the defendants' objection to the purported statement of opinion given by the court in its recapitulation of the evidence, it has been repeatedly held that an inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. *State v. Goines*, 273 N.C. 509, 514, 160 S.E. 2d 469 (1968). Defendants failed to do so. In addition, we find that the trial judge stated the contentions of both parties quite fairly. Consequently, we find no merit in the objections posed by the defendants and conclude that the trial judge did not err in instructing the jury.

Defendants further contend that the trial judge erred in his instructions on the facts and law in several other respects. We have examined the charge and all assignments of error and exceptions raised by the defendants and find them to be without merit.

In defendants' trial, we find

No error.

Judges PARKER and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. SEQUOYAH E. TRUEBLOOD

No. 7912SC1170

(Filed 6 May 1980)

Criminal Law § 84; Searches and Seizures § 3— civilian trial of Army officer—seized evidence—participation by military authorities—Posse Comitatus Act

A violation of the Posse Comitatus Act, 18 U.S.C. § 1385, does not require the exclusion of evidence thereby obtained from a civilian criminal trial. Furthermore, there was no violation of the Posse Comitatus Act where such part as an Army Criminal Investigation Division agent and other Army personnel played in connection with a civilian investigation of the illegal drug activities of defendant, an officer in the U. S. Army, was at all times passive, and there was no use of "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" as prohibited by the Act.

APPEAL by defendant from *Brown, Judge.* Judgments entered 2 August 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 April 1980.

By indictments proper in form defendant was charged with possession with intent to sell and deliver, sale and delivery, and conspiracy to sell and deliver cocaine, all in violation of North Carolina statutes. Prior to trial defendant moved for an order

> . . . suppressing any and all evidence obtained by the State of North Carolina as a result of the investigative activity, both direct and indirect, of representatives of the United States Army Criminal Investigation Division on the ground that said investigative activity and the evidence seized as a result thereof was illegal and expressly prohibited by law and the provisions of Title 18, United States Code, Section 1385, more commonly referred to as the "Posse Comitatus Act".
>
> Specifically, Defendant moves to suppress all purported controlled substances and serialized currency at any time during the course and scope of the criminal investigation of the Defendant where such investigative activity included participation of representatives of the United States Army Criminal Investigation Division.

This motion was heard prior to defendant's trial by Judge E. Maurice Braswell, who denied the motion. At trial before Judge

Frank R. Brown and a jury, the jury returned verdicts finding defendant guilty on all charges. He appeals from judgments imposed on the verdicts, his sole assignment of error being directed to the denial of his pretrial motion to suppress.

Attorney General Edmisten by Associate Attorney General Kucharski for the State.

Coolidge, Clarke, Hutchens & Waple by Mark L. Waple, and Barfield and Canders by K. Douglas Barfield for defendant appellant.

PARKER, Judge.

Defendant's sole contention is that the court erred in denying his pretrial motion to suppress evidence which he contends was obtained as a result of violations of 18 U.S.C. § 1385, known as the Posse Comitatus Act. "A short answer to this contention is that a violation of the Act would not call for invocation of the exclusionary rule." *State v. Nelson*, 298 N.C. 573, 585, 260 S.E. 2d 629, 639 (1979). Thus, even if a violation of the Act had occurred in this case, there would have been no error in the court's denial of defendant's motion to suppress. We find, in any event, that no violation of the Posse Comitatus Act occurred in this case.

The Posse Comitatus Act reads as follows:

> 18 U.S.C. § 1385. USE OF ARMY AND AIR FORCE AS POSSE COMITATUS
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Discussing this Act, our Supreme Court said:

> The legislative purpose of the Posse Comitatus Act is to preclude the direct active use of federal troops in aid of execution of civilian laws. *Gillars v. United States*, 182 F. 2d 962 (D.C. Cir. 1950); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975). Passive activities of military authorities which incidentally aid civilian law enforcement

> are not precluded. *United States v. Red Feather, supra.* "[T]he statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws more effectively than possible through civilian law enforcement channels, and . . . those situations where an act performed primarily for the purpose of insuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute." Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 128 (1960).

State v. Nelson, supra at 585, 260 S.E. 2d at 639.

In this case Judge Braswell, after hearing evidence presented on defendant's motion to suppress, entered an order making findings of fact, to which no exception has been taken, which may be summarized as follows:

In January 1979 S.B.I. Agent Wolak talked with an agent of the Criminal Investigation Division of the U.S. Army at Fort Bragg concerning any army officer whose name was thought to be Truelove or Trueblood and who was thought to be involved in illicit drugs both on and off the base. At that time defendant was a Major in the army stationed at Fort Bragg. The C.I.D. Agent with whom Wolak talked sought advice from the Staff Judge Advocate at Fort Bragg concerning the Posse Comitatus Act. He was advised he could go with the S.B.I. Agent off post but could only observe the civilian investigation, and that if the agents came on post, the C.I.D. Agent should then assume charge of the investigation. S.B.I. Agent Wolak did conduct surveillances of defendant in January, February, and early March 1979. During these surveillances the C.I.D. Agent rode as a passenger in the Wolak vehicle. He was not in uniform, had no weapon, took no pictures, conducted no interviews, took no statements, and did not coordinate what was happening off post with anyone at Fort Bragg. On perhaps two occasions he did go get food for both agents to eat, he did listen to debriefing of an undercover agent and later made notes for his own command, and he did furnish Wolak background information on defendant, such as his name, number, and unit. The Staff Judge Advocate furnished access to a photograph of defendant.

On 26 January 1979 an undercover agent with the S.B.I. had a transaction with defendant on the Fort Bragg reservation in which he paid defendant $3000.00 from State funds for cocaine to be delivered on 29 January. On 29 January this agent paid defendant $1200.00 for marijuana which defendant had delivered to him on 26 January. This $1200.00 for marijuana was furnished by the C.I.D. from Army funds.

Defendant was arrested on 6 March 1979 at Spring Lake, N.C. by S.B.I. Agent Wolak. Immediately after the arrest he was taken to the residence of one Im Suk Dawson, a friend of the defendant, at Spring Lake, where a search warrant was executed. The C.I.D. Agent went to the Dawson residence, identified himself to the defendant, but did not participate in the search and did not then have defendant in his custody. After the civilian authorities took defendant to the Cumberland County Law Enforcement Center, the C.I.D. Agent did take defendant to defendant's room in the B.O.Q. at Fort Bragg to obtain his personal clothing. Once there, the C.I.D. Agent asked for and obtained defendant's consent to search his room.

These factual findings fully support Judge Braswell's conclusion that there was no violation of the Posse Comitatus Act in this case. The defendant, an officer in the Unted States Army, was subject to military discipline and control. His illicit drug dealings were of direct concern to the agents of the Army Criminal Investigation Division in performing their own duties. Such part as the C.I.D. Agent or other army personnel played in connection with the civilian investigation into defendant's violations of State laws was at all times passive. There was here no use of "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" in violation of 18 U.S.C. § 1385

In defendant's trial and in the judgments entered against him we find

No error.

Chief Judge MORRIS and Judge WELLS concur.

STATE OF NORTH CAROLINA v. SEQUOYAH E. TRUEBLOOD

No. 7912SC1173

(Filed 6 May 1980)

1. **Criminal Law § 34.8— defendant's guilt of other offenses—admissiblity to show plan or design**

In a prosecution for possession and sale of cocaine and conspiracy to sell cocaine, the trial court did not err in admitting evidence which set out chronologically the meeting of a law enforcement agent with defendant, the meetings of the conspirators, their trips to N.Y. to purchase cocaine, and delivery of that cocaine, though such evidence did tend to show the commission of prior criminal acts by defendant, since such evidence was admissible to show the series of transactions carried out by defendant and his coconspirators in pursuance of their plan and design to sell and deliver cocaine.

2. **Narcotics § 3.3— substance identified as cocaine—witness not qualified as expert—defendant not prejudiced**

The trial court did not err in permitting a witness to refer to a substance as cocaine without qualification as an expert, since defendant did not request a finding by the court with respect to the witness's expertise and gave no ground for his general objection, and defendant was not prejudiced in view of the subsequent testimony of a chemist that the substance was indeed cocaine.

3. **Narcotics § 4— conspiracy to sell cocaine—sufficiency of evidence**

The trial court properly submitted to the jury an issue of conspiracy to sell cocaine where the indictment charged the date of the conspiracy as "on or about" 5 March 1979, and the evidence tended to show that defendant, his coconspirators and a law enforcement agent met on several occasions from January through March 1979 for the purpose of discussing the sale of cocaine by defendant to the agent; several sales did take place; on 5 March the agent contacted defendant by calling a coconspirator; and on 6 March defendant and the agent met, and the agent purchased 1¼ ounces of cocaine.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 20 July 1979, Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 April 1980.

Defendant, a Major in the United States Army stationed at Fort Bragg, was charged with and convicted of possession with intent to sell and sale of cocaine in violation of G.S. 90-95(a)(1) and conspiracy to sell cocaine in violation of G.S. 90-98, and appeals from judgments entered on the verdicts of the jury.

Facts necessary for decision will be set out in the opinion.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Coolidge, Clarke, Hutchens and Waple, by Mark L. Waple, and Barfield and Canders, by K. Douglas Barfield, for defendant appellant.

MORRIS, Chief Judge.

Defendant brings forward and argues in his brief four assignments of error. The first is directed to the denial by the court of defendant's motion to suppress all evidence against defendant which was, according to defendant, taken in violation of the Posse Comitatus Act. This question was fully discussed and decided against defendant in *State v. Trueblood*, 46 N.C. App. 541, 265 S.E. 2d 662 (1980). No useful purpose would be served by repeating that discussion here. The resolution of the question against defendant in that companion case involving other transactions and charges resulting from the same investigation is decisive and controlling here. This assignment of error is overruled.

[1] The indictment charged that defendant, on or about 5 March 1979, conspired with one Im Suk Dawson and others to sell and deliver cocaine. Over defendant's objections, the court admitted evidence which set out chronologically the meeting of Agent Allcox with defendant, the meetings of the conspirators, their trips to New York to purchase cocaine and then the delivery of that cocaine. Defendant assigns as prejudicial error the admission of this evidence contending that the evidence proved the commission of prior criminal acts by defendant and allowed the State to inject into the trial evidence of defendant's character when he had not raised the issue of character. It is quite true that the evidence tends to show the commission of crimes by defendant and results in a showing of a bad character. Without question the evidence was prejudicial as is true of most evidence against a defendant charged with crime. Nevertheless the court did not commit reversible error in admitting the evidence.

In his discussion of the subject, Professor Brandis, in 1 Stansbury's N. C. Evidence § 91 (Brandis rev. 1973), p. 288, said:

> This is commonly supposed to be a somewhat difficult and complex field, marked out by a general rule of exclusion and a series of exceptions. It is submitted, however, that the rule is in fact a simple one which, when accurately stated, is subject to no exceptions: Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; *but if it tends to prove any other relevant fact it will not be excluded merely because it shows him to have been guilty of an independent crime.* (Emphasis added.)

Here the evidence to which defendant objected was clearly admissible to prove "the existence of a plan or design to commit the offense charged. . . ." *Id.* at § 92, p. 297. *See also* 1 Jones on Evidence § 162 (5th ed. 1958). The evidence was but a part of a series of transactions carried out by this defendant and his coconspirators in pursuance of their plan and design to sell and deliver cocaine. In *State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976), defendant was charged with burglary in the first degree and common law robbery. His primary contention on appeal was that State's witnesses were allowed to testify, over defendant's objection, with respect to their association with defendant in the commission of other breaking and enterings and thefts in this State and others over a period of two years prior to the occurrence for which defendant was tried. The Court, in finding no error in the admission of the testimony, noted that the general rule prohibits the offering of evidence tending to show that the accused has committed other crimes where he has not taken the stand and thereby placed his general character and credibility in issue.

> However, . . ., numerous exceptions to this rule are also well established. One is that such evidence may be admissible to identify the defendant as a perpetrator of the crime with which he is presently charged. Another is that such 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.

290 N.C. at 745, 228 S.E. 2d at 239. *See also State v. Forney*, 38 N.C. App. 703, 248 S.E. 2d 747 (1978), and cases there cited. This assignment of error is overruled.

It is difficult to ascertain the basis of defendant's assignment of error No. 3. We find the following in the Record under assignment of error No. 3: "For failure of the Court to sustain defendant's objections and grant defendant's motions to strike conclusionary testimony and incompetent testimony concerning the exact nature of suspected controlled substances." The assignment of error refers to exception Nos. 5, 10, 14, 19, 21 (R. p. 31, 35, 37, 39, 40). On R. pp. 30-31, we find the following:

> (Over the objection of Mr. Barfield which was overruled by the Court.) Exception No. 5.
>
> Mr. Allcox stated that on January 29th he met with Trueblood and Dawson at the restaurant. Christopher Russell accompanying Agent Allcox to the restaurant. Major Trueblood was seated beside me in the booth. During the meal the conversation with Chris Russell, Major Trueblood asked where was the cocaine. Chris Russell stated that the two ounces of cocaine was in his boot. At this time Chris Russell stomped his foot under the booth where I and Major Trueblood were seated and Major Trueblood removed the plastic bag containing 2 ounces of cocaine. At that time he handed me the package containing the cocaine and I put it in my pocket. We then left the restaurant and myself, Chris Russell, Major Trueblood and Im Suk Dawson got into my vehicle. At that time I paid Major Trueblood the sum of fourteen hundred fifty dollars, twelve hundred of it was for marijuana he had given me on Friday. Two hundred and fifty was for the cocaine over three thousand dollars I had paid him on Friday.

Rule 9(c)(1), North Carolina Rules of Appellate Procedure, provides:

> Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers",

and Rule 10(b)(1) requires that

> [e]ach exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference."

It is abundantly clear that defendant has failed to comply with these rules.

[2] If defendant's position is that at these places in the trial the court allowed the witness to refer to a substance as cocaine without qualification as an expert, the defendant did not request a finding by the court with respect to the witness's expertise and gave no ground for his general objection. In any event, no prejudice resulted in view of the subsequent testimony of the chemist that the substance was indeed cocaine.

This assignment of error is without merit and overruled.

[3] Finally, defendant urges that the court should have granted his motion to dismiss the conspiracy charges because there was insufficient evidence to go to the jury. This assignment of error is also without merit. We note that defendant concedes that there "is evidence of an alleged conspiracy and sale of controlled substances occurring around January 26, 1979, and January 29, 1979," but he contends this will not support an alleged conspiracy occurring on 5 March 1979. The indictment sets the date of the alleged conspiracy as "on or about" 5 March 1979.

The evidence for the State is briefly summarized as follows:

Agent Allcox first met defendant on 26 January 1979, having been introduced to defendant by Christopher Russell. At that meeting Allcox discussed with defendant, Russell, and Costa Lampros the purchasing of cocaine. Defendant stated that he was going to New York that weekend to buy cocaine. Allcox indicated an interest in buying at least two ounces and agreed to let defendant have $3,000 with which to buy the cocaine with defendant providing four pounds of marijuana as collateral. When defendant returned from New York on Sunday, Allcox would receive the two ounces of cocaine and pay defendant $1,200 for the marijuana. On Monday, 29 January 1979, Allcox met defendant, Russell, and Im Suk Dawson. Defendant delivered two ounces of cocaine to Allcox and Allcox paid defendant $1,200 for the marijuana plus $250 additional for the cocaine. Defendant told Allcox that he,

Russell, and Dawson had left on Sunday for Washington, D.C., by car. The weather was bad so he and Dawson took a commercial airplane to New York from Washington and Russell and Lampros drove the car back to North Carolina. Defendant purchased the cocaine in New York and he and Dawson returned to North Carolina by airplane arriving at Raleigh-Durham Airport where they were met by Russell and Lampros, returning to Fayetteville by car.

On 16 February 1979, Allcox again met with defendant and Dawson. At that time another purchase of cocaine was arranged. Allcox furnished $3,400 to defendant who stated he was planning to go to New York that weekend, get more cocaine, and return to Fayetteville. On 20 February, Allcox met with defendant who told him that Lampros and defendant had gone to Washington, picked up Russell, and proceeded to New York where he purchased cocaine. They then returned to Washington, dropped off Russell, and defendant and Lampros returned to Fayetteville. He had two and one-fourth ounces of cocaine and Allcox took it all. The price agreed upon resulted in Allcox's owing defendant $550. He had only $400 at that time. He paid that to defendant and agreed to pay the balance "on the next deal". After this meeting, Allcox attempted to contact defendant. On 1 March, defendant contacted Allcox by phone. On 5 March Allcox contacted defendant by calling Dawson. He and defendant met on 6 March and defendant stated that he had been to New York that weekend and had bought cocaine. Allcox, at that meeting, bought one and one-fourth ounces and paid $2,500 therefor.

Lampros testified that he was introduced to defendant by Russell in January of 1979 and associated with defendant until March of 1979. He testified with respect to the trip to New York by way of Washington when it was agreed that he and Russell would drive the car back and meet defendant and Dawson at the Raleigh-Durham Airport. This they did, and on the trip from Raleigh to Fayetteville, the four of them "discussed cocaine and the Major related what had happened in New York to Chris and myself." Dawson also participated in the conversation. When they got back to Fayetteville, they discussed "how the white powder substance would be weighed and in what different weights it would be weighed out" and the distribution of it. It was decided that some of the "coke" was for Lee Allcox. During February of

1979, he, defendant, Russell, and Dawson were all present on three or four occasions when general discussions of "coke" and the purchase of it in New York were had. Lampros testified in detail about a second trip to New York to purchase cocaine in which he, defendant, and Russell participated. He further testified to a discussion with defendant in late February or early March at a house in which defendant and Dawson were staying. They discussed defendant's purchase of "coke" and the possibility of Allcox's being an agent. Dawson was "in and out" of the room.

The evidence is clearly sufficient to support a guilty verdict.

The defendant has had a fair and impartial trial, free from prejudicial error.

No error.

Judges PARKER and WELLS concur.

A. TURNER WEBB AND ANNIE L. WEBB v. MARSHALL P. JAMES, JR., R. M. McEACHIN AND G. A. SMITH D/B/A SCOTLAND MOBILE HOME PARK DEVELOPMENT

No. 7916SC916

(Filed 6 May 1980)

1. Trial § 3.2— continuance—absent defendant—motion properly denied

Defendants failed to show sufficient grounds to require granting of their motion for continuance where the motion was unsupported by affidavit; defendants contended in their oral motion that one defendant was unavailable for an evidentiary hearing due to a previous commitment related to his profession; and, though argued in the brief that only the absent defendant could testify to circumstances surrounding a check in question, there was no evidence to this effect in the record.

2. Rules of Civil Procedure § 43— hearing on motion for relief from judgment—evidence limited to oral testimony

Defendants failed to show that the trial judge abused his discretion in directing that an evidentiary hearing on defendants' motion for relief from default judgment should be heard wholly on oral testimony. G.S. 1A-1, Rule 43(e).

3. Rules of Civil Procedure § 55.1; Appearance § 1.1— negotiation of continuance as appearance—setting aside default judgment proper

In an action to recover for breach of contract for the construction of a mobile home park, defendant made an appearance when he negotiated continuance of the action in order to gain time to comply with the contract; therefore, the trial court's action in voiding the prior default judgment entered by the clerk was proper both on the ground that defendant had appeared and on the ground that plaintiff's claim was not for a sum certain or for a sum which could by computation be made certain.

4. Rules of Civil Procedure § 55.1— entry of default—refusal to set aside—no abuse of discretion

In an action to recover for breach of a contract to construct a mobile home park, the trial court did not abuse his discretion in failing to set aside entry of default where defendant presented no evidence of the activity of an attorney on their behalf and no evidence of an accord and satisfaction, both of which they had cited in support of good cause; contrary to an accord and satisfaction, the trial court found that a check was given to plaintiffs on 7 July 1977 as the *quid pro quo* for plaintiff's agreement to continue the cause until the next term of court; and although this agreement may have been good cause for defendant's default from the time of the agreement until the next term of court, no evidence was presented showing good cause from the expiration of that agreement to the entry of default on 8 November 1978.

5. Rules of Civil Procedure § 55.1— motion to set aside default—jurisdiction of court to enter default judgment

When defendants made a motion to set aside the clerk's entry of default and default judgment, the trial court was not limited to a review of the action of the clerk, but was vested with jurisdiction to hear and determine all matters in controversy and render such judgment or order within the limits provided by law, including default judgment, and that principle would apply even though the order by the clerk was a nullity.

6. Rules of Civil Procedure § 55— default judgment—waiver of notice requirement

Where defendants, an appearing party, have brought the matter in controversy before the trial court as a result of their motion to set aside the clerk's order entering default, and there has been a full inquiry, defendants have in effect waived the notice requirement of G.S. 1A-1, Rule 55(b)(2) and are not entitled to further notice prior to entry of default judgment.

APPEAL by defendants from *Brannon, Judge.* Order entered 28 June 1979 in chambers in ROBESON County arising out of an evidentiary hearing held 14 March 1979 in SCOTLAND County. Heard in the Court of Appeals 26 March 1980.

This is an appeal from the denial of a Rule 60 motion which followed a default judgment. Plaintiffs' complaint, filed 7 January

1977, alleged defendants breached a contract for the construction of a mobile home park on plaintiffs' property. Plaintiffs prayed for $20,260.00 in damages. Plaintiffs' motion for entry of default was granted on 8 November 1978, and default judgment was granted by the clerk on that date.

Defendants moved for relief under Rules 6(b), 55(d), 60(b) with allegations that the clerk did not have jurisdiction to grant the default judgment; that they had tendered a check to plaintiffs' former attorney, now deceased, which had been accepted and cashed in full settlement of the controversy; that defendants had entered an appearance through their negotiations with plaintiffs or plaintiffs' counsel; that defendants had a meritorious defense in that the mobile home park had been satisfactorily constructed according to specifications; that plaintiffs' attorney had agreed to allow defendants' attorney to file an answer; and that defendants' attorney had withdrawn without placing anything in the file to indicate that defendants were disputing plaintiffs' allegations. The motion included an affidavit from defendants' former attorney.

Judge Brannon's order stated that the hearing on the matter had been continued so that an evidentiary hearing could be held, that defendants had appeared at the evidentiary hearing and requested that it be continued because one of the defendants could not be present, that that motion had been denied, that the court had considered only oral testimony and not affidavits, and that one of the plaintiffs had been called as an adverse witness. The court found that plaintiffs had accepted the check tendered by defendants as the *quid pro quo* for continuing the case until the next term so that defendants would have time to complete the lot, that defendants' former attorney had not made any entry in the file of his appearance on behalf of defendants, and that there had been no oral testimony that he had made an appearance. Judge Brannon concluded that the default judgment entered by the clerk was void because plaintiffs' claim was not for a sum certain, and rendered another default judgment against defendants for nominal damages, with the remaining damages to be decided at a nonjury session at a later date. Defendants appealed.

L. Wayne Sams for plaintiff appellees.

Locklear, Brooks & Jacobs, by Dexter Brooks for defendant appellants.

MARTIN (Robert M.), Judge.

[1] Defendants by their first assignment of error contend the trial court erred in refusing to grant defendants a continuance given the unavailability of one of the defendants. It is a well established rule in North Carolina that granting a motion for a continuance is within the discretion of the trial court. Continuances are not favored and the party seeking a continuance bears the burden of showing sufficient grounds. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). In the present case, when the motion came to be heard on 12 March 1979, defense counsel requested that the court initially consider several matters in chambers. After such in chambers consideration, the matter was set for an evidentiary hearing on 14 March 1979, if counsel were not able to agree on a factual stipulation. When the matter again came on for hearing on 14 March 1979, counsel announced that they had been unable to agree, whereupon defendants made an oral motion for a continuance on the ground that one of the defendants, Marshall P. James, was unavailable for the hearing due to a previous commitment related to his profession. The motion to continue is unsupported by affidavit and, although argued in the brief that only this particular defendant could testify to the circumstances surrounding the check in question, there is no evidence to this effect in the record. Defendants have failed to meet their burden of showing sufficient grounds for the motion.

[2] Defendants by their second and third assignments of error contend that the court erred in denying the use of an affidavit and verified motion in the hearing. Prior to the hearing the court "announced that it would consider only the oral live testimony of witnesses and that the affidavits filed herein would not be considered. . ." Consequently, the court excluded the affidavit of attorney J. Robert Gordon on the issue of whether defendants had made an appearance prior to the entry of default and excluded the verified motion of defendants on the issue of the existence of the defense of accord and satisfaction. Rule 43(e), N.C. Rules Civ. Proc., governing evidence on motions, provides:

> When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

In a comment on Rule 43(e), it is stated that

> The rule grants the judge specific authority to direct the type of evidence he will hear on a motion. . . . Thus, it seems obvious that the judge, in his discretion, may allow the facts to be presented for the purpose of a motion either wholly or partly by affidavit, oral testimony or deposition or any combination thereof.

W. Shuford, N.C. Civil Practice and Procedure § 43-7 (1975). A discretionary ruling of a trial judge is conclusive on appeal in the absence of a showing of abuse of discretion. 1 Strong's N.C. Index 3d, Appeal and Error § 54 (1976). Defendants have failed to show that the trial judge abused his discretion in directing that the matter be heard wholly on oral testimony.

[3] Defendants by their fourth and fifth assignments of error contend that defendants made an appearance through the representation of J. Robert Gordon whereby a continuance was sought and secured upon the consent of plaintiffs and through active settlement negotiations between the parties. After the court limited the hearing to oral testimony, defendant called one of the plaintiffs, A. Turner Webb, as an adverse witness. Based on the testimony presented at the hearing the court found the following facts:

1. That on July 7, 1977, the defendant, Marshall P. James, gave a check, introduced into evidence by the defendants, drawn on his account, to Jennings King, Esquire, now deceased, who was then representing the defendants (sic) herein as a result of a conversation relating to the controversy at issue herein between the parties hereto.

2. That said attorney gave said check to the plaintiff A. Turner Webb, who accepted same as the quid pro quo for agreeing to continue the cause herein until the next term of Court so that the defendants would have sufficient time to complete the mobile home park according to the contract specifications as understood by said plaintiff, and thereby to comply with the contract they had breached.

3. That an examination of the Court file indicated that J. Robert Gordon did not file an answer or any other document giving notice of his appearance for the defendants;

and that the Court was not offered any oral live testimony that J. Robert Gordon made any appearance in open Court in this matter.

4. That the defendants offered a verified motion in support of the defense of accord and satisfaction between said parties; and that the Court was not offered any oral live testimony from any of the defendants in support of the defense in open Court at this hearing.

Once precluded from introducing the affidavit and verified motion by the court's discretionary ruling restricting evidence to oral testimony, defendants presented no evidence on their contention that defendants made an appearance through the representation of J. Robert Gordon. Defendants did not include in the record any of the oral testimony presented at the hearing by adverse witness A. Turner Webb on the purpose of the $500 check paid by defendants to plaintiffs. When the evidence is not in the record it is presumed that the court's findings are supported by competent evidence and the findings are conclusive on appeal. *Town of Mount Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973). The finding of fact No. 3 supports the trial court's conclusion that defendants did not make an appearance through the representation of J. Robert Gordon. The remaining question is whether the finding of fact No. 2 supports the conclusion "[t]hat the defendants did not make an appearance in this action through the negotiation of the continuance which gave rise to the check introduced into evidence."

In *Roland v. Motor Lines*, 32 N.C. App. 288, 289, 231 S.E. 2d 685, 687 (1977), we noted that

> As a general rule, an "appearance" in an action involves some presentation or submission to the court. (Citation omitted.) However, it has been stated that a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance (citation omitted). In fact, an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff. (Citations omitted.)

Depending on the particular circumstances, communications between parties relative to giving the defendant an extension of

time in which to plead have been considered an "appearance" within the meaning of Rule 55(b)(2). Annot. 27 A.L.R. Fed. 620 (1976). In addition, negotiations between parties after the institution of an action may constitute an appearance. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *cert. denied* 289 N.C. 619, 223 S.E. 2d 396 (1976). We hold that when defendant negotiated a continuance of the action in order to comply with the contract, that he made an appearance.

Having concluded that defendants have appeared in the action, the court's action in voiding the prior default judgment entered by the clerk was proper both on the ground defendant had appeared and on the ground offered by the court that plaintiffs' claim was not for a sum certain or for a sum which can by computation be made certain. Plaintiffs' cross assignments of error are hereby overruled.

[4] Defendants by their sixth assignment of error contend that the court erred in failing to set aside the entry of default by the clerk pursuant to Rule 55(d). An entry of default may be set aside "[f]or good cause shown. . . ." The determination of whether an adequate basis exists for setting aside the entry of default rests in the sound discretion of the trial judge. *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E. 2d 794 (1971). It is clear that a discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion. *Privette v. Privette*, 30 N.C. App. 41, 226 S.E. 2d 188 (1976). At the risk of seeming redundant, we repeat that defendants presented no evidence of the activity of attorney J. Robert Gordon on their behalf and no evidence of an accord and satisfaction which are cited in support of good cause. Contrary to an accord and satisfaction, the court found that the $500.00 check was given to plaintiffs on 7 July 1977 as the *quid pro quo* for plaintiffs agreeing to continue the cause until the next term of court. Although this agreement may have been good cause for defendants' default from the time of the agreement until the next term of court, no evidence has been presented showing good cause from the expiration of that agreement to the entry of default on 8 November 1978. The judge did not abuse his discretion in failing to set aside the entry of default.

[5] Defendants by their seventh assignment of error contend that the court erred in granting plaintiffs a default judgment. We

disagree. When the defendants made a motion to set aside the clerk's entry of default and default judgment, the judge was not limited to a review of the action of the clerk, but was vested with jurisdiction "to hear and determine all matters in controversy in such action," and render such judgment or order within the limits provided by law as he deems proper under all the circumstances. G.S. 1-276; *Hendrix v. Alsop*, 278 N.C. 549, 180 S.E. 2d 802 (1971). This principle applies even though the order by the clerk is a nullity. *In re Foreclosure of Deed of Trust*, 20 N.C. App. 610, 202 S.E. 2d 318 (1974).

[6] Defendants argue that plaintiffs made no application to the court for a default judgment. This argument is without merit as the judge acquired jurisdiction to dispose of the entire case by entering a default judgment pursuant to G.S. 1-276 and Rule 55(b)(2). Defendants further argue that Rule 55(b)(2) required an appearing party to be served with written notice at least three days prior to the hearing on the application for judgment by default. If the action had come originally before the judge, defendants would be entitled to such notice as a condition to the entry of a default judgment. However, we hold that where defendants, an appearing party, have brought the matter in controversy before the court as a result of their motion to set aside the clerk's order and there has been a full inquiry, defendants have, in effect, waived the notice requirement and are not entitled to further notice prior to judgment.

Affirmed.

Judges WEBB and HILL concur.

JEAN PHILLIPS v. RONNIE D. PHILLIPS

No. 7928DC953

(Filed 6 May 1980)

1. **Rules of Civil Procedure § 56— amendment of case number on motion for summary judgment**

The trial court did not err in permitting plaintiff to amend her motion for summary judgment by correcting the file number shown in the caption thereof

where plaintiff had used the file number of a prior case between the parties, at the time the motion was served the present case was the only case pending between the parties, and the notice attached to the motion and the contents of the motion clearly indicated that the motion was directed to the present case.

2. Judgments § 37.3— amounts owed under separation agreement—earlier judgment res judicata as to defenses

In an action to recover alimony owed under a separation agreement, defendant's defenses that the separation agreement was invalid because of duress on the part of plaintiff and because of a material breach by the plaintiff were barred under the doctrine of *res judicata* by a consent judgment entered in an earlier action between the same parties to recover an amount then due under the same separation agreement. However, the earlier consent judgment was not *res judicata* as to alleged breaches of the agreement by plaintiff which arose subsequent to the consent judgment and could not have been brought forward in the first suit.

APPEAL by defendant from *Israel, Judge.* Judgment entered 25 May 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals 28 March 1980.

On 12 June 1978 plaintiff instituted a breach of contract action based upon a separation agreement executed by the parties on 4 February 1976. Plaintiff alleged that the defendant owed $1,025.00 as of 8 June 1978. Plaintiff attached a copy of the separation agreement as an exhibit to her complaint. Defendant's responsive pleadings, filed on 15 September 1978, contained a general denial, the defense of duress, although denominated a counterclaim, and a further defense also, denominated a counterclaim based upon alleged material breaches of the separation agreement by the plaintiff. Defendant also asserted a third-party claim against his children, alleging that pursuant to the separation agreement he executed a deed to the third-party defendants for his interest in the parties' homeplace. Defendant seeks to have the deed declared void for lack of consideration and because it was executed under duress. Plaintiff's suit was given file No. 78CVD1226.

On 5 April 1979 plaintiff filed a motion for summary judgment and a notice for motion, which documents were served by mail on the defendant. In support of her motion, plaintiff alleged that in August 1977 she had instituted an action in small claims court for payment of arrearages then owing by the defendant. Upon a verdict in plaintiff's favor by the magistrate, defendant appealed to the district court. Thereafter, the parties signed a

consent judgment in favor of the plaintiff for the amount owing. Plaintiff alleged that the prior consent judgment is *res judicata* to all defenses which the defendant has asserted in the present action. Plaintiff attached a copy of the complaint and consent judgment entered in the small claims matter, file No. 77CVM2317. However, plaintiff's motion for summary judgment and notice were captioned with the file number from the small claims action (77CVM2317).

Prior to the trial on the matter, the trial judge granted plaintiff's motion for summary judgment as to defendant's defenses. Upon a hearing on the merits, plaintiff testified that the defendant owed $2,100.00 under the separation agreement. Defendant presented no evidence. On 25 May 1979 a Judgment was filed in which the court found that the defendant presented no evidence that the plaintiff had breached the separation agreement, and that the prior consent judgment is *res judicata* of the issues raised in defendant's counterclaim. Therefore, the trial court awarded plaintiff $2,100.00 and dismissed defendant's counterclaim. Defendant appealed.

Elmore & Elmore, by Bruce A. Elmore, Jr., for plaintiff appellee.

Riddle, Shackelford & Hyler, by George B. Hyler, Jr., for defendant appellant.

MARTIN (Robert M.), Judge.

[1] Defendant first contends that the court erred in hearing the motion for summary judgment in this cause when the motion was filed in 77 CVM 2317 rather than in this cause which is 78 CVD 1226.

When this case was called for trial, plaintiff requested a hearing on her motion for summary judgment. Defendant objected on the ground that there was no motion for summary judgment pending in this cause. Upon discovering that said motion had been given the wrong case number, plaintiff orally moved to be allowed to amend the caption number of the motion for summary judgment from 77 CVM 2317 to 78 CVD 1226.

Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure in order that decisions be had on the merits

and not avoided on the basis of mere technicalities. Rule 15, N.C. Rules Civ. Proc.; *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). "The philosophy of Rule 15 should apply not only to pleadings but also to motions where there is no material prejudice to the opposing party." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 714, 220 S.E. 2d 806, 809 (1975), *cert. denied* 289 N.C. 619, 223 S.E. 2d 396 (1976). The motion for summary judgment was properly filed with the court pursuant to Rule 5(d) and (e), N.C. Rules Civ. Proc., governing the filing of pleadings and other papers, within two months of the date of trial and was properly served on the attorney for defendant. At the time the motion was served the subject case was the only case pending between plaintiff and defendant. The notice attached to the motion and the contents of the motion clearly indicate that it is directed to the subject case rather than to 77 CVM 2317. Defendant has demonstrated no prejudice arising from the incorrect case number. As in *Taylor* the trial court averted a decision on the basis of a mere technicality in allowing plaintiff to amend the file number and in proceeding to hear the motion on its merits.

[2] Defendant further contends that the court erred in allowing plaintiff's motion for summary judgment based on a plea of *res judicata*.

"An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit." (Citations omitted.) *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E. 2d 799, 805 (1973), quoting *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962). A consent judgment, as well as a judgment on trial of issues, is *res judicata* as between the parties upon all matters embraced therein. *McLeod v. McLeod*, 266 N.C. 144, 146 S.E. 2d 65 (1966). The plea of *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties *exercising reasonable diligence*, might have brought forward at the time and determined respect-

ing it. *Painter v. Board of Education*, 288 N.C. 165, 217 S.E. 2d 650 (1975).

In applying these principles to the case *sub judice*, we think defendant's defenses that the deed of separation was invalid due to duress on the part of the plaintiff and because of a material breach of the separation agreement by the plaintiff are barred by the earlier judgment involving the same plaintiff and defendant and the same subject matter. In the earlier action, plaintiff alleged that defendant owed her "[a]limony since June 15, 1977—275.00 $25.00 per week." This claim was based on a separation agreement which plaintiff and defendant entered into on 4 February 1976 whereby defendant promised to pay plaintiff the sum of $25.00 per week as alimony. In a consent judgment entered 28 February 1978 defendant represented by counsel consented to the following finding of fact: "That the Defendant owes the Plaintiff, pursuant to a separation agreement, the sum of $275.00 (Two Hundred Seventy-Five and 00/100 Dollars)," and was ordered to pay said amount. Although not specifically pled in the earlier action, the separation agreement is within the scope of the pleadings and forms the basis of plaintiff's right of recovery against defendant in both actions. The ultimate issue in both actions is the same, whether defendant failed to pay any sums which the separation agreement obligated him to pay.

The *res judicata* effect of the consent judgment on the present action falls squarely within an example set forth in *Cromwell v. County of Sac.*, 94 U.S. 351, 352-53, 24 L.Ed. 195, 197-198 (1877).

> Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of considerations or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed.

Such is the case here as to the defense of invalidity of the separation agreement and the defense of breach of the separation agree-

ment where the breaches existed at the time prior to or at the time of the consent judgment.

Defendant correctly submits, however, that summary judgment on the ground of *res judicata* was not properly granted as to the defense of breach where the breaches arose subsequent to the consent judgment and could not have been brought forward in the first suit. Because the court, prior to the hearing of any evidence, allowed plaintiff's motion for summary judgment, which motion alleged that the consent judgment was "res judicata to all defenses which the defendant has assented [sic] to the above action," defendant was precluded from presenting evidence of those breaches which may have arisen after the consent judgment. For these reasons, summary judgment as it relates to all those defenses which are *res judicata* is affirmed. The order of the court allowing alimony is vacated and the cause is remanded to district court of Buncombe County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. BOBBY GLENN MOORE

No. 797SC1110

(Filed 6 May 1980)

1. Criminal Law § 99— court's statement concerning defendant's plea—error not prejudicial

Defendant was not prejudiced where the court, upon call of the case for trial, stated to the jury, "It's my understanding that the state has advised the Court that they intend to proceed on the basis of a second degree murder plea," since no objection to the statement was made by defendant at the time, and the court and the jury understood defendant's plea to be "not guilty."

2. Homicide § 21.7— second degree murder—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for second degree murder where it tended to show that a party was in progress at defendant's house on the night in question; before deceased arrived at the party, defendant showed his guests a shotgun with a shell that went in it; defend-

ant stated that he would use the gun if he had to; prior to deceased's coming into defendant's house, defendant stated that he wished deceased had not come because they did not get along; when defendant got the gun later in the evening and told everyone to be quiet, he pointed it at deceased and said "especially you"; deceased snickered and the gun went off; and witnesses did not see defendant point the gun at anyone else or see defendant stumble or get bumped.

3. Jury § 9; Criminal Law § 101— alternate juror discharged—recall within minutes—absence of findings not prejudicial

Where an alternate juror had been dismissed for no more than two or three minutes before his recall, and there was no evidence that the juror spoke to anyone or listened to anyone during his brief stay in the courtroom, defendant was not prejudiced by the trial court's failure to make findings of fact that the juror could again accept his oath and disregard any comments that may have been made by the public while he was discharged.

APPEAL by defendant from *Reid, Judge.* Judgment entered 6 July 1979 in Superior Court, WILSON County. Heard in the Court of Appeals 16 April 1980.

The defendant was tried for the murder in the second degree of Andy Earl Jones, and was convicted of voluntary manslaughter. The State's evidence tended to show that the defendant and his girl friend invited several people to their home on the night of 16 February 1979 where the parties drank liquor and beer and smoked some marijuana. Among the guests was the decedent. Prior to the arrival of Andy Earl Jones, when the party became noisy, the defendant brought out a shotgun and shell and said he would use it if he had to. Later in the evening, Andy Earl Jones arrived, and the defendant was heard to say that he wished Jones had not come over; that the defendant did not like Jones and did not get along with him. Later in the evening, about 1:00 a.m., there was much loud talking and laughing. The defendant appeared with the gun, pointed it at the deceased and said: "Everybody's going to have to get quiet—especially you [Jones]." The deceased laughed, and the gun went off. After the shot was fired, the defendant said: "Oh, my God! What have I done;" and threw the gun down.

The judge instructed the jury on murder in the second degree, voluntary manslaughter, and involuntary manslaughter, and the jury returned a verdict of guilty of voluntary manslaughter. Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Rebecca R. Bevacqua, for the State.

Farris, Thomas & Farris, by Robert A. Farris, for defendant appellant.

HILL, Judge.

[1] Upon the call of the case for trial, the court stated to the jury: "It's my understanding that the state has advised the Court that they intend to proceed on the basis of a second degree murder plea." The defendant contends that such language gave the jury the impression defendant had pled guilty to murder in the second degree and that the language constitutes reversible error. Such contention is without merit. Furthermore, we note no objection to the statement was made by the defendant at the time. A thorough reading of the entire record makes it clear that the court and the jury understood defendant's plea to be "not guilty." In no way was the defendant prejudiced by the judge's "slip of the tongue." This assignment of error is overruled.

The defendant next contends the trial judge erred in admitting improper evidence over the defendant's objections and in excluding competent evidence elicited by defendant at trial We will examine the questions in some detail.

On cross-examination, the defendant asked Deputy Sheriff Poythress why he had failed to bring to the stand copies of statements made by eyewitnesses. The trial judge ruled the defendant would not be allowed copies of the statements until such time as the eyewitnesses testified, and at such time the defendant would be allowed copies of the statements for impeachment purposes. The defendant contends he was placed at a disadvantage in preparing his defense by the delay in receiving such statements. The position taken by the trial judge is well within his discretion in controlling cross-examination.

Defendant then asserts the trial judge interrupted his cross-examination of a witness by suggesting an answer to the witness. Specifically, the witness had testified to a statement made by the defendant that he wished the deceased had not come to the party and the defendant's counsel had asked the witness why he had

failed to tell this during district court proceedings. The trial judge pointed out that there was no evidence the question was asked in the district court. Such action by the trial judge did not prejudice the defendant. The trial judge only kept the record straight.

Next, the district attorney questioned a witness as follows:

Q. Now, I believe Mrs. Moore testified that no one was ever shown a shotgun shell on that night, but you say that's not correct?

(Objection by Mr. Farris.
Overruled.)

A. Yes, Sir.

(Motion to Strike by Mr. Farris.
Denied.)

Admittedly, the question was leading and improper as to form, but we fail to see how the defendant suffered any prejudice.

Likewise, defendant asserts it was improper for the district attorney to question the defendant on cross-examination about prior convictions for impeachment purposes. This is a common practice and generally accepted. *State v. Miller*, 281 N.C. 70, 78, 187 S.E. 2d 729 (1972). When we look at all the questions in the assignment of error to which the defendant objects, we do not find sufficient prejudice to warrant a new trial, and, therefore, overrule this assignment of error.

[2] The defendant contends the trial court erred in denying his motion to dismiss at the end of the State's evidence and at the conclusion of all the evidence. Defendant contends that the evidence points to nothing more than an accidental killing. This argument is without merit.

The State presented the testimony of Timothy Webb who testified as follows regarding the events on the night Andy Jones was killed: that when they got to defendant's house the defendant showed them a shotgun, along with a shell that went in it; that the defendant said he would use the gun if he had to; that prior to Andy Jones' coming into the defendant's house, defendant said he wished Jones hadn't come because they didn't get along; that

when defendant got the gun later in the evening and told everyone to be quiet, he pointed it at Jones and said, "especially you"; that Jones snickered and the gun went off; and that defendant did not point the gun at anyone else nor did he see defendant stumble or get bumped.

The State also offered the testimony of Karen Strickland who testified as follows: that she had heard defendant say he didn't like Jones; that the defendant showed them the shotgun and the shell; that later the defendant went and got the gun, told everybody to be quiet, and standing right in front of Jones said "especially you"; that Jones kind of laughed and then the gun went off; that the breech on the shotgun was closed when the defendant stood in front of Andy; and that she didn't see the defendant bump anything or anybody.

The State further presented the testimony of Rhonda Glover. Glover testified to the following: that before Jones got to the defendant's house, the defendant showed them the gun and the shell and said he would use the gun if he had to; that the defendant said he didn't like Jones; that the defendant went to get the gun later in the evening, came out of the bedroom walking real fast and went straight to where Jones was; that the defendant told everybody to be quiet, looked at Andy and said "especially you"; that when Jones laughed, the defendant shot him; and that she didn't see the defendant bump into a door or get bumped.

And finally, the State presented the testimony of Ralph Lamm, who testified: that the defendant pointed the breeched shotgun at Jones so that the barrel was actually touching him when the gun went off; that he didn't see defendant point the gun at anyone else; that he didn't see anyone bump into defendant; and that he had heard of the defendant and Jones being in fights.

The State's evidence is sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the second degree where as here it tends to show that the defendant intentionally inflicted a wound with a deadly weapon which caused deceased's death. *State v. Hodges*, 296 N.C. 66, 72, 249 S.E. 2d 371 (1978). The defendant's motions to dismiss were properly denied.

Defendant has grouped together six unrelated exceptions without citing a single authority in support, which he contends

point to prejudice in the court's instructions. The burden is on the defendant, not only to show error, but also to show that the error complained of adversely affected him. *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968). We have examined the exceptions which make up this assignment of error and conclude defendant has shown no error in the instructions made by the judge to the jury which would adversely affect the defendant.

[3] Finally, defendant contends the trial judge erred in recalling an alternate juror. At the end of the case, the alternate juror was dismissed, and took a seat among the public. Almost immediately one of the original twelve jurors notified the court that she had discovered she knew some of the people involved and such knowledge would affect her decision. The court dismissed her and replaced her with the alternate juror. While the defendant did ask to note an exception, he gave no reason and declined an invitation to question the juror.

Defendant contends the trial judge should have made findings of fact that the juror could again accept his oath and disregard any comments that may have been made by the public while he was discharged. The alternate juror had been discharged for no more than two or three minutes before his recall. There is no evidence that the juror spoke to anyone or listened to anyone during his brief stay in the courtroom. It may have been the better practice to have the trial judge make findings of fact under the circumstances, but we fail to see any prejudice accruing to the defendant. The assignment of error is overruled.

In the trial of the case below, we find

No error.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. THEODORE HEDGEPETH

No. 7910SC1085

(Filed 6 May 1980)

Homicide § 28.4— defense of habitation—necessity for instruction

The trial court in a second degree murder case erred in failing to charge the jury on defense of habitation where there was evidence tending to show that defendant was an 81 year old man in poor health; deceased was a fugitive from a mental institution, his age was in the forties, and he weighed 178 pounds; defendant ordered deceased to leave his home after deceased had threatened defendant's life and defendant had retreated into his home; deceased warned defendant of his intent to return and kill him; deceased thereafter came onto the porch of defendant's home, stuck his head around the door frame, and renewed his threats; defendant shot deceased when deceased again stuck his head around the door frame; and defendant's wife and six month old granddaughter were also in the home.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 10 July 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 26 March 1980.

The defendant Theodore Hedgepeth is an eighty-one year old retired farmer, in poor health, having suffered a stroke within the past two years. He was tried on an information charging him with the second degree murder of James Newkirk, having voluntarily waived the finding and return of a true bill. Decedent was a man in his forties, five feet nine inches tall, and weighed 178 pounds. He was a fugitive patient from Dorothea Dix Hospital. The jury returned a verdict of guilty of voluntary manslaughter, and the judge sentenced defendant to an active sentence of five years. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

McDaniel & Heidgerd, by C. Diederich Heidgerd; and J. Franklin Jackson, for defendant appellant.

HILL, Judge.

Although defendant brings forward three assignments of error, we conclude that one is dispositive of this case. The following facts appear of record:

The defendant and the decedent met at a county filling station, went to an A.B.C. store, purchased a quart of whiskey which they began drinking, and then went to the defendant's home, a four-room frame dwelling with a small foyer and front porch. The foyer abutted defendant's bedroom. Defendant's wife was somewhere about the premises, and a six-month old granddaughter was lying on a bed in the house. The decedent went into the house and brought the baby onto the porch. Defendant directed the decedent to take the baby back into the house because the weather was cool. Decedent returned the baby, came back to the porch and as he passed the defendant on an apparent course toward his car, told defendant: "I will come back here in the house and kill you." When he said that, decedent was standing in the yard. The defendant testified that when Newkirk came from inside the house back to the porch he was acting funny; he acted like he ". . . was gonna make a break and jump on me." Defendant further testified that he had never ". . . seen the decedent act like that. He was acting like the fool there all at once."

The defendant went into the house and told decedent to get in his car and leave, to go on home. Defendant testified, "[I] heard something walking on the porch I thought it was my wife. I thought maybe he [decedent] had done gone home, and I see a big black face peeping in there at me." Defendant also testified that, "After I told him to leave he just kept coming. He would peep his head around [the door frame] and then go back. I couldn't see his body part." Defendant stated at various points in his testimony that, "The first time [decedent] stuck his head in and I loaded my gun . . . ." "I was scared of him . . . ." "He said I'm gonna kill you when he stuck his head in the door, and he took his head back, and I couldn't see it . . . ." "When he peeped around I shot him in the neck because it is the only thing I could see." "I was scared of him." "I was looking after my house when I shot Mr. Newkirk."

There were blood spots on the refrigerator on the porch, on the floor of the porch, going down the steps, and on the gun barrel. The decedent's body had a wound of approximately one and one-fourth to one and one-half inches in diameter, indicating he was shot from a distance of about six or seven feet.

A psychiatrist from Dorothea Dix Hospital testified the decedent was suffering from psychotic depression and would have been unpredictable without his medication, and that when drinking alcohol would have been impulsive. The petition for admission to Dorothea Dix Hospital indicated Mr. Newkirk had been threatening his thirteen-year-old daughter and that he said he needed to kill.

The court charged the jury on the doctrine of self-defense within the home. The defendant contends he was entitled to a charge on defense of his habitation. We concur in the defendant's contention.

Justice Branch (now Chief Justice) summarized the holdings of the North Carolina courts in the areas of self-defense within the dwelling and the doctrine of defense of habitation in the case of *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979), in which he points out at page 158:

> It is apparent that the distinction between the rules governing defense of habitation and self defense in the home is a fine one indeed. As we have noted, however, the importance of the fine distinction between the two lies in different factual situations to which each applies. What constitutes 'reasonable apprehension' in the face of an attempted forcible entry into one's home may well differ from that which constitutes 'reasonable apprehension' when one is face to face with his assailant. We are of the opinion that a defendant is entitled to the benefit of an instruction on defense of habitation when he has acted to *prevent* [emphasis added] a forcible entry into his home. Such an instruction would be more favorable to a defendant than would an instruction limited to self defense.

In the same case, Justice Branch cites, as follows, on page 156:

> In *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1966), the distinction between the rules governing defense of habitation and ordinary self-defense was clarified. There Justice Sharp (now Chief Justice) wrote:
>
> > When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as

> would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally *prevent* the entry, even by the taking of the life of the intruder. Under those circumstances, 'the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family. . . . But the jury must be the judge of the reasonableness of defendant's apprehension.' [Emphasis added.]
>
> It is important to note that in *State v. Miller*, supra, this Court for the first time stated that 'the rules governing the right to defend one's *habitation* against *forcible entry by an intruder* are substantially the same as those governing his right to defend himself.'

The facts of the case *sub judice* require a holding that defendant is entitled to a charge on defense of habitation. We are aware that ". . . one of the most compelling justifications for the rules governing defense of habitation is the desire to afford protection to the occupants of a home under circumstances which might not allow them an opportunity to see their assailant or ascertain his purpose, other than to speculate from his attempt to gain entry by force that he poses a grave danger to them." *McCombs, supra*, at 157. We do not read *McCombs* as limiting the defense to that situation. Instead, the defense is limited to the situation where one shoots in order to prevent a forcible entry into his habitation.

Although defined as defense of habitation, the defense in reality is that of defense of person, for under no circumstances is the taking of life available as a defense for protecting property. We cannot believe the fear aroused in an occupant of a dwelling caused by one attempting to enter whose identity and motive are uncertain is greater than the fear experienced when a fugitive from a mental institution threatens to cross the threshold and threaten the life of the occupant.

The defendant had ordered Newkirk from the premises after his life was threatened and he had retreated into his house, be-

lieving the deceased had gone. By refusing to leave the defendant's yard and returning to the porch of the house, the deceased became a trespasser, an intruder attempting a forcible entry. The deceased had warned the defendant of his intent to return and kill him, thereafter coming onto the porch and renewing the threats and sticking his head around the threshold of the door. When we consider the size of the aggressor, his age, his threats, and his "funny actions" in contrast to the age, health, frailty and circumstances of the defendant and his right to protect himself, his infant grandchild and his wife, we conclude it is a jury question upon a proper charge whether defendant was acting within the framework of the defense of habitation when he shot the decedent.

The other issues raised by the defendant are moot in the light of our decision. We conclude the defendant is entitled to a

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

BURKE COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION v. THE SHAVER PARTNERSHIP

No. 7925SC800

(Filed 6 May 1980)

1. **Arbitration and Award § 1— Federal Arbitration Act—conflicting state law—applicability of Act**

If the Federal Arbitration Act, 9 U.S.C. § 2, applies to a particular contract, the Act supersedes conflicting state law, notwithstanding a choice of law provision in the contract.

2. **Arbitration and Award § 1— Federal Arbitration Act—transaction involving commerce—interstate shipment of goods required**

A "transaction involving commerce" within the meaning of the Federal Arbitration Act does not encompass transactions which do not involve or relate to actual physical interstate shipment of goods.

3. **Arbitration and Award § 1— contract for architectural services—inapplicability of Federal Arbitration Act**

The Federal Arbitration Act did not apply to a contract between the parties, the essence of which was for defendant to provide architectural services

to plaintiff for the construction of two high schools, since the evidence did not show that the contract was a transaction involving commerce.

APPEAL by defendant from *Griffin, Judge*. Orders entered 17 May 1979 and 26 June 1979, in the Superior Court of BURKE County. Heard in the Court of Appeals 5 March 1980.

This is an action for damages allegedly resulting from defects in the design of the roof on a school owned by Plaintiff Board of Education. Plaintiff seeks $150,000.00 in damages from Defendant.

Defendant responded by demanding arbitration of the dispute pursuant to the Rules of the American Arbitration Association and moved for a stay of the action pending arbitration.

Plaintiff denied the existence of an agreement to arbitrate and obtained a Temporary Restraining Order restraining any further proceedings in the arbitration.

The Court entered an Order denying defendant's motion to stay the lawsuit, and allowing plaintiff's motion to stay further arbitration proceedings. The Court held that the Federal Arbitration Act, which would require arbitration of the dispute, did not apply. Defendant gave notice of appeal.

Simpson, Baker, Aycock & Beyer, by Dan R. Simpson and Samuel E. Aycock, for the plaintiff.

Moore and Van Allen, by Jeffrey J. Davis, for the defendant.

MARTIN (Robert M.), Judge.

The question dispositive of this appeal is whether the contract between the parties is a transaction involving interstate commerce. The trial court found that the contract did not constitute a transaction involving commerce, but we are not bound by those findings of fact, and may look at all the evidence to determine whether in fact the evidence does show that the contract was a transaction involving commerce. *Setzer v. Annas*, 286 N.C. 534, 212 S.E. 2d 154 (1975).

[1] It is now well settled that if the Federal Arbitration Act, 9 U.S.C. § 2, applies to a particular contract, the act supersedes conflicting state law, notwithstanding a choice of law provision in the contract. In *General Atomic Co. v. Felter*, 436 U.S. 493, 56 L.Ed. 2d 480, 98 S.Ct. 1939 (1978) a New Mexico State trial court judge

had enjoined General Atomic Company from pursuing arbitration under the Federal Act. The Supreme Court, in applying the Federal Act to these state court proceedings, held that a state court had no power to enjoin resort to arbitration under the Federal Act.

The contract in the case *sub judice* contained an arbitration clause but whether the contract evidences a transaction involving commerce is seriously in question. *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 18 L.Ed. 2d 1270, 87 S.Ct. 1801 (1967), involved a "consulting agreement" between the parties, a Maryland corporation and a New Jersey corporation. This consulting agreement was closely associated with a contract pursuant to which the plaintiff purchased the defendant's multi-state paint business and transferred the manufacturing operation from New Jersey to Maryland. The United States Supreme Court held that "[t]he consulting agreement was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce." *Id.* at 401, 18 L.Ed. 2d at 1276, 87 S.Ct. at 1804-05.

[2] Justice Fortas, writing the opinion of the Court, referred by footnote to the legislative history of the Federal Arbitration Act in response to a dissent to his opinion written by Justice Black, who argued that the language "transactions involving commerce" should be limited to "contracts between merchants for the interstate shipment of goods." As noted by Justice Fortas, ". . . the House Report on this legislation . . . proclaims that '(t)he control over interstate commerce [one of the bases for the legislation] reaches not only the *actual physical interstate shipment of goods* but also contracts relating to interstate commerce.' " Id. at 401-02, 18 L.Ed. 2d at 1276, 87 S.Ct. at 1805 (citing H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). (Emphasis added.) The point concerning this language in Justice Fortas' opinion is that, while denying Justice Black's contention that the Federal Arbitration Act should apply only to contracts between merchants *for* the *interstate shipment of goods*, it seems clearly to equate the term "interstate commerce" with the phrase "actual physical interstate shipment of goods."

Justice Fortas' argument is summarized as follows:

> It would be remarkable to say that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce, but that an agreement relating to the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State is not.

Id. at 402, 18 L.Ed. 2d at 1276, 87 S.Ct. at 1805. It is thus manifest from *Prima Paint* that the term "transaction involving commerce" was not thereby expanded to encompass transactions which do not involve or relate to actual physical interstate shipment of goods.

In *Conley v. San Carlo Opera Company*, 163 F. 2d 310, (2d Cir. 1947) the plaintiff had contracted with the defendant for an option on plaintiff's services as an opera singer. A controversy arose, and the Opera Company claimed that the arbitration clause contained in the contract was governed by the Federal Arbitration Act and was therefore irrevocable. The court held that the contract did not evidence a transaction involving commerce, even though the plaintiff would be required to travel throughout the United States giving operatic performances. Thus, the act which consummated the contract was the singing and not the travel between the states.

Electric Co. v. Hospital Corp., 42 N.C. App. 351, 256 S.E. 2d 529 (1979) involved a contract between an electrical contractor and the Durham County General Hospital Corporation, wherein the electrical contractor contended the Federal Arbitration Act applied because some of the materials which it used in completing the electrical contract had been shipped in interstate commerce. We rejected this argument, deciding that the shipment across state lines of materials necessary for the electrical contractor to complete its performance under the contract was incidental to, and not the essence of, the contract.

[3] In the case *sub judice*, the affidavit of John Shaver, a general partner of defendant, submitted in support of the proposition that the contract evidences a transaction involving interstate commerce states:

> 2. At the time the building which is the subject of this action was designed and built, The Shaver Partnership had

offices in Salina, Kansas, Michigan City, Indiana, and Hickory, North Carolina.

3. Virtually all of the design work done for the building which is the subject of this lawsuit was done in Michigan City, Indiana.

4. Even during the construction phase, most of the field work was done by personnel working out of the Michigan City, Indiana office.

5. Approximately 85% to 90% of all the work done by The Shaver Partnership in fulfillment of its contract with respect to the building that is the subject of this lawsuit was done in Michigan City, Indiana.

6. All of the bookkeeping and accounting records maintained by The Shaver Partnership with respect to the design and construction of the building that is the subject of this lawsuit were maintained in Salina, Kansas.

7. Payments made by Plaintiff in this action to The Shaver Partnership for work done in the design of the building that is the subject of this lawsuit were made to The Shaver Partnership's office in Michigan City, Indiana.

8. In the course of the design of the building that is the subject of this lawsuit, personnel from The Shaver Partnership had numerous dealings with representatives of building material suppliers from all around the country concerning the specification of building materials for the construction of the buildings.

9. In fact, The Shaver Partnership did indeed specify the use of materials manufactured by suppliers in many different states, for the construction of the building that is the subject of this lawsuit.

10. In addition, in the course of performing the contract for the design of the building that is the subject of this lawsuit, The Shaver Partnership consulted with an Indiana food service consultant for the design of food service facilities for the building.

11. Also, the structural engineering design work, required for the design of the building that is the subject of this lawsuit, was performed for The Shaver Partnership by Carl Walker Associates, whose offices are in Kalamazoo, Michigan.

However, it is evident that the essence of the contract was for the defendant to provide architectural services to plaintiff for the construction of two high schools. The architectural services were the very heart of the contract, that is the consummation of it. The above factors incidental to the contract, many of which might go to establish diversity of citizenship between the parties, do not establish that the essence of the contract between the plaintiff and defendant involve commerce, *e.g.*, the interstate shipment of goods.

The Federal Arbitration Act is "based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" 388 U.S. at 405, 18 L.Ed. 2d at 1278, 87 S.Ct. at 1807. (Citation omitted.) The Act does not apply in this case for that the evidence does not show that the contract was a transaction involving commerce. The order entered by the trial court is

Affirmed.

Judges CLARK and ERWIN concur.

WALTER DUNN LAROQUE IV v. CATHERINE HOLM LAROQUE

No. 798DC1024

(Filed 6 May 1980)

Judgments § 19.1; Rules of Civil Procedure § 60.2; Trial § 1— improper calendaring of case—absence of notice—irregular judgment—meritorious defense—setting aside judgment

A divorce judgment was irregular because it was rendered in violation of the rules of practice concerning notice of the calendaring of a case for trial where plaintiff's attorney failed to send defendant a copy of the calendar request or certificate of readiness required by Rule 2(d) of the General Rules of Practice for the Superior and District Courts for the cases calendared earlier

than five months after the complaint is filed, and defendant received no notice of the trial which was held one day after her answer was filed and thirty days after the complaint was served. Therefore, defendant's motion to set aside the divorce judgment pursuant to Rule 60(b)(6) should have been allowed where plaintiff showed a meritorious defense to the divorce based on a separation for one year in that plaintiff and defendant had not lived continuously separate and apart for one year.

APPEAL by defendant from *Hardy, Judge.* Judgment entered 16 July 1979 in District Court, LENOIR County. Heard in the Court of Appeals 21 March 1980.

On 6 April 1979 plaintiff filed a complaint seeking an absolute divorce on the grounds of a one year separation which had begun on 1 April 1978. Defendant was served by registered mail in Maryland where she was residing on 9 April 1979. On 19 April 1979, plaintiff filed a calendar request with the Clerk of Superior Court in Lenoir County. In spite of the fact that no answer had been filed, the calendar request certified that "this request is not premature and that the case is ready for the hearing or trial requested" and requested that the divorce hearing be set for the 9 May 1979 session of Lenoir County District Court. The case was scheduled and printed in the calendar for trial on 9 May 1979 as plaintiff requested.

On 5 May 1979 defendant, unrepresented by an attorney, timely mailed her answer denying a continuous separation for one year, to plaintiff's attorney, who received it on 8 May 1979 and who filed the answer in the clerk's office on the same day. On the following day, 9 May 1979, the matter was heard without defendant's being either present or represented at the hearing. At the hearing, plaintiff introduced a statement made by the defendant in answer to a question contained in a Uniform Reciprocal Enforcement Support Act proceeding to the effect that plaintiff had last lived with defendant in April, 1978. A judgment of absolute divorce was rendered for plaintiff on grounds of one year separation.

On 15 June 1979, defendant filed a Rule 60(b) motion to set aside the judgment on grounds of excusable neglect and any other reason justifying relief. Both grounds are based on the fact that the hearing took place one day after defendant timely filed her answer and with no notice having been given to defendant of the date of the hearing. Defendant alleged a meritorious defense in

that plaintiff and defendant had not been living continuously separate and apart since 1 April 1978 but there had been several cohabitations after that date. Defendant further alleged that she had filed an action for divorce from bed and board in Maryland against plaintiff but was unable to obtain service. Additionally defendant moved pursuant to Rule 15 to be allowed to amend her answer to ask for the custody of their minor child, divorce from bed and board, alimony and counsel fees *pendente lite*, child support, division of personal property and other matters to which defendant would be entitled in the action.

From the order denying defendant's Rule 60 motion for relief from judgment of absolute divorce, defendant appealed.

Gerrans and Spence, by William D. Spence, for plaintiff appellee.

Perry, Perry & Perry, by Warren S. Perry and E. B. P. Worthington, for defendant appellant.

MARTIN (Robert M.), Judge.

The issue dispositive of this appeal is whether the court erred in its conclusion that defendant has shown no right to relief from the judgment of absolute divorce.

Subject to the provisions of Rule 40(a), N.C. Rules of Civ. Proc. and G.S. § 7A-146, the calendaring of civil cases is controlled by Rule 2 of the General Rules of Practice for the Superior and District Courts. Rule 2 provides that a ready calendar shall be maintained by the Clerk of Court and that five months after a complaint is filed the clerk shall place that case on the ready calendar. From the ready calendar a tentative calendar shall be prepared and shall be mailed to each attorney of record four weeks before the first day of court. A final calendar shall likewise be prepared and mailed to each attorney of record no later than two weeks prior to the first day of court. Rule 2(d) requires that "[w]hen an attorney desires a case placed on the ready calendar earlier than five months after complaint is filed, he shall file a certificate of readiness with the clerk, with copy to opposing counsel. The clerk shall immediately place said case on the ready calendar." Thus the rule contemplates that systematic notice of the calendaring of a case be given to a party at each stage of the calendaring process.

Although, once a court has obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause, the law does not require parties to "dance continuous or perpetual attendance" on a court simply because they are served with original process.

> "The law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. For this reason, the law establishes rules of procedure admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps and principles of natural justice demand that his rights be not affected without an opportunity to be heard." (Citations omitted.)

Collins v. Highway Commission, 237 N.C. 277, 281, 74 S.E. 2d 709, 713 (1953). Rule 2 of the Rules of Practice, by requiring notice of the calendaring of a case, secures to a party the opportunity to prepare his case for trial and to be present for trial or to seek a continuance. Although the rule specifies that the calendar be sent to each attorney of record and that the copy of the certificate or readiness be sent to opposing counsel, it is implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. We note that it has long been the practice in this State that when a party to an action does not have counsel, a copy of each calendar on which his action appears calendared for trial is mailed to him at the last address available to the Clerk. *See, e.g., Thompson v. Thompson*, 21 N.C. App. 215, 203 S.E. 2d 663, *cert. denied* 285 N.C. 596, 205 S.E. 2d 727 (1974).

In the case *sub judice*, a copy of the calendar request or certificate of readiness was not sent to defendant as required by Rule 2(d) when an attorney desires a case placed on the ready calendar earlier than five months after the complaint is filed. Nor is there anything in the record to show that there was a trial calendar mailed to defendant. Defendant received no notice of the trial which was held one day after her answer was filed and 30 days after the complaint was served.

We have often stated that a party to a legal action, having been duly served with process, is bound to keep himself advised as to the time and date his cause is calendared for trial for hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing. *Craver v. Spaugh*, 226 N.C. 450, 38 S.E. 2d 525 (1946); *Equipment Co. v. Albertson*, 35 N.C. App. 144, 240 S.E. 2d 499 (1978); *Thompson v. Thompson*, 21 N.C. App. 215, 203 S.E. 2d 663, *cert. denied*, 285 N.C. 596, 205 S.E. 2d 727 (1974). However, in each of those cases, a close examination of the facts reveals that the party or his attorney was sent a copy of the calendar on which his action appeared. The controlling fact in each case was neglect and inattention by the party or his counsel. There is no such neglect of her lawsuit by the defendant in the present case. Furthermore, were we to apply the rule of constructive notice, that when a case is listed on the court calendar, a party has notice of the time and date of hearing, such a rule bends to embrace common sense and fundamental fairness. *See Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490 (1969). We think common sense and fundamental fairness required that before the divorce could be granted, notice be given defendant of the trial when the trial was had one day after an answer was filed by the out-of-state defendant who had no reason to know that the case had been listed on the calendar.

