NORTH CAROLINA COURT OF APPEALS REPORTS

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EDWARD B. CLARK
GERALD ARNOLD
JOHN WEBB
HARRY C. MARTIN
HUGH A. WELLS
CECIL J. HILL
WILLIS P. WHICHARD
CHARLES L. BECTON*

Retired Judges

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SHERRY M. COCHRAN

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*Appointed 19 January 1981 to fill the unexpired term of Judge Richard C. Erwin.

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[1]Appointed 16 January 1981.
[2]Appointed 1 January 1981.
[3]Appointed 19 December 1980.

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EMERGENCY JUDGE

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[1]Appointed 16 January 1981.
[2]Elected 4 November 1980 and took office 1 December 1980.
[3]Appointed 6 February 1981 to succeed L. Frank Faggart who died 5 January 1981.
[4]Appointed 1 December 1980.

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OF

NORTH CAROLINA

AT

RALEIGH

JAMES CLIFTON PEELER EMPLOYEE, PLAINTIFF v. STATE HIGHWAY COMMISSION, SELF-INSURED, EMPLOYER, DEFENDANT

No. 7910IC191

(Filed 5 August 1980)

1. **Master and Servant § 75– workers' compensation – permanent partial disability – future medical expenses**

G.S. 97-29 did not authorize an award requiring defendant employer to pay plaintiff's future medical expenses "so long as it will tend to lessen his period of disability" since the statute entitles a claimant to recover compensation for medical care only where disability is found to be total and permanent, and it had been expressly found that plaintiff suffered a permanent partial disability.

2. **Master and Servant § 75– workers' compensation – future medical expenses – period of disability not lessened**

The full Industrial Commission properly struck a conclusion by the hearing commissioner that "plaintiff will need additional medical expenses from time to time in the future to lessen his permanent partial disability" and the portion of the award requiring defendant employer to pay plaintiff's future medical expenses "so long as it will tend to lessen his period of disability" where the hearing commissioner's findings of fact showed at most that the future medical treatment is necessary to keep plaintiff's condition from deteriorating and that it will not "tend to lessen the *period* of disability" within the meaning of former G.S. 97-25, *i.e.*, the period of plaintiff's diminished capacity to work.

Judge MARTIN (Robert M.) dissenting.

APPEAL by plaintiff from North Carolina Industrial Commission, Docket G-4623. Opinion and award filed 13 December 1978. Heard in the Court of Appeals 22 October 1979.

This claim was filed under the Workers' Compensation Act by plaintiff, an employee of the State Highway Commission, to recover compensation and medical expenses for injuries resulting from an accident arising out of and in the course of his employment when he was run over by a motor grader on 22 October 1979. Defendant-employer admitted liability and entered into an agreement for the payment of compensation for temporary total disability from 30 October 1969 to 22 March 1973.

On 22 March 1978 a hearing was held before Deputy Commissioner C.A. Dandelake. Based on medical reports, the hearing commissioner found that plaintiff sustained an injury by accident arising out of and in the course of his employment which resulted in a 20% permanent partial disability of the back, 28% permanent partial disability of the right leg, and 5% permanent partial disability of the left leg. The hearing commissioner also made the following findings of fact:

> (5) As a result of the plaintiff's injuries, plaintiff has the loss of or permanent injury to important external and internal organs or parts of the body for which no compensation is payable under any other subdivision of this section and the Industrial Commission may award proper and equitable compensation not to exceed $5,000 for any one organ which was the rate on October 22, 1969 when plaintiff sustained his serious injuries. That the plaintiff has lost complete use of his bladder and his secondary sexual organs such as the prostate and seminal vesicles. Under the circumstances, this patient will be 100% impotent for the duration of his life. He will require the continued use of an external drainage apparatus because of the necessity to create a urinary diversion above the bladder. That the plaintiff will also have to have continued treatment two times a year for an ileo-loop stomo in the right lower quadrant of the abdomen which will require permanent use of a collection appliance. These are synthetic material which will require repeated replacement and, therefore, will require a necessary replacement periodically to tend to lessen his disability. That a reasonable amount under G.S. 97-31(24) would be $5,000.00 for the 100% loss of plaintiff's

sex life; that a reasonable amount for the loss of bladder and prostate would be $1,861.60; that the plaintiff has other damage to his body but this uses up the total amount plaintiff can receive under the law as of October 22, 1969.

(6) The plaintiff's doctors are also of the opinion that plaintiff will have to be seen regularly at least two times a year as the plaintiff will continue to have disability related to his urinary tract because of the ileo-loop urinary tract infections or may even develop a chronic urinary tract infection which may predispose to calculus or stone formation and may develop certain electrolite imbalances or even progress to renal sufficiency (sic) with associated azotemia and anemia and possible acidosis. In order to avoid this type of complication he will need periodic evaluation to consist of complete blood counts with serum, Bun and Creatinine and Electrolyte determinations. He will also require periodic urinalysis directly from the ileo-loop along with quantitive urine cultures and drug sensitivities if indicated. He should also have periodic x-ray evaluation of the ileo-loop and of the kidneys to determine both anatomic and functional status. That the x-ray procedure be done at yearly intervals and that the urinalysis and cultures and blood studies be done at three to six months intervals. He may need surgical removal of the retained bladder if he continues to have difficulty with fluid accumulations with possible secondary infections in the bladder. That the plaintiff will also continuously wear a long leg waist height support. That all of the above will be required to keep plaintiff's condition from worsening.

The hearing commissioner concluded plaintiff was entitled to compensation for 126 weeks of permanent partial disability at the rate of $46.80, and that plaintiff was entitled to compensation for future medical expenses for treatment "recommended by plaintiff's doctor so long as it will tend to lessen his period of disability."

On appeal by defendant-employer the full Commission struck the deputy commissioner's conclusion of law that "[p]laintiff will need additional medical expense from time to

time in the future to lessen his permanent partial disability" and that portion of the award ordering defendant to pay future medical expenses for treatment to lessen the period of disability. Plaintiff-employee appeals from the Opinion and Award of the Full Commission.

Williams, Willeford, Boger & Grady by Thomas M. Grady for plaintiff appellant.

Ralf F. Haskell, Assistant Attorney General for defendant appellee.

PARKER, Judge.

Plaintiff's sole assignment of error is to the action of the full Commission in striking out the hearing Commissioner's conclusion of law that "[p]laintiff will need additional medical expenses from time to time in the future to lessen his permanent partial disability" and the portion of the award requiring defendant-employer to pay plaintiff's future medical expenses "so long as it will tend to lessen [plaintiff's] period of disability." Under G.S. 97-85, the Industrial Commission, upon review of the opinion and award of the hearing Commissioner, may reconsider the evidence and amend the award, *Lee v. Henderson & Associates*, 284 N.C. 126, 200 S.E. 2d 32 (1973), and the award of the full Commission is conclusive and binding as to all questions of fact if supported by competent evidence. *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951). However, the legal conclusions of the Commission are subject to judicial review. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968); *Paving Co. v. Highway Commission*, 258 N.C. 691, 129 S.E. 2d 245 (1963). In the present case, the action of the Commission in striking the Deputy Commissioner's conclusion on the question of plaintiff's additional medical expenses was, in effect, a conclusion of law, and we review it as such.

[1] In that conclusion, the deputy commissioner cited G.S. 97-29 as authority for plaintiff's entitlement to medical expenses. Assuming that the Commission ordered the conclusion stricken on the ground that G.S. 97-29 did not authorize it, we find that it acted correctly. That statute entitles a claimant to recover

compensation for medical care only where disability is found to be total and permanent. *See, Perry v. Furniture Co.*, 296 N.C, 88, 249 S.E. 2d 397 (1978); *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). In the present case, the deputy commissioner had expressly found that plaintiff had suffered a permanent partial disability.

[2] Disregarding the statutory reference, we next consider whether the conclusion was sufficient under G.S. 97-25 to afford a basis for the award. At the time the injury occurred on 22 October 1969, G.S. 97-25 provided for the award of expenses for medical treatment in pertinent part as follows:

> Medical, surgical, hospital, nursing services, medicines, sick travel, and other treatment including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief *and for such additional time as in the judgment of the Commission will tend to lessen the period of disability* ... shall be provided by the employer. (emphasis added)

That statute was amended by 1973 Sess. Laws, c. 520, s. 1 to eliminate the ten-week limitation on treatments which are necessary "to effect a cure or give relief." However, the amendment does not apply to the present case because the injury occurred before its effective date. *See, Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965); *Hartsell v. Thermoid Co.*, 249 N.C. 527, 107 S.E. 2d 115 (1959); *Oaks v. Mills Corp.*, 249 N.C. 285, 106 S.E. 2d 202 (1958); *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958). Thus, under the statute applicable in the present case, an award of expenses for medical treatment could only be made: (1) where reasonably required to effect a cure or give relief within a ten-week period from the date of injury, and (2) after the ten-week period, where in the judgment of Commission treatment may reasonably be required to tend to lessen the period of disability.

In *Millwood v. Cotton Mills*, 215 N.C. 519, 2 S.E. 2d 560 (1939), the claimant was permanently totally disabled as the result of a compensable head injury which led to serious mental disorder and required that she be committed to custodial hospital care

for the remainder of her life. Although there was evidence that this treatment "would tend to lessen her disability," the Supreme Court emphasized that there was no evidence to support a finding that treatment would tend to lessen the *period* of her disability, and, therefore, that the Commission was without jurisdiction to make the award. In a more recent case, *Ashley v. Rent-A-Car Company*, 271 N.C. 76, 155 S.E. 2d 755 (1967), the Court, in an opinion by Branch, J. (now C.J.), held that the permanent character of a disability did not preclude an award for medical treatment where the evidence showed that the claimant had not yet reached maximum improvement and that the treatment would reduce the period of his disability. Implied in the Court's decision in *Ashley, supra*, is that the phrase "lessen the period of disability" as used in G.S. 97-25 is to be interpreted to mean "lessen the period of time of diminution in earnings."

In the present case the Hearing Commissioner's findings were directed to the question whether the medical care would tend to lessen claimant's disability and whether it would be required to keep plaintiff's condition from worsening. The conclusion of law based upon these findings was only to the effect that these expenses will be necessary "to lessen [plaintiff's] permanent partial disability," not that they would tend to lessen the period of disability. Although plaintiff would not be forced to incur these expenses were it not for his work-related injury, we are bound by the wording of the statute as then written and by its judicial interpretation. The conclusion of law, while logically flowing from the findings of fact, simply did not provide a basis upon which an award of medical expenses could be made, and it was properly stricken by the full Commission as mere surplusage. Further, we note that the deputy commissioner's determination of percentage permanent partial disability and his award of compensation thereon effectively precluded him from awarding payment of medical expenses. Unlike the employee in *Ashley v. Rent-A-Car, supra*, whose percentage permanent partial disability had not been finally assessed at the time the award for medical treatment was made because he had not yet reached maximum improvement, plaintiff in the case now before us had done so, as the findings of and award for disability necessarily imply. Thus, any future medical treat-

ment, however necessary, could not "tend to lessen the *period* of disability," *i.e.* the period of plaintiff's diminished capacity to work.

For the same reasons, the full Commission properly struck that portion of the award directing defendant to pay "future medical expenses for treatment as recommended by plaintiff's doctor so long as it will tend to lessen his period of disability." It is clear that the Industrial Commission is without power to make an award except upon proper findings of fact and conclusions of law drawn therefrom. The findings of fact here show at most that the treatment is necessary to keep plaintiff's condition from deteriorating.

Our holding in this case produces a harsh result. However, in the Workers' Compensation Act "the Legislature has prescribed and limited the benefits to and the burdens upon those subject to its provisions. It is the duty of the courts to declare the law as written, and not to make it." *Millwood v. Cotton Mills, supra,* at 525, 2 S.E. 2d at 563. The Opinion and Award appealed from is

Affirmed.

Chief Judge MORRIS concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.), dissenting:

I dissent from the opinion of the majority because I believe that the amendment to G.S. 97-25, 1973 Sess. Laws, c. 520, s. 1, is applicable here and requires that the case be remanded to the Commission for further findings of fact. In its recent decision in *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E. 2d 56 (1980), the Supreme Court applied the 1973 amendment to G.S. 97-25 retroactively in a case in which the claim arose, as did the present case, out of an accident occurring prior to the effective date of the amendment. The statute, in its present form and as applied in *Schofield*, provides in part that the employer shall furnish:

> [m]edical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability . . . .

In enacting 1973 Sess. Law, c. 520, s. 1, therefore, the legislature intended to eliminate the ten-week limitation on treatments which are necessary "to effect a cure or give relief." Thus, as I interpret the statute, an award by the Commission requiring the furnishing of medical treatment as provided in amended G.S. 97-25 may be based upon any one of three alternative findings specified in the statute, that is, that such treatment is reasonably required (1) to effect a cure, (2) to give relief, *or* (3) if additional time is required, to lessen the period of disability.

It is clear upon the record in the present case that the continuing medical treatment which plaintiff will require throughout his life as a result of the terrible permanent injuries which he received in his accident will never "effect a cure," or "lessen the period of [his] disability." Thus, neither the first nor the third finding required by G.S. 97-25 as a prerequisite to the award of medical expenses could be made in the present case. There is, however, abundant evidence in the record that continuing medical treatment and provision of supplies will be necessary to maintain this plaintiff at his present, however poor, level of health, evidence which in my view would amply support a finding by the Commission that such treatment is reasonably required to "give relief." Upon such a finding, an award requiring the employer to provide the cost of the treatment could be based.

It is undisputed here that plaintiff suffered an injury by accident arising out of and in the course of his employment. He should, therefore, be entitled to compensation to the full extent allowed by a liberal interpretation of our Workers' Compensation Act. As the policy of the Act was stated by Justice Seawell in *Barber v. Minges*, 223 N.C. 213, 25 S.E. 2d 837, (1943):

> The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. It is said to be acceptable to both employer and employee, because it reduces the cost of settlement and avoids delay. To the employee, it means a certainty of some sort of compensation for an injury received in the course of business; and to the employer, it reduces unpredictability of loss and puts it on an actuarial basis, permitting it to be treated as "overhead," absorbed in the sales price, and thus transferred to that universal beast of economic burden, the consumer. *Allen v. State*, 160 N.Y. Supp., 85; *Village of Kiel v. Industrial Commission* (Wis.), 158 N.W., 68. It is said to be humanitarian and economical as opposed to wasteful in the conduct of the enterprise, and is referred to the propriety of keeping loss by accident incidental to employment chargeable to the industry where it occurs. *Kennerson v. Thomas Towboat Co.*, 89 Conn., 367, 94 A., 372. It is called "an economic system of trade risk." Losses incidental to industrial pursuits are like wrongs and breakage of machinery — a cost of production." *Mackin v. Detroit-Limken Axle Co.*, 187 Mich., 8, 153 N.W., 49; *Village of Kiel v. Industrial Commission, supra.* It should be charged against the industry responsible for the injury. *Klawinski v. Lake Shore and N.S. Ry. Co.*, 185 Mich., 643, 152 N.W., 213; Schneider, Workmen's Compensation Law, Permanent Edition, s. 1.

223 N.C. at 216-217, 25 S.E. 2d at 839.

Although the above-quoted language refers specifically to private industry and its employees, the policy expressed therein should be equally applicable where, as here, a State employee is involved. It is only just that, where the language of G.S. 97-25 permits payment for treatment of an injured State employee, the taxpayers of this State should ultimately bear the cost of medical treatment necessitated by an accident incidental to that employment where that treatment will "give relief."

Because the Commission failed to make any findings of fact as to whether the medical treatment involved here is reasonably required to "give relief," I would remand the case for further proceedings.

NATIONAL ADVERTISING COMPANY v. THOMAS W. BRADSHAW, JR., AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 7910SC1080

(Filed 5 August 1980)

1. **Highways and Cartways § 2.1– Outdoor Advertising Control Act – violation – no administrative hearing provided**

There was no provision within the Outdoor Advertising Control Act or the administrative regulations published pursuant to the Act which required or provided for anything other than a written administrative appeal to the Secretary of Transportation, and petitioner therefore was not entitled to any administrative hearing by the Secretary; similarly, the Administrative Procedure Act did not apply in this case because there was no statute or administrative rule which required the Department of Transportation to make an agency decision after providing an opportunity for an adjudicatory hearing.

2. **Highways and Cartways § 2.1– Outdoor Advertising Control Act – due process of law not denied**

There was no merit to petitioner's contention that the Outdoor Advertising Control Act and the regulations issued pursuant thereto deprived petitioner of due process of law, since petitioner was specifically provided with the opportunity to have his position heard in a de novo proceeding before a trial judge.

3. **Highways and Cartways § 2.1– outdoor advertising sign permit revoked – nonconforming sign destroyed by windstorm – no re-erection permitted**

Where petitioner's permit for an outdoor advertising sign was revoked because damages exceeded 50% of the initial value of the sign, the sign had been "destroyed" by a windstorm, and it was a nonconforming sign which could not legally be re-erected, there was no merit to petitioner's contention that his evidence showed that the cost of repairing the sign was less than 50% of the cost of replacing the sign, that the sign was not destroyed, and that therefore the permit for the sign was improperly revoked, since (1) petitioner did not provide any evidence of the inital value of the sign, and it was the initial value, not the replacement value, which was the figure for comparison under the regulation in question; (2) the definition of destroyed sign in the regulation in question specifically included a sign which had been completely blown down, even though one of the support poles, though snapped at five to six feet above the ground level, was still standing; and (3) petitioner failed to make any argument that the sign was not "nonconforming" or that the sign was not "re-erected" after the storm, the re-erecting in this case not being a mere "normal repair" within the exception to the definition of repair in the challenged regulation.

APPEAL by respondent from *Bailey, Judge.* Judgment entered 4 October 1979 in Superior Court, WAKE County. Heard in the Court of Appeals on 12 May 1980.

The petitioner-appellee is a business corporation which is engaged in the erection and maintenance of outdoor advertising signs. The respondent-appellant is the duly appointed Secretary of the Department of Transportation of the State of North Carolina.

In 1967 the General Assembly enacted the Outdoor Advertising Control Act, now codified as Article 11 of Chapter 136 of the North Carolina General Statutes. Pursuant to this authority the Department of Transportation issued regulations codified in Subchapter 2H of Title 19 of the North Carolina Administrative Code and also published its *Outdoor Advertising Manual* (see footnote 1 below). In accordance with these rules and regulations, the petitioner-appellee submitted to the Department of Transportation an application and fees for a permit for one of its signs which had been erected adjacent to U.S. Route One near Lakeview, North Carolina. A permit, No. US-0001-56044, was issued for the "nonconforming" sign by virtue of a "grandfather clause."

On or about January 25 or 26, 1978 employees of the North Carolina Department of Transportation discovered that the petitioner-appellee's sign had been blown down by high winds. The poles upon which the sign was attached were snapped and broken, one at the ground level and one about five feet above the ground. The panels of the sign were also on the ground.

On 9 February 1978 notification was mailed by a District Engineer of the Department of Transportation to the petitioner advising the petitioner that its Permit No. US-0001-56044 was revoked because "more than 50 percent of the sign was destroyed" and it could not be re-erected because it was a nonconforming sign.

Following the revocation notice, the sign was repaired and re-erected by splinting the pole that was broken above the ground surface, by replacing the pole that was broken at the

ground level, and by reattaching the sign to these poles, all at a cost of $85.03. The cost of replacing the sign would have been $263.66.

On 6 March 1978, the petitioner, pursuant to G.S. 136-134, appealed the decision of the District Engineer to the Secretary of Transportation. Without giving the petitioner any opportunity to be heard, except as set forth in petitioner's letter of appeal, the Secretary of Transportation, on 20 March 1978 wrote to petitioner and affirmed the decision of the District Engineer. The Secretary's letter provided in pertinent part:

> "Your outdoor advertising permit was revoked by District Engineer Beck by reason of the fact that your sign was totally destroyed and sustained damages in excess of 50 percent of the initial value of the sign.
>
> During a routine investigation of outdoor advertising sign inventories, following the wind storm of January 25-26, 1978, Department of Transportation employees discovered the sign allowed by permit number US-0001-56044 to be completely on the ground. All evidence pointed to the fact that the sign had been blown down by high winds. Photographs taken at the time of inspection indicate all sign support posts were down and some of the posts were twisted and splintered showing failure under torque and/or bending stresses.
>
> The North Carolina Administrative Code defines a destroyed sign as, 'A sign no longer in existence due to factors other than vandalism or other criminal or tortuous [sic] acts. An example of a destroyed sign would be a sign which has been completely blown down by the wind.' 'Completely blown down' is interpreted to mean that the entire sign structure, including sign support posts, has been blown down.
>
> In accordance with this interpretation, sign permits must be revoked for those non-conforming signs and signs

conforming by virtue of the 'Grandfather Clause', which have been completely blown down.

It is, therefore, my conclusion that the sign was in fact completely blown down by high winds and, pursuant to the rules and regulations promulgated by the Board of Transportation, cannot be legally re-erected."

Pursuant to G.S. 136-134.1, the petitioner appealed to the Superior Court. The Superior Court held that the *Outdoor Advertising Manual* aand the relevant portions of the North Carolina Administrative Code are unconstitutional because they do not allow the aggrieved sign owner to be heard or to present evidence at the stage of the administrative proceeding. The Superior Court also held that the sign had not been destroyed and that the administrative finding that the sign had been destroyed was erroneous and exceeded the agency's legal authority. The Court ordered the reinstatement of the petitioner's sign permit and the Secretary now appeals this ruling.

Attorney General Edmisten by Assistant Attorney General Thomas H. Davis, Jr. for respondent appellant.

Bailey, Dixon, Wooten, McDonald & Fountain by Kenneth Wooten, Jr. and Gary S. Parsons for petitioner appellee.

CLARK, Judge.

[1] This case presents several questions of first impression concerning the interpretation and operation of the Outdoor Advertising Control Act, N.C. Gen. Stat. §§ 136-126 to 136-140 (as amended, effective 1 July 1977, 1977 N.C. Sess. Laws, Ch. 464). The first question is whether the petitioner-appellee was entitled to any administrative hearing by the Secretary of Transportation pursuant to the provisions of the Outdoor Advertising Control Act, *supra*, or the Administrative Procedure Act, N.C. Gen. Stat. Ch. 150A. The answer to this question is "no." We can find no provision within the Outdoor Advertising Control Act, or the administrative regulations published pursuant to

the Act[1] which require or provide for anything other than a written administrative appeal to the Secretary of Transportation. N.C. Gen. Stat. § 136-134; 19 N.C.A.C. 2H.0212; 19A N.C.A.C. 2E.0213 (language almost identical).

Similarly, the Administrative Procedure Act does not apply in the instant case because there is no statute or administrative rule which "requir[es] by law" the Department of Transportation to make an agency decision after providing "an opportunity for an adjudicatory hearing," N.C. Gen. Stat. § 150A-2(2) (definition of "contested case"), and the subject controversy is therefore not a "contested case" within the meaning of N.C. Gen. Stat. § 150A-23 which provides for administrative hearings in "contested cases." In *Orange County v. Board of Transportation*, 46 N.C. App. 350, 265 S.E. 2d 890 (1980), we held that an environmental challenge to action by the State highway department under the North Carolina Environmental Policy Act involved a "contested case" where the Department of Transportation was acting, as here, pursuant to its authority under Chapter 136 of the General Statutes (as opposed to under Chapter 20, where the Department is exempted from the Administrative Procedure Act, N.C. Gen. Stat. § 150A-1(a)). *Orange County*, however, involved a specific statutory overlay in which the Environmental Protection Act gave the Department of Administration additional authority to publish rules which, in

[1]The administrative regulations first became effective on 15 October 1972. *See, Days Inn of America, Inc. v. Board of Transportation*, 24 N.C. App. 636, 211 S.E. 2d 864 (1975); *Bracey Advertising Company, Inc. v. North Carolina Department of Transportation*, 35 N.C. App. 226, 241 S.E. 2d 146 (1978). These regulations were codified in the North Carolina Administrative Code, Title 19, Chapter 2, Subchapter 2H, effective 1 February 1976, and amended effective 7 January 1977. The regulations, including the 1977 amendments, were published by the Department of Transportation in the *Outdoor Advertising Manual* (1977). The regulations were again amended on 1 June 1978. More recently the regulations have been recodifed as Subchapter 2E of Chapter 19A of the North Carolina Administrative Code, effective 1 July 1978. Since the letter from the District Engineer was dated 9 February 1978 and the letter from the Secretary of Transportation was written on 20 March 1978, we are confined to interpret the regulations as they were codified under Chapter 19 of the Administrative Code in January 1977. We do note, however, that we find no difference between the language as now codified under Chapter 19A which would materially affect the outcome of this decision.

turn, subjected the actions of the Board of Transportation to the Administrative Procedure Act. The opinion went on to explain: "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." 46 N.C. App. at 374, 265 S.E. 2d at 906. Similarly, we hold that the action of the Secretary of Transportation in reviewing a written appeal from a decision of the District Engineer does not require an adjudicatory hearing and does not trigger the provisions of the Administrative Procedure Act.

[2] Nor do we see any merit in either the petitioner-appellee's contention, or the ruling of the trial court below, that the Outdoor Advertising Act and the regulations issued pursuant thereto deprive the appellees of due process of law. On the contrary, N.C. Gen. Stat. § 136-134.1, which preempts N.C. Gen. Stat. § 150A-43, specifically provides the appellee with the opportunity to have his position heard in a *de novo* proceeding before a trial judge. At such proceeding the petitioner is not limited to the evidence or documents contained in the administrative record (as is the general rule under N.C. Gen. Stat. § 150A-50, *but see* N.C. Gen. Stat. § 150A-49). We fail to see where the appellee has been denied any due process at all. On the contrary, the right to a trial *de novo* before a trial court is the epitome of due process.

We now turn to the substantive question involving the application of the administrative regulations to the facts of this case. The following definitions in 19 N.C.A.C. 2H are apposite.

> ".0109 ERECT
>
> To construct, build, *raise*, assemble, place, affix, attach, create, draw or in any way bring into being or establish, but it shall not include any of the foregoing activities when performed as an incident to the change of advertising message or *normal* maintenance or repair of a sign structure." (Emphasis supplied). [*See, also*, N.C. Gen. Stat. § 136-128(.01).]

".0123 NONCONFORMING SIGN

A sign which was lawfully erected but which does not comply with the provisions of state law or state rules and regulations passed at a later date or which later fails to comply with state law or state rules or regulations due to changed conditions. Illegally *erected* signs or maintained signs are not nonconforming signs." (Emphasis supplied.) *[See, also,* N.C. Gen. Stat. § 136-128(2a).]

".0130 DESTROYED SIGN

A sign no longer in existence due to factors other than vandalism or other criminal or tortious acts. As example of a destroyed sign would be a sign which has also been completely blown down by the wind." [*See, also,* 19A N.C.A.C. 2E.0201(v).]

".0132 SIGN CONFORMING BY VIRTUE OF THE 'GRANDFATHER CLAUSE.'

A sign legally erected prior to the effective date of the Outdoor Advertising Control Act in a zoned or unzoned commercial or industrial area which does not meet the standards for size, spacing and lighting passed at a later date." [*See, also,* 19A N.C.A.C. 2E.0201(x).]

There is no doubt that petitioner's sign was a sign which "conform[ed] by virtue of the Grandfather Clause." The only question is whether the damage to the sign in January 1976 was such that, pursuant to the Act and the administrative regulations, the sign could not be repaired, replaced, or re-erected, and consequently, that petitioner's permit should have been revoked for nonconformance. If the permit were properly revoked, then the subsequent act of erecting or maintaining the sign would be illegal.

The statutory scheme is as follows: N.C. Gen. Stat. § 136-130 provides the Department of Transportation with the authority to promulgate rules and regulations concerning: (1) outdoor advertising signs along the right-of-way of interstate or prim-

ary highways in this State; (2) "the specific requirements and procedures for obtaining a permit for outdoor advertising, as required in G.S. 136-133"; and (3) "for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued." N.C. Gen. Stat. § 136-133 further provides, in effect, that no sign along a primary highway in the State may be erected and maintained except upon a permit issued by the Department of Transportation, which permit shall be valid until revoked for nonconformance with the Act or the rules and regulations promulgated by the Department of Transportation. N.C. Gen. Stat. §§ 136-131 and -132 also provide that the Department of Transporation may, after using the procedure for condemnation proceedings, acquire by purchase, gift or condemnation all existing, nonconforming advertising. However, if the sign be illegal, that is, if the sign be "erected or maintained" in violation of the Act or the rules and regulations issued pursuant to the Act, or if the sign be "maintained without a permit regardless of the date of erection," the owner must remove it or the State may remove the sign at the owner's expense. N.C. Gen. Stat. § 136-134.

When, then, may a permit for outdoor advertising be revoked? Section 2H.0209 of Chapter 19 of the Administrative Code, effective 7 January 1977 and recodified as Section 2E.0210 of Chapter 19A, provides in relevant part:

".0209 REVOCATION OF PERMIT

Any valid permit issued for a lawful outdoor advertising structure shall be revoked by the appropriate District Engineer for any one of the following reasons:

* * * *

(6) Failure to maintain an outdoor advertising structure classified as nonconforming so as to allow the structure to remain substantially the same as it was in existence on the date of the issuance of a valid permit. Extension or enlargment of the sign is a change in the existing use. *Replacement, rebuilding or re-erecting, is a change in the existing use.*

Exception is made for the rebuilding or re-erecting of signs which have been vandalized or subject to other criminal or tortious act.

* * * *

(12)Abandonment, discontinuance or *destruction* of a sign,

(13)Making repairs to a nonconforming sign or a sign conforming by virtue of the grandfatner clause which exceed 50 percent of the initial value of the sign *as determined by the district engineer.* Total repairs during any twelve consecutive months may not exceed 50 percent of this initial value of the sign. To avoid liability under this clause, the advertiser should contact the district engineer prior to making any major repairs to discuss the scope of the proposed maintenance improvements. In the event a district engineer determines needed repairs to a *nonconforming* sign will exceed 50 percent of the value of the sign, he will contact the Right-of-Way Branch to consider purchase of the sign contingent upon funding availability." (Emphasis supplied.)

In his petition, the petitioner stated that the letter from the District Engineer gave two reasons for revoking the permit: (1) "more than fifty percent of the sign was destroyed" and (2) the sign was a nonconforming sign which could not be re-erected. The Secretary of Transportation in turn gave these reasons for revoking the permit: (1) damages exceeded 50 percent of the initial value of the sign; (2) the sign had been "destroyed" according to the definitions; and (3) it was a nonconforming sign which could not legally be re-erected.

[3] The petitioner contends that his evidence shows that the cost of repairing the sign was less than fifty percent of the *cost of replacing* the sign, that the sign was not "destroyed" and that therefore the permit for the sign was improperly revoked. We do not agree.

First, the petitioner did not provide any evidence of the *initial value* of the sign, and it is the initial value, not the replacement value, which is the figure for comparison under 19 N.C.A.C. 2H.0209(13). Moreover, the determination was not made by the District Engineer. Even if the $263.66 figure given by petitioner as the cost for replacing the sign were representative of its initial value, subsection (13) is not the only ground which can be or was asserted by the State in support of its action to revoke the permit.

Second, 19 N.C.A.C. 2H.0209(12), *supra*, allows a permit to be revoked upon the "destruction" of a sign. "Destruction" is merely the nominative form of the verb "destroy" and the definition of "destroyed sign," provided in 19 N.C.A.C. 2H.0130, *supra*, specifically includes "a sign which has been completely blown down by the wind." The petitioner argues that the sign was not "completely blown down" because one of the support poles, though snapped at five to six feet above the ground level, was still standing. We cannot accept petitioner's position. Regardless of the cost, large or small, of re-erecting the sign, the sign was completely blown down by the wind within the meaning of the regulation. The regulation does not require that all support poles be broken off at ground level before the sign could not be re-erected. Indeed, such a requirement would contravene the purpose of the statute and *would render* the regulation useless.

Third, even assuming, *arguendo*, that subsections (12) and (13) do not apply, petitioner has failed to make any argument that either the sign was not "nonconforming" or that the sign was not "re-erected" after the storm. The definition of "erected" in 19 N.C.A.C. 2H.0109, *supra*, includes "raise," "assemble," "place," "affix," and "attach" — actions which were taken by petitioner in the instant case. Nor do we think that the re-erecting in the instant case was a mere "normal repair" within the exception to the definition. Subsection (6) of 19 N.C.A.C. 2H.0209, *supra*, specifically refers to *re-erecting* as opposed to merely *erecting* and no exception is made therein for re-erection of a nonconforming sign which has been taken down or has fallen down for any reason other than criminal or tortious acts. The obvious purpose of the statute and regulation is to gradually phase out signs, either individually or in the aggregate,

which existed at the time of enactment but which tended to harm the public interest and welfare by causing ugliness, distraction, and safety hazards along our State's primary highways. N.C. Gen. Stat. § 136-127. Whether the petitioner is entitled to compensation for the value of his lease, if any, or by N.C. Gen. Stat. §§ 136-111, -131, -132, -140, 19 N.C.A.C. 2H.0209(13), is not before us in this appeal.

The judgment of the Superior Court is

Reversed.

Chief Judge MORRIS and Judge ERWIN concur.

CHARLES DARSIE, GUARDIAN AD LITEM FOR LOLA MAE HARDY v. DUKE UNIVERSITY

No. 7914SC990

(Filed 5 August 1980)

Charities and Foundations § 3; Hospitals § 3.1– Duke University – charitable institution – immunity from suit for 1961 injuries at Duke Hospital

Under the law of charitable immunity as it existed in 1961 when the injuries in question allegedly occurred, defendant Duke University was, as a matter of law, a charitable institution and is therefore immune from liability for the negligence of its employees in the treatment of patients at Duke Hospital absent proof that it failed to exercise due care in the selection or retention of the employees charged with negligence.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 22 August 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 April 1980.

On 13 February 1979, plaintiff, guardian ad litem for Lola Mae Hardy, commenced this action for damages for personal injury suffered by Lola Mae Hardy while a patient at the Duke University Medical Center on 26 October 1961, allegedly due to defendant's negligence. Defendant, by its answer, averred, *inter alia*, that "[a]s an eleemosynary corporation, having used due care in the selection, training and retention of such em-

ployees, it is advised and believes and so alleges that it cannot be held liable for injuries resulting from their negligence, if any injury to Lola Mae Hardy did result from the negligence of any employees ... ." On 3 July 1979, plaintiff moved pursuant to G.S. 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, for partial summary judgment on defendant's defense of charitable immunity. On 25 July 1979, defendant filed a cross-motion for summary judgment, supported by affidavits, which incorporated defendant's charter and by-laws under which it operated at the time the incident allegedly occurred.

According to the affidavit of J. Peyton Fuller, defendant's Assistant Vice President and Corporate Controller, defendant is a "non-stock educational corporation" which includes the Duke University Medical Center. He stated that Duke Hospital is a unit within the Medical Center, "without any separate status or identity." Referring to the annual audit performed for the years 1961-62, the affidavit stated that for the fiscal years 1961 and 1962, "[t]he financial operations of Duke Hospital were treated as a part of the total financial operation of Duke University", and during 1961-62, only forty-five percent of the total operating costs of the University was derived from revenue from the operation of the University, which included Duke Hospital and all "auxillary sources". The deficit of fifty-five percent was made up, according to Fuller, through "grants, gifts, and income from charitable or benevolent sources." Fuller stated further:

> Duke University as a non-stock corporation, declares no dividends, and no person, trustee, officer or employee of Duke University derives any private gain or profit from the operation of the University. All revenue which accrues to the University from any sources whatsoever is used to further the objects and purposes of Duke University as set forth in its charter.
>
> The United States Treasury Department has ruled that Duke University is a non-profit educational institution and is exempt from the provisions of the federal income tax laws and that contributions to Duke University are deductible by donors in computing their taxable income ....

> Since "Duke Hospital" was an integral and inseparable part of Duke University, the United States Treasury Department expressly held that Duke Hospital shared the tax exempt status of Duke University. This rule was in effect during the 1961-62 fiscal year of Duke University.

By stipulation the trial court heard defendant's summary judgment motion before it heard plaintiff's. In an order entered and filed 22 August 1979, the trial court ruled in favor of defendant and dismissed plaintiff's claim. From the judgment entered upon the trial court's conclusion, as a matter of law, that defendant was a charitable institution, thus enabling it successfully to plead the defense of charitable immunity, plaintiff appeals.

Grover C. McCain, Jr., and James B. Archbell for plaintiff appellant.

Newsome, Graham, Hedrick, Murray, Bryson and Kennon, by E.C. Bryson, Jr., for defendant appellee.

MORRIS, Chief Judge.

Plaintiff's sole contention on appeal is that defendant may not assert the defense of charitable immunity for negligence in the medical treatment furnished by Duke Hospital because the hospital operations, although an integral part of Duke University, constitute a commercial and noncharitable enterprise. Plaintiff argues that although the University as a whole operated as a charitable institution during the fiscal year 1961-62 because only forty-five percent of the total cost of operating the University was derived from revenue accruing through the operation of the University, for the same period approximately ninety-six percent of the costs of operating Duke Hospital were covered by patient receipts, income from the public dispensary, and other revenue. Plaintiff argues further that "while 55% of the operating costs of the University were covered by grants, gifts and income from charitable or benevolent sources, only 1.73% of the costs of operating the Hospital were covered by gifts and grants from the Duke Endowment and other sources." In order properly to answer plaintiff's contentions, we must first review the law with respect to charitable immunity.

The doctrine of charitable immunity in North Carolina was abolished in 1967 in *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 152 S.E. 2d 485 (1967), and the subsequent enactment the same year of G.S. 1-539.9 by the General Assembly. Since the injury on which this lawsuit is based occurred in 1961, whether defendant may claim charitable immunity in this case must be determined in light of the law existing prior to 1967.

The rule of tort liability, as it existed before *Rabon*, was explained by Justice Sharp (later Chief Justice), writing for the majority, as follows:

> In *Williams v. Hospital*, 237 N.C. 387, 389, 75 S.E. 2d 303, 304, it is said:
>
> > "It is settled law in this jurisdiction that a charitable institution may not be held liable to a beneficiary of the charity for the negligence of its servants or employees if it has exercised due care in their selection and retention. *Barden v. R.R.*, 152 N.C. 318, 67 S.E. 971; *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807; *Herndon v. Massey*, 217 N.C. 610, 8 S.E. 2d 914; *Johnson v. Hospital*, 196 N.C. 610, 146 S.E. 573; *Smith v. Duke University*, 219 N.C. 628, 14 S.E. 2d 643."
>
> . . .
>
> Decided cases indicate that the present state of the law in North Carolina is as follows: A patient, paying or nonpaying, who is injured by the negligence of an employee of a charitable hospital may recover damages from it only if it was negligent in the selection or retention of such employee, *Williams v. Hospital, supra, Williams v. Hospital Asso., supra*, or perhaps if it provided defective equipment or supplies. *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159. A stranger (anyone who is not a beneficiary of the charity, i.e., one other than a patient) who is injured by the negligence of *any* employee, however, may collect damages from the hospital. *Cowans v. Hospitals*, 197 N.C. 41, 147 S.E. 672. Nor does the fact that a charitable institution has procured

> liability insurance affect its immunity. *Herndon v. Massey*, 217 N.C. 610, 8 S.E. 2d 914.

269 N.C. 3-4, 152 S.E. 2d at 486-87. Assuming the status of a charitable institution, defendant is, under *pre-Rabon* law, immune from liability for the negligence of Duke Hospital or its employees. The only question before us is, therefore, whether defendant was a charitable institution at the time of its alleged negligence, which would enable defendant to assert the defense of charitable immunity as a bar to plaintiff's claim.

Generally defined, a charitable institution is an organization or other entity engaged in the relief or aid to a certain class of persons, a corporate body established for public use, or a private institution created and maintained for the purpose of dispensing some public good or benevolence to those who require it. *See generally, Z. Smith Reynolds Foundation, Inc. v. Trustees of Wake Forest College*, 227 N.C. 500, 42 S.E. 2d 910 (1947); *Habuda v. Trustees of Rex Hospital, Inc.*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968); 14 C.J.S., *Charities* § 2 (1939). As to educational institutions, whether a particular institution of learning is charitable depends on whether it is cperated for public benefit or for private gain. *E.g., Ettlinger v. Trustees of Randolph-Macon College*, 31 F. 2d 869 (4th Cir. 1929); *Trustees of Iowa College v. Baillie*, 236 Iowa 235, 17 N.W. 2d 143 (1945). The same test has been applied to public hospitals which are established and maintained for charitable purposes. *E.g., Helton v. Sisters of Mercy of St. Joseph's Hospital*, 234 Ark. 76, 351 S.W. 2d 129 (1961); *Danville Community Hospital, Inc. v. Thompson*, 186 Va. 746, 43 S.E. 2d 882 (1947). *Contra, e.g., Adkins v. St. Francis Hospital of Charleston, W.Va., Inc.*, 149 W.Va. 705, 143 S.E. 2d 154 (1965); *White v. Charity Hospital of Louisiana in New Orleans*, 239 So. 2d 385 (La.App. 1970).

In *Martin v. Board of Commissioners of Wake County*, 208 N.C. 354, 180 S.E. 777 (1935), the Court held that a hospital created by the General Assembly and maintained to provide medical treatment and hospital care for the indigent sick and afflicted poor within the county, and supported by donations by individuals as well as by sums paid by patients who are able to pay for services rendered to them, primarily was a charitable

institution. *See also Habuda v. Rex Hospital, Inc., supra* (wherein this Court held *Martin* controlling on issue of whether Rex Hospital was charitable in 1964). Similarly, in *Z. Smith Reynolds Foundation, Inc. v. Trustees of Wake Forest College, supra*, the Court characterized both the Foundation and Board of Trustees as charitable in nature. As to the Trustees, the Court stated:

> "The trustees of Wake Forest College" is declared to be a non-profit, educational institution existing and performing its functions with the support of the Baptist denomination in the State, operating through its local churches and the Baptist State Convention of North Carolina, and as such is a charitable corporation under the laws of the State of North Carolina.

227 N.C. at 510, 42 S.E. 2d at 916.

This same rationale was enunciated in *Berry v. Odom*, 222 F. Supp. 467 (M.D.N.C. 1963), where the Court held that a lawsuit similar to the case at bar was barred by defendant Duke University's status as a charitable organization. In *Berry*, plaintiff sought recovery for personal injuries allegedly sustained while a patient at Duke University Hospital in 1961. Defendant Duke University moved for summary judgment in its favor on the ground that it was a charitable or eleemosynary corporation and thus immune from tort liability. There, plaintiff conceded for the purposes of argument that if defendant Duke University was a charitable institution, and it exercised ordinary care in the selection and retention of the treating physician, no liability results.

After stating the law as discussed above, the Court reviewed the following undisputed material facts:

> From the evidence submitted, it appears that Duke University was originally chartered by the 1840-41 General Assembly of the State of North Carolina as Union Institute Academy. In 1850 the name was changed to Normal College. The primary purpose of the institution at that time was to train qualified personnel to teach in public schools of

North Carolina. In 1858 the name was again changed to Trinity College. The declared purpose of the corporation at that time was that of operating "a literary institution for the North Carolina Conference of the Methodist Episcopal Church South." In 1891 the charter was again amended to provide for the removal of the operations of Trinity College from Randolph County to "at or near the Town of Durham in North Carolina." There were other revisions of the charter in 1903, which, among other things, empowered the faculty and trustees to confer "* * * such degrees and marks of honor as are conferred by colleges and universities generally: * * *" The final amendment to the charter was in 1924, when the name was changed from Trinity College to Duke University. In the latter amendment, the corporation was given perpetual existence, and was authorized to receive and hold by gift, devise, purchase, or otherwise, property, real and personal, for the use of its purposes as an educational institution.

Duke University is a non-stock, educational corporation and consists of the undergraduate colleges, and the school of arts and sciences, the school of law, the school of medicine, the school of divinity, and the school of nursing as graduate schools. The Duke University Hospital is a unit of the corporation and is adjunct to the School of Medicine.

For the fiscal year ended June 30, 1962, 50.86% of the total cost of operating Duke University was derived from revenue accruing through the operation of the university, including the hospital and the medical school, and all auxiliary sources, leaving a deficit of 49.14%, which was made up through endowment income grants, gifts, and income from charitable or benevolent sources. The University declares no dividends, and no persons, including trustees, officers and employees, derive any private gain or profit from the operation of the institution. All revenues which accrue to the University from any source whatsoever are used to further the objects and the purposes of the University as set forth in its charter.

> The crucial question is whether, under the foregoing facts, the defendant, Duke University, is a charitable or eleemosynary institution.

222 F. Supp. at 469. On these facts the Court concluded as follows:

> There can be little question but that Duke University is an eleemosynary or charitable corporation. It has no capital stock and there is no provision for declaring dividends. Practically one-half of its income is derived from endowments and gifts. There is no opportunity for personal profit by anyone. The fact that it makes a charge to its students and hospital patients does not affect its status as a charitable or eleemosynary corporation.

The Court distinguished *Waynick v. Reardon*, 236 N.C. 116, 72 S.E. 2d 4 (1952), where the Court held the evidence presented in that case was sufficient to go the jury on the question of actionable negligence by defendant Duke University's agent physician. The *Waynick* Court stated that if the doctor involved was guilty of actionable negligence, such negligence was imputable to defendant Duke University. The Court in *Berry*, analyzing the judgment of the trial court in *Waynick*, concluded:

> It would appear that this observation was unnecessary to a decision in the case, and that the only question submitted to the Supreme Court for decision was whether there was sufficient evidence of negligence on the part of the doctor to submit the case to the jury.

222 F. Supp. at 470, citing *Smith v. Duke University*, 219 N.C. 628, 14 S.E. 2d 643 (1941) (action against doctor and Duke University for damages resulting from injuries allegedly due to negligent medical treatment held properly dismissed for lack of evidence on question of negligence). The question of charitable immunity was not discussed in either *Waynick* or *Smith*. In *Waynick*, the Court said, speaking through Justice Valentine, "[t]he decisive question presented by this appeal is whether the evidence sufficeth to take the case to the jury." 236 N.C. at 119, 72 S.E. 2d at 6. This was the question before the Court in *Smith*.

The Court found that evidence of negligence was not sufficient to take the case to the jury and, therefore, did not reach the question of charitable immunity.[1]

The undisputed facts presented in this case on defendant Duke University's motion for summary judgment parallel exactly the findings made by the trial court in *Berry*. Finding *Berry* controlling in this instance, we, therefore, hold that the trial court properly granted defendant's summary judgment motion on the ground of charitable immunity.

Plaintiff cites decisions from other jurisdictions which tend to support his position that Duke Hospital, for all practical purposes, was operating as an entity separate from the University, and that the doctrine of charitable immunity is inapplicable in this situation. *E.g., Gamble v. Vanderbilt University*, 138 Tenn. 616, 200 S.W. 510 (1918); *Grueninger v. Harvard College*, 343 Mass. 338, 178 N.E. 2d 917 (1961); *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219 (1907); *Carver Chiropractic College v. Armstrong*, 103 Okla. 123, 229 P. 641 (1924). Plaintiff argues further that defendant's self-acclaimed status as an eleemosynary institution as stated in its articles of incorporation and charter is not conclusive evidence of defendant's status, and that, in fact, Duke Hospital, separate from Duke University, operated "not by means of charity but rather the patients pay for the vast majority of the services rendered by the defendant hospital." We are not persuaded that the decisions cited by plaintiff are controlling in this case, nor are we of the opinion that Duke Hospital operated for profit rather than for the general purposes of the University. It is well settled that defendant's status as an eleemosynary institution is not affected by the fact that it derives a part of its operating costs

[1] Certain decisions of this Court have dealt with the question of charitable immunity. In *Helms v. Williams*, 4 N.C. App. 391, 166 S.E. 2d 852 (1969) and *McEachern v. Miller*, 6 N.C. App. 42, 169 S.E. 2d 253 (1969), the doctrine of charitable immunity was pleaded as a defense to claims of medical malpractice against two hospitals. In *Helms*, the question was whether there was sufficient evidence to require the submission to the jury of an issue of whether the hospital was negligent in hiring and retaining the nurse charged with negligence. In *McEachern*, plaintiff conceded that the doctrine of charitable immunity applied and nonsuit as to the defendant hospital was proper.

from its beneficiaries, which, in this case, are its patients, when the balance of these costs comes from endowments and gifts. *Z. Smith Reynolds Foundation, Inc. v. Trustees of Wake Forest College, supra.* Further, we find nothing in the materials presented which compels us to conclude that Duke University, in fact, treated its hospital operations as separate and distinct from the rest of its college and graduate programs. Duke Hospital, as a teaching facility and medical center, has played an important role in the educational process at Duke University and is an indivisible unit of that institution.