We hold that the judgment in the present case is irregular because it was rendered in violation of the rules of practice respecting procedural notice of the calendaring of the case for trial. *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). Defendant has shown meritorious defense to the divorce based on one year separation in that plaintiff and defendant had not been living continuously separate and apart during the year beginning 1 April 1978. Defendant's motion to set aside the judgment pursuant to Rule 60(b)(6) should have been allowed. The court's order denying defendant's motion is reversed and the matter remanded to district court for consideration of defendant's motion to amend the answer and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges CLARK and ERWIN concur.

EDWARD McKINLEY TERRY, JR. v. CHARLES THURMAN TERRY, INDIVIDUALLY AND AS FORMER EXECUTOR OF THE ESTATE OF EDWARD McKINLEY TERRY, SR.

No. 7910SC881

(Filed 6 May 1980)

1. **Fraud § 9— insufficiency of complaint to state claim**

Plaintiff's allegation that his father, at a time when his physical health was fast deteriorating, transferred his interest in the business owned by him and the defendant to the defendant for $25,000, coupled with plaintiff's "belief" that the value of his father's interest far exceeded the price paid by defendant, was not a sufficient pleading of actionable fraud as required by G.S. 1A-1, Rule 9(b).

2. **Executors and Administrators § 11— executor's improper approval of sale alleged—insufficiency of complaint to state claim**

Allegation by plaintiff, deceased's son, that defendant, brother of deceased, while acting as executor of his brother's estate, engaged in self-dealing and breached his fiduciary duty in approving a contract for the sale of deceased's interest in a retail business to defendant failed to state a claim for relief, since the sales contract was executed and the transfer of plaintiff's father's interest to defendant consummated three weeks before the father's death, and defendant did not qualify as executor of the estate until some time thereafter.

3. **Appeal and Error § 6.6— denial of motion to dismiss—no appeal**

No appeal lies from the denial of a Rule 12(b)(6) motion to dismiss.

APPEAL by plaintiff and defendant from *Britt, Judge.* Order entered 16 August 1979 in Superior Court, WAKE County. Heard in the Court of Appeals on 20 March 1980.

In this civil proceeding plaintiff undertakes to allege six separate claims for relief against the defendant. The defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted was allowed with respect to the first, third, fourth and sixth claims, and denied as to the fifth claim. Plaintiff took a voluntary dismissal with prejudice with respect to his second claim, and appealed. Defendant appealed from the denial of his motion to dismiss the fifth claim.

Tharrington, Smith & Hargrove, by Steven L. Evans, for the plaintiff appellant.

Emanuel & Thompson, by W. Hugh Thompson, and Yeargan & Mitchiner, by Joseph H. Mitchiner, for the defendant appellant.

HEDRICK, Judge.

In his first claim for relief, plaintiff alleged that he was a devisee under the will of his father who, prior to his death on 25 February 1977, had been president and, until 31 May 1973, sole stockholder of a retail furniture and appliance business in Raleigh. He further asserted that his father's physical condition had declined rapidly and drastically due to cancer in the two months before his death; that his father was confined to bed and was administered heavy doses of medication for intense pain during that time; and that three weeks before his death, his father had signed a document "purporting to transfer all of his [deceased's] interest in Terry's Furniture Company, Inc." to the defendant for $25,000.00. Defendant is the brother of the deceased and was employed by the deceased "to assist in running the store and to keep the books of the store." On 31 May 1973 deceased had transferred "by gift" 1,087 shares of stock in the company to defendant. Although plaintiff witnessed the signing of the document transferring all interest in the business to the defendant, he alleged that he was under such "severe emotional distress" that he did not understand the contents of the document. He claimed that he did not learn of the transfer until more than a year following his father's death; that he was fired from his job at the store shortly thereafter; and that defendant had refused to allow him an opportunity to inspect the books and records of the company to determine the value of his father's interest, but upon information and belief, he alleged that the value "was far in excess" of the $25,000.00 paid by defendant. Plaintiff then alleged the following:

> 18. [Defendant] knowingly and willfully, and with the intent to deceive, fraudulently induced his brother and business associate, Edward McKinley Terry, Sr., [deceased] to sell his interest in Terry's Furniture Company, Inc. at a grossly inadequate price, and such deceit occurred at a time when Edward McKinley Terry, Sr. was confined to his bed, nearly blind, unable to talk or hear clearly, suffering from intense pain, and under heavy medication.
>
> 19. [Defendant] knowingly and willfully, and with the intent to deceive, misrepresented to plaintiff following the death of plaintiff's father the circumstances surrounding his

alleged purchase of plaintiff's father's interest in Terry's Furniture Company, Inc. and that plaintiff should trust his uncle to protect plaintiff's interest.

Plaintiff claimed that the "deceit" thereby perpetrated entitled him to recover as damages the difference between the "true market value" of his father's interest and the $25,000.00 paid by defendant.

[1] The question presented by plaintiff's appeal from the dismissal of this first claim is whether his allegation that his father, at a time when his physical health was fast deteriorating, transferred his interest in the business owned by him and the defendant to the defendant for $25,000.00, coupled with the plaintiff's "belief" that the value of his father's interest far exceeded the price paid by defendant, is a sufficient pleading of actionable fraud as required by Rule 9(b), G.S. § 1A-1. We think not.

> "Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated 'that fraud is better left undefined,' lest, . . . 'the craft of men should find a way of committing fraud which might escape a rule or definition.' "

Roberson v. Williams, 240 N.C. 696, 701, 83 S.E. 2d 811, 814 (1954) [quoting from *Furst v. Merritt*, 190 N.C. 397, 404, 130 S.E. 40, 44 (1925)]. However, the vitals of the creature are well established: "There must be a misrepresentation of material fact, made with knowledge of its falsity and with intent to deceive, which the other party reasonably relies on to his deception and detriment." *Moore v. Wachovia Bank and Trust Co.*, 30 N.C. App. 390, 391, 226 S.E. 2d 833, 834 (1976); *see also Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). Additionally, the plaintiff must sufficiently plead his cause by stating all material facts and circumstances allegedly constituting the fraud "with particularity." Rule 9(b), G.S. § 1A-1. It has been held by this Court that the rule requires the pleader to state the time, place and content of the alleged fraudulent undertaking. *Coley v. North Carolina National Bank*, 41 N.C. App. 121, 254 S.E. 2d 217 (1979). Clearly, the recitation of "[m]ere generalities and conclusory allegations" is not suf-

ficient to plead fraud. *Moore v. Wachovia Bank and Trust Co., supra* at 391, 226 S.E. 2d at 835; *see also Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979).

When we examine the pleading before us in light of these requirements, we find it deficient. The only facts plaintiff has alleged are that the business was conveyed three weeks before his father died and that his father was very ill at the time. He has alleged no facts respecting the content of the negotiations between his father and the defendant prior to the signing of the document transferring the business, and he concedes in his argument on appeal that he does not know the substance of the transactions between his father and the defendant. He has alleged no facts which would demonstrate that the defendant acted intentionally to deceive him, nor in our opinion, has he pleaded any facts from which such an intent could be inferred. Although he asserts that the price paid by the defendant was grossly inadequate, he has alleged no facts to show the "true market value" of the interest transferred so that we can weigh the adequacy of the price. In short, plaintiff has pleaded no facts to support his general allegation that the defendant fraudulently induced the transfer of the deceased's interest in the store. That allegation, in the absence of facts on which it can stand, is a mere conclusion on the plaintiff's part.

We are not unsympathetic to the plaintiff's plight and his supposed inability to gather the facts, if they exist, to support his pleading. We are not inadvertent to the fact that his father was very ill at the time he transferred his interest in the business to the defendant. On the other hand, we cannot overlook the facts, also contained in the plaintiff's complaint, that his father and the defendant were brothers; that they had worked closely together in the business for many years; and, most significantly, that his father had transferred *by gift* a number of shares of stock in the business to the defendant almost four years prior to his death. It would require the rankest speculation on our part to supply the facts and circumstances necessary to make out a case of actionable fraud for this plaintiff. That we will not do. We hold that the defendant's motion to dismiss the plaintiff's first claim for relief was properly granted.

For the same reasons, plaintiff's fourth claim for relief must fall. We believe that plaintiff has but stated in different words his general allegation of fraud when he alleges in the fourth claim that the defendant induced the transfer by exercising "deceit and influence" over the deceased. He has pleaded no new or additional facts in the fourth claim, and it likewise was properly dismissed.

[2] In his third claim for relief, plaintiff alleged that the defendant, while acting as executor of his father's estate, engaged in "self-dealing" in that he had a duty, as executor, to refuse to approve the contract for the sale of the deceased's interest in the company since the contract was not "in the best interest of the estate." Defendant's approval of the contract, in plaintiff's view, constituted a breach of fiduciary duty.

Here we think the complaint patently fails to state a claim for relief, since the sales contract was executed and the transfer of plaintiff's father's interest to defendant consummated 21 days before Mr. Terry's death. Also, defendant did not qualify as the executor of the estate until some time thereafter. While the defendant as executor obviously had fiduciary duties, manifestly the defendant owed no fiduciary duties to the deceased or to plaintiff at the time he purchased the interest in the store. The trial court correctly allowed defendant's Rule 12(b)(6) motion to dismiss this claim.

Finally, plaintiff asserted in his sixth claim for relief that he was entitled to punitive damages for being "deceived, oppressed, and embarrassed by the false actions and representations" of the defendant. It is hardly necessary to observe that damages are not awarded in a vacuum. Having failed to state a claim for relief based on fraud, *a fortiori* plaintiff has failed to assert a claim for punitive damages.

[3] Defendant purports to appeal from the denial of his motion to dismiss the plaintiff's fifth claim for relief. No appeal lies from the denial of a Rule 12(b)(6) motion. *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). Therefore, defendant's appeal will be dismissed.

The result is: With respect to plaintiff's appeal, the Order dismissing his first, third, fourth and sixth claims for relief is affirmed; with respect to defendant's appeal from the denial of his

motion to dismiss the fifth claim for relief, the appeal is dismissed.

Affirmed in part; dismissed in part.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. KERMIT HONEYCUTT

No. 7912SC999

(Filed 6 May 1980)

Criminal Law § 35— declarations against penal interest—nonretroactivity of decision

The decision of *State v. Haywood*, 295 N.C. 709, which changed a rule of evidence by holding that declarations against penal interest are now admissible in evidence under certain conditions, is not to be applied retroactively but is to be applied only to trials begun after 28 November 1978, the date of that decision.

ON certiorari to review the Order of *Brewer, Judge.* Order entered 27 June 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals on 18 March 1980.

The defendant in this case was originally tried and convicted in September 1977 of assault with a deadly weapon inflicting serious injury. From a judgment sentencing him to ten years' imprisonment, he appealed to this Court, assigning as error the trial court's exclusion of an out-of-court comment allegedly made by a third party to the defendant's sister, which defendant claimed was against the penal interest of the declarant. He argued that his sister should have been allowed to testify as to the contents of the declaration. In a decision filed 20 June 1978 and reported at 37 N.C. App. 50, 245 S.E. 2d 376, we held, per Judge Parker, that the statement was properly excluded as hearsay since this State did not recognize declarations against penal interest as valid exceptions to the hearsay rule. Defendant's trial was found to be without error and his conviction was thus affirmed.

Thereafter, on 17 May 1979, defendant filed in the Superior Court a motion for appropriate relief "pursuant to N.C.G.S 15A-1411 et seq." As grounds for relief, he set out the following:

> 5. That the Supreme Court of North Carolina has now changed the rule of evidence which the . . . defendant carried forth as an issue to the North Carolina Court of Appeals and Chief Justice Susie Sharp has concluded that it is in the best interest of the administration of justice that declaration[s] against penal interest be admitted under certain stated conditions.
>
> 6. That the change in the rule of evidence is set forth in *State of North Carolina vs. Paul Austin Haywood,* [295 N.C. 709, 249 S.E. 2d 429, filed 28 November 1978] . . .
>
> 7. That the above is a significant change in the substantive law of the State of North Carolina as applicable to the proceedings leading to the defendant's conviction and sentence and retroactive application of the changed legal standard is required.

On 29 June 1979 Judge Brewer entered an Order allowing the defendant's motion and awarding him a new trial. On 3 October 1979 we allowed the State's petition for a writ of certiorari.

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

Blackwell, Thompson, Swaringen, Johnson & Thompson, by E. Lynn Johnson, for the defendant appellee.

HEDRICK, Judge.

The State argues that Judge Brewer erred in granting the defendant's motion for appropriate relief and ordering a new trial for the reason that the change in evidentiary law announced by *State v. Haywood,* 295 N.C. 709, 249 S.E. 2d 429 (1978), upon which defendant based his motion and Judge Brewer relied for his decision, should be accorded prospective effect only.

Defendant specifically brought his motion for relief pursuant to G.S. § 15A-1415(b)(7) which provides grounds for relief from judgment at any time after verdict where "[t]here has been a significant change in law, either substantive or procedural, ap-

plied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required."

That the opinion of the Supreme Court in *Haywood* effected a change in the law of this State is not and could not be disputed. Prior to the decision, and dating as far back as the opinion of the Court per Chief Justice Ruffin in *State v. May*, 15 N.C. 328 (1833), we have ruled inadmissible for all purposes so-called declarations against penal interest, that is, extrajudicial confessions of a third person that he or she committed the crime for which the defendant is being tried. Chief Justice Sharp, speaking for the Court in November 1978, rejected the rule and concluded that "it is in the best interests of the administration of justice that declarations against penal interest be admitted" under stringent conditions which she thereafter set forth. *State v. Haywood, supra* at 730, 249 S.E. 2d at 442. The inquiry in the case now before us is simply whether retroactive application of the changed legal standard is required. That is, before the motion for appropriate relief can be available in this case, it must be found that *Haywood* requires retrospective application. Thus, we do not confront the question whether the facts of the instant case bring it within the conditions mandated by *Haywood.*

It is obvious without elaboration that we are dealing with a change in a rule of evidence, as the opinion in *Haywood* repeatedly notes. Although our inquiry does not necessarily end with that observation, we agree with the Attorney General that the relatively recent cases of *State v. Harris*, 281 N.C. 542, 189 S.E. 2d 249 (1972), and *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972), are relevant to and provide guidance for the decision in this case. In both *Harris* and *Daye*, the Court was faced with the question of whether to apply retroactively a change in an evidentiary rule announced some six months earlier in the case of *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), which held that a witness, including the defendant in a criminal case, no longer could be cross-examined as to whether he had been indicted or was under indictment for a criminal offense other than the one for which he was then on trial. Justice Moore for the Court in *Harris* [filed the same day as the opinion of Justice (now Chief Justice) Branch for the Court in *Daye*] rejected the defendant's

contention that the change effected in *Williams* should be applied retroactively. He reasoned as follows:

> The change in the law that resulted from the *Williams* case was a change in a rule of evidence and affected no contractual or vested right of defendant. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952). The Court merely altered a rule of evidence which it had adopted some forty-four years ago. . . .

State v. Harris, supra at 549, 189 S.E. 2d at 253.

In thereafter concluding that the new rule of *Williams* would be applied prospectively only, Justice Moore was guided by a number of decisions of the United States Supreme Court, in particular *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967), a decision which we find especially enlightening in our analysis of the instant case. Six members of the *Stovall* Court agreed that a new evidentiary rule announced the same day, which required the exclusion of identification evidence tainted by exhibiting the accused to identifying witnesses in the absence of counsel, would not be given retroactive effect. Although the Court was convinced that the new exclusionary rule was justified "by the need to assure the integrity and reliability of our system of justice," its decision to apply the rule prospectively only was strengthened by "[t]he unusual force of the countervailing considerations." *Id.* at 299, 87 S.Ct. at 1971, 18 L.Ed. 2d at 1204-05. Most critically, the Court was persuaded against retroactive application by two factors: (1) the long-standing reliance of law enforcement authorities on the old rule, and (2) the potentially overwhelming disruption of and burden on the administration of the criminal justice system.

For more than a century, the law of this State held inadmissible hearsay statements against penal interest. We agree with the Attorney General that to give retroactive effect to the change in the law "could easily disrupt the orderly administration of our criminal law."

Our decision is bolstered by our belief that the change in evidentiary law effected by *Haywood* does not rise to the magnitude of a constitutional reform, such as a shift in the burden of proof or an alteration in constitutional guarantees, which most

likely would mandate retroactivity. *Cf. Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977). Indeed, Chief Justice Sharp noted in the *Haywood* decision that the case raised no constitutional issues. Neither did she intimate in any manner that the changed rule was to be retroactively applied. We do not think that the *Haywood* Court intended such a result. Nor do we believe that such a result is nonetheless required. It is our opinion, and we so hold, that the rule announced in *Haywood* applies only to trials begun after 28 November 1978, the effective date of that opinion.

For the foregoing reasons, we hold that the trial court erred in granting the defendant's motion for appropriate relief and ordering a new trial. His order entered 29 June 1979 is vacated.

Vacated.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. REBEL ALLEN COLE

No. 7925SC973

(Filed 6 May 1980)

Searches and Seizures § 37— jacket in car trunk—warrantless search incident to arrest for speeding unlawful

The trial court properly concluded that an officer's warrantless search of defendant's jacket was unlawful where the evidence tended to show that the officer stopped defendant for speeding; after seeing a pipe in plain view in the car and finding a pipe on defendant's person during a pat down prior to defendant's being put in the officer's car, the officer conducted a search of defendant's vehicle; in the trunk the officer observed a large winter jacket which defendant was using to carry his clothing; the officer then searched the pockets of the jacket and found four bags of marijuana; and the officer, having discovered the contents of the trunk and having taken them under his control, should have obtained a warrant before searching the jacket.

APPEAL by the State from *Snepp, Judge.* Order entered 25 July 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals 6 March 1980.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Wesley F. Talman, Jr. for the defendant.

WELLS, Judge.

The parties agree that the trial court's findings of fact are based on competent evidence, and we quote them here in their entirety:

1. On March 19, 1979, the defendant was operating a motor vehicle on Interstate 40 in Catawba County; he was observed by Trooper Richardson of the State Highway Patrol by means of radar operating at a speed of 65 miles per hour in a 55 miles per hour zone and Trooper Richardson stopped the defendant;

2. Trooper Richardson observed from the outside of the vehicle a portion of an orange color plastic water pipe which Trooper Richardson recognized from his experience in law enforcement as being the type used to smoke marijuana;

3. Trooper Richardson requested the defendant to come to his patrol car to observe the radar and before placing him in the patrol car he patted the defendant down which is standard practice before placing anyone in a State Highway Patrol vehicle;

4. That as a result of the pat down the trooper discovered in the pocket of the defendant's flannel shirt a wooden pipe of the type known by the trooper from his experience to be used to smoke marijuana;

5. The trooper then took the car keys from the defendant and searched the interior of the vehicle and in a closed ashtray found another pipe used to smoke marijuana and observed some green seeds on the floor and ashes in the ashtray;

6. The trooper then unlocked the trunk of the car; in the trunk the defendant had a large winter type of jacket within which was other clothing; that the trooper reached in the pocket of the jacket and extracted therefrom articles which the State proposes to introduce into evidence in this trial;

7. The automobile then was locked; the defendant was taken some two hours later before a magistrate; that at the time that he was taken from the scene, he was under arrest for speeding; that his automobile was hauled in to the Catawba County Sheriff's Department by a wrecker ordered by the trooper;

8. The defendant was not charged with any violation of the controlled substance act on that occasion but a bill of indictment charging him with felonious possession of marijuana was later returned by the grand jury of Catawba County. . . .

Based upon these findings the trial court concluded that Trooper Richardson had probable cause to stop defendant's vehicle for speeding, and that upon his observing the water pipe as well as the pipe found in defendant's shirt pocket, the officer had probable cause to search defendant's vehicle. However, the court determined that, having taken defendant's vehicle and jacket under his control, the officer's warrantless search of the jacket was unlawful. The court granted defendant's motion to suppress the four bags of marijuana found in defendant's jacket.

We do not discuss the legality of the search of the vehicle since the question has not been raised. This appeal presents only one issue—the lawfulness of the warrantless search of defendant's jacket under the Fourth Amendment to the Constitution of the United States, which prohibits unreasonable searches and seizures. In *Arkansas v. Sanders*, 442 U.S. 753, 61 L.Ed. 2d 235, 99 S.Ct. 2586 (1979) the police had probable cause to believe the suitcase the defendant was carrying contained marijuana. The defendant's taxi was stopped and searched and defendant's suitcase was seized by the police from the trunk of the taxi and searched at the scene without a warrant. The Supreme Court of the United States held that while the search of the vehicle was lawful, the immediate and warrantless search of defendant's luggage, which could have been taken along with the defendant to the police station where a warrant could have been obtained, violated the Fourth Amendment. The Court stated that, "a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is

associated with luggage taken from other locations." 442 U.S. at 764, 61 L.Ed. 2d at 245, 99 S.Ct. at 2593. The Court concluded:

> Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. Where—as in the present case—the police, without endangering themselves or risking loss of evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected.

Id., 442 U.S. at 766, 61 L.Ed. 2d at 246, 99 S.Ct. at 2594; *cf.*, *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977) (warrantless search of footlocker seized from automobile trunk held unlawful); *accord*, *State v. Gauldin*, 44 N.C. App. 19, 259 S.E. 2d 779 (1979).

In *Sanders*, the Court distinguished between the police's right to search the suitcase and their right to seize it, stating that seizure was constitutionally preferable to immediate search, whenever practical, so that a detached magistrate could rule on the question of probable cause. *Id.*, 442 U.S. at 765-766, 61 L.Ed. 2d at 246, 99 S.Ct. at 2594, n. 14. The majority in *Sanders* noted, however, that

> [n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burgler tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. [Citation omitted.] There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other

> parcels depends not at all upon whether they are seized from an automobile.

Arkansas v. Sanders, supra, 442 U.S. at 764-765, 61 L.Ed. 2d at 245, 99 S.Ct. at 2593-2594, n. 13.

One of the effects of the Court's opinion in *Sanders* is that law enforcement officials and the courts are left with the difficult problem of determining which containers are protected and which are not. *Id.* (Blackmun, J. dissenting). The Federal circuit courts have extended the holding in *Sanders* to prohibit warrantless searches of other types of containers seized from vehicles. *United States v. Calandrella* and *United States v. Kaye,* 605 F. 2d 236 (6th Cir. 1979), *cert. denied,* ---- U.S. ----, 62 L.Ed. 2d 420, 100 S.Ct. 522 (1979) (briefcase); *United States v. Bella,* 605 F. 2d 160 (5th Cir. 1979) (guitar case); *United States v. Meier,* 602 F. 2d 253 (10th Cir. 1979) (backpack). We believe that the case *sub judice* is most analogous to the situation presented in *Meier.* In *Meier,* the Tenth Circuit reasoned, 602 F. 2d at 255:

> We perceive no significant difference between *Sanders* and the present case. *Sanders* involved a closed but unlocked suitcase lawfully taken from an automobile. Here we are concerned with a closed but unlocked backpack lawfully seized in the search of an automobile. A backpack would seem to be governed by the "suitcase" rule, as a backpack, like a suitcase, is a "repository for personal items when one wishes to transport them." *Arkansas v. Sanders,* 442 U.S. at 764 [61 L.Ed. 2d at 245], 99 S.Ct. at 2593.

In the instant case the trial court found, and the State does not contest, that the contraband was found in mid-March in the pocket of a large winter jacket within which defendant was transporting other clothing. Defendant's use of this large jacket at this time of the year as a container for his personal effects was obvious. As in *Sanders* and *Meier* the contents of the container were not in the plain view of the investigating officer. It is clear that the defendant had sought and expected no lesser amount of privacy with respect to the items enclosed in this "package" than that typically accorded a suitcase, briefcase, guitar case, and backpack. The trial court, having found no exigent circumstances which would justify immediate search of the jacket/container, correctly concluded that Trooper Richardson "having discovered the

contents of the trunk and taking [*sic*], them under his control, the coat could not [have] been searched without the issuance of a search warrant."

No error.

Judges HEDRICK and WEBB concur.

DAVID E. HANES AND WIFE, LINDA S. HANES v. JAMES H. KENNON

No. 7922SC868

(Filed 6 May 1980)

1. **Easements § 8.4 — right of way granted by deed — width and location**

In an action to determine the width and location of defendant's right of way across plaintiffs' land pursuant to a 1958 deed granting defendant a right of way "of such width as is necessary and reasonable to provide adequate ingress and egress over the grantor's property" to the property conveyed to defendant, the evidence supported the trial court's judgment allowing defendant a right of way 28 feet wide at a location generally along an existing roadway which is only 12 to 14 feet wide.

2. **Appeal and Error § 24.1 — failure to preserve exceptions and assignments of error — dismissal of appeal**

Appeal is subject to dismissal where appellants failed to make any reference to the assignments of error and exceptions pertinent to the questions presented and failed to identify them by number and by pages of the record at which they appear.

APPEAL by plaintiffs from *McConnell, Judge*. Judgment entered 4 May 1979, and amended judgment signed 26 May 1979 in DAVIDSON County Superior Court. Heard in the Court of Appeals 20 March 1980.

This is an action to determine the width and location of the defendant appellee's road right of way. Plaintiffs and defendant are the owners of adjoining parcels of land with a common source of title. Plaintiffs acquired title to their tract on 8 March 1978. The defendant acquired title to his tract 14 July 1958. Defendant's deed contained the following proviso:

> Also conveyed with this instrument is a road right of way leading from the Sowers Road through the grantor's property to the property conveyed herein. Said right of way is to be of such width as is necessary and reasonable to provide adequate ingress and egress over the grantor's property from the Sowers Road to the property herein conveyed.

The right of way serving the defendant's property runs through the property now owned by plaintiffs. There had been in existence for many years, even prior to the defendant's original deed, an old road approximately twelve to fourteen feet wide, across the property now owned by the plaintiffs. On or about 13 March 1978, defendant went onto the roadway and began clearing trees on either side for a total width of approximately thirty feet. Plaintiffs filed suit on 15 March 1978, asking that the defendant be restrained from enlarging the roadbed, and from trespassing on plaintiff's property outside of the existing roadbed. A preliminary injunction continuing the temporary restraining order in force was entered on 11 April 1978. The case was tried before the judge without a jury. Both parties stipulated prior to trial that all claims for damages would be waived and the only material issues for the jury were the width and location of the right of way. The trial judge visited the location of the roadway, heard witnesses, found facts, made conclusions of law, and entered a judgment dissolving the temporary restraining order and allowing the defendant a right of way twenty-eight feet wide at a location generally along the existing old roadway. Plaintiffs appealed.

W. L. Stafford, Jr., for plaintiff appellants.

Jerry B. Grimes and Beamer H. Barnes for defendant appellee.

HILL, Judge.

[1] Plaintiffs make eighteen assignments of error, based on twenty-five exceptions, and bring forward five questions for review. Plaintiffs succinctly assert, however, that the primary question to be resolved in the appeal is how much right of way was conveyed in 1958 by the deed to the defendant.

Plaintiff appellants contend there had been in existence across their servient tenement for a period of many years an old narrow right of way which had remained constant from the time the defendant acquired his right of way until March 1978, at which time the defendant asserted a right to a larger thirty-foot right of way. Plaintiffs cite *Borders v. Yarborough*, 237 N.C. 540, 75 S.E. 2d 541 (1953), as controlling, in which the Court, at page 542, says:

> It is stated in 110 A.L.R. Annotations, p. 175 'where the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances' (Citing numerous authorities); and also at p. 178 'It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and use of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.

Plaintiffs further contend the deed conveying the right of way should be construed in view of the circumstances and the intentions of the parties at the time of the execution of the deed in 1958. We agree.

The defendant appellee contends that the trial judge sat without a jury, visited the premises with counsel for both parties, heard the evidence, made findings of fact, reached conclusions of law, and entered judgment for the defendant. This Court is bound by the trial court's findings when there is competent evidence to support them. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368 (1975); *Scott v. Shackelford*, 241 N.C. 738, 86 S.E. 2d 453 (1955).

Plaintiffs have objected to admissibility of certain evidence considered by the court. We must keep in mind that a trial court sitting without a jury is deemed to have excluded any irrelevant and improper evidence. *State v. Davis*, 290 N.C. 511, 541, 227 S.E. 2d 97 (1976). The trial court has both the right and duty to seek information, particularly when it sits without the benefit of a jury to the end that justice will be done. *Everette v. Lumber Co.*, 250 N.C. 688, 694, 110 S.E. 2d 288 (1959).

We must now apply these basic principles of law to the facts of this case.

The only material issue is how wide the road easement granted in 1958 was.

Defendant testified that when he bought the land in 1958, he acquired it for building a house, possibly other houses in the future, and farming; that the existing road across the property was insufficient and inadequate in 1958; that he thought he was buying, and intended to buy, something more; that in 1958, the deed recognized the road was inadequate and empowered defendant to cut a new road wherever he wanted to; that he repaired a house using the existing road for delivery of materials when the weather was right; that he could not get in the road in rainy weather; that he had farmed the land over the last twenty years.

Mr. Myers, a land developer, testified an eighteen-foot road with six-foot slopes on either side, or twenty-two feet with an easement to trim the banks, would be sufficient; that the present road is not sufficient. Other witnesses testified a total of twenty-eight or thirty feet would be sufficient. Witness Joe Hedrick emphasized that thirty feet would have been adequate in 1958 and would be today.

Hence, it appears there was evidence to support the court's finding of facts, and we are bound thereby.

[2] Nevertheless, we must dispose of this case in another manner. The plaintiff appellants have failed to comply with the Rules of Appellate Procedure. The appellants summarized the questions for review at the beginning of appellants' brief. However, appellants failed to make any reference to the assignments of error and exceptions pertinent to the question and further failed to identify them by their numbers and by pages of the printed record at which they appear. Exceptions in the record not set out in the appellants' brief, or in support of which no reason or argument is stated or authority cited will be taken as abandoned. Rule 28(b)(3), Rules of Appellate Procedure. In the brief proper, appellants present arguments and refer to exception numbers and pages in the record, but do not tie the arguments to the question.

Exceptions not preserved and set forth as required by the Rules are deemed abandoned. For the reasons set out herein, the

appeal is subject to dismissal. The Rules of Appellate Procedure are mandatory. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979); *State v. Brown*, 42 N.C. App. 724, 257 S.E. 2d 668 (1979).

Appeal dismissed.

Judges PARKER and MARTIN (Harry C.) concur.

REBECCA LYNN DODD v. WILLIAM WYNN WILSON, BY HIS GUARDIAN AD LITEM JERRY C. JACKSON, AND JERRY C. JACKSON

No. 7926SC974

(Filed 6 May 1980)

Automobiles §§ 89.4, 90.9— failure to instruct on last clear chance—verdict of no negligence—insufficient evidence of last clear chance

In an action to recover damages sustained by plaintiff pedestrian when she was struck by a car owned and driven by defendants, the question of whether the trial court erred in failing to submit an issue as to last clear chance was rendered moot by the jury's verdict finding no negligence on the part of defendants; furthermore, this was not a case in which the doctrine of last clear chance applied, since the evidence tended to show that plaintiff, in full possession of her faculties, stood two or three feet out in a southbound lane and turned at an angle so that she was looking south, and defendant, who was traveling south without lights at 6:30 p.m., hit plaintiff without even seeing her.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 7 June 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 April 1980.

Plaintiff brought this action against defendants, the operator and owner of a motor vehicle, which struck plaintiff while she was crossing a highway. Defendants in answer to the complaint pled the defense of contributory negligence. Plaintiff filed a reply setting forth the doctrine of last clear chance. On trial of the case, the trial court refused to submit the case to the jury on the issue of last clear chance pled in plaintiff's reply. The case was submitted to the jury on the issues of defendant's negligence, plaintiff's contributory negligence and damages. The jury returned a verdict adverse to plaintiff finding no negligence on the part of defendant. Plaintiff appeals.

Sanders, London and Welling, by Alvin A. London and Charles M. Welling, for plaintiff appellant.

Golding, Crews, Meekins, Gordon and Gray, by John G. Golding and Ned A. Stiles, for defendant appellees.

VAUGHN, Judge.

Defendant assigns as error the trial court's refusal to submit the issue of last clear chance to the jury. We hold that the jury's verdict on the issues submitted to it renders this question moot.

The case was submitted to the jury on the issues of defendant's negligence, plaintiff's contributory negligence and damages. These issues as submitted and as answered by the jury were as follows:

> 1. Was the plaintiff, Rebecca Lynn Dodd, injured as a result of the negligence of the defendant, William Wynn Wilson?
>
> ANSWER: No
>
> 2. Did Rebecca Lynn Dodd by her own negligence contribute to her injuries?
>
> ANSWER: _____
>
> 3. What amount of damages, if any, is the plaintiff entitled to recover of the defendants?
>
> ANSWER: $_____

The jury's verdict of no negligence on defendant's part makes the doctrine of last clear chance a moot issue in this case.

"The doctrine of last clear chance presupposes antecedent negligence on the part of the defendant and antecedent contributory negligence on the part of the plaintiff, such as would, but for the application of this doctrine, defeat recovery." *Clodfelter v. Carroll*, 261 N.C. 630, 634, 135 S.E. 2d 636, 638 (1964); *Freight Lines v. Burlington Mills*, 246 N.C. 143, 97 S.E. 2d 850 (1957). The trial court properly and adequately instructed the jury on the issue of defendant's negligence. The jury was properly instructed that the other two issues of plaintiff's contributory negligence and damages need not be considered if the jury

answered the first issue in defendant's favor, *i.e.*, that defendant was not negligent. This was the answer the jury returned and it is supported by evidence presented in the case. If last clear chance were submitted as an issue, the jury would not have reached it based on the finding that defendant was not negligent. The jury's answer to one issue which determines the rights of a party can render exception concerning other issues moot. *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763 (1967).

This case should be distinguished from *Cockrell v. Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978), where the trial court erroneously refused to instruct on the doctrine of last clear chance. The pertinent issues submitted to the jury and the jury answers were as follows:

> 1. Was Mary Lynn Cockrell killed as a result of the negligence of the defendant, Johnny Harold Cavanaugh?
>
> ANSWER: No
>
> 2. Did Mary Lynn Cockrell by her own negligence contribute to her death?
>
> ANSWER: Yes.

Id. at 451, 245 S.E. 2d at 502. The Court held it was error not to instruct on the doctrine of last clear chance and that the error was not cured nor made moot by the jury verdict. In *Cockrell*, the Court was faced with a verdict resulting from the jury's not heeding the trial court's instruction *not* to consider the issue of the plaintiff's contributory negligence if it found no negligence on the part of the defendant. In the case at hand, there is no inconsistency in the jury finding of no negligence by defendant. The error or confusion on the part of the jury present in *Cockrell* is not present in this case.

Moreover, not only is the issue of last clear chance moot in this case because of the jury finding of no negligence on the part of defendant, this was not a case where the doctrine applies. Whether the doctrine applies is determined by the facts and circumstances of each particular case. Had the issue not been rendered moot by the jury finding, the issue would have been whether there was sufficient evidence, considered in a light most favorable to plaintiff, to require submission of the issue of last

clear chance to the jury. The evidence presented at trial would under this standard present the following.

After dark on 16 November 1977, plaintiff started to cross from the west to the east a two lane North Carolina highway which runs north and south. The area was lighted by a nearby streetlight and lights from businesses located nearby. Plaintiff walked a step or two into the southbound lane and stopped there for traffic which was coming north on the road. She turned at an angle so she could see the oncoming northbound cars. The defendant driver was travelling south on the road in the lane plaintiff was standing in. A friend of plaintiff, standing on the west side of the road saw defendant's car and screamed to plaintiff who then saw the oncoming car. It did not have any lights. She attempted to get out of the road but was struck by the right side of defendant's car. The defendant driver told the investigating officer he did not know he had hit anything but heard a scream and turned around 500 feet from where he hit plaintiff and came back. The road is straight for 960 feet from a hill crest to the point where plaintiff was hit. The view is unobstructed.

These facts presented in a light most favorable to plaintiff do not present a situation where the doctrine of last clear chance is applicable.

> It is well established that in order to submit the issue of last clear chance to the jury, the evidence must tend to show the following elements: (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured.

Wray v. Hughes, 44 N.C. App. 678, 681-82, 262 S.E. 2d 307, 309-10 (1980). Plaintiff, in full possession of her faculties stood two or three feet out in a southbound lane and turned at an angle so that she was looking south. Defendant, meanwhile, was driving

without lights at 6:30 p.m. and hit plaintiff without even seeing her. While this, in a light most favorable to plaintiff, seems to be a case of negligence on the part of both parties, the doctrine does not apply if defendant had only the last possible chance to avoid the injury. Defendant must have had the last clear chance. The evidence in a light most favorable to plaintiff does not indicate that defendant had such a clear chance. For plaintiff to be entitled to the instruction, there must be evidence that plaintiff was in a position of inadvertent or helpless peril which defendant thereafter discovered or should have discovered and that defendant had the means and the time to avoid the injury and failed to do so. The evidence does not present a situation where the doctrine would apply. *See, e.g., Battle v. Chavis,* 266 N.C. 778, 147 S.E. 2d 387 (1966); *Clodfelter v. Carroll,* 261 N.C. 630, 135 S.E. 2d 636 (1964); *Sink v. Sumrell,* 41 N.C. App. 242, 254 S.E. 2d 665 (1979).

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 MAY 1980

ARTESIAN POOLS v. FLIEHR No. 7926SC768	Mecklenburg (78CVS10364)	Affirmed Dissent as to Leslie Ann Fliehr
CAVINESS v. SMITH No. 7919SC119	Randolph (77CVS347)	No Error
COOPER v. EMPLOYMENT SECURITY COMM. No. 799SC686	Granville (79CVS75)	Affirmed
DICKSON v. DICKSON No. 7926DC698	Mecklenburg (78CVD6013)	No Error
FIGURE EIGHT v. LAING No. 795DC914	New Hanover (78CVD85) (79CVD120) (79CVD121)	Affirmed
GRAVES v. WALSTON No. 798SC979	Greene (77CVS7)	Affirmed
HUTCHINS v. GREYHOUND LINES No. 7921SC851	Forsyth (79CVS2235)	Affirmed
KINTON v. CURRIN No. 7910SC1020	Wake (79CVS1563)	Appeal Dismissed
LEGRANDE v. FURNITURE CO. No. 7910IC772	Industrial Comm. (G-7021)	Affirmed
MARTIN v. WADSWORTH No. 796SC984	Northampton (79CVS2)	Reversed and Remanded
RADFORD v. RADFORD No. 798DC874	Wayne (78CVD187)	Dismissed
STATE v. ADAMS No. 7914SC1131	Durham (79CRS12094) (79CRS12102) (79CRS12103) (79CRS12104)	No Error
STATE v. BIDDIX No. 7919SC1185	Randolph (78CRS7839)	No Error
STATE v. CARTER No. 7927SC1186	Gaston (79CRS8444) (79CRS8448)	No Error
STATE v. DANIELS No. 793SC1159	Pitt (78CRS20076)	No Error

STATE v. EVANS No. 7912SC1119	Cumberland (78CRS48762)	No Error
STATE v. GARDNER No. 7919SC1174	Cabarrus (79CR5563)	No Error
STATE v. GORHAM No. 798SC905	Greene (78CRS2166) (78CRS2198) (78CRS2199) (78CRS2164) (78CRS2165) (78CRS2200) (78CRS2163) (78CRS2196) (78CRS2197)	Gorham—No Error Chavis & Whitaker— Dismissed
STATE v. GREENE No. 7929SC1134	Rutherford (78CRS4426) (78CRS4431)	No Error
STATE v. HAMLIN No. 796SC1047	Halifax (78CR9943) (78CR10528)	No Error
STATE v. HAYES No. 794SC1155	Sampson (79CRS2174) (79CRS2175)	No Error
STATE v. HUFHAM No. 7928SC861	Buncombe (79CRS1190) (79CRS1191)	No Error
STATE v. JOYNER No. 796SC849	Halifax (78CR2433)	No Error
STATE v. KIRBY No. 798SC1114	Wayne (79CR6729) (79CR6730)	No Error
STATE v. MARCH No. 7920SC959	Union (78CRS9221)	New Trial
STATE v. MARQUEZ No. 793SC940	Craven (78CRS15710) (78CRS15711)	No Error
STATE v. MITCHELL No. 7921SC934	Forsyth (79CR787)	No Error
STATE v. ROBINSON No. 7926SC858	Mecklenburg (78CR135585) (78CR136753)	No Error
STATE v. SMITH No. 7926SC1091	Mecklenburg (78CR128375)	No Error
STATE v. THOMAS No. 7914SC1168	Durham (78CRS34969)	No Error

STATE OF NORTH CAROLINA v. JAMES ROBERTS LYNCH

No. 7921SC818

(Filed 6 May 1980)

Bigamy § 2; Marriage § 2— whether marriage performed before proper minister— question of ecclesiastical law

In a bigamy prosecution in which the crucial determination was whether the person before whom a purported prior marriage of defendant was solemnized was an ordained minister of any religious denomination or a minister authorized by his church, the determination of whether there was a church or a religious denomination was not for the jury since it was a matter of ecclesiastical law, and the trial court properly refused to give defendant's requested instructions defining "church" and "religious denomination."

Judge WELLS dissents.

APPEAL by defendant from *Walker (Hal H.), Judge*. Judgment entered 23 February 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 30 January 1980.

Defendant and Sandra Lynch exchanged wedding vows in the presence of Sandra's father, Chester Wilson. Mr. Wilson, a member of the Catholic faith, had obtained a minister's certificate from the Universal Life Church in Modesto, California, which stated that he was an ordained minister in that church. Approximately four years after the marriage ceremony, defendant and Sandra separated. No divorce was obtained. Seven months later, defendant married Mary Alice Bovender. He was indicted for bigamy. The jury found him guilty as charged. From a judgment imposing a period of probation, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Eubanks, Walden & Mackintosh, by Larry L. Eubanks and Bruce A. Mackintosh, for defendant appellant.

ERWIN, Judge.

It is the rule in this jurisdiction that if a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Bolton*, 28 N.C. App. 497, 221 S.E. 2d 747, *appeal dis-*

missed, 289 N.C. 616, 223 S.E. 2d 390 (1976). Thus, our initial inquiry is to determine whether the requested instructions were proper.

The requested instructions read:

> "(1) 'Religious denomination' as used in the marriage statute GS § 51-1, means an established organization of individuals or groups of individuals united for the purpose of worshipping in a common manner, providing instruction or dissemination of some tenet or particular faith, or organized for the accomplishment of some common religious purposes. Such a denomination is distinguished from other organized groups in that it exists principally for the maintenance, furtherance or practice of common religious beliefs.
>
> (2) 'Church' as used in the marriage statute GS § 51-1 refers to a body which is a part of a particular Religious Denomination. The term 'Church', means a voluntary organization of people for religious purposes who are associated for religious worship, discipline and teaching and who are united by the profession of the same faith, holding the same creed, observing the same rites, and acknowledging the same ecclesiastical authority."

The essence of defendant's assignment of error is that without the foregoing instructions, the jury could not determine the existence or nonexistence of evidence to support an essential element of the crime of bigamy, *i.e.*, a valid prior marriage. To constitute a valid marriage in our State, the requirements of G.S. 51-1 must be met. G.S. 51-1 provides:

> "§ 51-1. *Requisites of marriage; solemnization.*—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each *in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church*, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be in-

> terfered with by the provisions of this Chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation." (Emphasis added.)

Under the statute, a valid marriage must be solemnized in the presence of one of three persons: (1) an ordained minister of any religious denomination; (2) a minister authorized by his church; or (3) a magistrate. In the instant case, the crucial determination was whether Mr. Wilson was an ordained minister of any religious denomination or a minister authorized by his church. The trial court correctly instructed the jury that whether Mr. Wilson was an ordained minister was not for their determination but was a matter of church law. *See State v. Bray*, 35 N.C. (13 Ired.) 289 (1852). The reasoning set forth in *Bray* justifying this decision is set forth thusly:

> "The statute, without assuming to pronounce dogmatically who were true ministers of the gospel, meant to give a catholic rule, by admitting every one to be so, to this purpose, who, in the view of his own church, hath the cure of souls by the ministry of the Word, and any of the sacraments of God, according to its ecclesiastical polity, implying spiritual authority to receive or deny any desiring to be partakers thereof, and to administer admonition or discipline, as he may deem the same to be to the soul's health of the person and the promotion of godliness among the people. When to such a ministry is annexed, according to the canons, or statutes of the particular church, the faculty of performing the office of solemnizing matrimony, the qualification of the minister is sufficient, within the statute."

Id. at 295. While the statute interpreted in *State v. Bray, supra*, required that the minister "hath the cure of souls" as part of his dominion, the present statute does not so require. *See* G.S. 51-1. To the contrary, the present statute provides for the solemnization of marriage by any "minister authorized by his church," *id.*, and the statute further states that "marriages solemnized before

March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation."

What is a church? The trial court instructed the jury that they need not determine whether or not there was a church, because it was a matter of ecclesiastical law; but that a church "may be constituted by having one member, or ten thousand, or anywhere in between or above ten." The primary effect of this instruction was to remove this question from the jury's province. We hold that this was proper.

A church is an organization for religious purposes. *Williams v. Williams*, 215 N.C. 739, 3 S.E. 2d 334 (1939). This is, in essence, the definition which defendant requested the jury be given; however, it was not a proper subject for their determination. Whether or not a church exists must be determined, in the first instance, essentially by examining the economy of the believers and comparing it with the human, religious experience as it has existed throughout the ages. This is not to say that the State is free to reject any religious group that is unorthodox in its beliefs, but rather that a State may examine and scrutinize an organization to ensure that such beliefs are commonly held. Our reaching of this conclusion is bolstered by our courts' interpretation of what a minister is for purposes of the statute. Thus, we hold that whether a church exists is still a question ecclesiastical in nature, because our statute embodies this assumption. We believe that a determination of what a religious denomination is falls within the same category. Accordingly, we hold that the trial court did not err in refusing to give the requested instructions to the jury.

The State presented evidence establishing all of the elements of the crime—bigamy, and the trial court's denial of defendant's motion to dismiss at the close of all the evidence was not error.

In the trial of defendant, we find

No error.

Judge MARTIN (Robert M.) concurs.

Judge WELLS dissents.

SPALDING DIVISION OF QUESTOR CORPORATION, DALLAS ELECTRICAL CONTRACTORS, INC., DALLAS PLUMBING COMPANY, W. R. MATHIS AND WITTEN SUPPLY COMPANY v. HORACE M. DUBOSE III, TRUSTEE, AND ROBERT J. BERNHARDT, TRUSTEE, AS THEIR INTERESTS MAY APPEAR

No. 7927SC1144

(Filed 6 May 1980)

Execution § 15— collateral attack on execution sale

Plaintiffs' action in superior court to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash but merely cancelled judgments against the property owner constituted an impermissible collateral attack upon the order of confirmation of the execution sale by the clerk of court, plaintiffs' remedy being to proceed directly either by motion in the cause or appeal.

APPEAL by defendants from *Burroughs, Judge.* Judgment signed 12 October 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 18 March 1980.

This is an action by plaintiffs to declare null and void an execution sale and to declare void a deed issued pursuant to the execution sale. Plaintiffs allege the execution sale is defective because defendants did not pay cash for the property, violating N.C.G.S. 1-339.47.

Defendants moved to dismiss pursuant to Rule 12, North Carolina Rules of Civil Procedure, and plaintiffs moved for summary judgment. The motions were heard upon affidavits and stipulations and the trial court denied defendants' motion to dismiss and entered summary judgment for plaintiffs. Defendants appeal.

Defendants secured judgments against A. C. Burgess, Jr. and issued executions upon Burgess's property. Burgess owned a house and lot, and the sheriff posted notice of sale of this property under defendants' executions. Meanwhile, plaintiffs, who had claims against Burgess for labor and materials used in construction of the house, filed liens and obtained judgments on them against Burgess. Plaintiffs' judgments are junior in time to defendants' judgments.

At the execution sale upon defendants' judgments, defendants bid $32,556.88, which was paid by cancelling defendants'

judgments, rather than by payment in cash. Plaintiffs did not bid at the sale and no upset bid was filed within the ten-day period. Thereafter, the Clerk of Superior Court of Gaston County confirmed the sale by order of confirmation. No one appealed from the clerk's order of confirmation. Upon order of the clerk, the sheriff executed and delivered a deed conveying the property to defendants.

Charles D. Gray III for plaintiff appellees Dallas Electrical Contractors, Inc. and Dallas Plumbing Company.

Stewart and Lowe, by Michael David Bland, for plaintiff appellee W. R. Mathis.

Horace M. DuBose III and Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt, by Robert J. Bernhardt, for defendant appellants.

MARTIN (Harry C.), Judge.

Defendants contend the superior court did not have jurisdiction of the cause of action alleged by plaintiffs as it is a collateral attack upon the judgment of confirmation by the clerk of superior court. If the court had jurisdiction, we are faced with the question whether the clerk had authority under Article 29B of Chapter 1 of the General Statutes of North Carolina to permit defendants to use their judgments as cash in the payment of their bid to the sheriff on the execution sale.

The clerk has original jurisdiction to enter orders confirming execution sales. "No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court." N.C. Gen. Stat. 1-339.67. Appeals from the clerk of superior court to the judge are controlled by N.C.G.S. 1-272, containing the following: "An appeal must be taken within ten days after the entry of the order or judgment of the clerk . . .." The appeal must be taken within ten days after the clerk's judgment to entitle the judge of the superior court to review the ruling. *Muse v. Edwards*, 223 N.C. 153, 25 S.E. 2d 460 (1943). There must be an appeal from the clerk's judgment to give the superior court jurisdiction. *See Ramsey v. R. R.*, 253 N.C. 230, 116 S.E. 2d 490 (1960). The superior court does not acquire jurisdiction where there is no

appeal from the clerk's judgment. *Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E. 2d 19 (1967).

Plaintiffs did not appeal from the judgment of confirmation by the clerk. Defendants contend plaintiffs' action is a collateral attack upon the clerk's order and that it cannot be maintained as their remedy is by appeal from the order of the clerk. Plaintiffs argue they are not attacking the clerk's order but are seeking to set aside the sheriff's deed. Plaintiffs ask in their complaint that the execution sale be declared null and void because defendants did not pay their bid in cash. They also ask that the sheriff's deed be declared void for the same reason. The court in its summary judgment declared that the order of the clerk is void. We hold plaintiffs are collaterally attacking the clerk's order.

Plaintiffs cannot avoid the execution sale by collateral attack; they must proceed directly, either by motion in the cause or appeal. *Williams v. Dunn*, 163 N.C. 206, 79 S.E. 512 (1913); *Henderson v. Moore*, 125 N.C. 383, 34 S.E. 446 (1899). The proper remedy to set aside an execution or a sale thereunder is by motion in the cause and not by independent action. *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E. 2d 166 (1977); *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340 (1938). Where the proceeding complained of is before the clerk, the additional remedy of appeal to the superior court judge is available. N.C. Gen. Stat. 1-272.

We hold the superior court erred in denying defendants' motion to dismiss and in entering summary judgment for plaintiffs. Plaintiffs have mistaken their remedy. With this ruling, we do not reach the other issue raised on the appeal.

The judgment of the superior court is reversed and the cause is remanded to the Superior Court of Gaston County for entry of a judgment allowing defendants' motion to dismiss plaintiffs' action.

Judges PARKER and HILL concur.

STATE OF NORTH CAROLINA v. REUBEN ISAAC COATS

No. 7912SC1199

(Filed 6 May 1980)

1. **Robbery § 5.4— robbery with dangerous weapon charged—evidence of common law robbery insufficient**

In a prosecution for robbery with a dangerous weapon, defendant's denial of his participation in the robbery and his denial that he saw a gun during the robbery did not constitute evidence sufficient to require the trial court to submit an issue of common law robbery to the jury.

2. **Criminal Law § 115— lesser included offense—instruction not required**

In the absence of a conflict in the evidence, the contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense.

3. **Criminal Law § 126— jurors assenting to verdict—court's inquiry sufficient**

There was no merit to defendant's contention that the record did not affirmatively show that each juror assented to the verdict announced by the foreman, since the record showed that the trial court, upon receiving an unresponsive answer to the question concerning the verdict, repeated the question and received a responsive and affirmative answer.

Judge WEBB dissenting.

APPEAL by defendant from *Brown, Judge*. Judgment entered 1 August 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 April 1980.

Defendant was charged in a bill of indictment with the 20 December 1978 robbery with a dangerous weapon of James Russell Smith. Upon his plea of not guilty he received a trial by jury.

In summary, the evidence for the State tended to show that on the date in question James Russell Smith entered a car with defendant, whom Smith knew casually, and three other men. Smith sat in the back with defendant on his left. Another man was on his right. The two remaining men were seated in the front. As they drove in a direction away from the closest town, one man in the front produced a gun and announced that Smith was being robbed. That man and the man on Smith's right then hit Smith. The defendant took Smith's wallet and watch. In addition, Smith's jacket, shoes and money which were kept separate

from the wallet were taken. Smith later led police to the scene of the robbery where Smith's shoes and torn shirt were found. After arrest defendant admitted having been in the car at the time of the robbery but denied that he had given any help to the robbers or to the victim.

Defendant testified that on the date in question he accepted a ride from some men. Smith joined them and as they rode along one man in the front, known to the defendant as "Hoot," told Smith he was being robbed and hit him. Defendant denied participating in the robbery. Additional evidence is discussed in the opinion.

The jury found the defendant guilty as charged and he was sentenced to serve an active term of imprisonment. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Macrae, Macrae, Perry & Pechmann, by Daniel T. Perry, III, for defendant-appellant.

MARTIN (Robert M.), Judge.

[1] In his first assignment of error defendant offers two arguments to support his contention that the trial court erred in refusing to submit the issue of common law robbery to the jury. Defendant first points to his own testimony when he was asked on direct examination, "Did you ever see any gun—did you see Hoot with any gun?" Defendant answered, "No, sir." Counsel asked, "You didn't see the gun?" Defendant answered, "It was dark in the car anyway." On cross-examination defendant was asked, "You say you never saw a gun?" He answered, "I didn't." The prosecutor then asked, "Were you seated in a position where you could see a gun?" The defendant explained, "It was dark in the car and it was dark in the area. I was in the back seat and I never saw no gun." Defendant contends that this evidence, if believed by the jury, tends to establish the commission of the lesser included crime of common law robbery. We do not agree.

> The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous

> weapon whereby the life of a person is endangered or threatened. (Citations omitted.) In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime. If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence *relating to the elements* of the crime charged an instruction on common law robbery is not required. (Citations omitted.)

State v. Lee, 282 N.C. 566, 569-70, 193 S.E. 2d 705, 707 (1973). *See State v. Wilson*, 31 N.C. App. 323, 229 S.E. 2d 314 (1976).

We have examined the record and we hold that the testimony of the defendant is not inconsistent with the evidence offered by the State tending to show that the robbery was completed with a firearm. Defendant's denial of his participation in the robbery of Smith and his denial that he saw a gun during the robbery of Smith does not constitute evidence that defendant is guilty of common law robbery.

Defendant also argues that the evidence for the State would support an instruction on common law robbery on the theory that Smith's testimony is suspect due to evidence of his drinking, the poor lighting conditions and an allegedly incomplete description of the weapon.

[2] In the absence of a conflict in the evidence, the contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense. *State v. Gurkin*, 8 N.C. App. 304, 174 S.E. 2d 20 (1970). "It is the task of the jury alone to determine the weight and credibility of the evidence, and to determine the facts." 4 Strong's N.C. Index 3d, Criminal Law, § 103 (1976).

In summary, Smith's testimony indicates that he saw a barrel, handles, and cylinder of a silver-colored, heavy gun. This gun was pointed at Smith by one of the men in the front seat when Smith was told that he was being robbed and it was still present and visible when the defendant removed Smith's watch and wallet. The credibility of this evidence was properly a question for the jury. This assignment of error is overruled.

[3] Defendant next asserts that the record does not affirmatively establish that each juror assented to the verdict announced by the foreman.

When the verdict was returned, defendant requested that the jurors be polled. During that inquiry the following took place:

> COURT: Mrs. Bailey, your foreman has returned a verdict of guilty as charged, was this your verdict?
>
> MRS. BAILEY: We understood it acting in concert.
>
> EXCEPTION. This constitutes
>
> DEFENDANT'S EXCEPTION NO. 3
>
> COURT: Was this your verdict?
>
> MRS. BAILEY: Yes.
>
> COURT: And do you still agree and assent thereto?
>
> MRS. BAILEY: Yes.
>
> EXCEPTION. This constitutes
>
> DEFENDANT'S EXCEPTION NO. 4

Article I, Sec. 24 of the Constitution of North Carolina requires a unanimous verdict for a valid conviction for any crime. The trial court, upon receiving an unresponsive answer to the question concerning the verdict, repeated the question and received a responsive and affirmative answer. *See State v. Blackmon*, 28 N.C. App. 255, 220 S.E. 2d 850 (1976). We find no ambiguity in the announcement of the verdict and we hold that the defendant was convicted in the fashion provided for by the Constitution.

In defendant's trial we find

No error.

Judge HILL concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe there was sufficient evidence of common law robbery for this offense to have been submitted to the jury. The defendant testified that there was a robbery while he was in the automobile but he did not take part in it. He testified that he observed the robbery and it was accomplished by beating James Russell Smith with hands and fists. He testified he never saw a gun. I believe this is evidence which, when considered with the other evidence, is sufficient for the jury to find the defendant participated in the robbery and a weapon was not used. This would be sufficient to convict the defendant of common law robbery, and it was error not to submit this charge.

JOHN H. CAESAR, EMPLOYEE v. PIEDMONT PUBLISHING COMPANY, EMPLOYER AND TRAVELERS INSURANCE COMPANY, CARRIER

No. 7910IC1066

(Filed 6 May 1980)

Master and Servant § 73— workers' compensation—amputation of portion of thumb—rate of compensation

Where the distal portion of an employee's left thumb was amputated, the rate of compensation for permanent partial disability was not limited to 25% under Industrial Commission Rule XV(1) for partial loss of the thumb itself, and the employee could be compensated at a higher rate under G.S. 97-31(1) and (19) for loss of use of the thumb.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission entered 31 July 1979. Heard in the Court of Appeals 25 April 1980.

The parties stipulated that at the time of the injury by accident the parties were subject to the provisions of the Workmen's Compensation Act; that the carrier on the risk was Travelers Insurance Company; that plaintiff's average weekly wage was $166.00; that plaintiff sustained an injury by accident arising out of and in the course of his employment on 2 June 1977 and further stipulated into evidence five medical records including medical reports of Dr. J. E. Jennings, the initial treating physician, and Dr. Bostic.

At a hearing on 12 February 1979 held before Deputy Commissioner Dianne C. Sellers, plaintiff's evidence tended to show that he sustained an injury by accident arising out of and in the course of his employment when a truck door slammed shut on the distal portion of his left thumb. The medical report of Dr. Jennings indicated that after the accident on 21 June 1977 the distal portion of plaintiff's left thumb was amputated. On 24 August 1977, Dr. Jennings rated plaintiff as having a 20% permanent partial disability of the thumb. On 6 April 1978, Dr. Bostic evaluated plaintiff's condition and on examination found that plaintiff has approximately 3/8ths of an inch of the distal phalanx as a remanent; that the thumbnail grows across the end of the phalanx cupping completely around and tending to grow into the palmer surface; that there is a slight amount of motion in the DIP joint but that plaintiff does not seem to have active flexion function although he can extend the flexed digit. Dr. Bostic rated plaintiff as having an 85% to 90% disability of the thumb itself because of the shortening and the inability to use the thumb in a functional way because of residual sensitivity. Dr. Bostic also rated plaintiff as having a 20% to 25% permanent disability of the left hand in its entirety. Plaintiff testified that his thumb was extremely sensitive and that he could not use it; that he could not apply any pressure to it; that it was sensitive to the cold; that he could not hold a cup, button buttons or tie his shoes using his thumb because of pain.

In an opinion and award filed 5 April 1979 Deputy Commissioner Sellers found the following pertinent fact:

> 6. On viewing the plaintiff's thumb, the undersigned found that the amputation is distal to the base of the thumbnail. However, in view of the joint involvement and the subsequent functional loss, plaintiff has sustained a 68⅓% permanent partial disability of his left thumb as a result of said injury by accident. Plaintiff was temporarily totally disabled until August 29, 1977, which is the first day plaintiff returned to work after the amputation surgery.

Deputy Commissioner Sellers awarded plaintiff compensation in accordance with the 68⅓ percent rating.

Defendants appealed to the Full Commission contending that it was error for the hearing officer to fail to follow Rule 15,

subsection 1, of the Rules of the Commission and find that plaintiff was entitled only to 25% permanent partial disability of the left thumb. On 31 July 1979, the Full Commission adopted the decision of the Deputy Commissioner and affirmed the award. Defendants appealed.

Westmoreland and Sawyer, by Laura F. Sawyer, for plaintiff appellee.

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

MARTIN (Robert M.), Judge.

The sole question presented for review is whether the Commission erred in failing to find that the plaintiff was entitled to 25% permanent partial disability of the left thumb under Rule XV(1) of the Rules of the Industrial Commission.

The North Carolina Industrial Commission has the authority to make rules, not inconsistent with the Workers' Compensation Act, for carrying out the provisions of that Act, pursuant to G.S. 97-80(a). Accordingly, the Commission formulated Rule XV(1) which states: "Amputation of any portion of the bone of a distal phalange of a finger or toe at or distal to the visible base of the nail will be considered as equivalent to the loss of one-fourth (¼) of such finger or toe." Defendant argues that when compensation is awarded under G.S. 97-31(1) for the loss of a thumb, the rate of compensation is limited to 25% under Rule XV(1) for the amputation of the above portion of the thumb. We do not agree.

In awarding compensation for permanent partial disability at the rate of 68⅔ percent, the Commission considered the functional loss of the use of the thumb as a whole. In so doing, the Commission did not interpret Rule XV as an exclusive limitation on the rate of compenation for an injury involving the amputation of a portion of a finger. Rather the Commission construed Rule XV in conjunction with G.S. 97-31(19) which provides: "The compensation for partial loss of or for partial loss of use of a member . . . shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss. . .". Therefore, when plaintiff can prove a case under either partial loss of a member subject to Rule XV or partial loss of the use of

that member, he is entitled to compensation under either heading. *See* 2 A. Larson, The Law of Workmen's Compensation § 58.20 (1976). This interpretation is consistent with the plain and explicit language of G.S. 97-31(19) which provides for an award in the alternative for either loss of or loss of use of a member.

The injured employee is entitled to an award which encompasses all injuries received in the accident. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). Had the initial reimplantation of plaintiff's thumb been successful, plaintiff would nevertheless be entitled to compensation for any loss of use of the thumb which may have resulted from the injury. Because a portion of plaintiff's thumb was later amputated, we do not think plaintiff's recovery is confined to the less favorable remedy for amputation when he can prove a greater loss of use of the member as a whole. The Commission properly awarded plaintiff compensation for the functional loss of his finger under G.S. 97-31(1) and 97-31(19).

The order of the Commission is

Affirmed.

Judges WEBB and HILL concur.

MIKE METCALF, TERRY METCALF, BILLY METCALF AND MARGIE METCALF, W. J. TEAGUE AND WIFE, LORETTA TEAGUE AND PAUL M. AIKEN, SR., AND WIFE, VERNEDA AIKEN v. W. C. PALMER AND WIFE, HAZEL H. PALMER, AND CHARLES O. COFFEY BUILDERS, INC., AND B. A. BROOKS

No. 7925SC991

(Filed 6 May 1980)

Appeal and Error § 6.2— order setting aside judgment—appeal premature

The trial court's order entered pursuant to Rule 60(b)(1) setting aside a judgment which had dismissed plaintiff's action with prejudice for failure of plaintiffs' counsel to appear when the case was called for trial was interlocutory, and defendants' appeal therefrom was premature.

Metcalf v. Palmer

APPEAL by defendants from *Hairston, Judge.* Order entered 5 June 1979 in Superior Court, CALDWELL County. Heard in the Court of Appeals 17 April 1980.

Plaintiffs commenced this action on 5 June 1978 by filing complaint in which they seek damages for breach of contract. Defendants filed answer denying material allegations in the complaint. The case was placed on the calendar for trial at the regular 12 February 1979 Session of Superior Court in Caldwell County. Upon call of the case on the morning of 13 February 1979, plaintiffs' counsel failed to appear, and Judge Kenneth A. Griffin, the Judge Presiding, entered an order dismissing the action with prejudice.

On 23 February 1979 plaintiffs filed a motion to set aside the judgment dismissing the action. This motion was heard before Judge Peter W. Hairston, Judge Presiding at the 4 June 1979 Session of Superior Court in Caldwell County. On 5 June 1979 Judge Hairston entered an order finding that on Monday, 12 February 1979, the plaintiffs' attorney had called the clerk's office and asked to be given one day's notice before the case was tried, that on Tuesday, 13 February 1979, the attorney's client was in court but the attorney was not present, and that to dismiss this case would be to punish the client for neglect of the counsel. The court also found that under the circumstances counsel's neglect merited relief under G.S. 1A-1, Rule 60(b)(1). In accord with these findings, Judge Hairston ordered that the judgment dismissing the action with prejudice be set aside and that the case be returned to the regular calendar. From this order, defendants appealed.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellees.

Wilson, Palmer & Cannon by Bruce L. Cannon for defendant appellants.

PARKER, Judge.

Defendants have attempted to appeal from an order entered pursuant to G.S. 1A-1, Rule 60(b)(1), setting aside a judgment which had dismissed plaintiffs' action with prejudice for failure of plaintiffs' counsel to appear when the case was called for trial.

The order appealed from is interlocutory. It does not affect any substantial right of defendants which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits. Its only effect is to require defendants to face a trial on the merits, just as does an adverse ruling on a Rule 12(b)(6) motion, which "is in most cases, an interlocutory order from which no direct appeal may be taken." *State v. School*, 299 N.C. 351, 355, 261 S.E. 2d 908, 911 (1980); *accord, Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). The right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal. *See*, 57 N.C.L.R. 907.

In *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978), defendant appealed from an order of the trial court setting aside, because of procedural irregularity, a summary judgment which had been granted to the defendant. This Court entertained the appeal and reversed. *Waters v. Personnel, Inc.*, 32 N.C. App. 548, 233 S.E. 2d 76 (1977). The Supreme Court granted plaintiff's petition for discretionary review and in turn reversed the decision of this Court, holding that this Court erred in not dismissing defendant's appeal *sua sponte*. In the opinion of the Supreme Court, written for the Court by Exum, J., the Court said:

> General Statutes 1-277 and 7A-27 in effect provide "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E. 2d 178, 181 (1974); *accord, Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975). An order is interlocutory "if it does not determine the issues but directs some further proceeding preliminary to final decree." *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E. 2d 82, 91 (1961). The reason for these rules is to prevent fragmentary, premature and unnecesary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for deter-

mination in a single appeal from the final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E. 2d 669, 671 (1951).

294 N.C. at 207-08, 240 S.E. 2d at 343.

In the present case the parties have not raised the question of appealability. However, "[w]here an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *State v. School*, *supra*, at 360, 261 S.E. 2d at 914.

We recognize that our Supreme Court and this Court have historically entertained appeals from orders setting aside default judgments even though such orders are clearly interlocutory and only questionably may be considered as affecting a substantial right. *See, Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (Opinion filed 15 April 1980), and cases cited therein. We acknowledge that our holding in the present case is not altogether logically consistent with that practice. That practice, however, as an English Court once observed with reference to another doctrine, "is grown revered by age, and it is not now to be broken in upon," *Jee v. Audley*, 1 Cox 324, 325, 29 Eng. Rep. 1186, 1187 (1787), and we have been reluctant to do so absent an express direction from our Supreme Court. *See Davis v. Mitchell*, *supra*. However, in light of what we perceive to be the clear signals transmitted by *State v. School*, *supra*; and *Waters v. Personnel, Inc.*, *supra*, we do not think the practice should be extended to permit immediate appeal in the present case.

Appeal dismissed.

Chief Judge MORRIS and Judge WELLS concur.