Our narrow holding is that, under the law of charitable immunity as it existed at the time the injuries allegedly occurred in this case, defendant Duke University was, as a matter of law, a charitable institution and is, therefore, immune from liability for the negligence of its employees in the treatment of the patients at Duke Hospital, absent proof that it failed to exercise due care in the selection or retention of the employees charged with negligence.

Affirmed.

Judges PARKER and WELLS concur.

GENERAL GREENE INVESTMENT COMPANY, KERMIT G. PHILLIPS, II, AND WIFE, JEANNETTE S. PHILLIPS v. EDWARD I. GREENE ET UX ESTHER Z. GREENE, G-K, INC. A NORTH CAROLINA CORPORATION AND UNDERWOOD REALTY CO., A NORTH CAROLINA CORPORATION AND THE CITY OF GREENSBORO, THE STATE OF NORTH CAROLINA

No. 7918SC864

(Filed 5 August 1980)

1. Municipal Corporations § 33– street closed by city – proper notice given – indexing of resolution adequate

Summary judgment was properly entered for defendants on plaintiffs' claim that they possessed certain dedicatory rights which entitled them to have a named street maintained as an open street furnishing them access from their 3.5 acre tract to a major thoroughfare in the city, since the street in question had been closed and effectively withdrawn from dedication by resolution of the city council on 21 August 1967, prior to the time any of the plaintiffs acquired title; plaintiffs could not collaterally attack the council's

finding that notice of the hearing to close was duly published, since the council found that notice that the hearing was to be held had been duly published, owners of all property abutting both sides of the portion of the street to be closed had requested such closing in writing, and no appeal was taken from the council's action; and indexing of the resolution closing the street under the name of the City of Greensboro, without also indexing it under the names of the abutting landowners who acquired the fee simple title to the portion closed, was all that G.S. 153-9(17) required.

2. **Adverse Possession § 25.2– closed street – no adverse possession under color of title**

The trial court properly granted summary judgment for defendants on plaintiffs' claim that they had title to a contested strip of land, which was a street which the city had closed, by adverse possession for seven years under color of title, since the deed to plaintiffs' predecessor in title conveyed no title to any property beyond the borderline of the closed street with the remainder of the tract conveyed, and though the deed conveying the same property from their predecessor in title to plaintiffs was not a part of the record, even if plaintiffs otherwise satisfied the legal requirements of adverse possession, the absence of a paper writing purporting to pass title to the closed portion of the street either to plaintiffs' predecessor or to plaintiffs would defeat any claim of adverse possession under color of title.

3. **Reformation of Instruments § 7– reformation of deed to include closed street – no showing of mutual mistake or fraud**

Absent allegations or any forecast of evidence of mutual mistake or fraud in the drafting of a deed from a corporation to plaintiff Investment Company, plaintiffs raised no issue of material fact which would, if resolved, entitle them to reformation of the deed to include any portion of the closed section of a street which abutted the property transferred by the deed.

4. **Quasi Contracts and Restitution § 1.2– improvements made to street – no good faith belief – no recovery on theory of unjust enrichment**

Plaintiffs were not entitled to recover an amount which they allegedly spent for improvements to a street in the good faith belief that they were maintaining a dedicated public way jointly with the property owner adjoining on the northeast, since plaintiffs did not purport to act under any colorable authority when they chose to improve the street in the erroneous belief that they were maintaining a dedicated public way, and they could thus claim no good faith, albeit erroneous, belief that they had the right to make any improvements to the street.

APPEAL by plaintiffs from *Collier, Judge.* Judgments signed 3 July 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 March 1980.

Plaintiffs filed this action seeking reformation of a deed, damages, and injunctive relief. In their complaint filed 29 March

1979 they alleged the following: On or about 26 March 1971 plaintiff General Greene Investment Company (Investment Company) entered into a contract with defendants Edward I. Greene and G-K, Inc. to purchase a tract of land of approximately 3.5 acres in Greensboro, N.C. At that time the individual defendants and G-K, Inc. furnished to plaintiff Investment Company a survey dated 29 September 1966 which showed the property in question as running with the southwest margin of Retreat Street, which street was shown as being open on said plat and as furnishing access to Wendover Avenue in Greensboro. Pursuant to the terms of the contract of sale, defendant G-K, Inc. executed a warranty deed dated 1 June 1971, which deed described the northeast margin of a portion of the property as running with the southwestern margin of Retreat Street as defined by the recorded plat of the "Camp Stokes" property. Contrary to an alleged express understanding between Investment Company and defendants Greene and G-K, Inc., those defendants thereafter contended that Retreat Street was closed at the time of conveyance. Because defendant Underwood Realty was seeking a building permit from the City of Greensboro for construction on Retreat Street, the Phillips plaintiffs, successors in title to Investment Company, sought an injunction restraining defendants Underwood Realty, Inc. and Edward I. Greene and wife from undertaking construction upon the street and restraining the defendant City of Greensboro from issuing any permit. Plaintiffs also sought reformation of the 1 June 1971 deed from G-K, Inc. to Investment Company to include the area of Retreat Street, along with a declaration that such is the property of the Phillips plaintiffs.

Edward I. Greene and G-K, Inc. answered, admitting that G-K, Inc. entered into a contract with Investment Company in 1971 and executed a deed, but denying that Edward I. Greene was a party to that contract. They further admitted that G-K, Inc. executed a deed on 1 June 1971 conveying title to the 3.5 acre tract of land, but otherwise denied the material allegations of the complaint. Defendants Greene and G-K, Inc. raised the defense that, at the time the contract to convey was executed, the portion of Retreat Street abutting the property was not an open street, and that the 1 June 1971 deed did not purport to convey title to any part of Retreat Street to Investment Company, the grantee.

Defendant Underwood Realty Company also denied the material allegations of the complaint and alleged that by virtue of a resolution of the City Council of the City of Greensboro dated 21 August 1967 closing Retreat Street from West Bessemer Avenue in Greensboro to Wendover Avenue, Underwood Realty and defendant Edward I. Greene, as the abutting owners, had acquired title to the center of the former street. By deed dated 27 December 1978, Edward I. Greene and wife, Joyce C. Greene, conveyed to defendant Underwood Realty the portion of Retreat Street which they had previously acquired. All defendants prayed that plaintiffs' action be dismissed.

Defendants G-K, Inc. and Edward I. Greene filed motions for dismissal and for summary judgment in their answer, and Underwood Realty made similar motions. At the hearing on these motions, the documentary evidence showed the following:

Edward I. Greene acquired title to the tract abutting Retreat Street by warranty deed in 1965. On 21 December 1967, upon petition of Edward I. Greene and Underwood Realty Company, the owners of all the property abutting both sides of Retreat Street from West Bessemer Avenue to Wendover Avenue, the City Council of the City of Greensboro resolved to close and abandon that portion of Retreat Street as a public street. In April 1969, G-K, Inc. acquired title from Edward I. Greene to the property abutting the southwest margin of Retreat Street. On 1 June 1971, pursuant to a contract of sale, defendant G-K, Inc. conveyed the property bordering on Retreat Street to plaintiff Investment Company by warranty deed. Plaintiffs Kermit G. Phillips, II and wife Jeannette S. Phillips apparently acquired the property by deed dated 19 January 1972. On 27 December 1978 Edward I. Greene and wife, Joyce C. Greene, conveyed title to the southern portion of Retreat Street which Edward I. Greene had acquired as a result of the closing of the street to defendant Underwood Realty, thereby vesting title to the entire closed portion of Retreat Street in Underwood.

In two separate judgments dated 3 July 1979, the trial court granted the motions of Underwood Realty Company and of Edward I. Greene, and G-K, Inc. for dismissal and for summary judgment. From these judgments plaintiffs appealed.

J. Bruce Morton and Kent Lively for plaintiff appellants.

J. Sam Johnson, Jr, for defendant-appellees Edward I. Greene and G-K, Inc.

John W. Hardy and Douglas, Ravenel, Hardy, Crihfield and Bullock for defendant Underwood Realty Company.

PARKER, Judge.

In separate judgments dated 3 July 1979 the trial court granted the motions of defendants Edward I. Greene, G-K, Inc. and Underwood Realty Company for dismissal under Rule 12(b)(6) and for summary judgment under Rule 56. Because matters outside the pleadings were considered, we review the judgments under the standard applicable under Rule 56. Thus, defendants were entitled to summary judgment dismissing plaintiffs' action if the record discloses that there is no genuine issue as to the material facts which establish the nonexistence of plaintiffs' claims. In making that determination, the court must view all material furnished in support of and in opposition to the motions for summary judgment in the light most favorable to the plaintiffs as the parties opposing the motion. The movants 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. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978).

[1] Applying these principles to the present case, we hold that summary judgments were properly entered. Plaintiffs' first claim for relief rests upon the theory that they possess certain dedicatory rights which entitle them to have Retreat Street maintained as an open street furnishing them access from the 3.5 acre tract of land to Wendover Avenue in Greensboro. The description in the 1 June 1971 deed from G-K, Inc. to plaintiff Investment Company referred to a plat of "Camp Stokes Property" recorded in Plat Book 2, Page 45, Guilford County Registry, and described a portion of the land conveyed as being a part of the "Camp Stokes Property." The deed from plaintiff Investment Company to plaintiffs Kermit G. Phillips, II and wife, Jeannette S. Phillips, was not attached as an exhibit to the record. Even if it be assumed, however, that that deed also

made reference to the plat, the record discloses that plaintiffs have no rights by way of dedication in Retreat Street.

The general principle is that where an owner has certain property platted, showing lots, streets, or alleys, and sells lots with reference to the plat, he thereby dedicates the streets and alleys to the use of those who purchase the lots and their successors in interest. *Elizabeth City v. Commander*, 176 N.C. 26, 96 S.E. 736 (1918); *Green v. Miller*, 161 N.C. 24, 76 S.E. 505 (1912). As to those private parties, the dedication is irrevocable, except with the consent of the municipality acting on behalf of the public and the consent of those persons having vested rights in the dedication. *Steadman v. Pinetops*, 251 N.C. 509, 112 S.E. 2d 102 (1960); *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898 (1956). Even if the deed to the Phillips plaintiffs was made with reference to the plat of the "Camp Stokes property", on which Retreat Street was shown as an open street, the record discloses that Retreat Street had been closed and effectively withdrawn from dedication by resolution of the City Council of the City of Greensboro on 21 August 1967, prior to the time any of the plaintiffs acquired title.

At that time G.S. 153-9(17) [now G.S. 160A-299] granted to the governing body of a municipality the power to close any street or road or portion thereof upon the following conditions: (1) notification by registered letter to adjoining property owners who did not join in the request for the closing; (2) publication of notice; (3) determination by the governing body "that the closing of said road is not contrary to the public interest and that no individual owning property in the vicinity of said street or road or in the subdivision in which is located said street or road will thereby be deprived of reasonable means of ingress and egress to his property." The statute provided further that:

> Upon the closing of a street or road in accordance with the provisions hereof, all right, title and interest in such portion of such street or road shall be conclusively presumed to be vested in those persons, firms or corporations owing lots or parcels of land adjacent to such portion of such street or road, and the title of each of such persons, firms or corporations shall, for the width of the abutting land owned by such

persons, firms or corporations, extend to the center of such street or road.

Plaintiffs contend that, despite the resolution of the City Council closing Retreat Street, plaintiff Investment Company purchased the property upon the representation that Retreat Street was open and that they are not bound by the resolution on the grounds that it was indexed only under the City of Greensboro in the grantor index in the Register of Deeds office in Guilford County and that the record does not disclose that notices required by G.S. 153-9(17) were given. This contention is without merit. In its resolution of 21 August 1967 the City Council found that notice that the hearing was to be held had been duly published and that the owners of all of the property abutting both sides of the portion of Retreat Street to be closed had requested such closing in writing.[1] No appeal was taken from the Council's action as allowed by G.S. 153-9(17). Because all of the abutting owners did consent to the closing, no other notices by mail to landowners were required by G.S. 153-9(17), and plaintiffs may not collaterally attack the Council's finding that notice of the hearing was duly published.

Further, we conclude that indexing of the resolution of the City Council closing Retreat Street under the name of the City of Greensboro, without also indexing it under the names of the abutting landowners who acquired the fee simple title to the portion closed, was all that G.S. 153-9(17) required. The statute provided only that a certified copy of the resolution of the governing body closing a street "shall be recorded in the office of the register of deeds office." The vesting of title to the closed street in the abutting landowners as a result of the resolution occurred not by conveyance from the municipality, but by operation of law.

[1]In its resolution the City Council also found as a fact "that the closing of the portion of [Retreat] street is not contrary to the public interest and that no individual or other party owning property in the vicinity of the street, or in the subdivision in which the street is located, will be deprived of reasonable means of ingress and egress to his or its property." Maps furnished for the hearing on defendants' motions for summary judgment show that plaintiffs' 3.5 acre tract abuts on and has direct access to Battleground Avenue, a major thoroughfare in the City of Greensboro.

[2] There being no genuine issue of material fact as to the validity of the City Council's resolution closing the portion of Retreat Street abutting the property which plaintiffs acquired, the question remains whether any such issue exists with respect to plaintiffs' claim of title to the strip of land representing what was formerly Retreat Street. As a result of the closing, defendant Underwood acquired fee simple title from its abutting boundary to the center of the street from the north, and defendant Edward I. Greene acquired fee simple title from his abutting boundary to the center of the street from the south. Although plaintiffs Kermit G. Phillips and Jeannette S. Phillips contend that they have title to the contested strip by adverse possession for seven years under color of title, the documentary evidence refutes their claim that color of title has been shown. Color of title has been defined "as a paper writing which on its face professes to pass the title to land but fails to do so because of want of title in the grantor or by reason of the defective mode of conveyance used." *Trust Co. v. Parker and Parker v. Trust Co.*, 235 N.C. 326, 332, 69 S.E. 2d 841, 845 (1952). The 1 June 1971 deed from G-K, Inc. to Investment Company, the Phillips's predecessor in title, conveyed no title to any property beyond the borderline of Retreat Street with the remainder of the tract conveyed. The deed conveying the same property from Investment Company to the Phillipses is not a part of the record, but even if the Phillipses have otherwise satisfied the legal requirements of adverse possession, the absence of a "paper writing" purporting to pass title to the closed portion of Retreat Street either to Investment Company or to the Phillipses defeats any claim of adverse possession under "color of title." No title could ripen until plaintiffs' possession had been maintained for twenty years. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E. 2d 235 (1953).

[3] Neither is there any showing upon this record that when plaintiff Investment Company purchased the property in 1971, there was any representation by any of the defendants that they were conveying title beyond the Retreat Street boundary of the 3.5 acre tract. In April 1969 defendants Edward I. Greene and Esther Z. Greene had conveyed the 3.5 acre tract to G-K, Inc. by warranty deed, but they did not convey their fee simple title to the portion of Retreat Street which was closed. Neither was a party to the 1971 contract of sale with plaintiff Invest-

ment Company. G-K, Inc. alone entered into a contract with Investment Company to convey title to the subject property, and G-K alone executed the warranty deed dated 1 June 1971 in accordance with the contract of sale. Neither the contract of sale nor the warranty deed contained language promising to convey or purporting to convey any property north of the boundary of the tract with Retreat Street, title to which G-K, Inc. had never held. Absent allegations or any forecast of evidence of mutual mistake or fraud in the drafting of the 1971 deed from G-K, Inc. to plaintiff Investment Company, plaintiffs have raised no issue of material fact which would, if resolved, entitle them to reformation of the deed to include any portion of the closed section of Retreat Street. *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926).

[4] The last of plaintiffs' claims for relief is based on allegations that they are entitled to recover $29,200.00 of the defendants for improvements made by them to Retreat Street, including grading, filling and building a retaining wall, in the good faith belief that they were maintaining a dedicated public way jointly with Underwood Realty, the property owner adjoining on the northeast. Although plaintiffs refer in their prayer for relief to the improvements as "betterments," the right to betterments is a defensive right only, which accrues to a party possessing land under color of title when the true owner seeks to enforce his right to possession. *Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966). Such is not the present case. Even treating the claim as grounded on the equitable doctrine of unjust enrichment, *see Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E. 2d 316 (1944), no genuine issue of material fact has been raised which would prevent entry of summary judgment in favor of defendants. The essence of such a claim is that an owner of property who stands by while another, acting in the good faith belief that he has the right to do so and without inexcusable negligence, erects improvements upon that property, should not be entitled to retain the benefits without paying therefor. *Rhyne v. Sheppard, supra.* We hold as a matter of law that plaintiffs did not have the requisite good faith belief. Once an owner of land has dedicated a road to the public, with the sanction of the authorities, those authorities are thereafter responsible for maintenance and repairs: *Kennedy v. Williams*, 87 N.C. 6 (1882). G.S.

160A-296 and G.S. 136-66.1(2) confer upon municipalities not only the power, but also the duty, of extending, paving, cleaning and improving existing streets, and this duty may be delegated by contract to individuals only where the statutory bidding requirements are met. Plaintiffs in the present case did not purport to act under any colorable authority when they chose to improve Retreat Street in the erroneous belief that they were maintaining a dedicated public way. Thus, they can claim no good faith, albeit erroneous, belief that they had the right to make any improvements to the street, and they have no cause of action against the private individuals who in fact owned the property at the time the improvements were made.

Defendants carried their burden of showing that there were no issues of material fact to be resolved at trial. The judgments appealed from granting summary judgments in favor of defendants Edward I. Greene, G-K, Inc. and Underwood Realty Company are

Affirmed.

Judges MARTIN (Harry C.) and HILL concur.

JONAS MELVIN GARDNER v. ROSE D. GARDNER

No. 7911DC1157
No. 8011DC49

(Filed 5 August 1980)

1. **Divorce and Alimony § 16.3– wife's alimony action – right to have husband's divorce action stayed – voluntary dismissal of husband's action improper**

The Supreme Court's determination that G.S. 1A-1, Rule 13 (a) accorded defendant wife the right to have her husband's action for divorce instituted in Johnston County dismissed or to have it stayed pending resolution of her action for alimony instituted in Wayne County was final insofar as it adjudicated that particular right, and the subsequent enactment of G.S. 50-19, providing that an action for divorce could be maintained during the pendency of an action for alimony notwithstanding the provisions of G.S. 1A-1, Rule 13 (a), did not apply to affect the legal consequences of the Supreme Court decision; therefore, the trial court erred where, rather than granting defendant wife's motion to stay plaintiff husband's action for divorce in which

defendant had filed a counterclaim for alimony, the court permitted plaintiff to take a voluntary dismissal without prejudice and dismissed defendant's counterclaim.

2. **Divorce and Alimony § 5– divorce action – recriminatory defenses improperly stricken**

In plaintiff's action for divorce, the trial court erred in striking defendant's recriminatory defenses, since the statute eliminating the recriminatory defenses raised by defendant did not become effective until 16 June 1978; this action was filed on 1 June 1976; and the statute did not specify whether it was applicable to pending litigation, and it therefore is given prospective effect only.

APPEAL by defendant-wife from *Lyon, Judge.* Order entered 7 August 1979 in District Court, JOHNSTON County. Appeal by plaintiff-husband from *Christian, Judge.* Order entered 13 December 1979 in District Court, JOHNSTON County. Heard in the Court of Appeals 20 May 1980.

On motion of the parties made pursuant to Rule 40 of the N.C. Rules of Appellate Procedure, the appeals in two cases were consolidated for hearing in the Court of Appeals. Case No. 79DC1157 involves an appeal by defendant-wife from an order granting plaintiff-husband a voluntary dismissal of an action for divorce brought by him in Johnston County on 1 June 1976, (denominated Case No. 76CVD347 in the trial court), and dismissing defendant-wife's defense of recrimination and her counterclaim for alimony without divorce. Case No. 8011DC49 is an appeal by plaintiff-husband from an order dismissing a second action for divorce instituted by him in Johnston County on 8 August 1979 (denominated 79CVD1010 in the trial Court).

The complaint in Case No. 76CVD347, plaintiff's first action for divorce, stated a claim for absolute divorce on the grounds of one year's separation beginning 28 May 1975. Prior to the filing of that action, defendant-wife had instituted Case No. 76CVD620 in Wayne County on 12 May 1976 seeking an award of alimony pendente lite and permanent alimony. She later amended her complaint to pray for a divorce from bed and board. Based on the pendency of her Wayne County Case No. 76CVD620, defendant-wife filed a motion in Case No. 76CVD347, to dismiss her husband's action for absolute divorce or to stay that action pending final resolution of her action for alimony

without divorce. That motion was denied, and defendant filed a petition for certiorari in this Court seeking review of that denial, which petition was denied. She then petitioned the Supreme Court for discretionary review, which petition was allowed. In an opinion filed 24 January 1978 in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978), the Supreme Court found error in the denial of defendant-wife's motion to dismiss or to stay plaintiff's action for divorce, and remanded the case for further proceedings.

On 31 July 1979, after Case No. 76CVD347 was returned to the district court in Johnston County, defendant-wife again moved to stay the action in accordance with the mandate of the Supreme Court pending final determination of Case No. 76CVD620 in Wayne County or, in the alternative, to continue the action to permit defendant-wife to conduct further discovery. At that time, Case No. 76CVD620 was on appeal from an order of the district court in Wayne County granting the husband's motion for change of venue.[1]

At a hearing before Judge Lyon at the 6 August 1979 session of district court in Johnston County upon defendant's motion to stay Case No. 76CVD347, plaintiff moved in open court to dismiss defendant's defense of indignities to the person, willful failure to provide subsistence, and abandonment, and to dismiss plaintiff's counterclaim for alimony pendente lite and permanent alimony. Judge Lyon entered an order on 7 August 1979 denying defendant-wife's motion to stay, dismissing her defenses to the action for divorce, and dismissing her counterclaim for alimony. He concluded that plaintiff-husband was enti-

[1]The judgment of the trial court granting the motion for change of venue was reversed in an opinion by this Court in *Gardner v. Gardner*, 43 N.C. App. 678, 260 S.E. 2d 116 (1979), Vaughn, J., dissenting. That decision was affirmed by the Supreme Court in *Gardner v. Gardner*, 300 N.C. 715, 268 S.E. 2d 468 (1980). The husband had attempted unsuccessfully on two previous occasions to have the venue changed. On both occasions the district court ruled that venue properly lay in Wayne County. On the first occasion, the husband appealed to this court from the ruling denying his motion, and the ruling was affirmed in an unpublished opinion.34 N.C. App. 165, 237 S.E. 2d 357 (1977). On the second occasion, no appeal was perfected as to the venue question.

tled under G.S. 1A-1, Rule 41 (a) to take a voluntary dismissal without prejudice. From that order, defendant-wife appealed.

On 8 August 1979, the day following the entry of Judge Lyon's order, plaintiff-husband instituted Case 79CVD1010 by filing a new complaint seeking absolute divorce in which he alleged that the parties were married on 11 August 1957; that they had separated on 28 May 1975; and that they had lived separate and apart for more than one year immediately preceding the institution of the action. Prior to filing an answer, defendant-wife moved to dismiss the action upon the grounds, among others, that the institution of the action constituted a violation of the mandate of the Supreme Court in the prior appeal of plaintiff-husband's first action for divorce and that the law of the case required that any divorce action be filed as a cross action in defendant's action for alimony without divorce pending in Wayne County, Case No. 76CVD620. Judge Christian, presiding at the 10 December 1979 civil session of district court in Johnston County, granted defendant-wife's motion and ordered that plaintiff have until 14 January 1980 to file his action for divorce as a cross-action or counterclaim in the Wayne County action. From that order, plaintiff-husband appealed.

Upon motions of both parties, the appeals in Nos. 7911DC1157 and 8011DC49 were consolidated for hearing.

Mast, Tew, Nall & Lucas by George B. Mast and Taylor, Warren, Kerr & Walker by Lindsay C. Warren, Jr. for plaintiff.

Freeman, Edwards & Vinson by George K. Freeman for defendant.

PARKER, Judge.

DEFENDANT'S APPEAL

The issue before the Supreme Court in the prior appeal of this case in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978) was whether the trial court erred in denying defendant-wife's motion to dismiss or stay his action in Johnston County

pending resolution of Case No. 76CVD620, her action for alimony without divorce in Wayne County. In an opinion written by Exum, J., the court held that G.S. 1A-1, Rule 13 (a) required that a stay or a dismissal of this action with leave to plaintiff to file it as a counterclaim in the prior action should be granted, stating:

> Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under Rule 13 (a), may not be prosecuted during the pendency of the prior action but must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action. The claim, however, will not be barred *by reason of Rule 13(a)* if it is filed after final judgment has been entered in the prior action.