WADE H. POTTS; DON WAYNE POTTS, ARTHUR B. POTTS AND MAVIS L. POTTS, TRUSTEES OF JOHN H. POTTS MEMORIAL CEMETERY; BOBBY E. McDANIEL AND WIFE, BARBARA R. McDANIEL; DONALD R. McDANIEL AND WIFE, NANCY M. McDANIEL; AND FRED B. McDANIEL AND WIFE, JOANN S. McDANIEL v. J. W. BURNETTE AND WIFE, ESTELLE BURNETTE; JUDY LEE BURNETTE ROGERS AND HUSBAND, ALEXANDER ROGERS; JAMES HENRY BURNETTE AND WIFE, LORETTA BURNETTE; C. T. BURNETTE AND WIFE, JUANITA BURNETTE; AND DENNIS HALL BURNETTE

No. 7930DC737

(Filed 6 May 1980)

Adverse Possession § 25.2— road across defendant's land—insufficient evidence of hostile use

Plaintiffs' evidence was insufficient to show that their use of a road across defendants' land was hostile to defendants' interest or under a claim of right where such evidence tended to show that plaintiffs had used the road in question for many years; plaintiffs never asked permission to use the road; but plaintiffs never presented any evidence that their use of the road had been other than with defendants' permission.

APPEAL by defendants from *Leatherwood, Judge.* Judgment entered 16 April 1979 in District Court, JACKSON County. Heard in the Court of Appeals 27 February 1980.

Plaintiffs allege that for more than 50 years they and their predecessors in title had made open, notorious, hostile, adverse and continuous use of a road which leads from State Road 1149 across defendant's land to plaintiff's property. They seek to have defendants enjoined from denying them the use of the road, and to have a permanent easement declared in their favor.

At trial plaintiffs presented evidence, after which defendants moved for a directed verdict, which was denied. Defendants offered no evidence. The jury found for plaintiffs, and defendants' motions for judgment notwithstanding the verdict and new trial were denied. Defendants appeal.

Rogers, Cabler and Henson, by J. Edwin Henson, for plaintiff appellees.

Orr & Payne, by Robert F. Orr, for defendant appellants.

ARNOLD, Judge.

The development of the law of prescriptive easements in North Carolina is set out in *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). In North Carolina, unlike the majority of other jurisdictions, we presume that the use of a way over another's land is permissive unless evidence appears to the contrary. *Id.* In the present controversy the sole issue is whether plaintiffs presented evidence sufficient to go to the jury that their use of the road over defendants' land was "adverse, hostile, or under a claim of right." See *id.* at 580, 201 S.E. 2d 900.

Plaintiffs presented substantial evidence that they have used the road in question for many years. However, "[t]he mere use of a way over another's land cannot ripen into an easement by prescription, no matter how long it may be continued." *Henry v. Farlow*, 238 N.C. 542, 543, 78 S.E. 2d 244, 245 (1953), citing numerous cases. Plaintiffs presented much evidence that they have never asked permission to use the road, but neither in their brief nor on oral argument were plaintiffs able to point to any evidence that their use of the road has been other than with defendants' permission. When plaintiffs were widening the portion of the road that lies on their property, they asked defendants for permission to come onto defendants' land and widen the road. "Mr. Leonard Potts spoke to Mr. Wade Burnette and cleared it with him to bring the bulldozer in and widen the road . . . ." Earlier, when the road was scraped, "they had to skip a certain space . . . because the Burnettes would not let them scrape that portion of the land." As for asking permission simply to travel the road, William Potts testified, "The reason I did not ask permission was that we thought it was a free country, not a bunch of hogs in there, and everybody was welcome to go where they wanted to." Leonard Potts testified, "As far back as I can remember . . . I never asked him for permission to use the road. It's a free country up there. We don't ask people. We just, they come over me and I go over them. . . . [W]e all go over one another's land and never think nothing about it." As the court said in *Henry v. Farlow, id.* at 544, 78 S.E. 2d 245-46, "[t]he circumstance that the owners of the soil did not object to the use of the way harmonizes with the theory that they permitted the use of the way. There is, moreover, no inconsistency between the circumstance that the plaintiff . . . used the way without asking the

owners of the soil for permission to do so, and the conclusion that the plaintiff . . . used the way with the implied consent of the owners of the soil." Furthermore, "[t]he law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the land owner is called upon 'to go to law' to protect his rights." *Weaver v. Pitts*, 191 N.C. 747, 749, 133 S.E. 2, 3 (1926).

The court in *Dickinson v. Pake, supra*, pointed out that in order to establish that a use is hostile, it is not necessary to show a heated controversy, but it is necessary to show that the use was of a nature that would give the owner of the land notice that the use was being made under a claim of right. We do not find that the use here is of such a nature as to give notice to defendants that is under a claim of right. Furthermore, the idea that plaintiffs used the road under a claim of right adverse to defendants' rights is negated by the testimony of Wade Potts: "My claim for the use of this . . . road at least prior to this action has been based on both my assumption that the State was maintaining it and that it was a State road and it was based on the fact that I have used the road so long that I think I should have the privilege to get to my property."

We find that plaintiffs' evidence was insufficient to show that their use of the road was hostile to defendants' interest or under a claim of right, and accordingly that the evidence was insufficient to go to the jury. *Cf. Watkins v. Smith*, 40 N.C. App. 506, 253 S.E. 2d 354 (1979); *Coggins v. Fox*, 34 N.C. App. 138, 237 S.E. 2d 332 (1977). Defendants were entitled to a directed verdict or a judgment notwithstanding the verdict. The judgment of the trial court is

Reversed.

Chief Judge MORRIS and Judge VAUGHN concur.

BETTY JANE SULLIVAN LOGAN v. LIFE INS. CO. OF NORTH AMERICA, INC.

No. 7926SC606

(Filed 6 May 1980)

Insurance § 67.2— death by accident—insured killed while struggling over gun

In an action to recover under an insurance policy providing coverage for the death of the insured by accident, the evidence on motion for summary judgment presented an issue of material fact as to whether insured's death was caused by accident or whether it was instead a foreseeable result of his own conduct where it tended to show that insured struck his estranged wife and pointed a gun at her during an argument; insured and his wife struggled over the gun; the wife picked up the gun when it fell to the floor; the gun went off when insured lurched toward his wife, killing insured; and insured had pointed a gun at his wife on previous occasions but his wife did not struggle or resist on any of those occasions.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 15 February 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 January 1980.

Plaintiff alleges that she is the widow of John Henry Logan, who at the time of his death was insured under a policy issued by defendant. By the terms of that policy plaintiff as beneficiary was entitled to collect $11,000 for Logan's death if it resulted "directly and independently of all other causes from bodily injuries caused by accident." Plaintiff has presented a signed Proof of Loss form but defendant has refused to pay.

Defendant answered, denying that Logan's death was caused by accident and alleging that it was instead a foreseeable result of his own conduct. Defendant also moved for summary judgment, which was granted. Plaintiff appeals.

Lane and Helms, by H. Parks Helms and I. Manning Huske, for plaintiff appellant.

James P. Crews and Robert L. Burchette for defendant appellee.

ARNOLD, Judge.

The record on appeal contains plaintiff's deposition and her verified affidavit. Although the record does not reveal whether

these documents were presented and considered on the motion for summary judgment, we assume that they were, since they contain the only statement of the facts in this case. The undisputed circumstances surrounding Logan's death are as follows:

Plaintiff and Logan were married and had four children, but they had separated and had been living apart for more than a year at the time of his death. Logan spent the night of October 2 at plaintiff's house, where he slept on the sofa. The next morning he asked her to go to bed with him, and she refused. He slapped her on the face "a couple of times" and then went into the bedroom, saying that if she wouldn't go to bed with him he had something that would make her go. Logan took a pistol out of a drawer, plaintiff approached him, and they "tussled" over the gun. It fell to the floor and plaintiff picked it up and turned to face Logan. He "lurched" at her and the gun went off, killing him. The whole sequence of events happened "really quickly."

Logan had assaulted the plaintiff on previous occasions. In 1966 and in 1974 he shot at her. Six days before his death and on one other occasion he had pointed a gun at her. On none of these occasions did she struggle or try to resist; she simply withdrew. On the most recent occasion before his death she did grab Logan's hand briefly when one of the children entered the room, but on that occasion as well she withdrew as quickly as possible.

Upon these facts, the court granted summary judgment for defendant. Plaintiff argues that although the factual occurrences are undisputed, there remains for the jury the question of whether Logan reasonably could have foreseen plaintiff's response to his actions. We agree that this question must be determined by the jury. As the court said in *Clay v. Ins. Co.*, 174 N.C. 642, 645-46, 94 S.E. 289, 290 (1917), the true test of liability in cases of this sort is not whether the insured was the aggressor in the affray that took his life, but whether he was "the aggressor, under circumstances that would render a homicide likely as the result of his own misconduct." The circumstances in this case are not so clear cut that it can be determined as a matter of law that Logan's death was a reasonably foreseeable result of his actions. His assaults on the plaintiff in the past had never resulted in a struggle. Whether he should have anticipated that on this occa-

sion plaintiff would struggle with him over the gun is a material question of fact.

The North Carolina cases we have examined in which the insured was found as a matter of law not to have died by accident reveal no previous course of conduct between the parties to the affray which might have raised expectations on the part of the insured. See *e.g. Gray v. State Capital Life Ins. Co.*, 254 N.C. 286, 118 S.E. 2d 909 (1961); *Scarborough v. World Ins. Co.*, 244 N.C. 502, 94 S.E. 2d 558 (1956); *Clay v. Ins. Co., supra.* We have found no North Carolina case which reveals a previous course of conduct, but cases in other jurisdictions have been decided on facts very similar to those now before us, and the deaths in those cases have been found to be accidental. For example, in both *Yeager v. Travelers Ins. Co.*, 515 P. 2d 117 (Colo. App.), *reh. denied, cert. denied,* (1973) and *Martin v. Massachusetts Mutual Life Ins. Co.*, 463 S.W. 2d 681 (Tenn.), *reh. denied* (1971), the insured husbands had beaten and abused their wives on a number of occasions, but neither wife had resisted until the time each shot her husband, causing his death.

Because there exists a material question of fact—whether plaintiff's response to Logan's conduct was reasonably foreseeable—summary judgment for defendant was inappropriate. The order of the trial court is

Reversed.

Judges PARKER and WEBB concur.

IN THE MATTER OF THE PROPOSED ASSESSMENT OF ADDITIONAL SALES AND USE TAX FOR THE PERIOD APRIL 1, 1970 THROUGH DECEMBER 31, 1973 AGAINST ROBINSON O. EVERETT AND WIRT SMITH T/A TARA APARTMENTS

No. 7910SC47

(Filed 6 May 1980)

Taxation § 31.1— laundry machines in apartments—sales tax levied on receipts

Apartment building owners who maintain laundry machines for tenants must pay sales tax on the gross receipts from the machines. G.S. 105-164.4(4).

In re Assessment of Tax

APPEAL by petitioners-taxpayers from *Preston, Judge.* Judgment entered 6 September 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 21 September 1979.

Appellants owned and operated apartment buildings in the City of Raleigh in which they owned and maintained coin-operated washers and dryers for the benefit of the tenants. The North Carolina Department of Revenue assessed sales and use taxes against the appellants based on the receipts from these coin-operated washers and dryers. The appellants paid the tax under protest and sought administrative review. They received adverse rulings from the Secretary of Revenue, the Tax Review Board, and the superior court. They have appealed to this Court.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Everett, Everett, Creech and Craven, by Robinson O. Everett and William A. Creech, for petitioner-appellants.

WEBB, Judge.

The only issue in this appeal is whether the gross receipts from the laundry machines in the apartments the appellants owned were subject to the provisions of G.S. 105-164.4(4) which provides as follows:

> (4) Every person, firm or corporation engaged in the business of operating a pressing club, cleaning plant, hat-blocking establishment, dry-cleaning plant, laundry (including wet or damp wash laundries and businesses known as launderettes and launderalls), or any similar-type business, or engaged in the business of renting clean linen or towels or wearing apparel, or any similar-type business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or rental business for any of the aforenamed businesses, shall be considered "retailers" for the purposes of this Article. There is hereby levied upon every such person, firm or corporation a tax of three percent (3%) of the gross receipts derived from services rendered in engaging in any of the occupations or businesses named in this subdivision, and every person, firm or corporation subject to the provisions of this sub-

> division shall register and secure a license in the matter hereinafter provided. . . .

G.S. 105-164.3(1) provides:

> (1) "Business" shall include any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or advantage, either direct or indirect. The term "business" shall not be construed in this Article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.

The Tax Review Board concluded the appellants operated the washers and dryers for profit, the activity did not constitute occasional or isolated transactions, and therefore "the taxpayers were engaged in the operation of a business similar in type to a launderette or launderall . . .," and the gross receipts derived therefrom are subject to the provisions of G.S. 105-164.4(4). We agree with the Tax Review Board.

Appellants argue that a legislative change in G.S. 105-85 (the privilege license tax) is persuasive that they are not liable under G.S. 105-164.4(4). The Department of Revenue previously took the position that owners of apartments who had coin-operated laundry machines in the apartment buildings were required to purchase privilege licenses for the operation of laundries. G.S. 105-85 was amended by 1975 N.C. Sess. Laws Ch. 828 to provide:

> "launderettes and launderalls" shall not include persons who own or operate apartment buildings in which they provide such machines for the exclusive use and convenience of tenants therein, nor shall such persons be considered to be engaged in any "similar type business."

Appellants argue that this exclusion by the General Assembly from the privilege license tax of apartment building owners who maintain laundry machines for tenants shows the General Assembly did not intend such persons to pay sales tax on the gross receipts from the machines. This amendment to G.S. 105-85 was introduced as H. B. 1169. *See* 1975 House Journal, p. 796. As introduced, it excluded the payment of sales tax on the gross receipts of washing machines in apartment buildings. This exclusion was deleted before the adoption of the bill. We do not believe

the General Assembly intended by the amendment to G.S. 105-85 to exclude the payment of sales tax by apartment owners on the receipts from coin-operated washers or dryers.

Affirmed.

Judges ARNOLD and WELLS concur.

C. C. WOODS CONSTRUCTION COMPANY, INC., PLAINTIFF v. BUDD-PIPER ROOFING COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. W. EDWARD JENKINS, ARCHITECT, THIRD-PARTY DEFENDANT

No. 7914SC963

(Filed 6 May 1980)

Appeal and Error § 39.1— record on appeal not filed in apt time—dismissal of appeal

Appeal is dismissed where the record on appeal was not filed in the appellate court within 150 days from the giving of notice of appeal. Appellant's motion for a new trial or a modification of the judgment pursuant to Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment.

APPEAL by third-party plaintiff from *Farmer, Judge.* Judgment entered 23 April 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals on 15 April 1980.

This is a civil proceeding wherein C. C. Woods Construction Company, Inc., plaintiff, seeks to recover $11,345.40 from Budd-Piper Roofing Company on a contract under which Budd-Piper was to perform roofing work on a building to be constructed by plaintiff. Defendant Budd-Piper filed a third-party complaint against W. Edward Jenkins, the registered architect for the building, and alleged that it had been damaged by Jenkins' negligence in approving a building materials list which inaccurately specified the roofing bonding material to be used. The third-party defendant filed an Answer denying negligence on his part and alleging that Budd-Piper had substituted unacceptable roofing

bonding materials without requesting permission from anyone in violation of its contract with plaintiff.

Thereafter, the trial judge, after hearing all the evidence, allowed Jenkins' motion to dismiss pursuant to Rule 41(b), G.S. § 1A-1, and on 23 April 1979 entered a judgment wherein he made findings and conclusions, and ordered that Budd-Piper's third-party action against Jenkins be dismissed. Budd-Piper appealed from the judgment of involuntary dismissal of its third-party claim.

Eugene C. Brooks III, and Lipton & Mills, by Stuart S. Lipton, for the third-party plaintiff appellant.

Young, Moore, Henderson & Alvis, by Charles H. Young, Jr., for the third-party defendant appellee.

HEDRICK, Judge.

The judgment from which the third-party plaintiff appealed was entered on 23 April 1979. On 1 May 1979 the third-party plaintiff filed notice of appeal from the 23 April judgment. On 2 May the third-party plaintiff filed a "motion for new trial" or, "in the alternative, modification of judgment" pursuant to Rule 59, G.S. § 1A-1. Likewise, on 2 May, the third-party plaintiff again gave notice of appeal from the 23 April judgment, and the court entered an order fixing the time for the service of the proposed record on appeal, and for the third-party defendant to serve objections or proposed alternative record. On 15 May the trial judge entered an Order denying the "motion for a new trial" or, "in the alternative, modification of judgment," and stated that the appeal entries previously filed "are to remain in full force and effect and said Order denying [the] motion for a new trial (or, in the alternative, modification of judgment) is hereby appealed from as if said Appeal Entries had been filed subsequent to said Order. . . ." Thereafter, and inexplicably, the trial judge on 30 May filed a second Order wherein he again denied the third-party plaintiff's motion for a new trial or modification of judgment, and on 6 June filed another Order stating that the appeal entries "hereinbefore filed are to remain in full force and effect", and again fixing the time periods for service of the proposed record on appeal.

Whether the notice of appeal from the judgment entered 23 April was given on 1 May or 2 May, as the record plainly demonstrates, or on 15 May, as the appellant contended at oral argument, the record on appeal was not filed in this Court within 150 days from the date of the giving of notice of appeal, as required by Rule 12(a), N. C. Rules App. Proc. Since no extension of time within which to file the record on appeal was sought or granted by this Court, the appeal will be dismissed. Rule 27(c), N. C. Rules of App. Proc. The chronology of events set out above with respect to the giving of the notice of appeal, the making of the motion for a new trial or a modification of judgment pursuant to Rule 59, the orders fixing the time for the service of the record on appeal, and the orders denying the third-party plaintiff's Rule 59 motion, did not and could not extend the time within which the appellant is required to file the record on appeal in this Court after giving notice of appeal from the judgment. *See* the Drafting Committee Note to App. Rule 27(c).

Appeal dismissed.

Judges ARNOLD and ERWIN concur.

NANCY R. PASOUR v. JOSEPH S. PIERCE, JR.; ROBERT L. HEAVNER; JOHN E. JENKINS; JAMES I. COX; AND LARRY L. BRITTAIN, INDIVIDUALLY AND D/B/A FIVE STAR DEVELOPERS; JOSEPH S. PIERCE, JR.; ROBERT L. HEAVNER; JOHN E. JENKINS; JAMES I. COX; LARRY L. BRITTAIN; AND EDWARD E. STEBBINS, INDIVIDUALLY AND D/B/A HOSPITAL PLAZA ASSOCIATES; PIERCE, HEAVNER & JENKINS BUILDERS, INC.; AND THE CITY OF GASTONIA, NORTH CAROLINA

No. 7927SC988

(Filed 6 May 1980)

Appeal and Error § 6.2— decision as to fewer than all parties—appeal premature

Plaintiff's appeal from the trial court's order dismissing the complaint against defendant city was premature, since the granting of the city's motion to dismiss disposed of the rights and liabilities of fewer than all the parties; nowhere in the trial court's order did it certify that there was no just reason for delay and thereby assure an immediate appeal of its order; and the signing of the appeal entry by the trial court did not, in and of itself, satisfy the affirmative act of certification required by Rule 54(b).

APPEAL by plaintiff from *Griffin, Judge.* Order entered 19 September 1979 in Superior Court, GASTON County. Heard in the Court of Appeals on 16 April 1980.

In this civil action plaintiff seeks to recover damages for personal injuries resulting from a fall allegedly caused by the negligence of the defendants in the construction, ownership and development of a building referred to as the "Hospital Plaza Building." In her complaint, plaintiff alleged that the individual defendants, d/b/a Five Star Developers, negligently constructed the building in that they

. . .

(b) Designed or had caused to be designed and/or constructed a four and one-half (4½) inch, more or less, wide step-off from said building onto the sidewalk below;

. . .

(d) They failed to follow established safety codes for the design and construction of this exit way;

The alleged negligence of the individual defendants, d/b/a Hospital Plaza Associates, consisted of their maintaining the exit way in the above-described condition without placing warning signs thereon, and their failing to warn plaintiff "of this latently dangerous exit way." Finally, plaintiff contended that the defendant City of Gastonia was negligent in that it approved the plans and issued its building permit for the construction of the Hospital Plaza Building without requiring the seal of a registered architect or a registered architectural corporation on the plans.

Thereupon, the defendant City of Gastonia moved to dismiss the complaint as to it, pursuant to Rule 12(b)(6), G.S. § 1A-1, for plaintiff's failure to state a claim against the City for which relief could be granted. The motion was allowed.

From an Order filed 20 September 1979 dismissing the complaint as to the City of Gastonia, the plaintiff appealed.

Harris & Bumgardner, by R. Dennis Lorance, for the plaintiff appellant.

City Attorney Henry M. Whitesides and Assistant City Attorney Thomas C. Pollard for the defendant appellee City of Gastonia.

HEDRICK, Judge.

Ordinarily, the allowance of a motion to dismiss is immediately appealable. This case, however, obviously involves multiple defendants, and the Order granting the City's motion to dismiss purports to dispose of the case as to that defendant only. G.S. § 1A-1, Rule 54(b), provides in pertinent part:

> *Judgment upon multiple claims or involving multiple parties.* — When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

It should be noted that section (b) of this rule does not define a final judgment. Rather, it simply provides for (1) the entry of such a judgment as to fewer than all the claims or all the parties in a multiple claim or multiple party lawsuit, and (2) a procedure whereby such a judgment as to fewer than all the claims or all the parties is immediately appealable. *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). While the record before us does not disclose what disposition, if any, has been made of plaintiff's claim against any defendants besides the City of Gastonia, counsel for plaintiff advised this Court at oral argument that those claims are still pending in the Superior Court of Gaston County. Clearly, the granting of the City's motion to dismiss the complaint as to it disposes of "the rights and liabilities of fewer than all the parties." Moreover,

the court did not employ the procedure established by the rule to assure an immediate appeal of its Order dismissing the plaintiff's claim against the City since nowhere in the order did the court certify that "there is no just reason for delay." *See Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974). This Court has held that "the signing of an appeal entry by the trial court cannot, in and of itself, be held to satisfy the affirmative act of certification required by Rule 54(b)." *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 172, 265 S.E. 2d 240, 247 (1980). Although the question has not been raised by the defendant, it is the duty of an appellate court to dismiss an appeal if there is no right to appeal. *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978).

Accordingly, we hold that the plaintiff's appeal is premature and must be dismissed.

Appeal dismissed.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. CHESTER ESTES

No. 7920SC1118

(Filed 6 May 1980)

Safecracking § 4— instructions—use of safe for money or valuables

In a prosecution for safecracking and attempted safecracking which occurred on 13 December 1976, the trial court erred in failing to charge the jury that the safe must have been used for storing money or other valuables, since such use was an element of the crimes charged under G.S. 14-89.1 on the dates they were committed.

APPEAL by defendant from *Seay, Judge.* Judgment entered 9 July 1979 in Superior Court, UNION County. Heard in the Court of Appeals 16 April 1979.

Defendant was convicted on charges of safecracking, attempted safecracking, felonious breaking and entering, and larceny. The State's evidence tended to show that Exom David Oldham, Jr., Ray Cummings, and the defendant drove to Monroe

where they planned to break into the Electric Membership Corporation. Estes stayed in the car with a walkie-talkie, and Oldham and Cummings forced their way into the building, drilled two holes in the vault door, ripped off the combination and handle, but were unable to break into the vault. Thereafter, the two—Oldham and Cummings—broke open the night depository, took some money and divided it with the defendant. Defendant offered no evidence. Upon conviction, the defendant appealed.

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

Joe P. McCollum, Jr., for the defendant appellant.

HILL, Judge.

Defendant brings forward five assignments of error, but we consider one question to be dispositive.

The defendant contends the trial judge committed prejudicial error by failing to instruct the jury on the elements of the crime of safecracking and attempted safecracking as was the law on 13 December 1976.

G.S. 14-89.1 on the date of the crime provided:

> Any person who shall by the use of explosives, drills or tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault *used for storing money or other valuables* shall, upon conviction thereof, receive a sentence . . . . (Emphasis added.)

The statute was amended by the legislature in 1977, and the words "used for money or other valuables" were omitted. The trial judge based his instruction on this law. The State contends that this Court should take judicial notice that a vault, a safe, or a depository box are, through common usage and understanding, the customary receptacles in which money and valuables are kept.

The law on 13 December 1976 included an element additional to the law that was the basis of the trial judge's instruction. In *State v. Hill*, 272 N.C. 439, 443, 158 S.E. 2d 329 (1968), Justice Lake in writing an opinion as to the law of safecracking at that time stated, "the General Assembly has seen fit to provide for the imposition of a sentence of imprisonment up to life upon con-

viction of the offense there described. It has made an element of that offense the fact that the safe forced open be one 'used for storing money or other valuables.' "

The judge erred to the prejudice of the defendant. He should have included in his charge all of the elements of the crime as it was defined in 1976. Because a new trial must be granted in this case, we do not consider the other questions.

For the reasons set out above, the defendant must be granted a

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. CHARLES STEVEN SHEETZ

No. 7921SC966

(Filed 20 May 1980)

1. **Searches and Seizures § 1; Process § 6— evidence secured by subpoena—no search and seizure**

Evidence secured by subpoenas is not normally subject to the strictures of the Fourth Amendment.

2. **Process § 6; Searches and Seizures §§ 19, 25— court order as criminal investigation warrant—absence of probable cause**

An order of the superior court, entered upon application of the district attorney, requiring defendant to present to the sheriff's department for examination all business and working records of a florist and gift shop which he owned was not a subpoena *duces tecum* but was a criminal investigative warrant, and probable cause was required for issuance of a valid warrant. The district attorney's affidavit did not state sufficient underlying circumstances from which the court could conclude that probable cause existed where it alleged that a sheriff's department investigation of a fire at defendant's florist and gift shop disclosed evidence of irregularities which, if shown to be true, would constitute serious violations of the law on the part of defendant, and defendant's motion to suppress the records or evidence from the records seized from him should have been allowed.

3. **Process § 6; Criminal Law § 84— court order as subpoena—evidence obtained in exploitation of prior illegal search**

A court order directing defendant to produce and turn over to the S.B.I. the business and working records of his florist and gift shop was a subpoena,

and evidence obtained pursuant to the subpoena order should have been excluded in defendant's arson trial where it was obtained by exploitation of an earlier illegal search and seizure pursuant to a warrant not based on probable cause.

4. **Constitutional Law § 76; Process § 6— self-incrimination—business records and tax returns obtained by subpoena**

The State's use of business records obtained from defendant sole proprietor by subpoena in his trial for arson violated defendant's Fifth Amendment right against self-incrimination; however, the use of defendant's tax returns which had been prepared by someone else and obtained from defendant by subpoena did not violate his right against self-incrimination.

5. **Arson § 3— incendiary origin of fire—expert testimony**

An expert in arson investigation may properly give his opinion that a fire was of incendiary origin where his opinion is based on his own examination of the burned premises and on a proper hypothetical question supported by the evidence.

6. **Arson § 4.1— unlawful burning of building—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for unlawfully burning a building used in carrying on a trade where the evidence tended to show: the fire occurred within five minutes after defendant closed his florist and gift shop; the premises were still secure when firemen arrived; the fire was not caused by electrical malfunction; an arson expert was of the opinion that the fire was of incendiary origin; an assistant fire marshal's report expressed the opinion that defendant started the fire by dumping an ash tray in a trash can; and defendant was heavily in debt and had recently increased the amount of insurance on the premises.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 14 June 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 March 1980.

Defendant was charged in a bill of indictment with the unlawful burning of a building used in the carrying on of a trade. The events preceding the obtaining of the indictment follow.

On 28 August 1978, a fire occurred at the Clemmons Florist and Gift Shop in Clemmons. Defendant was the sole proprietor and operator of the business. On 28 August 1978, he let his employee, Janice Ellis, out the front door, locked it, and left out the back door. Five minutes after defendant closed the florist, the fire started. Upon arriving at the shop, Assistant Fire Marshal Frank Reed Jarvis began investigating the premises for possible causes of the fire. Subsequently, the Sheriff's Department also began investigating the fire. The record is not clear as to the date

the investigation began or what precipitated it. On 10 October 1978, the district attorney filed an application requesting that the Sheriff's Department be allowed to examine certain records in the possession of defendant, the Clemmons Florist and Gift Shop, Wachovia Bank and Trust Company (Wachovia), Central Carolina Bank, and the Northwestern Bank (Northwestern).

An order bearing the same date and entitled "ORDER FOR EXAMINATION OF BUSINESS AND BANK ACCOUNT RECORDS" was issued by the Superior Court. The order stated:

> "It appears to the Court from the duly verified Petition of Donald K. Tisdale, District Attorney for the Twenty-First Judicial District, that as a result of an investigation into the fire at Clemmons Florist and Gift Shop, Clemmons, North Carolina, on August 28, 1978, in Forsyth County, North Carolina, the said District Attorney for the State, the Honorable Donald K. Tisdale, has requested the Forsyth County Sheriff's Department to make an investigation and report in regard to said fire and
>
> It further appears to the Court that the Forsyth County Sheriff's Department through its agents has conducted an investigation into said matter which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of one individual, and
>
> It further appears to the Court that the Forsyth County Sheriff's Department cannot complete its investigation without examining the business and working records and checking, savings, and loan accounts of Charles Steven Sheetz, 1730 Aberdeen Terrace, in the following named banks: Wachovia Bank and Trust Company, N.A., Central Carolina Bank, and Northwestern Bank."

Based upon its findings of fact, the court ordered the Wachovia Bank and Trust Company and the Northwestern Bank *to allow* representatives of the Sheriff's Department to examine bank records and the accounts of defendant and the Clemmons Florist and Gift Shop. Defendant was also ordered *to present* to representatives of the Sheriff's Department *for examination* all business and working records of the shop.

An order issued 4 December 1978 directed defendant to produce and turn over to the State Bureau of Investigation the business and working records of the shop and directed Wachovia, Central Carolina Bank, and Northwestern to allow the State Bureau of Investigation to examine the accounts of defendant and the Clemmons Florist and Gift Shop. A final order was entered on 13 December 1978 which stated in pertinent part:

> "It further appears to the Court that the State Bureau of Investigation cannot complete its investigation without examining the business accounts of Charles Steven Sheetz, 1730 Aberdeen Terrace, in the following named businesses and financial institutions: NCNB Visa Bank Card Department, Account No. 4342-650-042-346; Shell Oil Company, P. O. Box 80, Tulsa, Oklahoma 74102, Account No. 477-141-006; Citibank Visa, 2 Huntington Quad., Huntington Station, New York 11746, Account No. 4128-544-311-116; Blazer Financial Services, 229 West 5th Street, Winston-Salem, North Carolina; Capital Finance Company, 227 West 5th Street, Winston-Salem, North Carolina; and Southern Discount of Winston-Salem, Winston-Salem, North Carolina, for the period of January 1, 1978, through and including, August 28, 1978."

Defendant complied with these orders.

On 5 March 1979, Assistant Fire Marshal Frank Reed Jarvis submitted an investigative report to the district attorney, which stated in pertinent part:

> " 'It is the opinion of this investigator that after Charles Steven Sheetz let Mrs. Janis [sic] Ellis out the front door of the florist shop on 8-28-78, at approximately 1700, he returned to the work area of the shop and dumped the contents of at least one ash tray into the green plastic trash can under the long table in front of the walk-in cooler, this ash tray being the closest to his path of travel to the rear door, and intentionally set fire to the combustible materials in the area of the green plastic trash can.' "

On 2 April 1978, the grand jury returned a true bill of indictment against defendant. Prior to trial, defendant moved to suppress the introduction of any evidence gleaned from the business

records and the introduction of the business records. The motion to suppress was denied. The trial court concluded that the 10 October 1978 and 4 December 1978 orders were in the nature of a subpoena *duces tecum.* No mention was made of the 13 December 1978 order.

The jury found defendant guilty. From the judgment entered and a term of imprisonment, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Morrow, Fraser & Reavis, by Bruce C. Fraser, for defendant appellant.

ERWIN, Judge.

Defendant's initial assignment of error concerns the trial court's denial of his motion to suppress the introduction of evidence. We find it necessary to review the propriety of the orders to resolve this contention.

I. Order (10 October 1978)

The order issued on 10 October 1978 was entitled "ORDER FOR EXAMINATION OF BUSINESS AND BANK ACCOUNT RECORDS." The language of the order provided for an examination of the business and working records of defendant's business, as well as those of the banks named therein. The order was different from those issued on 4 December and 13 December. We believe this difference was of constitutional magnitude.

[1] Normally, an order to produce documents, a subpoena, or subpoena *duces tecum,* is not thought to invoke the strictures of the Fourth Amendment of the United States Constitution, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

However, a subpoena is subject to the Fourth Amendment stricture aginst indefiniteness. *See United States v. Miller*, 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976); *Fisher v. United States*, 425 U.S. 391, 48 L.Ed. 2d 39, 96 S.Ct. 1569 (1976); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 90 L.Ed. 614, 66 S.Ct. 494 (1946); *Wilson v. United States*, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911). Thus, the nature of the order being considered is of significance.

[2] The present order is akin to those called for by the United States Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 56 L.Ed. 2d 305, 98 S.Ct. 1816 (1978); *See v. Seattle*, 387 U.S. 541, 18 L.Ed. 2d 943, 87 S.Ct. 1737 (1967); and *Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed. 2d 930, 87 S.Ct. 1727 (1967), *i.e.*, administrative search warrants. G.S. 15-27.2 expressly authorizes issuance of administrative and inspection warrants. "But '[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.' " *Michigan v. Tyler*, 436 U.S. 499, 508, 56 L.Ed. 2d 486, 498, 98 S.Ct. 1942, 1950 (1978), and the warrant must be viewed as a criminal investigative search warrant.[1] *Michigan v. Tyler, supra.* With this in mind, we look to see if the search warrant and its issuance meet the constitutional requirements embodied in the Fourth Amendment of the United States Constitution.

A. Probable Cause

> "Within the meaning of the Fourth Amendment and G.S. 15-25(a), now G.S. 15A-243 to 245, probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. *State v. Campbell, supra.* Thus, the affidavit upon which a search warrant is

1. G.S. 15-27.2(c)(1) provides that when an authorized person under G.S. 15-27.2(a) seeks a warrant which is not a part of a legally authorized program of inspection, a warrant to conduct an inspection may issue upon a showing of *probable cause*. The probable cause standard has been interpreted to be the same as in the case of a search warrant in a criminal proceeding. *Gooden v. Brooks, Comr. of Labor*, 39 N.C. App. 519, 251 S.E. 2d 698, *appeal dismissed*, 298 N.C. 806, 261 S.E. 2d 919 (1979). Thus, whether the warrant is viewed as an administrative search warrant or a regular search warrant issued pursuant to G.S. 15A-245 is not material to the resolution of this case.

issued is sufficient if it 'supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.' *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971)."

State v. Riddick, 291 N.C. 399, 406, 230 S.E. 2d 506, 511 (1976), *reh. denied*, 293 N.C. 261, 247 S.E. 2d 234 (1977). The affidavit upon which the order of 10 October 1978 was issued alleged in pertinent part:

"[T]hat as a result of an investigation being conducted by the Forsyth County Sheriff's Department into a fire occurring at Clemmons Florist and Gift Shop on August 28, 1978 in Forsyth County, Clemmons, North Carolina, the said District Attorney has reason to believe that the examination of certain records in the possession of Charles Steven Sheetz and one Clemmons Florist Gift [sic] Shop and the entire business and working records of the Clemmons Florist and Gift Shop would be in the best interest of the enforcement of the law and the administration of justice in Forsyth County . . ."

"Probable cause cannot be shown 'by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based . . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.' *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965). The issuing officer 'must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion . . . .' *Giordenello v. United States*, 357 U.S. 480, 2 L.Ed. 2d 1503, 78 S.Ct. 1245 (1958)."

State v. Campbell, 282 N.C. 125, 130-31, 191 S.E. 2d 752, 756 (1972).

In *State v. Campbell, supra*, a special agent for the State Bureau of Investigation had sworn under oath that he had prob-

able cause to believe that defendant Campbell had certain illegal drugs in the described house. The facts allegedly justifying issuance of a warrant were the agent's possession of arrest warrants for defendant and his cohorts and the fact that:

> " 'Peter Michael Boulus, Special Agent; N.C. State Bureau of Investigation; being duly sworn and examined under oath, says under oath that he has probable cause to believe that Kenneth Campbell; M. K. Queensberry and David Bryan has on his premises certain property, to wit: illegally possessed drugs (narcotics, stimulants, depressants), which constitutes evidence of a crime, to wit: possession of illegal drugs . . . .' "

Id. at 130, 191 S.E. 2d at 756. One of the grounds upon which our Supreme Court held the seizure of the drugs unconstitutional was that nowhere in the affidavit was there a sufficient statement of underlying circumstances *from which the magistrate could have concluded* that probable cause existed. We believe that the affidavit in question contains the same flaw. The allegation that agents have conducted an investigation which has disclosed evidence of irregularities which, if supported by evidence and found to be true, would constitute serious violations of the law on the part of the defendant, without the disclosure of facts from which the magistrate could ascertain the existence of irregularities that would constitute serious violations of the law, does not meet the constitutional standard for issuance of a search warrant. *See Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965); *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *accord, State v. Macri*, 39 N.J. 250, 188 A. 2d 389 (1963).

Defendant's motion to suppress introduction of the records or evidence gleaned from the records seized from him personally and the Clemmons Florist and Gift Shop pursuant to the order dated 10 October 1978 should have been allowed. *See Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963); *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *see also* G.S. 15A-974.

B. Exclusionary Rule

Evidence seized during an unlawful search cannot constitute proof against the victim of the search,[2] and the exclusionary prohibition extends to the indirect as well as to the direct products of such invasions. *Wong Sun v. United States, supra,* and *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182 (1920). As stated by Mr. Justice Holmes in *Silverthorne Lumber Co. v. United States, Id.* at 392, 64 L.Ed. at 321, 40 S.Ct. at 183:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

Subsequent case law has restated this requirement thusly:

> "[T]he more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

Wong Sun v. United States, 371 U.S. 471, 488, 9 L.Ed. 2d 441, 455, 83 S.Ct. 407, 417 (1963). Thus, we must look to see if the evidence obtained pursuant to the orders dated 4 December 1978 and 13 December 1978 was obtained by exploitation of the unlawful search and seizure or by means sufficiently distinguishable to be purged of the primary taint.

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2. Defendant does not have standing to object to the seizure of or use of the business records of the banks or financial institutions at trial. *See United States v. Miller,* 425 U.S. 435, 48 L.Ed. 2d 71, 96 S.Ct. 1619 (1976).

Defendant's reliance on the Right to Financial Privacy Act of 1978, § 1100, 12 U.S.C. 3401 *et seq.* is misplaced since the act, even if it bars such disclosure, by its terms would not apply to acts occurring prior to November 10, 1978.

II. Orders Dated 4 and 13 December 1978

[3] The orders of 4 December 1978 and 13 December 1978 are subpoenas, and evidence procured by subpoenas is normally not subject to the strictures of the Fourth Amendment. *Fisher v. United States*, 425 U.S. 391, 48 L.Ed. 2d 39, 96 S.Ct. 1569 (1976); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 90 L.Ed. 614, 66 S.Ct. 494 (1946); *Wilson v. United States*, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911). Thus, evidence obtained pursuant to these orders can only be excluded if it has been obtained by exploitation of the illegal search and seizure.[3] For the reasons that follow, we hold the evidence obtained from defendant personally and as sole proprietor should have been excluded and could not be used to sustain the conviction.

The order dated 4 December 1978 was issued upon the application of the district attorney to facilitate the completion of the criminal inquiries of the sheriff and the State Bureau of Investigation.

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182 (1920), the United States Supreme Court, when faced with a similar factual situation, held that evidence lawfully obtained pursuant to subpoenas issued subsequent to a prior unlawful seizure was not admissible to sustain a criminal prosecution against the defendants.

In *Silverthorne*, an indictment had been filed against defendants. They were both arrested. Meanwhile, the United States Marshal, without lawful process, seized books, papers, and documents of defendants' company. Defendants filed an application to have the books returned. The District Court ordered the return of the items, but not before copies and photographs had been made. Subpoenas were then served to reproduce the items. While the facts in the instant case differ, in that here an unlawful search warrant preceded the initial unlawful search, we find no difference of constitutional magnitude, because the issuance of the subsequent subpoenas as in *Silverthorne* was inextricably

3. Defendant can only object to the records taken from him personally and as the sole proprietor of the Clemmons Florist and Gift Shop. *See* Footnote 2. Thus, the evidence obtained from the banks and financial institutions was admissible, and the 13 December 1978 order becomes irrelevant to our decision.

connected with the prior illegal search. Their very issuance was for the purpose of exploiting the evidence obtained by the prior illegal search, *i.e.*, to show criminal acts. For these reasons, we reverse.

III. Production of Records

[4] Defendant also raises the argument that use of business records of a sole proprietor against him in a criminal proceeding when the records are obtained pursuant to subpoenas is violative of the Fifth Amendment of the United States Constitution privilege against self-incrimination.

Whatever solace defendant may have taken from the language used by Mr. Justice Marshall in *Bellis v. United States*, 417 U.S. 85, 87-88, 40 L.Ed. 2d 678, 683, 94 S.Ct. 2179, 2182-83 (1974), stating that "[t]he privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life" has been eviscerated by the Court's subsequent decisions which have all but eliminated the privilege for the private individual, the very person for whom the amendment sought to provide.

In the leading case, *Fisher v. United States*, 425 U.S. 391, 48 L.Ed. 2d 39, 96 S.Ct. 1569 (1976), the United States Supreme Court held that a taxpayer does not have standing to invoke the privilege where the government orders the taxpayer's accountant to produce work papers prepared from information given him by the taxpayer for the preparation of the taxpayer's tax return. In reaching its decision, the Court reasoned that "[t]he accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him." *Id.* at 409, 48 L.Ed. 2d at 55, 96 S.Ct. at 1580. In the instant case, defendant testified:

> "My accountant usually does my taxes for me. I sign the returns, but don't never [sic] look at them. I just sign whatever he fills out.
>
> . . . I check quarterly with my bookkeeper when he does my quarterly taxes. I have got to turn over all the materials to the bookkeeper so he can prepare the tax forms, and he

checks the books. He usually computes the amount of inventory value from either the invoices or what has been put in the ledger. I don't know how he arrives at the equipment value."

Inasmuch as defendant's appeal is based on turning over his tax returns to the State pursuant to the subpoenas, his constitutional argument is rendered meritless by the decision in *Fisher v. United States, supra.*

In all candor, we must call attention to our decision in *Lowder v. All Star Mills, Inc.*, 45 N.C. App. 348, 263 S.E. 2d 624 (1980).

In *Lowder*, we held that the defendant could not be held in contempt for failure to furnish copies of *his* federal and state income tax returns or to write out a list of his assets because of the privilege against self-incrimination embodied in the Fifth Amendment of the United States Constitution. Our premise in holding that the defendant could not be forced to furnish copies of his federal and state income tax returns was that the returns were *prepared* by *defendant*. The issue as to whether someone else had prepared the returns for the defendant was neither raised nor addressed.

In the instant case, defendant testified: "I have had no really formal education in bookkeeping. I am more or less a small businessman who kept his own books and records and took them to my accountant quarterly." To the extent that defendant's constitutional argument rests on the compelled production of business records prepared by him as sole proprietor of the Clemmons Florist and Gift Shop, it must prevail. *See Lowder v. All Star Mills, Inc.*, 45 N.C. App. 348, 263 S.E. 2d 624 (1980). The motion to suppress should have been allowed as it related to the following records in the possession of defendant—invoices, accounts receivable, outstanding notes payable, and credit charges.

IV. Motion to Dismiss

Defendant's plea of not guilty in a prosecution under G.S. 14-62 places the burden upon the State to prove (1) the fire, (2) that it was of incendiary origin, and (3) that defendant was connected with the crime. *State v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549 (1951).

A motion for dismissal pursuant to G.S. 15A-1227 tests the sufficiency of the evidence to sustain a conviction. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

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

Id. at 80, 252 S.E. 2d at 540-41.

Evidence that a fire occurred is not in dispute. However, defendant contends that the evidence of incendiary origin is incompetent and that there is no causal connection between him and the fire.

[5] Defendant's argument that the evidence of incendiary origin is incompetent is meritless. An expert in arson investigation may properly give his opinion that a fire was of incendiary origin where his opinion is based on the expert's own examination of the premises and based on a proper hypothetical question supported by the evidence. *State v. Smith*, 34 N.C. App. 671, 239 S.E. 2d 610 (1977), *appeal dismissed*, 294 N.C. 186, 241 S.E. 2d 73 (1978). For purposes of a motion to dismiss, incompetent evidence may be considered. Thus, assuming *arguendo* that the witness was improperly qualified as an expert, his testimony would still support denial of the motion to dismiss. *State v. Cuthrell, supra*, does not establish a contrary rule.

[6] As to defendant's argument about the sufficiency of the causal connection, we note that the assistant fire marshal's report was read to the jury and connected defendant with the crime. We

hold that this evidence was sufficient to withstand the motion to dismiss. On the day of the fire, defendant had closed the shop. The fire occurred within five minutes of the closing. The fire was not caused by electrical malfunction. When the firemen arrived, the premises was still secure. When this evidence is viewed in the light most favorable to the State, an inference of guilt clearly arises. When evidence of motive, *i.e.*, heavy indebtedness, and evidence of a recent increase in the amount of insurance on the premises are coupled with the foregoing circumstances, the jury could reasonably find defendant guilty of the crime charged. We find the facts in *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971), distinguishable.

Other assignments of error submitted need not be considered, as they may not occur at retrial.

For the errors noted in the foregoing text, defendant is entitled to a

New trial.

Judges MARTIN (Robert M.) and CLARK concur.

IN THE MATTER OF: FORECLOSURE OF A DEED OF TRUST EXECUTED BY SUTTON INVESTMENTS, INC. DATED NOVEMBER 9, 1976, AND RECORDED IN DEED OF TRUST BOOK 1188, PAGE 213, IN THE OFFICE OF THE REGISTER OF DEEDS OF FORSYTH COUNTY, NORTH CAROLINA, BY BARDEN W. COOKE, SUBSTITUTE TRUSTEE

No. 7921SC535

(Filed 20 May 1980)

1. Mortgages and Deeds of Trusts § 19.1 — default in payment on note — acceleration of debt — no notice of default required

Language in a note and deed of trust by which respondent mortgagor obligated itself provided that there was a right of acceleration and foreclosure upon the failure of the mortgagor to pay principal, interest, taxes, charges and assessments within thirty days from the date due without regard to notice, but there was no such right upon the failure of the mortgagor to comply with the provisions requiring it to maintain insurance or to comply with the other covenants and agreements between the parties unless written notice was given and thirty days had elapsed since the giving of the notice; therefore, the

mortgagee had no duty to give written notice to the mortgagor of default in the payment of the annual installments of principal and interest, and the mortgagee's acceleration of the debt and the trustee's commencement of foreclosure proceedings after the mortgagor's failure to pay the amount due on its annual installment within thirty days of its due date were fully authorized under the parties' agreement.

2. **Mortgages and Deeds of Trust §§ 19.1, 25— acceleration of debt—good faith irrelevant—exercise of power of sale upon default in payments proper**

There was no merit to mortgagor's contention that, pursuant to G.S. 25-1-208, mortgagee's lack of good faith in its decision to accelerate the debt precluded it from exercising the power of sale contained in the deed of trust since the statute relied upon by mortgagor imposes a good faith requirement upon the exercise of a secured creditor's option to accelerate "at will" or "when he deems himself insecure," but the right of acceleration upon which mortgagee's rights depended in the present case was conditioned upon the occurrence of an event within the complete control of the debtor, *i.e.*, compliance with the terms and conditions contained in the note and deed of trust.

3. **Mortgages and Deeds of Trust § 25; Jury § 1— foreclosure under power of sale—no right to jury trial**

No trial by jury is required in hearings conducted under G.S. 45-21.16, since that statute was intended by the legislature to meet minimum due process requirements, not to engraft upon the procedure for foreclosure under a power of sale all the requirements of a formal civil action; the statute refers to appeal "to the *judge* of the . . . court having jurisdiction"; and the right to trial by jury applies only to cases in which the prerogative existed at common law or was granted by statute at the time the N. C. Constitution was adopted, and forclosure by power of sale does not fall into that category.

APPEAL by respondent Sutton Investments, Inc. from *Washington, Judge.* Order entered 6 March 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 January 1980.

This is an appeal by the mortgagor from an order of the superior court entered after hearings held pursuant to G.S. 45-21.16 authorizing foreclosure of a deed of trust.

In November 1976 Richardson Corporation of Greensboro (Richardson) sold and conveyed a shopping center in Winston-Salem to Sutton Investments, Inc. (Sutton) for the price of $3,800,000.00. Sutton paid $1,150,000.00 in cash, assumed existing deeds of trust totaling $1,650,000.00, and executed its purchase money note secured by a deed of trust on the property for the $1,000,000.00 balance. The principal of the note was payable in five annual installments of $100,000.00 each commencing 10

November 1977 and thereafter in three annual installments of $166,666.66 each. Interest on unpaid principal balances at rates set forth in the note was payable annually on principal payment dates. The note provided that it could be prepaid in whole or in part at any time without penalty.

Sutton paid, albeit late, the first annual installment of principal and interest which became due 10 November 1977. In April 1978 Sutton proposed that it make monthly prepayments on the annual amount to become due in 1978. After some initial disagreement between Richardson and Sutton as to the computation of the proper monthly amount and amount of percentage rents due to Richardson from shopping center tenants for the period prior to Sutton's taking title, Richardson accepted monthly prepayments on the note from Sutton, applying these prepayments first to interest and then to principal. As of 10 November 1978, the due date for payment of the second annual installment of principal and interest, there remained an unpaid balance on that installment of $40,082.22 on principal and $1,519.05 on interest, making a total then due of $41,601.27. By letter dated 6 November 1978 Richardson notified Sutton of these amounts to become due 10 November 1978. No payment was made on that date. On 4 December and on 7 December 1978 Sutton tendered and Richardson accepted two checks in the amount of $11,827.00 each, leaving an unpaid balance of $17,947.27 still owed by Sutton on the annual installment which had become due 10 November 1978. This balance still being unpaid thirty days after it had become due, Richardson declared the entire balance of the purchase money note immediately due and payable in full and called on the substitute trustee in the deed of trust to foreclose. The provisions in the note and deed of trust giving the holder of the note the right to accelerate payment in event of default will be set forth in the opinion.

On 12 December 1978 the substitute trustee filed with the clerk of superior court in Forsyth County a petition for hearing prior to foreclosure sale and served on Sutton notice of hearing as required by G.S. 45-21.16. On 16 December 1978, four days after the substitute trustee filed his petition for hearing with the clerk of superior court, Richardson received by mail Sutton's check in the amount of $17,947.27, which check was refused by Richardson.

On 8 January 1979 a hearing was held before the assistant clerk of superior court in Forsyth County pursuant to the notice of hearing filed by the substitute trustee. The clerk entered an order that date finding that the substitute trustee was entitled to proceed with foreclosure under the terms of the deed of trust.

On appeal by respondent Sutton for hearing de novo before the judge of superior court in Forsyth County, respondent requested and was denied a trial by jury. On 6 March 1979 Judge Washington, the superior court judge before whom the de novo hearing was held, entered an order in which, based upon findings of fact, the court concluded as a matter of law that the note executed by Sutton in November 1976 evidenced a valid debt, that Richardson was and is the holder of the note, that default had occurred, and that acceleration of the debt and exercise of the power of sale were authorized under the terms of the note and the deed of trust. From the order adjudging that the substitute trustee could proceed with foreclosure under the deed of trust, Sutton appeals.

Adams, Kleemeier, Hagan, Hannah & Fouts by M. Jay DeVaney and Bruce H. Connors for Richardson, petitioner appellee.

Smith, Moore, Smith, Schell & Hunter by J. Donald Cowan, Jr. and William L. Young for Sutton, respondent appellant.

PARKER, Judge.

On this appeal respondent does not dispute either that the Note and the Deed of Trust are genuine or that the $17,947.27 balance due on the second annual installment on the note was not tendered until more than thirty days after 10 November 1978, the date on which the annual installment was due. Rather, relying upon the language of the Note and Deed of Trust, respondent contends that the judge erred in determining that petitioners were entitled to foreclose under the terms and conditions contained in the Deed of Trust.

The Deed of Trust and the Note both bear date 9 November 1976, and each instrument refers specifically to the other. There is no question that the Deed of Trust was executed to secure payment of the $1,000,000.00 balance of purchase price owed to

Richardson and evidenced by the Note. The pertinent provisions of the Note with respect to default and the holder's option to accelerate read:

> In the event of: (1) failure to pay any interest or any installment of principal, or any portion of either, or any other sums required to be paid by this Note and the Deed of Trust of even date herewith, within thirty (30) days after the same become due and payable; or (2) failure to perform and comply with any and all of the *other* covenants, terms and provisions of this Note and/or the Deed of Trust of even date herewith and the continuance of such default (i.e. any default other than the payment of principal and interest, or any portion of either) for a period of thirty (30) days after receipt of written notice thereof, then in any of said events said principal sum and all advancements made pursuant to the provisions of said Deed of Trust, together with all unpaid interest, shall be at once due and payable at the option of the holder hereof, its successors or assigns, and be collectible without further notice. (Emphasis added.)

The Deed of Trust provides that the debt may be accelerated and the power of sale exercised by the trustee as follows:

> [I]f the party of the first part [Sutton] fails to make any payment required in the Note hereby secured or of the interest on same, or of any part of either, or of any taxes, charges and assessments within thirty (30) days after the same shall become due and payable, or if default be made with reference to procuring, paying for, assigning and keeping in force policies of insurance as herein provided, or if default be made in the due fulfillment of the covenants and agreements or any of them herein contained, and such default shall continue for thirty (30) days after receipt of written notice from the party of the third part (Richardson) to the party of the first part (Sutton) . . . .

The parties are in agreement that the Deed of Trust and the Note are consistent in specifying the omissions which constitute default. They are further in agreement that such default is the first precondition to acceleration of the debt and exercise of the power of sale. The dispute arises as to the second precondition, that is, the time period for which the omission or default must

continue before the mortgagee's power to accelerate the debt and the trustee's power to sell the encumbered property arise.

[1] Respondent contends that before the holder of the Note may accelerate the debt and the Trustee may exercise his power of sale pursuant to the terms of the Deed of Trust, the mortgagor's omission to perform any duty must continue for a period of thirty days *after receipt of written notice thereof.* Thus, because the mortgagee, Richardson, at no time gave written notice to Sutton of its default in payment of principal and interest due on the 1978 annual installment, respondent contends that Richardson had no power to accelerate the debt or to order the substitute trustee to exercise the power of sale under the Deed of Trust, and that the judge erred in finding that petitioner-mortgagee was entitled to proceed with foreclosure. We do not agree.

It is well settled that a power of sale contained in a deed of trust must be exercised in strict conformity with the terms of the instrument. *Brown v. Jennings,* 188 N.C. 155, 124 S.E. 150 (1924); *Ferebee v. Sawyer,* 167 N.C. 199, 83 S.E. 17 (1914). Such powers of sale are contractual, *Eubanks v. Becton,* 158 N.C. 230, 73 S.E. 1009 (1912), and ordinary rules of contract govern their interpretation. The general rule of contract is that "[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." *Yates v. Brown,* 275 N.C. 634, 640, 170 S.E. 2d 477, 482 (1969). Thus, where a note and a deed of trust are executed simultaneously and each contains references to the other, the documents are to be considered as one instrument and are to be read and construed as such to determine the intent of the parties. *Bank v. Belk,* 41 N.C. App. 356, 255 S.E. 2d 421 *cert. denied* 298 N.C. 293, 259 S.E. 2d 911 (1979); *see, Frye v. Crooks,* 258 N.C. 199, 128 S.E. 2d 257 (1962). Of course, if the language in the separate instruments defining the conditions upon which a power of sale may be exercised is contradictory, language in a deed of trust expressly limiting the exercise will govern. *Worley v. Worley,* 214 N.C. 311, 199 S.E. 82 (1938).

Applying these principles to the present case, we conclude initially that proper interpretation of the provisions in the Note and the Deed of Trust prescribing the conditions of default re-

quires that the instruments be read together as one contract rather than as two independent agreements. Thus, the "problem is not what the separate parts mean, but what the contract means when considered as a whole." *Simmons v. Groom*, 167 N.C. 271, 275, 83 S.E. 471, 473 (1914).

The provisions at issue in the present case are those in the Deed of Trust and those in the Note concerning default and acceleration. Although similar, they are not identical. The parties have stipulated on this appeal that original drafts of the Note and Deed of Trust were prepared by counsel for Sutton, the mortgagor, and that these drafts contained consistent clauses regarding the rights of Richardson in the event of failure of Sutton to pay principal and interest or failure to comply with all terms and conditions of the Note and Deed of Trust. On 9 November 1976 counsel for both parties met to discuss revisions of several of the exhibits to the purchase agreement, including the Promissory Note and the Deed of Trust. Subsequent to that meeting, the form of the Note was revised although the Deed of Trust remained unchanged.

Respondent mortgagor contends that the express language of the Deed of Trust requires that written notice be given in the event of *any* default and that the right to foreclose does not arise until thirty days after such notice, despite the "apparently inconsistent terms" in the Note. In support of this contention respondent relies upon the decision of our Supreme Court in *Worley v. Worley, supra.*

In *Worley*, the mortgagors executed four notes, the first of which specified that interest was "due and payable annually." The deed of trust securing payment of the notes, however, included a provision for power of sale "if default be made in the payment of said bonds or the interest on same, or any part of either at maturity . . . ." 214 N.C. at 312, 199 S.E. at 82. Upon the mortgagors' failure to pay interest on the first note at the end of one year, the mortgagee attempted to foreclose under the power of sale, which foreclosure was enjoined. In permitting recovery in an action brought by the mortgagors to recover damages for losses on account of the unlawful foreclosure, the Supreme Court held that the language in which the power of sale was conferred in the mortgage limited the right to sell, despite the inconsistent

reference in the note to annual payment of interest: "The court cannot shorten the time on which the parties have expressly agreed." 214 N.C. at 313, 199 S.E. at 83.

Worley v. Worley, supra, is clearly distinguishable from the case now before us. Here, although the relevant provisions in the Note and in the Deed of Trust are not identical, they are not inconsistent. The Deed of Trust first specifies that acceleration may occur if the mortgagor "fails to make any payment required in the Note hereby secured or of the interest on same, or of any part of either, or of any taxes, charges and assessments within thirty (30) days after the same shall become due and payable." In the same sentence, it is specified that acceleration may occur "if default be made with reference to procuring, paying for, assigning and keeping in force policies of insurance as herein provided, or if default be made in the due fulfillment of the covenants and agreements or any of them herein contained, and such default shall continue for thirty (30) days after receipt of written notice from the [mortgagee] to the [mortgagor]." Even without reference to the terms of the Note, a logical interpretation of this language is that there is a right of acceleration and foreclosure upon the failure of the mortgagee to pay principal, interest, or taxes, charges and assessments within thirty days from the date due without regard to notice, but that there is no such right upon the failure of the mortgagor to comply with the provisions requiring it to maintain insurance or to comply with the other covenants and agreements between the parties unless written notice has been given and thirty days has elapsed since the giving of the notice. Default in the payment of principal, interest, and taxes are events clearly within the knowledge of the mortgagor. Default in the fulfillment of other covenants and agreements, such as default in maintaining the property in good order and repair or in maintaining the proper amount of insurance, are events more peculiarly within the knowledge of the mortgagee, and written notice may be necessary to apprise the mortgagor of defaults of this character.

That this interpretation correctly reflects the intention of the parties is confirmed by the language of the Note itself. In the revised Note the parties have underscored the distinction between the different types of events constituting default, using the number "(1)" to set off default in payment of any installment of

principal or interest or any other *sums* from the due date, and the number "(2)" to set off the failure to comply with "any and all of the other covenants, terms and provisions" of the Note and the Deed of Trust, *"i.e. any default other than the payment of principal and interest, or any portion of either"* (Emphasis added). This latter type of default is the only one as to which notice must be given. Under this interpretation of the agreement, petitioner Richardson, as mortgagee, had no duty to give written notice to respondent Sutton of default in the payment of the annual installments of principal and interest. Thus, the mortgagee's acceleration of the debt and the trustee's commencement of foreclosure proceedings after respondent's failure to pay the amount due on its annual installment of $17,947.27 by December 10, 1978 were fully authorized under the parties' agreement, and the judge correctly so found.

[2] Relying upon G.S. 25-1-208, respondent mortgagor next contends that even if the undisputed facts establish as a matter of law that Richardson had a right to accelerate the debt, Richardson's lack of good faith in its decision to accelerate precludes it from exercising the power of sale contained in the Deed of Trust. This contention is without merit. The statute relied upon is that portion of the Uniform Commercial Code which imposes a good faith requirement upon the exercise of a secured creditor's option to accelerate "at will" or "when he deems himself insecure." "These clauses are clearly distinguished from default-type clauses . . . where the right to accelerate is *conditioned* upon the occurrence of a condition which is within the control of the debtor." *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 631, 224 S.E. 2d 580, 588 (1976). As in *Crockett, supra*, the right of acceleration upon which Richardson's rights depend in the present case is conditioned upon the occurrence of an event within the complete control of the debtor, i.e., compliance with the terms and conditions contained in the Note and the Deed of Trust. Thus, assuming *arguendo* that G.S. 25-1-208 is applicable to real property transactions, it is inapplicable to the type of acceleration clause at issue in the present case.

[3] Finally, respondent Sutton challenges the denial of its request for trial by jury upon the hearing de novo in Superior Court. We agree with the judge of the superior court that no trial by jury is required in hearings conducted under G.S. 45-21.16.

That statute was adopted by our General Assembly in response to the decision in *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), which held our then existing statutory procedure for foreclosure under a power of sale contained in a deed of trust to be constitutionally defective as applied in that it provided no assurance of notice to the mortgagor nor any hearing prior to foreclosure and sale. As adopted in 1975 in response to that case, G.S. 45-21.16 was intended by the legislature to meet minimum due process requirements, not to engraft upon the procedure for foreclosure under a power of sale all of the requirements of a formal civil action. To have done so would have been to render the private remedy as expensive and time-consuming as foreclosure by action. Thus, upon appeal from an order of the clerk authorizing the trustee to proceed with sale, the judge is limited upon the hearing de novo to determining the same four issues resolved by the clerk. *In re Watts*, 38 N.C. App. 90, 247 S.E. 2d 427 (1978). Those issues are: "[T]he existence of [a] (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such . . . ." G.S. 45-21.16(d). That the General Assembly did not intend to provide for a full trial by jury is also indicated by the language of G.S. 45-21.16(d) which refers to appeal "to the *judge* of the district or superior court having jurisdiction" (emphasis added), and of G.S. 45-21.16(e) which refers to the right of either party to petition the resident superior court judge or chief district court judge, "*who shall be authorized to hear the appeal.*" (emphasis added). Further, under our state Constitution, the right to trial by jury applies only to cases in which the prerogative existed at common law or was granted by statute at the time the Constitution was adopted. *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E. 2d 464 (1963). *In Re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961). Clearly, foreclosure by power of sale has historically been a private contractual remedy, *see, Kornegay v. Spicer*, 76 N.C. 95 (1877), and there was no right at the time our Constitution was adopted either by virtue of the common law or statute to a jury determination of the type of issues to be resolved by a hearing pursuant to G.S. 45-21.16.

At the hearing de novo held on 16 February 1979, the judge, upon competent evidence, found that Sutton was indebted to Richardson, the noteholder, that Sutton was in default, that

Richardson had a right to foreclose under the terms of the Deed of Trust, and that due notice was given to Sutton. These findings support the court's conclusion that the Substitute Trustee is entitled to proceed with foreclosure. The order appealed from is

Affirmed.

Judges ARNOLD and WEBB concur.

WASHINGTON PAUL BAYLOR v. H. LEE BROWN AND DOROTHY MITCHELL BROWN

No. 7926SC706

(Filed 20 May 1980)

Rules of Civil Procedure § 60— failure to defend action—no showing of extraordinary circumstances—setting aside of default improper

In an action by plaintiff to recover his automobile, tools of his trade and other personal possessions which defendants were allegedly withholding, the trial court erred in entering an order setting aside entry of default judgment and allowing defendants twenty days in which to file answer, since there was no showing of extraordinary circumstances where defendant's attorney withdrew before filing answer because he could not reach a financial agreement with defendants; the Legal Aid Society, which was representing plaintiff, was informed that defendants' attorney was withdrawing; the Legal Aid Society could not be held responsible for defendants' inability to hire counsel; there was no evidence that plaintiff practiced or attempted to practice any fraud, deceit, misrepresentation, or duress upon defendants; defendants invested $3000 in their business during the period of time this action was pending; and defendants made a free choice to take the risk of not defending the action against them and to use the $3000 for another purpose other than defending the action in question.

APPEAL by plaintiff from *Snepp, Judge*. Order entered 26 February 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 February 1980.

In this civil action, the complaint was filed on 6 April 1978, and a default judgment awarding the amount of $14,121 plus attorney fees was entered 30 June 1978. On 26 February 1979, the trial court entered an order pursuant to Rule 60(b)(6) of the Rules of Civil Procedure setting aside the judgment. Plaintiff appealed.

Legal Services of Southern Piedmont, Inc., by Leslie J. Winner and Lark Hayes, for plaintiff appellant.

Craighill, Rendleman, Clarkson, Ingle & Blythe, by Francis O. Clarkson, Jr., and William B. Webb, Jr., for defendant appellees.

ERWIN, Judge.

History of Case

On 6 April 1978, plaintiff filed his complaint and motion for preliminary relief against defendants, husband and wife, for the return of his automobile, tools of his trade, and other personal possessions which defendants were withholding. Plaintiff also sought damages in the amount of $14,050 arising from malicious prosecution, abuse of process, trespass to his car and the possessions therein, breach of contract, and conversion. He also sought punitive damages in the amount of $10,000. Plaintiff prayed for treble the amount of actual damages awarded on grounds that defendants' actions constituted an unfair and deceptive trade practice. *See* G.S. 75-1.1 *et seq.*

Plaintiff alleged that on 20 December 1977, he entered into an oral agreement with defendant H. Lee Brown to purchase a 1973 Ford from defendant's wife, Dorothy. Under the terms of this agreement, plaintiff would assume payments on a loan made to Dorothy when she purchased the car. At the time the agreement was made, plaintiff had possession of the car with the permission of defendants. Pursuant to the agreement, plaintiff retained possession and made loan payments in December 1977 and January 1978.

The oral agreement was reduced to writing which gave plaintiff permission to possess and operate the car and to succeed to ownership upon payment of the loan. The agreement contained the following language, *inter alia*:

> "That the permission of H. Lee Brown for the said Paul Baylor to possess and operate the vehicle may be terminated and revoked at any time at the option of H. Lee Brown, at which time H. Lee Brown may succeed to and take possession of the automobile and in the interest or right to possession of the said Paul Baylor shall thereupon immediately terminate."

Plaintiff alleged that at the time the agreement was signed, the parties agreed that H. Lee Brown could repossess the automobile only if plaintiff did not make the payments as agreed.

Prior to 1 February 1978, plaintiff drove the car to Florida, where he was arrested and jailed for five days on a fugitive warrant based on a North Carolina charge of auto larceny. This arrest resulted from the defendants' report to the Mecklenburg County Police Department on 30 January 1978 that plaintiff had stolen the car. At the time plaintiff was arrested, the car and his possessions therein, including his tools, were impounded. After release from jail, plaintiff returned to Charlotte without his car or other personal property. On 6 March 1978, plaintiff appeared in District Court, Mecklenburg County for the probable cause hearing on the automobile larceny charge. Defendants failed to appear, and the charge was dismissed.

After plaintiff's arrest, he made repeated unsuccessful requests to defendant Dorothy Brown to return the car and other property found in the car. On 6 April 1978, the Superior Court heard plaintiff's motion for injunctive relief and thereafter entered an order making findings of fact as alleged in the complaint and ordered the defendants to show cause why the car and possessions should not be returned to plaintiff. On 24 April 1978, a consent order was entered providing that the car and possessions of plaintiff be returned to him, and plaintiff was to continue making payments under the prior agreement.