294 N.C. at 181, 240 S.E. 2d at 406.

Subsequent to that decision, the General Assembly amended Chapter 50 of the General Statutes, effective 1 July 1979, to permit the maintenance of certain actions as independent actions notwithstanding the provisions of Rule 13 (a). 1979 Sess. Laws, Ch. 709, s. 2. That amendment, codified as G.S. 50-19, provides:

> *Maintenance of certain actions as independent actions permissible.*- (a) Notwithstanding the provisions of G.S. 1A-1, Rule 13 (a), any action for divorce under the provisions of G.S. 50-5 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for
>
> (1) Alimony;
>
> (2) Alimony pendente lite;
>
> (3) Custody and support of minor children;

(4) Custody and support of a person incapable of self-support upon reaching majority; or

(5) Divorce pursuant to G.S. 50-5 or G.S. 50-6.

[1] The initial question presented on this appeal is whether the district court was bound to follow the Supreme Court's mandate in *Gardner v. Gardner, supra,* or whether G.S. 50-19 as enacted effective 1 July 1979 is applicable. If G.S. 50-19 is given retroactive effect here, plaintiff-husband would have the unquestioned right to maintain his action for divorce in Johnston County even though defendant's action for alimony in Wayne County is still pending. The considerations which should govern determination of this question are similar to those upon which the Supreme Court relied in its recent determination of the issue of venue involved in Case No. 76CVD620, defendant-wife's action pending in Wayne County for alimony without divorce. *Gardner v. Gardner,* 300 N.C. 715, 268 S.E. 2d 468 (1980). In that case, the Supreme Court held that even though statutes or amendments pertaining to procedure are generally to be applied retrospectively, the amendment to G.S. 50-3 could not be applied in that case to defeat the wife's right to venue in Wayne County established by statute and by prior judicial determination. The court stated:

> Our concern here, however, is less with the metaphysics of plaintiff's right to her chosen venue than with the constitutional requirement that the judgment which accords that right be stable. Article IV, Sec. 1 of the North Carolina Constitution vests the judicial power of the State, including the power to render judgments, in the General Court of Justice, not in the General Assembly. Under this provision, the Legislature has no authority to invade the province of the judicial department. *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791 (1967). It follows, then, that a legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction. Hospital v. Guilford County, 221 N.C. 308, 20 S.E. 2d 332 (1942).

300 N.C. at 719, 268 S.E. 2d at 471.

In the proper exercise of its jurisdiction upon the prior appeal in this case, the Supreme Court determined that G.S. 1A-1, Rule 13(a) accorded defendant-wife the right to have her husband's action for divorce dismissed or to have it stayed pending resolution of Case No. 76CVD620 in Wayne County. Insofar as the decision adjudicated that particular right, it was final, and the subsequent enactment of G.S. 50-19 could in no way affect the legal consequences flowing therefrom. Upon remand of any case after appeal, the mandate of the Supreme Court must be adhered to strictly, and any judgment entered in the cause by the trial court in any manner contrary to that mandate is erroneous. *D & W Inc. v. Charlotte*, 268 N.C. 720, 152 S.E. 2d 199 (1966); *Collins v. Simms*, 257 N.C. 1, 125 S.E. 2d 298 (1962). "Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals." *Collins v. Simms, supra* at 11, 125 S.E. 2d at 306. (Parker, J., concurring).

Here the trial court, rather than granting defendant-wife's motion to stay the action in accordance with the Supreme Court's mandate, permitted plaintiff-husband to take a voluntary dismissal without prejudice pursuant to G.S. 1A-1, Rule 41(a) and dismissed defendant-wife's counterclaim for alimony without divorce. This the court had no power to do. Although defendant-wife has a similar claim for alimony without divorce pending in Wayne County, she nevertheless had a statutory right to plead this counterclaim in her husband's action for divorce. *vanDooren v. vanDooren*, 37 N.C. App. 333, 246 S.E. 2d 20 (1978). Having filed a counterclaim arising out of the same transaction alleged in plaintiff-husband's complaint, defendant thereby deprived plaintiff of his statutory right under G.S. 1A-1, Rule 41(a) to take a voluntary dismissal without her consent. *Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (filed 15 April 1980); *Layell v. Baker*, 46 N.C. App. 1, 264 S.E. 2d 406, (erroneously shown in 265 S.E. 2d 252 as a case reported without published opinion) (1980). Further, the dismissal contemplated by the Supreme Court upon remand from the earlier appeal was clearly not a voluntary dismissal by plaintiff pursuant to Rule 41(a), but a dismissal by the trial court by virtue of G.S. 1A-1, Rule 13(a), upon the terms and conditions specified in the court's opinion.

[2] Not only did the trial court err in dismissing defendant's counterclaim, it also erred in striking her recriminatory defenses. Plaintiff-husband filed this action for divorce pursuant to G.S. 50-6 on 1 June 1976. In 1977 Sess. Laws. Ch. 817, Sec. 1, effective 1 August 1977, the General Assembly amended G.S. 50-6 to provide in pertinent part:

> 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 the grounds of one year's separation).

The amendment specified that it was not applicable to pending litigation. Subsequently, in 1977 Sess. Laws Ch. 1190 Sec. 1, the legislature again amended G.S. 50-6 to substitute the following language:

> A plea of *res judicata*, or of recrimination with respect to any provision of G.S. 50-5 or G.S. 50-7, shall not be a bar to either party's obtaining a divorce under this section.

This act specified that it would be effective 16 June 1978. Although the earlier amendment to G.S. 50-6 eliminated certain recriminatory defenses of a spouse to an action for absolute divorce brought by the other spouse on the ground of one year's separation, the eliminated defenses referred to were those based upon "any provision of G.S. 50-5." The defenses "based upon any provision of G.S. 50-7," which would include the defenses of abandonment and indignities to the person, were not eliminated until 16 June 1978, the effective date of the second amendment to G.S. 50-6. That amendment did not specify whether it was applicable to pending litigation. The general rule of construction is that an amendment which invalidates a preexisting statutory defense will, in the absence of a clear legislative intention otherwise, be given prospective effect only. *See generally, Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970); 73 Am. Jur. 2d Statutes, § 350, pp. 487-488. We find nothing in the second amendment to indicate a legislative intent that the elimination of the recriminatory defenses based upon G.S. 50-7 should apply retroactively.

PLAINTIFF'S APPEAL

Plaintiff initiated his second action for absolute divorce on the day following the entry of Judge Lyon's order permitting plaintiff to take a voluntary dismissal of his first action for divorce. In dismissing plaintiff's second action for divorce and giving him leave to file it as a cross-action or counterclaim in the alimony action in Wayne County, Judge Christian relied upon the mandate of *Gardner v. Gardner, supra.*

It is clear that if plaintiff had initiated an action for absolute divorce on 8 August 1979 *for the first time,* the pendency of defendant's action for alimony would not bar the maintenance of this new action, G.S. 50-19, and defendant would not be entitled to raise any recriminatory defenses. G.S. 50-6, as amended in 1977 Sess. Laws, Ch. 1190, s.1. Plaintiff did not, however, seek an absolute divorce in this action for the first time, and his right to maintain the action must be determined with reference to the entire history of litigation between the parties. The allegations upon which plaintiff's claim for relief in this second action for divorce was based are identical to those in Case No. 76CVD347, his first action for divorce. Plaintiff-husband was only in a position to file a second action on those grounds because of his voluntary dismissal of that first action on the previous day. We have held on defendant's appeal that Judge Lyon erred in permitting plaintiff to take that voluntary dismissal. As stated earlier, the decision of the Supreme Court in *Gardner v. Gardner, supra,* on the earlier appeal in plaintiff's first divorce action was a final judicial determination of defendant-wife's right by virtue of Rule 13(a) to require that her husband's action for divorce based on the separation of the parties since 28 May 1975 be stayed pending resolution of the Wayne County action or dismissed with leave to file it as a counterclaim in that action. For the same reasons that there was error in Judge Lyon's order permitting that dismissal, there was no error in Judge Christian's order requiring plaintiff-husband to bring his action on those grounds, if at all, as a counterclaim in the pending suit for alimony without divorce. That was the law of the case, *Wilson v. McClenny,* 269 N.C. 399, 152 S.E. 2d 529 (1967), *Pulley v. Pulley,* 256 N.C. 600, 124 S.E. 2d 571 (1962), which no subsequent legislative enactment could alter.

CONCLUSION

The result is, in Case No. 7911DC1157, the order allowing plaintiff-husband to take a voluntary dismissal and dismissing defendant's counterclaim and defense of recrimination is reversed, and the case is remanded.

Reversed and Remanded

In Case No. 8011DC49, the order dismissing plaintiff's action for absolute divorce is

Affirmed.

The costs on appeal in both cases will be taxed against the plaintiff.

Judges HEDRICK and VAUGHN concur.

MARY THOMPSON, WIDOW & GUARDIAN AD LITEM OF TORI ANN THOMPSON AND TRACY THOMPSON, MINOR CHILDREN; A.W. HUFFMAN, JR., ADMINISTRATOR OF THE ESTATE OF JOHN H. THOMPSON, DECEASED, EMPLOYEE, PLAINTIFFS v. LENOIR TRANSFER COMPANY, EMPLOYER; AND AETNA INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7910IC1060

(Filed 5 August 1980)

1. **Master and Servant § 64.1; Evidence § 34.6– workers' compensation – death benefits – suicide – pain and depression from work-related injury**

In an action to recover workers' compensation benefits for the death of an employee from an overdose of pain medicine prescribed in the treatment of injuries received by the employee in a work-related automobile accident, the hearing commissioner erred in the exclusion of evidence of the physical and mental condition of the deceased employee after the accident since (1) the evidence was relevant to plaintiffs' theory that pain and depression from the work-related injuries caused the deceased to commit suicide and (2) the evidence was admissible under the exception to the hearsay rule for a person's statement as to then-existing pain and other physical discomfort.

2. **Master and Servant § 64.1– workers' compensation – suicide – whether act was willful – pain and depression from work-related injury**

The Industrial Commission erred in denying workers' compensation benefits for the death of an employee from suicide by an overdose of pain medicine prescribed in the treatment of injuries received by the employee in a work-related automobile accident on the ground that there was "no evidence that his mental condition was affected to such an extent that he was not conscious of his actions or that the proximate cause of his suicide was his injuries," since an employee who becomes devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences and commits suicide as a result thereof does not act willfully within the meaning of G.S. 97-12(3). Therefore, where there was competent evidence that deceased took his own life because he could not withstand either the pain or depression and because there was no hope of recovery, the cause is remanded for proper findings and conclusions by the Industrial Commission.

APPEAL by plaintiffs from Order of North Carolina Industrial Commission entered 29 November 1978. Heard in the Court of Appeals 24 April 1980.

The appellant is the widow and administratrix of the estate of the deceased-employee, John H. Thompson. The appellant seeks to recover, *inter alia*, death benefits under the Workers' Compensation Act, N.C. Gen. Stat. § 97-38.

It is undisputed that on 26 January 1976, the deceased-employee suffered an injury to his left femur, pelvis, and right tibia and fibula as a result of an automobile accident; that at the time of said injury an employment relationship existed between the deceased-employee and defendant-employer, Lenoir Transfer Company; and that defendant Aetna Insurance Company was the compensation carrier on the risk. It is also undisputed that the deceased-employee died on 22 December 1976 as a result of an overdose of pain medicine which had been prescribed by Dr. Paul E. Brown, an orthopedic medical doctor who treated the decedent's medical injuries.

The matter was heard by Commissioner Forrest H. Shuford, II, Chief Deputy Commissioner, in Hickory, North Carolina, on 21 June 1978. Additional testimony was received in Lenoir on 16 October 1978. The critical Findings of Fact and Conclusions of Law made by Commissioner Shuford were as follows:

"FINDINGS OF FACT

* * * *

5. Between the time of his accident and the date of his death on 22 December 1976, deceased employee became quite depressed and dejected. Prior to the accident he had appeared to be a well-adjusted, active and fun-loving person. Following the accident he became more and more depressed and dejected as time went by. He suffered with pain in his legs and was given strong pain medication by Dr. Brown and was also prescribed Valium. During the night of 21-22 December 1976 deceased employee took an overdose of drugs and died as a result of multiple toxicity. While the death of deceased employee was contributed to by his accident and the after effects of the accident, the death was a result of his willful intention to kill himself.

* * * *

With respect to the death of deceased employee being a result of the accident, whereas it appears that the deceased employee was depressed and dejected and suffering from pain, there is absolutely no evidence that his mental condition was affected to such an extent that he was not conscious of his actions or that the proximate cause of his suicide was his injuries.

* * * *

It is specifically found as a fact that the death was a result of the willful intention of deceased to kill himself and that the suicide of deceased employee was not a proximate result of his injury by accident.

* * * *

In practically every case severe injuries cause depression and despondency on the part of the injured or ill employee. It is the opinion of the undersigned that it must be shown that such despondency and depression of the employee was

sufficient to cause the suicide in order for the prohibition in G.S. 97-12(3) concerning intentional death to be overcome.

* * * *

CONCLUSIONS OF LAW

* * * *

3. The death of the deceased employee was a result of the willful intention of the deceased employee to kill himself and no death benefits are thus payable. G.S. 97-12."

Upon review by the Full Commission, the Full Commission affirmed and adopted the Opinion and Award filed by Chief Deputy Commissioner Shuford.

Other necessary facts are stated in the opinion.

Wilson, Palmer & Cannon by Hugh M. Wilson and David T. Flaherty, Jr., for plaintiff appellants.

DuMont, McLean, Leake & Harrell by Larry Leake for defendant appellees.

CLARK, Judge.

We note at the outset that defendants have attempted to place their own exceptions in the record without formally including cross-assignments of error in the record as required by Appellate Rule 10(c)-(d). We therefore decline to consider these exceptions.

[1] The first issue presented in this case is whether the Hearing Commissioner erred in refusing to admit some evidence of the physical and mental condition of the deceased employee. Without setting out each excluded item, we hold that it was error to exclude such evidence of decedent's suffering. First, the evidence is relevant because appellants' theory is that the work-related injury caused the deceased such pain and depression that the deceased was caused to commit suicide. Even

though pain and suffering are not compensable under our Workers' Compensation Act, *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 236, 25 S.E. 2d 865, 867 (1943), and even though N.C. Gen. Stat. § 97-12(3) specifically forbids recovery under our Act where an individual has intentionally killed himself, the appellants' theory is nonetheless one which is cognizable by our Courts. As stated by Justice Sharp (later Chief Justice):

> "To say, as a matter of law, that one who intentionally takes his own life acts willfully is to ignore 'the role which pain or despair may play in breaking down a rational, mental process.' *Harper v. Industrial Commission*, 24 Ill. 2d 103, 107, 180 N.E. 2d 480, 482. Annot., 15 A.L.R. 3d 616, 622. 'If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is "independent," or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation.' 1A Larson's Workmen's Compensation Law § 36.30 (1967); Annot., 15 A.L.R. 3d 616, 622. As Fowler, J., pointed out in his dissent in *Barbour v. Industrial Commission*, 241 Wis. 462, 6 N.W. 2d 199 (1942) (a decision which applied *Sponatski)*, when suicide is the 'end result' of an injury sustained in a compensable accident, it is 'an intervening act but not an intervening cause . . . .' "

Petty v. Associated Transport, Inc., 276 N.C. 417, 426, 173 S.E. 2d 321, 328 (1970). *Petty* made it clear that mental derangement may be caused by the consequences of the injury, including pain and despair, as well as by the injury itself. In *Petty* the Court also emphasized that the evidence in that case tended to show that Petty's death was a result of the "agitated depression" resulting from the accident and the Court rejected the Commissioner's finding that there was no causal relation between the accident and death.

Second, even though much of the proffered testimony was hearsay, most of the testimony would come within the well-recognized exception for a person's statement as to then-

existing pain and other physical discomfort. 1 Stansbury's N.C. Evidence § 161 (Brandis rev. 1973). Moreover, regardless of whether such evidence is deemed to be an exception to the hearsay rule, "[i]t is very generally held that when the physical condition of a person is the subject of inquiry, his declarations as to his present health, condition of his body, suffering and pain, etc. are admissible in evidence." *Howard v. Wright*, 173 N.C. 339, 342, 91 S.E. 1032, 1033 (1917); *Munden v. Metropolitan Life Insurance Co.*, 213 N.C. 504, 506, 196 S.E. 872, 874 (1938).

As a general rule, "[t]he burden is on the appellant not only to show error, but that the alleged error was prejudicial and amounted to the denial of some substantial right," 1 Strong's N.C. Index 3d *Appeal and Error* § 46.1 (1976), and the "exclusion of evidence, including the testimony of witnesses, cannot be held prejudicial when the record fails to show what evidence would have been introduced or what testimony would have been given by the witness." 1 Strong's N.C. Index 3d *Appeal and Error* § 49.1 (1976). In the instant case, however, we cannot say that plaintiff has failed to show prejudicial error because in several instances the proffered testimony does appear in the record. Of particular importance is the testimony of Dr. Brown, in answer to a hypothetical question, that the pain and despair experienced by decedent as a result of the accident could be a cause of his suicide. The doctor's conclusion was allowed into evidence by the Commissioner on the condition that competent evidence was presented to support the hypothetical question submitted to the doctor, and it is not clear whether this conditional evidence was considered by the Commissioner.

[2] Even considering the evidence which was allowed in evidence, it was error for the Commissioner to conclude that "there is absolutely no evidence that his mental condition was affected to such an extent that he was not conscious of his actions or that the proximate cause of his suicide was his injuries." First, the *Petty* case explicitly rejected the requirement that the mere "fact that a workman knew that he was inflicting upon himself a mortal wound will, in all cases, amount to a 'willful intention' to kill himself, within the meaning of the statute." 276 N.C. at 427, 173 S.E. 2d at 328 (quoting from the Supreme Court of Florida.) The focus is not on whether the

decedent was conscious of his act but whether because of his injuries he was "devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences." *Id.* The "issue turns not on the employee's knowledge that he is killing himself, but rather on the existence of an unbroken chain of causation from the injury to the suicide." 1A Larson's, Workmen's Compensation Law § 36.30 at 6-136. As further explained by Professor Larson:

> "In one of the pioneering American statements of this position, Judge Fowler, dissenting in the *Barbour* case, argued along lines, which have always been considered sound proximate cause doctrine, that if the first cause produces the second cause, that second cause is not an independent, intervening cause. The question whether the actor appreciated the consequences of his act should not be decisive on the fundamental question whether that act was a natural and foreseeable result of the first injury. To say that it was not such a result, one must take the position that it is unforeseeable that a man, in unbearable pain, will knowingly take his own life. That position is simply untenable, and if any evidence is needed, the number of compensation cases presenting these facts should be proof enough."

Larson, supra, § 36.30 at 6-136, –137. Much of this same language was quoted in *Petty, supra,* 276 N.C. at 426, 173 S.E. 2d at 328.

Second, it is one thing for the Commissioner to reject evidence as being incredible, but it is another to say the evidence does not exist *at all. See, e.g., Petty, supra,* 276 N.C. at 429, 173 S.E. 2d at 330, where Justice Sharp noted that the absolute nature of the Commissioner's finding in that case ignored certain conflicting statements in the testimony of several witnesses. Similarly, in the instant case we find a considerable amount of properly admissible evidence which would tend to indicate that the decedent took his life because he could not bear to withstand either the pain or the depression and because there was no hope of recovery:

1. Dr. Brown, the orthopedic medical doctor who treated the decedent, testified that the decedent complained of "continuing electric shock-type burning in his left leg;" that he prescribed the strongest medicine for pain other than narcotics which could be prescribed; that he prescribed the maximum dosages for each type of medication decedent was given; that on 6 December 1976, the last time the doctor saw decedent, and almost a year after the injury occurred, the decedent said he was continuing to have the pain; that on 6 December 1976, the doctor observed a depression about decedent's condition; and, (as conditional evidence) that the severe pain and depression could have contributed to decedent's death.

2. Mary Thompson, decedent's wife, testified that decedent's "general mental outlook was very bad;" that he could not sleep; that he was despondent; that she had to give him baths and help him go to the bathroom; that such dependency "embarrassed" him, "bothered" him, "worried" him, and kept him hoping that he would improve; that he grew more despondent each month, each week, and each day; that he wanted to know when he would begin to see any hope of getting better; and that on the night of his death he was "in real bad pain."

3. Stanley Wilson testified that prior to his accident, decedent was very lively and very active, but that after the accident Wilson detected a change in decedent's physical and mental condition; that he was more depressed than he had ever seen him before; and that decedent, while in tears, expressed to Wilson that he could hardly stand the pain.

4. Jerry Barlow testified that prior to the accident the decedent's general physical health, demeanor, disposition and mental outlook were good; that Barlow noticed a change in decedent's mental outlook and disposition after the accident; and, (upon objection improperly sustained) that decedent was down in the dumps, depressed, and "counting to find out," when decedent asked Dr. Brown if the doctor could take decedent's leg off to stop the pain and the doctor responded negatively.

5. Patsy Huffman testified that decedent, prior to the accident, was fun-loving, very sports-minded, loved life, loved his

family, loved his job, and was very well adjusted, but that after the accident he talked of the severity of his pain and talked about it all of the time.

6. Al Huffman testified that decedent told him, in reference to decedent's pain: "It makes me climb the walls. Without medication, I cannot sleep. I can't function" (motion to strike improperly granted). Huffman also testified that decedent later stated: "I don't know whether the pain is worth it; I don't know if I can stand it any longer" (objection properly sustained for leading question).

7. Walter Estes testified that before the accident decedent was happy-go-lucky and that he loved to live, but that decedent was crying when Estes saw decedent after the accident, and that decedent got more and more depressed as time went on.

8. A.W. Huffman, Jr., testified that decedent told him "the pain was so severe that if he had a gun he would just blow his brains out" (objection improperly sustained).

As we read *Petty*, if the Hearing Commissioner were to find the above-stated facts as true, and in the absence of any other evidence as to any other intervening cause, the decedent's wife would be entitled to recover death benefits under N.C. Gen. Stat. § 97-38.

Notwithstanding the fact that the Hearing Commissioner cited the *Petty* case, "[i]t is clear that this proceeding has been heard and reviewed under a misapprehension of the applicable principle[s] of law." 276 N.C. at 429, 173 S.E. 2d at 330. The opinion and award of the Commission is vacated and the cause is remanded to the Industrial Commission for a rehearing to: (1) determine the admissibility of Dr. Brown's answer to the hypothetical question propounded by counsel for plaintiff, and, if the answer is admissible, to properly consider such testimony; (2) to consider testimony of lay witnesses concerning decedent's pain and depression which tend to establish a direct causal relation between the accident and the suicide; and (3) to make appropriate additional findings of fact and awards as may be consistent with this opinion and the facts found upon remand.

Vacated and Remanded.

Judges VAUGHN and MARTIN (Harry C.) concur.

GENEVA R. ASBURY, ADMINISTRATRIX OF THE ESTATE OF GREGORY LEE WATKINS, DECEASED, PLAINTIFF v. THE CITY OF RALEIGH, NORTH CAROLINA, A MUNICIPAL CORPORATION; RALEIGH CITY COACH LINES, INC., A NORTH CAROLINA CORPORATION; THE CAPITAL AREA TRANSIT SYSTEM AND DRURY FISHER SPAIN, DEFENDANTS

No. 7910SC1158

(Filed 5 August 1980)

Automobiles §§ 85, 89.2– bicyclist striking bus – contributory negligence – no last clear chance

In an action to recover for the death of a bicyclist in a collision with defendant's bus, the evidence on motion for summary judgment disclosed that decedent was contributorily negligent as a matter of law in striking defendant's bus where it showed that decedent was 15 years old at the time of the accident; the accident occurred on a city street which was 26 feet wide and which had no markings indicating the lanes of travel; the bus was traveling in a northerly direction and decedent was traveling in a southerly direction on the street; cars were legally parked along the east curb of the street; prior to the accident the bus moved out toward the center of the street to pass parked cars; there was sufficient room for the bus and approaching vehicles to pass each other while abreast of the parked cars, and the bus was therefore within its half of the "main-traveled portion" of the roadway; as he rode his bicycle toward the bus, decedent was looking downward so that he could not see the bus until immediately before the accident; as the bus was completing its movement around the parked cars, the driver saw decedent moving toward the bus's lane of travel; and the driver sounded his horn, applied his brakes, and swerved to the right but decedent and his bicycle collided with the left front corner and windshield of the bus. Furthermore, the doctrine of last clear chance did not apply because the evidence shows that the bus driver could not have avoided the accident in the exercise of reasonable care.