After this order was signed, defendants' attorney met with them and informed them in a letter dated 12 May 1978 that, in his opinion, it would cost between $1,500 to $2,500 to represent them in this case. He requested $500 as a down payment and would have required an additional $1,500 to be paid to him within one month in order to further represent defendants.

On 19 May 1978, plaintiff's counsel, Legal Aid, wrote defendants' attorney that if an answer was not filed by 23 May 1978, an entry of default would be sought. On the same day, defendants' attorney wrote Legal Aid, informing them that defendants were unable to pay his legal fee and that they planned to find another attorney in a week. Legal Aid wrote defendants, notifying them that if their answer was not filed or an attorney did not contact them by 26 May 1978, they would apply for an entry of default.

Defendants' counsel advised them that he was going to withdraw as counsel on 22 May 1978. By letter, defendants were advised by counsel as follows:

> "May I again express to you the urgency in obtaining an attorney immediately and filing an Answer to the Complaint. The time for filing an Answer expired May 10, 1978, so your attorney will need to obtain permission from the attorneys representing Baylor to file a late Answer. As I stated to you during our telephone conversation, if an Answer is not filed immediately a judgment by default will be entered against you for the amount prayed for in the Complaint."

On 26 May 1978, plaintiff moved for entry of default and served defendants with a copy of said motion. On 5 June 1978, Attorney Hulse wrote defendants and suggested that they employ an attorney to get the judgment set aside. He warned them that if they failed to do so, the sheriff would execute on the judgment. On 20 June 1978, defendants were notified of a hearing to determine the amount of damages and whether the judgment by default was appropriate.

On 26 June 1978, the hearing on said default judgment was held. Defendants did not appear. Judgment was entered for plaintiff against defendants in part as follows:

> "1. Defendants are jointly and severally liable to plaintiff in the amount of $14,121.00. This amount is three times his actual damages of $4,707.00.
>
> 2. Defendants are jointly and severally liable to Legal Services of Southern Piedmont, Inc., in the amount of $1612.50 as attorneys' fees."

Events Following Judgment

On 27 November 1978, an execution of judgment was returned wholly unsatisfied. On 22 December 1978, plaintiff filed a Motion in Supplemental Proceedings, requesting the court to order defendants to appear and answer any questions concerning their property. The motion was granted, and defendants appeared and answered questions.

On 26 January 1979, defendants, through their newly retained counsel, moved for relief of judgment pursuant to G.S. 1A-1, Rule 60(b), of the Rules of Civil Procedure. Therein, they alleged that they are not engaged in the business of selling new or used automobiles; that after entering into the written agreement concerning purchase of the car, the parties agreed that the car would remain within the state, and that its removal therefrom would be cause for repossession; that at the probable cause hearing on the larceny, defendant Dorothy Brown appeared after the charge was dismissed due to a misunderstanding with an attorney who was to accompany her; that after the complaint against them was filed, defendants were financially unable to keep Attorney Hulse; and that they never requested Legal Aid to help them since plaintiff was being represented by them in this case.

Evidence Presented on Rule 60(b)(6) Motion

Defendant Lee Brown testified that he had an income of $500 to $600 per month; that on 10 May 1978, he received a check for $3,000 from his wife's father as a loan and his household furniture was used as collateral; that he paid his present attorney a $500 retainer; that he has been in court before on domestic matters; and that he currently has a suit pending against another individual. This defendant admitted that he never called Legal Aid to ask for an extension of time to file an answer or to notify them that he did not have an attorney. In an affidavit filed, this defendant (Lee Brown) stated that during April and May 1978, his sole source of income was $1,004.21 from his business and that he does not own an automobile or any real property.

Defendant Dorothy Brown testified and presented an affidavit to the effect that her take home pay for April and May 1978 was $1,119.10; that both defendants' expenses during that period was $2,291; and that she pays $125 per month to her mother for one of her children.

An investigator for the Mecklenburg County Police Department testified that H. Lee Brown told him that plaintiff had been told to take the car to an insurance adjuster and had not returned, and that he believed that Baylor had taken the car to Florida. The investigator further testified that H. Lee Brown showed a great deal of hostility toward Baylor and never told him

anything about the agreement between the parties concerning purchase of the car.

Judgment

The trial court entered an order setting aside the entry of default judgment pursuant to G.S. 1A-1, Rule 60(b)(6), of the Rules of Civil Procedure and allowed defendants 20 days in which to file answer.

The court concluded as a matter of law as follows:

"1. That the Defendants have a meritorious defense to each and every allegation against them in the complaint.

2. That under the circumstances of this case, the ends of justice would be served by allowing the Defendants' motion to set aside the entry of default and judgment by default, and to have their liability, if any, determined by a jury."

Question Presented

Plaintiff's first question for our determination is: "Do the trial court's findings of fact, together with the other uncontroverted matters of record, establish sufficiently extraordinary circumstances to justify setting aside the default judgment pursuant to G.S. § 1A-1, Rule 60(b)(6)?" For the reasons that follow, we answer, "No," and vacate the judgment entered.

Rule 60(b)(6) of the Rules of Civil Procedure provides in part:

"(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(6) Any other reason justifying relief from the operation of the judgment."

"North Carolina Rule 60(b), including all six grounds listed therein, has been taken literally from Federal Rule 60(b), except that the last sentence of Federal Rule 60(b) provides for the abolishment of the writs of coram nobis, coram vobis, audita

querela and bills of review, which the North Carolina Rule does not." W. Shuford, N.C. Civil Practice and Procedure, § 60-1 (1975). The nearly identical provisions of our Rule 60(b) and Federal Rule 60(b) point to the federal decisions for interpretation and enlightenment. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971). Federal courts hold that Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses of the rule. *Menier v. United States*, 405 F. 2d 245 (5th Cir. 1968). *See Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F. 2d 594 (5th Cir. 1963). Judge Vaughn stated for this Court in *Equipment Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E. 2d 499, 501-02 (1978):

> "Courts have the power to vacate judgments when such action is appropriate, yet they should not do so under Rule 60(b)(6) except in extraordinary circumstances and after a showing that justice demands it. Thus the federal courts, in considering similar questions, have identified as relevant factors (1) the general desirability that a final judgment not be lightly disturbed, (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure, (3) the opportunity the movant had to present his claim or defense, and (4) any intervening equities."

As recognized in our decision in *Equipment Co. v. Albertson, supra*, the setting aside of a judgment pursuant to G.S. 1A-1, Rule 60(b)(6), of the Rules of Civil Procedure should only take place where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. The factors enumerated in *Equipment Co. v. Albertson, supra*, are means of determining the pre-existence of conditions justifying the use of G.S. 1A-1, Rule 60(b)(6), of the Rules of Civil Procedure.

In the present case, the propriety of the court's order hinges on the third factor—the opportunity the movant had to present his claim or defense. In setting aside the default judgment, the trial court found as a fact in pertinent part:

> "6. On May 22, 1978, the said William F. Hulse filed a motion to withdraw as attorney of record because the Defendants were not able to make the necessary financial ar-

rangements with him and on the same date, an order was entered of record allowing this motion. The said Legal Aid Society was informed that Mr. Hulse was withdrawing because the Defendants did not have sufficient money to pay him.

* * *

12. In this case, the said Legal Aid Society had knowledge or should have in the exercise of ordinary care had knowledge that these Defendants could not afford an attorney to defend themselves against an action of this nature.

* * *

14. During April and May of 1978, the Defendant, H. Lee Brown, operated a small auto upholstery shop, had an income of slightly over $500 per month, and the Defendant, Dorothy Mitchell Brown, had an income of $660 one month and $706 the next. The total expenses of the two Defendants for living during that period of time was at least $2,291.00, all as appears in the affidavit of Dorothy M. Brown filed herein. The defendants had no assets except Mr. Brown's business."

In the case *sub judice*, the court could have only relied on Rule 60(b)(6), in that the facts do not call into play any other subsection of Rule 60(b). There is not any evidence in the record before us that plaintiff practiced or attempted to practice any fraud, deceit, misrepresentation, or duress upon defendants. The Legal Aid Society could not be held responsible for defendants' inability to hire counsel. The record reveals that defendants invested $3,000 in their business during the period of time this action was pending.

To us, defendants made a free choice to take the risk of not defending the action against them and to use the $3,000 for another purpose other than defending the action in question. In view of this fact, we hold that the record does not reveal any extraordinary circumstance which would warrant the trial court to use its discretion as provided by Rule 60(b)(6).

The trial court's order setting aside the judgment is

Vacated.

Judges MARTIN (Robert M.) and WELLS concur.

BENJAMIN HART, ADMINISTRATOR OF THE ESTATE OF ROBERT EARL BATTLE, DECEASED v. J. M. WARREN, M.D.

No. 797SC1037

(Filed 20 May 1980)

1. **Appeal and Error § 14— directed verdict—withdrawal of notice of appeal—motion for new trial—appeal of directed verdict and denial of new trial**

Where plaintiff gave notice of appeal on 11 December 1978 when a directed verdict was entered for defendant, plaintiff moved for a new trial on 19 December, plaintiff moved to withdraw his appeal on 22 December, plaintiff filed a renewed motion for a new trial on 26 December, and this motion was denied on 29 March 1979, plaintiff's notice of appeal on 6 April from judgment on the directed verdict and from the order denying plaintiff's motion for a new trial brought the case before the Court of Appeals in a proper and timely fashion.

2. **Physicians, Surgeons and Allied Professions § 17.2— negligence of doctor in treatment of patient—sufficiency of evidence**

Plaintiff's evidence was sufficient for the jury on the issue of whether negligence by defendant physician was a proximate cause of the death of plaintiff's intestate where there was evidence tending to show that defendant, a general practitioner, undertook to treat the intestate when he came to a hospital emergency room; defendant's examination of the intestate lasted only four minutes; a medical expert testified that the patient's history revealed a textbook case of possible pancreatitis; a serum amylase test would have revealed pancreatitis, but no such test was ordered by defendant; defendant diagnosed intestate's condition as alcoholic gastritis and gave intestate a strong pain reliever which masked his symptoms; the intestate should have been put in the hospital but was allowed to go home; the intestate died of a combination of pancreatitis and a perforated ulcer; and a medical expert testified that he had an opinion based on a reasonable medical certainty that defendant's negligence was a cause of the intestate's death.

APPEAL by plaintiff from *Brown, Judge*. Judgment entered 12 December 1978 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 23 April 1980.

This is an action by the administrator of the estate of Robert Earl Battle against J. M. Warren, M.D., for damages allegedly resulting from the wrongful death of plaintiff's intestate, which plaintiff alleges was proximately caused by the negligence of the defendant.

On 11 December 1978 defendant moved for a directed verdict under Rule 50 of the Rules of Civil Procedure. The motion was

allowed on the same day, and plaintiff gave notice of appeal. On 19 December 1978 plaintiff moved for a new trial. Thereafter, on 22 December 1978 plaintiff moved to abandon and withdraw his notice of appeal. Then, on 26 December 1978, plaintiff filed a renewed motion for a new trial pursuant to Rule 59, which motion was denied by the Court on 29 March 1979. Plaintiff thereupon gave notice of appeal from the judgment on the directed verdict entered 12 December 1978 and from the order dated 29 March 1979 denying plaintiff's motion for a new trial. The trial judge entered an order dated 10 April 1979 adjudging that plaintiff had given due notice of appeal.

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

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

HILL, Judge.

[1] Appellee contends plaintiff appellant has abandoned in his brief the one properly preserved exception and assignment of error, and, therefore, failed to present any question to this Court; that by abandoning his first appeal and seeking a new trial the appellant was precluded from appealing from rulings made previously by the trial court. *See Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). We do not agree. Once the notice of appeal was given, jurisdiction was transferred from the superior court to the Court of Appeals. In order to properly proceed with plaintiff's motion for a new trial, jurisdiction had to be re-established in the superior court. This was done on 22 December 1978 by plaintiff's motion for withdrawal of notice of appeal. This simply restored jurisdiction in the trial court, and notice of appeal on 6 April 1979 from judgment on the directed verdict and from the order denying plaintiff's motion for a new trial brought the case before this Court in a proper and timely fashion.

[2] Appellant contends the trial court erred in directing the verdict in favor of the defendant at the end of the plaintiff's evidence. A careful reading of the record leads us to the same conclusion. We must set forth rather extensive facts for proper disposition of the case.

Robert Earl Battle left work on 14 October 1974, complaining of abdominal pain and during the evening was driven to the emergency room of Nash General Hospital. At the hospital a nurse took a preliminary medical history, and the defendant doctor examined Battle for some four or five minutes. Defendant doctor is a general practitioner and was covering the emergency room that night. Battle indicated he had been drinking a pint of alcohol each day for the past ten or twelve days, complained of intermittent stomachache, nausea and vomiting. His temperature, respiration rate, blood pressure, blood work and pulse rate were within normal limits. The abdomen was soft and flat and bowel sounds hyperactive.

Dr. Warren gave decedent a moderately strong pain reliever, diagnosed the condition as alcoholic gastritis, and allowed Battle to go home after prescribing a mild relaxant and anti-pain drug. Battle became progressively worse and was carried to another doctor's office the following afternoon. Battle died two days after the examination by defendant.

The patient was seen by Dr. James E. Bryant in Rocky Mount on the afternoon of 15 October 1974. Dr. Bryant is engaged in family practice and a general practice. Dr. Bryant testified that his diagnosis was pancreatitis, which diagnosis was later confirmed. Dr. Bryant further testified that he was familiar with the standard of care at Nash General Hospital for a family practitioner covering the emergency room. After being presented with a long hypothetical question containing facts to be found by the jury, Dr. Bryant testified on cross-examination that the examination and treatment of Battle by Dr. Warren were in accordance with an acceptable standard of care. On redirect examination, Dr. Bryant testified after listening to another hypothetical question outlining the facts of this case that he would have considered pancreatitis as a possible diagnosis and that a serum amylase test would have helped in the diagnosis of the patient's problems. He mentioned other factual situations where he would not have made such a diagnosis.

Dr. Herbert J. Proctor testified that he was licensed to practice medicine in North Carolina in 1969; that he did his residency and internship at North Carolina Memorial Hospital in Chapel Hill, was board qualified in general and thoracic surgery and thus

was an "expert" in these areas. He listed his educational background, teaching and writing experience, and hospital experience. Dr. Proctor further testified that he averaged nine or ten hours a day in the emergency room seeing patients. Dr. Proctor is familiar with standards and practices in communities such as Rocky Mount and hospitals such as Nash General Hospital, having been clinical director for Emergency Medical Services of North Carolina. Proctor stated that he had been in Nash General Hospital; that he is familiar with the standards and practices in communities of that size and in hospitals of that size; and that pancreatitis crosses over into his area of expertise. Dr. Proctor qualified as an expert and testified that the patient died of a combination of pancreatitis and a perforated ulcer. Based on a hypothetical question covering the facts of the case, Dr. Proctor further testified that from a medical point of view, the course of diagnosis and treatment pursued by the defendant, Dr. Warren, is not the course that would have been pursued by a reasonably skillful emergency room physician in a hospital the size of Nash General. Dr. Proctor took issue with the examination of the patient taking only four minutes and the giving of a substantial anti-pain drug which masked the symptoms. The doctor testified that the patient's history revealed a textbook case of the possibility of pancreatitis, and a serum amylase should have been drawn; that in his opinion a serum amylase test would have revealed pancreatitis; that it is unlikely that pancreatitis would have developed over a short period of time; and that Battle should have been admitted to the hospital.

Dr. Proctor further testified that based on the hypothetical question given to him previously, he had an opinion based on a reasonable medical certainty that the defendant Warren's negligence was a cause of Battle's death.

The defendant moved for a directed verdict pursuant to Rule 50, contending there was insufficient evidence before the Court of a failure by defendant to exercise reasonable care in the treatment of the patient, based on the standard acceptable for a general practitioner in the same or similar community. The court adjourned without ruling on the motion and asked the defendant to restate his motion the following day. At that time, the defendant moved for a directed verdict based on Rule 50, contending that the plaintiffs had not proved negligence; had not proved

negligence was the proximate cause of death; and had not proved negligence sufficient to go to the jury. The motion was allowed.

It is elementary that in determining the sufficiency of evidence to withstand a Rule 50 motion, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in its favor. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

Justice Parker has stated, that in ruling on a motion for nonsuit,

> . . . after all the evidence of plaintiff and defendant is in, the court may consider so much of defendant's evidence as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. Otherwise, consideration would not be in the light most favorable to the plaintiff.

Morgan v. Tea Co., 266 N.C. 221, 222-223, 145 S.E. 2d 877 (1966).

The courts of the State have repeatedly held that,

> A physician or surgeon who undertakes to render professional services must meet these requirements:
>
> (1) he must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess;
>
> (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's care; and
>
> (3) he must use his best judgment in the treatment and care of his patient. (Citations omitted.)
>
> If a physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable.

Hunt v. Bradshaw, 242 N.C. 517, 521-2, 88 S.E. 2d 762 (1955); *Cozart v. Chapin*, 39 N.C. App. 503, 251 S.E. 2d 682, *disc. rev. denied* 297 N.C. 299 (1979).

In *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E. 2d 565 (1966), in an opinion by then Chief Justice Parker, we find the following:

> A qualified physician or surgeon does not guarantee or insure the correctness of his diagnosis, and ordinarily he is not responsible for a mistake in diagnosis if he uses the requisite degree of skill and care. Generally stated, a qualified physician or surgeon is not liable for an honest error or mistake in judgment if he applies ordinary and reasonable skill and care, keeps within recognized and approved methods, and forms his judgment after a careful and proper examination or investigation. He is not charged with the duty of omniscience, and ordinarily is not an insurer. In order to afford a basis for malpractice, the want of skill or care must be a proximate cause of the injury or death of the patient. 70 CJS, Physicians and Surgeons, p. 48, a, c, d, e.

We are aware that the legislature at its 1975 session (second session, c. 977, s. 4) established a statutory Standard of Health Care, but this cause of action arose prior thereto. *See* G.S. 90-21.12.

Defendant contends the plaintiff has failed to show any breach of an acceptable standard of care. We do not agree. Admittedly, there is conflict in the testimony offered by plaintiff's witnesses. Nevertheless, when we look at the testimony offered by Dr. Proctor in the light most favorable to the plaintiff as is required, we must conclude there was sufficient evidence to go to the jury on the issue of whether the plaintiff has shown any breach of an acceptable standard of care.

Defendant contends plaintiff fails to show that any possible breach of an acceptable standard of care by the defendant was the proximate cause of the death of plaintiff's intestate. Again, we must turn to the testimony of Dr. Proctor.

> Q. Based upon the same facts set forth in the hypothetical question above, do you have an opinion, doctor, based upon reasonable medical certainty, as to whether or not the defendant's negligence was a cause of Robert Earl Battle's death?

OBJECTION OVERRULED.

A. I do.

MOTION TO STRIKE ANSWER. DENIED.

Q. What is your opinion, doctor?

OBJECTION OVERRULED.

A. My opinion is it contributed to his death.

MOTION TO STRIKE DENIED.

Q. Was it a cause of his death?

OBJECTION—leading.

THE COURT: Try not to lead the witness.

A. It was.

Q. I will rephrase the question. State whether or not it was a cause of his death?

OBJECTION OVERRULED.

A. I think it was a cause.

MOTION TO STRIKE ANSWER. DENIED.

Defendant contends the foregoing testimony is incompetent. That question is not directly raised at this time. Furthermore, the court must consider even "incompetent" evidence in ruling on a motion for a directed verdict. *Koury v. Follo*, 272 N.C. 366, 372, 158 S.E. 2d 548 (1968).

In order for the plaintiff to make out a prima facie case, it was necessary that plaintiff not only show negligence on the part of the defendant, but that such negligence was the proximate cause of the injury sustained by plaintiff's intestate—that the negligence shown had a causal relationship to the injury complained of. If the evidence failed to show a causal connection between the alleged negligence and the injury complained of, motion for directed verdict in favor of the defendant was proper. *Weatherman v. White*, 10 N.C. App. 480, 484, 179 S.E. 2d 134 (1971).

Defendant contends plaintiff has failed to show that any act of the defendant was the real or direct cause of death. Dr. Proctor

testified that in his opinion the defendant's negligence was a cause of the death of Robert Earl Battle. This is sufficient to overcome defendant's motion.

Next, defendant argues that physician's negligence must be an affirmative act, and that a *failure to diagnose* is not active negligence. We note that the defendant did diagnose; he did perform affirmative acts. Defendant simply made a hurried examination which did not include necessary tests to arrive at a *proper* diagnosis in accordance with the acceptable standard of care for communities similar to Nash County.

> The law is, of course, well settled that a physician is liable for a wrong diagnosis of a case, resulting from a want of reasonable skill or care on the part of the physician and followed by improper treatment, to the injury of the patient.

Brewer v. Ring and Valk, 177 N.C. 476, 489, 99 S.E. 358 (1919).

In conclusion, not only is there evidence of a cursory examination of the patient, but the treatment consisted of a masking of the symptoms of the real illness through an injection for pain and a failure to admit Battle to the hospital where X-rays would have been routinely done and would have aided in providing a proper diagnosis.

Defendant cites *Byrd v. Express Co.*, 139 N.C. 273, 51 S.E. 851 (1905), in which an employee of the defendant failed to load serum onto a train. The serum was needed in the treatment of plaintiff's son, who later died. The attending physician, when asked whether, if the medicine had been received in time and taken according to his directions, would probably have effected a cure or saved his patient's life, answered that the prognosis in all aggravated cases of typhoid fever is very grave. The doctor expressed the belief that had there been no interruption in the course of treatment, ". . . that the chances of recovery would have been better . . ." and that was as far as he would go. *Byrd, supra*, at p. 277. In sustaining the motion for nonsuit, Justice Walker, speaking for the Supreme Court, said: "[T]his falls very short of tending to prove that the failure to receive the medicine caused the [patient's] death." *Id.* We find that case distinguishable from the case *sub judice* where Dr. Proctor unequivocably testified

that defendant's negligence in failing to diagnose was a cause of death.

Plaintiff cites as error the procedure by which the court heard arguments on defendant's motion for directed verdict. Motion was made to dismiss under Rule 50 at the end of plaintiff's case on one day. The court recessed until the following day at which time the court asked the defendant to repeat his motion. Defendant did, and made further and different arguments. The repetition of the motion and arguments made in conjunction therewith are a continuation of the motion and argument made the previous day. The burden is on the plaintiff to show not just some technical error but rather a prejudicial error which amounts to the denial of a substantial right. *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E. 2d 488 (1967). We find no error.

Based on the evidence of record and the rules of law set out herein, the plaintiff is entitled to a

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. JOHN W. CUMMINGS AND WILLIE MAE RAY CUMMINGS

No. 7912SC1106

(Filed 20 May 1980)

Homicide § 21.2— battery of intoxicated victim—aspiration of vomitus as cause of death—injuries inflicted by defendants as cause of death

In a prosecution for manslaughter, evidence was sufficient to show that the assault by defendants was a proximate cause of the victim's death where such evidence tended to show that the victim's blood ethanol content was .35%; before the assault by defendants, the victim was walking, moving about freely, and running backwards with his hands in the air; the direct cause of his death was aspiration of vomitus; and the jury could reasonably find from the evidence that the victim's death resulted not from the injuries inflicted upon him in the unlawful battery by defendants but from being knocked to the sidewalk on his back where, because of his intoxicated condition, he was unable to expel the vomitus from his mouth and thereby "drowned," and that the victim would not have died but for defendants' unlawful assault upon him.

Judge CLARK dissenting.

State v. Cummings

APPEAL by defendants from *Braswell, Judge.* Judgments entered 12 July 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 April 1980.

Defendants were charged with voluntary manslaughter in the death of Oscar M. Melvin. The state's evidence showed defendants were chasing Melvin, who was running backwards with his hands up in the air. John Cummings had a thick board in his hands and was hitting at Melvin with it. At the same time, Willie Mae Cummings was carrying a broken-off bottle. As Melvin ran backwards, John swung the board "midway" of his stomach. Defendants pursued Melvin into a corner at the ice box outside Horne's Grocery Store. There, Willie Mae went behind Melvin and stabbed at him. As he fell forward, John hit him with the stick and Melvin spun around, falling to the sidewalk. Two other people came up with sticks but did not hit Melvin. In a few seconds, they all ran away leaving Melvin. Melvin was lying flat on his back on the sidewalk when the officers arrived. Around his head was a small puddle of blood. He took a few gasping breaths and died.

William B. Leach, a medical doctor stipulated to be an expert specializing in pathology, performed an autopsy upon the body of Melvin. Dr. Leach found Melvin to be a middle-aged black man, 5 feet 8 inches tall and weighing 180 pounds. There were a number of wounds on his body: a cross-shaped laceration of his skull four inches above his left eyebrow, a deep cut to the bone of his left chin about 1-1/2 by 1-3/8 inches, one in the lower neck above the breastbone, a shallow cut below his left collarbone, and numerous scratches.

Internally, Melvin's lungs were congested and the air passage system, the bronchial system, was filled with material identical to that later found in his stomach. This indicated to Dr. Leach that the material had been aspirated or sucked into the lungs. In the doctor's opinion the immediate cause of death was that Melvin's airway was obstructed by the vomitus which he had sucked into the airway system of his lungs. He asphyxiated or drowned because of this obstruction.

Melvin had a blood ethanol content of .35 percent, which would cause a person to be stuporous or unconscious. Being in a lying down or prone position, with this blood alcohol content af-

fecting his "gag reflexes," would have caused him to suck vomitus into his throat. This is more common when a person is in a prone position.

When the officers arrived at the scene, they secured the area and searched it for weapons. They did not find a knife either on Melvin or in the area, but did find a broken 1 by 4 piece of lumber.

Defendants' evidence showed that Melvin was at Rick's house, right behind Horne's Grocery. Willie Mae went there also and there were other persons in the house. All were drinking wine. Willie Mae was at the piano with some wine in a jar when Melvin made sexual advances toward her. Melvin went to the bathroom and as he returned he again made sexual remarks to Willie Mae and went on out to the front porch. She then went to the porch and told Rick what had happened. About this time, Johnny Cummings came into the yard and took up the argument with Melvin. Melvin had a knife out and threatened to cut Johnny, so Johnny got a board. He and Melvin chased each other around the yard, Johnny with the board and Melvin with a knife. Meanwhile, Willie Mae had picked up a piece of broken glass. They got to Horne's Grocery and Johnny hit Melvin with the board. Willie Mae swung at him with the bottle and he went down. Willie Mae and Johnny went back to Rick's house.

Upon submission of the case to the jury, a verdict of guilty of involuntary manslaughter was returned as to each defendant. From sentences of imprisonment, defendants appeal.

Attorney General Edmisten, by Assistant Attorney General James L. Stuart, for the State.

Malcolm R. Hunter, Assistant Public Defender, Twelfth Judicial District, for defendants.

MARTIN (Harry C.), Judge.

Defendants' principal assignment of error is directed to the court's refusal to grant their motions for dismissal at the close of all the evidence. Their argument is centered on the lack of a showing that the assault by defendants was a proximate cause of Melvin's death.

As always, upon a motion to dismiss, we must view the evidence in the light most favorable to the state and allow the state every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both. Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. If there is substantial evidence to support a finding that the offense has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977); *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979).

The state's evidence, considered as above stated, shows Melvin was highly intoxicated and that this affected his ability to expel vomitus from his mouth; his "gag reflexes" were inoperative. He was more likely to inhale vomitus into his airway system if in a prone position. Prior to the assault by defendants, he was in an upright position, running backwards and moving about freely, and a logical inference from the evidence is that he was not vomiting prior to being knocked down. Defendants struck Melvin about the head and body with a board and broken bottle several times and knocked him to the sidewalk, flat on his back. Defendants made no effort to aid him but left him and ran back to Rick's house. When Officer Burgess got to Melvin, he was still on his back, with his eyes glassed over, taking deep gasping breaths.

The state must produce evidence sufficient to establish beyond a reasonable doubt that the death proximately resulted from defendants' unlawful acts. *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844, 31 A.L.R. 2d 682 (1952). The act complained of does not have to be the sole proximate cause of the death, nor the last act in sequence of time. There may be more than one proximate cause of the death in question. It is enough if defendants' unlawful acts join and concur with other causes in producing the result. *Batts v. Faggart*, 260 N.C. 641, 133 S.E. 2d 504 (1963); *Richardson v. Grayson*, 252 N.C. 476, 113 S.E. 2d 922 (1960); *Harris v. Montgomery Ward & Co.*, 230 N.C. 485, 53 S.E. 2d 536 (1949).

In *State v. Knight*, 247 N.C. 754, 102 S.E. 2d 259 (1958), defendant was properly found guilty of involuntary manslaughter where deceased died from fright or shock resulting from an unlawful battery upon him, even though the injuries inflicted thereby in and of themselves would not have caused death.

> An accused who wounds another with intent to kill him and leaves him lying out of doors in a helpless condition on a frigid night is guilty of homicide if his disabled victim dies as the result of exposure to the cold. This is true because the act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause [of the death] is the natural result of his criminal act.

State v. Minton, supra at 722, 68 S.E. 2d at 848.

Where a defendant unlawfully assaulted deceased by striking him, without any intent to kill, causing him to fall and his head to strike the hard floor resulting in his death from a fractured skull, it is a homicide. *Goldberg v. Insurance Co.*, 248 N.C. 86, 102 S.E. 2d 521 (1958).

The evidence in *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961), is analogous to our case. There deceased, with defendant and others, was drinking, deceased being highly intoxicated, his ethanol content being 4.0 milligrams per milliliter. He was unconscious or in a helpless condition, although the acute alcoholism would not have killed him. Defendant and deceased were in front of a car, when defendant shoved him into a ditch where he fell face down in the water. Defendant drove away, leaving deceased in a ditch. There was no evidence of trauma on the body and the cause of death was drowning. The Supreme Court held the evidence was sufficient to submit the case to the jury on the charge of manslaughter.

The jury could reasonably find from the evidence that Melvin's death resulted not from the injuries themselves, inflicted upon him in the unlawful battery by defendants, but from being knocked to the sidewalk upon his back where, because of his intoxicated condition, he was unable to expel the vomitus from his mouth and thereby "drowned," and that Melvin would not have died but for defendants' unlawful assault upon him. The direct cause of Melvin's death, the aspiration of vomitus, was the natural result of defendants' assault upon him.

The defendant must accept his victim in the condition that he finds him. We hold defendants' motions for dismissal were properly overruled. Further, we hold the evidence is sufficient for a rational trier of fact to find defendants guilty beyond a reasonable doubt of involuntary manslaughter under the laws of North Carolina. *Jackson v. Virginia*, --- U.S. ---, 61 L. Ed. 2d 560, *rehearing denied*, 62 L. Ed. 2d 126 (1979).

Defendants argue in their brief that the trial court erred in its charge to the jury. These assertions have no merit and as they do not raise any new or unusual questions, they require no elaboration. The case was well tried by the veteran trial judge and "illustrates anew the unrelenting truth that 'the sin ye do by two and two ye must pay for one by one.' " *State v. Minton, supra* at 727, 68 S.E. 2d at 852.

No error.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissents.

I agree with the majority that the trial judge has grown old and skilled through experience and therefore qualifies as a veteran, that the case was well tried (except for applying the law to the facts), and that those who sin or err "by two and two must pay for one by one." However, I dissent from the majority opinion because I believe that, as a matter of law, the death of Oscar M. Melvin was not proximately caused by the defendants' actions. "[I]f defendant did not cause the death of decedent, within the rules of legally-recognized causation, he cannot be convicted of homicide even if he committed an assault and battery upon that person and is subject to conviction upon a charge of this lesser offense." Perkins, *Criminal Law* (2d ed. 1969) at 727.

First, as explained by Professor Perkins, "[c]onceivably a different set of proximate cause might be established for each particular crime. This has not been done, but since the degree of moral obliquity exhibited by the act, and the extent of the social menace involved, are factors to be considered, the result will not

necessarily be the same for all offenses. *In particular, the legal eye reaches further in the examination of intentional crimes than in those in which this element is wanting, such as involuntary manslaughter.*" (Emphasis supplied.) *Perkins, supra,* at 693. *See also,* La Fave and Scott, *Criminal Law* (1972) at 252 ("cause and result crimes of intention must be treated separately from those of recklessness and negligence.")

Second, while foreseeability generally has no application to the issue of proximate causation in criminal cases, the exception to this rule arises when there is an independent intervening cause or a dependent intervening cause in the form of an abnormal response of a human being. *Perkins, supra,* at 726. Consequently, "if defendant's act created merely a condition, and the actual harm resulted from an 'independent' cause, or an abnormal response by man . . . the issue of proximate cause is dependent upon whether or not such harm . . . was a foreseeable risk of the condition created by the defendant." *Id.* In this case, the medical doctor testified that the cause of death was the result of the decedent's inhaling his own vomitus, and that he had no opinion as to whether the defendant's blow caused the vomiting. Further, the malfunction of the gag reflex was due to the decedent's excessive consumption of alcohol. I do not think that the defendant could have possibly foreseen that the decedent would drown in his own vomitus when a medical doctor has testified that he had no opinion as to whether defendant's act would cause vomiting. "*In jure non remota causa sed proxima spectatur*" (in law not the remote cause but the proximate cause is regarded.)

Third, when the force which was set in motion by defendants has come to a position of apparent safety or when the victim has reached a place of apparent safety, and death results from another cause, the acts of the defendants will not be the proximate cause of the decedent's death. *See, State v. Preslar,* 48 N.C. 421 (1856); *Perkins, supra,* at 696-97. *See, also, People v. Elder,* 100 Mich. 515, 59 N.W. 237 (1894) in which it was held that one who knocks another down is not the proximate cause of death which resulted when another bystander took advantage of the helpless situation of the victim to administer a fatal kick.

Finally, "courts have tended to distinguish cases in which the intervening act was a *coincidence* from those in which it was a

response to the defendant's prior actions. An intervening act is a *coincidence* when the defendant's act merely put the victim at a certain place at a certain time, and because the victim was so located it was possible for him to be acted upon by the intervening cause. . . . By contrast, an intervening act may be said to be a *response* to the prior actions of the defendant when it involves a reaction to the conditions created by the defendant. [A] coincidence will break the chain of legal cause unless it was foreseeable. . . ." La Fave and Scott, *supra*, at 257-58. The medical doctor could not state that the vomiting was a response to defendant's blows. The vomiting was, rather, coincidental to the defendant's act and was therefore not the proximate cause of the decedent's death.

GERALDINE MAYBANK, PLAINTIFF v. S. S. KRESGE COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF v. G.T.E. SYLVANIA, INC., THIRD PARTY DEFENDANT

No. 7918SC1033

(Filed 20 May 1980)

1. Negligence § 5; Sales § 23— exploding flashcube—no strict liability

The doctrine of strict liability does not apply in an action to recover for injuries from an exploding flashcube since the doctrine applies only in cases involving dangerous instrumentalities, and a flashcube is not a dangerous instrumentality.

2. Negligence § 31; Sales § 22.2— exploding flashcube—failure to show negligence by seller—res ipsa loquitur inapplicable

In an action to recover for injuries resulting from the explosion of a flashcube sold to plaintiff by defendant, plaintiff failed to show negligence on defendant's part where she offered no evidence of similar occurrences, and the doctrine of *res ipsa loquitur* was inapplicable since defendant did not have exclusive control and management over the flashcube.

3. Sales § 5.1— no express warranty of flashcube

A cautionary warning on a package of flashcubes about damaged bulbs shattering or causing static electricity and directions on how to get a replacement when a bulb failed to flash did not constitute an express warranty of the flashcube.

4. Sales § 6.1; Uniform Commercial Code § 12— exploding flashcube—breach of warranty of merchantability

In an action to recover for injuries resulting from the explosion of a flashcube sold to plaintiff in defendant's store, plaintiff's evidence was sufficient for the jury on the issue of defendant's breach of implied warranty of merchantability where it tended to show that plaintiff purchased the flashcube in a sealed package and placed it in her purse where it remained for about nine days before use; at the time of use one flashcube with four flashes contained in the same package was used without incident; the flashcube which exploded was then placed on the camera and exploded when used the first time; the flashcube did not appear defective or abnormal at any time from when purchased to when used; nothing occurred between the purchase and use to indicate that plaintiff mishandled, damaged or altered the flashcube; and the camera was used with flashcubes without problems both before and after the explosion. G.S. 25-2-314(2).

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 5 June 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 April 1980.

Plaintiff brought this action for damages resulting from the explosion in her face of a Blue Dot flashcube manufactured by G.T.E. Sylvania, Inc. and sold to plaintiff by defendant. Plaintiff pled causes of action for negligence, strict liability and breach of warranty. Defendant's third party action against the manufacturer was severed for trial at a later date.

Plaintiff, a Greensboro, North Carolina resident, made a trip to New York City in July, 1972 to visit her son and her two-year-old grandson. For the trip, she borrowed her daughter's Argus camera, which was about three years old. Two days before she left for New York, defendant, trading under the name of K-Mart, sold her a package of G.T.E. Sylvania flashcubes for $.88. The package contained three flashcubes with four flashes on each. On the carton appeared in bold letters the word "caution." Following that were words to the effect that although each bulb is safely coated and the flashcube provides a shield, a damaged cube may shatter. According to testimony, the printing on the carton goes on to say, "If any time a flashbulb contained in a Sylvania tube [*sic*] fails to flash, return the cube to the address below for replacement."

Plaintiff carried the flashcubes to New York in her pocketbook. The package remained sealed from time of purchase until she first began to take pictures of her son's home and her grand-

son about a week after she arrived in New York. On 21 July 1972, she opened the carton and used one of the flashcubes to take four pictures without any problems. She removed the second cube from the package and placed it on the camera. The flashcube in no way appeared abnormal. When she pushed down the camera lever to take a picture of her grandson, the flashcube exploded. The explosion which sounded like a blast of a gun knocked her glasses off and caused cuts in her left eye. Only her two-year-old grandson was with her at the time of the injury. At first, she could not see at all. When her son returned home, about an hour later, he took her immediately to the hospital. She was hospitalized for eight days and was out of work for three weeks because of the injury. Her vision, which is still not as good as before the accident, improved some. She continued to see doctors after her release from the hospital. The camera has been used since without incident.

At the close of plaintiff's evidence, on motion of defendant, the court directed a verdict for defendant. Plaintiff appeals.

Barefoot and White, by J. C. Barefoot, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr., for defendant and third party plaintiff appellee.

VAUGHN, Judge.

The sole question of this appeal is whether a directed verdict was erroneously entered for defendant. Considering the evidence under the standard set forth in *Kelly v. Harvester Company*, 278 N.C. 153, 179 S.E. 2d 396 (1971), the evidence, in a light most favorable to plaintiff, was sufficient to carry the case to the jury on the claim of breach of an implied warranty but insufficient to carry the case to the jury on the claims of breach of an express warranty, negligence and strict liability. The trial court erred in directing a verdict on the claim of breach of an implied warranty.

[1] Thus far, our Court has not applied the doctrine of strict or absolute liability to products liability actions. A plaintiff's claim must be based on negligence or breach of warranty. *Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E. 2d 862 (1979). The doctrine of strict liability applies only in cases involving

dangerous instrumentalities such as explosives. A flashcube is not a dangerous instrumentality per se nor under the circumstances of this case, albeit an exploding flashcube, can we say it became a dangerous instrumentality for which the seller was absolutely liable. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974); *Patterson v. Weatherspoon*, 29 N.C. App. 711, 225 S.E. 2d 634, *cert. den.*, 290 N.C. 662, 228 S.E. 2d 453 (1976).

[2] Plaintiff stated a cause of action for negligence but at trial offered no direct or indirect evidence of negligence on the part of the defendant seller. Plaintiff could have established a jury question on the issue of negligence by showing similar occurrences. No such proof was presented. Negligence is not established by the showing of one faulty product. *Tedder v. Bottling Co.*, 270 N.C. 301, 154 S.E. 2d 337 (1967). The doctrine of *res ipsa loquitur* is inapplicable to the case at hand because defendant did not have exclusive control and management over the flashcube. *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540 (1961).

[3] The record on appeal is not clear about the existence of any express warranty on the part of the defendant seller nor the manufacturer. From the record, there appears to be no applicable express warranty by defendant. Plaintiff, on cross-examination, did read several sentences from the package in which the flashcubes came. These sentences do not appear to constitute a limited express warranty. Apparently, the package contained a cautionary warning about damaged bulbs shattering or causing static electricity and directions on how to get a replacement when a bulb failed to flash. The package itself was not made a part of the record on appeal and the actual wording is not before us. The evidence in the record does not indicate the existence of any limited or modified warranty. *See* G.S. 25-2-316; -719. There is no indication of any implied warranty of fitness for a particular purpose arising on the facts of this case. *See* G.S. 25-2-315.

[4] This case, therefore, hinges on whether plaintiff presented evidence sufficient to get to the jury on the existence of implied warranty of merchantability which was breached by the defendant seller. "Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant with respect to goods of that kind." G.S. 25-2-314(1).

> [A]n action for breach of implied warranty of merchantability under G.S. 25-2-314 . . . entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of an implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Reid v. Eckerds Drug, 40 N.C. App. 476, 480, 253 S.E. 2d 344, 347, *cert. den.*, 297 N.C. 612, 257 S.E. 2d 219 (1979). It is the plaintiff's burden to prove this claim. G.S. 25-2-607(4); *Burbage v. Suppliers Corp.*, 21 N.C. App. 615, 205 S.E. 2d 622 (1974). We now consider whether the evidence in a light most favorable to plaintiff proved the essential elements of her claim for relief.

Plaintiff purchased the package of flashcubes for $.88 from defendant's K-Mart store. Defendant was a merchant within the definition of that term in the Uniform Commercial Code as provided in the first clause of G.S. 25-2-104(1). Defendant sold the flashcube to plaintiff and "is a merchant with respect to goods of that kind." G.S. 25-2-314(1).

Whether the flashcube was merchantable can be resolved in part by examining G.S. 25-2-314(2) which provides that

> Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which the goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

These are the minimum standards which a good must have in order to be merchantable. A flashcube which does not work properly and which causes the unexpected harm this flashcube caused is not merchantable. A flashcube can "pass without objection," be "of fair average quality" and "fit for ordinary purposes" and be far short of perfect. But these minimum requirements embodied in G.S. 25-2-314(2)(a)(b)(c) are not met by a flashcube which explodes. *Contrast Coffer v. Standard Brands,* 30 N.C. App. 134, 226 S.E. 2d 534 (1976). Such a flashcube is not "within the variations permitted by the agreement." The package contained a warning of possible shattering of a flashcube. The warning of possible shattering or static electricity does not mean that an exploding flashcube has been "adequately contained, packaged and labeled" or that it "conform[ed] to the promises or affirmations of fact made on the container." This was not an adequate warning of the consequences of this case. A flashcube which shatters might be merchantable. An exploding flashcube is not, however, merchantable. The attributes listed in G.S. 25-2-314(2) are not exclusive nor exhaustive. The evidence of this case is to the effect that the attributes of merchantability found in subsection (2) of G.S. 25-2-314 were not present in the flashcube. This is sufficient proof that the flashcube was not merchantable to reach the jury.

It is not sufficient that plaintiff prove the flashcube was not merchantable. The evidence must establish that the flashcube was not merchantable at the time of sale. *Rose v. Motor Sales,* 288 N.C. 53, 215 S.E. 2d 573 (1975). The evidence presented by plaintiff was to the effect that she purchased the flashcube in a sealed package, placed it in her purse where it remained for about nine days before use and that at the time of use one flashcube with four flashes contained in the same package was used without incident and that the flashcube which exploded was then placed on the camera and exploded when used the first time. The flashcube did not appear defective or abnormal at any time from when purchased to when used. Plaintiff could not recover if it is merely conjectural that the defect existed at the time of sale. In this case where the defective product was enclosed in its original container until use and nothing occurred between the purchase and use of the product which would indicate that plaintiff mishandled,

damaged or altered the product, the evidence does not compel a finding that the product was not merchantable at the time of sale but the evidence is sufficient to permit a reasonable inference to the effect that the flashcube was not merchantable at the time of sale. It is, therefore, a matter of fact for the jury to decide and not a matter of law for the trial court.

There is no question that plaintiff has proved injury to her person which is a compensable consequential damage for breach of an implied warranty of merchantability. G.S. 25-2-715(2)(b). It need not be foreseeable injury as long as it proximately results from the breach of the warranty.

This brings us to the fourth element of plaintiff's claim for breach of an implied warranty which is that the defect amounting to a breach of the implied warranty of merchantability proximately caused the injury. Plaintiff's evidence is to the effect that the camera was used previously and subsequently with flashcubes without problems and that the flashcube contained no visible defects. The evidence does not show any action on the part of the buyer following delivery of the flashcubes by the defendant seller which would demonstrate the loss resulted from some action by the plaintiff buyer. The evidence does not show that carrying the flashcubes in the pocketbook or that the camera was the proximate cause of the injury. In a light most favorable to the plaintiff, the defective flashcube proximately caused plaintiff's injury.

Finally, an injured buyer must give notice to the seller of the breach of the warranty. G.S. 25-2-607(3)(a). Plaintiff testified that she did not inform defendant on her return from New York of the injury. The suit itself appears to be the first notice of the breach to defendant. Defendant, however, has not asserted failure to give notice as an affirmative defense and it is, therefore, deemed waived. *Reid v. Eckerds Drugs,* 40 N.C. App. at 485, 253 S.E. 2d at 350.

The record, in addition to not disclosing the defense of notice of the breach, does not disclose any other defense such as a proper disclaimer which was not unconscionable, notice to the buyer of the defect nor limitation of action which would defect plaintiff's claim. It was error to direct a verdict for defendant at the close of plaintiff's evidence. Plaintiff made out a prima facie case of breach of an implied warranty of merchantability. Plaintiff's

evidence exceeds mere conjecture in proving defendant sold her a defective product which proximately caused injury to her person.

Reversed and remanded.

Judges CLARK and MARITN (Harry C.) concur.

ALICE S. BEHR v. BYRON C. BEHR

No. 7910DC1004

(Filed 20 May 1980)

1. **Rules of Civil Procedure § 19— child support—child not necessary party to action**

In an action to recover arrearages due for child support and alimony, joinder of the parties' child was not required, even if she had reached the age of majority or become emancipated, since the parties' separation agreement provided that all support payments were to be made to plaintiff, as the child's mother.

2. **Husband and Wife § 12— separation agreement—cohabitation not rescission**

In an action to recover arrearages for support due under the parties' separation agreement, there was no merit to defendant's contention that there was a genuine issue of fact before the court concerning rescission of the separation agreement, since the validity and construction of the agreement were governed by the laws of N.Y.; under N.Y. law, mere cohabitation does not invalidate a separation agreement; and defendant's affidavit, alleging mere cohabitation between husband and wife, and showing the parties' intention at that time to obtain a divorce, considered in light of their subsequent divorce, showed that the parties did not intend a reconciliation.

3. ***Divorce and Alimony* § 24.10— child support—child reaching 18—emancipation not shown—decrease in support not required**

Under N.Y. law, which determined the validity and construction of the parties' separation agreement, the fact that a child has reached the age of 18 is not determinative of the question as to whether emancipation has occurred; therefore, there was no merit to defendant's contention that his support payments under the separation agreement must be decreased because the agreement provided for such a reduction when the child became emancipated and because the child had reached the age of 18, since defendant's papers demonstrated the child's continued dependency on her parents, and defendant failed to come forth with any facts which would tend to establish emancipation.

4. Judgments § 37.3— installments due under separation agreement—failure to claim all installments due—judgment as estoppel

Where plaintiff filed an action on 9 October 1978 to recover all arrearage due under a separation agreement from 1 May 1977 through 1 February 1978, and plaintiff obtained a judgment for all installments owing during this period, plaintiff was estopped to seek recovery of the arrearage which had accumulated between 1 February 1978 and 9 October 1978 which plaintiff could have demanded in the action she commenced on the latter date, since, under the doctrine of merger, a party suing for the breach of an indivisible contract must sue for all of the benefits which have accrued at the time of suit or be precluded from maintaining a subsequent action for installments omitted.

APPEAL by defendant from *Parker (John H.), Judge*. Judgment entered 31 July 1979 in District Court, WAKE County. Heard in the Court of Appeals 18 March 1980.

In her complaint, plaintiff alleges that she and defendant were married 15 November 1956 and divorced 21 August 1967. Prior to the divorce, they entered into a separation agreement which was executed in the State of New York. A copy of the agreement was incorporated into the complaint. Pursuant to the terms of the agreement, defendant was required to pay $5,520 per year in equal monthly installments for the support of plaintiff and of their daughter Lisa Kathryn until she reached the age of twenty-one or became emancipated. Lisa Kathryn was born 18 May 1960. Plaintiff has previously obtained judgments against defendant for arrearage in support in the amounts of $13,853.03, $3,870, $4,630 and $4,659.32, respectively. All such judgments remain unsatisfied. Defendant has made no payments since 1 March 1978 and owes plaintiff $4,600 for support under the agreement. In his answer, defendant admitted the marriage, divorce, and execution of the separation agreement. He denied the other operative allegations of the complaint, and raised several additional defenses.

Plaintiff moved for summary judgment and supported her motion with an affidavit in which she stated that she had received no money from the previous judgments against defendant and that he had made no payments to her for the period alleged in the complaint. Defendant responded with a counteraffidavit. Following a hearing on the motion, the trial court entered summary judgment for the plaintiff requiring defendant to pay plaintiff $460 per month, and to pay the sum of $4,600 into the Superior

Court of Wake County no later than 15 August 1979 for the use and benefit of plaintiff as arrearage due plaintiff under the agreement. Defendant appeals.

William A. Smith, Jr. for plaintiff appellee.

Purrington, McNamara & Pipkin, P.A., by Thomas P. McNamara, for defendant appellant.

WELLS, Judge.

[1] Defendant brings forward four assignments of error. Defendant first contends that the trial court erred by refusing to join Lisa Kathryn as a necessary party to this action. A necessary party is one whose presence is required for complete determination of the claim. G.S. 1A-1, Rule 19; *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973). We hold that joinder of Lisa Kathryn was not required, whether or not she reached the age of majority or became emancipated, because the separation agreement provided that all support payments were to be made to plaintiff, as Lisa Kathryn's mother.

[2] Defendant argues that there was an issue of fact before the court relating to rescission of the separation agreement, and that summary judgment was therefore not properly entered. The validity and construction of a separation agreement entered into in another state are governed by the laws of that state. *Medders v. Medders*, 40 N.C. App. 681, 254 S.E. 2d 44 (1979). In the present case, the separation agreement was executed by the parties in New York and the agreement specifically provides that it should be interpreted under the laws of that State. The parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental policy of the state of otherwise applicable law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

Defendant asserts in his verified answer and affidavit that the separation agreement was rescinded by the parties after it was executed, because the parties continued to live together as husband and wife for a period of time prior to their divorce. Under New York law, mere cohabitation does not invalidate a separation agreement—the parties must intend a reconciliation.

Markowitz v. Markowitz, 52 A.D. 2d 521, 381 N.Y.S. 2d 678 (1st Dep't 1976). The defendant's affidavit, alleging mere cohabitation between husband and wife, and showing the parties' intention at that time to obtain a divorce, considered in light of their subsequent divorce, shows that the parties did not intend a reconciliation. Accordingly, the defendant has not shown a forecast of evidence which would be available to him at trial to show that a genuine issue of material fact exists on the subject of reconciliation.

[3] Defendant argues that his support payments under the separation agreement must be decreased because the agreement provided for such a reduction when his daughter, Lisa Kathryn, became emancipated, and that Lisa Kathryn became emancipated on 18 May 1978 when she reached the age of eighteen. While we agree that the separation agreement contemplated that Lisa Kathryn's emancipation could occur prior to the age of twenty-one, under New York law the fact that a child has reached the age of eighteen is not determinative of the question as to whether emancipation has occurred. Emancipation is concerned with the extinguishment of parental rights and duties as well as the removal of the disabilities of infancy. *Wysocki v. Prior*, 24 A.D. 2d 732, 263 N.Y.S. 2d 342 (4th Dep't 1965), *leave to appeal denied*, 16 N.Y. 2d 486 (1965). In the case at bar, plaintiff's papers demonstrate Lisa Kathryn's continued dependency on her parents, and defendant has failed to come forth with any facts which would tend to establish emancipation. Under these circumstances, defendant has failed to show that a genuine issue of material fact exists on the issue of emancipation.

[4] Defendant additionally argues that a portion of plaintiff's present claim is barred under the doctrine of *res judicata* because she failed to assert it in a former action based on the same separation agreement. It is undisputed that on 9 October 1978 plaintiff filed an action to recover all arrearage due under the agreement from 1 May 1977 through 1 February 1978, and that plaintiff obtained a judgment in that action for all installments owing during this period. Defendant now argues that plaintiff is estopped to seek recovery of the arrearage which had accumulated between 1 February 1978 and 9 October 1978, which plaintiff could have demanded in the action she commenced on

this latter date. Harsh though the application of the rule may be in this case, we are constrained to agree.

The doctrine of merger is a collateral aspect of *res judicata* which determines the scope of claims precluded from relitigation by an existing judgment. *See, Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964); *Elliott v. Burton*, 19 N.C. App. 291, 198 S.E. 2d 489 (1973). Under the doctrine of merger, a party suing for the breach of an indivisible contract must sue for all of the benefits which have accrued at the time of suit or be precluded from maintaining a subsequent action for installments omitted. RESTATEMENT OF JUDGMENTS § 62, Comment *h* (1942); 50 C.J.S. Judgments § 671, p. 117 (1947). An even broader "transactional" approach is proposed in Section 61 of the RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Draft No. 5, 1978):

> § 61. Dimensions of "Claim" for Purposes of Merger or Bar —General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 47, 48), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

As in the original Restatement, the Tentative Draft of the Second Restatement would bar recovery of unclaimed installments, owing under an indivisible contract, due at the time the prior action was commenced. *Id.*, Comment *d*. "The reason for the rule lies in the necessity of preventing vexatious and oppressive litigation and implicit in this rule is an assumption that a plaintiff who has split his cause of action has acted inequitably, knowing that he was

causing unnecessary vexation to the defendant or at least careless as to whether or not he was causing such vexation." *Maloney v. McMillan Book Co.*, 52 Misc. 2d 1006, 277 N.Y.S. 2d 499, 502 (City Ct. Syracuse 1967).

Plaintiff does not argue, nor do we believe in this case she could argue, that defendant's contractual obligation to pay a yearly amount of alimony in equal monthly installments in itself created a divisible agreement, under which she could sue for each installment independently of those payments already due at the commencement of the action. While plaintiff could have maintained a separate action for each installment immediately after it became due, subject to consolidation under G.S. 1A-1, Rule 42(a) at the discretion of the trial court,

> If no action is brought until after there have been two such failures only one action can thereafter be maintained for the two. One judgment bars any further action for breaches that existed at the time suit was brought and that might have been included in a single action. This rule is to reduce the cost of litigation and to prevent unnecessary and vexatious actions.
>
> So only one action is maintainable for all installments of money under a single contract that are overdue when suit is commenced, or for all installments of rent that are due under a single lease. The same is true of all other kinds of breaches as well, failure to make repairs or to insure as well as failure to pay a monthly installment or to deliver goods or to perform services.
>
> The same rule applies to all other kinds of contracts requiring a series of performances such that a series of breaches can occur by failure to render the performances as required.

4 Corbin, Contracts § 950, pp. 821-822 (1951). The rule has been applied to installments of unpaid rent (*Viviano v. Ferguson*, 39 S.W. 2d 568 (Mo. App. 1931); *Maloney v. McMillan Book Co., supra*), commissions (*Le John Mfg. Co. v. Webb*, 91 A. 2d 332 (D.C. 1952)), disability insurance (*Metropolitan Life Ins. Co. v. Richter*, 182 Okla. 446, 78 P. 2d 307 (1937)), and automobile loan payments (*Jones v. Bank*, 168 Va. 284, 191 S.E. 608 (1937)).

Our Supreme Court applied the principle of merger to the payment of overdue installments at an early date. *Smith v. Lumber Co.*, 142 N.C. 26, 54 S.E. 788 (1906), *overruled on other grounds*, 267 N.C. 56, 147 S.E. 2d 590 (1966). In *Smith*, the plaintiff employee sued his employer for the first wage installment which his employer allegedly owed to him when, at the time the plaintiff brought suit, three such wage installments were owing and recoverable. The Court held that the plaintiff, "could have recovered the amount of both the second and third installments in the [prior] suit . . . and is consequently barred from the recovery of either one of them in this action. . . ." 142 N.C. at 31-32, 54 S.E. at 790. We perceive no legally sufficient basis for distinguishing the contractual obligation to pay monthly installments of alimony from the installments owing in *Smith* or the cases from other jurisdictions cited above. As stated by Justice Huskins, quoting from Herman on Estoppel and Res Judicata §§ 122, 123, pp. 130, 131, a judgment

> is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided. . . . The court requires parties to bring forward the whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to matters which might have been brought forward as part of the subject in controversy. . . . The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

In re Trucking Co., 285 N.C. 552, 560, 206 S.E. 2d 172, 178 (1974).

It was incumbent upon plaintiff when she brought her October 1978 action to include in it all installments which were due and recoverable at the time she filed the action, and her failure to do so or to obtain judgment for them in that action now acts as a bar to her recovery of them in the action *sub judice*. The amount of the judgment in this action must be modified so as to eliminate those installments.

Modified and affirmed.

Judges HEDRICK and WEBB concur.

JEANE JUNKER MORRIS v. KENT B. MORRIS

No. 7826DC373

(Filed 20 May 1980)

1. **Trial § 15.4— exception to answer—motion to strike**

Where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable.

2. **Divorce and Alimony § 16.5— alimony action—abandonment—stock ownership by wife—irrelevancy—absence of prejudice**

While defendant husband's reference in an alimony action to plaintiff wife's ownership of stock was of doubtful relevance to the issue to be determined at trial as to whether defendant abandoned plaintiff, plaintiff failed to show that the admission of such testimony substantially prejudiced her or in any way influenced the jury verdict.

3. **Divorce and Alimony § 16.5— alimony action—abandonment—involvement with another woman—remoteness—condonation**

Testimony that some eight or ten years before defendant separated from plaintiff in 1973 he stayed away from his family for three months and purchased an automobile for another woman was rendered incompetent to prove defendant's unlawful abandonment of plaintiff by the remoteness in time of the incident and by plaintiff's subsequent condonation of it. Similarly, testimony as to defendant's relationship with a different woman one and one-half years after his separation from plaintiff was inadmissible where there was no indication of any involvement with her during any period close in time to the separation.

4. **Divorce and Alimony § 16.7— alimony action—abandonment—instructions—plaintiff's burden of proof**

The trial court's instructions in an alimony action based on abandonment properly placed on plaintiff wife the burden of proving that defendant husband's separation from her was without adequate justification or provocation on her part, that is, the instructions placed on plaintiff the burden of proving only the absence of conduct on her part which rendered it impossible for defendant husband to continue in the marriage and not to negate every possible justification for defendant's leaving.

Judge WEBB dissenting.

APPEAL by plaintiff from *Johnson, Judge*. Judgment entered 30 November 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 1 February 1979.

This is an action for alimony without divorce brought on grounds of abandonment and non-support. In her complaint filed 14 October 1975 plaintiff-wife alleged the marriage of the parties on 21 June 1952, the abandonment of her by the defendant when he left their home on 18 June 1973 without adequate provocation on her part, and his willful failure to provide her with necessary subsistence according to his means so as to render her condition intolerable and life burdensome. Defendant answered and denied that he had abandoned or had failed to support the plaintiff. As a further defense he alleged that plaintiff had constructively abandoned him by ceasing marital relations and offering indignities to his person.

At trial before a jury, plaintiff-wife offered evidence tending to show the following: Defendant-husband, an engineer, is vice-president of a company in which he owns half of the stock. During the years immediately prior to the parties' separation in 1973, defendant was out of town several nights a week. On 18 June 1973 he came home and told plaintiff that he was going to take some furniture and move into an apartment. Although she asked him to discuss the problems and to remain with her, defendant indicated that he needed to move out "to think things over." After that date he did not resume living in the house, although he did come home on Sundays. Thereafter, defendant continued to put money into their joint checking account to provide for her support. Plaintiff admitted that their sexual relations had been infrequent for a while prior to the separation; however, she stated that she was not at fault in that. She denied that she had criticized her husband concerning the amount of money he earned or that she had nagged him to buy property at the beach or to take more trips.

Defendant testified that the reason for the separation was his wife's constant criticism of him during the latter years of the marriage. Plaintiff constantly nagged him about such things as joining a country club, buying beach property, remodeling their home, and buying antiques. He became demoralized because of plaintiff's constant indications that he did not earn enough money.

During the last two or three years prior to the parties' separation, plaintiff rejected him and refused him sexual relations.

At the close of the evidence, the trial judge submitted one issue to the jury, which answered it as follows:

> 1. Did the defendant wilfully abandon the plaintiff without just cause or provocation?
>
> ANSWER: No.

From judgment on the verdict that she recover no alimony of the defendant, plaintiff appealed.

Walker, Palmer & Miller by James E. Walker and Robert P. Johnston for plaintiff-appellant.

John R. Ingle and Stephen D. Poe for defendant-appellee.

PARKER, Judge.

Plaintiff-wife's first assignment of error is directed to the trial court's overruling of her objections to certain portions of her husband's testimony in which he referred to her ownership of stocks. While defendant was testifying on direct examination concerning his wife's demands that they purchase beach property, the following took place:

> Q. What would she say?
>
> A. She would like for us to buy the property. And, one of my responses to that was, "Well, why don't you sell some of your stock and let's buy the property?"
>
> MR. WALKER: I OBJECT to that.
>
> COURT: OVERRULED.
>
> A. And, she said, "Well, I'm not going to sell any of my stock." So, consequently I said, "Well, we can't afford it."

At one other point in his testimony, defendant again in an unresponsive answer referred to his wife's ownership of stocks, to which plaintiff's counsel's objection was again overruled.

[1, 2] We note at the outset that plaintiff's counsel made no motion to strike the answers to which he objected. The general rule

is that where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable. *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953). Disregarding counsel's failure to follow proper procedure, we find no reversible error. If it be admitted that defendant's reference to his wife's stock ownership may have been of doubtful relevance to the issue to be determined at trial, that is, whether he had wrongfully abandoned her, plaintiff has nevertheless failed to demonstrate that the admission of such testimony substantially prejudiced her or in any way influenced the jury verdict. Plaintiff's first assignment of error is, therefore, overruled.

[3] In her second and third assignments of error, plaintiff challenges the trial court's exclusion of evidence concerning defendant's relationships with two women. Outside of the presence of the jury, defendant testified for the record that some eight or ten years before he separated from plaintiff he stayed away from his family for about three months. During this period he sold some stocks to purchase an automobile for a woman he met in Charlotte. At the end of that period the parties decided "to get back together and try it again." Both the remoteness in time of this incident and the evidence of plaintiff-wife's subsequent condonation render this evidence irrelevant and incompetent to prove defendant's unlawful abandonment of plaintiff on 18 June 1973. Its admission would have unduly prejudiced defendant and introduced issues of adultery extraneous to the suit. For similar reasons, defendant's testimony on voir dire as to his relationship with a different woman one and one-half years after his separation from his wife was properly excluded. Although defendant testified that he was acquainted with the woman, who had formerly worked for his company and who resided in the apartment complex to which he moved upon his separation, there is no indication of any involvement with her during any period close in time to the separation. Plaintiff's second and third assignments of error are overruled.

Plaintiff's final assignments of error are directed to the court's instructions to the jury. She contends first that the trial judge failed to declare and explain the law arising on the evidence as required by G.S. 1A-1, Rule 51(a). We find no error. After summarizing the evidence of the parties, explaining the ap-

plicable law, and stating the parties' contentions, the court instructed the jury what it must find in order to return a verdict for plaintiff. Viewed contextually, the charge adequately apprised the jury of the facts which, if found by them to be true, would justify such a verdict. Although plaintiff relies on the decision of our Supreme Court in *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E. 2d 387 (1971), in support of her contention that the jury was not given any direction as to the bearing of her conduct on the question whether her husband was justified in leaving, that case is distinguishable from the case now before us. In *Panhorst, supra*, a new trial was ordered on plaintiff-wife's claim of abandonment because the trial court had failed to instruct the jury that there is no constructive abandonment by one spouse justifying the other spouse in leaving the home where the defect of which the departing spouse complains is due to the illness or physical disability of the remaining spouse. In the present case there was no evidence that the justification for defendant-husband's leaving, if found to exist by the jury, was due to causes beyond plaintiff-wife's control.

[4] Plaintiff-wife's final contention is that the trial court's instructions erroneously placed upon her the inordinate burden of proving that at the time of defendant-husband's withdrawal from the home he could have continued in the marriage with safety, health and self-respect. "One spouse abandons the other, within the meaning of [G.S. 50-16.4(4)], where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it." *Panhorst v. Panhorst, supra* at 670-671, 178 S.E. 2d at 392. Where a spouse seeks to recover alimony on the grounds of abandonment, that spouse has the burden of proving each and every element of abandonment, including the absence of justification. *Murray v. Murray*, 37 N.C. App. 406, 246 S.E. 2d 52 (1978), *affirmed*, 296 N.C. 405, 250 S.E. 2d 276 (1979). In his final mandate, the trial judge instructed the jury as follows:

> So, Members of the jury, if you are satisfied from the evidence and by its greater weight, the burden of proof being upon the plaintiff to so satisfy you that the defendant wilfully separated himself from the plaintiff; and, that such separation was without the consent of the plaintiff; and, that such separation was without the intent of returning; and, that this

separation was without adequate justification or provocation, then it will be your duty to answer that issue, "Yes," in favor of the plaintiff.

On the other hand, Members of the jury, if, considering all of the evidence, the plaintiff has failed to prove to you, that is to satisfy you by the greater weight of the evidence — from the greater weight of the evidence, then it would be your duty to answer the issue, "No," in favor of the defendant.

Although plaintiff contends that these instructions placed upon her the burden of proving that her husband could have continued the marriage with health, safety, and self-respect, a fair reading of the charge discloses that the trial court placed upon her only the burden of proving that her husband's separation was without adequate justification or provocation on her part. Thus, her burden of proof was not to negate every possible justification for defendant-husband's leaving, but rather to prove only the absence of conduct on her part which rendered it impossible for him to continue in the marriage. The allocation of the burden of proof in a case such as this may not appear entirely logical, in that it in effect requires the plaintiff to prove a negative state of facts. There are, however, strong policy considerations which support such an allocation. These policy considerations were noted by our Supreme Court in *Allen v. Allen*, 244 N.C. 446, 94 S.E. 2d 325 (1956). In that case the court held that a plaintiff alleging indignities to the person as grounds for alimony was required to bear the burden of proving lack of provocation, stating:

"[T]he State and society and the children have an interest in the marriage status, and in preserving the family when that can be done without undue hardship. To require the complaining party to show lack of provocation gives the Court a chance to see that the assistance of the law in breaking up the family is used for the benefit of the injured party only".

244 N.C. at 450-451, 94 S.E. 2d at 329.

In the present case, the trial court properly instructed the jury as to the burden of proof, and upon these instructions the jury found that plaintiff-wife had failed to meet her burden.

For the reasons stated, we find

No error.

Judge ARNOLD concurs.

Judge WEBB dissenting.

I dissent from the majority because I do not believe there was sufficient evidence of justification for the defendant to leave his wife to be considered by the jury. It appears to me that under all the evidence, the defendant could have continued the marriage without endangering his health, safety and self-respect. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E. 2d 923 (1952). Since I do not believe there was evidence of justification, I do not believe the plaintiff should have been required to prove there was not justification.

MOTOR INN MANAGEMENT, INC. v. IRVIN-FULLER DEVELOPMENT CO., INC.

No. 7912SC1002

(Filed 20 May 1980)

1. **Appeal and Error § 3— constitutional question not raised at trial—no consideration on appeal**

The appellate courts will not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the trial court.