APPEAL by plaintiff from *Canaday, Judge.* Judgment entered 12 September 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 19 May 1980.

Plaintiff, Geneva R. Asbury, is the Administratrix of the Estate of Gregory Lee Watson who died as a result of injuries to

his head which occurred when his bicycle collided with a bus which was owned by the Capital Area Transit System operated by Raleigh City Coach Lines, Inc., and driven by Drury Fisher Spain, an employee of Raleigh City Coach Lines, Inc.

Plaintiff filed a complaint under the provisions of the North Carolina Wrongful Death Act alleging that the negligence of the defendant bus driver was the cause of the accident. Defendants answered alleging specific acts of contributory negligence on the part of plaintiff's deceased. Plaintiff replied alleging last clear chance. Depositions were taken from eyewitnesses and the investigating officer. On 27 August 1979 defendants moved for summary judgment. On 12 September 1979 the trial court entered an order and final judgment granting defendants' motion.

The witnesses to the accident include: the bus driver, Drury Fisher Spain; three passengers on the bus, Michelle Renee Reavis, Beverly Jones and Connie Francis Burke; and Dean Martin, Alma Whitfield and Lillian Leach. Other information was supplied by investigating officer Robert H. Phillips, Jr.; the investigator for the defendants, James E. Woodward; and plaintiff's private investigator, John D. Myers.

The depositions and affidavits tend to show that the accident occurred near the intersection of Grantland Drive and Sunview Drive in a residential area in Raleigh, North Carolina. Grantland Drive is 26 feet wide and runs in a north-south direction. Sunview Drive forms a "T" intersection with Grantland Drive on the east side of Grantland Drive. Grantland Drive has a downward slope for approximately a hundred yards or so prior to the intersection with Sunview Drive; and, beginning at the intersection with Sunview Drive, Grantland Drive begins a steeper incline leading to a crest of a hill approximately 175 to 200 feet on the north side of the intersection (more specific measurements are included below.) A bus stop and a bench are located on the southeast corner of the intersection and a fire hydrant is located on the northeast corner of the intersection. There are no markings on Grantland Drive which indicate lanes of travel, but the road permits traffic moving in both northerly and southerly directions. A 25 mile per hour speed limit sign is

posted on the east side of Grantland Drive at the top of the hill immediately south of the intersection with Sunview Drive. Parking is permitted on the east but not the west side of Grantland Drive.

The collision between the decedent and the city bus occurred at approximately 3:00 p.m. on 19 June 1978. At that time the weather was hot, and the visibility clear. Some cars were parked on the east side of Grantland Drive south of the bus stop.

Just prior to the accident, the city bus was proceeding northward on Grantland Drive and was moving down the hill toward the intersection with Sunview Drive. The bus moved out toward the center of the road in order to pass the parked cars. No passengers were waiting at the bus stop.

The parties agree that there is a genuine issue of material fact as to the speed of the bus immediately prior to the accident. Lillian Leach stated in her affidavit that she was standing in her living room and saw the bus pass by the front of her house 'at a high rate of speed" which she estimated to be between 35 and 40 miles per hour. The defendant driver Drury Spain told Officer Phillips shortly after the accident that the bus was going at a rate of 25 to 30 m.p.h., but in his deposition, the driver stated that he was going 20 m.p.h.

The relative timing, distances, and positions involved are discussed more fully in the opinion. However, it appears that, as the bus was at or near the intersection at the bottom of the hill, the deceased bicyclist had just ridden his bicycle over or had just mounted his bicycle on the top of the hill just north of the intersection. All eyewitnesses agree that the deceased proceeded southward down the hill and looked downward at the ground or the bike so that he could not see the approaching bus and that he kept his head down until immediately before the accident. It is also apparent that the deceased began his movement on the west side of Grantland Drive (in his right lane) and that at some point the deceased crossed over onto the east side of Grantland Drive.

As the deceased approached the top of the hill, north of the intersection, the bus was completing his movement around the parked cars at a point adjacent to or south of the intersection of Grantland and Sunview Drives. After seeing the bicyclist moving toward the bus's lane of travel, the defendant driver sounded his horn four to six times (although some witnesses do not recall hearing the horn). The driver also applied his brakes so that the bus was either stopped or moving slowly (5 to 10 m.p.h.) when the deceased and his bicycle collided with the left front corner and the windshield of the bus. One witness stated that even if the bus had stopped, the decedent would nonetheless have struck the bus. Others stated, in answering leading questions, that the bus driver had no opportunity to do anything else to avoid the accident. No witness identified any action the bus driver might have taken to avoid the accident.

The collision occurred approximately 15 or 20 feet beyond the fire hydrant. Although the driver testified that the left side of the bus was only 10 to 15 inches from the east curb at the time of the impact, measurements taken before the 8-foot-wide bus was moved indicated that the right front wheel of the bus was 5 feet 10 inches from the west curb.

In his deposition Officer Phillips stated that in his opinion the decedent's head struck the windshield. James Woodward observed hair and skin attached to the cracked glass in the windshield. Woodward's measurements indicated that the distance from the west curb of Grantland Drive to the closest portion of the bus was 12 feet 7 inches, but that the distance from the point immediately below the hair and skin in the cracked windshield to the west curb was 13 feet 9 inches.

Other necessary facts will be stated in the opinion.

William A. Smith, Jr., for plaintiff appellant.

Allen, Steed and Allen, by Thomas W. Steed, Jr., and William D. Dannelly for defendant appellees.

CLARK, Judge.

The plaintiff challenges as error the trial court's granting of defendant's motion for summary judgment.

The plaintiff first argues that there were several genuine issues of material fact as to defendant's negligence. We see no need to address each of these factual issues because the uncontradicted testimony and statements in the supporting depositions and affidavits clearly show that decedent was contributorily negligent and that decedent's contributory negligence was a concurring, if not the sole proximate cause of the accident; and, as a consequence, plaintiff is barred from recovery. *Griffin v. Ward*, 267 N.C. 296, 299, 148 S.E. 2d 133 (1966). The decedent was negligent in several respects. First, we note that in the absence of sufficient avidence to show otherwise, the decedent, being older than fourteen years of age, is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it. *Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E. 2d 763 (1967); *Baker v. Seaboard Air Line Ry.*, 150 N.C. 562, 564, 64 S.E. 506, 507, 509 (1909). Similarly, "under our motor vehicle statutes a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles." *Van Dyke v. Atlantic Greyhound Corporation*, 218 N.C. 283, 286, 10 S.E. 2d 727 (1940). Second, there is no conflict in the testimony of the eyewitnesses that the decedent had crossed over to the east side of Grantland Drive just before the accident, in which case, the decedent would also be negligent for failure to operate his bicycle upon the right half of the roadway, within the meaning of N.C. Gen. Stat. § 20-146(a).

The plaintiff, however, argues that the objective facts show otherwise, in that the decedent and the bus were both moving eastward at the time of impact and that, even when the bus stopped, part of the bus extended over the center line of the road. Were there no cars legally parked on the east side of Grantland Drive or were there markings on the pavement dividing lanes of travel, this argument might have merit, but where there is room both for the bus and the approaching vehicles to pass each other while abreast the parked car, it is clear that though the bus was not technically within the center of the road, it was nonetheless within its half of the "main-

traveled portion of the roadway" within the meaning of N.C. Gen. Stat. § 20-148. We note that if there were no room for the bus and another oncoming vehicle to pass each other when abreast of the parked car, it would have been the duty of the bus driver to have yielded to the oncoming vehicle, N.C. Gen. Stat. § 20-146(a)(2). Such was not true here, for even if the parked car were as wide as the city bus herein (8 feet), there still would have been two nine-foot-wide lanes in which both the bicycle and the bus could travel. The undisputed facts therefore indicate that decedent drove his bicycle over four feet into the bus's half of the "main-traveled portion" of the roadway at the time of the impact.

For this same reason there is also no merit in plaintiff's contention that the bus driver was negligent and proximately caused the accident because the driver did not slow down or stop when, after he saw the decedent in decedent's right lane at the top of the hill, the driver nonetheless proceeded around the parked car without slowing down. At this point in time there was no indication that decedent was moving eastward, and it was entirely reasonable for the bus driver to assume that the decedent would remain within his half of the main-traveled portion of the road. Similarly, the activity of passing the parked vehicle cannot be deemed to be an act of original negligence on the part of the bus driver which in turn created the decedent's perilous condition.

We now turn to plaintiff's argument that defendants are nonetheless liable under the doctrine of last clear chance. The doctrine "is not a single rule, but is a series of different rules applicable to differing factual situations." *Exum v. Boyles*, 272 N.C. 567, 575, 158 S.E. 2d 845, 852 (1968). We note that this case is not one in which the peril of plaintiff's decedent was created by the defendant, therefore, application of the rule of Section 480, of the Restatement of the Law of Torts, Negligence, would not apply. *Exum, supra.* Based on our discussion above, there are no facts which would tend to indicate any "original negligence" on the part of the defendant driver which created decedent's peril; rather, the evidence without conflict suggests that the decedent's peril was created by his own inattention and his own act of directing his bicycle into the path of the bus. Therefore,

we choose to apply the rule of § 479 of the Restatement of the Law, Torts, Negligence, quoted in *Exum, supra,* which entitles "plaintiff who has negligently subjected himself to a risk of harm from defendant's *subsequent* negligence" to recover if, immediately preceding the harm:

> "(a) *the plaintiff is unable to avoid it* by the exercise of reasonable vigilance and care, and
>
> (b) the defendant
>
> (i) *knows* of the plaintiff's situation and *realizes* the helpless peril involved therein; or
>
> (ii) knows of the plaintiff's situation and *has reason to realize* the peril involved therein; or
>
> (iii) *would have discovered* the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril *had he exercised the vigilance which it was his duty to the plaintiff to exercise,* and
>
> (c) *thereafter* is negligent in failing to utilize with reasonable care and competence *his then existing ability to avoid harming the plaintiff." (Emphasis added in Exum, supra.)*

272 N.C. at 574-75, 158 S.E. 2d at 852. The gist of the rule is "peril and discovery of such peril in time to avoid injury." *Exum, supra.* We see no material issue of the facts that: (1) decedent's peril was not apparent in time for the defendant to avoid the accident, and (2) that the defendant driver acted prudently to avoid the accident.

Plaintiff argues that the driver saw the decedent before the driver began to pull out around the parked car, at a point 246 feet from the point of impact, and, citing *Champion v. Waller,* 268 N.C. 426, 150 S.E. 2d 783 (1966), that the mere fact that the decedent was on a bicycle, placed the driver on notice of a dangerous situation. We do not agree. First, as we have ex-

plained, unlike the 13-year-old child in *Champion*, the decedent was almost 16 years of age and is presumed to be able to perceive danger and to act to avoid it. Second, at this point in time the driver saw the decedent in the middle of the west lane of travel and there was no indication that he was in any position of peril. No other person saw the bicyclist at this point in time. Plaintiff argues that Beverly Jones saw the decedent at the top of the hill "on our side" but her statement refers to a point in time when the bus was "going up" the hill, as opposed to when the bus was going down the preceding hill on the south side of the intersection and was in the act of passing the parked car.

The driver's testimony indicates that it was only after the bus had passed the parked car that it became apparent that the decedent, with his head down, was moving over to the bus's lane of travel. A this point the driver was 172 feet from the point of impact. At this point the decedent was still not in peril and could, by the exercise of reasonable vigilance, have extricated himself from possible danger. Nonetheless, the driver immediately began to apply the brakes.

The decedent continued in his lane of travel and began to cross over into the bus's lane of travel. At this point the decedent had entered a position of peril, although it is still apparent that the decedent, by the exercise of reasonable vigilance, could have turned his wheel to avoid moving toward the bus. However, even assuming that the decedent was in peril and could not extricate himself, the driver nonetheless acted promptly to avert an accident by continuing to apply his brakes, swerving to the right, and blowing his horn several times. There is no testimony which indicates that the accident could have been avoided by the mere flick of a wrist as the plaintiff suggests. On the contrary, given the speed and trajectory of the bicycle, and the relative size of the bus, it would have been difficult, if not impossible, for the bus to have avoided the collision. The plaintiff is required to offer evidence beyond speculation that the bus driver had a "clear" chance, as opposed to a mere possible chance to avoid the accident. Here, however, every eyewitness testified to the effect that the driver did all he could do. *See, e.g., Van Dyke v. Atlantic Greyhound Corporation, supra.* There is no material contradiction in any of this testimony.

Affirmed.

Chief Judge MORRIS and Judge ERWIN concur.

SYLVIA RODIN AND GERTRUDE GROTEN v. EBEN MERRITT

No.7915SC639

(Filed 5 August 1980)

Vendor and Purchaser § 2– vesting of title after conditions met – rule against perpetuities inapplicable – vesting of title in four years – reasonable time

Where the parties entered into an agreement for the sale of land with title to vest after certain conditions had been met, including having the property rezoned and annexed to the city, obtaining approval for the desired development from all necessary state and local governmental agencies, satisfying themselves that there was adequate water supply and sewage disposal, filing such subdivision plats as might be required, and obtaining building permits, the agreement was not violative of the rule against perpetuities since the conditions contained in the contract would be accomplished, if at all, within a reasonable time; a reasonable time would not extend beyond 21 years; the parties did not intend the contract to extend beyond a reasonable time; the purchaser was given the right to elect to waive any of the conditions and to call for closing in advance of the time set by giving notice in writing to seller's attorney; and this the purchaser did approximately four years after execution of the contract. Therefore, the trial court erred in ruling that the agreement was void and unenforceable as a matter of law.

APPEAL by plaintiffs from *McKinnon, Judge.* Judgment entered 11 May 1979, Superior Court, ORANGE County. Heard in the Court of Appeals 30 January 1980.

By this action plaintiffs seek a declaratory judgment, pursuant to G.S. 1-253 *et seq.* declaring that an agreement entered into between defendant and Rillstone Properties, Inc., on 25 July 1974, is valid and enforceable. Plaintiffs also seek a decree of specific performance requiring defendants to "cause the title to the property which is the subject of this Contract to be conveyed to a bank or trust company to be held by such bank or trust company as Trustee for the benefit of the seller" pursuant to the terms of the contract and to comply fully with all the

obligations under the contract. Plaintiffs are the assignees of Rillstone Properties, Inc. On or about 21 September 1978, counsel for plaintiffs wrote to defendant's counsel requesting that, pursuant to the final paragraph on page 4 of the contract, defendant "cause the title to the property described in said Agreement to be conveyed to a bank or trust company within thirty (30) days from the date of this letter, which bank or trust company shall hold the property for the benefit of Mr. Merritt pursuant to the terms of said Contract and which bank or trust company shall receive explicit and express instructions that it is authorized and directed to deliver title to said property to my clients pursuant to said Agreement."

Defendant's counsel, by letter dated 10 October 1978, advised that Mr. Merritt did not agree to transfer title to the property to a bank or trust company.

On 28 November 1978, plaintiffs instituted this action. Defendant answered, including in his answer a motion to dismiss, based on contentions that defendant's wife is a necessary party and that the court lacks jurisdiction to adjudicate plaintiffs' claim. Further, he averred as his first defense, that plaintiffs' complaint failed to state a cause of action. By his second defense, he denied the principal allegations of the complaint. In his third defense, he averred that the agreement is not enforceable because no consideration has been paid and because it contains no time for performance, a period in excess of four years being an unreasonable time. He then filed a motion for judgment on the pleadings under G.S. 1A-1, Rule 12(c).

On hearing of the motion to dismiss and motion for judgment on the pleadings, the court entered an order in which it declared that the action is a proper one under G.S. 1-253 *et seq.*, but that the agreement is void and unenforceable as a matter of law and plaintiffs are not entitled to specific performance.

Powe, Porter, Alphin and Whichard, by Charles R. Holton and Eugene F. Dauchert, Jr., for plaintiff appellant.

Alexander and McCormick, by Sydenham B. Alexander, Jr., and John G. McCormick, for defendant appellee.

MORRIS, Chief Judge.

Plaintiffs' one assignment of error is directed to the court's ruling that the agreement is void and unenforceable as a matter of law. Plaintiffs contend that the agreement is not violative of the rule against perpetuities. We agree.

Under the terms of the contract, "Seller agrees to sell and convey, and the Purchaser agrees to purchase all that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Township of Chapel Hill, State of North Carolina, being more particularly described in Schedule A, annexed hereto and being more particularly shown and delineated on the map annexed hereto and made a part hereof." No date was set for the transfer of title. The purchase price was $1,800,000. Fifty thousand dollars of that was to be placed in escrow upon the execution of the contract in an interest bearing account pending performance by the parties of the obligations under the contract. Four hundred thousand dollars was to be paid in cash or by certified check "on closing of title". The remaining $1,350,000 was to be represented by a note bearing interest at the rate of 8% per annum and to mature seven years "after the closing of title." The note was to be secured by a deed of trust conveying the property. The contract was "subject to and conditioned upon the ability of the Purchaser, at Purchaser's own cost and expense:

a) to cause the property which is the subject of this contract to be annexed to the City of Chapel Hill;

b) to cause the property which is the subject of this contract to be rezoned to a zoning use classification or classifications to permit the comprehensive development of the subject property with a blend or mix, acceptable to Purchaser of commercial use; multi-family/condominium use; one family residential use;

c) the obtaining of all state and local agency approvals for such comprehensive development of the property including, but not limited to, state road approvals;

d) sufficient and satisfactory evidence of availability and capacity to serve the proposed development of water supply and sewage disposal;

e) the filing of subdivision plats or site plans as may be required by any and all state of [sic] municipal agencies;

f) the issuance of valid and enforceable building permits in such number and for such use as Purchaser may require consistent with the zoning use classification above enumerated.

The closing of title to be had pursuant to this contract shall be had thirty (30) days subsequent to the completion of items a through f enumerated above.

The conditions of this contract shall be deemed to be conditions only and not representations, it being expressly understood that the failure of a condition shall entitle Purchaser to a cancellation of this contract and a refund of the moneys paid hereunder.

The Purchaser may elect to waive any condition set forth in this contract."

The Rule Against Perpetuities is stated as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray, Rule Against Perpetuities § 201, p. 191 (4th ed. 1942). It precludes the creation of any future interest in property which does not necessarily vest within 21 years after a life or lives presently in being, and the period of gestation, where gestation is, in fact, taking place. Where the 21-year period has no reference to lives in being, it has been said to be in gross, and the grant is not too remote if the contingency must happen within 21 years. "If . . . a contract creates an interest in property which equity can enforce, then the rule against perpetuities applies." 61 Am.Jur. 2d *Perpetuities and Restraints on Alienation* § 42, pp. 44-45 (1972); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907).

If the contract is construed, as we think it must, as postponing the vesting of the title to the land until all conditions are performed, vesting could conceivably be delayed longer than 21 years from the date of the execution of the contract.

The Rule grew up as a limitation on family dispositions of property, and the measuring stick of lives in being plus 21 years is well adapted to disposition of property by will and other family gift transactions. However, it is difficult to perceive that the same reasons for its creation would have any application to today's sophisticated, arms-length commercial real estate transactions. We find it difficult to believe that either lives in being or 21 years have much relevance to business and their affairs, or that this judge made rule should be applied to commercial transactions. *See generally* Leach, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv. L. Rev. 1318 (1960) [hereinafter "Leach"]. Note, *Rule Against Perpetuities: Application to a Lease to Commence Upon Completion of Building*, 47 Calif. L. Rev. 197 (1959); Note, *Property: Rule Against Perpetuities: Applicability to Commercial Lease*, 6 U.C.L.A. L. Rev. 165 (1959).

> Rules which bear such birthmarks assume a different aspect when they are applied to contracts or leases in a modern society whose economic structure rests upon planning for the future and whose life blood is credit. Since the rule against perpetuities was born in a society which extolled the tight ownership of inherited real property, it does not facilely operate as to commercial agreements in today's dynamic economy.

Wong v. DiGrazia, 35 Cal. Rptr. 241, 247, 386 P. 2d 817, 823 (1963).

We think the facts in some recent cases involving "on completion" leases are similar enough to the facts in the case *sub judice* to merit discussion. Frequently, leases for spaces in shopping centers are executed as early as prior to the beginning of construction of the shopping center. The leases generally provide that the term shall begin either upon completion or within a stated number of days from completion of the premises, and, of course, the term could conceivably be delayed beyond

21 years. In order to avoid the application of the Rule, some courts have construed the transaction as one which creates a vested interest with the term and possession to take effect in the future. *E.g., Francis v. Superior Oil Co.*, 102 F. 2d 732 (10th Cir. 1939); *Isen v. Giant Food, Inc.*, 295 F. 2d 136 (D.C.Cir. 1961); *City of Santa Cruz v. MacGregor*, 178 Cal.App. 2d 45, 2 Cal.Rptr. 727 (1960). Some courts have held the contract void as violative of the rule. *Johnson v. Preston*, 226 Ill. 447, 80 N.E. 1001 (1907); *Dallapi v. Campbell*, 45 Cal.App. 2d 541, 114 P. 2d 646 (1941) (oil and gas lease rights reserved in deed); *Haggerty v. City of Oakland*, 161 Cal.App. 2d 407, 326 P. 2d 957 (1958) ("on completion" lease); *Southern Airways Co. v. DeKalb County*, 101 Ga. App. 689, 115 S.E. 2d 207 (1960) (reversed on ground that agreement did not constitute a lease but rather a management contract in *Southern Airways Co. v. DeKalb County*, 216 Ga. 358, 116 S.E. 2d 602 (1960)); *United Virginia Bank Citizens & Marine v. Union Oil Co. of Cal.*, 214 Va. 48, 197 S.E. 2d 174 (1973) (agreement granting defendant option to purchase land, the 120-day option period to begin at the time the City of Newport News, Virginia, acquired certain right of way, held void as being in violation of Rule Against Perpetuities).[1]

We believe the better reasoned result is reached in *Wong v. DiGrazia, supra.* There the parties entered into a 10-year lease to commence upon filing of notice of completion of a building to be constructed. The lessor's obligation to construct was subject to "material and/or labor shortages, strikes, lockouts, governmental actions and all causes beyond control of the lessor," the obtaining of a building permit, and approval of the completed plans and specifications. The agreement required the lessor to begin construction "forthwith" upon approval of the plans and to "continue expeditiously." The Court wrote a very scholarly discussion of the Rule Against Perpetuities and noted:

[1]Although still authoritative as precedent, the results and reasoning in *Johnson v. Preston, supra,* and *Haggerty v. City of Oakland, supra,* have been criticized and questioned in subsequent decisions. *See Breault v. Feigenholtz*, 250 F. Supp. 551 (N.D. Ill. 1965); *Singer Co. v. Makad, Inc.*, 213 Kan. 725, 518 P. 2d 493 (1974); *Wong v. Digrazia, supra.*

> Not only have the courts evolved exceptions to the rule, but the doctrine as to performance within a reasonable time constitutes in itself one such exception. Courts and scholars almost unanimously agree that provisions which make vesting contingent upon performance within a reasonable time, or some equivalent phrase, do not violate the rule "if, in the light of the surrounding circumstances, as a matter of construction 'a reasonable time' is necessarily less than twenty-one years." (3 Simes & Smith, Future Interests (2d ed. 1956) § 1228 at p. 122.) Many courts, in fact, presume that a "reasonable time" is less than the period of the rule. In any event, a reasonable time in the present transaction, in the light of the circumstances, must necessarily be a period far less than 21 years. We cannot accept that portion of *Haggerty v. City of Oakland* which expresses a contrary position and, to that extent, it is disapproved."

35 Cal. Rptr. at 249-50, 386 P. 2d at 825-26. The Court further concluded all rights established by the agreement would arise within the 21-year period and that any breach of the agreement would be remedial within such period. The same result was reached by the Supreme Court of Kansas in *Singer Co. v. Makad, Inc.*, 213 Kan. 725, 518 P. 2d 493 (1974).

In the agreement before us title was to be transferred 30 days after purchaser had completed the items listed; *i.e.*, cause the property to be rezoned and annexed to the city, obtained approval for the desired development from all necessary state and local governmental agencies, satisfied themselves that there was adequate water supply and sewage disposal, filed such subdivision plats as might be required, and obtained building permits. Clearly, all these things would be accomplished prior to the expiration of a 21-year period. In *Isen v. Giant Food, Inc., supra*, the plaintiffs owned contracts to purchase certain unimproved land in Fairfax County, Virginia, contingent on obtaining zoning for commercial purposes. Defendant desired that plaintiffs build a store for its rental on a portion of the land. They entered into an "Agreement to Lease" which provided that within 20 days after the plaintiffs acquired the property the parties would execute a lease identical in terms with the agreement to lease. Although the Court held that the leasehold

interest vested, under Virginia law, upon the execution of the agreement, not at the time the term commenced and the Rule Against Perpetuities was not applicable, the Court did say: "We think, however, that the agreement required that zoning for commercial purposes, if obtained at all, must be obtained within a reasonable time and that such time, in the circumstances of this case, is certainly within the period of perpetuities." 295 F. 2d, at 137-38.

Surely the conditions contained in the contract between the parties here would be accomplished, if at all, within a reasonable time. Just as clearly, it seems to us, a reasonable time would not extend beyond 21 years. It is completely obvious that the parties did not intend the contract to extend beyond a reasonable time. The purchaser was given the right to elect to waive any of the conditions and to call for closing in advance of the time set by giving notice in writing to seller's attorney. This the purchaser has done.

It seems clear that in drafting the contract the parties did not anticipate that the Rule Against Perpetuities would be applied to void the agreement. Had they recognized the possibility, it would have been quite simple merely to add a proviso that in any event closing and transfer of title would occur not later than 21 years from the date of the agreement. The observation of a noted authority in this field is pertinent:

> A very practical consideration is worth noting here: the esoteric learning of the Rule Against Perpetuities is, apart from dim memories from student days, a monopoly of lawyers who deal in trusts and estates. Those members of the bar who specialize in corporate matters including commercial leases, are not intimately familiar with it or alerted to its caprices. The law should not be applied in such a way as to ignore the realities of the legal profession.

Leach, supra, at 1322.

We think the result we have reached is a reasonable application of the rule and find support in a principle of law long recognized in this State; *i.e.,* where a contract does not specify

the time of performance or the time of termination, the law will prescribe that performance must be within a reasonable time and that the contract will continue for a reasonable time, "taking into account the purposes the parties intended to accomplish." *Scarborough v. Adams*, 264 N.C. 631, 641, 142 S.E. 2d 608, 615 (1965), and cases there cited; *Lewis v. Allred*, 249 N.C. 486, 490, 106 S.E. 2d 689, 692 (1959) (quoting with approval 49 Am. Jur., *Statute of Frauds*, § 356, p. 667 (1943): "In case of an executory contract of sale, where the time for the execution of the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time . . . ."); *Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E. 2d 472 (1952), and cases there cited; *Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E. 2d 872 (1971); *Hardee's Food Systems, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E. 2d 70 (1969). *See also Kirkland v. Odum*, 156 Geo. 131, 118 S.E. 706 (1923).

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

Reversed.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. ALTON DAWES CROUCH

No. 7922SC1150

(Filed 5 August 1980)

1. **Criminal Law § 90– State's impeachment of own witness – prior inconsistent statements – prejudicial error**

The trial court committed prejudicial error in permitting the district attorney to impeach his own witness by reading from and questioning the witness about portions of a pretrial statement made by the witness to an S.B.I. agent after the court had ruled that such portions of the statement were inadmissible in evidence.

2. **Constitutional Law § 45– refusal to permit defendant to act as co-counsel**

The trial court did not err in denying defendant's request to serve as co-counsel since a defendant does not have a right to appear both by himself and by counsel.

State v. Crouch

APPEAL by defendant from *Washington, Judge.* Judgment entered 19 July 1979 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 22 April 1980.

Defendant was charged in a bill of indictment, proper in form, with the offense of murder in the first degree and was convicted of murder in the second degree. Defendant was sentenced to an active term of imprisonment of not less than 18 years nor more than 25 years, from which he appealed.

STATE'S EVIDENCE

At 7:15 p.m. on 28 December 1978, Rayford and Irene Crouch (husband and wife) were watching television at home when Shuford John Marlow, deceased (Mr. Crouch's first cousin), came to visit them. The three had a few drinks. They went to the store and purchased $12.00 worth of groceries with a $100 bill. Marlow gave Irene the change. They returned to the Crouch home to find defendant (Mr. Crouch's nephew) standing at the door. They entered the trailer and continued to drink intoxicating beverages until Irene sat on defendant's lap and stated, "Shuford [deceased], this is our favorite nephew." Without warning, Marlow jumped up and pushed the table over on defendant, knocking him backward out of his chair onto the floor. A scuffle ensued between deceased and defendant. Rayford and Irene Crouch separated the two. Marlow apologized several times, defendant accepted the apologies, and they shook hands. Marlow went outside, and everyone thought he had gone home. Rayford saw the parking lights on Marlow's car come on at one point. A loud banging was heard at the door a few minutes later, and Marlow was standing there. He said, "Arie one of your [S.O.B.'s] come out here and I'm going to kill you." Rayford Crouch told Marlow that no one was mad at him and that he should come back into the house and spend the night. Marlow said, "By God, I'm going home." Mr. and Mrs. Crouch and defendant talked a few minutes longer. Then, defendant left to go home.

A commotion was heard outside, and Rayford Crouch found both men lying in the yard facing each other. Defendant was cutting Marlow. Rayford Crouch told him to stop and that he

was killing Marlow. Defendant stopped. Rayford Crouch tried to pick up Marlow, but found he had blood all over his arm. He then went into the house. He heard a car crank up and thought defendant was taking Marlow to the hospital. Later, he found Marlow's body in the yard.

DEFENDANT'S EVIDENCE

Defendant's evidence tended to show that he visited the Crouch home on 28 December, just as the State's evidence tended to show. Events inside the trailer were substantially similar to those described by Rayford and Irene Crouch. Defendant denied saying that there had never been a man whom he could not cut when he took out his knife, and he denied that Marlow had told him to put the knife away. He had shown everyone the knife, because it was a collector's item, and he had just bought it. He carried it with him, because he used it in his work to open cardboard boxes. After he left the trailer, he saw that Marlow was leaning into the passenger side of Marlow's car parked behind his car in the driveway. Defendant asked Marlow to move his car so that he could go home. Marlow came running around the car and swung a hammer at defendant, saying that he was going to kill defendant. Defendant ducked, and the hammer struck a glancing blow off the side of his head. Defendant moved closer to Marlow, trying to avoid further blows, and the two fell to the ground. Marlow continued to try to hit him, and defendant feared for his life. He got out his knife while holding onto Marlow with one hand and began cutting Marlow on the back of his leg. That did no good, so he began cutting Marlow on the back of his head. Marlow continued to hit him. Defendant went home and later returned to Crouch's trailer, found Marlow's body, and called the sheriff.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons II, for the State.

Edward L. Hedrick, for defendant appellant.

ERWIN, Judge.

[1] In his brief, defendant brings forward 38 assignments of error based on 135 exceptions taken during his trial. Defendant contends, *inter alia*, that the trial court committed error in allowing the district attorney to repeatedly question, argue with, and belittle his own witnesses concerning pretrial statements given to agents of the State Bureau of Investigation and in allowing the district attorney to ask leading questions of his own witness, portions of which questions were read verbatim upon excluded portions of the pretrial statements. We find prejudicial error, the judgment entered is vacated, and the defendant is awarded a new trial.

In *State v. Anderson*, 283 N.C. 218, 224-25, 195 S.E. 2d 561, 565-66 (1973), Justice Sharp (later Chief Justice) stated the rule for the Supreme Court relating to a party impeaching his own witness as follows:

> "Until changed by statute applicable to civil cases (G.S. 1A-1, Rule 43(b) (1969)), it was established law in this State that a party could not impeach is own witness in either a civil or a criminal case. 1 Stansbury, *North Carolina Evidence* § 40 (Brandis rev. 1973). *See also* McCormick, *Evidence* § 38 (Cleary Ed., 2d, ed. 1972); 3A Wigmore, *Evidence* §§ 896-905 (Chadbourn rev. 1970). This rule, unchanged as to criminal cases, still precludes the solicitor from discrediting a State's witness by evidence that his general character is bad or that the witness had made prior statements inconsistent with or contradictory of his testimony. However, the trial judge has the discretion to permit the solicitor to cross-examine either a hostile or an unwilling witness for the purpose of refreshing his recollection and enabling him to testify correctly. 'In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. *S. v. Noland*, [204 N.C. 329, 168 S.E. 413 (1933)]; *S. v. Taylor*, [88 N.C. 694 (1883)]. But the trial judge offends the rule that a witness may not be impeached by the party calling him and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief.' *State v. Tilley*, 239 N.C. 245, 251, 79 S.E. 2d 473, 477-78 (1954)."

In *State v. Smith*, 289 N.C. 143, 157, 221 S.E. 2d 247, 255-56 (1976), Justice Huskins stated for the Supreme Court:

> "During the examination of James Thomas, the district attorney questioned him with reference to a paper writing marked State's Exhibit 10 which purportedly was a statement made by Thomas to a police officer in November 1973. This statement apparently consisted of responses to the identical questions which were being asked at trial regarding the involvement of defendants in the crimes charged in this case. Defendants objected to the interrogation of Thomas concerning his previous written statement and, with the jury absent, argued that such examination was tantamount to the State's impeachment of its own witness. In overruling the objections the court replied that the statement previously made by Thomas was 'no more impeaching than the leading questions that he has been permitted to ask.' That is precisely the point defendants now urge, and we think the point is well taken.
>
> The district attorney's 'leading questions' were calculated not only to impeach his own witness but also to prove the contents and the truth of the prior inconsistent testimony of the witness at the first trial. The obvious effect of these questions was to demonstrate to the jury that a written record existed which corroborated verbatim the 'testimony' contained in the district attorney's questions. The anti-impeachment rule makes Exhibit 10 imcompetent as evidence, and the district attorney's questions which indirectly but unmistakably placed it before the jury were prejudicial. Such interrogation of the witness Thomas violated the 'rule of law which forbids a prosecuting attorney to place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence.' *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954); *accord, State v. Anderson, supra.*"

Rayford Crouch was interviewed by Special Agent Lester of the SBI on 29 December 1978. A written statement was taken by the agent. Judge Washington ruled that the

following portion of the 29 December 1978 statement of Rayford Crouch was excluded from being introduced into evidence at the trial of defendant:

"December 29, 1978 Interview of Rayford W. Crouch:

According to Rayford Crouch, after the first affray inside the trailer, and after Shuford Marlow had returned and stated, 'If any one of you sons-of-bitches come out of that place, I'll kill you.' Alton stated that he was, 'Not scared of the son-of-a-bitch and go up and went out the door.'

The witness stated that when Alton Crouch returned the next morning to find the body of Shuford Marlow, the defendant said, 'Let's take him and throw him in the river.' The witness stated that he told Alton, 'Hell no, I'm not having nothing to do with that.'"

On direct examination of Rayford Crouch by Mr. Zimmerman, the following questions were propounded:

"Q. Now, again, you talked to Special Agent Lester and gave him a statement, didn't you?

A. Yes, sir.

Q. And you looked at what I showed you just a minute ago. I ask you to look at this and refresh your recollection about this, also. Look at that line I have underlined right there where my thumb is. Does that refresh your recollection now as to what you told him?

A. I told him that.

Q. What was that you told him?

MR. HEDRICK: OBJECTION.

COURT: OVERRULED.

EXCEPTION NO. 10

A. I told him that he said, 'Let's throw him in the river.'

Q. Who said that?

A. Alton, but just like I said, I drunk so much liquor and everything until I have these hallucinations and dreams, and I'll not get on this stand and swear that that is the Gospel truth.

Q. But you ain't going to swear you didn't say it, either, are you?

MR. HEDRICK: OBJECTION.

COURT: SUSTAINED. You can't cross examine your own witness.

MR. ZIMMERMAN: I understand, if Your Honor please.

Q. Now, you see that there, Rayford?

A. Yes.

Q. Does that refresh your recollection — what did you say then?

MR. HEDRICK: OBJECTION.

COURT: OVERRULED.

EXCEPTION NO. 11

A. I don't think he said that.

Q. What did he say, though?

A. He said — said, 'I'm a going home.'

Q. What did you tell the agent that he said after you refreshed your recollection now?

MR. HEDRICK: OBJECTION.

COURT: OVERRULED.

MR. HEDRICK: I'd like to be heard, if Your Honor please.

(Conference at the bench with the court and Mr. Hedrick and Mr. Zimmerman.)

COURT: The objection is sustained to that question.

MR. ZIMMERMAN: Cross examine.

(To the foregoing which, despite the court's rulings, amounted to an impeachment of his own witness by the district attorney, the defendant respectfully excepts.)

EXCEPTION NO. 12"

On redirect examination of Rayford Crouch, Mr. Zimmerman propounded:

"Q. All right. Now, what was that he asked you to put in that there — is that what is up here?

MR. HEDRICK: OBJECTION.

COURT: OVERRULED.

Q. Is that what he told you to say — is that one of the things Mr. Lester told you to say?

A. Well, I don't recall.

Q. That Alton said he wasn't scared of the son-of-a-bitch and went out the door?

(The foregoing questions were asked while the district attorney was pointing to a paper in his hand and holding the paper in the face of the witness.)

MR. HEDRICK: Objection to his reading that to the jury, your Honor. (Referring to the district attorney's reading from the SBI report to the witness.)

COURT: Members of the jury, the question of counsel is not evidence of itself. The witness testifies from the witness stand. Next question?

Q. What did this man right here tell you to put in there that wasn't the truth? (Referring to the statement again.)

A. Well, I don't know just offhand. He just scared me, and I had been drinking so much that I would have told him anything to get out of there. I ain't going to swear that he said those words now.

Q. What words?

A. That he said he wasn't scared of him.

MR. HEDRICK: OBJECTION.

MR. ZIMMERMAN: He has a right to answer now.

(Comment directed to defense counsel)

(To the court's failure to rule upon defense counsel's objection and to the court's allowing the questioning to proceed, the defendant respectfully excepts.)

EXCEPTION NO. 14

A. I'm not going to say he said, 'I'm not scared of the son-of-a-bitch,' because he said three or four times he was going home; but whether he said that, I wouldn't swear to that.

Q. You say Alton said that and you can't swear to that, is that right?

A. That's right.

Q. Now, you said, (Alton said), 'Let's take him and throw him in the river.' You are saying Mr. Lester told you that — to tell that, too?

A. No, sir, I believe I dreamed that, because I have a lot of hallucinations over drinking whiskey.

Q. Did you dream him out there, this man, cutting that old man out in the yard there?

MR. HEDRICK: OBJECTION.

COURT: OVERRULED.

EXCEPTION NO. 15

A. No, sir.

Q. Was that dreaming?

A. No, but I hadn't been asleep yet then. I'd been asleep whenever he questioned me."

The State contends that the record does not show prejudicial error and relies on *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568 (1976), *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301, 97 S.Ct. 338 (1976). The distinction between *Peplinski* and the case *sub judice* lies in the fact that Judge Washington had ruled that the portion of the statement complained of would not be admitted into evidence; but nevertheless, the district attorney continued to read and to cross-examine his witness about the excluded statement. We are compelled to find prejudicial error in this assignment of error.

[2] The trial court did not err in denying defendant's request to serve as co-counsel. A party has the right to appear in *propria persona* or by counsel, but the right is alternative, and one has no right to appear both by himself and by counsel. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386 (1964), *cert. denied*, 377 U.S. 1003, 12 L.Ed. 2d 1052, 84 S.Ct. 1939 (1964), *reh. denied*, 379 U.S. 874, 13 L.Ed. 2 d 83, 85 S.Ct. 28 (1964).

We do not consider the other assignments of error, in that they may not occur at retrial of this defendant.

Defendant is awarded a

New trial.

Judges HEDRICK and ARNOLD concur.

W & H GRAPHICS, INC. AND BOBBY E. WINKLER v. RONALD D. HAMBY

No. 7925SC834

(Filed 5 August 1980)

1. **Corporations § 28; Rules of Civil Procedure § 15.2– amendment of complaint to conform to evidence – no implied consent by defendant**

In an action by a corporation and one of its stockholders against the other corporate stockholder to recover damages for the wrongful retention of the corporation's property and to obtain an accounting, the trial court erred in permitting the individual plaintiff to amend his complaint to conform to the evidence and seek involuntary dissolution of the corporation pursuant to G.S. 55-125 (a)(4), although the evidence was sufficient to raise an issue as to the reasonable necessity of involuntary dissolution, since the corporation itself is a necessary defendant in an action for involuntary dissolution, and it cannot be said that defendant knew or should have known that the admission of evidence relevant to the issue of involuntary dissolution was directed to that issue and that he was impliedly consenting to a complete realignment of the parties, particularly where the same counsel represented both the individual plaintiff and the corporation. G.S. 1A-1, Rule 15(b).

2. **Rules of Civil Procedure § 6– belated filing of reply – implied finding of justification**

The trial court's order denying defendant's motion for an entry of default on its counterclaim for failure of plaintiffs to file a reply within the specified period by implication found that plaintiffs' filing of a reply after the specified time was justified pursuant to G.S. 1A-1, Rule 6(b).

3. **Rules of Civil Procedure § 41– nonjury trial – dismissal of claim – failure to find facts**

The trial court in a nonjury trial erred in failing to make findings of fact to support its entry of judgment dismissing defendant's counterclaim at the close of defendant's evidence. G.S. 1A-1, Rule 41(b).

APPEAL by defendant from *Howell, Judge.* Judgment entered 14 March 1979 in Superior Court, CALDWELL County. Heard in the Court of Appeals 18 March 1980.

Plaintiffs W.H. Graphics, Inc. and Bobby E. Winkler brought this action on 20 March 1978 against defendant Hamby seeking an accounting and damages, alleging that defendant was in wrongful possession of the corporation's property and that he had refused to return it to the corporation after demand had been made upon him to do so.

Plaintiff corporation was formed in 1971 by plaintiff Winkler and defendant Hamby to carry on a printing business. Originally, plaintiff Winkler and defendant Hamby were the sole shareholders and directors, and by resolution of the Board of Directors in June 1971 Winkler was named president and treasurer and Hamby vice president and secretary. During the period that the corporation actively carried on business, Winkler was issued 1315 shares of stock, and Hamby was issued 417 shares. The corporation continued in business until 31 December 1976, at which time the parties agreed to cease doing business and to permit defendant Hamby to continue to use the equipment and other assets of the business. The corporation was not dissolved.

Plaintiffs alleged in their complaint that the agreement was that defendant continue to use the assets until a proper distribution was determined, and that in February 1978 plaintiffs made demand upon defendant to return the property, but that defendant refused to do so. They prayed for damages in the amount of $15,000.00 and for an accounting of the assets of W & H Graphics, Inc.

In his answer filed 17 May 1978 defendant admitted that he and plaintiff Winkler were shareholders in the business, that the parties had agreed to permit defendant to use the assets of the business, and that demand had been made that he return the property to the corporation. He alleged, however, that the parties had agreed since the inception of the business that all profits and ownership be divided equally between him and Winkler, and he alleged that if plaintiff owned 76» of the out-

standing shares in W & H Graphics, Inc., that such shares were never lawfully issued. By way of counterclaim, defendant alleged that the individual plaintiff had mismanaged the business of the corporation, causing it to sustain losses, and that the individual plaintiff had wrongfully withdrawn monies from the corporation. Defendant sought dismissal of plaintiff's complaint under G.S. 1A-1, Rules 12(b)(1) and 12(b)(6), and prayed recovery of $78,010.09 plus interest in damages.

On 17 July 1978, plaintiffs having filed no timely reply to his counterclaim, defendant filed an affidavit with the clerk of superior court of Caldwell County seeking entry of default. Prior to the hearing scheduled before the clerk on 31 July 1978, plaintiffs filed their reply. Following the hearing on 31 July, the clerk refused to enter default. On 31 August 1978 an order was entered by Judge Walker, as presiding judge of Superior Court in Caldwell County, denying defendant's motion for entry of default and for judgment by default.

Following denial of a motion by plaintiffs for summary judgment and of motions by defendant for dismissal of plaintiff's action, the case came on for trial before Judge Howell, sitting without a jury, at the 12 March 1979 civil session of superior court in Caldwell County. All parties presented evidence, and at the close of defendant's evidence, plaintiffs' motion for involuntary dismissal of defendant's counterclaim was granted. At that time the individual plaintiff was permitted to amend his complaint pursuant to G.S. 1A-1, Rule 15(b) to seek involuntary dissolution of the corporation. The trial court entered judgment, making findings of fact as to plaintiff's amended claim for relief and concluding that involuntary dissolution of W & H Graphics, Inc. was reasonably necessary for the protection of the individual plaintiff. The parties were given ten days from the entry of judgment to agree upon an alternative course to dissolution. The order stated that if the parties did not reach agreement within that time, a receiver should be appointed to take possession of the corporate assets for sale and to distribute the proceeds of sale in accordance with the interests of the shareholders in the corporation. From this judgment defendant appealed.

Billings, Burns & Wells, by W. Joseph Burns and Michael Wells for plaintiff appellees.

W.P. Burkhimer for defendant appellant.

PARKER, Judge.

PLAINTIFFS' CLAIMS FOR RELIEF

[1] The judgment entered 14 March 1979 was based upon the granting of plaintiff Winkler's motion at the close of trial to amend the pleadings to conform to the evidence and seek involuntary dissolution of the corporation pursuant to G.S. 55-125. The validity of that judgment as to plaintiffs' claims for relief depends upon whether the motion to amend was properly granted. We hold that it was not.

G.S. 1A-1, Rule 15(b) provides in part:

> *Amendments to conform to the evidence.* — When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues . . . .

The purpose in adopting Rule 15(b) was to alter the strict code doctrine of variance which existed under our prior law. *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972); *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). As has been stated concerning the federal counterpart to our own rule:

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record–

> introduced as relevant to some other issue– which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial.

3 Moore's Federal Practice § 15.13 [2] at 15-171, 15-172 (2d ed.); *accord, Fowler v. Johnson*, 18 N.C. App. 707, 198 S.E. 2d 4 (1973). Balancing the liberal philosophy of Rule 15(b) in favor of amendments against the notion of fairness to opposing parties, our Supreme Court has held that amendment to conform to the evidence is appropriate only where sufficient evidence has been presented at trial without objection to raise an issue not originally pleaded and where the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975).

The present case began as a suit brought by W. H. Graphics, Inc. and Bobby Winkler, as a shareholder of plaintiff corporation, to recover damages and to obtain an accounting.[1] Defendant's counterclaim was apparently grounded on the theory that the individual plaintiff had breached his fiduciary duty to the corporation, for which breach he sought a recovery of monetary damages. At trial plaintiff Winkler introduced evidence of the value of the printing equipment and other assets of the corporation which he had alleged defendant had no right to retain. He testified that at the time the parties agreed to cease doing business, plaintiff had proposed that defendant buy him out or buy the stock and keep the equipment and continue doing business as W & H Graphics, Inc. Defendant thereafter used the

[1]W & H Graphics was, of course, the real party in interest in this litigation. To the extent that the complaint states a cause of action against defendant Hamby for retention of corporate assets, the cause of action lies in the corporation alone. *Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967). Thus, plaintiff was without any real interest in the original controversy. G.S. 1A-1, Rule 21 provides that misjoinder of parties is not ground for dismissal of the action, but that the court, on motion of any party or on its own initiative, may order that a misjoined party be dropped. Defendant in the present case, however, made no such motion under Rule 21.

equipment in his own business, known as Hamby Printing. On cross-examination, plaintiff testified that he was issued 1305 shares of stock in the corporation in consideration of his payment of $10,000.00 and services previously performed. He identified numerous checks which he had written or cashed for the corporation and testified that most of them were for business purposes.

In turn, defendant offered evidence that during the time W & H Graphics, Inc. was a going business, he had handled the production end of the business, and Winkler the sales and promotion end. Defendant invested $4,000.00 in the business and received "a little over 400 shares of stock." Because of the individual plaintiff's neglect of his duties, the level of business fell between 1974 and 1976. Defendant testified that when the parties ceased doing business as of 31 December 1976, few assets remained. At that time they agreed that plaintiff Winkler would take the accounts receivable and defendant would take the equipment, and that eventually upon dissolution of the corporation, plaintiff and defendant would adjust the amounts received on liquidation to equalize their receipts. After December 1976 defendant opened up his own printing business known as Hamby Printing Company, at the same place of business formerly occupied by W & H Graphics, Inc. and used the equipment of W & H Graphics as well as new equipment he purchased on his own to carry on that business. In a verified affidavit filed prior to trial defendant stated that he held the assets as secretary and stockholder of W & H Graphics, Inc.