2. **Abatement and Revival § 3— N. C. court inconvenient forum—motion to stay properly granted**

The trial court's findings of fact were sufficient to support its order staying further proceedings in this action to permit a trial of the cause in S. C. where the court found that plaintiff was an N. C. corporation and defendant was an S. C. corporation; the action was for breach of a management contract between the parties in which plaintiff agreed to perform management and supervisory services for defendant in the operation of a hotel in S. C. owned by defendant; the contract provided that it was made in S. C. and was to be construed and interpreted in accordance with the laws of S. C.; although defendant had not filed answer, counsel intended to file a counterclaim based on plaintiff's alleged failure to provide the services it was obligated to perform under the contract; the principal witnesses defendant proposed to call, sixty-nine in number, were primarily residents of S. C. engaged in various professions, government employment, or firms other than defendant or plaintiff and not subject to the subpoena powers of the N. C. courts; the cost of obtaining

witnesses would be unduly or intolerably burdensome for defendant; plaintiff planned to call nine witnesses, eight of whom resided in N. C. and one of whom resided in S. C.; all of the nine were or had been employed by plaintiff; there was no other action pending between the parties; defendant stipulated and consented to trial of the action in S. C. with plaintiff remaining as plaintiff in any action brought in S. C.; and defendant waived any defense of the statute of limitations.

3. Abatement and Revival § 3— *forum non conveniens*—facts determining applicability

The doctrine of *forum non conveniens* should be applied with flexibility depending upon the facts and circumstances of each case, with the view of achieving substantial justice between the parties, and relevant facts, among others, that may be considered are: convenience and access to another forum; nature of case involved; relief sought; applicable law; possibility of jury view; convenience of witnesses; availability of compulsory process to produce witnesses; cost of obtaining attendance of witnesses; relative ease of access to sources of proof; enforceability of judgment; burden of litigating matters not of local concern; desirability of litigating matters of local concern in local courts; choice of forum by plaintiff; all other practical considerations which would make the trial easy, expeditious and inexpensive.

APPEAL by plaintiff from *Canaday, Judge.* Order entered 9 July 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 April 1980.

Plaintiff, a North Carolina corporation, commenced this action against defendant for an alleged breach of a management contract between it and defendant. In this contract plaintiff agreed to perform certain management and supervisory services for defendant in the operation of the Carolina Inn, a hotel complex owned by defendant in Columbia, South Carolina. Plaintiff contends that defendant discharged plaintiff without cause and prevented plaintiff from further performance of its obligations under the contract, resulting in damages to plaintiff.

Defendant moved to dismiss for improper service and lack of jurisdiction over defendant. Upon the denial of this motion by the court, defendant filed a written motion pursuant to N.C.G.S. 1-75.12(a) for a stay of further proceedings in this action to permit a trial of this cause in South Carolina. Defendant alleged it would result in substantial injustice if the action were tried in North Carolina. Both parties filed affidavits and the court conducted two hearings on the motion to stay and thereupon entered order making findings of fact and conclusions of law and ordering the action

stayed to permit the trial of the cause in South Carolina. Plaintiff excepts to the signing and entering of the order and appeals to this Court.

McCoy, Weaver, Wiggins, Cleveland & Raper, by John E. Raper, Jr. and Reginald M. Barton, Jr., for plaintiff appellant.

Anderson, Broadfoot and Anderson, by Henry L. Anderson, for defendant appellee.

MARTIN (Harry C.), Judge.

This appeal requires the construction of N.C.G.S. 1-75.12(a) under the facts and circumstances of this case. The statute follows:

> *Stay of proceeding to permit trial in a foreign jurisdiction.*—(a) When Stay May be Granted.—If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.
>
> . . . .
>
> (c) Review of Rulings on Motion.—Whenever a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal.

[1] Plaintiff first contends the statute violates Article I, Section 18, of the North Carolina Constitution:

> *Courts shall be open.* All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Plaintiff argues it is a "person" within the meaning of the section and has a right to have its claims tried in the courts of North

Carolina. However, we are not required to construe this section of the constitution, which is now a popular pastime in North Carolina, because it does not affirmatively appear from the record on appeal that this question was presented to or passed upon in the superior court. The appellate courts will not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the trial court. *City of Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974); *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971); *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979). This is in accord with decisions of the Supreme Court of the United States. *Edelman v. California*, 344 U.S. 357, 97 L. Ed. 387 (1953). Appellant contended at oral argument that the constitutional question was presented to the trial court. Nevertheless, we are bound by the record on appeal. *Rogers v. Rogers*, 265 N.C. 386, 144 S.E. 2d 48 (1965); *In re Sale of Land of Warrick*, 1 N.C. App. 387, 161 S.E. 2d 630 (1968). Appellant has the duty to see that the record on appeal is properly made up. *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262 (1965); *State v. Byrd*, 4 N.C. App. 672, 167 S.E. 2d 522 (1969). The record fails to show that the constitutional question was presented to and passed upon by the trial court; therefore, it is not properly before us.

[2] We are left with the question whether the court's findings of fact and conclusions of law support the order staying the proceedings in this action. Plaintiff did not except to any of the findings of fact or conclusions of law found by the court. Where findings of fact are not challenged by exceptions in the record, they are presumed to be supported by competent evidence and are binding upon appeal. *Phillips v. Alston*, 257 N.C. 255, 125 S.E. 2d 580 (1962); *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E. 2d 878 (1970). There remains for determination the issue whether the facts found support the judgment and whether error of law appears on the face of the judgment. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967); *Durland v. Peters, Comr. of Motor Vehicles*, 42 N.C. App. 25, 255 S.E. 2d 650 (1979).

The court found as facts that plaintiff is a North Carolina corporation with its principal place of business in Cumberland County, North Carolina, and defendant is a South Carolina corporation with its principal place of business in South Carolina, not authorized to do business in North Carolina. This action is for

breach of a management contract between plaintiff and defendant, in which plaintiff agreed to perform management and supervisory services for defendant in the operation of the Carolina Inn, owned by defendant in Columbia, South Carolina. The contract provided that it was made in South Carolina and was to be construed and interpreted in accordance with the laws of South Carolina. Although defendant has not filed answer, counsel intend to file a counterclaim based on plaintiff's alleged failure to provide the services it was obligated to perform under the contract. The principal witnesses defendant proposes to call, sixty-nine in number, are primarily residents of South Carolina engaged in various professions, government employment, or firms other than defendant or plaintiff and not subject to the subpoena powers of the North Carolina courts and the cost of obtaining witnesses would be unduly or intolerably burdensome for defendant. Plaintiff plans to call nine witnesses, eight who reside in North Carolina and one in South Carolina, all of whom are or have been employed by plaintiff. There is no other action pending between the parties and defendant has stipulated and consented to the trial of this action in South Carolina[1] and has waived any defense of the statute of limitations.

Upon these facts the court made the conclusion of law that it would work a substantial injustice to defendant for the action to be tried in North Carolina and that South Carolina is the proper place for trial of the action on its merits.

This Court held in *Acorn v. Knitting Corp.*, 12 N.C. App. 266, 182 S.E. 2d 862, *cert. denied*, 279 N.C. 511, 183 S.E. 2d 686 (1971), that the trial court could enter a stay pursuant to N.C.G.S. 1-75.12(a) upon a finding that it would work a substantial injustice for the action to be tried in North Carolina. The entry of an order under N.C.G.S. 1-75.12(a) is a matter within the sound discretion of the trial judge. *Allen v. Trust Co.*, 35 N.C. App. 267, 241 S.E. 2d 123 (1978). It appears these are the only North Carolina cases involving this statute.

Looking to other sources, we find some assistance in interpreting our statute. With respect to the Wisconsin statute which

1. In oral argument, counsel for defendant stipulated that plaintiff would be entitled to remain as the plaintiff in any action between the parties brought in South Carolina on the contract.

was the first statute of this type enacted, the Supreme Court of Wisconsin stated:

> The general purpose of the law is discussed by Professor G. W. Foster, Jr., of the University of Wisconsin Law School, who served as the reporter for the Judicial Council in the preparation of the revisions to ch. 262, Stats. In reference to sec. 262.19, he states in the revision notes to 30 Wis. Stats. Annot. (1972 pocket parts):
>
> > "This section is new. Its purpose is to permit trial of a cause in another state upon a convincing showing that trial of the cause in Wisconsin is so inconvenient that substantial injustice is likely to result. . . ."
>
> . . . .
>
> Dean Robert Leflar points out that *forum non conveniens* is a necessary response to the expanding basis for *in personam* jurisdiction and the proliferation of "long-arm statutes," which make it likely that courts will be faced with imported lawsuits having little or no connection with the forum. He recommends that courts have discretion to refuse to hear such transient lawsuits and to require the parties to litigate their differences in a more convenient forum. . . .
>
> The doctrinal background of *forum non conveniens* is discussed by Ehrenzweig and Louisell in *Jurisdiction in a Nutshell* (2d ed. 1968). They point out that the doctrine is invoked when a court has unquestioned jurisdiction but, for policy reasons, declines to exercise it. The text points out, at page 84, citing *Goodwine v. Superior Court* (1965), 63 Cal. 2d 481, 485, 47 Cal. Rptr. 201, 203, 204, 407 Pac. 2d 1, 4, that:
>
> > "In determining the applicability of the doctrine, the court must consider the public interest as well as the private interests of the litigants. The court must consider such factors as the ease of access of proof, the availability and cost of obtaining witnesses, the possibility of harassment of the defendant in litigating in an inconvenient forum, the enforceability of the judgment, the burden on the community in litigating matters not of local concern, and the desirability of litigating local matters in local courts."

Littmann v. Littmann, 57 Wis. 2d 238, 245-46, 203 N.W. 2d 901, 905 (1973).

In New York, the court held the doctrine of *forum non conveniens* was developed to justify stay of cases where it is found, on balancing the interest and convenience of the parties, that the action could be better adjudicated in another forum. The application of the rule should turn upon considerations of justice, fairness and convenience. When it plainly appears that the initial forum is an inconvenient forum and that another is available which would better serve the ends of justice and the convenience of parties, a stay should be entered. *Silver v. Great Amer. Ins. Co.*, 29 N.Y. 2d 356, 328 N.Y.S. 2d 398, 278 N.E. 2d 619 (1972).

[3] We hold the doctrine of *forum non conveniens* should be applied with flexibility depending upon the facts and circumstances of each case, with the view of achieving substantial justice between the parties. Relevant facts, among others, that may be considered are: convenience and access to another forum; nature of case involved; relief sought; applicable law; possibility of jury view; convenience of witnesses; availability of compulsory process to produce witnesses; cost of obtaining attendance of witnesses; relative ease of access to sources of proof; enforceability of judgment; burden of litigating matters not of local concern; desirability of litigating matters of local concern in local courts; choice of forum by plaintiff; all other practical considerations which would make the trial easy, expeditious and inexpensive. These, and other factors, have been considered by other courts in making the determination of motions under such statutes. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L.Ed. 1055 (1947); *Koster v. Lumbermens Mutual Co.*, 330 U.S. 518, 91 L.Ed. 1067 (1947); *Chavarria v. Superior Court*, 40 Cal. App. 3d 1073, 115 Cal. Rptr. 549 (1974); *Lear Siegler, Inc. v. Sargent Industries, Inc.*, Del. Super., 374 A. 2d 273 (1977); *Gore v. United States Steel Corp.*, 15 N.J. 301, 104 A. 2d 670, *cert. denied*, 348 U.S. 861, 99 L.Ed. 678 (1954); *Regal Knitwear Co., Inc. v. M. Hoffman & Co., Inc.*, 96 Misc. 2d 605, 409 N.Y.S. 2d 483 (1978).

In applying these rules to the instant case, we hold the facts found by the court support the conclusion that it would work a substantial injustice to defendant for this case to be tried in North Carolina and that the court of South Carolina is the proper,

convenient, reasonable and fair place for the trial of this action. No error of law appears on the face of the judgment. We find no abuse of the court's discretion in the entry of the order. It is, therefore,

Affirmed.

Judges VAUGHN and CLARK concur.

PHILIP WEBER, PETITIONER v. BUNCOMBE COUNTY BOARD OF EDUCATION, RUSSELL KNIGHT, E. E. CALDWELL, RUEBEN CALDWELL, JOHN W. CARROLL, DR. ROGER JAMES, EDNA ROBERTS, AND W. GRADY ROZZELL, RESPONDENTS

No. 7928SC928

(Filed 20 May 1980)

1. **Schools § 13.2— dismissal of career teacher—due process—notice and hearing**

The requirements of due process were met in the dismissal of a career teacher where the superintendent notified the teacher by letter that he would recommend the teacher's dismissal for insubordination because of (1) his failure to acknowledge receipt of an evaluation for 1977-78, (2) his response to the principal's request for clarification of his grading system, (3) his insufficient final evaluation of the year's work for 1977-78, (4) his response to an inquiry about his failure to attend school assemblies, and (5) his failure to follow administrative policy with respect to signing in and out of work; after a hearing in which each of these charges was developed at length, the Professional Review Panel unanimously found that the teacher was insubordinate with respect to each of the charges; upon appeal to the school board and after another full hearing, the board adopted a resolution dismissing the teacher, and the board chairman notified the teacher by letter that the board had found insubordination as to each of the charges and had ordered his dismissal.

2. **Schools § 13.2— dismissal of career teacher—insubordination—sufficiency of evidence**

The record as a whole supported a school board's dismissal of a career teacher for insubordination where there was evidence that the teacher signed in and out of work for a week in advance when administrative rules required him to do so on a daily basis; when the school principal by letter asked the teacher to explain his grading procedure, he simply referred the principal to a page in the school handbook; the teacher violated school policy by missing an assembly; and he failed to complete an eighteen page year-end evaluation form but instead drew a face with a tongue stuck out on the form.

APPEAL by respondents from *Howell, Judge.* Judgment entered 12 July 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 26 March 1980.

Petitioner brought this action pursuant to the provisions of G.S. 115-142(n) for judicial review of the action of respondent school board (Board) dismissing him from his position as a public school teacher in the Buncombe County schools. The essential allegations of Weber's position are that he had achieved career status as a teacher under G.S. 115-142(c) in the Buncombe County schools and that after he was informed by the Superintendent of the Buncombe County Schools that his dismissal would be recommended to the Board, he requested a review of the recommendation by a Professional Review Panel. This request was granted and after holding a hearing, the Panel recommended his dismissal. After a hearing the Board issued an order dismissing petitioner. Weber alleged that he did not receive a fair hearing before the Panel or the Board, that the Board's order dismissing him failed to make sufficient findings of fact and conclusions of law, that the findings of fact were not supported by competent, material and substantial evidence, and that the Board's conclusions of law were not supported by necessary and proper findings of fact. Weber prayed that the Board's order dismissing him be declared void, that he be reinstated as a career teacher, and that he receive back pay.

Respondent Board answered, denying the essential allegations in the petition, and prayed that the petition be dismissed. Judge Howell made extensive findings of fact and conclusions of law, and ordered Weber reinstated with back pay. Upon motion of respondent Board, execution of Judge Howell's order has been stayed pending this appeal.

Snyder, Leonard, Biggers & Dodd, by Gary Dodd, for petitioner appellee.

Reynolds, Nesbitt & Crawford, by Robert A. Crawford and Martin L. Nesbitt, Jr., for respondent appellants.

WELLS, Judge.

[1] The first ground cited by the trial court for setting aside the Board's order was the alleged failure of the school authorities to

follow the procedure for dismissal established by statute. While the court found no single violation of procedure sufficient to taint the entire process, the court concluded that a succession of partial errors denied the petitioner a fair adjudication:

> [T]he failure of the Superintendent to specify with some exactitude the charges, the failure of the Review Panel to place its findings in understandable English language, and the adoption of the Board of the same language, when taken together, render the teacher's rights meaningless, taint the whole process and make his absolute right of appeal meaningless. This alone is sufficient to require that the Board's finding be overruled or set aside. It is concluded that there has been a substantial failure to observe the letter of the statute and the requirements necessarily implied therein.

We believe that the trial court erred in concluding that petitioner's due process rights were violated. As Judge Parker has explained,

> [t]he procedures prescribed by G.S. 115-142 for the dismissal of a career teacher are essentially administrative rather than judicial. As was pointed out in this Court's opinion in *Thompson* [*v. Board of Education*, 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *reversed on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977)], the Board is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court. Nor are the Rules of Civil Procedure applicable. G.S. 1A-1. While a Board of Education conducting a hearing under G.S. 115-142 must provide all essential elements of due process, it is permitted to operate under a more relaxed set of rules than is a court of law. Boards of Education, normally composed in large part of non-lawyers, are vested with "general control and supervision of all matters pertaining to the public schools in their respective administrative units," G.S. 115-35(b), a responsibility differing greatly from that of a court. The carrying out of such a responsibility requires a wider latitude in procedure and in the reception of evidence than is allowed a court.

Baxter v. Poe, 42 N.C. App. 404, 409, 257 S.E. 2d 71, 74-75 (1979), *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 298 (1979). While the format and clarity of the charges before and the conclusions

reached by the superintendent, Professional Review Panel and Board were far from exemplary, they were not such as to constitute a denial of petitioner's right to due process of law.

In his letter notifying petitioner that he would recommend petitioner's dismissal to the Board, the superintendent stated the grounds for dismissal as "insubordination", listing specifically, *inter alia*, the controversies concerning: (1) petitioner's failure to acknowledge receipt of an evaluation for 1977-1978; (2) petitioner's response to the principal's request for clarification of petitioner's grading system; (3) petitioner's insufficient final evaluation of the year's work in 1977-1978; (4) petitioner's response to an inquiry about his failure to attend school assemblies; and (5) petitioner's failure to follow an administrative policy with respect to signing in and out of work. After a hearing in which the circumstances of each of the above charges was developed at length, the Professional Review Panel unanimously found that petitioner was insubordinate with respect to each of these issues.[1] Upon appeal to the Board and another full hearing, the Board adopted a resolution dismissing petitioner. The chairman of the Board sent petitioner a letter notifying him that it had found insubordination as to each of the issues cited above, and ordering his dismissal. Under these circumstances we believe that petitioner was adequately notified about the charges against him, that he was given a meaningful hearing, and that petitioner was permitted an adequate second hearing and review before the Board at which he was allowed to present his story and cross-examine opposing witnesses. Petitioner makes no claim that he was inadequately represented by counsel. The requirements of fairness and due process demand nothing more for an administrative determination.

[2] The court below also found that the record failed to establish insubordination on the part of petitioner with respect to the in-

1. We attach great importance to the function of the Review Panel. Under G.S. 114-142(g) and (h), the panel is selected by the State Superintendent of Public Instruction and must be composed of persons who do not reside in the community where the teacher is employed. The teacher has the right to insist that at least two of the five panel members be selected from his peer group (i.e., other teachers, as opposed to administrators). Judge Howell found considerable fault with the style of the Review Panel's report. We sympathize, but the report nevertheless reflects the Panel's understanding of the charges against Weber and its unanimous decision that the charges were justified.

cidents alleged. Under G.S. 150A-51 the Superior Court may reverse a school board decision if:

> . . . the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are . . . (5) [u]nsupported by substantial evidence . . . in view of the entire record as submitted. . . .

This standard of judicial review is known as the "whole record test" and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Thompson v. Bd. of Education*, 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The "whole record test" does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably reach a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. The court may not consider the evidence which justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. *Thompson v. Bd. of Education, supra; accord, Baxter v. Poe, supra.*

The "whole record" in this case demonstrates inability on the part of the principal in dealing precisely and professionally with a teacher; but it just as clearly shows a teacher defying his principal's authority and responsibility. These circumstances present questions to be resolved by the judgment of the Board.

As Judge (now Chief Judge) Morris stated in *Thompson v. Bd. of Education, supra*, 31 N.C. App. at 424-425, 230 S.E. 2d at 177-178, "[i]nsubordination imports a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders." The record in this case amply documents a series of acts in which petitioner failed to comply with the reasonable rules and regulations of administrators, and shows what appears to be petitioner's contempt for the school administration. Among other things, there was evidence that petitioner signed in and out of work for a week in advance, when the rule required him to do so on a daily basis. There was evidence

that when the school principal wrote petitioner and asked him to explain his grading procedure, petitioner simply referred him to a page in the school handbook. The record also contains evidence that petitioner violated school policy by missing an assembly and that he failed to complete a seventeen or eighteen-page year-end evaluation form, instead drawing a face with a tongue stuck out on the form. While we believe that each of these acts in itself shows insubordination on the part of petitioner, the cumulative effect documents petitioner's insubordinate attitude toward the school administration in general.

While there was also evidence that many of the acts described above were relatively minor in character and occasionally done by other teachers, and that these acts were not intended by petitioner to violate administration rules, this evidence was not so overwhelming as to compel the Board to dismiss the charges raised against petitioner. It is clear that the trial court examined and reviewed the record before it in great detail. It also seems clear, however, that having done so, the court then substituted its own judgment for that of the Board. This is not permitted under the whole record test. *Thompson v. Bd. of Education, supra.*

Reversed.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. STEVE ANTHONY PUCKETT

No. 7922SC1135

(Filed 20 May 1980)

1. Criminal Law § 126.3— defendant's guilt—juror's statement after trial—no showing of juror's disqualification to serve

Testimony by one of defendant's friends that, after the trial was over, he heard a juror state, "If he [defendant] wasn't guilty, the judge would have dismissed it," was insufficient by itself to indicate that the juror was unqualified to serve; furthermore, the witness's testimony seeking to impeach the verdict was incompetent.

2. Criminal Law § 66.5— pretrial lineup—no right to counsel

Defendant was not entitled to legal representation at a pretrial lineup since adversary judicial proceedings had not begun on the charge of which he was subsequently convicted.

3. Criminal Law § 66.6— pretrial lineup—no suggestiveness

There was no merit to defendant's contention that a pretrial lineup was so suggestive that he was denied due process of law where the evidence tended to show that six white males were in the lineup; all had long hair and facial hair; all were close in age to defendant; and defendant was the only man viewed who had on shorts, but there was no evidence that defendant's mode of dress was not chosen by defendant himself.

4. Criminal Law § 66.15— pretrial lineup—in-court identification of independent origin

There was no merit to defendant's contention that the State failed to show an in-court identification of defendant was of independent origin and not the result of an allegedly illegal pretrial lineup, since defendant's contention was moot in light of the court's holding that the lineup procedures were proper, and since the identifying witness testified that she had not heard defendant speak before trial but was sure of her identification when she heard him speak in the courtroom because she had listened to the robber speak for one hour during commission of the crime.

5. Criminal Law § 132— motion to set aside verdict as contrary to weight of evidence—denial proper

In a prosecution for armed robbery where defendant presented unimpeachable alibi evidence which, if believed, would have precluded a conviction, the trial court nevertheless did not abuse its discretion in denying defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence, since the victim's identification of defendant was unshakable, and since the jury could determine the credibility of defendant's witnesses.

6. Constitutional Law § 54— one year between arrest and trial—illness of counsel—no denial of speedy trial

Defendant was not denied his right to a speedy trial by a one year lapse between his arrest and his trial, since defendant was not prejudiced; the delay resulted because of illness of counsel and failure of the court reporter to record the voir dire of the jury; and at no point did the State drag its heels in prosecuting the case.

APPEAL by defendant from *Washington, Judge.* Judgment entered 12 July 1979 in Superior Court, DAVIE County. Heard in the Court of Appeals 18 April 1980.

Defendant is charged with the 19 April 1978 robbery of Mrs. Thelma Plemmons. At trial, during the presentation of the State's evidence, Mrs. Plemmons testified that at approximately 1:15 p.m.

on 19 April 1978 a young woman and man entered her home, ostensibly to use the telephone in order to call for help to fix a flat tire. The man pointed a gun in Mrs. Plemmons' face and threatened to kill her if she did not give him money. The man took money from Mrs. Plemmons' purse and kitchen cabinet, bound Mrs. Plemmons and left. After a few minutes' delay, Mrs. Plemmons escaped, went to her neighbor's house and called the sheriff's department.

On 24 July 1978, defendant was ordered to appear in a lineup. Mrs. Plemmons identified defendant as the man who robbed her, whereupon he was charged with violation of G.S. 14-87. Defendant was convicted of robbery with a firearm and now appeals that conviction.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Gilbert T. Davis, Jr. for defendant appellant.

HILL, Judge.

[1] Defendant first argues that a particular juror was prejudiced and unqualified, and that thereby he was denied a fair trial and not given due process of law. We find no error.

After the verdict was returned, defendant moved for mistrial and for a new trial. Evidence was offered on both motions. One of defendant's friends testified that after the trial was over, he heard a juror state, "[I]f he [defendant] wasn't guilty, the Judge would have dismissed it." The witness then went up to the jury box and identified the juror he believed had made the statement.

We agree with defendant that jurors should not deliberate under the misapprehension the juror in this case allegedly did. We do not believe, however, that the statement by itself indicates that the juror was unqualified to serve. The statement could indicate the juror's rationalization of what appears from the evidence to be a hard decision the jury had to make. The trial judge, in his discretion, felt the trial was fair, and we will not disturb that judgment. Furthermore, we do not believe the witnesses' testimony in seeking to impeach the verdict was competent. *See* G.S. 15A-1240(a). *Also see State v. Cherry*, 298 N.C. 86, 100, 257 S.E. 2d 551 (1979).

[2] Defendant next argues that the trial court erred in failing to suppress the pre-trial and in-court identification of defendant by Mrs. Plemmons. Defendant was first identified in a lineup at which he was not represented by counsel. Defendant contends this lack of representation rendered the lineup illegal *per se*. We find no error.

Although defendant was in custody at the time of the lineup on another charge, adversary judicial proceedings had not begun on the charge from which arose the conviction he is now appealing. In these respects, defendant's situation is similar to the defendant's in *State v. Simms*, 41 N.C. App. 451, 255 S.E. 2d 282 (1979). In *Simms*, the defendant was confined in one county on charges and brought to another county for a lineup relating to a robbery charge. Defendant Simms had not been charged with the robbery at the time of the lineup. This Court said in *Simms*, at p. 455, that, "[a] person has a right to counsel at a pre-trial lineup when it is a critical stage of the criminal prosecution against [him]. *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178 (1967)." However, under *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972), ". . . this right only attaches at or after the commencement of adversary judicial proceedings against defendant." Defendant had no constitutional right to legal representation at the lineup.

[3] Defendant contends the pre-trial lineup was so suggestive that he was denied due process of law, thus rendering inadmissible, evidence of Mrs. Plemmons' lineup identification. We find no error.

The trial judge conducted a voir dire examination of a Davie County deputy sheriff concerning the lineup. Six white males were in the lineup. All were close in age to the defendant, and like the defendant had long hair and facial hair. Three of the men wore gray twill trousers and white T-shirts. Defendant was the only man viewed who had on shorts.

Just as in *State v. Taylor*, 280 N.C. 273, 279, 185 S.E. 2d 677 (1972), there is no evidence that defendant Puckett's mode of dress was not chosen by Puckett himself. The trial judge found no error in the lineup procedure. " 'Such findings of fact, . . . are conclusive if they are supported by competent evidence in the

record.' " (Citations omitted.) *Taylor, supra,* at p. 279. We find that the trial judge was correct in his finding.

Defendant finally contends in regard to the lineup procedure that it was conducted in violation of Article 14 of Chapter 15A, particularly G.S. 15A-274 and G.S. 15A-279. Our Supreme Court has held in *State v. Irick,* 291 N.C. 480, 490, 231 S.E. 2d 833 (1977), that Article 14 ". . . was not aimed at [protecting] *in custody* defendants." The Court went on to state in *Irick,* at p. 490, that "[t]he statute does not apply to an in custody accused." This Court has held that the restrictive interpretation set forth in *Irick* applies even to a defendant in custody on other charges at the time of the lineup. *See State v. Thompson,* 37 N.C. App. 651, 657, 247 S.E. 2d 235 (1978).

[4] Defendant finally contends in relation to the identification procedures that the State failed to show the in-court identification of defendant was of an independent origin and not the result of the illegal pre-trial lineup. We disagree.

Defendant's contention is moot in light of our holding that the pre-trial procedures were proper, but assuming *arguendo* that they were not, we find that the State showed Mrs. Plemmons' identification at trial was independent of her pre-trial viewing of defendant. Mrs. Plemmons stated on voir dire that, "I didn't hear [defendant] speak until I was in this courtroom, and I was more sure than ever after I heard the voice, because I listened to it [during the robbery] for one hour." Mrs. Plemmons then stated at trial that, "I didn't have any doubt whatsoever when I first saw MR. PUCKETT but that if I did have a doubt it was removed after I heard him speak in the courtroom that morning."

We hold that the in-court identification was independent in origin, thus making any constitutional error that may have arisen in the pre-trial lineup harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967), *rehearing denied,* 386 U.S. 987 (1967). *Also see State v. Taylor,* 280 N.C. 273, 280, 185 S.E. 2d 677 (1972).

[5] Defendant argues next that the trial court abused its discretion by denying defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence. No motion to dismiss for insufficiency of the evidence was made.

The motion to dismiss the verdict as being against the greater weight of the evidence necessarily invokes the exercise of the trial court's discretion. *Roberts v. Hill*, 240 N.C. 373, 380, 82 S.E. 2d 373 (1954). No question of law is raised. Although defendant's evidence clearly leads to the conclusion that it would have been virtually impossible for him to have robbed Mrs. Plemmons, in light of the victim's unshakable identification of defendant, we cannot say that the trial judge abused his discretion in failing to set aside the verdict.

Defendant made no motion to dismiss for insufficiency of the evidence. Pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5), defendant could have requested on appeal a review of the sufficiency of the evidence, so on our own motion, we have made such a review. *State v. Alston*, 44 N.C. App. 72, 73, 259 S.E. 2d 767 (1979).

Despite the fact that defendant presented unimpeachable alibi witnesses, which if believed, would have precluded a conviction, we must conclude that the evidence was sufficient to go to the jury. "[T]he evidence must be interpreted in the light most favorable to the State . . . ." (Citations omitted.) *State v. Miller*, 270 N.C. 726, 730, 154 S.E. 2d 902 (1967). "[T]he credibility of witnesses and the proper weight to be given their testimony is to be determined by the jury, not by the court upon a motion for judgment of nonsuit." (Citations omitted.) *Miller, supra*, at p. 730. The State's evidence in the case *sub judice* was clearly sufficient to take the case to the jury.

[6] In his last argument, defendant argues that he did not receive a speedy trial in violation of his rights under the Sixth Amendment to the United States Constitution. Defendant was arrested on 24 July 1978, but not tried until one year later on 9 July 1979.

"The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution." *State v. Johnson*, 275 N.C. 264, 269, 167 S.E. 2d 274 (1969). Four interrelated factors must be considered: the length of the delay; the cause of the delay; prejudice to the defendant; and waiver of his right to a speedy trial by the defendant. *See Johnson, supra.*

In the case *sub judice* there was a long delay. Furthermore, it is evident from letters written by defendant and statements made by his counsel, Mr. Davis, that defendant was anxious to stand trial and be through with the ordeal. We find, however, no breach of defendant's Sixth Amendment rights.

The negligible prejudice to the defendant caused by the long delay is insignificant in light of the reason. Defendant's first counsel withdrew for medical reasons. The case was continued at the request of defendant's new counsel, but he, too, eventually withdrew because of illness. Defendant's present counsel brought the case to trial on 18 April 1979; but due to the court reporter's failure to record the voir dire of the jury, the trial court, in an abundance of regard for defendant's rights continued the case. At no point did the State drag its heels in prosecuting the case. We find no violation of defendant's Sixth Amendment rights.

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

No error.

Judges MARTIN (Robert M.) and WEBB concur.

CHARLES KINNARD, D/B/A CLOSET ENTERPRISES, INC. v. MECKLENBURG FAIR, LTD., HORACE WELLS, MACK HUNTER, ED MATLICK, AND SANDRA HUMPHRIES

No. 7926SC917

(Filed 20 May 1980)

1. Rules of Civil Procedure § 15.1 — amendment of complaint not permitted — no error

The trial court did not err in denying plaintiff's motion to amend his complaint in a breach of contract action to allege unfair and deceptive acts and practices in violation of G.S. 75-1.1, since plaintiff made his motion to amend two days prior to trial, four years after filing of the complaint, and seven years after the facts which gave rise to the lawsuit; allegations of unfair and deceptive trade practices would greatly change the nature of the defense and would subject defendant to potential treble damages which greatly increased the stakes of the lawsuit; and, had the motion been allowed, further discovery and time for preparation would likely have been sought, thus further delaying trial.

2. Landlord and Tenant § 13— breach of lease by landlord—directed verdict for landlord improper

In an action by plaintiff tenant to recover for breach of a lease agreement, the trial court erred in directing verdict for defendant landlord where the evidence tended to show that plaintiff rented space from defendant for the purpose of holding a flea market; plaintiff promised to pay defendant $1200 at the end of the July 4 weekend after a flea market was held on July 1-3; at the flea market on July 1 defendant's caretaker distributed a circular advertising a flea market with a name similar to the name of plaintiff's flea market which was to operate at the fairgrounds at the same time and place as plaintiff's flea market and which was to be under new management; when plaintiff saw the circulars, he announced at the flea market that he was moving his flea market to another location; on July 3 plaintiff refused to pay the $1200 in rent because of the circulars distributed by defendant; and defendant then evicted plaintiff without giving plaintiff ten days written notice as required by their lease agreement.

3. Contracts § 27— breach of lease—failure to show amount of damages not fatal to case

The fact that plaintiff tenant presented no evidence tending to show his damages resulting from an alleged breach of a lease agreement by defendant landlord was not fatal to plaintiff's case, since a showing that there was a contract and that defendant performed an act rendering it impossible for plaintiff to perform his part of the agreement or there was some breach of the contract, entitled plaintiff at least to nominal damages.

4. Landlord and Tenant § 13.1— termination of lease—written notice not given—issue as to waiver of notice

In an action to recover for breach of a lease agreement, the trial court erred in directing verdict for defendant landlord based in part on the ground that plaintiff, in announcing to his flea market exhibitors that he was moving to another location, gave notice of his intention to leave and therefore could not complain that he was not given ten days notice of the termination of the lease, since whether plaintiff intended by his announcement to waive his right to use the premises for any purpose and whether this was so understood by defendant could not be inferred as a matter of law.

Judge WEBB dissenting.

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 11 May 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 March 1980.

This is an action for breach of a lease agreement. The trial court granted summary judgment in favor of the individual defendants, directed a verdict in favor of defendant, Mecklenburg Fair, Ltd. and dismissed the counterclaim of defendant Mecklenburg Fair, Ltd. with prejudice. Plaintiff appeals from the directed verdict in favor of defendant.

Louise E. Fowler, for the plaintiff.

Walker, Palmer & Miller, by James E. Walker and Raymond E. Owens, Jr., for the defendant.

MARTIN (Robert M.), Judge.

[1] Plaintiff by his first assignment of error contends that the court erred in denying his motion to amend his complaint to include a second claim for relief based on unfair and deceptive acts and practices in violation of G.S. 75-1.1. It has been repeatedly held that a motion under Rule 15(a), N.C. Rules Civ. Proc. for leave of court to amend a pleading is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119, *cert. denied and appeal dismissed*, 294 N.C. 736, 244 S.E. 2d 154 (1978); *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979).

The trial court denied the motion, ". . . it appearing to the Court that there is no just reason for allowing such amendment." Although the trial court did not state specific reasons for the denial of the motion, in the absence of any declared reason for the denial of leave to amend, this court may examine any apparent reasons for such denial. *See Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978). In the present case we find the following apparent reasons for the denial of leave to amend. The actions complained of occurred from May to July of 1972. Plaintiff filed his action on 27 May 1975. It was not until 8 May 1979, two days prior to the trial on 10 and 11 May 1979, four years after the filing of the action, and seven years after the facts which gave rise to the lawsuit that plaintiff made his motion to amend. The proposed amendment set forth for the first time in the present suit allegations of unfair and deceptive practices under the unfair competition statute. These allegations would not only greatly change the nature of the defense to what was a breach of contract action but also would subject defendant to potential treble damages which greatly increased the stakes of the lawsuit. Had the motion been allowed, further discovery and time for preparation would likely have been sought, thus further delaying the trial. In light of these factors, the judge's denial of plaintiff's motions did not constitute an abuse of discretion.

[2] Plaintiff by his second assignment of error contends the court erred in granting defendant's motion for a directed verdict made at the close of plaintiff's evidence. A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). In determining whether the evidence is sufficient, all of the evidence must be considered in the light most favorable to the nonmoving party and he must be given every reasonable inference that may be drawn therefrom. *Reeves v. Musgrove*, 39 N.C. App. 43, 249 S.E. 2d 455 (1978).

Plaintiff's evidence considered in the light most favorable to him tends to show that he was sole shareholder of Closet Enterprises, Inc., a promotional business which derived its income from renting space to exhibitors and dealers including flea market dealers. On 26 June 1972 plaintiff signed a lease agreement with defendant Mecklenburg Fair, Ltd. The effective date of the lease was retroactive to 1 January 1972 and covered the period from January to June 1972 during which plaintiff and defendant were negotiating aspects of the lease agreement. At the time the lease was signed, plaintiff was in arrears under the written lease, the amount of which was in dispute. Pursuant to an oral agreement, plaintiff promised to pay defendant $1200 at the end of the 4th of July weekend, after a flea market was held on July 1-3.

At the flea market on 1 July 1972, defendant's caretaker distributed a circular advertising a flea market with a name similar to the name of plaintiff's flea market which was to operate at the fairgrounds at the same time and place as plaintiff's flea market and which was to be under new management. When plaintiff saw the circulars he announced at the flea market that he was moving his flea market to another location. Plaintiff's evidence also tends to show that plaintiff had been making arrangements to move his flea market in May 1972.

On 3 July 1972, defendant made a demand for the $1200 which plaintiff refused to pay because of the circulars distributed by defendant. When plaintiff refused to pay, a "confrontation" ensured in which defendant's president said that plaintiff was not to come on the premises again and to get off the premises. Later that evening when plaintiff attempted to leave, the gates were

locked and the locks changed. While trying to get out, plaintiff observed defendant's employee outside the gate with what appeared to be a gun. Plaintiff then called the police who let plaintiff out. The following day plaintiff returned to prepare for the next event and was arrested for trespassing, a warrant for his arrest having been sworn out by defendant's president. Plaintiff thereafter moved his flea market to another location.

Plaintiff's evidence further tends to show that defendant breached the lease by interfering with his business and by either terminating the lease or taking possession of the leased premises without giving plaintiff ten days written notice pursuant to the following provisions in the lease.

> 16. LANDLORD'S RIGHT TO TERMINATE. In addition to LANDLORD'S other available remedies as by law provided, LANDLORD may in all events terminate this Lease upon the happening of any one of the following events:
>
> A. Breach of any of the terms of this Lease by TENANT, including but not limited to the timely payment of either the base rental or the percentage rental, or both;
>
> * * *
>
> Should LANDLORD elect to terminate this Lease for either A or B above, it shall do so by giving 10 days prior written notice to TENANT.
>
> * * *
>
> 18. LANDLORD'S RIGHT OF RE-ENTRY: Supplemental to LANDLORD'S option to terminate this lease upon a breach thereof by TENANT, LANDLORD may—in the alternative—elect to take possession of the leased premises upon such breach and act as TENANT'S agent for the purpose of subleasing the same. All receipts from such subleasing shall be credited to the rentals otherwise due from TENANT according to the terms of this Lease. This right of re-entry may be exercised upon 10 days prior written notice to TENANT and may be exercised without the necessity of LANDLORD instituting any legal proceedings.

Hence, regardless of whether plaintiff was in breach by his refusal to pay rent on 3 July 1972, he was entitled to 10 days

notice prior to termination or re-entry by defendant. Defendant's failure to give such notice constitutes a breach of the lease agreement by defendant. Furthermore, unauthorized entry and repossession of the leased premises by the lessors constitutes a breach of the lease agreement. The lessee, at his election, may sue for damages. *Produce Co. v. Currin*, 243 N.C. 131, 90 S.E. 2d 228 (1955).

It may be that both parties are in breach. However, "[a] partial breach by one party . . . does not justify the other party's subsequent failure to perform; both parties may be guilty of breaches, each having a right to damages." 4 A. Corbin, Contracts § 946 (1951). Even if plaintiff's refusal to pay rent is considered a total breach, a total breach does not always terminate the other party's duty to perform. 4 A. Corbin, *supra*. This is particularly true in the present case where the duty to give notice arises on the lessee's breach. Therefore, plaintiff is not precluded from recovering damages for defendant's breach of contract.

[3] Plaintiff, who relocated the flea market within a few weeks, presented no evidence tending to show his damages. This, however, is not fatal to plaintiff's case as defendant suggests. "Where plaintiff's evidence tends to show the existence of a contract between the parties and that defendant performed an act rendering it impossible for plaintiff to perform his part of the agreement, or otherwise makes out a *prima facie* case of breach of contract, a motion to nonsuit is properly denied irrespective of the evidence of damage, since breach of contract entitles the injured party to nominal damages at least." *Cook v. Lawson*, 3 N.C. App. 104, 107, 164 S.E. 2d 29, 32 (1968), quoting 2 Strong's N.C. Index 2d, Contracts § 27 (1967).

[4] The court in granting defendant's motion for a directed verdict based its order in part on the ground that plaintiff in announcing to his exhibitors on 2 July 1972 that he was moving to another location gave notice of his intention to leave and, therefore could not complain of not having ten days notice of the termination of the lease. The issue raised is whether plaintiff waived his right to notice.

> A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A party may excuse performance expressly or by conduct which natu-

> rally and justly leads the other party to believe that performance is dispensed with. There can be no waiver unless so intended by one party, and so understood by the other. It is a question of intent, which may be inferred from a party's conduct. Intent is an operation of the mind and should be proven and found as a fact and is rarely to be inferred as a matter of law. *Manufacturing Co. v. Lefkowitz*, 204 N.C. 449, 168 S.E. 517, and authorities there cited.

Construction Co. v. Crain and Denbo, Inc., 256 N.C. 110, 118-19, 123 S.E. 2d 590, 596 (1962). In the case at bar, plaintiff announced only that he was moving his flea market business to another location. The testimony shows, however, that plaintiff promoted numerous other events at the exhibition grounds. Whether plaintiff intended by his announcement to waive his right to notice of termination of his right to use the premises for any purpose and whether this was so understood by defendant cannot be inferred as a matter of law and does not provide a basis for a directed verdict. We think plaintiff's evidence of breach of the lease agreement was sufficient to go to the jury.

Reversed.

Judge HILL concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe when the plaintiff announced he was moving the flea market to another location and did not pay the rent as he agreed to do, he breached the lease agreement and is not entitled to damages. I vote to affirm.

In re Hunt and In re Dowd

IN THE MATTER OF DOUGLAS MCAUTHER HUNT

IN THE MATTER OF ROGER ALAN DOWD

No. 7926DC839

No. 7926DC840

(Filed 20 May 1980)

Constitutional Law § 34; Infants § 16— juvenile hearing—continuance to permit State to present additional evidence—no double jeopardy

Respondents were not placed in double jeopardy when the trial court continued juvenile delinquency hearings after the State had presented one witness in order to give the State an opportunity to bring in additional witnesses where the same judge heard evidence at each stage of the hearing and rendered his findings at the conclusion of the entire adjudicatory process.

APPEAL by respondent Hunt from *Black, Judge.* Orders entered 17 April 1979 and 24 January 1979 in District Court, MECKLENBURG County. Appeal by respondent Dowd from *Jones (William G.)* and *Black, Judges.* Orders entered 31 August 1979 and 18 July 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 March 1980.

Both of these cases involve appeals from juvenile orders finding the respondent juvenile delinquent as defined by G.S. 7A-278(2). In Hunt, the State charged in a juvenile petition that respondent had intentionally disturbed classes at a junior high school, in violation of G.S. 14-288.4(a)(6), and had obstructed an officer while he was trying to arrest the respondent for the above offense, in violation of G.S. 14-223. A hearing was held on 15 January 1979 at which the only witness who testified for the State was the principal of the junior high school, who stated that on 1 December 1978 at around 10:00 a.m. he was called to three classrooms, including the one at which respondent was assigned, but observed no disorders. He observed respondent running from the building. At this point, on its own motion the trial court entered an order continuing the proceeding until 24 January 1979 to "give the State a chance to bring in additional witnesses who can testify to the allegations of the petition." At the beginning of the subsequent hearing, the juvenile's motion to dismiss on grounds of former jeopardy was denied. The State then presented

the testimony of the juvenile's teacher and the arresting officer, after which the court found that respondent had committed both of the offenses alleged in the petition.

In the Dowd case the State alleged that the juvenile was delinquent in possessing marijuana, in violation of G.S. 90-95(a)(3). At the hearing on 6 June 1979 the State presented the testimony of a teacher at respondent's junior high school, who stated that he had observed the juvenile with what appeared to be a marijuana cigarette in his hand. Over respondent's objection, the trial court granted the State's motion for a continuance until 18 July 1979 in order to "bring in the lab analyst." At the hearing on that date a chemist and the police officer who seized the cigarette testified, after which the court found the juvenile had committed the offense alleged in the petition. Respondents appeal.

Public Defender Fritz Y. Mercer, Jr., by Assistant Public Defender Donna Chu, for the respondents.

Attorney General Rufus L. Edmisten, by Associate Attorney Steven Mansfield Shaber, for the State.

WELLS, Judge.

The single issue raised by respondents' counsel in these cases concerns whether the trial court's granting the State or ordering a continuance for the sole purpose of allowing the State time to present additional evidence against the respondents constituted placing them in double jeopardy in violation of the Fifth Amendment to the Constitution of the United States.

The Double Jeopardy Clause of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969). The Double Jeopardy Clause normally comes into play in three situations: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Brown v. Ohio,* 432 U.S. 161, 53 L.Ed. 2d 187, 97 S.Ct. 2221 (1977). The Clause has also been held applicable in some circumstances to proceedings which terminate prior to judgment. *Arizona v. Washington,* 434 U.S. 497, 54 L.Ed. 2d 717, 98 S.Ct. 824

(1978).[1] The rationale of this extension of the protection of the Clause is that

> the State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188, 2 L.Ed. 2d 199, 204, 78 S.Ct. 221, 223 (1957). The protection of the Clause applies to juvenile proceedings. *Breed v. Jones*, 421 U.S. 519, 44 L.Ed. 2d 346, 95 S.Ct. 1779 (1975); *In re Drakeford*, 32 N.C. App. 113, 230 S.E. 2d 779 (1977).[2]

In the present action respondents argue that the "continuance" granted by the trial court in fact amounted to successive trials. While we agree that a major objective of the Double Jeopardy Clause is to prevent the prosecution from having

1. Under the English and early American practice the bar of double jeopardy could only be asserted on the basis of an actual verdict of acquittal or conviction. However, beginning with the Supreme Court's decision in *United States v. Perez*, 9 Wheat 579, 6 L.Ed. 165 (1824) it became established in our Country that a defendant could be put in jeopardy even in a prosecution which did not terminate in a conviction or acquittal. For an extended discussion of the historical development of the Double Jeopardy Clause, *see, Crist v. Bretz*, 437 U.S. 28, 57 L.Ed. 2d 24, 98 S.Ct. 2156 (1978) (Powell, J., dissenting).

2. The Supreme Court of the United States first recognized that juvenile court systems must provide juveniles with the essentials of due process and fair treatment in the case of *In re Gault*, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967). The Court has recognized, however, that not all of the rights guaranteed to defendants in criminal proceedings must be afforded in juvenile actions. *See, McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971) (no right to trial by jury in state juvenile delinquency proceedings). The reason that constitutional standards have been relaxed is that such proceedings are not strictly "criminal" in nature, but have the purpose of providing a procedure for dealing with young persons which possesses the requisite flexibility to diagnose and treat childhood developmental problems *before* children with such problems become hardened criminals. However, the Court has realized as early as *Gault* that juvenile proceedings are not purely "civil" and are attended by a significant amount of stigmatization to the accused. To this end the Court has attempted to balance the need for flexibility with procedural safeguards mandated by our Constitution for defendants in criminal proceedings. *See, In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970) (the state's burden of proof in juvenile delinquency proceedings must be beyond a reasonable doubt).

"another opportunity to supply evidence which it failed to muster in the first proceeding," *Burks v. United States*, 437 U.S. 1, 11, 57 L.Ed. 2d 1, 9, 98 S.Ct. 2141, 2147 (1978), we do not believe that the continued hearing constituted a "second proceeding" to which jeopardy again attached.

In a jury trial, jeopardy attaches at the time the jury is empanelled. *Crist v. Bretz*, 437 U.S. 28, 57 L.Ed. 2d 24, 98 S.Ct. 2156 (1978); *State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977). In a juvenile proceeding, jeopardy attaches when the judge, as trier of fact, begins to hear evidence. *Breed v. Jones, supra; In re Drakeford, supra.* The constitutional basis for the fact that jeopardy is held to attach at this time is *the need to protect the interest of the accused in retaining a chosen fact-finder. Crist v. Bretz, supra.* In both of the cases *sub judice* the same finder of fact heard evidence at each stage of the hearing and rendered his findings at the conclusion of the adjudicatory process. It is clear in each of the cases that jeopardy attached only once—at the time the judge began to hear evidence. While respondents conceivably may have been put through additional embarrassment, anxiety and expense as a result of the continued hearings, the subsequent hearing before the same trier of fact was not a second trial barred by the Double Jeopardy Clause.

Respondents cite *State v. Coats*, 17 N.C. App. 407, 194 S.E. 2d 366 (1973) in support of their argument that the continued hearings constituted double jeopardy. In *Coats* we held that where a continuance was granted by the district court judge to allow the State additional time to subpoena a witness and the second district court hearing *began anew with the defendant again entering a plea*, the Double Jeopardy Clause barred the proceeding. *Coats* and the other cases cited by respondents in which the trial was discontinued, the trier of fact dismissed, and a new jury empanelled are distinguishable from the situation presented in the cases *sub judice. See, e.g., Downum v. United States*, 372 U.S. 734, 10 L.Ed. 2d 100, 83 S.Ct. 1033 (1963) and *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975), *mod. as to death penalty*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3212 (1976). In *Carter*, the North Carolina Supreme Court held that a one-week continuance granted to allow the State to present the testimony of a witness, temporarily incapacitated due to surgery, did not subject defendant to a separate trial and was not barred by the Double Jeopar-

dy Clause. In the cases before us the Fifth Amendment rights of each of the accused under the Clause—the right to have his case heard in its entirety and determined before the same trier of fact—has not been infringed.[3]

No error.

Judges HEDRICK and WEBB concur.

SOUTHERN NATIONAL BANK OF NORTH CAROLINA v. B & E CONSTRUCTION COMPANY, INC., ARTHUR B. JACOBY AND BOB M. BARLOW

No. 7916DC891

(Filed 20 May 1980)

1. **Bills and Notes § 20— evidence that note was paid in full—summary judgment improper**

In an action to recover on a negotiable promissory note on which the individual defendants were allegedly liable as endorsers, the fact that the note had at one time been marked "paid," coupled with one defendant's testimony that he knew that the note had been paid, raised a genuine issue of material fact as to whether the note had in fact been satisfied, and the trial court therefore erred in granting summary judgment for plaintiff.

2. **Rules of Civil Procedure § 36— requests for admissions deemed admitted—procedure**

To be entitled to have requests for admissions deemed admitted for insufficiency of the responses thereto under G.S. 1A-1, Rule 36, a party must first move the trial court to determine the sufficiency of the responses and then obtain a ruling from the court to this effect.

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3. While we hold that the continuances allowed by the juvenile courts did not violate the Double Jeopardy Clause, we note that under certain circumstances the granting of a continuance for the benefit of the State may be barred by our sense of fundamental fairness and due process in the administration of justice. Certainly, the State may not be afforded repeated continuances for the purpose of obtaining sufficient evidence to satisfy the State's burden of proof in the delinquency proceedings, where it would not serve the best interest of the child under G.S. 7A-285. Since respondents have not argued in their brief that their due process rights have been violated, Rule 28(a) of the N.C. Rules of Appellate Procedure does not permit us to reach this issue at this time. *Brown v. Neal*, 283 N.C. 604, 197 S.E. 2d 505 (1973).

APPEAL by defendant from *Gardner, Judge.* Judgment entered 15 May 1979 in District Court, ROBESON County. Heard in the Court of Appeals 20 March 1980.

In this action the plaintiff bank is seeking payment from the defendants based upon a negotiable promissory note. Plaintiff alleged in its verified complaint that on or about 12 August 1975 defendant B & E Construction Company, Inc. executed and delivered to it a promissory note, payable on demand, in the principal amount of $25,000 with interest of nine percent per annum. The note itself was marked "paid", although this mark is crossed through and marked "paid in error, 9/10/75" followed by initials. Plaintiff alleged that the construction company defaulted under the note, that demand was made upon the defendants for payment, but payment was not made, and that the individual defendants Arthur B. Jacoby and Bob M. Barlow were liable on the note as endorsers. Plaintiff demanded judgment in the principal sum of $25,000 together with interest, court costs and reasonable attorney's fees as provided in the note.

Defendant Jacoby's unverified answer denied, on information and belief, the note, his endorsement and plaintiff's demand for payment, further defending on grounds that the note had been paid in full. On 2 January 1979, plaintiff served defendant Jacoby with detailed requests for admissions which were answered by defendant on the day of the hearing on plaintiff's motion for summary judgment. At the hearing defendant Jacoby testified that the note had been paid off. From the trial court's granting of plaintiff's motion for summary judgment against all defendants, defendant Jacoby appeals.

Levine, Goodman & Pawlowski, by Miles S. Levine, for defendant appellant.

C. Christopher Smith for plaintiff appellee.

WELLS, Judge.

[1] The principal question presented in this appeal is whether the trial court properly entered summary judgment under G.S. 1A-1, Rule 56 in favor of the plaintiff. The movant has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Singleton v.*

Stewart, 280 N.C. 460, 186 S.E. 2d 400 (1972). Summary judgment is available to a plaintiff as well as a defendant. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

In this case, the fact that the note was at one time marked "paid", coupled with defendant Jacoby's testimony that he knew that the note had been paid, raises a genuine issue of material fact as to whether the note had in fact been satisfied. Jacoby's testimony, showing his personal knowledge of payment, is more than a conclusory allegation. Jacoby testified, "I know the note was paid off. That I know as a fact." We believe that this testimony shows defendant's personal knowledge of payment and represents a forecast of evidence available to the defendant at trial, demonstrating the existence of a genuine issue of material fact. This is all the defendant needs to show in order to defeat plaintiff's motion for summary judgment. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

[2] The secondary question presented in this appeal concerns the sufficiency of defendant's responses to plaintiff's requests for admissions. Plaintiff submitted detailed requests with respect to the matters concerning defendant's alleged indebtedness and defendant's failure to respond to plaintiff's demands for payment. Defendant's responses, filed the day of the hearing, were as follows:

> 1. That the answers contained in Paragraphs #'s 1, 7, 8, 9, 10, 16, 17, 18, 19(a-e) are admitted.
>
> 2. That the answers contained in Paragraphs #'s 2, 3, 4, 5, 6, 11, 12, 13, 14, & 15 are denied.

Plaintiff argues that defendant Jacoby's mere denial of many of the matters to which his request for admissions were addressed did not comply with the required specificity of Rule 36, and that the trial court was correct in treating its requests as admitted for purposes of ruling on its motion for summary judgment. We do not decide whether defendant's responses have met the required specificity of the Rule, since we hold that a party, to be entitled to have requests for admissions deemed admitted for insufficiency under Rule 36, must first move the trial court to determine the

sufficiency of the responses and then obtain a ruling from the court to this effect.[1]

Under the 1975 amendments to G.S. 1A-1, Rule 36, "[t]he party who has requested the admissions may move to determine the sufficiency of the answers or [the responding party's] objections [to the requests]." 1975 N.C. Sess. Laws, ch. 762.[2] Thus, under the amended Rule, if the party who serves the requests believes any of the responding party's answers are insufficient, the party serving the requests

> may move [the trial court] for such a determination. . . . In the case of answers not complying with the Rule, it may order the matter admitted, or order the party to serve amended answers. In lieu of any of these orders, the court may order that the matter be put over for determination at the pre-trial conference or at some designated date.

4A Moore's Federal Practice ¶ 36.06, p. 36-74 (1980). The justification stated for this amended procedure is that

> [g]iving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore,

1. We note, however, that the rule explicitly provides that a denial, "shall fairly meet the substance of the requested admission, and where good faith requires that a party qualify his answer or deny only part of the matter of which an admission is requested, he shall specify so much of it as true and qualify or deny the remainder." It has been held that an answer is sufficient if it simply admits or denies the matters concerning which admissions are requested—the answer need not set out the evidence in support of the sworn statement or give the names of witnesses to be called by the party. *Van Horne v. Hines*, 31 F. Supp. 346 (D. D.C. 1940). Most of the reported litigation involving the sufficiency of answers to requests for admissions has been concerned with the clarity or sufficiency of *qualified* answers given by a responding party. *See Havenfield Corp. v. H & R Block, Inc.*, 67 F.R.D. 93 (W.D. Mo. 1973).

2. Pursuant to Rule 37(a)(4), a party who moves to determine the sufficiency of his opponent's responses may, if the answers are shown to be insufficient, recover his reasonable expenses in obtaining such an order, and the term "reasonable expenses" is defined to include attorney's fees.

> have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, then at other times have declared that the matter was admitted. The rule as revised conforms to [this] practice.

Comment—1975 Amendment to rule 36.[3]

The record is void of any request by plaintiff to have the trial court determine the sufficiency of defendant's answers to plaintiff's requests for admissions. Nor does the record contain any ruling by the trial court to this effect. Plaintiff's requests could not properly have been deemed admitted because the question of the sufficiency of Jacoby's answers was not properly raised below. Accordingly, defendant Jacoby was entitled to assert payment of the note as a defense to plaintiff's claim.

Reversed.

Judges HEDRICK and WEBB concur.

3. The North Carolina Rule 36 is virtually identical to its Federal counterpart, as amended in 1970. The procedure adopted in the amended Rule for determining the sufficiency of the responding party's answers was derived from the prior practice of some of the Federal courts. The amendment to the Rule allowing this novel procedure was necessitated by the willingness of other courts to hold that an insufficient answer to a request for admission was equivalent to no answer at all, resulting in the automatic admission of the matter alleged in the request. 8 Wright & Miller, Federal Practice and Procedure: Civil § 2263, pp. 735-739 (1970).

Hobby and Son v. Family Homes

J. T. HOBBY AND SON, INC., A NORTH CAROLINA CORPORATION (SUCCESSOR CORPORATION TO HOBCO BUILDING COMPANY); ROBERT MONTGOMERY PAYNTER AND WIFE, SHIRLEY L. PAYNTER; THOMAS C. BOGLE AND WIFE, SARA M. BOGLE v. FAMILY HOMES OF WAKE COUNTY, INC., A CORPORATION

No. 7910SC1009

(Filed 20 May 1980)

Deeds § 20.3— single family residential restrictive covenant—family care home as prohibited use

A restrictive covenant limiting the use of subdivision lots to single family residences is violated by the use of a lot for a "family care home" in which a staff of caretakers and a house manager provide sheltered care for two to five mentally or physically infirm adults who pay for their care. Furthermore, such enforcement of the restrictive covenant does not violate the statute giving handicapped persons the right to reside in residential communities, homes and group homes, G.S. 168-9, since the residents are not prevented from living in the home because of their handicap.

APPEAL by defendant from *Smith (Donald L.), Judge.* Judgment entered 1 June 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 18 April 1980.

The individual plaintiffs and the corporate defendant are owners of residential lots in Scarsdale Subdivision, Raleigh. J. T. Hobby and Son, Inc., is the successor corporate developer of the subdivision. Lots in the subdivision contain restrictive and protective covenants which affect all lots. The specific covenant at issue in this suit reads as follows:

> No lot shall be used except for residential purposes, but nothing herein shall be construed to mean that a lot may not be converted to a street regardless of the type of use made of such street. No building shall be erected, altered, placed, or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2½ stories in height, a private garage for not more than three cars and out-building incidental to residential use. . . .

The Raleigh City Council passed an ordinance effective 22 May 1977 permitting what are known as "family care homes," to be located in residential areas. The defendant took title to lot 9, Block F, Scarsdale Subdivision, on 17 June 1977. Suit was filed by

plaintiffs one month later, seeking to restrain the defendant from using the property as a family care home. The matter was heard 31 May 1979, at which time orders of summary judgment and a permanent injunction favoring plaintiffs were entered. Defendant appealed.

Seay, Rouse, Johnson, Harvey & Bolton, by James L. Seay and Ronald H. Garber, for plaintiffs appellee.

Theodore A. Nodell, Jr., for defendant appellant.

HILL, Judge.

[1] Defendant contends the trial court erred by entering summary judgment in favor of the plaintiffs, there being a genuine issue of material fact present. In order to address defendant's contention, we are compelled to construe the restrictive covenant cited above. In other words, we must decide whether the operation of a "family care home" complies with the restriction that the lot on which the home is located be restricted to residential purposes, and whether any building located thereon meets the definition of a single family dwelling. The regulations defining a "family care home" promulgated by the North Carolina Department of Human Resources indicate it to be ". . . a small residence which provides sheltered care for two to five adults who, because of age or disability, require some personal services along with room and board to assure their safety and comfort." Such homes are licensed and include all boarding homes and rest homes which are for two to five adults who are aged or mentally or physically infirm, and who are not connected by blood or marriage to the person applying for a license to operate such a home. A charge is made for the resident's care. The residents are defined as "[a]ged or disabled persons residing in the home who pay for their care."

The facility is managed by an administrator who is not required to live at the facility, but, if not, he must employ a supervisor-in-charge. In brief, a staff of caretakers and a house manager are required to operate the facility, and the entire operation is licensed and strictly regulated. The cost of living in the home comes from two sources—an annual grant from the State of North Carolina and from the patient. The person in charge of the property which is the subject of this controversy appears to be a married couple. The other residents, all of whom

are unrelated retarded adults, have lived on the premises since the home opened in 1977.

In making application for the permit to operate the facility, the defendant was presented with several choices by which to categorize the property, including "Residential, Commercial, Office, Institutional, Day Care, and Industrial." The defendant indicated "*Institutional.*" It did *not* choose "Residential."

" 'Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. . . . Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.' " *Long v. Branham*, 271 N.C. 264, 268, 156 S.E. 2d 235 (1967), *citing* 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 187 (1965).

A careful examination of the factual situation *sub judice* leads us to the conclusion that the operation of the dwelling is more institutional than residential in nature. Certainly, the criteria for a single family residence is not met.

The North Carolina Supreme Court has defined "family" as being: "(1) those who live in the same household, subject to the general management and control of the head thereof; (2) [dependent] . . . upon such supervising, controlling and managing head; . . . (3) [wherein there is rendered] mutual gratuitous services with no intention on one hand of paying for such service and no expectation on the other of receiving reward or compensation." *McGee v. Crawford*, 205 N.C. 318, 321, 171 S.E. 326 (1933).

It is obvious that the above definition cannot be satisfied by the persons living in the dwelling which is the subject of this controversy. Here the supervisor-administrators, as well as other employees, are paid for their services. The defendant landowner is an operator of the home (though designated not for profit). The defendant molds policies concerning the operation of the home, and is subject to licensing as well as governmental supervision. Although the number of residents appears fixed, we can visualize a transition in the number of occupants with the idea being to maintain a full house at all times so as to make economical operation possible. The retarded persons do not pay the entire cost of

their room and board. The State pays portions of this cost, and the resident pays part. Outside members of the resident's family are encouraged to participate in the activities—even though not living on premises. No service appears to be gratuitous.

The operation of the home appears to go beyond even that of a "boarding" house. Courts have held that a boarding house violates residential covenants unless the keeping of a boarder is incidental to the use of the premises by a family. *See Annot.*, 14 A.L.R. 2d 1376, 1406 (1962). Here the keeping of boarders cannot be classified as incidental. The home is a business venture and appears to be a part of a business chain operated by defendant.

Defendant contends it has not changed any portion of the dwelling so as to preserve the single family residential character of the subdivision. Perhaps no architectural change has been made, but we are aware that "a house is not a home" in every situation. Here the house in an institution.

Defendant next contends the marital relationship between the caretakers would bring the relationship of the parties within the definition of "family" as required by the covenant. We have concluded there is indirect evidence of a husband-wife relationship in the record. However, the arguments previously presented would make this fact meaningless. We find that no issue of genuine material fact existed.

Next, defendants contend the entry of summary judgment was contrary to statute and public policy. Defendant quotes Judge Morris (now Chief Judge) in *Hale v. Moore*, 4 N.C. App. 374, 379, 167 S.E. 2d 12 (1969), as saying: " 'The courts have generally sustained covenants restricting the use of property where reasonable, [and] *not contrary to public policy*, not in restraint of trade and not for the purpose of creating a monopoly. . . .' " (Emphasis added.)

Defendant then cites G.S. 168-9 which provides that:

> Each handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes and group homes, and no person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or have the authority, to prevent any handicapped citizen, on the basis of his or her

handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen.

The statute clearly does not apply. The residents are not prevented from living in the home because of their handicap. The restrictive covenants do no violate G.S. 168-9.

We would reach a similar conclusion if the mentally retarded persons were of sound mind. Their handicap is not the issue. The issue is the operation of a commercial venture that violates the restriction. Defendant chose a location where private unilateral contracts ought to be honored by it in the same manner as by the other owners of lots in the subdivision.

The covenants at issue were on record in Wake County Courthouse long before the property was purchased by the defendant corporation. The covenants were open to public inspection. The plaintiffs presumably had purchased their homesites in Scarsdale, relying, at least partly, on the protection offered by the covenants. The limitations are beneficial to maintaining quality neighborhoods, and even defendant does not contend they are void. The covenants are an effort to limit the neighborhood to single family dwellings—precluding institutions.

Finally, we are not impressed with defendant's argument that upholding the covenants would be violative of defendant's constitutional rights. The record of the case does not reflect that any question of constitutional law was presented to or considered by the trial court. Such an issue will not be considered for the first time on appeal. *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911, *cert. den.* 287 N.C. 465 (1975).

The judgment of the trial court is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. WEATHERSPOON McLAURIN

No. 7914SC1162

(Filed 20 May 1980)

1. **Homicide § 24.1— use of deadly weapon—instruction on inferences proper**

The trial court did not err in charging the jury that an intentional killing by means of a deadly weapon raised the inference that such a killing was unlawful and done with malice, even when self-defense was at issue.

2. **Homicide § 28— defense of habitat—instruction not required**

Defendant in a homicide prosecution was not entitled to an instruction on defense of habitat where there was no evidence that defendant was acting to prevent a forcible entry into his home.

3. **Homicide § 28.4— no duty to retreat within habitat—failure to instruct error**

The trial court in a homicide prosecution erred in failing to charge that there was no duty on the part of defendant to retreat within his habitat, since the evidence tended to show that defendant was on his own premises; deceased carried a pistol; deceased reached into her pocket as if going for a gun; deceased told defendant that she would give him "six little bullets"; and defendant thought deceased intended to follow through with her threat.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 16 August 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 23 April 1980.

The defendant appellant was tried and convicted for the murder in the second degree of Lucille Surles. Surles had been doing housework for defendant, aged 60, and his mother, aged 86. Defendant had loaned Surles money from time to time, and recently had loaned her $300.00.

On the day of the slaying, defendant had been drinking liquor and taking medicine. Surles' daughter testified that on the night of 9 January 1979, at about 10:30 or 11:00 p.m., defendant telephoned her house and asked to speak with her mother; that she advised defendant her mother was asleep; that defendant hung up but called back and told the daughter to tell Surles that defendant's mother was on her deathbed.

Surles and her daughter drove to defendant's home, arriving at about 11:00 p.m. They were let into the house by defendant and walked into the bedroom where defendant's mother generally stayed. Defendant's mother was not in the room, and defendant

pulled a gun out of his pocket and told the victim, "I called your goddamn ass over here to kill you," and shot Surles one time. Surles' daughter made an effort to call for help on the telephone, and defendant fired a second shot into her mother. The daughter testified that she heard defendant tell her mother that he meant to kill her.

Defendant testified on his own behalf, stating that he believed he had to shoot the victim in self-defense; that he had received $11,000 in a disability claim and had spent great portions of it on the victim and her children; that the victim entered his house while he ". . . was drunk, laying down," using her key; that he asked the victim for his money and she told the defendant she was going to give him "six little bullets" and reached into her coat pocket. Defendant, knowing the victim carried a gun and believing she was going to kill him, shot her twice with his pistol.

The trial judge charged the jury on murder in the second degree, and voluntary manslaughter, and gave an instruction on self-defense. Defendant requested a charge on defense of domicile, which was refused. The jury returned a verdict of murder in the second degree, and defendant appealed.

Attorney General Edmisten, by Associate Attorney Francis W. Crawley, for the State.

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

HILL, Judge.

[1] Defendant first contends that the trial court erred in charging the jury that an intentional killing by means of a deadly weapon raises the inference that such a killing was unlawful and done with malice, even when self-defense is at issue. We find no error.

Defendant contends unlawfulness and malice could not be presumed from a finding of an intentional killing by means of a deadly weapon until after the jury had found the absence of self-defense on the part of the defendant beyond a reasonable doubt. Appellant relies upon *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds* 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), which interpreted *Mullaney v. Wilbur*,

421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). The Court in *Hankerson, supra,* at p. 651, stated that:

> [T]he State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt, . . . If, after the mandatory presumptions [of malice and unlawfulness] are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. . . . If there is evidence in the case of all the elements of self-defense, *the mandatory presumption of unlawfulness disappears* but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, *including the inferences* and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty. (Emphasis added.)

The trial court herein charged upon the permissible *inference* of unlawfulness and malice as follows:

> If the State proves beyond a reasonable doubt, or it is admitted that this defendant intentionally killed Lucille Surles with a deadly weapon, or intentionally inflicted a wound upon Lucille Surles with a deadly weapon which proximately caused her death, you may *infer* first that the killing was unlawful; and second, that it was done with malice, but you are not compelled to do so. You may consider the *inferences* along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If you *infer* that the killing was unlawful and was done with malice, the defendant would be guilty of second degree murder. (Emphasis added.)

The above portion of the trial court's charge is virtually identical to the language recommended by our Supreme Court in *State v. Harris,* 297 N.C. 24, 28, 252 S.E. 2d 781 (1979), a case in which murder in the second degree was charged and where self-defense was at issue. Our Court recommended the trial courts charge that:

> If the State proves beyond a reasonable doubt, or it is admitted, that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may *infer* first, that the killing was unlawful, and second that it was done with malice, but you are not compelled to do so. You may consider the *inferences* along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. (Emphasis added.)

The language suggested in *State v. Harris, supra*, and the portion of the charge to which appellant excepted, allow the jury to consider all facts and circumstances, including evidence of self-defense, in determining whether the killing was unlawful. When the issue of self-defense is raised, the State continues to have the burden of proving each element of the crime of murder in the second degree beyond a reasonable doubt. Simultaneously, the additional burden is added of proving malice based on inferences rather than presumptions. The language in the court's charge clearly follows the principles set forth in *Hankerson, supra.*

When evidence of self-defense is presented in a murder in the second degree case, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. *Hankerson, supra.* The Court by its charge allowed the jury to consider the evidence of self-defense in addition to the permissible inference of unlawfulness in determining whether the killing was unlawful and did not deprive the defendant of due process of law.

[2] Defendant contends the trial judge should have submitted an instruction on defense of habitat or domicile. It is well settled in North Carolina that the defense of habitation or domicile is limited to those cases where a defendant is attempting to prevent a forcible entry into his home. *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979). In the case *sub judice* there is no evidence the defendant was acting to prevent a forcible entry into his home. The deceased and her daughter were already in defendant's home when first observed by the defendant. The trial judge correctly refused to charge on defense of habitation or domicile and proceeded to charge on self-defense.

[3] Defendant attacks the judge's charge saying that the judge erred in failing to charge there was no duty on the part of the defendant to retreat within his habitat or domicile. We agree.

In the present case, not only was the defendant on his own premises, but there is evidence that the deceased carried a pistol; that she reached into her pocket as if going for a gun; that the deceased told the defendant that she would give him "six little bullets"; that the defendant thought the deceased intended to follow through with her threat.

A person is not obligated to retreat when he is assaulted in his dwelling house or within the curtilage thereof, whether the assailant be an intruder or another lawful occupant of the premises. *State v. Browning*, 28 N.C. App. 376, 221 S.E. 2d 375 (1976). Under the circumstances, it was error for the judge to fail to charge upon the defendant's right to stand his ground without retreating.

We do not consider the remaining assignments of error since we must award the defendant a

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

EDITH S. KING, WIDOW OF HAROLD B. KING, DECEASED EMPLOYEE, PLAINTIFF v. EXXON COMPANY, EMPLOYER, SELF-INSURER, CARRIER DEFENDANT

No. 7910IC1059

(Filed 20 May 1980)

Master and Servant § 55.3— workers' compensation—death not result of accident

The Industrial Commission properly determined that the death of a traveling mechanic who replaced computers in gas pumps at service stations did not result from an accident arising out of and in the course of his employment where decedent was found lying unconscious on his back on the concrete next to a gas pump on which he was working; decedent had hemorrhaged from the rupture of a congenital aneurysm in the left carotid artery; in order to perform his work, decedent had to crouch down and lift computers weighing 50 to 60 pounds up into the pumps; the strain upon decedent from the position in which he was working could have caused the aneurysm to rupture; there

was no evidence that decedent had any bruises, lacerations, abrasions or other physical indicia of a trauma or fall; and there was no evidence that decedent was doing anything but his usual work at the time of his injury.

APPEAL by plaintiff from the Full Industrial Commission. Opinion filed 5 June 1979. Heard in the Court of Appeals 24 April 1980.

Plaintiff seeks to recover worker's compensation death benefits for the death of her husband. Commissioner Vance heard the case, made findings of fact, and concluded that decedent's death resulted from an injury by accident arising out of and in the course of his employment. Defendant appealed to the Full Commission. The Commission, Chief Deputy Commissioner Shuford dissenting, set aside the award, concluding that decedent did not sustain an injury by accident arising out of and in the course of employment.

The evidence may be summarized as follows: Decedent was employed by Exxon as a traveling mechanic. On 1 December 1975 decedent was working at Jones Exxon, replacing computers in the gas pumps. In order to do this he had to crouch down and lift the computers, which weigh 50 to 60 pounds, up into the pumps. Jones had been talking to decedent as he worked, and Jones went away long enough to serve a customer at another pump. When he returned he found decedent lying on his back on the concrete, apparently unconscious, parallel to the gas pump island and about four feet away from it. Decedent was taken to the hospital where he was found to have a subarachnoid hemorrhage. Arteriograms revealed two large congenital aneurysms of the left internal carotid artery. Surgery was performed on 23 December, but on 29 December decedent hemorrhaged again from the aneurysm. His condition continued to deteriorate, and he died on 7 January.

From the Commission's denial of benefits, plaintiff appeals.

Young, Moore, Henderson & Alvis, by B. T. Henderson II and Walter Brock, Jr., for plaintiff appellant.

Moore & Van Allen, by John T. Allred and Robert D. Dearborn, for defendant appellee.

ARNOLD, Judge.

The facts found by the Commission are conclusive on appeal, G.S. 97-86, and the scope of our review is the limited determination of whether there was presented competent evidence to support the Commission's findings. *Willis v. Reidsville Drapery Plant*, 29 N.C. App. 386, 224 S.E. 2d 287 (1976). In order to recover under the Worker's Compensation Act (Chapter 97 of the General Statutes) plaintiff is required to prove that the injury which resulted in death (1) was caused by an accident, (2) arose out of the employment, and (3) was sustained in the course of the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). The Commission found that "[t]here [was] no [evidence] with respect to decedent having any bruises, lacerations, abrasions, or other physically observable indicia of a trauma or fall, nor did x-rays reveal any fractures," and that "[d]ecedent did not sustain an injury by accident arising out of and in the course of his employment." Plaintiff contends that there is no evidence to support these findings, and that in fact the evidence compels a finding that a fall caused the injury which led to decedent's death.

Dr. Adcock, a neurosurgeon, gave his expert opinion about what caused the aneurysm to rupture:

> It is my opinion that if the Commission finds as a fact Mr. King's bodily contact with the flat solid concrete surface and particularly his head's contact with the flat concrete surface and including "straining and lifting computers and all" that could have and probably did aggravate the pre-existing aneurysm to such an extent as to cause rupture or leakage and accelerate Mr. King's death.
>
> It is also my opinion that the squatting and crouched position in which Mr. King had to change the computers weighing 50 to 60 pounds combined with the manual labor involved in loosening the nuts and working in close quarters and then lifting, installing and taking out computers could have and probably did elevate Mr. King's blood pressure to such an extent as to cause a rupture or leak in the pre-existing congential [sic] aneurysm and lead ultimately to his death.

. . . .

> It would pop if you had a system like the body and squatted down and strained really hard or lifted machinery. It is very common that people rupture aneurysms already there by such as that.
>
> Most commonly in a history of congenital aneurysm rupture occurs during the act of sexual intercourse. It is also common in people drilling overhead, pulling on heavy wrenches.

Plaintiff relies upon the first quoted paragraph, arguing that the rupture itself is evidence that a fall occurred. This is not what the doctor testified, however. It was his testimony that if a fall brought decedent's head into contact with the concrete, this probably caused the aneurysm to rupture. He also testified, however, that the strain upon decedent from the position in which he was working probably caused the rupture. In light of this testimony, and the fact that no other evidence was presented to show that a fall caused decedent's injury, we find that the evidence supports the Commission's findings. The "fall" cases cited by the plaintiff are not on point, since in none of them was there any evidence that the decedent had a pre-existing condition which without a fall could have caused his death, as is the case here. *See Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963) (evidence that the cause of death was bleeding from a laceration received in a fall); *DeVine v. Dave Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77 (1947) (evidence that decedent received a fatal blow when he fell and his head struck concrete); *Calhoun v. Kimbrell's, Inc.*, 6 N.C. App. 386, 170 S.E. 2d 177 (1969) (evidence that decedent was found at the foot of a flight of stairs, that he sustained a skull fracture, and that a contusion of the brain resulted in death).

In its "Comments" to its findings of fact, the Commission indicated that there was no evidence that at the time of his injury decedent "exerted unusual or extraordinary effort, stress, or strain so as to constitute an interruption of his regular work routine and thus establish a compensable injury." In spite of plaintiff's arguments to the contrary, we find that the evidence supports this finding. Plaintiff testified that decedent was employed by Exxon as a traveling mechanic and that he talked to her "lots of times about the installation of meters or computer

pumps. . . . To work on the pumps he would have to get into a cramped position. He . . . would have to stoop down and work up under a pump . . . ." There is no evidence that decedent was performing any but this usual work at the time of his injury. The Commission properly found that this evidence does not show an injury by accident. "No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by accident." *Searsey v. Perry M. Alexander Const. Co.*, 35 N.C. App. 78, 80, 239 S.E. 2d 847, 849, *cert. denied* 294 N.C. 736, 244 S.E. 2d 154 (1978); *see also Ferrell v. Montgomery & Aldridge Sales Co.*, 262 N.C. 76, 136 S.E. 2d 227 (1964); *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962).

Plaintiff assigns error to the Commission's statement in its "Comments" that a particular notation in decedent's medical records was "without probative value." We find no prejudice to plaintiff from this statement, however, since the notation referred to stated only that decedent " 'collapsed while working at a gas pump at a Station, according to attendant,' " and other evidence of the same import was before the Commission.

The Commission concluded that plaintiff's Exhibit 8 was not admissible into evidence because it was hearsay, and plaintiff assigns error. Since Exhibit 8 was not included in or filed with the record on appeal, however, we have no basis for determining that the Commission erred.

The Commission's findings are supported by competent evidence, and its opinion is

Affirmed.

Judges HEDRICK and ERWIN concur.

FCX, INC. v. OCEAN OIL COMPANY, FORMERLY SENTRY OIL CO., INC., JAMES BAXTER EUBANKS AND WIFE, SARAH L. EUBANKS

No. 7910SC665

(Filed 20 May 1980)

1. Accounts § 2— account stated—extent of agreement in question

The trial court erred in entering summary judgment for plaintiff in an action to recover the amount allegedly owed by defendant for the purchase of petroleum products where there was a material question of fact as to whether a meeting between the parties resulted in an account stated as to the totality of the transaction between the parties or only as to the balance of plaintiff's ledger sheets.

2. Accord and Satisfaction § 1; Compromise and Settlement § 5— disputed account—cashier's check tendered—acceptance

In an action to recover on an account, plaintiff's retention of a cashier's check tendered by defendant, though the check was not deposited, was sufficient acceptance of a lesser amount than plaintiff claimed was due it to result in an accord and satisfaction or compromise and settlement, and if the jury found that the account between the parties was unliquidated or that it was liquidated but there was new consideration for the acceptance of the check, plaintiff was barred from further recovery.

APPEAL by defendants from *Braswell, Judge*. Judgment entered 25 May 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 5 February 1980.

Plaintiff alleges that between 1974 and 1978 it sold petroleum products on credit to the corporate defendant, and that the individual defendants executed a Statement of Responsibility for the account. In the spring of 1978 defendants questioned the amount they owed to plaintiff, and the account was reconciled to $38,322.49, to which defendants agreed. On 3 August 1978 defendants tendered a cashier's check in the amount of $26,337.49, marked "For payment in full." Plaintiff has retained this check, but has not cashed it. Plaintiff seeks to recover the $38,322.49, or to be allowed to deposit defendants' check without prejudice and to recover from defendants the $11,985 balance.

Defendants answered, alleging that in February 1977 the parties entered into an agreement that plaintiff would sell to them at the best price and freight free, and that plaintiff has not complied with this agreement. Defendants admit that their account with

plaintiff was corrected to $38,322.49, but deny that this amount is the balance due, alleging that the items which made up the account were incorrectly priced. Defendants also allege that plaintiffs' retention of their "payment in full" check amounts to full payment of the account. In addition, defendants counterclaimed for treble damages for plaintiff's alleged unfair trade practices, again alleging that plaintiff had agreed to sell to them at its best price and freight free. Plaintiff replied that it had entered into such an agreement, which was to continue for one year from January 1977, and denied that it had breached the agreement.

Plaintiff moved for summary judgment, attaching to its motion two affidavits, the ledger of the parties' account, and a letter of 3 August 1978 signed by the male defendant. The first paragraph of that letter is as follows:

> In regards to the account of Ocean Oil Co., Inc., formerly Sentry Oil Co., Inc., when you and Mr. Arnold Walton were last in our office attempting to correct your records, which at that time you showed Sentry Oil owed $43,302.70, whereas we showed that Sentry owed to FCX the amount of $38,322.49 and after meditation, consultation and several telephone calls you and your company agreed to accept our amount of $38,322.49 as being correct, to which we agreed.

The seven subsequent paragraphs address the "best price and freight free" agreement, defendant's feeling over the course of the year that the agreement was not being complied with, and his investigations into the matter. The letter concludes:

> [W]e looked at our invoices and those of FCX dealers and it was our opinion that we had not received the "best price", nor had we received our products "freight free" as we had been promised.
>
> So we concluded that we would take the figure agreed upon of $38,322.49 and subtract the freight on product [sic] we received during the "freight free" year of $11,985.00 and we have a balance of $26,337.49 for which we have attached a cashier's check and for which in our considered opinion does forthwith pay the account of Ocean Oil Co., Inc., formerly Sentry Oil Co., Inc. in full.

The affidavits attached to plaintiff's motion both stated that in the presence of the affiants the defendants had on 11 July 1978 agreed to the balance of $38,322.49 and promised to pay it.

Defendants presented affidavits in response to plaintiff's motion, stating that in July 1978 the parties "reached a tentative balance based upon the account being in accordance with the [best price and freight free] agreements. The pricing was not in accordance with the agreements but all products were overpriced to the extent they included a transportation charge." Defendants also moved for summary judgment on the ground that plaintiff's retention of their cashier's check barred any further recovery.

The court entered summary judgment for plaintiff in the amount of $38,322.49. Defendants appeal.

E. Ray Briggs for plaintiff appellee.

Vaughan S. Winborne for defendant appellants.

ARNOLD, Judge.

[1] It is plaintiff's position that at the meeting on 11 July 1978 the parties reached an account stated, agreeing that the amount due from defendants to plaintiff was $38,322.49. The affidavits presented by the plaintiff on its motion for summary judgment, and the first paragraph of defendant's 3 August 1978 letter to plaintiff support this position. The remainder of defendant's letter, however, and his affidavit in response to plaintiff's motion for summary judgment indicate defendants' belief that they are entitled to a set-off against this amount, and that what was actually reached at the 11 July meeting was an agreement that $38,322.49 was the correct balance for the ledger sheets, but not necessarily a final determination of what defendants actually owed to plaintiff. This situation is analogous to that in *Nello L. Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962). There the court noted that while the parties did not dispute the amount plaintiff had charged defendant for the crushed rock furnished to defendant, defendant did contend that the plaintiff had agreed to make an "equitable adjustment" in the balance due because the rock delivered did not meet the contract specifications. The court said: "The defendant's theory of the case seems to be that although it did not dispute the amounts plaintiff had charged it

for the [crushed rock] represented by the two invoices, those charges did not represent an *account stated* in the sense of an agreement with respect to the *totality* of the transactions between plaintiff and defendant, *i.e.*, a final settlement between them. Defendant denied that the parties had either expressly or impliedly struck a balance in their claims against each other and agreed upon . . . the amount which defendant should pay to plaintiff in final settlement of all claims existing between them." *Id.* at 529-30, 126 S.E. 2d 506.

An account stated need not cover all the dealings between the parties; since an account stated is nothing more than an agreement between the parties, it extends only to the items they considered in reaching their agreement. *Id.* In the present case, defendants do not deny that $38,322.49 represents the correct balance of the ledger sheets of their account with plaintiff. To that extent, it is clear that the parties reached an account stated. Defendants do contend, however, that they did not agree to $38,322.49 as a final settlement, because they are entitled to a set-off. "In an action on an account stated, the party against whom the balance is claimed may set off against it any balance which he claims from items not included in the settlement." *Id.* at 531, 126 S.E. 2d 507. Whether the meeting of 11 July resulted in an account stated as to the totality of the transactions between the parties, or only as to the balance of the ledger sheets, is a material question of fact which must be decided by a jury. Summary judgment for the plaintiff was inappropriate. *Cf. Carroll v. McNeill Industries, Inc.*, 37 N.C. App. 10, 245 S.E. 2d 204, *affirmed* 296 N.C. 205, 250 S.E. 2d 60 (1978).

[2] Defendants assign error to the denial of their motion for summary judgment, arguing that plaintiff's retention of their full payment cashier's check bars it from any further recovery. Plaintiff argues that by the mere retention of the check it has not converted the funds to its own use or otherwise accepted them as full payment of defendants' account.

When this action goes to trial, the jury may find that at the 11 July meeting the parties reached an account stated as to the totality of the transactions between them, or that they reached an account stated only as to the balance of the ledger sheets. If the jury finds the former, the amount due from defendants to plaintiff

will have become liquidated, and in that case the cashier's check from defendants for a lesser amount will have been an accord and satisfaction only if it is also found that there was new consideration for the payment of part in discharge of the whole. *Baillie Lumber Co., Inc. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E. 2d 85 (1969); 1 Am. Jur. 2d, Accord & Satisfaction §§ 5 & 12. If, on the other hand, the jury finds that the final amount due from defendants to plaintiff was still in dispute after the 11 July meeting, defendants' payment of a lesser amount on condition was an accord and satisfaction, or a compromise and settlement, if it was accepted by plaintiff. G.S. 1-540; 1 Am. Jur. 2d, Accord & Satisfaction §§ 5 & 12.

We find that plaintiff's retention of the cashier's check, though the check was not deposited, was sufficient acceptance of the lesser amount to result in an accord and satisfaction or compromise and settlement. A cashier's check is paid for in advance, and is the next thing to cash. Such a check is not subject to countermand, 10 Am. Jur. 2d, Banks § 544, and is considered accepted by the bank for payment by the act of its issuance. 10 Am. Jur. 2d, Banks § 643. "Cashier's checks . . . are regarded substantially as the money which they represent . . . ." 10 Am. Jur. 2d, Banks § 544, at 518-19. It has been held that money tendered by the debtor as full payment of his debt, and taken by the creditor, claiming a balance still due, was accepted on the conditions under which it was tendered. *Cline v. Rudisill*, 126 N.C. 523, 36 S.E. 36 (1900). The court did not require that the creditor deposit or otherwise actually use the money. Here, plaintiff's retention of the cashier's check in spite of defendants' requests that it be returned is equally an acceptance. If the jury finds that the account between the parties was unliquidated, or that it was liquidated but there was new consideration for the acceptance of the check, plaintiff is barred from further recovery.

Because material issues of fact exist, defendants were not entitled to summary judgment. Defendants' third assignment of error is without merit. The questions of fact in this controversy must be resolved by a jury, and, accordingly, the order of the trial court is

Reversed.

Judges PARKER and WEBB concur.

DR. LOCKSLEY S. HALL v. PIEDMONT PUBLISHING COMPANY, A CORPORATION, AND DAVID V. LINER

No. 7923SC1003

(Filed 20 May 1980)

Libel and Slander § 10— physician in mental commitment proceeding as public official—necessity for showing malice in false statements

A physician in a mental commitment proceeding was a public official within the purview of the rule prohibiting a public official from recovering damages for defamatory statements relating to his official conduct in the absence of allegation and proof of actual malice in the making of the statements. Therefore, a directed verdict was properly entered for defendant newspaper publisher and defendant attorney in plaintiff physician's libel action based on the publication of newspaper articles concerning the questionable commitment of a man to a State mental hospital and depicting two doctors, including plaintiff, in a cartoon as rubber stamps where plaintiff failed to show malice on the part of defendants in publication of the articles.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 28 November 1979 in Superior Court, YADKIN County. Heard in the Court of Appeals 17 April 1980.

Plaintiff brought this civil action against defendants seeking damages for libel. The complaint alleged false statements concerning plaintiff which were defamatory to plaintiff in his profession. He alleged the corporate defendant published an article containing false and defamatory information given to it by the individual defendant and that defendants knew or had reason to believe the information was false.

On 16 April 1972, an article was published in the *Winston-Salem Journal-Sentinel* entitled "Was Sane Man Railroaded?" The article dealt with the commitment of a man to the State mental hospital at Camp Butner under questionable circumstances. Above the article was a cartoon portraying two doctors as rubber stamps. Fictitious names were used and the geographic location where the commitment was ordered was described no more fully than as "a nearby county." Approximately eleven months later, on 11 March 1973, another article appeared in the *Winston-Salem Journal-Sentinel* entitled "Man Sues Over Commitment." This article reported on a suit filed in Forsyth County Superior Court by Carlyle Booe, a former resident of Yadkin County, against his

wife, the Yadkin County sheriff, the Yadkin County Clerk of Court, a notary public and two physicians, one of whom was the plaintiff in this case, Dr. Locksley S. Hall. The article reported Booe's allegations contained in a complaint drawn by his attorney, the individual defendant in this case, David Liner. The complaint alleged improper commitment of Booe to the John Umstead Hospital. The 16 April 1972 and 11 March 1973 articles were written by different reporters. The suit brought by Booe ended with summary judgment for the two doctors which was affirmed by this Court. *Booe v. Hall*, 24 N.C. App. 276, 210 S.E. 2d 293 (1974).

Dr. Hall instituted this action against the publisher of the *Winston-Salem Journal-Sentinel* and Booe's attorney. Plaintiff's complaint alleges that while the 16 April 1972 article "withheld identity of the plaintiff," the 11 March 1973 article "identified the plaintiff as being one of the physicians referred to in the article published and circulated on April 16, 1972."

After filing answers and taking discovery, defendants moved for summary judgment which was granted by the trial court. In an unpublished opinion, the Court of Appeals reversed the trial court's entry of summary judgment for defendants. *Hall v. Piedmont*, 33 N.C. App. 637, 235 S.E. 2d 800, *cert. den.*, 293 N.C. 360, 238 S.E. 2d 149 (1977).

The action was tried before the Yadkin County Superior Court in May, 1979. Defendants moved for a directed verdict at the close of plaintiff's evidence which was granted. The trial court ruled plaintiff was a public official under the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964), which prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves actual malice in the making of the statement.

Plaintiff appeals from the granting of the directed verdict.

McElwee, Hall, McElwee and Cannon, by John E. Hall, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by Charles F. Vance, Jr., and W. Andrew Copenhaver, for defendant appellee, Piedmont Publishing Company.

Roy G. Hall, Jr., and Zachary T. Bynum III, for defendant appellee, David V. Liner.

VAUGHN, Judge.

It was plaintiff's burden to prove defamatory language on the part of defendants of or concerning plaintiff which was published to a third person causing injury to plaintiff's reputation *and* if the plaintiff was a public official or public figure, plaintiff must prove actual malice on the part of defendants. We hold that a directed verdict was properly granted for defendants because plaintiff was a public official and plaintiff has not shown actual malice on the part of defendants in the publication of any words possibly defamatory to plaintiff.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964), the Court held that the First Amendment of the United States Constitution prohibited a public official from recovering damages for defamatory statements relating to his official conduct in the absence of both allegation and proof of actual malice in the making of the statement. The trial court in the case at hand concluded that plaintiff was a public official and that plaintiff failed to offer any evidence of actual malice on the part of defendants.

Under the rule of *New York Times*, plaintiff was a "public official." "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 15 L.Ed. 2d 597, 605, 86 S.Ct. 669, 676 (1966). Plaintiff was a medical examiner in Yadkin County operating under the authority conferred to physicians in judicial commitment proceedings found in former G.S. 122-59, -63 and -65, which were repealed by the legislature effective 1 September 1973 and declared unconstitutional by this Court on 27 June 1973. 1973 N.C. Sess. Laws c. 762, s. 2; *In re Confinement of Hayes*, 18 N.C. App. 560, 197 S.E. 2d 582, *cert. den.*, 283 N.C. 753, 198 S.E. 2d 729 (1973). Some courts regard the physician in a mental commitment proceeding as a quasi-judicial officer. *See, e.g., Linder v. Foster*, 209 Minn. 43, 295 N.W. 299 (1940). Plaintiff was compensated for his services pursuant to G.S. 122-43. Then, as now, the statute referred to physicians as "officers" in the commitment process at least for purposes of compensation. Our courts have not characterized a physician acting in this capacity for purposes of the *New York Times* rule. A mental commitment proceeding is recog-

nized as a quasi-judicial proceeding in this jurisdiction and the physicians who provide affidavits are given an absolute privilege as to any defaming statement they make about the committed person. This privilege comes not as an officer but as a witness in a quasi-judicial proceeding. The physician has witness immunity and not official immunity from defamation suits. *Fowle v. Fowle*, 255 N.C. 720, 122 S.E. 2d 722 (1961); *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860 (1957); *Jarmon v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954). It is not, however, inconsistent with these cases to hold that physicians involved as plaintiff was in this case are public officials for purposes of the *New York Times* rule.

In upholding the trial court's ruling that plaintiff is a public official for purposes of the *New York Times* rule, we are consistent with other rulings in this jurisdiction on the subject. For purposes of the *New York Times* rule, a deputy sheriff and a taxicab inspector have been held to be public officials. *Dellinger v. Belk*, 34 N.C. App. 488, 238 S.E. 2d 788 (1977), *cert. den.*, 294 N.C. 182, 241 S.E. 2d 517 (1978); *Cline v. Brown*, 24 N.C. App. 209, 210 S.E. 2d 446 (1974), *cert. den.*, 286 N.C. 412, 211 S.E. 2d 793 (1975). While a doctor as medical examiner may not be very high in the hierarchy of government, he holds a position with the potential for great social harm if abused. Thus, independent interest in and comment on the qualifications and performance of a person holding that position is to be encouraged. The appropriate balance between freedom of speech as it relates to comments on the actions of a medical examiner in the performance of his duties and freedom from harassment to the person performing those duties is to declare that he is a public official.

We now turn to whether plaintiff as a public official has demonstrated "actual malice" on the part of defendants in the publication of any possibly defamatory statements. As stated in *New York Times*,

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80, 11 L.Ed. 2d at 706, 84 S.Ct. at 726; *see also Ponder v. Cobb*, 257 N.C. 281, 126 S.E. 2d 67 (1962). A plaintiff

must produce "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for truth." *Gertz v. Welch*, 418 U.S. 323, 342, 41 L.Ed. 2d 789, 807, 94 S.Ct. 2997, 3008 (1974); *Beckly Newspapers Corp. v. Hanks*, 389 U.S. 81, 19 L.Ed. 2d 248, 88 S.Ct. 197 (1967). The reasonable prudent man standard is not to be used. *St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed. 2d 262, 88 S.Ct. 1323 (1968).

The issue thus on this appeal where a motion for directed verdict was granted at the close of plaintiff's evidence becomes whether the evidence in a light most favorable to plaintiff presents clear and convincing proof that defendants published false information "with knowledge that it was false or with reckless disregard of whether it was false or not." We hold that actual malice was not clearly and convincingly proven by plaintiff. The testimony of Dr. Hall and the reporter who wrote the article demonstrates the failure to meet the standard of proof of actual malice required for a defamation suit by a public official.

Dr. Hall did not know the reporters who wrote the articles in question. He offered no evidence of animosity on the part of defendant publisher or any of its employees. The only recollection plaintiff had of any animosity was sometime during the time he was a resident at Baptist Hospital between 1962 and 1966 when plaintiff argued with unknown reporters for defendant publisher about information to be released on patients to the press.

David DuBuisson, a reporter for defendant publisher, testified for plaintiff. He admitted that he wrote the article, "Was Sane Man Railroaded?" based upon information given him by a Winston-Salem attorney whom he considered reputable. Commitments to state mental hospitals and the procedure involved had interested DuBuisson before and he had written other articles on the subject. He learned from someone that Liner represented someone in a commitment case and he dropped by Liner's office to ask him some questions. DuBuisson did not recall that Liner gave him the real names as they were of no significance to him. He did not know Dr. Hall nor any of the others involved in the commitment proceeding. He did not check with the doctors involved because he did not know who they were. He had no serious doubts about the truth of the matters he published in the article. There was, therefore, no clear and convincing evidence of actual malice. A directed verdict was properly granted for the defendant publisher.

Proof of actual malice by a plaintiff-public official in defamation suits is a heavy burden. He has to prove a state of mind, and we do not think it an appropriate issue for summary judgment where defendant has the burden of showing the absence of an issue of actual malice. *See Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9, 61 L.Ed. 2d 411, 422 n. 9, 99 S.Ct. 2675, 2680 n. 9 (1979). Indeed, summary judgment was reversed for defendants in this case in part for this very reason in the unpublished opinion filed 6 July 1977. At the directed verdict stage, however, the case is on a different footing with plaintiff having the burden of proving actual malice. Plaintiff has not met his trial burden of proof.

This reasoning which supports a directed verdict for the defendant publisher would also support a directed verdict for defendant Liner. The evidence does not show clearly and convincingly that he acted with actual malice. None of the testimony demonstrates actual malice on his part.

Defendant Liner also maintains a directed verdict for him was proper because the claim was barred by the statute of limitations. We need not decide that question in light of our holding that plaintiff is a public official who has not shown actual malice.

For the reasons stated, directed verdict in favor of defendants is affirmed.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

THOMAS L. RIDENHOUR AND WIFE GERALDINE H. RIDENHOUR v. THE LIFE INSURANCE COMPANY OF VIRGINIA

No. 7921DC980

(Filed 20 May 1980)

Insurance § 45— accidental death provision—applicability to insured—insured child not covered

In an action to recover on a policy insuring the lives of plaintiff and her four children, the accidental death benefit provision, which covered "the accidental death of the Insured," when read in the context of the policy as a whole, was subject only to the interpretation that coverage under the accidental death provision extended to the Insured, plaintiff mother, and not to the In-

sured Child; furthermore, plaintiffs could not recover the accidental death benefit for the child even if the insured agent did represent that the provision in question would apply to all individuals listed in the policy, since such representation would not establish a reasonable interpretation of the contract but would directly contradict the written policy, the terms of which determined the parties' rights.

APPEAL by plaintiffs from *Harrill, Judge.* Judgment entered 19 September 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 16 April 1980.

Plaintiffs, in their complaint, seek to recover against the defendant insurance company under a life insurance policy alleging that by the terms of the policy, an accidental death benefit provision is provided to the insured without additional premium; that the child of plaintiff Geraldine H. Ridenhour died in an automobile accident; that the defendant has paid only $1,000 in term insurance on the child; and that the defendant has refused to pay accidental death benefits under the policy of $1,000. A copy of the insurance policy including the application for the policy was attached to the complaint.

Defendant filed a Motion to Dismiss under Rule 12 on the grounds that the policy clearly provides accidental death benefits for the "Insured" (Geraldine H. Ridenhour) and not for the "Insured Child."

Plaintiff Thomas Ridenhour then filed an affidavit stating that when he applied for the policy he listed his wife and her children as the Insureds under this policy; that he specifically told the insurance agent he wanted double coverage on everyone (his wife and her children); and the agent told him that double payment was provided for his wife and all the children for accidental death at no additional cost under the "Accidental Death Benefit Provision" of the policy.

Plaintiffs moved for summary judgment. The court denied plaintiffs' motion for summary judgment and allowed "the motion of the defendant for summary judgment. . ." Plaintiffs gave notice of appeal.

Pettyjohn & Molitoris, by Theodore M. Molitoris for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

MARTIN (Robert M.), Judge.

The question presented by this appeal is whether the accidental death provision of the parent and child policy applies to the children insured under that policy. The accidental death provision reads as follows: "The company agrees, subject to the provisions of this policy, to pay an Accidental Death Benefit upon receipt at its National Headquarters of due proof of the accidental death of the Insured." The meaning of the language "the Insured" as used in this policy is a question of law. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970).

The plaintiffs contend that the policy contains no qualifying statement as to who the "Insured" is; that the term "Insured" must be read in accordance with the application attached to the policy and that, when so read, the term Insured is reasonably susceptible of several interpretations. We disagree. The interpretation chosen by plaintiff can be arrived at only by ignoring the distinction between Insured and Insured Child which is made throughout both the policy and the application which together constitute the entire contract by the terms of the agreement.

The application has clearly divided sections headed PROPOSED INSURED A, PROPOSED INSURED B, AND PROPOSED INSURED C—CHILDREN (Family Plan or Parent Child). Under Proposed Insured A is listed Geraline (misspelled in pleadings as Geraldine) H. Ridenhour, Proposed Insured B is left blank and under Proposed Insured C—Children are listed the names of Mrs. Ridenhour's four children. Question 4 on the application refers in the heading to "INSUREDS A & B PART I AND INSURED CHILDREN PART II." Below in question 5 of the application dealing with coverage, premiums and benefits, the following appears with reference to the accidental death benefit and disability benefit:

5(f) Paid ADB	Ins. A (x) Ins. B ( )	(g) Paid Dis.	Ins. A (x) Ins. B ( )

Block 5(f) with the words "Paid ADB" (Paid Accidental Death Benefits) shows a check mark in the block for Insured A, who is Geraline H. Ridenhour as shown above. There is no block for Insured C—Children appearing next to either the accidental death or disability benefit. The application indicates that these benefits apply only to Insured A and B and not to Insured Children. Thus, it can readily be seen that the application distinguishes between the classes Insured and Insured Children and between the benefits which apply to each.

The policy also furthers the distinction between the Insured and Insured Child. Page one of the policy lists the Insured as Geraline H. Ridenhour. On page 3, Policy Specifications, the following appears:

OWNER THE INSURED	PLAN PARENT AND CHILDREN
INSURED GERALINE H. RIDENHOUR	33 AGE NEAREST BIRTHDAY
NUMBER 76013589	$5,000 INSURANCE ON INSURED
CLASS STANDARD	JULY 28, 2028 MATURITY DATE
POLICY DATE JULY 28, 1976	INSURANCE ON INSURED CHILD TERM INSURANCE $1,000
SCHEDULE OF BENEFITS	SCHEDULE OF PREMIUMS

	Amount	Payable For
LIFE INSURANCE INCLUDING ACCIDENTAL DEATH INSURED WAIVER OF PREMIUM DISABILITY INSURED	$10.53	52 Years

Hence, the Insured again clearly refers to Geraline H. Ridenhour on the face of the policy as opposed to the insured children.

Moreover, by definition the language Insured and Insured Child designates two different categories of insured under the policy. "INSURED CHILD. As used in this policy, Insured Child means any child, stepchild, or legally adopted child of the Insured named in the application for this policy. . ." Only several policy provisions need be excerpted in order to show that this distinction is obvious throughout the policy and that Insured and Insured Child are different categories to which different benefits and rules apply. For example,

5. PAID-UP INSURANCE ON CHILDREN

In the event of the death of the *Insured* . . . any remaining insurance provided by this policy on the life of each *Insured Child* shall be continued in force. . . . This policy must be surrendered upon death of the *Insured* and if there is any remaining insurance, a supplementary paid-up policy or policies will be issued . . . on the life of each *Insured Child* . . . (Emphasis added.)

6. PAYMENT OF DEATH BENEFIT

PAYMENT OF PROCEEDS. . .

a) The amount payable upon the death of the *Insured* shall be paid to the Beneficiary, if then alive, otherwise to the estate of the *Insured.*

b) The amount payable upon the death of any *Insured Child* shall be paid to the *Insured,* if then alive, otherwise to the Beneficiary, if then alive, otherwise to the estate of the *Insured Child.* (Emphasis added.)

Therefore, it is manifest that when the Accidental Death Benefit Provision, which covers "the accidental death of the Insured," is read in context of the policy as a whole, it is subject to only one interpretation: coverage under accidental death provision extends only to the Insured, in this case, Geraline H. Ridenhour, and not to the Insured Child. Where the language of an insurance policy is plain, unambiguous and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms. *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978).

Plaintiffs by their second argument contend that summary judgment for defendant was improper because their uncontroverted affidavit shows that the insurance agent interpreted the Accidental Death Benefit Provision to apply to all the individuals listed in the policy. However, this representation, if made, would not establish a reasonable interpretation of the contract; it would directly contradict the written policy. Under long established precedent, this may not be done. *Cavin's, Inc. v. Insurance Co.*, 27 N.C. App. 698, 220 S.E. 2d 403 (1975), citing *Floars v. Insurance Co.*, 144 N.C. 232, 56 S.E. 915 (1907). As in *Cavin's*, the plaintiff has alleged neither fraud nor mutual mistake but only that representations were made by defendant's agent. Not seeking reformation, plaintiffs have brought suit upon the written policy and the rights of the parties must, therefore, be determined by its terms. *Cavin's Inc. supra.* Whether plaintiffs have a cause of action in negligence against the insurance agent we do not decide as plaintiffs cannot by their affidavit convert their action in contract against the insurance company into an action for negligent failure to procure insurance against the agent.

Plaintiffs, having sued on the contract, have shown no legal basis for their claim. Summary judgment was properly entered for defendant.

Affirmed.

Judges WEBB and HILL concur.

LOWE'S OF FAYETTEVILLE, INC. v. RICHARD QUIGLEY AND WIFE, SANDRE QUIGLEY

No. 7911SC982

(Filed 20 May 1980)

1. **Laborers' and Materialmen's Liens § 7; Sales § 10.1— defective notice of materialman's lien—effect on action for goods sold and delivered**

The dismissal of a suit because plaintiff's notice of claim of a materialman's lien was fatally defective was improper where the complaint, in addition to averring the lien and praying for its foreclosure, stated a claim for relief for a personal judgment against defendants for goods sold and delivered.

2. **Sales § 10.2— action for goods sold and delivered—summary judgment improper**

The trial court erred in entering summary judgment for defendants in an action to recover an indebtedness arising out of an unpaid account for building materials sold to defendants where defendants failed to carry their burden as movants of establishing the lack of any triable issue of fact.

APPEAL by plaintiff from *Preston, Judge*. Judgment entered 12 June 1979 in Superior Court, HARNETT County. Heard in the Court of Appeals 16 April 1980.

Plaintiff's complaint alleges that the plaintiff sold and delivered to the defendants, on an account guaranteed by the defendants, certain building materials to be used in the construction of a home on the defendants' lot; that the defendants have failed to pay $20,010.14 due on this account; and that the plaintiff has filed, pursuant to Chapter 44 of the General Statutes a Notice of Claim of Lien. Plaintiff prayed for judgment in the amount of $20,010.14 with interest, for costs to be taxed, for the judgment to be declared a lien on the property, and for the sale of the property with the proceeds to be applied to pay the judgment and costs. A guaranty agreement, statements of account and notice of claim of materialmen's lien were attached to the complaint.

Defendants' answer moved to dismiss the complaint under Rule 12; denied the material allegations in the complaint except as to defendants' ownership of the real property; and, as a further defense, alleged that the building materials were sold to a contractor, Henry M. Eaton and Eaton and Son Builders, Inc.; that defendants have no actual knowledge of what, if any, of the materials may have been secured from plaintiff by Eaton; and that a substantial portion of the materials have never been delivered to the premises or placed in defendants' possession. Defendants prayed that plaintiff recover nothing, that plaintiff's claim of lien be denied, and that notice of the lien be stricken from the public record.

Defendants moved for judgment on the pleadings and, in the alternative, for partial judgment on the pleadings on the grounds that plaintiff's purported notice of claim of materialmen's lien is deficient. Defendants also moved for summary judgment; and, in the alternative, for partial summary judgment as to plaintiff's claim for enforcement of the defective lien.

The court entered an order allowing defendants' motion for summary judgment and for judgment on the pleadings as to the purported notice of claim of lien, and ordering the Superior Court Clerk to cancel that notice. The court also allowed defendants' motion for summary judgment and for judgment on the pleadings as to plaintiff's action to enforce the notice of claim of lien; and the court dismissed the plaintiff's action. In footnote 1 to its judgment, the court noted that the notice of claim of lien did not meet the statutory requirements of G.S. § 44A-12(c)3 because the property therein described was not the property to which the materials were allegedly supplied, and the notice did not meet the requirements of G.S. § 44A-12(c)5(a) because the date of the last alleged furnishing of materials was not included in the notice. Since the notice was fatally defective, the court stated that plaintiff's action to enforce it must also fail. Plaintiff gave notice of appeal. Subsequently the parties stipulated that plaintiff was not appealing from those portions of the court order as they relate to plaintiff's action to enforce the claimed lien.

Clark, Shaw, Clark & Bartelt by Heman R. Clark, for the plaintiff.

Johnson & Johnson, by W. Glenn Johnson, for the defendants.

MARTIN (Robert M.), Judge.

The plaintiff by its first assignment of error contends that because its complaint states a claim for relief for indebtedness arising out of the unpaid account, the court erred in allowing defendants' motion for judgment on the pleadings and summary judgment and in dismissing plaintiff's entire cause of action when the notice of claim of lien was fatally defective.

It is well settled that "[t]he statutory lien is incident to and security for a debt. There can be no lien in the absence of an underlying debt." *Eason v. Dew*, 244 N.C. 571, 574, 94 S.E. 2d 603, 606 (1956). "A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist." *Clark v. Morris*, 2 N.C. App. 388, 391, 162 S.E. 2d 873, 874 (1968), quoting *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954).

"Enforcement of a mechanic's lien is not the exclusive remedy in regard to the obligation which such lien secures. The enforcement of the lien is a cumulative remedy provided by statute . . . and may be pursued in connection with ordinary remedies. The lienor may proceed to enforce his lien and simultaneously bring an action to recover a personal judgment for the amount due." 53 Am. Jur. 2d Mechanics' Liens § 340 (1970). The rule regarding the right to a personal judgment is further set out as follows:

> Many cases hold that in an action to foreclose a mechanic's lien, a personal judgment may be rendered against a party to the action who is liable, in addition to a judgment foreclosing the lien.
>
> * * *
>
> The right to a personal judgment generally is dependent on a contractual relation being shown between the plaintiff and the defendant against whom the personal judgment is sought. So, there must be a contractual relation established between the owner of property on which a lien is claimed and the lienor to support a personal judgment against the owner in an action for the foreclosure of the lien.

53 Am. Jur., *supra*, § 417. *See Lumber Co. v. Builders*, 270 N.C. 337, 340, 154 S.E. 2d 665, 667 (1967).

[1] In the present case the complaint contains enough matter to sustain a cause of action for goods sold and delivered and to establish defendants' contractual obligation to pay for the goods. The pleading, therefore, did contain a sufficient statement of a cause of action entitling plaintiff to a personal judgment against the defendants. We hold that dismissal of a suit on account of plaintiff's inability to establish an alleged lien is improper where the complaint, in addition to averring the lien and praying for its foreclosure, states a good cause of action for labor performed or materials supplied.

[2] The plaintiff by its second assignment of error contends that the court erred in granting summary judgment in favor of defendants on the merits as to plaintiff's claim for relief for indebtedness arising out of the unpaid account.

In support of their motion for summary judgment defendants submitted the affidavit of defendant Sandre Quigley indicating that the mortgage corporation from which she and her husband obtained a construction loan has refused to allow release of funds for the completion of improvements until the notice of claim of lien is removed from the record, and that the notice has created a substantial hardship for defendants. Plaintiff submitted no counter affidavit but relied on its complaint which was verified by its credit manager. Defendants argue that although the affidavit of Sandre Quigley deals predominately with the notice of claim of lien, plaintiff is not entitled to rely on the allegations contained in its complaint once defendants' motion was properly filed and served. Because plaintiff relied on its complaint, defendants contend that plaintiff cannot be heard to complain of an adverse ruling. Defendants clearly misperceive the burden of the party moving for summary judgment.

First, a verified complaint may be treated as an affidavit if it meets the requirements of the rule for affidavits. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). Second, it is not necessary to decide in this case whether or not plaintiff's verified complaint qualifies as an affidavit. Even if it does not meet the requirements of the rule and may not be considered, defendants still have the burden of showing that there is no triable issue of

fact and that they are entitled to judgment as a matter of law. "Hence, plaintiff may yet succeed in defending against the motion for summary judgment if the evidence produced by the movant and considered by the court is insufficient to satisfy the burden." *Id.* at 705, 190 S.E. 2d at 194.

Thus, considering only the supporting documents of defendants, we conclude that the granting of summary judgment was erroneous. Defendants have failed to carry the movant's burden of establishing the lack of any triable issue of fact on defendants' alleged indebtedness to plaintiff.

Reversed.

Judges WEBB and HILL concur.

THOMPSON & LITTLE, INC. v. HENRY COLVIN AND MARION R. HARRIS

No. 7912SC901

(Filed 20 May 1980)

Frauds, Statute of § 5; Contracts § 27.1— sale of restaurant equipment—assumption of debt by subsequent purchaser—existence of contract—statute of frauds inapplicable

In an action to recover on sales contracts for restaurant equipment, evidence was sufficient to support a finding that defendant agreed to assume the original restaurant owner's indebtedness where the evidence tended to show that defendant offered to take over the indebtedness and plaintiff agreed upon condition that some documentation be provided; plaintiff did not specifically state that this document must evidence the assumption agreement, but instead intended a document showing that the original owner had transferred the equipment to defendant; defendant provided such a document and told plaintiff not to bother the original owner anymore, "that everything would be under him"; plaintiff released the original owner from liability; and defendant subsequently made two payments on the equipment. Furthermore, since defendant's agreement to assume the indebtedness was neither a promise to answer for the debt of another nor a contract for the sale of goods for $500 or more, the statute of frauds did not apply, and plaintiff was not required to enter into evidence a memorandum of the agreement.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 24 May 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 March 1980.

Plaintiff alleges that it entered into two conditional sale contracts for certain items of restaurant equipment with defendant Colvin and that Colvin is in default on his payments under the agreements. In the alternative, plaintiff alleges that on 29 May 1977, the parties entered into a novation of the sale contracts, by which defendant Harris assumed liability for payments under the agreements, that defendant Colvin was released, and that Harris is in default. Plaintiff has taken a voluntary dismissal with prejudice as to defendant Colvin. Defendant Harris (defendant) answered, denied that he agreed to assume the indebtedness, and pleaded the Statute of Frauds as a defense. Defendant moved for summary judgment, which was denied.

At trial, plaintiff presented evidence that the conditional sale agreements with Colvin were entered into in April and June 1976. The equipment sold was installed in the A & T Restaurant. In May 1977, Colvin contacted W. D. O'Quinn, plaintiff's president, and told him that he had a "money-man" who wanted the equipment. A meeting was arranged for around 18 May with O'Quinn, Colvin, and defendant present.

O'Quinn testified:

> "That meeting was about Mr. Harris taking over the contracts for the . . . equipment . . . . I discussed this matter with Mr. Harris regarding his assuming the indebtedness on these contracts. His response was that he wanted to come in and take them over. I told him I couldn't until I got something more than word-of-mouth to convert these contracts over to him . . . and I told him he'd have to go back, or I would have to get a contract from the lawyer to draw up so that it would show that this is a regular transaction. I didn't know—only word-of-mouth that he bought the whole thing . . ."

A second meeting was arranged for 24 May 1977. To that meeting, defendant brought a document entitled "Deed of Release" which was signed by Colvin and which quitclaimed Colvin's interest in the equipment installed in the A & T Restaurant. O'Quinn testified that "[t]his is the document that I referred to as stating in the earlier meeting that I wanted to show that Mr. Colvin had transferred the equipment to Mr. Harris." At this meeting, defendant asked for an itemized breakdown of the cost

of the equipment "so that his company could take over the payments." This information was given to defendant. O'Quinn testified further that "[a]fter Mr. Harris brought me the Deed of Release, he told me strictly not to bother Mr. Colvin any more at any time and that everything would be under him." No document was prepared showing that defendant agreed to assume Colvin's indebtedness.

In May and August 1977, plaintiff received checks marked "for equipment A & T Restaurant" and signed by Aronul Harris, defendant's wife. She testified that these checks were written because plaintiff was threatening to pull the equipment out of the building, and the tenant was thinking of moving. The checks were written against the money received from the tenant of the restaurant.

Colvin testified that in January 1977, he transferred to defendant the A & T Restaurant Building and the land on which it was located, and later discussed with him defendant's taking over Colvin's indebtedness to plaintiff on the restaurant equipment. Defendant wanted to know what was owed on the equipment, and Colvin told him. He gave defendant "all the contracts and the deeds and everything." Colvin did not recall the date of the May meeting with O'Quinn and defendant, but at that meeting, he told O'Quinn that he had signed everything over to defendant. The "Deed of Release" was drawn up after that meeting. At the meeting, O'Quinn agreed to drop Colvin from any indebtedness on the accounts, and after that, Colvin made no more payments and was never billed further.

O'Quinn, recalled, testified that it was at the first meeting that an agreement was reached that defendant would assume Colvin's indebtedness. At that time, defendant had not received from O'Quinn information about the amount owed, but defendant already had gotten the figures from Colvin. Defendant "did not ask any questions about those contracts. The only thing he said was, 'I know what is on it, and I accept it as it is.' "

At the close of plaintiff's evidence, defendant moved for a directed verdict, which was granted. Plaintiff appeals.

Rose, Thorp, Rand & Ray, by Ronald E. Winfrey, for plaintiff appellant.

Malone, Johnson, DeJarmon & Spaulding, by C. C. Malone, Jr., for defendant appellee.

ERWIN, Judge.

A motion for a directed verdict under G.S. 1A-1, Rule 50, of the Rules of Civil Procedure raises the question of whether the evidence, considered in the light most favorable to the plaintiff, would support a verdict in his favor. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). In the present case, we find that the evidence presented is sufficient to support a verdict for plaintiff and that a directed verdict for defendant was improper.

The evidence, taken in the light most favorable to the plaintiff, shows the following. After plaintiff and Colvin had executed the conditional sale agreements and the equipment had been installed, Colvin transferred to defendant the land and building and discussed with him defendant's taking over the indebtedness on the equipment. Colvin gave defendant the sale contracts and information about the amount due. Plaintiff, defendant, and Colvin then met, and at that meeting, defendant said that he wanted to "come in and take [the contracts] over." Plaintiff told defendant this could not be done by word-of-mouth; there would have to be a writing. The parties met again a few days later, and to that meeting, defendant brought a document which quitclaimed to defendant all of Colvin's interest in the equipment. At that time, plaintiff provided to defendant information about the amount due on the contracts, and defendant told plaintiff "not to bother Mr. Colvin any more at any time and that everything would be under him." Subsequently, plaintiff received from defendant two checks marked "for equipment A & T Restaurant."

Upon this evidence, the jury could find that at the first meeting, defendant offered to take over Colvin's indebtedness, and plaintiff agreed, upon the condition that some documentation be provided. O'Quinn did not specifically state that this document must evidence the assumption agreement, and in fact, he testified that what he meant was a document "to show that Mr. Colvin had transferred the equipment to Mr. Harris." At the second meeting, defendant provided such a document and told plaintiff not to

bother Colvin anymore, "that everything would be under him." Subsequently, defendant made two payments on the equipment. The evidence is sufficient to support a finding that defendant agreed to assume Colvin's indebtedness. There is evidence that plaintiff released Colvin from liability, which would provide consideration for the agreement. Since such a contract would be neither a promise to answer for the debt of another nor a contract for the sale of goods for $500 or more, as defendant alleged, the Statute of Frauds does not apply, and plaintiff was not required to enter into evidence a memorandum of the agreement.

The judgment of the trial court is reversed. We need not address plaintiff's second argument, since the purported error to which it relates may not recur at a

New trial.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. ANDERSON DAVIS

No. 7926SC1153

(Filed 20 May 1980)

Constitutional Law § 52— speedy trial—preindictment delay—necessity for showing prejudice and intentional delay

In order for a defendant to carry the burden of his motion to dismiss for preindictment delay violating his due process rights pursuant to the Fifth and Fourteenth Amendments, he must show both actual and substantial prejudice from the preindictment delay *and* that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant. Therefore, defendant's motion to dismiss for failure to give him a speedy trial because of preindictment delay was properly denied where defendant relied solely on the claim that he was prejudiced by the delay and did not attempt to show the reason for the delay.

APPEAL by defendant from *Barbee, Judge.* Judgments entered 18 July 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 April 1980.

In April 1978, the State Bureau of Investigation and the Charlotte Police Department began a narcotics campaign in

Charlotte, North Carolina. Agent W. J. Watson, of the SBI, worked with a confidential informant and purchased narcotics in Mecklenburg County during April and May, including the purchases from defendant, Anderson (Mississippi Slim) Davis, which are the subject of this lawsuit. The confidential informant continued to work with other narcotics agents in this drive until the latter part of October 1978. The informant was promised a delay before any arrests were made so that the drug traffickers could not connect him with the sales. Thus, the informant would be protected.

In the course of this investigation, defendant made sales to agent Watson on 25 and 26 April 1978. On 18 December 1978, warrants were issued for defendant, charging him with possession of cocaine for the purpose of sale and the sale of cocaine on 26 April 1978. These warrants were served on defendant 21 December 1978. Thereafter, on 15 January 1979, true bills of indictment were returned on these charges. At the same time, true bills of indictment were returned charging the defendant with possession of cocaine for the purpose of sale and the sale of cocaine on 25 April 1978.

Defendant moved before Judge Snepp that the charges be dismissed for failure to give defendant a speedy trial under the Fifth and Sixth Amendments to the United States Constitution because of preindictment delay. Upon hearing the motion 25 May 1979, Judge Snepp entered an order, with findings of fact and conclusions of law, denying defendant's motion.

When the cases came on for trial in July 1979, defendant again moved to dismiss before the trial judge on the basis of unreasonable preindictment delay. At the hearing, defendant produced testimony by Helen Rasmussen that she lived in Miami, Florida. In December 1977 she lived and worked at Carl's El Padre Motel, checking people in and out, receiving rent, and performing other duties. Prior to Christmas 1977 she met defendant, and about the 1st of January, 1978, he rented an apartment from her at Carl's. Defendant checked out of the motel either May 16 or 17, 1978, while she was gone from the motel for a period of about five days. Davis was not absent from the motel during April 1978. She would have known if he had gone, even for a few days. She did not specifically remember the days of 25 and 26

April 1978, and although she searched for the motel records for that period, she was unable to locate them. While defendant was at the motel, he paid his rent daily. She had the records until the motel was sold 15 January 1979, when they were transferred to the new owner.

The state produced testimony concerning the undercover narcotics investigation recited above. The trial court denied the motion to dismiss. At the trial, Helen Rasmussen testified for defendant as summarized above, indicating defendant was in Florida at the time the crimes were committed. From verdicts of guilty and judgments of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

Assistant Public Defender, 26th Judicial District, David A. Graham for defendant.

MARTIN (Harry C.), Judge.

Defendant asserts only the contention that his motion to dismiss the charges for unreasonable preindictment delay should have been allowed. Defendant failed to file objections or exceptions to any of the findings of fact or conclusions of law made by the trial judge. He only excepted to the entry of the order denying his motion. Therefore, the findings of fact are deemed to be supported by the evidence and are conclusive upon appeal. There remains only the question whether the findings support the order entered and whether error appears in the order as a matter of law. *State v. Raynor*, 235 N.C. 184, 69 S.E. 2d 155 (1952); *State v. Melson*, 15 N.C. App. 586, 190 S.E. 2d 296 (1972).

Defendant contends he suffered actual and substantial prejudice from the preindictment delay, relying upon *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976), and *State v. Herring*, 33 N.C. App. 382, 235 S.E. 2d 88 (1977). He concedes that the state did not intentionally delay the indictment in order to impair defendant's ability to defend himself.

There appears to be some dissonance over whether the defendant must carry a dual or single burden in order to sustain his motion to dismiss. Defendant contends that North Carolina has adopted a single-burden test; if defendant proves either intention-

al delay on the part of the state in order to impair defendant's ability to defend himself or actual and substantial prejudice from the preindictment delay, he is entitled to a dismissal of the charges. Defendant argues that *Dietz* and *Herring* are authority for the single-burden test. The state insists defendant must carry both burdens in order to secure a dismissal of the charges, relying upon *United States v. Marion,* 404 U.S. 307, 30 L.Ed. 2d 468 (1971), and *United States v. Lovasco,* 431 U.S. 783, 52 L.Ed. 2d 752, *rehearing denied,* 434 U.S. 881, 54 L.Ed. 2d 164 (1977).

We hold that the Supreme Court of the United States has answered this issue in *Lovasco.* This case involved a preindictment delay of eighteen months. The Court held the Speedy Trial Clause of the Sixth Amendment was not applicable, as it applied only to delay following indictment, information or arrest. Defendant's remedy is pursuant to the due process clause of the Fifth and Fourteenth Amendments. Defendant argued that due process bars prosecution whenever a defendant suffers prejudice as a result of preindictment delay, the same position defendant Davis insists upon. The Supreme Court held:

> Thus *Marion* [*United States v. Marion, supra*] makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

431 U.S. at 790, 52 L.Ed. 2d at 759. In *Lovasco,* the preindictment delay was the result of investigation by the government before seeking indictments. The Court held that "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.' " 431 U.S. at 795, 52 L.Ed. 2d at 762. Further, the Court held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796, 52 L.Ed. 2d at 763.

We note that both *Dietz* and *Herring* were decided prior to *Lovasco*: *Dietz* on 6 April 1976, *Herring* on 1 June 1977, and *Lovasco* on 9 June 1977. Nor does *Dietz* or *Herring* contain the definitive holding suggested by defendant Davis.

The reason for the delay of Mississippi Slim's arrest and indictment was to allow the continued use of the undercover informant in the narcotics investigation and to assure the safety of the officers and others engaged in the work. North Carolina had experienced a serious incident involving the safety of undercover agents in a similar narcotics investigation. The Court in *Lovasco*, footnote 19, quotes from Professor Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stan. L. Rev. 525, 527 (1975), as reason for noninvestigative delay the following: " '[P]roof of the offense may depend upon the testimony of an undercover informer who maintains his "cover" for a period of time before surfacing to file charges against one or more persons with whom he has dealt while disguised.' " This reasoning is equally true where the witness is a state agent working undercover, rather than an informant.

We hold that for defendant to carry the burden on his motion to dismiss for preindictment delay violating his due process rights pursuant to the Fifth and Fourteenth Amendments, he must show both actual and substantial prejudice from the preindictment delay *and* that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant. *Lovasco, supra.*

Here, defendant Davis admittedly relies solely upon the claim that he suffered actual and substantial prejudice from the delay and does not attempt to show the nature or reason for the preindictment delay. It necessarily follows that defendant's motion must fail and the trial court correctly ruled in denying defendant's motion to dismiss. The order is supported by the court's findings and no error of law appears.

No error.

Judges VAUGHN and CLARK concur.

GRACE H. RODGERS, ADMINISTRATRIX OF THE ESTATE OF WILLIAM CLAYTON RODGERS v. MRS. E. B. TINDAL

No. 7910SC704

(Filed 20 May 1980)

Executors and Administrators § 31— sale of assets after insolvent decedent's death—action to recover sales price—setoff for decedent's debts improper

The trial court erred in entering judgment allowing defendant to set off the amount owed by decedent to defendant at the time of decedent's death against defendant's debt owed to plaintiff administratrix for the *post mortem* purchase of assets in decedent's insolvent estate, since to allow defendant to collect more in her role as a creditor merely because she "purchased" assets from the estate would unduly prejudice all other creditors, and defendant's counterclaim against the estate was limited to her pro rata share of the funds available for her class of creditors.

APPEAL by plaintiff from *Hobgood, Judge.* Judgment entered 6 July 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 7 February 1980.

On 8 November 1975, William Clayton Rodgers died. On 5 December 1975 Grace H. Rodgers became the administratrix of the decedent's estate.

At the time of the decedent's death, the decedent was operating a Tastee Freeze in Apex, North Carolina. The building was leased by the decedent from the defendant appellee in this case. At the time of decedent's death, the decedent was indebted to the defendant for the following items:

Balance due for purchase price of inventory	$2,572.09
Ten percent of October sales, due as rent under the terms of the lease agreement	$3,016.12
Ten percent of sales from November 1 through November 8, as rent under the terms of the lease agreement	$ 535.64
Decedent's phone bill paid by defendant	$ 25.36

Decedent's insurance premium paid by defendant	$ 88.90
Decedent's payroll due to employees paid by defendant	$ 155.80

Immediately following the death of the decedent, the defendant and the plaintiff entered into an oral agreement, whereby the defendant purchased from the plaintiff the inventory of products and accessories ($5,643.42) and equipment ($2,500.00) for a total price of $8,143.42. In addition, at the time of the decedent's death there was $314.08 in cash money in the cash register in the Tastee Freeze building. This latter sum has been retained by the defendant. Also, following the death of the decedent, the defendant received from an employee of the decedent the sum of $50.00 which was repayment of a loan that the decedent had made to the employee.

The estate of the decedent is insolvent to the extent that its liabilities exceed the assets by at least $30,000.00.

The plaintiff-appellant brought this action to recover the sum of $8,507.50. In her counterclaim the defendant asserted that $6,604.85 was owed to defendant by the decedent and that this amount should be offset against the amount owed by the defendant to the decedent's estate.

The trial court entered a judgment which entitled the plaintiff to recover $1,902.65 plus interest after 8 November 1975.

Joslin, Culbertson, Sedberry & Houck by Charles H. Sedberry; Savage & Godfrey by David R. Godfrey for plaintiff appellant.

Hollowell, Silverstein, Rich & Brady by Ben A. Rich for defendant appellee.

CLARK, Judge.

The question presented in this appeal is whether the trial court erred in entering the judgment in this action allowing the defendant to set off the amount owed by the decedent to defendant, at the time of the decedent's death, against defendant's debt

owed to plaintiff for the *post mortem* purchase of assets in the decedent's insolvent estate. We now reverse.

This case is controlled by *Pate v. Oliver*, 104 N.C. 458 (1889), in which an action was brought by the creditors of an intestate's estate against the administrator of the estate on his administrator's bond. At the time of his death, the intestate was engaged in the turpentine business and had leased for the year turpentine "boxes" for certain stipulated sums, payable at different periods. The administrator sold the turpentine in the boxes and the unexpired leases thereon. In certain instances the lessors were purchasers of the turpentine and unexpired leases. In actions brought by the administrator to recover the purchase price, the lessors interposed as a setoff or counterclaim the amount agreed to be paid by the intestate as rent for the whole year. On appeal the Supreme Court held:

> "The estate is insolvent, and in such cases it is well settled that no counterclaim can be allowed which will give an undue priority to any creditor, and thus defeat the rights of the others to have the assets applied *pro rata* to their claims. (Citations omitted.)
>
> The application of the proceeds of the sale of the unexpired terms as set-offs falls within the condemnation of the foregoing principle. They should have been collected and applied, like other assets, to the payment of the debts . . . ."

104 N.C. at 465.

The defendant asserts that *Pate* is not controlling because (1) the decision is an old one; and (2) the cases upon which *Pate* relies are not sound precedent for *Pate*. We are not persuaded by the first of these arguments and we are not at liberty to reverse a decision of our Supreme Court.

The defendant, however, contends that the general hierarchy of priorities for the payment of claims against a decedent's estate in North Carolina, is not applicable because the defendant is both a creditor and a debtor of the estate. This argument does not bear up to close scrutiny. While it is true that a setoff would be allowed with respect to debts (mature or unmature) existing *before* decedent's death (and this rule does not only apply to banks) this rule does not apply where, as here, the defendant

became a debtor of the estate *after* the insolvent decedent's death, the time at which the proportional rights of *all* creditors become vested. To allow the defendant to collect more in his role as a creditor merely because he "purchased" assets from the estate would, as the court in *Pate* observed, unduly prejudice all the other creditors. Contrary to the argument of the defendant, we will not "do equity" as between the estate and defendant at the inequitable expense of all the other creditors of the estate. This is precisely the kind of arrangement which G.S. 28A-19-13, set forth below, was designed to prevent:

> "No personal representative or collector shall give to any claim any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class."

This result is supported by numerous cases in other jurisdictions. *Barber v. Westchester Bank and Trust Company*, 205 Misc. 673, 129 N.Y.S. 2d 376 (1954); *Supreme Liberty Life Insurance Company v. Ridley's Administrator*, 261 Ky. 403, 87 S.W. 2d 940 (1935); *Hampton Roads Fire & Marine Insurance Company v. Coburn Motor Car Company*, 158 Va. 675, 164 S.E. 723 (1932); *Mahon v. Harney County National Bank*, 104 Or. 323, 206 P. 224 (1922); *Laighton v. Brookline Trust Company*, 225 Mass. 458, 114 N.E. 671 (1917); Annot. 36 A.L.R. 3d 693 (1971); Annot. 7 A.L.R. 3d 908 (1966).

We do not see this result as inconsistent with the procedural rules allowing a setoff to be pleaded as a counterclaim. Rule 13(b), N.C.R. Civ. P. The mere fact that one may plead a right does not determine the extent to which that right exists. Here defendant's counterclaim against the estate is limited to his pro rata share of the funds available for his class of creditors. This outcome may be harsh, but it is no harsher than the consequences of the insolvency faced by all of the creditors in his class.

Reversed.

Judges HEDRICK and VAUGHN concur.

JUDY STEPHENSON WILLIAMS v. MICHAEL JOHN WILLIAMS

No. 7920DC983

(Filed 20 May 1980)

Appearance § 1.1; Divorce and Alimony § 23.4— attorney's participation in conference with court and opposing party—general appearance

Defendant made a general appearance in a child custody action when his counsel participated in a conference with the plaintiff and the district court judge pertaining to an order enjoining defendant from taking the child out of the jurisdiction of the court, and the court had jurisdiction over defendant's person even though no service of process was made upon either defendant or his counsel.

APPEAL by defendant through Special Appearance of Counsel from *Burris, Judge.* Judgment entered 27 June 1979 in District Court, MOORE County. Heard in the Court of Appeals 7 March 1980.

This action by the mother of minor child for custody of the child was filed on 23 February 1979. On that date the Honorable Donald R. Huffman, Chief District Judge, in conference with the plaintiff and defendant's attorney, entered an order restraining defendant from removing the minor child from the jurisdiction of the court until a hearing was held on 5 March 1979.

After the conference and prior to the order being physically served on the defendant, the defendant removed himself and the minor child from the jurisdiction of the court. Thereafter the Moore County Sheriff's Department made numerous attempts to serve the defendant at his residence. Defendant and his wife had lived in a mobile home directly behind his parents' house (approximately 50 feet away) on his parents' property. Defendant shared the mailbox and the same postal address of his parents and they used the same telephone. On 17 March 1979 service of process was made upon the defendant by leaving a copy with his mother at the above-described residence at Route 2, Box 370, Sunset Drive, Robbins, North Carolina. Defendant's mother was found by the Court to be of suitable age and discretion to receive service of process.

On 5 March 1979 the court ordered that the defendant deliver custody of the child to the plaintiff pending a hearing on the matter.

On 5 March 1979 the defendant met with his father to exchange title and arrange for the sale of the mobile home. In the last week of April 1979, the defendant's mother saw the defendant in a mobile home park in Clarksville, Tennessee. Defendant's mother pleaded with the defendant to return to the State to defend this action but he failed to do so.