G.S. 55-125(a) provides that the superior court shall have power to liquidate the assets and business of a corporation in an action by a shareholder upon proof of any one of four conditions prescribed in that section. Subsection (4), which states one of those conditions, grants power to decree involuntary dissolution where "[l]iquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." This statutory provision vests broad equitable powers in the trial court in determining whether a corporation should be involuntarily dissolved, *Royall v. Lumber Co.*, 248 N.C. 735, 105 S.E. 2d 65 (1958); *see, Robinson, North Carolina Corporation Law and Practice*, § 29-11, pp. 592-593 (2d ed. 1974).

The evidence presented in the present case was clearly sufficient to raise an issue as to the reasonable necessity of involuntary dissolution under G.S. 55-125 (a)(4), thereby satisfying the first requirement established in *Eudy v. Eudy, supra* for amendment under Rule 15 (b). The question remains, however, whether the second requirement of *Eudy* was met, that is, that the parties understood, or reasonably should have understood, that this evidence was directed to that issue. We hold that it was not. The necessary defendant in an action for involuntary dissolution of a corporation under G.S. 55-125 is the corporation itself. Shareholders and directors may, but need not be, made parties defendant unless relief is sought against them personally. *Dowd v. Foundry Co.*, 263 N.C. 101, 139 S.E. 2d 10 (1964); *see* G.S. 55-125(e). In the present case, the corporation was a party from the outset of the litigation, but only as a co-party with plaintiff Winkler, and both the individual and the corporate plaintiff were jointly represented by the same counsel. The allowance of Winkler's amendment under Rule 15(b) at the close of trial to state a claim for involuntary dissolution had the effect not only of amending the complaint, but also of realigning W & H Graphics, Inc. as a party defendant. It can hardly be said that defendant knew or should have known that the admission of evidence relevant to the issue of involuntary dissolution was directed to that issue and that he was impliedly consenting to a complete realignment of the parties, particularly where the same counsel represented both Winkler and the corporation. Because the judgment was based on the erroneous allowance of the amendment to the pleadings, it must be vacated.

DEFENDANT'S COUNTERCLAIM

[2] Defendant contends that he was entitled to default judgment on his counterclaim on the grounds that plaintiffs failed to file timely reply to his pleadings. The counterclaim was filed with the clerk of court and served upon plaintiff by mail on 17 May 1978. As of 17 July 1978 when defendant sought entry of default, plaintiffs had filed no reply, and time for filing had expired. However, twelve days prior to the hearing on 31 July 1978 before the clerk of court on defendant's application for entry of default, plaintiffs did file a reply. Both the clerk of

court and the presiding judge of superior court denied defendant's application for judgment by default based on that filing. We find no error. G.S. 1A-1 Rule 6(b) provides, in part, as follows:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.

Treating plaintiffs' filing of a reply on 19 July 1978 as a motion for enlargement of the time provided for responding, we find inherent in the trial court's order denying defendant's motion for entry of default judgment the conclusion that plaintiff's failure to act was justified under Rule 6(b).

[3] Proceeding to the merits of defendant's counterclaim, we note that the court allowed plaintiff's motion for involuntary dismissal under Rule 41(b) at the close of defendant's evidence. Rule 41(b) provides that "[i]f the court renders judgment on the merits against the plaintiff, the court *shall* make findings as provided in Rule 52(a)." (Emphasis added). The requirement that findings of fact be made is mandatory, and the failure to do so is reversible error. *Hospital Corp. v. Manning*, 18 N.C. App. 298, 196 S.E. 2d 538 (1973). With respect to his counterclaim, defendant in the present case was a "plaintiff" within the meaning of Rule 41(b). When the court entered judgment on plaintiffs' claim for relief, no findings of fact were made to support the dismissal of defendant's counterclaim. For that reason, defendant is entitled to a new trial.

Conclusion

The result is, the judgment ordering the involuntary dissolution of W & H Graphics, Inc. and dismissing defendant's

counterclaim with prejudice is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

Vacated and Remanded.

Judges MARTIN (Harry C.) and HILL concur.

EVERETTE CANTERBURY, T/A EVERETTE CANTERBURY LUMBER COMPANY v. MONROE LANGE HARDWOOD IMPORTS DIVISION OF MACROSE INDUSTRIES CORPORATION

No. 795SC986

(Filed 5 August 1980)

Process § 14; Rules of Civil Procedure § 4– foreign corporation – service of process on Secretary of State ineffective

Where defendant, a N.Y. corporation, allegedly purchased lumber from plaintiff, a citizen of West Virginia, instructed plaintiff to ship the lumber to an N.C. business for treatment, processing, and storage, and then failed to pay for the lumber, plaintiff's action to recover the amount due was properly dismissed for insufficiency of service of process where service was had upon defendant by delivering copies of the summons and complaint, along with an order of attachment, to the office of the Secretary of State of N.C. which, in turn, mailed the documents to defendant in N.Y., since defendant had not appointed a process agent in this State; defendant did not transact business in N.C. so that service on the Secretary of State would be effectual under G.S. 55-143, the isolated incident involving one shipment of lumber not being sufficient to support such service; and there was no evidence that the contract between this plaintiff and this defendant was to be performed in whole or in part in N.C. so as to invoke the provisions of G.S. 55-145(a)(1), though a contract between defendant and a processor of lumber was to be performed here, since the cause of action did not arise out of that arrangement but out of the sales contract between plaintiff and defendant. Such service was not proper even though defendant admittedly had actual notice and even though minimum contacts existed between defendant and N.C. to permit the State constitutionally to exercise jurisdiction had service been effective.

APPEAL by plaintiff from *Bruce, Judge*. Order entered 9 August 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals on 16 April 1980.

Plaintiff in this action is a citizen of West Virginia, and defendant is a New York corporation. The action had its inception in the State of North Carolina on 26 March 1979, at which time plaintiff sought and obtained an order of attachment on a quantity of lumber owned by defendant and stored at Maritime Lumber Services in Wilmington, New Hanover County, North Carolina. As grounds to support the attachment, plaintiff filed an affidavit averring that defendant, with the intent to defraud its creditors, "[h]as removed, or is about to remove, [the lumber] from this State, ... and it is believed ... that defendant will soon ship it to points unknown." Pursuant to G.S. § 1-440.10, plaintiff filed a bond in the amount of $200.

Thereafter, on 13 April 1979, plaintiff filed a complaint wherein he alleged that he had sold the lumber in question to the defendant in September and October 1978, and that, "[p]ursuant to defendant's instructions," he had shipped the lumber to Maritime Lumber Services in Wilmington "for storage and treatment." The parties' contract provided that the lumber be paid for in full within 30 days after invoice, but plaintiff alleged that defendant had "defaulted" in paying and remained indebted to him in the amount of $14,694.

Service was had upon defendant by delivering copies of the summons and complaint, along with the order of attachment, to the Office of the Secretary of State of North Carolina. That office mailed the documents to the defendant in New York.

On 11 May 1979 defendant filed an answer wherein it moved to dismiss the complaint for lack of personal jurisdiction and insufficiency of service of process. Defendant further generally denied the allegations of the complaint, but admitted that it entered into "certain contracts" with plaintiff to buy "certain quantities" of lumber, and that the lumber was to be sent to Maritime Lumber Services in Wilmington "for storage, treatment and reshipment." However, defendant contended that plaintiff had "delivered a smaller quantity of lumber than was contracted for" which prevented defendant from filling an order to its customer. Defendant asserted a counterclaim for damages in the amount of $3,000 for loss of profits on the order to its customer. Plaintiff replied on 17 May 1979 and in essence denied the averments of the counterclaim.

On 14 June 1979 defendant moved to discharge the order of attachment against its property. In support of its motion, it offered affidavits that the value of the attached lumber was $15,800 and filed a bond in the amount of $29,400, in accord with G.S. § 1-440.39. The motion was allowed and an order was entered discharging the attachment. On 3 July 1979 the court, upon motion of the defendant, ordered that the plaintiff increase the amount of his bond to the sum of $8,000, pursuant to G.S. § 1-440.40(a).

Defendant then moved to dismiss the complaint "for lack of personal jurisdiction pursuant to Rule (12)(b)(2). . . ." On 9 August 1979 Judge Bruce entered an Order dismissing plaintiff's complaint "for insufficiency of service of process, pursuant to NCGS § 1A-1, Rule 12(b)(5)."

Plaintiff appealed.

Franklin E. Martin for the plaintiff appellant.

Franklin L. Block for the defendant appellee.

HEDRICK, Judge.

The question on which resolution of this appeal turns is whether substituted service of process on the Secretary of State was proper. For the reasons to follow, we are constrained to hold that it was not, even though the defendant admittedly had actual notice and even though we are satisfied that minimum contacts exist between this defendant and the State of North Carolina to permit this State constitutionally to exercise jurisdiction had service been effective.

Before we reach the ultimate issue respecting service and although we bottom our affirmation of the order dismissing plaintiff's action on the insufficiency of service, we deem it desirable to make the following observations concerning certain intricately related jurisdictional features of this case.

First, since the parties have raised no question regarding the propriety of the proceeding in attachment against the de-

fendant's property, we do not consider whether the statutory requirements of G.S. § 1-440.1 *et seq.* were met. But, assuming the attachment proceeding was in order so as to give the courts of this State subject matter jurisdiction, the "long-arm" statute, G.S. § 1-75.8, furnishes statutory grounds for the exercise of jurisdiction. In pertinent part, section 1-75.8 provides as follows:

> *Jurisdiction in rem or quasi in rem — grounds for generally.* — A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem ... in any of the following cases:
>
> . . .
>
> (5) In any ... action in which in rem or quasi in rem jurisdiction may be constitutionally exercised.

Our courts have interpreted subsection (5) to mean that the ability to attach a nonresident defendant's property is not a sufficient predicate, standing alone, for the assertion of *quasi in rem* jurisdiction. In accord with the decision of the United States Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977), we have held that the mandates of the due process fairness standard apply with equal force to actions *in rem* and *quasi in rem* as to actions *in personam*. *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E. 2d 164 (1978). Therefore, even though the statute here provides a ground for exercising *quasi in rem* jurisdiction, the final determinative factor is whether the nonresident defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945). *See Rush v. Savchuk*, — U.S. —, 100 S.Ct. 571, 62 L.Ed. 2d 516 (1980).

In the present case, we find the combination of the following factors sufficient to establish the requisite connection between the defendant and the forum: (1) The presence of the property in this State, especially in light of (2) the relationship

between the property and the cause of action. As the *Shaffer* Court pointed out, the mere presence of property in the forum may "suggest the existence of other ties among the defendant, the State, and the litigation, ... " *Shaffer v. Heitner, supra* at 209, 97 S.Ct. at 2582, 53 L.Ed. 2d at 701. *See also Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978). A significant tie develops when the property is *related* to the underlying controversy. In such a case, "it would be unusual for the State where the property is located not to have jurisdiction. ... [T]he 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." *Shaffer v. Heitner, supra* at 208-09, 97 S.Ct. at 2581, 53 L.Ed. 2d at 700. We think it indisputable that the property in the present case is related to and, indeed, is the source of the controversy between the plaintiff and the defendant.

A third factor which influences our opinion that the requirements of the minimum contacts test have been met in this case is the defendant's instruction to the plaintiff to ship the lumber to Maritime Lumber Services in Wilmington, North Carolina. In other words, the property did not fortuitously come to rest in North Carolina. "Whether judicial jurisdiction may be exercised over the owner ... may depend upon whether he has directed, or consented, that the chattel should be taken into the state or at least had reason to foresee that it would be taken there." Restatement (Second) of Conflict of Laws, § 38, Comment c at 165, and § 51, Comment a (1971). *See Educational Studios, Inc. v. James Cruze Productions, Inc.*, 112 N.J. Eq. 352, 164 A. 24 (1933); Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 St. John's L. Rev. 668 (1975). Moreover, not only did the defendant direct that the lumber be shipped to this State, he thereafter engaged the services of a North Carolina business enterprise for the treatment, processing and storage of his lumber. The logical assumption follows that the defendant and Maritime Lumber Services had a contract respecting the treatment of the lumber. In our opinion, the defendant thereby "engaged in ... purposeful activity related to the forum that would make the exercise of jurisdiction fair, just [and] reasonable. ..." *Rush v. Savchuk, supra* at_____, 100 S.Ct. at 573, 62 L.Ed. 2d at 525.

Finally, the nature of the property, *i.e.*, its tangible character, contributes to our conclusion that the State of North Carolina constitutionally could exercise *quasi in rem* jurisdiction in this case. *See* von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966).

We turn now to resolution of the ultimate issue since, despite the fact that constitutional and statutory grounds for the exercise of jurisdiction exist, nevertheless service of process obviously must be effective before our courts can proceed to entertain the suit. In this regard the following statutes are applicable to the issue before us:

> § 1-75.9. *Jurisdiction in rem or quasi in rem — manner of exercising.* — A court of this State exercising jurisdiction in rem or quasi in rem pursuant to § 1-75.8 [*supra*] may affect the interests of a defendant in such an action only if process has been served upon the defendant in accordance with the provisions of Rule 4(k) of the Rules of Civil Procedure, . . .

The applicable provisions of G.S. § 1A-1, Rule 4(k) direct that where, as here, the defendant is known, then he "may be served in the appropriate manner prescribed for service of process in section (j)." The pertinent provision of section (j) is found in subsection (6)b (1979 Cum. Supp.) and prescribes the following procedure for serving a foreign corporation:

> By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service . . . [of] process or by serving process upon such agent or the party in a manner specified by any statute.

According to the record before us, defendant had not appointed a process agent in this State. Plaintiff proceeded to attempt service through the Secretary of State, apparently on the authority of either G.S. § 55-144 or § 55-145, since there is likewise no evidence of record that the defendant was authorized to transact business in North Carolina so that service on the Secretary of State would be effectual under G.S. § 55-143.

On appeal, plaintiff argues first that defendant was served properly in accordance with the provisions of G.S. § 55-144 which provide:

> Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served.

What it means to "transact business" is addressed by statute as well as numerous decided cases in this jurisdiction. According to G.S. § 55-131(b),

> [A] foreign corporation shall not be considered to be transacting business in this State, . . . by reason of carrying on in this State any one or more of the following activities:
>
> . . .
>
> (9) Conducting an isolated transaction completed within a period of six months and not in the course of repeated transactions of like nature.

Our Supreme Court has interpreted "shall transact business in this State" to require the engaging in, carrying on or exercising, in North Carolina, some of the functions for which the corporation was created. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E. 2d 235 (1965). It has further been held that the business done by the corporation in this State must be of such nature and character "as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State." *Spartan Equipment Co. v. Air Placement Equipment Co.*, 263 N.C. 549, 556, 140 S.E. 2d 3, 9 (1965). In short, the activities carried on by the corporation in North Carolina must be substantial, continuous, systematic and regular. *Abney Mills v. Tri-State Motor Transit Co., supra. See also Marshall Exports,*

Inc. v. Phillips, 385 F. Supp. 1250 (E.D.N.C. 1974), *aff'd* 507 F. 2d 47 (4th Cir. 1974). An isolated instance of business activity or casual acts are not sufficient to support service on the Secretary of State pursuant to G.S. § 55-144. *Id.; see also Harrington v. Croft Steel Products, Inc.*, 244 N.C. 675, 94 S.E. 2d 803 (1956).

The record before us contains evidence of only a single instance of business conducted by this defendant in this State. As far as we can determine, the defendant has never been present in North Carolina at any time or for any purpose other than to have this one shipment of lumber treated and processed at Maritime Services. On the foregoing authorities, we hold that the defendant has not transacted business in North Carolina within the meaning of G.S. § 55-144 or to the extent that service on the Secretary of State pursuant to the statute was effective.

Plaintiff alternatively argues that defendant was served properly in accordance with the following provision of G.S. § 55-145:

> (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:
>
> (1) Out of any contract made in this State or to be performed in this State; . . .

This section has been interpreted to require that the lawsuit be based on a contract that has substantial connection with the forum state. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965).

The only fact in the instant case which would support applicability of this section of the statute is the shipment of the lumber to North Carolina. On the basis of the scant evidence before us, however, we cannot say with any degree of certainty that the contract between *this* plaintiff and *this* defendant was to be performed in whole or in part in this State. Obviously, the

contract between the defendant and Maritime Lumber Services was to be performed here. It is primarily that contract or business relationship which formed the basis for our conclusion that minimum contacts are present between the defendant and this State. But, the cause of action did not arise out of that arrangement. It arose exclusively out of the contract of sale, no part of which, as far as we can tell, was performed in North Carolina. Shipment of the lumber to Wilmington was merely incidental to the contract of sale. The statute, however, requires that the cause of action arise out of the contract on which the suit is based. In our opinion, the contract between plaintiff and defendant was performed outside North Carolina and thus the provision of G.S. § 55-145(a)(1) cannot be invoked to support service of process on the Secretary of State.

We find the decision in *Bowman v. Curt G. Joa, Inc.*, 361 F. 2d 706 (4th Cir. 1966) apposite. That case involved a sales contract for a machine with delivery f.o.b. the seller's plant in Wisconsin. The buyers accepted delivery of the machine at the seller's plant and paid all shipping costs to their North Carolina business site. The seller provided one technician for one day at the buyer's plant to help the buyers install the machine, and he was to return to supervise the initial production run. The Court held that substantial performance of the contract occurred at the seller's plant in Wisconsin and thus G.S. § 55-145(a)(1) did not apply. *See also Golden Belt Mfg. Co. v. Janler Plastic Mold Corp.*, 281 F.Supp. 368 (M.D.N.C. 1967), *aff'd*, 391 F. 2d 266 (4th Cir. 1968) (per curiam).

Circumstances were not present in this case to permit plaintiff to bring this defendant into court by substituted service on the Secretary of State. Barring the ability to personally serve the defendant, plaintiff's proper recourse was substituted service by way of registered or certified mail pursuant to G.S. § 1A-1, Rule 4(j)(9)(b). *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 232 S.E. 2d 458, *cert. denied*, 292 N.C. 641, 235 S.E. 2d 60 (1977). *See generally*, Louis, *Modern Statutory Approaches to Service of Process Outside the State — Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act*, 49 N.C.L.Rev. 235 (1971). We thus affirm the order of Judge Bruce dismissing the plaintiff's action.

Affirmed.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. GRANT DAWSON

No. 8017SC84

(Filed 5 August 1980)

Criminal Law § 89.10– cross-examination of defense witness – prior shoplifting incidents – no good faith basis for questions shown

In a prosecution for discharging a firearm into an occupied vehicle where defendant's entire defense was built on misidentification and alibi, the prosecutor's asking six questions of defendant's mother concerning prior shoplifting by her was highly prejudicial to defendant in that it tended to destroy by innuendo and suspicion the otherwise unimpeached evidence that defendant was at home when the shooting took place elsewhere, and, since there was no showing that the prosecutor had a good faith basis for asking the questions, the cross-examination was improper.

APPEAL by defendant from *Long, Judge*. Judgment entered 9 August 1979 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals on 3 June 1980.

In a bill of indictment proper in form, defendant was charged with discharging a firearm into an occupied vehicle, a felony and a violation of G.S. § 14-34.1. At the ensuing trial, evidence for the State tended to show the following:

Around 10:00 p.m. on 18 August 1978, Donald W. Cox took four of his friends for a ride in his jeep on the Duke Power right of way in Eden. As they came off the dirt right of way and proceeded up Maplewood Drive, a creamy yellow station wagon approached them. Its bright lights were burning. Cox slowed down and found that he "had to go out of the road to go around" the car, because the car was "sideways" in the road. He "knocked" the jeep into neutral to see what was going on. There were two people in the station wagon. As Cox started to go around, the person on the passenger side jumped out, ran to the back of the car, and said, "Stop or I will shoot." Neither Cox nor any of

his companions answered. The person fired a shot. Cox put the jeep back in gear, "floorboarded it" and "got out of there." The person fired three more shots in rapid succession. The jeep was struck in three places. Fragments from one of the shots hit one of the passengers, but no one was injured.

A few minutes later, the station wagon came up behind the jeep, followed it for a while, then passed and subsequently turned off to the right, and was gone. There was only one person in the car at that time, and he was the same person who had fired the shots. He drove at a normal rate of speed and made no attempts to stop the jeep or to communicate with anyone in the jeep.

At the time of the incident, Cox did not know who the person firing the shots was and had never seen him before. In court, Cox identified the defendant as the perpetrator. Cox testified that one of his companions, Tim McCrickard, said shortly after the shooting that he thought he knew who the assailant was, that "it was one of the Dawson brothers, the oldest one but he did not know the guy's first name . . . ." The group went to the Pizza Hut, and McCrickard went inside "to find out the guy's first name." When he came back, he said it was Grant Dawson, the defendant. They then went to the police station, and Cox took out a warrant for Grant Dawson's arrest. He described the assailant as being "tall and slim, having a full beard and a mole . . . on the left side" of his face. Defendant has a mole on the left side of his face. At the time of the shooting incident, he had a mustache and a full beard. At the time of trial he had only a mustache. Cox said he did not know why the defendant shot at him, nor did he know of any reason the defendant might have had for doing such a thing.

Cox's four companions also testified for the State and in substance corroborated his testimony. Bonnie Ruthledge said she had a good view of the assailant, but did not know who he was at the time and had never seen him before. In court, she identified defendant as the person who fired the shots.

Suzanne DePriest and Rhonda Ruthledge testified to similar effect. They too, did not recognize the assailant at the time,

but in court identified defendant as the perpetrator. "There is no question in my mind about that," both said.

Tim McCrickard described the incident in identical fashion. He said he did not know the defendant personally, but "had seen him right much. . . . I knew his brothers." McCrickard said he knew the defendant by sight because he [McCrickard] had worked at the Jan Stand car wash and service station, and the Dawson family "bought a lot of gasoline down there. . . . I have been seeing him or members of his family off and on for several years."

McCrickard testified further that Grant Dawson was the person "who did the shooting" and that the incident occurred two or three houses down from the Dawson residence.

The defendant's evidence tended to prove that defendant was at home with his family at the time of the shooting. The defendant, 24 years old at the time of trial, testified that he is the oldest of four brothers and that he attended college at Baldwin Wallace College in Berea, Ohio. During the summer of 1978, he was employed as a live-in counselor at Camp Saurakee in Wentworth, North Carolina, where he was in charge of 16 retarded children and adults. On 18 August 1978, a Friday, he was at home and had been in bed most of the week because of a back injury he had suffered the previous Monday. From approximately 7:30 p.m. until approximately 11:10 p.m. when police officers came to arrest him pursuant to the warrant secured by Cox, defendant remained in his parents' bedroom watching television. His father and his brother Scott were with him.

Defendant testified further that he owns and drives a 1974 Plymouth. His mother owns a station wagon to which only she and his father have keys and which she drives most of the time. Defendant said he did not know any of the State's witnesses, nor had he ever seen them prior to the preliminary hearing in the case. He denied leaving home for any reason after 5:00 p.m. on 18 August 1978.

Defendant's three brothers corroborated his testimony that he was home all evening on the night in question. His twin

brothers Blake and Scott, 18 years old at the time, were loading a U-Haul in the front driveway until about 8:30 or 9:00 that night and would have seen anyone leave the house from either the front or back doors. Blake testified that he observed the defendant watching television in their parents' bedroom several times that evening, that defendant was still in the bedroom after 10:00 p.m., and that he [defendant] "could not have left that house without me seeing him." Scott testified that from about 8:30 p.m. until the police officers arrived, he was in the master bedroom watching television with the defendant and their father, and that the defendant "did not leave the room before the officers arrived."

The defendant's mother testified that she owns a "Chrysler New York station wagon which is an off-white beige." On 18 August 1978 she drove the station wagon most of the day, picking up furniture. She returned home around 6:30 or 7:00 p.m. and was outside helping her sons, Blake and Scott, to load the furniture into the U-Haul "the whole time." They also loaded about ten cans of paint into the rear of the station wagon which had been backed into the driveway and parked next to the U-Haul while the loading was in progress. Her son Grant was at home all day. She saw him several times during the day and at 9:30 that night observed him in the master bedroom watching television. After 9:30 she was in the kitchen. She said that their house was "so built that I know that Grant was in the bedroom as you can't leave the master bedroom without coming down the hall, . . . there is no other way to go except by where I was." Grant did not leave, according to Mrs. Dawson, nor were any of their cars, including the station wagon, driven away from the house after 6:30 p.m., although the cars were "shifted" around after the loading of the U-Haul was completed. When the defendant was arrested, she and her husband drove to the police station in the defendant's Plymouth since the station wagon was "loaded."

The defendant's father, Dr. Shelton Dawson, a physician specializing in pediatrics, substantiated the testimony that his son Grant was home the entire evening of 18 August 1978 up to the time he was arrested. He and Grant watched television together in the master bedroom from about 8:00 p.m. Dr. Daw-

son stated, "From the time that he came back into the master bedroom until the time that the officers came to the door, Grant was in the master bedroom all of the time and did not get out of my sight."