On 17 April a hearing was held. The defendant was neither present nor represented by counsel. On 1 May 1979 the court entered an order, filed 4 May 1979, which, *inter alia*, placed custody of the child with the plaintiff and directed that defendant pay plaintiff $75 per week for support of the child.

On 4 June 1979 the court entered an order requiring the defendant to appear before the court on 12 June 1979 to show cause why he should not be held in contempt of the court. On 12 June 1979 the defendant's counsel moved to dismiss the action for lack of personal jurisdiction over the defendant because he had not been served with process. On 20 June 1979 the court entered an order, filed 27 June 1979, which denied the motion to dismiss. On the same date the court entered a judgment holding the defendant in contempt of court and directing the Sheriff to place defendant into custody for 180 days.

Seawell, Robbins, May & Webb by P. Wayne Robbins for plaintiff appellee.

Thigpen and Evans by Frank C. Thigpen for defendant appellant.

CLARK, Judge.

Defendant challenges the jurisdiction of the trial court because he was not served with process. We see no merit in this argument.

The death blow to defendant's argument lies in the fact that defendant's counsel participated in a conference on 23 February 1979 in Judge Huffman's office, pertaining to the custody of defendant's minor child, and did not at this time make any objection as to the lack of jurisdiction over the defendant. This activity constitutes a general appearance and confers jurisdiction over defendant's person even though no service was made upon either the defendant or his counsel of record. G.S. 1-75.7 (1979 Cum. Supp.); *Swensen 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);

Alexiou v. O.R.I.P. Ltd., 36 N.C. App. 246, 243 S.E. 2d 412, *cert. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978).

An excellent statement of the rule to be applied is found in an old opinion by the Supreme Court of West Virginia:

> " 'By appearance to the action in any case, for any other purpose than to take advantage of the defective execution, of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or nonexecution of process upon him.' (Citations omitted.) This is a declaration for a general principle, to be read in light of the facts and circumstances under which it is applied, in seeking its true meaning. Some attention must also be paid to its terms. It must be an appearance *for a purpose in the cause*, not one merely collateral to it . . . . No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or *participated in some step taken therein.* Mere presence in the courtroom when the case is called, or examination of the papers in it filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court, about the case, be regarded as an appearance . . . . The test is whether the defendant became an *actor in the cause*. . . ." (Emphasis supplied.)

Fulton v. Ramsey, 67 W. Va. 321, 68 S.E. 381 (1910). This statement is consistent with North Carolina case law on the subject of appearances. We note that it has long been the rule in this jurisdiction that a general appearance by a party's attorney will dispense with process and service. *See, e.g., Etheridge v. Woodley*, 83 N.C. 11 (1880).

Admittedly, the act of participation in a conference with the judge and opposing party presents a close case for invoking personal jurisdiction. Nonetheless, the "participation in some step taken"—in this case the action of the court to preserve jurisdiction over the subject matter of the litigation—is sufficiently directed toward "a purpose in the cause" to confer personal jurisdiction over the defendant.

Having found that defendant has made a general appearance through his attorney, we note that, "after a defendant has submit-

ted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert the defense that the court has no jurisdiction over his person either by motion or answer under Rule 12(b)." *Simms v. Mason Stores, Inc.*, 285 N.C. 145, 157, 203 S.E. 2d 769, 777 (1974). It is significant that in *Simms, supra*, the court cited with approval the case of *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F. 2d 543 (3d Cir. 1967) in which the federal court held that participation by the defendant in a hearing on a preliminary injunction was sufficient for the defendant to waive his defense of lack of personal jurisdiction. We can see little difference between *Wyrough* and the instant case, particularly since the preliminary matter before the court below pertained to an order enjoining defendant from taking the minor child out of the jurisdiction. In both cases the court obtained jurisdiction by virtue of defendant's participation in a vital proceeding.

We do note, however, that the participation by defendant's counsel in the contempt hearing would not invoke personal jurisdiction over the defendant since a contempt proceeding is a collateral matter that does not directly bear upon the subject matter of the controversy.

Since the court had jurisdiction over the defendant, he must comply with the order preventing him from removing the child from the jurisdiction of the court. It only follows that the defendant may not now assert that the court has no jurisdiction over the subject matter when the defendant has removed the subject matter from the jurisdiction in violation of a court order.

Affirmed.

Judges MARTIN (Robert M.) and ERWIN concur.

HOWARD W. McCAY v. CARLTON P. MORRIS AND BRUCE W. MUMM

No. 7930SC179

(Filed 20 May 1980)

1. **Vendor and Purchaser § 4— contract to convey—title rendered unmarketable by federal court decision—conveyance to third party—breach of contract**

Where a contract for the sale of land entered on 27 January 1975 provided that the sale was to be closed within 45 days unless there was an objection to the title, in which case the sale was to be closed when objection was removed, defendant seller obtained title through a foreclosure sale, and the title was rendered unmarketable by the decision of *Turner v. Blackburn*, 389 F. Supp. 1250, that a foreclosure proceeding is voidable if notice of the foreclosure was not given to the mortgagor, defendant seller had the choice of either expending the necessary sum to clear the title or waiting for the title to be cleared under G.S. 45-21.45 if an action to set aside the foreclosure was not commenced by 6 June 1976, and defendant breached his contract when he did neither but conveyed the property to a third party.

2. **Contracts § 20.1; Vendor and Purchaser § 4— contract to convey—title thereafter rendered unmarketable—doctrine of frustration not applicable**

The trial court did not err in failing to charge the jury on the doctrine of frustration in an action to recover for breach of a contract to convey realty in which the evidence showed that defendant seller obtained the property through a foreclosure sale and that the title had been rendered unmarketable by a federal court decision that a foreclosure proceeding is voidable if notice of the foreclosure was not given to the mortgagor, since frustration is such a fundamental change in conditions without the fault of either party after the contract was executed that, if performance were had, it would be a different thing than that for which the parties contracted, defendant could convey a good title to plaintiff as the contract required by expending the necessary sum to clear title or by waiting for the title to be cleared under G.S. 45-21.45, and difficulty of performance did not make the doctrine of frustration applicable.

3. **Vendor and Purchaser § 11— contract to convey—right of buyer to void the contract—no instruction on right of seller to void contract**

In an action to recover for breach of a contract to convey realty which gave the buyer the right to void the contract if title was not cleared within a reasonable time, defendant seller was not entitled to an instruction that he also had the right to void the contract if he could not have cleared the title within a reasonable time where there was no evidence that defendant attempted to clear title to the realty.

APPEAL by defendant Carlton P. Morris from *Thornburg, Judge.* Judgment entered 5 October 1978 in Superior Court, JACKSON County. Heard in the Court of Appeals 19 October 1979.

This is an action for money damages for breach of contract to convey a parcel of real property. Howard W. McCay and Carlton P. Morris entered into a contract on 27 January 1975 under the terms of which Morris was to convey to McCay a lot in Jackson County for a price of $5,000.00. Among the terms of the contract were the following:

> "Title to be good and marketable, or to be made so at the expense of the seller . . . . This sale is to be closed within 45 days unless attorney of title company discovers objections to the title, in which case sale is to be closed when objections are removed. . . . If title is found objectionable and cannot be cleared within a reasonable time, buyer may demand back his earnest money and declare this contract null and void.
>
> This agreement constitutes all conditions between parties relative to this sale and no terms not herein contained shall be recognized."

Carlton P. Morris had acquired the real estate through a foreclosure sale. Before the sale of the lot to McCay could be consummated, the United States Court for the Western District of North Carolina held in *Turner v. Blackburn*, 389 F. Supp. 1250 (1975) that a foreclosure proceeding is voidable under the United States Constitution if notice of the foreclosure was not given to the mortgagor. This placed a cloud on the title to the real estate. On 6 June 1975 the General Assembly adopted G.S. 45-21.45 which provided any previous foreclosure sale without notice was good to pass title if an action to set aside the sale had not been commenced by 6 June 1976. On 6 August 1975, Morris advised McCay by letter of his willingness to convey the lot to him subject to the right of the mortgagor to redeem the lot. In the same letter, Morris advised McCay that if he would not take the lot, Morris would sell it to Bruce W. Mumm. McCay refused to accept the parcel of real estate with this cloud on the title, and Morris conveyed it to Mumm. Plaintiff brought this action for money damages. At the end of the evidence, the court dismissed the claim against Mumm. Carlton P. Morris appealed from a judgment against him.

Rodgers, Cabler and Henson, by J. Edwin Henson, for plaintiff appellee.

Holt, Haire and Bridgers, by R. Phillip Haire, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the failure of the court to grant his motion for a directed verdict. He contends this should have been done because all the evidence showed that time was of the essence of the contract; that both parties intended that the sale be consummated quickly which accounted for the reduced purchase price; that neither of them foresaw the decision in *Turner v. Blackburn, supra,* and when the decision in that case made it impossible to consummate the sale quickly, this voided the contract. The difficulty with this argument is that the terms of the contract are not ambiguous. The contract of sale provides that the sale is to be closed within 45 days unless there is an objection to the title in which case the sale will be closed when the objection is removed. Parol evidence cannot vary these unambiguous terms. *See Development Corp. v. Alderman-250 Corp.,* 30 N.C. App. 598, 228 S.E. 2d 72 (1976). In this case, under the terms of the contract of sale, when *Turner v. Blackburn, supra,* made the property unmarketable, the defendant had the choice of either expending the necessary sum to clear the title or waiting for the title to be cleared by G.S. 45-21.45 and then tendering a deed to plaintiff. He chose not to do either and conveyed the property to a third party. By doing this, he breached his contract. The defendant's first assignment of error is overruled.

[2] Defendant's second assignment of error deals with the court's failure to charge the jury as to the doctrine of frustration. We have found few cases in this jurisdiction involving frustration. *See Sechrest v. Furniture Co.,* 264 N.C. 216, 141 S.E. 2d 292 (1965); *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290 (1955). A note in regard to frustration is found at 84 A.L.R. 2d 70 (1962) et seq. Frustration is not impossibility of performance. In England, it has been said that frustration is such a fundamental change in conditions after the contract was executed, which change occurs without fault of either party, that if performance

were had, it would be a different thing than that for which the parties contracted. The *Restatement of Contracts*, § 288 provides:

> Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

In the case sub judice, the defendant was required by the contract to tender a deed sufficient to convey a good title to the plaintiff. There was no evidence this was impossible to perform. If the defendant had delivered such a deed to the plaintiff, it would not be a different thing than that contracted for by the parties nor would the desired thing for which the parties contracted be frustrated. Difficulty of performance does not make the doctrine of frustration applicable. The defendant's second assignment of error is overruled.

[3] By his third assignment of error, the defendant contends the court erred in not instructing the jury that if he could not have cleared the title within a reasonable time that he had the right to void the contract of sale. The contract provided that if the title was not cleared within a reasonable time, the buyer had the right to declare the contract null and void. The defendant, relying on 17A C.J.S. *Contracts* § 399 (1963) and *Distributing Corp. v. Parts, Inc.*, 7 N.C. App. 483, 173 S.E. 2d 41 (1970), contends that if the buyer had this option under the contract, the seller had the same right. We hold the defendant was not entitled to this charge in the case sub judice. There is no evidence the defendant attempted to clear the title to the lot. Indeed the only evidence is that the defendant notified the plaintiff that if he would not take the lot as it was, the defendant would convey it to a third party.

The defendant's last assignment of error is to the failure of the court to charge the jury that an offer by defendant to convey the lot to plaintiff with the encumberance on it was a sufficient tender under the contract. He argues that the mortgagor would have had to pay $7,500.00 to redeem the property, and the plaintiff could not have been damaged by accepting the deed. We hold that the plaintiff had the right under the contract for the defend-

ant to tender to him a deed free from any encumbrances. Anything less than this was not the performance which the contract required.

No error.

Judges ARNOLD and WELLS concur.

M. H. ROURK AND WIFE, MARIE F. ROURK v. BRUNSWICK COUNTY

No. 7913DC1069

(Filed 20 May 1980)

1. **Deeds § 11.1— parol evidence contradicting terms of deed—exclusion proper**

The trial court did not err in refusing to allow parol evidence to contradict or modify the terms of a deed or create a reservation of the property by parol where the evidence tended to show that the deed in question was prepared by plaintiffs' attorney in whom they testified they had complete trust; plaintiffs signed the deed without reading it; it must be assumed that plaintiffs signed the instrument they intended to sign; and there was no evidence of mental incapacity, mutual mistake of the parties, undue influence, or fraud.

2. **Deeds §§ 8, 16.2— land conveyed for construction of health center—consideration—condition subsequent**

Provision in a deed from plaintiff physician and his wife to defendant county that defendant would begin construction of a public health center on the land within one year or the land would revert to plaintiffs was sufficient to state consideration and to create a condition subsequent.

3. **Reformation of Instruments § 7— reverter clause omitted from deed—no mutual mistake—reformation properly denied**

The trial court did not err in refusing to reform a deed by which plaintiffs conveyed property to defendant for the purpose of constructing a public health center on the basis of mistake, where plaintiffs claimed that the deed should have included a clause which would provide for reverter if defendant ceased to use the land for a public health center, but defendant contended the deed stated exactly what it meant for it to state, and there was therefore no mutual mistake.

APPEAL by plaintiffs from *Wood, Judge.* Judgment entered 28 August 1979 in District Court, BRUNSWICK County. Heard in the Court of Appeals 25 April 1980.

This is an action to reform a deed to real estate conveyed by the plaintiffs to the defendant for use by the defendant as a location for the county public health center. The deed was dated 15 April 1957, signed under seal by M. H. Rourk and wife, Marie F. Rourk, and contained the following language: "... in consideration of ONE DOLLAR to them paid by the party to the second part, the receipt of which is hereby acknowledged, and the further consideration that the County of Brunswick construct on the premises hereinafter described a public health center, have bargained and sold . . ." and ". . . subject to the condition, however, that it is agreed and understood by and between the parties to this deed and made a part of the consideration hereof . . . [that] if the construction of the said health center has not been commenced within the period of one year from the date of this instrument said property shall revert to the parties of the first part." Construction of the health center was commenced within the year, and the building was used continuously as a health center until the county decided to use the property as senior citizens facility. Plaintiffs contend the deed should have included a reverter clause providing that should the property cease to be used as a public health center it would revert back to the grantor and that a unilateral mistake was made by the draftsman in failing to include this provision. The trial judge found as a fact that insufficient evidence had been presented of unilateral mistake, lack of consideration, or of a mistake by the draftsman, and concluded plaintiffs were not entitled to a reformation of the deed. Plaintiffs appealed.

Powell & Smith, by William A. Powell, for plaintiff appellants.

John R. Hughes for defendant appellee.

HILL, Judge.

Plaintiffs first contend the trial court erred by excluding evidence that they received no consideration from defendant for the conveyance of the parcel of land. We do not agree.

[1] It is well settled that except in cases of fraud, mistake, or undue influence, parol trusts or agreements will not be set up or engrafted in favor of the grantor upon a written deed conveying

to the grantee the absolute title, and giving clear indication on its face that such title was intended to pass. *Conner v. Ridley*, 248 N.C. 714, 716, 104 S.E. 2d 845 (1958). Testimony tending to show an oral agreement in direct conflict with the deed is incompetent. *Conner, supra*, at p. 715.

The deed was prepared by plaintiffs' attorney (now deceased). Plaintiff M. H. Rourk testified that he had complete faith in his attorney; that he did not read the deed and did not have time to read deeds, busy as he was, all alone in the county practicing medicine. Rourk simply asked his attorney if it was all right to sign the deed. Plaintiffs only learned of the omission of a reverter clause years later when the county began to use the property as a center for the aged.

It must be assumed the plaintiffs signed the instrument they intended to sign. *Poston v. Bowen*, 228 N.C. 202, 203, 44 S.E. 2d 881 (1947). There is no evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud. Hence, we must conclude the court did not err in refusing to allow parol evidence to contradict or modify the terms of the deed, or create a reservation of the property by parol. *Campbell v. Sigmon*, 170 N.C. 348, 87 S.E. 116 (1915); *Conner v. Ridley, supra*, at p. 716.

[2] Next, plaintiffs contend the court erred in its findings of fact and conclusions of law that valuable consideration existed for the deed. Plaintiffs contend the language in the deed hereinafter set out simply created a condition subsequent.

> TO HAVE AND TO HOLD THE aforesaid tract or parcel of land, . . . subject to the condition, however, that it is agreed and understood by and between the parties to this deed and made a part of the consideration hereof that the parties of the first part are conveying the property described herein to the party of the second part upon the condition that the party of the second part shall construct on said premises a public health center . . . and that the actual construction of said health center shall commence within one year from the date of this instrument and if the construction of the said health center has not been commenced within the period of one year from the date of this instrument said property shall revert to the parties of the first part.

It will be noted that the word "considertion" is used and is coupled with acts to be performed by the defendant as a part thereof. These acts so imposed clearly are a part of the consideration for the deed in that defendant normally would be under no duty to perform them. Common sense also teaches that a physician must gain some advantage in having a health center in the community.

We do not quarrel with the plaintiffs' contention that the language creates a condition subsequent, but we have found no cases which provide that the language may not serve both to state consideration as well as to create a condition subsequent.

[3] Plaintiffs contend the deed should be reformed on the basis of mistake. We do not agree with plaintiffs. Defendants contend the deed states exactly what they meant for it to state. Certainly, there was no mutual mistake. As a general rule, a court will allow reformation of a written instrument on the basis of mistake when the mistake is mutual and fails to express the true intent of the parties. *Cobb v. Cobb*, 211 N.C. 146, 189 S.E. 479 (1937); *American Potato Co. v. Jeannette*, 174 N.C. 236, 93 S.E. 795 (1917); *Parker v. Pittman*, 18 N.C. App. 500, 197 S.E. 2d 570 (1973). We have concluded previously the deed was based on consideration and not a deed of gift. Therefore, there is no basis for reformation based on unilateral mistake under *Nelson v. Harris*, 32 N.C. App. 375, 232 S.E. 2d 298 (1977), *disc. rev. denied* 292 N.C. 641 (1977).

Finally, we are not impressed by plaintiffs' argument that the deed must be reformed on the basis of an alleged mistake by the draftsman. We note the trial judge in his findings of fact found that insufficient evidence of a mistake by the draftsman had been presented. We have searched the record and reach the same result. We are bound by the findings of fact reached by the trial judge.

The judgment reached by the trial judge is

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

PAUL J. QUATTRONE v. GEORGE WOFFORD ROCHESTER

No. 7915SC1012

(Filed 20 May 1980)

Process § 16— service on nonresident—failure to file affidavit of compliance with statute—service not invalid

Failure of plaintiff to file an affidavit of compliance required under G.S. 1-105(3) until 114 days after service of the summons on the Commissioner of Motor Vehicles did not render service on the nonresident defendant invalid, since filing of the affidavit did not affect the completeness of the service but rather merely perfected the record and furnished proof of compliance with G.S. 1-105 for the guidance of the courts.

APPEAL by defendant from *McClelland, Judge.* Order entered 21 September 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 18 April 1980.

This case involves the sufficiency of service under G.S. 1-105. Plaintiff's complaint alleged that plaintiff, a resident of Pennsylvania, had been injured when defendant, a resident of South Carolina, negligently drove into the rear of plaintiff's car in Alleghany County, North Carolina. The accident occurred on 21 May 1976. On 21 May 1979 plaintiff filed his complaint and caused a civil summons to be issued directed to defendant by serving the Commissioner of Motor Vehicles pursuant to G.S. 1-105. On 29 May 1979, the Commissioner of Motor Vehicles forwarded copies of the summons and complaint to defendant as required by G.S. 1-105. Thereafter on 7 June 1979, plaintiff filed a return receipt indicating that defendant had received the summons and complaint on 30 May 1979.

Defendant's answer, filed 19 June 1979, moved for dismissal pursuant to Rule 12(b)(2), (4) and (5) due to lack of jurisdiction over the person of defendant because of insufficiency of process and insufficiency of service of process. In his answer, defendant also raised the affirmative defense of the statute of limitations.

Prior to the hearing on 17 September 1979 on defendant's motion to dismiss, plaintiff had not appended the affidavit of compliance with the provisions of G.S. 1-105 as required by G.S. 1-105(3). The Court granted defendant's motion to dismiss for lack of service and denied plaintiff's motion for leave to file an af-

fidavit of compliance with the provisions of G.S. 1-105. Plaintiff gave notice to the Court of Appeals from the order granting defendant's motion to dismiss.

Thereafter, plaintiff filed the affidavit of compliance on 19 September 1979, along with a petition to the trial court to reconsider its prior ruling granting defendant's motion to dismiss. Upon rehearing, the trial court vacated its order and denied defendant's motion to dismiss finding, *inter alia*, "that appending the subject affidavit to the summons does not constitute an amendment to prove service of process so as to require the Court to consider whether prejudice is created by this ruling." Defendant appealed.

Latham, Wood and Balog, by B. F. Wood and Steve A. Balog, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and William L. Young, for defendant appellant.

MARTIN (Robert M.), Judge.

Defendant argues that the failure of plaintiff to file the affidavit of compliance required under G.S. 1-105(3) until after the hearing on the motion to dismiss which was more than three years after the accident and 114 days after service of the summons on the Commissioner of Motor Vehicles, renders the purported service invalid.

The case *sub judice* is controlled by two cases: *Ridge v. Wright*, 29 N.C. App. 609, 225 S.E. 2d 131 (1976) and *Ridge v. Wright*, 35 N.C. App. 643, 242 S.E. 2d 389, *cert. denied*, 295 N.C. 467, 246 S.E. 2d 10 (1978). Defendants in *Ridge* argued before this Court that their motion to dismiss for lack of service should be allowed since plaintiffs did not file affidavits of compliance as required by G.S. 1-105(3). Because the affidavits were filed pending the first appeal of that case, this Court ordered the affidavits stricken from the record and the affidavits were not considered by this Court on appeal. Having stricken the affidavits, we held that "[w]ithout the affidavits of compliance and other documents required by G.S. 1-105(3), clearly the service of process was defective. 29 N.C. App. at 611, 225 S.E. 2d at 132. In the ends of justice, however, we remanded the causes for another hearing on

defendants' motions to dismiss or in the alternative, to quash service of process.

At the 14 February 1977 hearing on remand, plaintiffs introduced two documents, purported affidavits of compliance as required by G.S. 1-105(3). The court again denied defendants' motions and defendants appealed arguing that this court in the first *Ridge* case did not contemplate that on remand, the trial court would consider plaintiffs' affidavits of compliance with G.S. 1-105(3). Rejecting that argument we concluded "that the cause was remanded for the very purpose of allowing the trial court to review the motions in light of plaintiffs' affidavits." 35 N.C. App. at 646, 242 S.E. 2d at 391. Hence, we held that service of process on defendants was sufficient when plaintiffs' affidavits of compliance were filed on 6 January 1976, some two years and five months and one year and five months after the summonses were served on the Commissioner of Motor Vehicles.

Although not spelled out in the *Ridge* cases, the decisions are grounded in the language of G.S. 1-105 which states in pertinent part:

> Service of such process shall be made in the following manner:
>
> (1) By leaving a copy thereof, with a fee of three dollars ($3.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section, shall be *sufficient service* on defendant. (Emphasis added.)
>
> (2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of *service* upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date *service on defendant shall be deemed completed.* (Emphasis added.)
>
> (3) The defendant's return receipt . . . together with the plaintiff's affidavit of compliance with the provisions of this section, must be appended to the summons or

other process and filed with said summons, complaint and other papers in the cause.

In applying the language of the statute and the *Ridge* cases to the case *sub judice*, service on the Commissioner of Motor Vehicles was complete when he was served by the Sheriff of Wake County on 21 May 1979. Service on defendant was deemed completed on 30 May 1979, the entry on defendant's return receipt evidencing the date on which notice of service upon the Commissioner and a copy of process were delivered to defendant. The filing of defendant's return receipt and the affidavit of compliance as required by G.S. 1-105(3), governing the filing of proof of service, then rendered the service pursuant to subsection (1) sufficient service on the nonresident defendant. The filing of the affidavit does not affect the completeness of the service but rather merely perfects the record and furnishes proof of compliance with G.S. 1-105 for the guidance of the courts. Because service was completed within the time limits required by Rule 4(c), N.C. Rules Civ. Proc., for substituted personal service, defendant's arguments that plaintiff's action discontinued and was subsequently barred by the statute of limitations is without merit.

Affirmed.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. DAVID SPRINKLE

No. 7921SC1172

(Filed 20 May 1980)

1. Burglary and Unlawful Breakings § 5.8— breaking and entering and larceny— sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of breaking and entering and larceny where it tended to show that a house was broken into while the owner was at work and a television, clock and watch were taken therefrom; about 2:00 p.m. on the day of the crimes two State's witnesses saw a female and two males standing in the field next to the house; one of the men was holding a television set which resembled the stolen set; as the two State's witnesses drove by the field, the three persons in the field fell to the ground; the witnesses saw the three per-

sons get into a red Volkswagen and identified defendant as the man who sat in the back seat of the Volkswagen holding the television set; and the Volkswagen belonged to the female driver whom defendant had known for several years.

2. Criminal Law § 131.2— newly available evidence—denial of motion for appropriate relief

The trial court did not err in denying defendant's motion for appropriate relief on the ground of newly available evidence where an indicted codefendant testified at the hearing on defendant's motion for appropriate relief that defendant did not participate in the break-in in question, and the trial court concluded that the newly available evidence probably was not true, tended only to contradict or impeach a former witness, and would not result in a different verdict at another trial.

APPEAL by defendant from *Washington, Judge*. Judgment entered 9 August 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 24 April 1980.

Defendant was charged and tried upon a proper bill of indictment with the 28 March 1979 breaking or entering of a residence occupied by Alma Lynch, and with the larceny therefrom of a television, a clock, and a watch having the combined value of $579.00. He was found guilty as charged and, from a judgment imposing a prison sentence of three to five years, he appealed.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

John J. Schramm, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns error to the denial of his timely motions for judgment as of nonsuit. At the trial of this matter, the State offered evidence which tended to show that, when Ms. Lynch left for work on the morning of 28 March 1979, the doors to her home were secure; that when she returned that afternoon, she found her home had been broken into; and that certain items of personal property which were in her home that morning were missing that afternoon. State's witnesses Thomas Allen and Bob Brown testified they had driven by the Lynch residence about 2:00 p.m. that day and had observed three people, one female and two males, standing in the field next to the house. One of the men was holding a television set which Allen said resembled one he had

seen in the living room of Ms. Lynch, who is his aunt. As Allen and Brown drove by the field in Allen's Ford van, the three individuals fell to the ground. Allen turned his van around, came back by the field, and saw that the three people were getting into a red Volkswagen parked on the roadside in front of his aunt's house. The female got in the front of the Volkswagen on the driver's side; one of the men got in the front of the passenger side; and the man with the t.v. got in the rear seat behind the driver. As Allen pursued the Volkswagen, he and Brown were able to see clearly into the back seat and to observe the man seated there, whom they identified as the defendant, staring back at them. They also plainly saw the driver, later identified as Penny Vasquez, and wrote down the license number of the car, which was subsequently determined to be registered in Vasquez' name.

Defendant testified that he had known Vasquez for several years, but that he had not been with her on the afternoon of 28 March 1979 and that he neither broke into nor took anything from the Lynch residence.

When we consider this evidence in the light most favorable to the State, as we must, we find it clearly sufficient to require its submission to the jury and to support the verdict. These assignments of error are without merit.

[2] Next, defendant contends the court erred in denying his motion for appropriate relief pursuant to G.S. § 15A-1415(b)(6) which prescribes as a ground for relief that

> Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

Defendant based his motion upon the following sequence of events: Defendant called as a witness at his trial Penny Vasquez, an indicted codefendant, who invoked her Fifth Amendment privilege against testifying to each question put to her by defendant's counsel. Immediately upon defendant's conviction, Vasquez entered a plea of guilty to larceny from the Lynch residence and the charge of breaking or entering against her was dismissed. Thereafter, at the hearing on defendant's motion for appropriate

relief, Vasquez testified that defendant was not with her on 28 March 1979 and that he did not participate in the break-in of the Lynch home. Defendant argues that her testimony constitutes newly available evidence of the caliber to entitle him to a new trial.

A motion for a new trial on the ground of newly discovered or newly available evidence is addressed to the sound discretion of the trial judge, whose ruling thereon will not be disturbed in the absence of a clear abuse of discretion. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Martin*, 40 N.C. App. 408, 252 S.E. 2d 859 (1979):

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Beaver, 291 N.C. 137, 143, 229 S.E. 2d 179, 183 (1976). *See also State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931). Defendant is required to meet all seven factors enumerated in *Beaver*. *State v. Martin, supra.*

In the case before us, after hearing evidence on the defendant's motion and making findings of fact thereon, the trial judge drew these conclusions:

> [T]hat such newly discovered evidence by the Defendant is probably not true; that this newly discovered evidence does tend only to contradict or impeach or discredit a former witness; and, that this newly discovered evidence is of such a nature as to show that on another trial a different result would probably not be reached and right will prevail.

In face of the testimony of Allen and Brown adduced at the trial of defendant to the effect that they saw three individuals in

the field next to the Lynch residence and, upon pursuing them, observed a man whom they identified as defendant in the back of Vasquez' Volkswagen holding a television resembling the one taken from the Lynch home, we fail to understand how the trial judge erred in drawing the above conclusions. The conclusions are supported by the facts, and we hold that the judge acted soundly within his discretion to deny defendant's motion for appropriate relief based on newly discovered or newly available evidence. Moreover, we find compelling the decision of this Court in *State v. Grant*, 21 N.C. App. 431, 204 S.E. 2d 700, *cert. denied*, 285 N.C. 592, 206 S.E. 2d 864 (1974), where we held that the trial court did not abuse its discretion in denying defendant a new trial despite his evidence that a codefendant and a person convicted as an accessory after the fact in the same robberies stated after their convictions that defendant had not taken part in the crimes for which he had been convicted.

Defendant argues that the district attorney acted improperly in refusing to accept Vasquez' guilty plea until after defendant's conviction had been secured, even though the district attorney was aware before defendant's trial that she would enter a plea. We fail to see where the impropriety arises, but, in any event, the record establishes that Vasquez, on the advice of her attorney, was not willing to enter a plea until after the jury submitted a verdict in defendant's case. This assignment of error is meritless.

Defendant's remaining assignment of error, which we have carefully considered, is addressed to remarks of the trial judge in his instructions to the jury regarding the nature of a probable cause hearing. Suffice it to say that we disagree with defendant that these remarks were either erroneous or prejudicial.

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

No error.

Judges ARNOLD and ERWIN concur.

MARY JACKIE WISDOM JOYNER v. NATIONWIDE INSURANCE

No 797DC1054

(Filed 20 May 1980)

Insurance § 43.1— group health insurance—coverage in month following termination of employment

Where a group health insurance policy provided coverage for the employees of a corporation "to the last day of the policy month coinciding with or next following . . . termination" of employment, one reasonable interpretation of the policy was that it provided coverage extending through the last day of the month succeeding the month in which employment terminated when the termination of employment did not coincide with the last day of the month, and an employee whose employment was terminated on 27 March was covered by the policy for surgery performed on 22 April.

APPEAL by defendant from *Matthews, Judge.* Judgment entered 28 September 1979 in District Court, NASH County. Heard in the Court of Appeals on 24 April 1980.

Plaintiff seeks to recover benefits under a group health insurance plan for medical expenses she incurred as the result of a hysterectomy during the period from 22 April 1976 through 3 May 1976. Defendant does not contest that the policy was issued to cover the employees of Cauley Enterprises, Inc. as of 1 February 1976, nor does it contend that the policy does not cover the type of medical expense for which plaintiff seeks recovery. Rather, in its answer to plaintiff's complaint, defendant denied liability on the grounds that the plaintiff was no longer an employee of Cauley Enterprises, Inc. at the time she incurred the hospital and surgical expenses because she terminated her employment on 27 March 1976, and coverage under the terms of the policy ceased when she "was no longer an employee of Cauley Enterprises, Inc."

Thereafter, defendant filed a request for admissions which established that plaintiff terminated her employment with Cauley on 27 March 1976 and was not employed by Cauley on 22 April 1976. At a hearing before the judge sitting without a jury, plaintiff testified that she had requested a leave of absence on 27 March, but that when she returned to work after her operation, her job "had been filled." She introduced into evidence her paycheck from Cauley dated 27 March 1976 which showed that $40.61 had been deducted for the April insurance premium.

Summary judgment on the issue of coverage was entered for plaintiff on 1 November 1978. Defendant's appeal from the entry of that judgment was dismissed by this Court as a premature appeal since the issue of damages remained to be determined. The parties subsequently stipulated "that should the question of coverage . . . be finally determined . . . in favor of plaintiff, plaintiff shall be entitled to recover of defendant . . . $1864.83. . . ." From a judgment entered 28 September 1979 that plaintiff recover that sum, defendant appealed.

Ezzell, Henson & Fuerst, by Thomas W. Henson, for the plaintiff appellee.

Battle, Winslow, Scott & Wiley, by Marshall A. Gallop, Jr., for the defendant appellant.

HEDRICK, Judge.

The resolution of the issue presented by this appeal requires our construction of the following provision of the insurance policy:

> A Certificateholder's coverage under any benefit provision of the Policy terminates upon the first occurrence of the following:
>
> . . .
>
> (4) To the last day of the policy month coinciding with or next following his termination of membership in the classes eligible for coverage under that benefit provision. . . .

"Policy month" is defined as "a period of successive days commencing on the first day of each calendar month and ending on the day immediately preceding the corresponding day of the next following calendar month." That is, a "policy month" is the equivalent of a calendar month. Our task is to decide whether the language "[t]o the last day of the policy month coinciding with or next following" termination admits of only one interpretation, as defendant argues, or whether the language is ambiguous and thus reasonably susceptible of more than one construction. "[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; . . ." *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 506, 246 S.E. 2d 773, 777 (1978). On the other hand, if its import is uncer-

tain or equivocal, that is, if the meaning of words or the effect of provisions is capable of several reasonable interpretations, the doubts will be resolved strictly against the insurer and liberally in favor of the insured so as to permit recovery where possible. *Grant v. Emmco Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978). Moreover, in deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended. *See generally* 7 Strong's N.C. Index 3d, *Insurance* §§ 6-6.3 (1977); 43 Am. Jur. 2d *Insurance* §§ 257-271 (1969). The rationale underlying the principle favoring the insured in situations of uncertainty is obvious: The company writes the policy and chooses the language. "[I]n accord with the presumed intention of the parties, the construction should be such as not to defeat, without a plain necessity, the insured's claim to the indemnity which it was his object to secure and for which he paid a premium." 43 Am. Jur. 2d, *supra* § 272 at 332; *accord, Grant v. Emmco Insurance Co., supra.*

Defendant in the case at bar argues that the language "the last day of the policy month coinciding with or next following . . . termination"—although concededly not a "model of draftsmanship"—is capable of only one reasonable interpretation, namely, that coverage extends to the last day of the month "during which the termination occurred." Thus, defendant contends, coverage ceased in this case on 31 March 1976, the last day of the month in which plaintiff terminated her employment at Cauley Enterprises.

We agree that this is one way to interpret the provision. We disagree that it is the only reasonable construction, nor do we think it the most reasonable signification to give the provision. The language, at best, is ambiguous. Rational persons could justifiably conclude, for example, that "the last day of the policy month *coinciding with*" termination means that the cessation of coverage and the termination of employment must occur simultaneously on the last day of the month. On the other hand, and contrary to defendant's contentions, rational persons could just as logically comprehend "the last day of the policy month . . . *next following*" termination to mean that coverage extends through the last day of the month *succeeding* the month in which employment terminates. Since the plaintiff in this case ended her employment with Cauley Enterprises on 27 March, a date which

does not coincide with the last day of the month, she rightly considered the meaning of the words "next following." We think she reasonably interpreted the language to provide coverage throughout April.

Had the defendant truly intended the language to mean only what it now contends, the policy could have been simply and precisely written to say that coverage ceases on the last day of the month in which employment terminates. That language admits of only one construction.

However, since we find the actual language in the provision at issue reasonably susceptible of several interpretations, we resolve the ambiguity in plaintiff's favor and hold that she was covered under the policy for medical expenses she incurred beginning on 22 April 1976. Moreover, although the factor is not necessarily decisive, we point out that plaintiff paid the April premium.

The judgment appealed from is affirmed.

Affirmed.

Judges ARNOLD and ERWIN concur.

JERRY W. WHITLEY v. MARTHA L. WHITLEY

No. 7926DC1156

(Filed 20 May 1980)

Divorce and Alimony § 24.1 — child support — amount improperly based on father's "earning capacity"

The trial court erred in determining that plaintiff failed to exercise his capacity to earn in disregard of his marital obligation to provide reasonable support for his children and the court erred in ordering plaintiff, whose monthly income was about $1000 before taxes, to pay $900 per month in child support and $5000 in a lump sum to defendant, since there was no evidence to indicate that plaintiff, who practiced law, intentionally depressed his income to avoid his support obligations.

APPEAL by plaintiff from *Cantrell, Judge*. Order entered 20 July 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 22 April 1980.

Plaintiff instituted an action for absolute divorce in January, 1979. The parties had entered into a deed of separation on 10 January 1978. The deed of separation provided, in part, that the wife had decided to live separate and apart; that both were fit and proper to have custody of the children but they would presently be left in the custody of the husband; that neither party was in need of support from the other and that the wife could retain the $18,500.00 received from the sale of property previously owned by the parties.

After the complaint was filed, defendant, on the 6th or 7th of February, took the children into her home. Then, on 16 February, she moved for an extension of time within which to answer the complaint. She later obtained another extension giving her until 19 April 1979 to file answer. On 19 April 1979, she filed answer and a cross claim seeking an order for child support, custody and counsel fees. Plaintiff had provided over $400.00 per month for the support of the children after they moved in with defendant.

The case was heard on 8 June and, on 20 July 1979, the court entered an order requiring plaintiff to pay child support in the monthly amount of $900.00, pay defendant the lump sum of $5,000.00 as reimbursement for providing for the children from February until the date of the hearing and pay defendant's counsel a fee of $500.00. Plaintiff appealed.

Jack P. Gulley and Gary A. Davis, for plaintiff appellant.

Murchison and Guthrie, by Alton G. Murchison III and K. Neal Davis, for defendant appellee.

VAUGHN, Judge.

Plaintiff's evidence, which was not contradicted, tends to show that his net income during 1979, up to the date of the hearing, was about $1,000.00 per month before taxes. Copies of his tax returns for prior years were introduced and disclosed net income (before taxes) from the practice of law as follows:

1975	$18,279.51
1976	$28,695.00
1977	$22,766.00
1978	$15,084.09

The record also discloses that plaintiff was heavily indebted and that the installment payments on some of his debts are substantial.

The amounts ordered to be paid are obviously in excess of plaintiff's ability to pay. The court, in apparent recognition of that fact, recited that plaintiff failed to exercise his capacity to earn "in disregard of his marital obligation to provide reasonable support for his children according to his abilities and capacity and commensurate with the standards to which they were accustomed."

The court appears to have based the order on the court's notion of some unspecified sum that it thought plaintiff should be able to earn instead of his actual income. The award should be based on plaintiff's actual income "if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably." *Conrad v. Conrad*, 252 N.C. 412, 418, 113 S.E. 2d 912, 916 (1960). Only where there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income to avoid family responsibilities can the "earning capacity" rule be applied. The basic issue is: "Is the husband, by reducing his income, primarily motivated by a desire to avoid his reasonable support obligations?" *Bowes v. Bowes*, 287 N.C. 163, 173, 214 S.E. 2d 40, 46 (1975); *Wachacha v. Wachacha*, 38 N.C. 504, 248 S.E. 2d 375 (1978). There is nothing in this record to support a conclusion that plaintiff had intentionally depressed his income to avoid his reasonable support obligation to his children. Plaintiff's net income, from the practice of law, did decrease in 1978. During that year, however, the children were in his custody pursuant to the deed of separation. There is nothing to indicate that they were not adequately provided for or that he had reason to believe that defendant would want to take custody of them after he filed for divorce and make a claim for child support. His earnings in 1979 prior to the hearing do not seem to be substantially below those for 1978, when he had the children with him.

Moreover, plaintiff's gross receipts over the four-year period do not vary greatly. Plaintiff's gross receipts for 1978 were only about $5,000.00 less than they were for 1976, his year of highest net earnings from the practice of law. The expenses for 1978 were substantially greater in 1978 and this contributed to lower net earnings.

The parties had separated on an earlier occasion. In November, 1976, defendant moved to Sarasota, Florida and took the children with her, but in June, 1977, the parties resumed their marital relationship. During the period between the separation and reconciliation, plaintiff paid defendant $1,000.00 per month. He testified that those funds came from the sale of real estate he had previously acquired. Plaintiff also testified that prior to the separation in 1976, he had worked fourteen or fifteen hours each day and had worked on weekends. The separation and loss of his family affected him very deeply and had a substantial effect on the zeal with which he could work. The loss of his family continues to affect the amount of his work but he is working more now than he was after the separation in 1976. The facts set out in this paragraph are recited in the order from which plaintiff appealed and appear to form the only basis for the court's action in ordering payments in excess of that which could be made from plaintiff's present income. These facts will not support a conclusion that plaintiff intentionally depressed his income to avoid his obligation to support his children.

Because the order for support must be vacated, we need not discuss plaintiff's objections to the order as it relates to the reasonable needs of the children except to say that the court's conclusion as to the reasonable needs of the children is not supported by the evidence or appropriate findings of fact.

The court also awarded defendant primary custody of the children. That part of the order is affirmed. That part of the order awarding attorney fees to be paid by plaintiff to defendant's counsel is also affirmed.

Those parts of the order directing plaintiff to pay $900.00 monthly into the clerk's office and the sum of $5,000.00 directly to defendant are vacated. The case is remanded for a new hearing to the end that the court can make appropriate findings and enter an order based on the then existing circumstances including the

relative abilities of the parties to provide for the reasonable needs of the children.

Affirmed in part.

Vacated and remanded in part.

Judges CLARK and MARTIN (Harry C.) concur.

MARIE S. HURDLE v. LILLIAN I. SAWYER AND HUSBAND, FLEETWOOD SAWYER; PHILIP SAWYER; CHARLIE M. HURDLE AND WIFE, MARIE H. HURDLE; HARVEY HURDLE AND WIFE, KATHLEEN D. HURDLE; EMMA LOU HURDLE NORRIS AND HUSBAND, ROBERT NORRIS; JOSEPH L. HURDLE, JR. AND WIFE, NANCY HURDLE; AND DORIS HURDLE HOFFMAN, ADMINISTRATRIX, C.T.A. ESTATE OF JOSEPH L. HURDLE, DECEASED; AND DORIS HURDLE HOFFMAN, INDIVIDUALLY, AND HUSBAND, DANIEL HOFFMAN

No. 791SC795

(Filed 20 May 1980)

Wills § 61.4— qualification as administratrix c.t.a.—no estoppel of right to dissent

Plaintiff's act of qualifying as administratrix c.t.a. of her husband's will did not constitute an election on her part to take under the will so as to bar her statutory right of dissent to the will.

APPEAL by defendants Lillian I. Sawyer, Fleetwood Sawyer, and Philip Sawyer from *Strickland, Judge*. Judgment entered 25 April 1979 in Superior Court, CHOWAN County. Heard in the Court of Appeals 4 March 1980.

This declaratory judgment action was brought by plaintiff, as the surviving widow of Joseph L. Hurdle, in which she sought a declaration that her dissent to the will of her late husband was valid. All of the devisees under the will were joined as defendants. Defendants Lillian I. Sawyer, Fleetwood Sawyer, and Philip Sawyer answered, alleging that plaintiff had qualified as administratrix c.t.a. of the will of Joseph L. Hurdle, and that by doing so, she had waived her right to dissent.

The matter was heard by the trial court without a jury, by consent of the parties. The trial judge entered judgment for plaintiff, from which the defendants appeal.

Twiford, Trimpi and Thompson, by C. Everett Thompson, for the plaintiff appellee.

White, Hall, Mullen, Brumsey & Small, by William Brumsey III, for the defendant appellants.

WELLS, Judge.

At the hearing before His Honor, Judge Strickland, plaintiff presented the testimony of six witnesses, including herself. Defendants offered no evidence. The trial judge found extensive facts and upon those findings, entered his conclusions of law favorable to plaintiff. All of the trial court's findings of fact are supported by the evidence and are therefore binding on appeal. The appeal presents but one question for our resolution: Whether Marie Hurdle lost her right to dissent to her husband's will when she qualified as the personal representative of his estate. The answer is that she did not.

In order to set the stage for our decision, we briefly recount the events and circumstances found as facts by the trial judge. Joseph L. Hurdle died testate on 23 January 1977. He was survived by his widow, Marie Hurdle, to whom he left nothing in his will, and by children who were beneficiaries under the will. The will was probated on 4 February 1977, on which date plaintiff applied for and was issued letters testamentary as administratrix c.t.a. of the will. At the time she qualified, plaintiff was sixty-nine years old, had not communicated with her deceased husband for eighteen years, was not accomplished in business affairs or the administration of estates, and did not have the assistance of legal counsel. On 2 March 1977 she was advised by counsel that she could dissent from the will. On the same day, her dissent was executed and filed with the Clerk. Notice of the dissent was sent to all devisees under the will, including the answering defendants. On 8 September 1978, plaintiff petitioned the Clerk to accept her resignation as administratrix c.t.a. in order that she might pursue her dissent to the will. On 2 October 1978, the Clerk entered an order accepting her resignation and approving her final account. Judge Strickland's conclusions, with which we agree, were that

plaintiff duly exercised her right to dissent, and that by qualifying as the personal representative of the estate, she did not make an election to take under the will, nor did she thereby waive or forfeit her right to dissent.

Earlier cases seemed to enunciate the rule that qualification by a surviving spouse as personal representative of the estate constituted an election to take under the will and hence operated to bar the right of dissent. The first of these was *Mendenhall v. Mendenhall*, 53 N.C. 287 (1860). The rule in *Mendenhall*, though not rigorously followed, found support in *In re Shuford's Will*, 164 N.C. 133, 80 S.E. 420 (1913); and *In re Will of Meadows*, 185 N.C. 99, 116 S.E. 257 (1923). Later cases have reflected a pronounced departure from *Mendenhall*. Justice (later Chief Justice) Sharp, writing for our Supreme Court in *Bank v. Barbee*, 260 N.C. 106, 108, 131 S.E. 2d 666, 669 (1963), set the tone:

> In the vast majority of jurisdictions the rule is that merely qualifying as executor or administrator c.t.a. is not sufficient standing alone, to constitute an election to take under the will but is a factor tending to establish such an election which must be considered in conjunction with all the other circumstances. [Citations omitted.]

Then in *Joyce v. Joyce*, 260 N.C. 757, 133 S.E. 2d 675 (1963) Chief Justice Denny, writing for our Supreme Court, approved the lower court's conclusion of law that the act of qualifying an executrix did not estop the widow from subsequently dissenting, where the evidence showed the widow to be elderly, of limited education, inexperienced in business matters, and uninformed and unadvised as to her legal rights.

In *Bank v. Stone*, 263 N.C. 384, 139 S.E. 2d 573 (1965) Justice Higgins, writing for our Supreme Court, approved the lower court's order finding a valid dissent, although the widow, though previously qualified as co-executor, later resigned and dissented, and there was no evidence of disability on her part. We believe Justice Higgins finally put *Mendenhall* to rest. There is no question in the case now before us that plaintiff properly and timely exercised her right of dissent, pursuant to the provisions of G.S. 30-1, G.S. 30-2, and G.S. 30-3. We hold that the act of qualifying as administratrix c.t.a. of her husband's will did not constitute an

election on her part to take under the will so as to bar her statutory right of dissent.

Affirmed.

Judges HEDRICK and WEBB concur.

HAROLD LLOYD, PLAINTIFF-EMPLOYEE v. JENKINS CONTEXT COMPANY, DEFENDANT-EMPLOYER AND AMERICAN MOTORISTS INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 7910IC128

(Filed 20 May 1980)

Master and Servant § 49.1— workmen's compensation—carpenter as employee

Plaintiff was an employee within the meaning of the Workmen's Compensation Act where the evidence tended to show that he was a carpenter working for an hourly wage and not for a contract price for a completed job; defendant's own witnesses testified that a foreman could instruct plaintiff in how to do the work; the fact that plaintiff was skilled in his job so that he needed little supervision did not make him an independent contractor; plaintiff did not have an independent business as a carpenter; plaintiff worked full-time for defendant; defendant apparently had the right to discharge plaintiff at any time; and there was no evidence that plaintiff had the right to employ people to assist him in the carpentry work without the permission of defendant.

APPEAL by defendants from order of North Carolina Industrial Commission entered 8 December 1978. Heard in the Court of Appeals 28 September 1979.

This appeal brings to the Court the question of whether, at the time of his accidental injury, the plaintiff was an employee of defendant Jenkins Context Company or whether he was an independent contractor. The evidence showed that plaintiff is skilled as a painter and a carpenter. In 1976, he began working for Jenkins as a painter at a rate of $5.00 per hour. While he was doing this painting work, he received permission from Harold Trivette to let his son do some painting at $3.00 per hour, which his son did. Later in the year, plaintiff began doing carpentry work on trailers that needed repair at Jenkins Context Company. He continued receiving $5.00 per hour for this work. He kept his

own time and was paid by a time sheet he delivered each week to the company office. Jenkins did not make any social security payments for the plaintiff or withhold any taxes from the amount paid him. Jenkins offered to put the plaintiff on its payroll, but he refused because the pay would have been only $4.50 per hour. Plaintiff testified that while he was doing carpentry work on the trailers, it was "pointed out" to him what to do and how to do it. Harold Trivette, vice president of Jenkins, testified "[a]s to whether I ever simply told Mr. Lloyd how to do a particular job, I'd say at times I told Buck how to do something but Buck was good and most of the time he did what he wanted to do." Mr. Trivette also testified that a foreman "would instruct Mr. Lloyd how and the way to do it, yes, if there was any—yes." Plaintiff was not required to work regular hours, but he normally worked approximately 40 hours per week. Plaintiff was injured in an accident while doing carpentry work on a trailer. He was carried to the emergency room of the local hospital where he made the statement that he was "self-employed." The Deputy Commissioner found facts based on the evidence and concluded an employer-employee relationship existed while plaintiff was working on the trailer. The Deputy Commissioner awarded workmen's compensation benefits to plaintiff. The Full Commission affirmed, and defendants appealed.

McElwee, Hall, McElwee and Cannon, by John E. Hall, for plaintiff appellee.

Tuggle, Duggins, Meschan, Thornton and Elrod, by Richard L. Vanore, for defendant appellants.

WEBB, Judge.

In order to bring himself within the coverage of the Workmen's Compensation Act, the claimant has the burden of proving that the employer-employee relationship existed. The reviewing court is not bound by the finding of this jurisdictional fact by the Industrial Commission. This Court must make its own finding from a consideration of all the evidence in the case. *See Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). G.S. 97-2(2) provides:

> The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . .

We hold that under this statutory definition, as interpreted by the cases in this jurisdiction, the plaintiff was an employee of defendant Jenkins Context Company at the time of his injury. We consider the following factors to be determinative: (1) the plaintiff was working for an hourly wage and not for a contract price for a completed job; (2) defendant's own witnesses testified a foreman could instruct the plaintiff in how to do the work. The fact that plaintiff was skilled in his job so that he needed very little supervision does not make him an independent contractor; (3) the plaintiff did not have an independent business as a carpenter; (4) the plaintiff worked full-time for Jenkins; (5) the defendant Jenkins apparently had the right to discharge the plaintiff at any time; and (6) there was no evidence that plaintiff had the right to employ people to assist him in the carpentry work without the permission of Jenkins. It is true that Jenkins did not withhold taxes from plaintiff's wages or pay his social security. Plaintiff also did not have to work regular hours. We do not feel these factors are determinative. We also do not believe the plaintiff's characterization of himself as "self-employed" should govern. It is the evidence as to what the relationship was that determines and not what the plaintiff thought it was. We believe the holding in this case is consistent with the definition of the employer-employee relationship as set forth in *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965) and *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944).

Affirmed.

Judges ARNOLD and WELLS concur.

FAY ARDYTH O'HARA, PLAINTIFF v. WILLIAM JAMES O'HARA, DEFENDANT

No. 7921DC389

(Filed 20 May 1980)

Divorce and Alimony § 16.10— alimony order voided by resumption of marital relationship

An order requiring defendant to pay alimony to plaintiff was voided when the parties resumed the marital relationship.

APPEAL by defendant from *Clifford, Judge.* Judgment entered 16 January 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 24 October 1979.

Defendant has appealed from an order denying his motion under Rule 60 of the North Carolina Rules of Civil Procedure to set aside a judgment. The parties were married in 1948. On 13 December 1971, the plaintiff instituted this action, praying for alimony without divorce. On 4 January 1972, the court entered an order requiring the defendant to pay alimony to the plaintiff. In a subsequent action, plaintiff stated in answer to an interrogatory that the parties had resumed the marital relationship in May and June of 1972. This admission is not in dispute. They separated again. Defendant obtained an absolute divorce from the plaintiff on 31 October 1977. On 10 March 1978, a hearing was held on a show cause order as to why the defendant should not be held in contempt for violating the judgment of 4 January 1972 requiring him to pay alimony. The court concluded that the award of alimony in the judgment of 4 January 1972 did not require that the parties live separate and apart and held the defendant in contempt. On 6 April 1978, the court entered an order setting aside the order of 10 March 1978, reciting that the order of 4 January 1972 was a *pendente lite* order which would not have survived a divorce. On 16 June 1978, the court entered another order in which it found that the judgment of 4 January 1972 is a final judgment for alimony and is binding on the defendant. The defendant next made a motion to set aside the judgment of 4 January 1972 and the order of 16 June 1978. This motion was denied and defendant appealed.

Wilson and Redden, by Alice Eller Patterson, for plaintiff appellee.

White and Crumpler, by Harrell Powell, Jr. and G. Edgar Parker, for defendant appellant.

WEBB, Judge.

We believe we are governed by the case of *Hester v. Hester,* 239 N.C. 97, 79 S.E. 2d 248 (1953). That case involved an action for alimony without divorce. After an award of alimony *pendente lite,* the parties resumed the marital relationship. Our Supreme Court held that the resumption of the marital relationship voided the

order for alimony *pendente lite*, but left the case pending with the right of the plaintiff to make another motion for alimony when the parties separated for the second time. We believe the language of *Hester* makes it applicable to permanent alimony as well as alimony *pendente lite*. We hold that when the parties in the case sub judice resumed the marital relationship, it voided the order of 4 January 1972 requiring the defendant to pay alimony, and it was error for the court not to grant the defendant's motion.

It may be that plaintiff lost any right to alimony under G.S. 50-11 when the defendant obtained a divorce. The record does not disclose on what ground the defendant obtained the divorce on 31 October 1977. We note that Chapter 817 of the 1977 Session Laws provided as follows:

> Section 1. G.S. 50-6, as it appears in the 1976 Replacement of Volume 2A, is amended by adding the following sentences at the end thereof:
>
> "A plea of *res judicata* or of recrimination with respect to any provision of G.S. 50-5 shall not be a bar to either party obtaining a divorce on this ground: Provided that no final judgment of divorce shall be rendered under this section until the court determines that there are no claims for support or alimony between the parties or that all such claims have been fully and finally adjudicated."
>
> Sec. 2. This act shall become effective August 1, 1977, and shall not affect pending litigation.

If the defendant obtained the divorce under G.S. 50-6 and the divorce action was not pending on 1 August 1977, the divorce judgment may be subject to being set aside. There was an alimony action pending at the time the divorce decree was signed, and the court could not properly have found otherwise.

For the reasons stated in this opinion, we reverse the order of the district court denying defendant's motion to set aside the judgment of 4 January 1972.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES CLARENCE GULLEY

No. 7911SC1125

(Filed 20 May 1980)

Arson § 4.2— charge of burning uninhabited dwelling—inhabitants only temporarily absent—nonsuit proper

Defendant who was charged with the unlawful burning of an uninhabited dwelling pursuant to G.S. 14-62 was entitled to have his motion for nonsuit granted since the evidence tended to show that the mobile home burned was used by three people as their place of residence, and their temporary absence at the time of the fire did not make the dwelling an uninhabited house within the meaning of the statute.

APPEAL by defendant from *Lee, Judge.* Judgment entered 18 July 1979 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 16 April 1980.

Defendant was indicted for the unlawful burning of an uninhabited dwelling, G.S. 14-62. The State presented evidence that on 23 November 1978 the mobile home in which Janice Watson, her son, and Roger Watson lived was found to be on fire. An antifreeze can was burning outside. Soon after the fire was discovered, defendant got out of a car in the road and inquired whether anyone was in the trailer. Then he picked up the anitifreeze can, put it in his car, and drove away.

Defendant and Janice Watson had lived together until December of 1977. Several weeks prior to the fire defendant came beating on Ms. Watson's trailer and "hollered" that if she did not come out, he would burn her out.

No one was at home at the time of the fire. The county fire marshal who investigated the fire gave his opinion that "somebody had thrown something through the window and lighted the fire from the outside." Hydro-carbon fuel was found on the mattress where the fire started.

Defendant denied setting fire to the trailer, and presented alibi evidence. He was found guilty and sentenced to five years. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr. for the State.

DeMent, Redwine & Askew, by Johnny S. Gaskins, for defendant appellant.

ARNOLD, Judge.

" '(A) defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.' " *State v. Cooper*, 275 N.C. 283, 286, 167 S.E. 2d 266, 268 (1969). Defendant was charged under G.S. 14-62 with burning an "uninhabited dwelling house." The evidence presented at trial showed that Janice Watson, her son, and Roger Watson used the mobile home which was burned as their place of residence, and that they were temporarily absent, spending the Thanksgiving holiday in another state, at the time of the fire. Defendant contends that this evidence shows that the dwelling burned was inhabited, though unoccupied at the time of the fire, and that consequently there is a fatal variance between allegation and proof.

At common law the burning of the dwelling of another was the crime of arson, *State v. Cuthrell*, 235 N.C. 173, 69 S.E. 2d 233 (1952), and this common law definition remains in effect in North Carolina. *State v. Arnold*, 285 N.C. 751, 208 S.E. 2d 646 (1974). Common law arson results from the burning of a dwelling even if its occupants are temporarily absent at the time of the burning. 5 Am. Jur. 2d, Arson & Related Offenses § 17; *see* Session Laws 1979, c. 760, s. 5 (amending G.S. 14-58 effective 1 July 1980); *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971). By statute the legislature has made criminal other types of burning, *see* G.S. 14-59 *et seq.*, and it is under one of these statutes, G.S. 14-62, that defendant is charged. G.S. 14-62 is entitled "Burning of churches and certain other buildings" and applies to the burning of uninhabited houses, churches, warehouses, offices, barns, etc. Since a dwelling which is merely temporarily unoccupied falls within the definition of arson, and since uninhabited houses are grouped in G.S. 14-62 with other structures in which people do not reside, we find that the legislature meant something more than the temporary absence of the occupants when it created the separate crime of burning an "uninhabited" house.

Few North Carolina cases have addressed the meaning of "uninhabited," but in the early case of *State v. Clark*, 52 N.C. 167 (1859) (per curiam), the court agreed that a structure which "was built for a dwelling-house, and had once been occupied as such, but was untenanted at the time of the burning," was an uninhabited house. The court pointed out there that the higher penalty for arson resulted from "the peculiar jealousies of our people for protecting *the house* which is the home of the citizen." *Id.* at 168 (emphasis added). More recently, in the case of *State v. Long*, 243 N.C. 393, 90 S.E. 2d 739 (1956), the court noted that an uninhabited house is not subject to common law arson, and indicated that the temporary absence of the residents was a different subject.

Because we find that the temporary absence of the Watsons from their dwelling did not make the dwelling an "uninhabited house" within the meaning of G.S. 14-62, the evidence in this case did not establish defendant's guilt of the crime with which he was charged. Defendant was entitled to have his motion for nonsuit granted.

Reversed.

Judges HEDRICK and ERWIN concur.

CARL R. WILLIAMS v. THE COUNCIL OF THE NORTH CAROLINA STATE BAR; THE TENTH (10th) JUDICIAL DISTRICT BAR; WRIGHT T. DIXON, COUNCILOR; THE HONORABLE HENRY V. BARNETTE, JR., THE HONORABLE STAFFORD G. BULLOCK, THE HONORABLE GEORGE R. GREENE, THE HONORABLE JOHN H. PARKER, AND THE HONORABLE RUSSELL G. SHERRILL, III, ALL DISTRICT JUDGES; THE HONORABLE GEORGE F. BASON, CHIEF DISTRICT JUDGE; AND WILLIAM A. SMITH, JR., ATTORNEY AT LAW

No. 7910SC985

(Filed 20 May 1980)

Attorneys at Law § 10— attorney's failure to perfect appeal—no knowledge by attorney and judges of disciplinary rule violation

Plaintiff's allegation that defendant attorney and defendant district court judges knew that plaintiff's attorney had failed to perfect an appeal does not

support an inference that defendants had "knowledge of a clear violation of DR 1-102" which defendants should have reported to the State and District Bars pursuant to DR 1-103(A), since there are many legitimate reasons as to why an appeal may not be perfected.

APPEAL by plaintiff from *Smith (Donald I.), Judge.* Judgment entered 1 June 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 16 April 1980.

Plaintiff alleges that in an earlier case in which he was defendant, and which was decided against him, his counsel, who is not a defendant here, failed to perfect an appeal. He seeks an injunction requiring, among other things, that counsel who file motions to dismiss for failure of their opponents to perfect an appeal on time report such failure to the State and District Bars; that these Bars take appropriate action when such dismissals recur; and that District Judges inquire about the reasons for such dismissals in their courts and bar negligent attorneys from practicing. Defendants moved to dismiss for failure to state a claim upon which relief could be granted, and this motion was granted. Plaintiff appeals.

Carl. R. Williams, plaintiff appellant, appearing pro se.

Attorney General Edmisten, by Special Deputy Attorney General Jacob L. Safron, for defendant appellee judges.

Carter G. Mackie for defendant appellee Smith.

H. D. Coley, Jr., for defendant appellees the State and District Bars and Dixon.

ARNOLD, Judge.

Plaintiff alleges that in the case of *Williams v. Williams* his appeal was dismissed because his attorney failed to perfect the appeal on time, though plaintiff specifically asked that the appeal be perfected. Plaintiff seeks injunctive relief against the defendants here on the basis that defendants Smith and the District Judges "by necessity . . . had some knowledge of such events," and that their failure to act on this knowledge violated the North Carolina Code of Professional Responsibility. Plaintiff makes no allegation that defendants Dixon, the State Bar, and the District Bar even had knowledge of the failure to perfect, and as to them

his complaint clearly fails to state a claim upon which relief can be granted.

Assuming *arguendo* that a failure to comply with the Code of Professional Responsibility can be the basis for a civil action, we find that plaintiff has failed to state a claim against defendants Smith and the District Judges as well. Plaintiff relies upon DR 1-102(A)(5): "A lawyer shall not . . . [e]ngage in professional conduct that is prejudicial to the administration of justice," and DR 1-103(A): "A lawyer possessing unprivileged knowledge of a clear violation of DR 1-102 should report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." The allegation that these defendants knew that plaintiff's attorney had failed to perfect an appeal does not, without more, support the inference that they had "knowledge of a clear violation of DR 1-102." Plaintiff makes no allegation that these defendants knew that the failure to perfect was against his wishes. There undoubtedly are a number of legitimate reasons why a perfected appeal is not the end result of every notice of appeal.

Plaintiff's action properly was dismissed.

Affirmed.

Judges HEDRICK and ERWIN concur.

EMPLOYERS MUTUAL CASUALTY CO. v. TIMOTHY MITCHELL GRIFFIN

No. 7926SC962

(Filed 20 May 1980)

1. Insurance § 135.1— fire insurance—fire caused by church member—insurer not subrogated to rights of repairer or mortgagee

Plaintiff insurer was not entitled to recover from defendant, a church member whose purported negligence caused the fire in question, on the ground that plaintiff was the subrogee of the company which repaired the fire damage and the mortgagee, since the repair company had no rights against defendant to which plaintiff might be subrogated, and since the mortgagee had rights against defendant, but plaintiff was not entitled to be subrogated to those rights.

2. Insurance § 136.1; Religious Societies and Corporations § 3.2— fire insurance —fire caused by church member—no right of church to sue member—no right of insurer to sue member

An unincorporated church may not sue one of its members for damages caused by the member's tortious conduct; therefore, because a church could not sue defendant, one of its members, whose purported negligence caused the fire in question, plaintiff insurer, as subrogee of its insured, the church, had no right to recover from defendant the amount paid the church under its fire insurance policy.

APPEAL by defendant from *Riddle, Judge.* Judgment entered 26 June 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 April 1980.

Plaintiff issued a fire insurance policy to the trustees of St. Paul Wesleyan Church, an unincorporated association. While the policy was in effect the church property was damaged by a fire which was caused by defendant, a member of the church. The church filed a claim under its policy with plaintiff, and plaintiff issued its draft for the claimed amount, payable to the church, to Southeastern Fire Services, Inc., which repaired the fire damage, and to Home Federal Savings & Loan Association, the mortgagee of the church property. Plaintiff now alleges that it is subrogated to the rights of the entities to which it made payment, and it seeks to recover from defendant for his purported negligence in causing the fire.

The trial court found facts and concluded that defendant's negligence caused the fire, that plaintiff was subrogated to the rights of the church and the mortgagee, and that plaintiff is entitled to recover from defendant. Defendant appeals.

Myers, Ray & Myers, by John F. Ray, for plaintiff appellee.

Caudle, Underwood & Kinsey, by C. Ralph Kinsey, Jr. and Scott C. Gayle, for defendant appellant.

ARNOLD, Judge.

Defendant's motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) was denied by the trial court. We find that defendant was entitled to have this motion granted, since plaintiff's evidence failed to show that it had a right to relief. *See Wells v. Sturdivant Life Ins. Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971).

[1] Plaintiff's position in this lawsuit is that it is entitled to recovery from defendant because it is the subrogee of the church, the mortgagee, and the company that repaired the fire damage. We find, however, that plaintiff is not the subrogee of either the repair company or the mortgagee.

The repair company has no rights against the defendant to which plaintiff might be subrogated. The mortgagee has rights against the defendant, *see Edwards v. Meadows*, 195 N.C. 255, 141 S.E. 595 (1928), but plaintiff has cited no authority, and we have found none, which indicates that plaintiff is entitled to be subrogated to those rights. The general rule is that upon payment of a loss the insurer is entitled to be subrogated to any right the *insured* may have against a third party who caused the loss, *Milwaukee Ins. Co. v. McLean Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25 (1962), and the mortgagee here is not an insured under plaintiff's policy.

[2] Having determined that plaintiff is not the subrogee of either the mortgagee or the repair company, we reach the question of whether plaintiff, as the subrogee of the insured church, has shown a right to relief. This question turns upon whether an unincorporated association may sue a member of the association in tort. The answer is no.

In *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), this court addressed for the first time the question of whether a member of an unincorporated church may sue the church in tort, and determined that a member of such a church is engaged with the other members in a joint enterprise and may not recover from the church damages for the tortious conduct of another member. This holding was followed in *Williamson v. Wallace*, 29 N.C. App. 370, 224 S.E. 2d 253, *cert. denied* 290 N.C. 555, 226 S.E. 2d 514 (1976). It is our view that the reverse is also true: an unincorporated church may not sue one of its members for damages caused by the member's tortious conduct.

At common law an unincorporated association is merely a body of individuals and not an entity, and it has no capacity to sue or be sued. *Stafford v. Wood*, 234 N.C. 622, 68 S.E. 2d 268 (1951). G.S. 1-69.1 allows such an association to sue and be sued under its common name, but does not affect the character of the

association as merely the aggregate of its members. Any attempt by the aggregate, which includes the defendant here, to sue defendant, a part of itself, in tort necessarily must fail, since a person cannot be both plaintiff and defendant in the same action. *Pearson v. Nesbit,* 12 N.C. 315 (1827); 59 Am. Jur. 2d, Parties § 6.

Plaintiff insurer, as the subrogee of its insured, takes only the rights which the church would have against defendant. *Dowdy v. Southern Ry. Co., Inc.,* 237 N.C. 519, 75 S.E. 2d 639 (1953). Since we have determined that the church has no rights against this defendant, plaintiff has no right to relief. The denial of defendant's motion to dismiss was error.

Reversed.

Judges HEDRICK and ERWIN concur.

MARY ELSIE STANSFIELD v. BRENDA MAHOWSKY D/B/A SOUTH BROADWAY DAMN YANKEES

No. 7920SC1055

(Filed 20 May 1980)

Negligence § 57.11— customer tripping over fallen sign—absence of negligence—contributory negligence

In an action to recover for injuries sustained by plaintiff when she tripped over a fallen sign at defendant's restaurant, plaintiff's forecast of evidence on motion for summary judgment failed to show negligence on the part of defendant and disclosed that plaintiff was contributorily negligent as a matter of law where it showed that the front door of the restaurant was held open by a sign on a tripod; while in the restaurant plaintiff told her husband that the sign had blown down but did not tell any of defendant's employees; none of the employees knew the sign had fallen; plaintiff left the restaurant 10 minutes later but forgot about the fallen sign and tripped over it and fell; and the day was clear and the sign was not concealed in any way.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 31 August 1979 in Superior Court, MOORE County. Heard in the Court of Appeals 24 April 1980.

Plaintiff seeks to recover for injuries she sustained when she tripped over a fallen sign at defendant's restaurant. Defendant

answered that plaintiff's own negligence caused her injury. Defendant moved for summary judgment, which was granted, and plaintiff appeals.

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

Anderson, Broadfoot & Anderson, by Henry L. Anderson, Jr., for defendant appellee.

ARNOLD, Judge.

The sole issue on this appeal is whether summary judgment for defendant was proper. We are well aware of the many cases which state that only in an exceptional negligence case is summary judgment appropriate, since even where the facts are undisputed it is usually for the jury to apply the standard of the reasonably prudent man. See, *e.g., Edwards v. Means,* 36 N.C. App. 122, 243 S.E. 2d 161, *cert. denied* 295 N.C. 260, 245 S.E. 2d 777 (1978). It is also true, however, that summary judgment is proper in a negligence case where the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law. *Phillips v. Texfi Industries, Inc.,* 44 N.C. App. 66, 259 S.E. 2d 769 (1979).

In the present case, the depositions and affidavit offered in support of the motion show the following: Just before noon plaintiff joined her husband in defendant's restaurant. When she arrived the front door was open, and a sign on a tripod was leaning against the door. Plaintiff sat with her husband at the bar for 15 to 20 minutes, and while she was there she saw the sign and tripod blow down onto the sidewalk. She told her husband that the sign had blown down but did not tell any of defendant's employees. None of the employees knew that the sign had fallen.

Plaintiff left the restaurant about 10 minutes after the sign fell. It was a clear day and the sign was not concealed in any way. When plaintiff went out she "had just forgotten all about it. If I had been looking down at the ground, I would have seen it . . . ." Right after plaintiff went out the door she tripped over the sign and fell.

Upon these facts, summary judgment for defendant was proper. Plaintiff has failed to show any evidence that defendant was

negligent. *Cf. Phillips v. Texfi Industries, Inc., supra.* Furthermore, the evidence establishes that plaintiff was contributorily negligent as a matter of law. By her own testimony she saw the sign and tripod fall, she saw it lying on the ground after it fell, and only 10 minutes later she tripped over it because she had forgotten it was there. Upon these facts a jury verdict that plaintiff was not contributorily negligent could not stand.

The order of the trial court is

Affirmed.

Judges HEDRICK and ERWIN concur.

EDGAR J. GURGANUS, JOHN H. GURGANUS AND CHARLES H. MANNING v. A. TOBY HEDGEPETH

No. 792SC1026

(Filed 20 May 1980)

Venue § 5.1— action involving real property—county where land located as proper venue

In an action by plaintiff lessees to have the court declare that they held a leasehold interest in a space in a trailer park, defendant was entitled to a change of venue as a matter of right to the county where the property in question was located. G.S. 1-76.

APPEAL by defendant from *Strickland, Judge.* Order entered 31 July 1979 in Superior Court, MARTIN County. Heard in the Court of Appeals 22 April 1980.

Plaintiffs allege that in 1978 they leased from defendant a space in a trailer park in Dare County, and that although they have complied with the terms of the lease, defendant has advised them to vacate the premises, thereby breaching the contract. They seek specific performance, the removal of the "cloud upon their leasehold title," or, in the event they receive neither of these, damages.

Defendant moved to remove this action from Martin County to Dare County. The court found that this is a transitory rather than a local action and denied defendant's motion.

Defendant appeals.

Gurganus & Bowen, by Edgar J. Gurganus, for plaintiff appellees.

Kellogg, White & Evans, by Thomas N. Barefoot, for defendant appellant.

ARNOLD, Judge.

G.S. 1-76(1) provides that where an action is for "[r]ecovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest," the action must be tried in the county in which the property is situated. In *Sample v. Towe Motor Company, Inc.*, 23 N.C. App. 742, 209 S.E. 2d 524 (1974), we found that this statute applied to facts much the same as those now before us. There, plaintiff lessors, alleging that defendant had breached the lease, notified defendant to vacate the premises and asked the court to order the lease terminated. We said: "The lease . . . vested defendant with 'an estate or interest' in real property. The action seeks to terminate that interest and will require the Court to determine the respective rights of the parties with respect to the leasehold interest." *Id.* at 743, 209 S.E. 2d 525. We do not find the present case distinguishable merely because the plaintiffs in this action are the lessees rather than the lessors. The thrust of plaintiffs' action is to have the court declare that they still hold a leasehold interest in the property, and such an action falls within G.S. 1-76.

The cases relied upon by plaintiffs are distinguishable upon their facts. *Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 201, 154 S.E. 2d 320 (1967), involved the construction of a building near plaintiff's store, in alleged violation of plaintiff's lease, and the court noted that the plaintiff did not seek a judgment that would affect an interest in land. *Thompson v. Horrell*, 272 N.C. 503, 158 S.E. 2d 633 (1968), was an action for damages for breach of a contract to construct a house, as was *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E. 2d 772 (1970). Neither of these involved a determination relating to any estate or interest in land.

Defendant is entitled to a change of venue as a matter of right. The order of the trial court is

Reversed.

Judges HEDRICK and ERWIN concur.

STATE OF NORTH CAROLINA v. CYNTHIA P. BROOKS

No. 7927SC1164

(Filed 20 May 1980)

Homicide § 30.3— improper submission of involuntary manslaughter—prejudicial error

The trial court in a second degree murder case committed prejudicial error in submitting an issue of involuntary manslaughter to the jury where there was evidence of self-defense and no evidence of involuntary manslaughter.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 19 July 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 23 April 1980.

Defendant was tried for second degree murder. Some of the evidence tended to show that on 7 April 1979 the defendant and her husband had been separated for one week. On that day, he came to her home, placed his hand around her throat, released her, and then threatened her with a knife. He then went outside the house. He returned to the inside of the house and threatened her with the "stick end of the broom." Defendant, at that time, shot her husband causing his death.

The court charged the jury it could find the defendant guilty of second degree murder, voluntary manslaughter, or involuntary manslaughter. From a sentence imposed upon a verdict of guilty of involuntary manslaughter, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders and Assistant Attorney General Thomas B. Wood, for the State.

Robert H. Forbes for defendant appellant.

WEBB, Judge.

The defendant assigns as error the submission to the jury of the charge of involuntary manslaughter. After the case sub judice

was tried, our Supreme Court rendered a decision in *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980). As applicable to this case, *Ray* held that if there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second degree murder. The evidence as to the shooting in the case sub-judice came from the testimony of defendant. She testified as follows:

> "When he picked up the broom I ran to my son's room. The gun was kept right beside the door. I grabbed this gun up and turned around. I can't remember; I was terribly upset. I was in fear of serious bodily injury. . . . I grabbed the gun; I can't remember if it was cocked. . . . I don't know where I shot him. I was upset and didn't look. I ran. I don't know how he was coming at me with the broom. . . . All I know is I was scared and didn't mean to shoot him. . . .
>
> . . . I don't know how many steps he took. As soon as I shot, I guess I dropped the gun and ran. I don't know how close he was."

Defendant also testified:

> "I don't recall firing the gun on this day. . . . I didn't mean to hurt or kill him; I just meant to scare him or something."

We hold that the only conclusion that can be drawn from this testimony is that defendant pointed the gun at the deceased and shot him while he was advancing toward her. This could not be involuntary manslaughter. *See State v. Ray, supra* and *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978).

The defendant has been acquitted of all degrees of homicide other than involuntary manslaughter. We have held there was not sufficient evidence of involuntary manslaughter to submit to the jury. The defendant must be discharged.

Reversed and remanded.

Judges MARTIN (Robert M.) and HILL concur.

CURRITUCK COUNTY v. GEORGE H. WILLEY AND MARTHA J. WILLEY

No. 791DC1078

(Filed 20 May 1980)

Counties § 5.1; Municipal Corporations § 30.12— zoning ordinance— prohibition of mobile home smaller than stated size

A county zoning ordinance prohibiting mobile homes with dimensions less than 24′ x 60′ does not violate the equal protection clause of the Fourteenth Amendment to the U. S. Constitution or Art. I, § 19 of the N. C. Constitution, since mobile homes are sufficiently different from other types of housing so that there is a rational basis for placing different requirements upon them.

APPEAL by defendant from *Chaffin, Judge.* Judgment entered 27 September 1979 in District Court, CURRITUCK County. Heard in the Court of Appeals 25 April 1980.

Plaintiff filed the present action alleging the feme defendant was in violation of plaintiff's zoning ordinance in that defendant had placed a double-wide mobile home with dimensions less than 24′ x 60′ on her property. The zoning ordinance states:

> (a) Permitted uses of buildings, structures and land: Dwellings, one-family detached including modular and double-wide mobile homes with minimum dimensions of 24′ x 60′, but no other mobile homes.

Defendant answered, admitting that her mobile home had dimensions less than those prescribed in the ordinance. The case came on for trial with the trial court concluding that the ordinance applied to defendant's property, was valid, constitutional and enforceable. The feme defendant (George Willey is now deceased) appealed.

White, Hall, Mullen, Brumsey & Small, by William Brumsey III, for plaintiff appellee.

J. Kenyon Wilson, Jr. and M. H. Hood Ellis for defendant appellant.

HILL, Judge.

The issue we must decide on appeal is whether the ordinance barring mobile homes, such as defendant's with dimensions of less than 24′ x 60′, must be struck down as violative of the equal pro-

tection clause of the Fourteenth Amendment to the United States Constitution, or Article I, § 19 of the North Carolina Constitution. We find no violation.

> 'A municipal ordinance is presumed to be valid, and the burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it.' 5 Strong, N.C. Index 2d, Municipal Corporations, § 8, p. 626.

State v. Martin, 7 N.C. App. 18, 20, 171 S.E. 2d 115 (1969). "If a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted." (Citation omitted.) *Martin*, at p. 20. Defendant ". . . must carry the burden of showing that [the ordinance] does not rest upon any reasonable basis, but is essentially arbitrary;" and "[I]f any state of facts reasonably can be conceived that would sustain [the ordinance], the existence of that state of facts at the time the [ordinance] was enacted must be assumed." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 79, 55 L.Ed. 369, 31 S.Ct. 337 (1910).

We find that defendant has not met her burden. It has been held in *State v. Martin*, 7 N.C. App. 18, 171 S.E. 2d 115 (1969), and *City of Asheboro v. Auman*, 26 N.C. App. 87, 214 S.E. 2d 621, *cert. denied* 288 N.C. 239 (1975), that mobile homes can be restricted by zoning ordinances to mobile home parks. We hold that mobile homes are sufficiently different from other types of housing so that there is a rational basis for placing different requirements upon them as was done by Currituck County.

Town of Conover v. Jolly, 277 N.C. 439, 177 S.E. 2d 879 (1970), relied on by the appellant, did not involve a zoning ordinance. In that case, a municipality had forbidden mobile homes within the corporate limits. Our Supreme Court held the General Assembly had not given this power to municipalities. *Conover* has no application to the case *sub judice*.

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

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 MAY 1980

AGRI-CHEMICALS v. VANDIFORD No. 798SC1030	Lenoir (77CVS456)	No Error
ENTERPRISES v. DAN-KAY No. 7928SC222	Buncombe (78CVS18)	Affirmed
FERRIER v. SUMMERS No. 794DC1025	Onslow (77CVD300)	No Error
McFADDIN v. JOHNSON No. 7926SC949	Mecklenburg (77CVS1719)	No Error
MOORE v. GARLAND No. 7917DC888	Surry (78CVD411)	Affirmed
STATE v. CASSIDY No. 8016SC2	Robeson (79CR2618) (79CR2627) (79CR2628)	No Error
STATE v. CHANDLER No. 7924SC1122	Watauga (78CRS5679)	New Trial
STATE v. FULLERTON No. 7915SC1191	Orange (79CRS5001) (79CRS5003)	No Error
STATE v. JARMAN No. 794SC1102	Onslow (79CRS8558) (79CRS8560)	No Error
STATE v. McCRIMMON No. 7918SC996	Guilford (78CRS64778)	No Error
STATE v. MacMILLIAN No. 7925SC1089	Catawba (79CRS4924)	No Error
STATE v. MALONE No. 7927SC886	Cleveland (79CRS2508)	No Error
STATE v. MOSLEY No. 7921SC569	Forsyth (78CRS32408)	Affirmed
STATE v. RHODES No. 793SC1145	Pitt (78CRS9345)	Reversed
STATE v. WEBB No. 809SC26	Person (79CRS2297)	No Error

APPENDIX

AMENDMENT TO
SUPERIOR - DISTRICT
COURT RULES

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS SUPPLEMENTAL TO THE RULES OF CIVIL PROCEDURE ADOPTED PURSUANT TO G.S. 7A-34

Effective July 1, 1980

Rule 2

CALENDARING OF CIVIL CASES

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and the first full week following the 4th of July or such other weeks as the Senior

Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) within twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.*

The amendment to Rule 2 was adopted by the Court in conference on June 3, 1980 to become effective immediately. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and of the Court of Appeals and by distribution of the amendment by mail to the Clerk of Court in each county of the state.

Britt, J.
For the Court.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

ABATEMENT AND REVIVAL

§ 3. In General

Trial court's findings of fact were sufficient to support its order staying further proceedings in an action for breach of a management contract to permit a trial of the cause in S.C. *Management, Inc. v. Development Co.*, 707.

Facts determining applicability of the doctrine of forum non conveniens. *Ibid.*

ABDUCTION

§ 1. Abduction of Children

Where defendant father contracted away his common law right to custody of his minor child by executing an agreement giving custody to plaintiff mother, plaintiff had a right to institute an action against defendant and his parents for abduction of the child while he was in her custody. *La Grenade v. Gordon*, 329.

ACCORD AND SATISFACTION

§ 1. Nature and Essentials of Agreement

Plaintiff's cashing of a check with the words "painting in full" marked on the face of the check constituted an accord and satisfaction as a matter of law. *Barber v. White*, 110.

In an action to recover on an account, plaintiff's retention of a cashier's check tendered by defendant, though the check was not deposited, was sufficient acceptance of a lesser amount than plaintiff claimed was due it to result in an accord and satisfaction or compromise and settlement. *FCX, Inc. v. Oil Co.*, 755.

ACCOUNTS

§ 2. Accounts Stated

Trial court erred in entering summary judgment for plaintiff where there was a material question of fact as to whether a meeting between the parties resulted in an account stated as to the totality of the transaction between the parties or only as to the balance of plaintiff's ledger sheets. *FCX, Inc. v. Oil Co.*, 755.

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

Appellants cannot obtain judicial review of a claim pertaining to the inadequacy of the environmental impact statement for a proposed federal-aid highway under either federal statutes or the N.C. Environmental Protection Act unless they show that the State Dept. of Transportation has requested and received location approval for the highway from the Federal Highway Administration. *Orange County v. Dept. of Transportation*, 350.

Appellants' failure to exhaust their administrative remedy of appeal to a hearing officer appointed by the Governor did not bar judicial review of a decision of the State Board of Transportation concerning the location and environmental impact of a proposed highway since the administrative remedy prescribed by environmental regulations is inadequate. *Ibid.*

Plaintiffs were all "aggrieved" by a decision of the State Board of Transportation on the location of an interstate highway within the meaning of G.S. 150A-43. *Ibid.*

APPEAL AND ERROR—Continued

§ 9. Moot Questions

Questions raised by parents of an allegedly neglected child concerning the validity of a proceeding which resulted in the placement of custody in the county department of social services were rendered moot since, pending appeal, the district court returned legal custody of the child to her parents. *In re Craddock*, 113.

§ 24.1. Form of Exceptions and Assignments of Error

Exceptions not preserved and set forth as required by the Rules of Appellate Procedure are deemed abandoned. *Equipment Co. v. Troitino and Brown, Inc.*, 343.

§ 39.1. Time for Docketing Appeal

Appeal is dismissed where the record on appeal was not filed in the appellate court within 150 days from the giving of notice of appeal. *Construction Co. v. Roofing Co.*, 634.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

In an action to recover for breach of contract for the construction of a mobile home park, defendant made an appearance when he negotiated a continuance in order to gain time to comply with the contract. *Webb v. James*, 551.

Defendant made a general appearance in a child custody action when his counsel participated in a conference with plaintiff and the district court judge pertaining to an order enjoining defendant from taking the child out of the jurisdiction, and the court had jurisdiction over defendant's person even though no service of process was made upon defendant or his counsel. *Williams v. Williams*, 787.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

The Federal Arbitration Act supersedes conflicting state law notwithstanding a choice of law provision in the contract in question. *Bd. of Education v. Shaver Partnership*, 573.

The Federal Arbitration Act did not apply to a contract between the parties, the essence of which was for defendant to provide architectural services to plaintiff, since the evidence did not show that the contract was a transaction involving commerce. *Ibid.*

ARREST AND BAIL

§ 3.8. Legality of Arrest for Drunk Driving

An officer had probable cause to make a warrantless arrest of defendant. *S. v. Spencer*, 507.

§ 5.1. Physical Force in Making Arrest

Plaintiff could not recover from defendant city and its police officers for the death of deceased who was shot and killed by city police officers while attempting to escape after an armed robbery at a motel, even if deceased was induced to participate in the armed robbery by the city's paid informant. *Hinton v. City of Raleigh*, 305.

ARSON

§ 3. Competency of Evidence

An expert in arson investigation could properly give his opinion that a fire was of incendiary origin. *S. v. Sheetz,* 641.

§ 4.1. Sufficient Evidence

The State's evidence was sufficient for the jury in a prosecution for unlawfully burning a building used in carrying on a trade. *S. v. Sheetz,* 641.

§ 4.2. Insufficient Evidence

Defendant who was charged with the unlawful burning of an uninhabited dwelling was entitled to have his motion for nonsuit granted since the evidence tended to show that the mobile home burned was used by three people as their place of residence. *S. v. Gulley,* 822.

ATTORNEYS AT LAW

§ 7. Compensation and Fees

Trial court improperly awarded plaintiff attorney's fees in an action to recover for breach of a lease agreement. *Leasing Corp. v. Myers,* 162.

§ 10. Disbarment Generally

Plaintiff's allegation that defendant attorney and defendant district court judges knew that plaintiff's attorney had failed to perfect an appeal does not support an inference that defendants had knowledge of a violation of disciplinary rules which defendants should have reported to the State and District Bars. *Williams v. State Bar,* 824.

AUTOMOBILES

§ 6.3. Defective Brakes

Trial court properly entered summary judgment for defendant in an action to recover for injuries allegedly caused by defendant's negligent installation of the brake system on a truck sold to plaintiff's employer and defendant's failure to use reasonable care in maintaining the brake system. *Spivey v. Motor Corp.,* 313.

§ 63.1. Negligence in Striking Children

Evidence of defendant's negligence was insufficient to be submitted to the jury where it tended to show that a child darted into the path of her car. *Colson v. Shaw,* 402.

§ 89.4. Last Clear Chance in Action by Pedestrian

In an action to recover damages sustained by plaintiff pedestrian when she was struck by a car, the question of whether the trial court erred in failing to submit an issue as to last clear chance was rendered moot by the jury's verdict finding no negligence on the part of defendants. *Dodd v. Wilson,* 601.

§ 90.1. Instructions on Violation of Safety Statutes

Trial court properly charged the jury that by statute a trailer was required to be equipped with a certain number of lights, if they believed the witnesses they would find that the trailer was properly equipped, and the issue of negligence they must determine was whether the lights were lighted at the time of the collision. *Harris v. Bridges,* 207.

AUTOMOBILES—Continued

§ 91.2. Issues as to Negligence and Contributory Negligence

Defendant was not prejudiced by the fact that all parties argued the issue of contributory negligence but that issue was not submitted to the jury, since the jury found defendant negligent but awarded plaintiff no damages, and the court set aside the verdict on the damages issue. *Harris v. Bridges*, 207.

§ 92.4. Insufficient Evidence of Negligence in Passenger's Action

In an action to recover for injuries sustained by a child who alighted from defendant's car and ran into the path of another car, defendant driver was not under a duty to supervise the child in crossing the street. *Colson v. Shaw*, 402.

§ 94.7. Contributory Negligence by Passenger; Knowledge That Driver Is Intoxicated

Evidence was insufficient to show that plaintiff was contributorily negligent as a matter of law by riding in a vehicle driven by defendant knowing defendant was intoxicated. *Harris v. Bridges*, 207.

§ 126.3. Breathalyzer Tests; Manner of Administering Test

The results of a breathalyzer test were not inadmissible because the breathalyzer operator performed preliminary steps of setting up the machine before defendant's attorney arrived to view the testing procedure. *S. v. Martin*, 514.

The State was not required to establish that it had followed certain procedures to maintain breathalyzer equipment before evidence of tests conducted with the equipment was admissible. *Ibid.*

§ 126.4. Breathalyzer Tests; Warnings to Defendant

In a prosecution for driving under the influence, trial court did not err in allowing into evidence questions asked by the breathalyzer operator and defendant's answer as to whether defendant was operating the vehicle when it was involved in an accident since the questioning did not affect the impartiality of the breathalyzer operator and since the operator was not required to remind defendant of his Miranda rights. *S. v. Spencer*, 507.

§ 127.1. Sufficient Evidence of Driving Under the Influence

Evidence was sufficient for the jury in a prosecution for driving under the influence where it tended to show that defendant had been nipping all day and his breathalyzer test indicated a blood alcohol level of .23%. *S. v. Spencer*, 507.

§ 131.2. Instructions on Failing to Stop After Accident

Trial court erred in instructing the jury that defendant would have violated G.S. 20-166(c) if he drove a vehicle involved in an accident with a pedestrian resulting in her death and he failed to give the required information to the driver of the vehicle which defendant sideswiped immediately after striking the pedestrian. *S. v. Gatewood*, 28.

§ 134. Unlawful Taking of Automobile

The crime of unauthorized use of a motor vehicle is a lesser included offense of larceny of an automobile, and trial court in this prosecution for larceny of an automobile erred in refusing to instruct on unauthorized use of a motor vehicle. *State v. Ross*, 338.

BAILMENT

§ 5. Rights in Regard to Third Persons

Plaintiff was not estopped to assert her title to a car against defendant, even if he were an innocent purchaser, merely because she left it in the possession of a third person, since she did not give the third person any indicia of ownership of the automobile. *Mabe v. Dillon*, 340.

BASTARDS

§ 10. Civil Action to Establish Paternity

The three-year statute of limitations for an action to establish the paternity of an illegitimate child violates the Equal Protection Clause of the U.S. Constitution. *Cogdell v. Johnson*, 182.

BIGAMY

§ 2. Prosecutions Generally

In a bigamy prosecution in which the crucial determination was whether the person before whom a purported prior marriage of defendant was solemnized was an ordained minister of any religious denomination or a minister authorized by his church, the determination of whether there was a church or a religious denomination was not for the jury since it was a matter of ecclesiastical law. *S. v. Lynch*, 608.

BILLS AND NOTES

§ 20. Sufficiency of Evidence in Action on Note

In an action to recover on a note on which individual defendants were allegedly liable as endorsers, the fact that the note had at one time been marked "paid" coupled with one defendant's testimony that he knew the note had been paid, raised a genuine issue of material fact as to whether the note had been satisfied. *Bank v. Construction Co.*, 736.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.8. Breaking and Entering and Larceny at Residential Premises

The State's evidence was sufficient to support conviction of the male defendant for breaking and entering a home and larceny of guns therefrom but was insufficient to support conviction of the female defendant on those charges. *S. v. Adams*, 57.

State's evidence was sufficient for the jury on the issue of defendant's guilt of breaking and entering a home and larceny of property therefrom. *S. v. Sprinkle*, 802.

CARRIERS

§ 10.1. Injury to Perishable Goods in Transit

Plaintiff's evidence was sufficient for the jury on the issue of negligence on the part of defendant common motor carrier in an action to recover for damages to frozen pizzas being transported by defendant to plaintiff's consignee. *Home Products Corp. v. Motor Freight, Inc.*, 276.

COLLEGES AND UNIVERSITIES

§ 1. State Institutions

Plaintiff was entitled to have his case submitted to the jury in an action to recover his salary as an instructor at Fayetteville Technical Institute. *McDonald v. Technical Institute*, 77.

COMPROMISE AND SETTLEMENT

§ 5. Sufficiency of Evidence

In an action to recover on an account, plaintiff's retention of a cashier's check tendered by defendant, though the check was not deposited, was sufficient acceptance of a lesser amount than plaintiff claimed was due it to result in an accord and satisfaction or compromise and settlement. *FCX, Inc. v. Oil Co.*, 755.

CONSTITUTIONAL LAW

§ 7.1. Delegation of Powers to State Administrative Agency

The delegation of authority to the N. C. Dept. of Transportation and the Board of Transportation to plan and construct an interstate highway did not constitute an unlawful delegation of legislative authority. *Orange County v. Bd. of Transportation*, 350.

§ 20. Equal Protection

The three-year statute of limitations for an action to establish the paternity of an illegitimate child violates the Equal Protection Clause of the U. S. Constitution. *Cogdell v. Johnson*, 182.

§ 24.7. Service of Process on Nonresidents

The courts of this State had statutory jurisdiction of an action to recover the purchase price of goods shipped by plaintiff from N. C. to defendants in S. C., but the nonresident defendants had insufficient minimum contacts with this State so that the assumption of in personam jurisdiction over defendants by the courts of this State would violate due process. *Phoenix America Corp. v. Brissey*, 527.

A Pennsylvania resident who had property in N. C. did not have sufficient contacts with this State to permit the N. C. courts to have personal jurisdiction in an action by a Georgia corporation to enforce a contract which was not negotiated or executed in N. C. and which involved the development of real property located in S. C. *Trust Co. v. Eways*, 466.

§ 28. Due Process in Criminal Proceedings

It is not fundamentally unfair or prejudicial to a defendant that evidence is obtained by police officers outside their territorial jurisdiction while conducting an undercover investigation. *S. v. Afflerback*, 344.

§ 30. Discovery; Access to Evidence

There was no merit to defendant's contention that an oral statement allegedly made by him to a police officer was wrongfully withheld from defense counsel during discovery and therefore should have been excluded from evidence. *S. v. Lang*, 138.

§ 31. Affording Accused the Basic Essentials for Defense

Trial court did not err in denying the indigent defendant's motion for appointment of a private investigator. *S. v. Carson*, 99.

CONSTITUTIONAL LAW—Continued

Police officers are under no duty to take any particular course of action when investigating a crime, and their failure to follow all investigative leads and to secure every possible bit of evidence is not prejudicial error. *S. v. Lang*, 138.

§ 34. Double Jeopardy

Respondents were not placed in double jeopardy when the trial court continued juvenile delinquency hearings after the State had presented one witness in order to give the State opportunity to bring in additional witnesses where the same judge heard all the evidence and rendered his findings at the conclusion of the entire proceeding. *In re Hunt*, 732.

§ 48. Effective Assistance of Counsel

A defendant charged with crime against nature was not denied the effective assistance of counsel because of the failure of his counsel to cross-examine the victim about a letter the victim wrote to the court stating he wished to have the charge against defendant dropped, or because of the failure of his counsel to move for nonsuit at the close of the State's evidence and the close of all the evidence. *S. v. Arsenault*, 7.

The existence of an actual conflict of interest between two codefendants who are tried in a joint trial and represented by two members of the same law firm constitutes a denial of effective assistance of counsel when actual prejudice is shown. *Ibid.*

Failure of defendant's counsel to move for a severance of his trial from that of a codefendant did not amount to a denial of effective assistance of counsel. *Ibid.*

There was no merit in defendant's contention that he was denied effective assistance of counsel because he and his wife were represented by a single appointed attorney in a felonious assault case and that a conflict of interest existed because he was prevented by G.S. 8-57 from presenting exculpatory evidence which would have tended to incriminate his wife. *S. v. McKenzie*, 34.

§ 50. Speedy Trial Generally

The 120-day period of the Speedy Trial Act for a trial de novo in superior court upon appeal from district court begins at the end of the first regularly scheduled criminal session of superior court which commences after defendant gives notice of appeal from the district court. *S. v. Morehead*, 39.

Where criminal charges are erroneously dismissed upon defendant's motion under the Speedy Trial Act and the court's ruling is thereafter reversed by the appellate division, trial of the case must begin within 120 days after the opinion of the appellate division is certified to the superior court. *Ibid.*

The State was in compliance with the provisions of the Speedy Trial Act where 49 days elapsed between defendant's indictment and trial. *S. v. Rice*, 118.

Where a criminal charge is dismissed without prejudice upon defendant's motion under the Speedy Trial Act, trial of defendant upon further prosecution by the State must begin within 120 days from the date the order is entered dismissing the charge without prejudice. *S. v. Ward*, 200.

§ 52. Requirement that Delay be Intentional and Prejudicial

In order for defendant to carry the burden of his motion to dismiss for preindictment delay violating his due process rights, he must show both actual and substantial prejudice from the preindictment delay and that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant. *S. v. Davis*, 778.

CRIMINAL LAW—Continued

§ 75.5. Requirement that Defendant be Warned of Constitutional Rights Before Interrogation

Defendant's incriminating statements to officers were competent where defendant was given the Miranda warnings, and where certain inconsistent statements made by defendant at the crime scene were not the result of interrogation. *S. v. Harris*, 284.

§ 75.8. Constitutional Warnings Before Resumption of Interrogation

An officer was not required to repeat defendant's Miranda warnings before he questioned defendant one hour after the warnings had been given. *S. v. Spencer*, 507.

§ 75.15. Mental Capacity to Confess; Intoxication

The fact that defendant was intoxicated at the time of his confession did not require its exclusion. *S. v. Spencer*, 507.

§ 84. Evidence Obtained by Unlawful Means

It is not fundamentally unfair or prejudicial to a defendant that evidence is obtained by police officers outside their territorial jurisdiction while conducting an undercover investigation. *S. v. Afflerback*, 344.

A violation of the Posse Comitatus Act does not require the exclusion of evidence thereby obtained from a civilian criminal trial, and there was no violation of the Act where the part played by an Army C.I.D. agent in connection with a civilian investigation of the illegal drug activities of defendant was passive at all times. *S. v. Trueblood*, 541.

A court order directing defendant to produce and turn over to the S.B.I. the business and working records of his florist and gift shop was a subpoena, and evidence obtained pursuant to the subpoena should have been excluded from defendant's arson trial where it was obtained by exploitation of an earlier illegal search and seizure pursuant to a warrant not based on probable cause. *S. v. Sheetz*, 641.

§ 91.4. Continuance Because of New Counsel

Trial court in a drunk driving case did not err in refusing to grant defendant a continuance because he had employed new counsel an hour before the trial. *S. v. Martin*, 514.

§ 92.5. Severance

Failure of defendant's counsel to move for a severance of his trial from that of a codefendant did not amount to a denial of effective assistance of counsel. *S. v. Arsenault*, 7.

§ 97.1. Introduction of Additional Evidence

Permitting a witness to be recalled and testify is a matter within the sound discretion of the trial judge. *S. v. Adams*, 57.

CRIMINAL LAW—Continued

§ 131.2. Motion for New Trial for Newly Discovered Evidence; Sufficiency of Showing

Trial court did not err in denying defendant's motion for appropriate relief on the ground of newly available evidence where an indicted codefendant testified at the hearing on defendant's motion for appropriate relief that defendant did not participate in the break-in in question. *S. v. Sprinkle*, 802.

§ 132. Setting Aside Verdict as Contrary to Weight of Evidence

In a prosecution for armed robbery where defendant presented unimpeachable alibi evidence, which, if believed, would have precluded a conviction, trial court nevertheless did not abuse its discretion in denying defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence. *S. v. Puckett*, 719.

§ 146. Appellate Jurisdiction in Criminal Cases

No appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari. *S. v. Evans*, 327.

§ 146.5. Appeal from Sentence Imposed on Guilty Plea

Defendant's appeal from denial of his motion to suppress was not properly before the court on appeal where defendant entered a bargained plea of guilty but gave the State no notice at any time of his intention to appeal. *S. v. Afflerback*, 344.

§ 149.1. Appeal by State Not Permitted

The State has no right of appeal from an order of the superior court dismissing a criminal case without prejudice upon a motion made by defendant under the Speedy Trial Act. *S. v. Ward*, 200.

§ 153. Jurisdiction of Lower Court Pending Appeal

Where an incest case had been appealed from the superior court to the Court of Appeals, superior court had no authority to consider defendant's motion for appropriate relief on the ground of newly discovered evidence. *S. v. Brock*, 120.

§ 181. Post Conviction Hearing

Trial court did not err in denying defendant's motion for appropriate relief on the ground that defendant failed to raise the issues presented in the motion in a previous motion for post-conviction relief, although defendant was not represented by counsel in filing the previous post-conviction motion. *S. v. McKenzie*, 34.

DAMAGES

§ 9. Mitigation of Damages

In an action to recover for breach of a lease agreement, trial court improperly granted summary judgment against one defendant on the issue of damages where there was a genuine issue of material fact concerning the sufficiency of plaintiff's attempt to mitigate damages. *Leasing Corp. v. Myers*, 162.

DAMAGES—Continued

§ 12. Pleading Special Damages

In an action to recover damages sustained by plaintiffs in their operation of a restaurant on land which defendants had sold to plaintiffs and which defendants allegedly knew had been filled so that it would not support a restaurant building, plaintiffs' allegations were sufficient to inform defendants of plaintiffs' demand for special damages. *Stanford v. Owens*, 388.

DEATH

§ 3.6. Sufficiency of Evidence in Wrongful Death Action

Plaintiff could not recover from defendant city and its police officers for the death of deceased who was shot and killed by city police officers while attempting to escape after an armed robbery at a motel, even if deceased was induced to participate in the armed robbery by the city's paid informant. *Hinton v. City of Raleigh*, 305.

DEEDS

§ 11.1. Parol Evidence Rule

Trial court did not err in refusing to allow parol evidence to contradict or modify the terms of a deed or create a reservation of the property by parol. *Rourk v. Brunswick County*, 795.

§ 20.3. Restrictive Covenants Against Multiple Family Dwellings

A restrictive covenant limiting use of subdivision lots to single family residences is violated by use of a lot for a family care home. *Hobby and Son v. Family Homes*, 741.

DIVORCE AND ALIMONY

§ 2.1. Pleadings

There was no merit to plaintiff's contention that a decree of divorce was improperly granted because of defective verification of defendant's pleadings since the counterclaim in which the divorce was prayed for was verified, although the original pleadings were not. *Swygert v. Swygert*, 173.

§ 13.5. Absolute Divorce; Sufficiency of Evidence

Where defendant alleged that the parties had lived continuously separate and apart for over a year and he alleged constructive abandonment by his wife, defendant's allegations were sufficient to state a cause of action under G.S. 50-5 and G.S. 50-6, and where defendant offered proof of a year's separation with intention that the separation be permanent he was entitled to a decree of absolute divorce even in the absence of proof of abandonment. *Swygert v. Swygert*, 173.

§ 16.5. Competency of Evidence in Alimony Action

Defendant's involvement with another woman some eight to ten years before he separated from plaintiff was too remote to be admissible to prove defendant's unlawful abandonment of plaintiff. *Morris v. Morris*, 701.

§ 16.7. Instructions in Action for Alimony Without Divorce

Trial court's instructions in an alimony action based on abandonment properly placed on plaintiff wife the burden of proving that defendant husband's separation

ESTOPPEL

§ 4.4. Indicia of Ownership

Plaintiff was not estopped to assert her title to a car against defendant, even if he were an innocent purchaser, merely because she left it in the possession of a third person, since she did not give the third person any indicia of ownership of the automobile. *Mabe v. Dillon*, 340.

EVIDENCE

§ 13. Attorney-Client Privilege

A superior court judge could not set aside the ruling of another superior court judge in the same action that documents from the file of defendant's former lawyer were protected from disclosure by the attorney-client privilege. *Munchak Corp. v. Caldwell*, 414.

§ 22.1. Evidence at Former Trial or Proceeding

In a trial on defendant's counterclaim for specific performance of a contract, the trial court did not err in permitting defendant to introduce into evidence the entire record from an earlier trial of plaintiffs' claim for reformation of the contract where the complaint and counterclaim were filed in the same lawsuit and constituted two parts of the same action, and the claims for reformation and specific performance were severed for trial. *Munchak Corp. v. Caldwell*, 414.

EXECUTION

§ 15. Attack on Sale

Plaintiffs' action in superior court to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash constituted an impermissible collateral attack upon the clerk's order of confirmation of the execution sale. *Questor Corp. v. DuBose*, 612.

EXECUTORS AND ADMINISTRATORS

§ 11. Dealings by Personal Representative with the Estate

Plaintiff's complaint was insufficient to state a claim against defendant for breach of his fiduciary duty while serving as executor of the estate of plaintiff's father. *Terry v. Terry*, 583.

§ 31. Priority in Payment

Trial court erred in entering judgment allowing defendant to set off the amount owed by decedent to defendant at the time of decedent's death against defendant's debt owed to plaintiff administratrix for the post mortem purchase of assets in decedent's insolvent estate. *Rodgers v. Tindal*, 783.

FRAUD

§ 9. Pleadings

Plaintiff's complaint was sufficient to state an action for fraud and breach of contract, and the fact that the full extent of plaintiff's damages might be a matter of some speculation was no basis for the trial court to dismiss plaintiff's complaint. *Cable, Inc. v. Finnican*, 87.

HIGHWAYS AND CARTWAYS—Continued

§ 9. Actions Against the State Board of Transportation

Plaintiffs stated claims under federal regulations to enjoin the Board of Transportation from taking further action on plans for an interstate highway without observing the statutory and constitutional rights of plaintiffs based on (1) denial of a right to be heard by the Board or other hearing officer in the area affected by the highway construction project and (2) inadequate notice of the highway corridor meetings held by the Board, and plaintiffs stated a claim for injunctive relief based on failure of the Board to grant them a hearing in violation of the Board's regulation in effect at the time plaintiffs sought to be heard. *Orange County v. Dept. of Transportation*, 350.

While the duty to decide where a highway corridor will be located is a discretionary duty for which no mandatory injunction will lie against the members of the Board of Transportation, the duties of such officials to hear plaintiffs, to provide notice, and to provide an environmental impact statement are ministerial duties which can be enforced by a mandatory injunction. *Ibid.*

The doctrine of sovereign immunity did not bar plaintiff's action against the State Board of Transportation alleging that the Board made a decision as to the location of the route for an interstate highway in an unlawful manner. *Ibid.*

The appellate court cannot say as a matter of law that plaintiffs have failed to state a claim for injunctive relief against the State Board of Transportation concerning its decision as to the location of an interstate highway based on plaintiffs' allegation that the environmental impact statement relied on by the Board was materially misleading. *Ibid.*

HOMICIDE

§ 21.2. Sufficiency of Evidence That Death Resulted From Injuries Inflicted by Defendant

Evidence was sufficient to show that the assault by defendants was a proximate cause of the victim's death though the direct cause of the victim's death was aspiration of his vomitus. *S. v. Cummings*, 680.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

Evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that defendant shot deceased who was a guest at his party. *S. v. Moore*, 563.

§ 24.1. Instructions on Presumptions Arising From Use of Deadly Weapon

Trial court did not err in charging the jury that an intentional killing by means of a deadly weapon raised the inference that such a killing was unlawful and done with malice even when self-defense was at issue. *S. v. McLaurin*, 746.

§ 28.4. Self-Defense; Right to Stand Ground and Duty to Retreat

Trial court in a second degree murder case erred in failing to charge the jury on the defense of habitation. *S. v. Hedgepeth*, 569.

Trial court erred in failing to charge that there was no duty on the part of defendant to retreat within his habitat. *S. v. McLaurin*, 746.

§ 30.3. Submission of Involuntary Manslaughter

Trial court in a second degree murder case committed prejudicial error in submitting an issue of involuntary manslaughter where there was evidence of self-defense and no evidence of involuntary manslaughter. *S. v. Brooks*, 833.

HUSBAND AND WIFE

§ 5. Wife's Contracts and Conveyances

When a wife joins her husband in the execution of a deed to convey property owned solely by him merely to release her inchoate right of dower, she neither is a grantor of the premises nor incurs any obligation by representations or covenants in the deed. *Wellons v. Hawkins*, 290.

§ 12. Rescission of Separation Agreement; Resumption of Marital Relationship

Plaintiff's evidence supported the trial court's determination that parties who had executed a separation agreement and consent judgment did not thereafter reconcile and resume marital cohabitation so as to abrogate defendant husband's duty under the agreement and judgment to pay alimony to plaintiff wife. *Hand v. Hand*, 82.

Mere cohabitation between the parties did not invalidate their separation agreement which was governed by the laws of N. Y. *Behr v. Behr*, 694.

§ 15. Estates by the Entirety

An innocent wife could not recover under a fire insurance policy issued to her husband insuring property owned by them as tenants by the entirety when the fire loss was caused by the intentional burning of the property by the husband. *Lovell v. Insurance Co.*, 150.

§ 24. Elements of Alienation of Affections

In an action for alienation of affections where there is no element of sexual defilement of plaintiff's husband, malice must be shown, and malice in such an action means unjustifiable conduct causing the injury complained of. *Heist v. Heist*, 521.

§ 25. Sufficient Evidence in Action for Alienation of Affections

Evidence was sufficient for the jury in an action for alienation of affections. *Heist v. Heist*, 521.

§ 26. Damages for Alienation of Affections

In order for plaintiff to recover punitive damages in an action for alienation of affections, she must show circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in causing the separation of plaintiff and her husband. *Heist v. Heist*, 521.

INFANTS

§ 16. Juvenile Hearings Generally

Respondents were not placed in double jeopardy when the trial court continued juvenile delinquency hearings after the State had presented one witness in order to give the State an opportunity to bring in additional witnesses where the same judge heard all the evidence and rendered his findings at the conclusion of the entire proceeding. *In re Hunt*, 732.

§ 20. Judgment in Juvenile Proceeding

Trial court had authority to place an undisciplined child in a privately operated facility for an indefinite stay at the county's expense. *In re Lambert*, 103.

INJUNCTIONS

§ 3. Mandatory Injunctions

While the duty to decide where a highway corridor will be located is a discretionary duty for which no mandatory injunction will lie against the members of the Board of Transportation, the duties of such officials to hear plaintiffs, to provide notice, and to provide an environmental impact statement are ministerial duties which can be enforced by a mandatory injunction. *Orange County v. Bd. of Transportation*, 350.

INSANE PERSONS

§ 1. Commitment to Mental Hospital

A magistrate's order, when read with an officer's affidavit incorporated by reference therein, was sufficient to support a custody order for involuntary commitment of respondent pursuant to the emergency procedures for violent persons. *In re Hernandez*, 265.

An officer's petition for involuntary commitment of respondent pursuant to the emergency procedures for violent persons was not required to be dismissed because the officer did not personally observe the respondent in an act of violence. *Ibid.*

§ 1.2. Sufficiency of Evidence in Involuntary Commitment Proceeding

Evidence was sufficient to support the court's findings that respondent was imminently dangerous to others. *In re Hernandez*, 265.

INSURANCE

§ 43.1. Hospital Expense Policy

An employee whose employment was terminated on 27 March was covered by a group health insurance policy for surgery performed on 22 April. *Joyner v. Insurance*, 807.

§ 45. Accident Insurance; Scope of Policy

In an action to recover on a policy insuring the lives of plaintiff and her four children, the accidental death benefit provision could be interpreted to extend coverage under that provision only to plaintiff mother and not the children. *Ridenhour v. Insurance Co.*, 765.

§ 67.2. Sufficiency of Evidence in Action on Accident Policy

The evidence on motion for summary judgment presented an issue of material fact as to whether insured's death was caused by accident or whether it was instead a foreseeable result of his own conduct in assaulting his wife with a gun. *Logan v. Insurance Co.*, 629.

§ 96.1. Automobile Insurance; Time for Giving Notice of Accident or Claim

Evidence that plaintiff insurer was not notified of defendant insured's possible involvement in a collision on 6 April 1978 until 3 May 1978 and evidence of the circumstances of the case was sufficient to support the trial court's determination that defendant's delay was unjustified, but the trial court erred in failing to consider whether plaintiff was prejudiced by such delay. *Insurance Co. v. Construction Co.*, 427.

INSURANCE — Continued

§ 121. Fire Insurance; Provisions Excluding Liability

An innocent wife could not recover under a fire insurance policy issued to her husband insuring property owned by them as tenants by the entirety when the fire loss was caused by the intentional burning of the property by the husband. *Lovell v. Insurance Co.*, 150.

Provision of an insurance policy issued by plaintiff excluding from coverage "property owned or occupied by or rented to the insured" applied to the loss in question so as to exclude coverage where it was uncontradicted that the premises damaged by fire were both occupied and rented to the insured. *Insurance Co. v. Plastics Corp.*, 335.

§ 130. Notice and Proof of Fire Loss

An insurance company cannot exercise sole discretion in accepting or refusing a proof of loss tendered pursuant to a fire insurance policy, and the trial court erred in submitting to the jury an issue as to whether plaintiff filed with defendant insurance company a proof of loss as required by the policy. *Brandon v. Insurance Co.*, 472.

§ 130.1. Waiver and Estoppel of Notice of Proof of Loss

Allegations and evidence were sufficient to carry the case to the jury on issues of waiver and estoppel by defendant insurer to assert plaintiff insured's failure to file proof of a fire loss. *Brandon v. Insurance Co.*, 472.

§ 135.1. Subrogation of Fire Insurer to Rights of Mortgagee

Because an unincorporated church could not sue defendant, one of its members, whose purported negligence caused the fire in question, plaintiff insurer as subrogee of its insured, the church, had no right to recover from defendant the amount paid to the church under its fire insurance policy. *Casualty Co. v. Griffin*, 826.

§ 149. Liability Insurance

Defendant was liable under a comprehensive general liability insurance policy for an injury to a third party on the premises of certain apartments, although the apartments were not listed in the declaration of hazards on the liability schedule, where the owner of the apartments was listed as an additional insured. *Insurance Co. v. Surety Co.*, 242.

JUDGMENTS

§ 8. Judgments by Consent

A superior court judge erred in allowing defendant to amend its answer to reassert the defense of lack of timely notice of a claim which plaintiff wanted defendant insurer to defend and pay since the parties had earlier agreed to a consent judgment striking the late notice defense. *Industries, Inc. v. Insurance Co.*, 91

§ 19.1. Irregular Judgments

A divorce judgment was irregular because it was rendered in violation of the rules of practice concerning notice of the calendaring of a case for trial and should have been set aside pursuant to Rule 60(b)(6). *Laroque v. Laroque*, 578.

§ 37.3. Preclusion of Relitigation of Issues That Could Have Been Decided

In an action to recover alimony owed under a separation agreement, defendant's defenses that the separation agreement was invalid because of duress

LANDLORD AND TENANT—Continued

§ 13. Termination of Lease

In an action by plaintiff tenant to recover for breach of a lease agreement, trial court erred in directing verdict for defendant landlord where plaintiff refused to pay rent because of the landlord's behavior and the landlord then evicted plaintiff without giving him 10 days notice. *Kinnard v. Mecklenburg Fair*, 725.

LIBEL AND SLANDER

§ 10. Communications Which Are Qualifiedly Privileged

A physician in a mental commitment proceeding is a public official within the purview of the rule prohibiting a public official from recovering damages for defamatory statements relating to his official conduct in the absence of allegation and proof of actual malice in the making of the statement. *Hall v. Publishing Co.*, 760.

MARRIAGE

§ 2. Creation and Validity of Marriage

Plaintiff's evidence raised an issue as to whether a common law marriage was entered into by plaintiff and defendant in S. C. after plaintiff obtained a divorce from her first husband. *Parker v. Parker*, 254.

In a bigamy prosecution in which the crucial determination was whether the person before whom a purported prior marriage of defendant was solemnized was an ordained minister of any religious denomination or a minister authorized by his church, the determination of whether there was a church or a religious denomination was not for the jury since it was a matter of ecclesiastical law. *S. v. Lynch*, 608.

§ 6. Presumption Applicable to Multiple Marriages

Evidence was sufficient to rebut the presumption in favor of the validity of plaintiff's second marriage. *Parker v. Parker*, 254.

MASTER AND SERVANT

§ 9. Action on Employment Contract

Plaintiff was entitled to have his case submitted to the jury in an action to recover his salary as an instructor at Fayetteville Technical Institute. *McDonald v. Technical Institute*, 77.

§ 49.1. Employees Within Meaning of Workers' Compensation Act

Plaintiff carpenter was an employee within the meaning of the Workers' Compensation Act. *Lloyd v. Jenkins Context Co.*, 817.

§ 55.3. Particular Injuries As Constituting Accident

Plaintiff suffered an injury by accident while attempting to pull a rod out of a roll of cloth in the course of her duties as a knitter. *Porter v. Shelby Knit, Inc.*, 22.

The evidence supported a finding that the cause of plaintiff's fall to the floor of the restaurant of which he was assistant manager was unknown and that he was injured by accident arising out of and in the course of his employment. *Slizewski v. Seafood, Inc.*, 228.

The death of a traveling mechanic who replaced computers in gas pumps at service stations did not result from an accident where the death resulted from a

MASTER AND SERVANT—Continued

rupture of a congenital aneurysm in the left carotid artery, and deceased was doing his usual work in the usual manner at the time of his injury. *King v. Exxon Co.*, 750.

§ 56. Causal Relation Between Employment and Injury

A decision by the Industrial Commission as to whether plaintiff employee's injury by accident while riding his motorcycle from the job site to the employer's shop arose out of and in the course of his employment should have been based on whether the trip itself was for the employer's benefit rather than on whether plaintiff's mode of travel benefited the employer. *Bee v. Window Co.*, 96.

§ 69.1. Meaning of Incapacity and Disability

Evidence supported a determination by the Industrial Commission that plaintiff was temporarily totally disabled. *Porter v. Shelby Knit, Inc.*, 22.

Evidence supported the Industrial Commission's finding that a hematoma suffered by plaintiff employee in a fall caused brain damage rendering plaintiff a partial hemiplegic and reducing his visual capabilities. *Slizewski v. Seafood, Inc.*, 228.

The Industrial Commission could properly find that plaintiff suffered permanent brain damage and is permanently disabled by reason of that injury where a surgeon testified that it would be impossible to recover completely from a hematoma of the size he removed from plaintiff's brain. *Ibid.*

§ 73. Workers' Compensation for Loss of Specific Members

Where a portion of an employee's thumb was amputated, the rate of compensation for permanent partial disability was not limited to 25% under an Industrial Commission Rule for partial loss of the thumb itself, and the employee could be compensated at a higher rate for loss of use of the thumb. *Caesar v. Publishing Co.*, 619.

MORTGAGES AND DEEDS OF TRUST

§ 19.1. Acceleration Clauses

The mortgagee had no duty to give written notice to the mortgagor of default in the payment of the annual installments of principal and interest, and the mortgagee's acceleration of the debt and the trustee's commencement of foreclosure proceedings were fully authorized under the parties' agreement. *In re Foreclosure of Deed of Trust*, 654.

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

There was no merit to mortgagor's contention that pursuant to G.S. 25-1-208 mortgagee's lack of good faith in its decision to accelerate the debt precluded it from exercising the power of sale contained in the deed of trust. *In re Foreclosure of Deed of Trust*, 654.

No trial by jury is required in hearings conducted under G.S. 45-21.16. *Ibid.*

§ 26. Notice and Advertisement of Foreclosure Sale

A notice of a foreclosure hearing before the clerk of court was not fatally defective because the notice stated the hearing would be held 3 January 1978 rather than 1979. *Lovell v. Insurance Co.*, 150.

MUNICIPAL CORPORATIONS

§ 10. Civil Liability of Municipal Officers and Agents

Plaintiff could not recover from defendant city and its police officers for the death of deceased who was shot and killed by city police officers while attempting to escape after an armed robbery at a motel, even if deceased was induced to participate in the armed robbery by the city's paid informant. *Hinton v. City of Raleigh*, 305.

§ 12.1. Liability Generally; Governmental or Proprietary Functions

Plaintiff's complaint was sufficient to state a claim for relief where it alleged that defendants wrongfully took and destroyed his concrete finishing equipment, personal property which was not a part of the alleged nuisance being abated. *Yates v. City of Raleigh*, 221.

§ 30.12. Zoning Restrictions of Mobile Homes

A county zoning ordinance prohibiting mobile homes with dimensions less than 24' x 60' does not violate the equal protection clause. *Currituck County v. Willey*, 635.

NARCOTICS

§ 3.3. Competency of Opinion Testimony

Trial court did not err in permitting a witness to refer to a substance as cocaine without qualifying as an expert. *S. v. Trueblood*, 545.

§ 4. Sufficiency of Evidence

There was no fatal variance between an indictment which charged conspiracy to sell cocaine on or about 5 March 1979 and evidence that an undercover agent contacted a coconspirator on 5 March and purchased cocaine from defendant on 6 March. *S. v. Trueblood*, 545.

NEGLIGENCE

§ 1.1. Elements of Actionable Negligence

Plaintiff's complaint was insufficient to state a claim based on defendants' negligence in filling their land prior to sale to plaintiffs since no legal duty was owed to plaintiffs at the time of the alleged negligent acts. *Stanford v. Owens*, 388.

§ 2. Negligence Arising From the Performance of a Contract

Plaintiff's complaint was sufficient to state a valid claim based on negligent misrepresentation where plaintiffs alleged defendants by their acts of filling their land knew or should have known of the land's inability to support a building of the type plaintiffs would place upon it, and plaintiffs alleged they suffered damages from cracking and stated the amount of the damages. *Stanford v. Owens*, 388.

Plaintiffs' complaint was sufficient to state a claim for relief against defendant engineering company for negligence in the preparation of a subsurface examination of a tract of land upon which plaintiffs relied in building a restaurant. *Ibid.*

§ 5. Dangerous Instrumentalities; Strict Liability

The doctrine of strict liability does not apply in an action to recover for injuries from an exploding flashcube. *Maybank v. Kresge Co.*, 687.

NEGLIGENCE—Continued

§ 57.11. Insufficient Evidence of Negligence in Action by Invitee

In an action to recover for injuries sustained by plaintiff when she tripped over a fallen sign at defendant's restaurant, plaintiff's forecast of evidence on motion for summary judgment failed to show negligence on the part of defendant and disclosed that plaintiff was contributorily negligent as a matter of law. *Stansfield, v. Mahowsky,* 829.

PARENT AND CHILD

§ 6.2. Respective Custody Rights of Parents

Where defendant father contracted away his common law right to custody of his minor child by executing an agreement giving custody to plaintiff mother, plaintiff had a right to institute an action against defendant and his parents for abduction of the child while he was in her custody. *La Grenade v. Gordon,* 329.

PARTITION

§ 1.2. Right to Partition

A partition proceeding cannot be maintained where a life tenant of the land sought to be partitioned has a power to dispose of such land. *Keener v. Korn,* 214.

PENSIONS

§ 1. Generally

Pension benefit provisions of the contract of defendant professional basketball player were sufficiently definite as to time of funding and as to amount, frequency and duration to be specifically enforced. *Munchak Corp. v. Caldwell,* 414.

Defendant's remedy at law was inadequate so that he was entitled to specific performance of the pension provisions of his contract as a professional basketball player. *Munchak Corp. v. Caldwell,* 414.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 17.2. Negligence of Physician in Diagnosis

Plaintiff's evidence was sufficient for the jury on the issue of whether negligence by defendant physician in treating plaintiff's intestate for alcoholic gastritis rather than pancreatitis was a proximate cause of the death of plaintiff's intestate. *Hart v. Warren,* 672.

PRINCIPAL AND SURETY

§ 5. Bonds for Particular Terms

Payment of an annual premium for a town clerk's bond converted the bond into a new and separate bond for each year, and the surety on the bond was liable for the amount embezzled by the clerk in each year the bond was in effect up to the penal sum of the bond. *Town of Scotland Neck v. Surety Co.,* 124.

PROCESS

§ 4. Proof of Service

Although the better practice is for officers to make their return specifying in detail upon whom and in what manner process was served, in a case where the return on its face does not affirmatively disclose facts showing nonservice, the plaintiff is not precluded from offering additional proof to establish that service was made as required by law. *Williams v. Burroughs Wellcome Co.*, 459.

§ 6. Subpoenaes

An order of the superior court requiring defendant to present to the sheriff's department for examination all business and working records of a florist and gift shop which he owned was not a subpoena duces tecum but was a criminal investigative warrant, and the district attorney's affidavit did not state sufficient underlying circumstances from which the court could conclude that probable cause existed for issuance of the warrant. *S. v. Sheetz*, 641.

A court order directing defendant to produce and turn over to the S.B.I. the business and working records of his florist and gift shop was a subpoena, and evidence obtained pursuant to the subpoena should have been excluded in defendant's arson trial where it was obtained by exploitation of an earlier illegal search and seizure pursuant to a warrant not based on probable cause. *Ibid.*

The State's use of business records obtained from defendant sole proprietor by subpoena in his trial for arson violated defendant's right against self-incrimination, but such right was not violated by the use of defendant's tax returns which had been prepared by someone else and obtained from defendant by subpoena. *Ibid.*

§ 9.1. Personal Service on Nonresident Individuals; Minimum Contacts Test

The courts of this State had statutory jurisdiction of an action to recover the purchase price of goods shipped by plaintiff from N.C. to defendants in S.C., but the nonresident defendants had insufficient minimum contacts with this State so that the assumption of in personam jurisdiction over defendants by the courts of this State would violate due process. *Phoenix America Corp. v. Brissey*, 527.

A Pennsylvania resident who owned property in N.C. did not have sufficient contacts with this State to permit the N.C. courts to have personal jurisdiction in an action by a Georgia corporation to enforce a contract which was not negotiated or executed in N.C. and which involved the development of real property located in S.C. *Trust Co. v. Eways*, 466.

§ 12. Service on Domestic Corporations

Evidence was sufficient to support the court's determination that service of process on the secretary to the personnel manager of the corporate defendant's Greenville plant was made on a person who was "apparently in charge" of an office of the corporate defendant, but the court's conclusion that the office was that of a "managing agent" was not supported by its finding that the personnel manager was "an employee in a management position." *Williams v. Burroughs Wellcome Co.*, 459.

§ 14.3. Service on Foreign Corporation; Minimum Contacts Test

The record did not show sufficient contacts on the part of defendant corporation in N.C. for the courts of this State to acquire in personam jurisdiction over it. *Green Thumb Industry v. Nursery, Inc.*, 235.

RULES OF CIVIL PROCEDURE—Continued

thereafter bound to remain in court on her allegations and could not take a voluntary dismissal of her suit prior to a hearing on the merits. *Swygert v. Swygert*, 173.

§ 43. Evidence

Defendants failed to show that the trial judge abused his discretion in directing that an evidentiary hearing on defendant's motion for relief from default judgment should be heard wholly on oral testimony. *Webb v. James*, 551.

§ 54. Judgments

The signing of an appeal entry by the trial court cannot in and of itself be held to satisfy the affirmative act of certification required by G.S. 1A-1, Rule 54(b). *Leasing Corp. v. Myers*, 162.

§ 55. Default

Where defendants, an appearing party, have brought the matter in controversy before the trial court as a result of their motion to set aside the clerk's order entering default, and there had been a full inquiry, defendants have in effect waived the notice requirement of G.S. 1A-1, Rule 55(b)(2). *Webb v. James*, 551.

§ 55.1. Setting Aside Default

Defendant failed to show good cause for the setting aside of entry of default where defendant's affidavits showed that the legal department of defendant received the suit papers on 7 June 1978 but they were misplaced and not relocated until the day entry of default was made. *Britt v. Georgia-Pacific Corp.*, 107.

Trial court did not err in setting aside entry of default against defendant in plaintiff's action to recover the balance due on a promissory note since plaintiff's complaint alleged that defendant's aircraft was included as collateral for the note executed by a third person, but the complaint did not allege any contractual obligation of defendant to plaintiff and did not make it clear that defendant's ownership in the aircraft was at stake. *Davis v. Mitchell*, 272.

Trial court's action in voiding a prior default judgment entered by the clerk was proper both on the ground that defendant had appeared and on the ground that plaintiff's claim was uncertain. *Webb v. James*, 551.

When defendants made a motion to set aside the clerk's entry of default and default judgment, trial court was not limited to a review of the action of the clerk but could hear and determine all matters in controversy and render such judgment or order within the limits provided by law, though the order by the clerk was a nullity. *Webb v. James*, 551.

§ 56. Summary Judgment

Trial court did not err in permitting plaintiff to amend her motion for summary judgment by correcting the file number shown in the caption thereof. *Phillips v. Phillips*, 558.

§ 60. Relief From Judgment or Order

Trial court erred in entering an order setting aside entry of default judgment and allowing defendants, who failed to defend the action, 20 days in which to file answer since there was no showing of extraordinary circumstances. *Baylor v. Brown*, 664.

RULES OF CIVIL PROCEDURE—Continued

§ 60.2. Grounds for Relief from Judgment

A divorce judgment was irregular because it was rendered in violation of the rules of practice concerning notice of the calendaring of a case for trial and should have been set aside pursuant to Rule 60(b)(6). *Laroque v. Laroque*, 578.

§ 60.4. Appeal of Ruling on Motion for Relief from Judgment

Plaintiff's motion for relief pursuant to G.S. 1A-1, Rule 60(b), filed while the case was pending on appeal in the Court of Appeals, was properly filed in the Court of Appeals, but since determination of plaintiff's motion will require resolution of controverted questions of fact which the trial court is in a better position to pass upon, the case is remanded to district court for hearing and determination of all issues raised by plaintiff's motion for relief. *Swygert v. Swygert*, 173.

SAFECRACKING

§ 4. Instructions

Trial court erred in failing to charge the jury that the safe must have been used for storing money or other valuables. *S. v. Estes*, 639.

SALES

§ 6.1. Implied Warranties

Plaintiff's evidence was sufficient for the jury on the issue of defendant's breach of implied warranty of merchantability of a flashcube which exploded and injured plaintiff. *Maybank v. Kresge Co.*, 687.

§ 10.1. Seller's Action for Purchase Price of Goods

The dismissal of a suit because plaintiff's notice of claim of a materialman's lien was fatally defective was improper where the complaint stated a claim for relief for a personal judgment against defendants for goods sold and delivered. *Lowe's v. Quigley*, 770.

§ 10.2. Sufficiency of Evidence in Action for Goods Sold and Delivered

The trial court erred in entering summary judgment for defendants in an action to recover an indebtedness arising out of an unpaid account for building materials sold to defendants. *Lowe's v. Quigley*, 770.

§ 22.2. Action for Injuries from Defective Goods; Sufficiency of Evidence

Trial court properly entered summary judgment for defendant in an action to recover for injuries allegedly caused by defendant's negligent installation of the brake system on a truck sold to plaintiff's employer and defendant's failure to use reasonable care in maintaining the brake system. *Spivey v. Motor Corp.*, 313.

§ 23. Inherently Dangerous Articles

The doctrine of strict liability does not apply in an action to recover for injuries from an exploding flashcube. *Maybank v. Kresge Co.*, 687.

SCHOOLS

§ 13.2. Dismissal of Teachers

The requirements of due process were met in the dismissal of a career teacher, and the record as a whole supported the school board's dismissal of the teacher for insubordination. *Weber v. Board of Education*, 714.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

It is not fundamentally unfair or prejudicial to a defendant that evidence is obtained by police officers outside their territorial jurisdiction while conducting an undercover investigation. *S. v. Afflerback*, 344.

A violation of the Posse Comitatus Act does not require the exclusion of evidence thereby obtained from a civilian criminal trial, and there was no violation of the Act where the part played by an Army C.I.D. agent in connection with a civilian investigation of the illegal drug activities of defendant was passive at all times. *S. v. Trueblood*, 541.

§ 19. Validity of Warrant

An order of the superior court requiring defendant to present to the sheriff's department for examination all business and working records of a florist and gift shop which he owned was not a subpoena duces tecum but was a criminal investigative warrant, and the district attorney's affidavit did not state sufficient underlying circumstances from which the court could conclude that probable cause existed for issuance of the warrant. *S. v. Sheetz*, 641.

§ 37. Search of Articles in Vehicle Incident to Arrest

Trial court properly concluded that an officer's warrantless search of defendant's jacket was unlawful where the officer stopped defendant for speeding, conducted a search of the trunk, and searched the pockets of a jacket in the trunk. *S. v. Cole*, 592.

SPECIFIC PERFORMANCE

§ 3. Inadequacy of Remedy at Law

Defendant's remedy at law was inadequate so that he was entitled to specific performance of the pension provisions of his contract as a professional basketball player. *Munchak Corp. v. Caldwell*, 414.

STATE

§ 4.3. Actions Against State Board of Transportation

The doctrine of sovereign immunity did not bar plaintiff's action against the State Board of Transportation alleging that the Board made a decision as to the location of the route for an interstate highway in an unlawful manner. *Orange County v. Dept. of Transportation*, 350.

TAXATION

§ 31.1. Sales Taxes

Apartment building owners who maintain laundry machines for tenants must pay sales tax on the gross receipts from the machines. *In re Assessment of Tax*, 631.

§ 41. Foreclosure of Tax Lien

The statute requiring that attorney fees be paid before a tax lien is extinguished applies only to actions by taxing units and not to actions by private citizens. *Keener v. Korn*, 214.

TRESPASS

§ 7. Sufficiency of Evidence

Evidence was sufficient to support the trial court's finding of damages based upon the value of plaintiffs' timber cut by defendant. *Britt v. Georgia-Pacific Corp.*, 107.

§ 8. Damages

In an action to recover for damages to real property and for the value of timber removed, trial court erred in awarding nominal damages to plaintiffs in addition to actual damages as a result of defendant's trespass. *Britt v. Georgia-Pacific Corp.*, 107.

TRIAL

§ 1. Notice and Calendars

A divorce judgment was irregular because it was rendered in violation of the rules of practice concerning notice of the calendaring of a case for trial and should have been set aside pursuant to Rule 60(b)(6). *Laroque v. Laroque*, 578.

§ 3.2. Motions for Continuance

Defendants failed to show sufficient grounds to require granting of their motion for continuance where the motion was unsupported by affidavit. *Webb v. James*, 551.

§ 55. Effect of Order Setting Aside Verdict

Defendant was not prejudiced by the fact that all parties argued the issue of contributory negligence but that issue was not submitted to the jury, since the jury found defendant negligent but awarded plaintiff no damages, and the court set aside the verdict on the damages issue. *Harris v. Bridges*, 207.

TROVER AND CONVERSION

§ 3. Procedure in Action for Conversion of Personalty

Where plaintiff alleged that she owned a car, that defendant wrongfully took possession of the car, and that he deprived plaintiff of possession of the car, such allegations were deemed admitted by defendant's failure to answer. *Mabe v. Dillon*, 340.

TRUSTS

§ 13.5. Clean Hands Doctrine in Action to Establish Resulting Trust

Plaintiff's unclean hands barred him from maintaining an equitable action to impose a resulting trust on real property conveyed solely to his former wife based on her parol agreement to convey the property to plaintiff when he was no longer engaged in unlawful activities. *Hood v. Hood*, 298.

UNIFORM COMMERCIAL CODE

§ 11. Express Warranties

Privity in the sale of goods is not necessary in a purchaser's action on a manufacturer's express warranty relating to the goods. *Cooper Agency v. Marine Corp.*, 248.

VENUE

WILLS

WORD AND PHRASE INDEX

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