Defendant also offered the testimony of Dr. Alfred B. Bonds, Jr., president of Baldwin Wallace College, who stated that the defendant "has an excellent reputation ... at our college." Two other witnesses also testified as to the defendant's good character.

Any additional evidence pertinent to the decision in this case will be discussed in the opinion to follow.

The jury found the defendant guilty as charged. From a judgment imposing a prison sentence of six months, the defendant appealed.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley and Assistant Attorney General Dennis P. Myers, for the State.

Bethea, Robinson, Moore & Sands, by Norwood E. Robinson; and Tharrington, Smith & Hargrove, by Wade M. Smith, for the defendant appellant.

HEDRICK, Judge.

Our disposition of defendant's ninth and tenth assignments of error makes it unnecessary for us to discuss his remaining arguments on appeal. We conclude that the prosecutor impermissibly harassed a key defense witness on a collateral matter such as to destroy the witness's credibility on the critical issues involved in the case with neither a concrete showing nor an inference raised by the circumstances that he was acting in good faith. In refusing to restrain the prosecutor's conduct or at least to require that the prosecutor demonstrate legitimate grounds for his harassment, the trial judge committed prejudicial error which deprived the defendant of his constitutionally guaranteed right to a fair trial. For this reason the defendant is entitled to a new trial.

The error obtains in the following colloquy which occurred between the prosecutor and the defendant's mother on cross-examination, to which defense counsel to no avail "vigorously" and repeatedly objected:

Q. Have you on any occasion or occasions shoplifted?

MR. ROBINSON: OBJECTION.

A. No, I was not.

Q. Do you know what I am talking about?

A. I assume by shoplifting you mean stealing.

Q. Do you often —

MR. ROBINSON: OBJECTION to the question.

COURT: OVERRULED.

. . .

Q. Have you at any time or times picked up things from Mann's Drug Store without paying for them?

MR. ROBINSON: OBJECTION.

COURT: OVERRULED.

A. They have been charged, no, I never picked up anything without paying for them.

Q. I will ask if you carried them home, left the store without paying for them?

MR. ROBINSON: OBJECTION.

COURT: OVERRULED.

A. They had been charged to the account.

Q. Without saying anything to anybody about it?

A. Not that I know of.

Q. And that if some of the articles were not returned?

A. I have never stolen anything in my life.

Q. No further questions.

COURT: Members of the jury, you may not consider the implication of the question.

We recognize that, for purposes of impeachment, a witness may be cross-examined by the asking of "disparaging questions concerning collateral matters relating to his criminal and degrading conduct." *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971). *Cf. State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979) (clarifying the rule that the questions must concern *particular* acts of misconduct.) However, such cross-examination is limited by the requirement that the questions be asked in good faith. *See, e.g., State v. Purcell, supra; State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975) (stating the rule), *death sentence vacated*, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975), *death sentence vacated*, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1206 (1976); *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied*, 397 U.S. 1050, 90 S. Ct. 1387, 25 L. Ed. 2d 665 (1970). This means simply that the questions must be grounded in fact. The prosecutor may not "inject into the trial of a cause to the prejudice of the accused by argument or by insinuating questions supposed facts of which there is no evidence." *State v. Phillips*, 240 N.C. 516, 524, 82 S.E. 2d 762, 767 (1954). Nor may he "needlessly badger or humiliate" the witness by asking insulting or impertinent questions which he knows will not elicit competent or relevant evidence. *State v. Daye*, 281 N.C. 592, 596, 189 S.E. 2d 481, 483 (1972).

Nowhere in the record before us does any basis for this attack on this witness appear. If it appears at all that the

prosecutor had a basis for asking these questions, it appears solely from the asking, and therein lies the problem with the court's refusal to require a showing that the questions were asked in good faith. Implicit in the asking is the accusation and appearance of guilt, as well as the impression that the prosecutor "had knowledge of evidential facts sufficient to support these insinuations." *State v. Foster*, 284 N.C. 259, 283-84, 200 S.E. 2d 782, 799 (1973) (Chief Justice Bobbitt dissenting). *See also State v. Phillips*, *supra*. Obviously, the witness's credibility already was inherently suspect by virtue of her relationship to the defendant. In our opinion, in his persistence and despite Mrs. Dawson's protestations to the contrary, the prosecutor succeeded through these questions in totally destroying her testimony by portraying her to be a thief. The portrayal, as far as we can tell, was baseless. Under the circumstances disclosed by this record, we think deference to the dictates of fair play and constitutionally administered justice at a minimum mandated the judge to ascertain whether the prosecutor did have grounds for asking the questions. A simple bench conference should have been sufficient. If the judge was unwilling to test the prosecutor's good faith or if a test revealed no basis for such harrassment, then the judge should not have permitted the questions to continue. Defense counsel's objections to their asking should have been sustained.

Moreover, under the circumstances present in this case, we think it plain that the judge's admonition to the jury to disregard the "implication of the question" came far too late and was too ambiguous to erase the error. At that point, Mrs. Dawson had been asked at least six questions regarding her "shoplifting" activities. Had the instruction been given after only one such question, we doubtless would have found it adequate to cure the impropriety. However, coming as late as it did, after the prosecutor had indicated he was finished with the witness, and being phrased in the singular as it was, the admonition in our opinion was wholly ineffectual.

In holding as we do in this case, we emphasize the fact

that this witness was crucial to the defendant's defense. She supported his alibi with the critical assertion that he could not have left the house at any time from approximately 6:30 p.m. on without her seeing his departure. She explained why the station wagon was parked in the place it was when the police officers arrived — that is, it had been moved out and parked behind the other cars in the driveway, which gave the appearance that it had arrived last, simply because it was to be driven out of town early the next morning to transport paint and to pull the U-Haul to some rental property owned by the family. She corroborated the defendant's testimony that he was dressed in a green "scrub suit" all evening, as opposed to the jeans and t-shirt described by the prosecuting witnesses, until he changed to go to the police station. The fair assessment of her credibility by the jury was perhaps pivotal. Yet, as we noted earlier, her credibility from the outset was innately weak because she was the defendant's mother. Furthermore, the question of the identification of defendant as the assailant was critical to the State's case in view of the fact that none of the State's witnesses personally knew the defendant, and four of the five persons in the jeep had never seen him before, nor did they recognize him at the time. The incident occurred at night. The other witness, McCrickard, stated only that he *thought* he knew who the assailant was. In short, the defendant's whole defense was built on misidentification and alibi. Under the circumstances, the asking of these six questions by the prosecutor was highly prejudicial to the defendant in that it tended to destroy by innuendo and suspicion the otherwise unimpeached evidence that Grant Dawson was at home when the shooting took place. Since the record fails to show that the prosecutor had a good faith basis for asking the questions, the cross-examination was improper.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

Judges PARKER and VAUGHN concur.

LEAMON FORD COUCH AND WIFE, GLADYS A. COUCH v. ADC REALTY CORP., ARLEN REALTY MANAGEMENT, INC., ARLEN REALTY, INC. AND CAMERON-BROWN COMPANY

No. 7914SC534

(Filed 5 August 1980)

1. **Ejectment § 3– failure to pay rent – summary ejectment improper remedy**

Plaintiffs' action was not one in which summary ejectment could be had before defendants had filed answers and before the time for filing answers had expired, since summary ejectment is allowed on five days' notice in certain cases and claims for summary ejectment are first heard before magistrates, while the summons in this case were not returnable before a magistrate, and they required defendants to answer within thirty days.

2. **Receivers § 2; Landlord and Tenant § 18– termination of lease – appointment of receiver pending litigation**

In an action to terminate a lease for alleged breaches by defendant and to have a receiver appointed to take over the management and preserve the property in question, the most the trial court could do under G.S. 1-502(1) was to appoint a receiver pending the outcome of the litigation, although the court characterized the appointment as that of a "permanent" receiver, since the court held a hearing and made the appointment before the time for filing an answer had elapsed.

3. **Landlord and Tenant § 18– failure to pay rent – no provision in lease for termination – tender of rent – determination as to proper amount not made**

A lease did not provide that, upon failure of the lessee to pay rent, the lessor could terminate the lease, though the lease did provide that in a default other than failure to pay rent the lessor would take no action to effect a termination of the lease without first giving the leasehold mortgagee a reasonable time to cure the default or to gain possession of the premises, and though the lease provided that upon the payment of the rent and performing the other terms of the lease, the lessee would have quiet enjoyment; therefore, the trial court erred in holding that the lessor did have the right to terminate the lease for nonpayment of rent and for other reasons; at the time defendants allegedly tendered the rent due, they had the right to tender the rent and costs pursuant to G.S. 42-33; the trial court erred in not making a factual determination as to the correctness of the amount of tender; and if the correct amount was tendered, plaintiffs' claim for possession of the property based on the failure to pay rent should have been dismissed.

4. **Receivers § 2; Landlord and Tenant § 18– alleged failure to pay rent – termination of lease – appointment of receiver – no acquiescence by lessee**

In an action to terminate a lease for failure to pay rent and to have a receiver appointed to take over the property where the trial court did in fact appoint a receiver, there was no merit to plaintiffs' contention that they had

the right to have the lease nullified because a "permanent" receiver had been appointed, since defendants did not acquiesce in the appointment of the receiver by failing to appear at a hearing held before expiration of the time for filing their answer; they made a motion which, if allowed, would have dissolved the receivership; and the trial court may have committed error by not allowing the motion.

APPEAL by defendants from *Herring, Judge.* Order entered 2 April 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 January 1980.

The plaintiffs own a certain parcel of real estate in Durham County which they leased in 1967 to Consolidated Properties, Inc. Plaintiffs later subordinated their interest in the property to a deed of trust to Cameron-Brown Company in order to obtain financing for an apartment complex. Through various assignments and mergers, Arlen Realty, Inc. obtained the leasehold interest of Consolidated. It assigned this interest to ADC Realty Corp. and Arlen Realty Management, Inc. became the manager of the property. On 15 January 1979, plaintiffs instituted this action. They alleged the defendants were in arrears in rent payments, delinquent in mortgage payments, and delinquent in the payment of city and county taxes; that these were material breaches of the lease agreement entitling the plaintiffs to immediate possession of the property. Plaintiffs prayed that the lease be declared null and void, that a receiver be appointed to take over the management and preserve the property, and that the plaintiffs be awarded money damages based on expenditures they had made as a result of the defendants' failure to perform their duties under the lease. Summons requiring the defendants to file answers to the complaint within 30 days were served on all defendants. On the date the action was filed, a receiver was appointed. A copy of the order appointing the receiver was served on the defendants directing them to appear and show cause on 22 January 1979 why a permanent receiver should not be appointed. On 23 January 1979, an order was signed in which the court found that the rent was in arrears, and the mortgage payments and taxes were delinquent. The court further found that these were material breaches of the lease and "the plaintiffs have an apparent legal and equitable right to the possession of the said property and termination of the leasehold interest . . . ." The court

appointed what was denominated a "permanent" receiver for the property.

The time for the defendants to file answers was extended until 20 April 1979. On 20 March 1979 the defendants filed a motion to dismiss the action on the ground that all rentals and costs due had been tendered to the plaintiffs pursuant to G.S. 42-33. An affidavit showing the tender and refusal by the plaintiffs to accept was attached to the motion to dismiss. On 23 March 1979 the plaintiffs filed an amended complaint in which they reaffirmed the allegations of their original complaint, and in addition, alleged the defendants had committed waste and had acquiesced in the appointment of a receiver, both of which entitled the plaintiffs to have the lease voided.

On 2 April 1979, the court signed an order in which it found "that the nature of the action was for summary ejectment," that the defendants "were served with copies of the Summons, Complaint, Petition and Order on January 16, 1979;" that the defendants, other than Cameron-Brown, did not appear at the hearing on 22 January 1979 although they had received notice of the hearing; that a permanent receiver was appointed after the hearing on 22 January 1979 and that defendants were permanently ejected from the premises. The court further found that the plaintiffs had the right to terminate the lease upon the failure of the defendants to pay the rent, make the mortgage payments, pay taxes on the property or by committing waste and that defendants had violated the terms of the lease in all these respects. The court found that the lease had been terminated.

As to the defendants' tender to the plaintiffs, the court found that the defendants knew the plaintiffs were asking for a "permanent" ejectment on 22 January 1979 and made no tender prior to the hearing on that date. The court found that the tender was of no effect.

The court also found that by not appearing at the hearing on 22 January 1979, the defendants had acquiesced in the appointment of a permanent receiver and that the lease would in any event be terminated as of 1 April 1979.

All defendants except Cameron-Brown appealed.

Nye, Mitchell, Jarvis and Bugg, by Charles B. Nye and John E. Bugg, for plaintiff appellees.

Fairley, Hamrick, Monteith and Cobb, by James D. Monteith and F. Lane Williamson, and Newsom, Graham, Hedrick, Murray, Bryson and Kennon, by Josiah S. Murray, III, for defendant appellants.

WEBB, Judge.

[1,2] The order dated 2 April 1979, which was, in effect, a final judgment terminating the defendants' interest in the leasehold estate, contained a recital "the nature of the action was for summary ejectment." Summary ejectment is governed by Art. 3 of Chapter 42 of the General Statutes. It is allowed on five days' notice in certain cases and claims for summary ejectment are first heard before magistrates. The summons in the case sub judice were not returnable before a magistrate, and they required the defendants to answer within 30 days. We hold that the case sub judice is not an action in which summary ejection may be had before the defendants had filed answers and before the time for filing answers had expired. With this in mind, we examine the order of 23 January 1979 upon which the order of 2 April 1979 was in part based. The order of 23 January 1979 purported to appoint a "permanent" receiver pursuant to Chapter 1, Art. 38 of the North Carolina General Statutes. G.S. 1-502 provides in part:

> A receiver may be appointed —
>
> (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

(2) After judgment, to carry the judgment into effect.

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

(4) In cases provided in G.S. 1-507.1 and in like cases, of the property within this State of foreign corporations.

(5) In cases wherein restitution is sought for violations of G.S. 75-1.1.

The only subsection of G.S. 1-502 under which a receiver could have been appointed was subsection (1). No judgment had been entered which would bring subsections (2) or (3) into effect; subsection (4) deals with the appointment of receivers for corporations (the receiver in the case sub judice was appointed to hold real property); and subsection (5) deals with unfair methods of competition which is not in issue in this case. Although the court characterized it as the appointment of a "permanent" receiver, the most the court could do under subsection (1) was to appoint a receiver pending the outcome of the litigation. The court's findings of fact in the 23 January order, which pertained to the matters at issue, were not binding so far as the final determination of the case was concerned but could only have been used to support the order appointing the receiver. We hold that on 23 January 1979, after the order had been signed, the action was pending as to all issues, and a receiver had only been appointed to hold the property pending the outcome of the litigation.

[3] The next question we face is the motion of the defendants to dismiss on the ground they had tendered the rent and costs to the plaintiffs. G.S. 42-33 provides in part:

> If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before a judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease.

It has been held that this section has no application if the terms of the lease provide the lessor can terminate the lease upon nonpayment of the rent. *Tucker v. Arrowood*, 211 N.C. 118, 189 S.E. 180 (1937). The superior court held in the order of 2 April 1979 that under the terms of the lease in this case the lessor did have the right to terminate the lease for nonpayment of rent and for other reasons. If the superior court were correct in this finding, G.S. 42-33 would not be applicable. The court cited two provisions of the lease. One of them provides that in a default other than failure to pay rent, the lessor will take no action to effect a termination of the lease without first giving the leasehold mortgagee a reasonable time to cure the default or to gain possession of the premises. The other provision of the lease cited by the court provides that upon the payment of the rent and performing the other terms of the lease, the lessee shall have the quiet enjoyment of the property. Neither of these provisions provides specifically that upon the failure of the lessee to pay rent or violate other provisions of the lease that the lessor may terminate the lease. The superior court made the following finding:

> "[T]he court finds and interprets the entire contract between the parties to provide for the termination of the lease agreement in the event that the Lessee does not make the payments of monies which includes rental, taxes and assessments, insurance premiums and mortgage payments and that the original parties to the lease agreement intended for the lease to so provide."

We hold the superior court committed error in this finding. Unless we infer from the two lease provisions cited above that the lessors have the right to terminate in the event of a failure to pay rent or for some other breach, we can find nothing in the lease which gives the lessors this right. We do not believe we can make this inference. Unless there is an express provision for a forfeiture in a lease, a breach of a covenant does not work a forfeiture. *See Morris v. Austraw*, 269 N.C. 218, 152 S.E. 2d 155 (1967).

The plaintiffs contend that G.S. 42-33 has no application because (1) the tender was not made prior to 23 January 1979 at which time a final judgment had been entered, (2) the defend-

ants did not account as to how they arrived at the tendered amount and (3) the tender did not include interest. We have held that the order of 23 January 1979 was not a final judgment in this case. The defendants' right to tender was not lost on that date. Whether the amount tendered was the proper amount and included interest are factual questions to be determined by the court. We hold that at the time the alleged tender was made, the defendants had the right to tender the rent and costs pursuant to G.S. 42-33. The superior court committed error by not making a factual determination as to the correctness of the amount of the tender. If the correct amount was tendered, the claim for possession of the property based on the failure to pay rent should have been dismissed.

[4] The plaintiffs contend that in any event the lease was terminated by the appointment of a receiver for the property. The lease provides in part as follows:

> "In the event that LESSEE ... shall ... consent to or acquiesce in the appointment of any ... receiver ... of all or any substantial part ... of the Demised Premises ... or if within ninety (90) days after the appointment without the consent or acquiescense [sic] of LESSEE of any ... receiver ... of all or any substantial part ... of the Demised Premises, such appointment shall not have been vacated or stayed on appeal, or otherwise ... then and in any such event, LESSOR ... may give written notice to LESSEE ... stating that this Lease and the term hereby demised shall expire and terminate on the date specified in such notice ... and ... this Lease and the term hereby demised and all rights of LESSEE under this Lease shall expire and terminate ... ."

In interpreting this provision of the lease, we note first that the receiver was appointed at the instance of the plaintiffs. The plaintiffs then contended they had the right to have the lease nullified because a receiver had been appointed. The law does not look with favor on forfeitures of leases. *See* 49 Am. Jur. 2d *Landlord and Tenant* § 1021 (1970). We do not believe the defendants acquiesced in the appointment of the receiver because they did not appear at the hearing of 22 January 1979. They

made a motion on 20 March 1979 which, if allowed, would have dissolved the receivership. We have held the court may have committed error by not allowing the motion. Under this state of facts, we hold the plaintiffs did not have the right to forfeit defendants' leasehold interest by the appointment of the receiver.

For the reasons stated in this opinion, we reverse the judgment of the superior court and remand for a determination as to whether the defendants tendered the proper amount of rent, including interest, and the costs. If they did so, the claim for possession of the premises, based on the failure to pay rent, should be dismissed and the receivership should be dissolved. The plaintiffs have also sued for waste and money damages based on expenditures they have made as a result of the defendants' violation of the lease agreement. These claims are left for trial.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA, EX REL., UTILITIES COMMISSION AND CONTRACT TRANSPORTER, INC., APPLICANT-APPELLEE v. M.L. HATCHER PICKUP & DELIVERY SERVICES, INC., PROTESTANT-APPELLANT

No. 7910UC850

(Filed 5 August 1980)

Carriers § 2.7– grant of contract carrier authority – sufficiency of evidence to support findings

The record as a whole supported findings by the Utilities Commission that an applicant for a permit to act as a contract motor carrier for Schlitz Brewing Company to transport bottles, pallets and packing materials between Kerr Glass Company in Wilson and the Schlitz plant in Winston-Salem met the definition of a contract carrier, that Schlitz had a need for a specific type of service, that such service is not otherwise available by existing means of transportation, and that the applicant's proposed operations will not unreasonably impair the efficient public service of common carriers.

Judge MARTIN (Robert M.) dissenting.

APPEAL by protestant from final order of the North Carolina Utilities Commission. Order entered 8 June 1979. Heard in the Court of Appeals 19 March 1980.

This case involves an application by Contract Transporter, Inc. (hereinafter applicant) for a contract carrier permit, which permit was granted by a hearing examiner and subsequently affirmed by the Commission. Pursuant to G.S. 62-262, applicant applied for a contract carrier's permit to transport bottles, pallets, and packing materials between Kerr Glass Company in Wilson and Schlitz Brewing Company in Winston-Salem.

M.L. Hatcher Pickup and Delivery Services, Inc., a common carrier (hereinafter protestant), filed a protest and motion for intervention alleging that the applicant's proposed service does not conform with the definition of a "contract carrier" under G.S. 62-262(i)(1) and Rule R2-15(b) of the Commission, since the transportation needs of Schlitz are not such as would require any special type of service not available from the protestant and that the service proposed would unreasonably impair the efficient public service of protestant and other carriers and be inconsistent with the public interest.

APPLICANT'S EVIDENCE

Applicant's evidence tended to show that since 1973, it had a contract to transport bottles as a contract carrier for Schlitz between Owens-Illinois Company in Midway and Schlitz Brewery in Winston-Salem. Schlitz and Owens terminated their contract and Kerr Glass Company in Wilson became Schlitz's new supplier. Applicant has provided services for Schlitz since the new contract, using special equipment. The glass bottles transported for Schlitz are moved in unitized pallet loads in bulk form and in corrugated cartons and trays, also on pallets. Trailers specially equipped with automatic electrical unloading systems are required for moving the bulk bottles. These are 43 foot and 48 foot custom design rollerbed trailers with specifications for overall height and minimum door opening height. They have rollers, which are recessed below the floor level when not in use and which are hydraulically raised when needed. Approximately 40 percent of Schlitz's traffic from Wilson to Winston-

Salem requires specialized rollerbed equipment to be available and to be continuous. Sixty percent of the traffic does not require specialized equipment but does require continuity of service.

Mr. Joseph Erwin, director of traffic for Schlitz, testified that the scheduled delivery of bottles to the brewery is critical and must be consistent and dependable due to the minimum storage room available for bottles at the brewery. Otherwise, irreparable harm will be caused to Schlitz's manufacturing process. Schlitz needs one carrier to provide both specialized and non-specialized service.

PROTESTANT'S EVIDENCE

Protestant's evidence tended to show that it had purchased eight rollerbed trailers which would meet Schlitz's specifications. It had made efforts to solicit Schlitz's business and would be willing to dedicate equipment to Schlitz on a long-term basis or enter a contract with Schlitz. Protestant's vice-president and general manager testified that it was his understanding that the regulations had been changed so as to allow common carriers to have contract authority also. He proposed to perform the service under the protestant's general commodity authority although this does not include the authority to carry any commodity for which special equipment is required. Protestant has the rollerbed equipment and will give no one customer preference over another.

The hearing examiner's recommended order, which was affirmed by the Commission, granted the applicant contract carrier authority including, *inter alia*, that the proposed operations conformed with the definition of contract carrier pursuant to G.S. 62-3(8); that the applicant is fit, willing, and able to perform; that the proposed operations would be consistent with the public interest and policy; and that the applicant has met its statutory burden of proof. Protestant appealed.

Allen, Steed & Allen, by Thomas W. Steed, Jr. and Noah H. Huffstetler III, for applicant appellee.

Bailey, Dixon, Wooten, McDonald & Fountain, by Ralph McDonald, for protestant appellant.

ERWIN, Judge.

Protestant's appeal is based on three questions. The initial question asks:

> "(1) Are the Utilities Commission's findings of fact sufficient to support its conclusions that the proposed operations conform with the definition of a contract carrier and that the applicant has met the burden of proof prescribed by statute?"

We do not find error.

Contract Carrier

G.S. 62-262(i) sets out what the Commission must consider before it may issue a permit to a contract carrier. G.S. 62-31 authorizes the Commission to make rules and regulations. Pursuant thereto, the Commission promulgated NCUC Rule R2-10(b) and NCUC Rule R2-15(b).

Rule R2-10(b) provides:

> "(b) Contract carrier authority for the transportation of passengers or property will not be granted unless the proposed service conforms to the definition of a contract carrier as defined in G.S. 62-3(8) and applicant meets the burden of proof required under the provisions of G.S. 62-262(i) and Rule R2-15(b)."

Rule R2-15(b) provides:

> "(b) If the application is for a permit to operate as a contract carrier, proof of a public demand and need for the service is not required; *however, proof is required that one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation,* and have entered into and filed with the

> Commission with a copy to the Public Staff prior to the hearing or at the time of the hearing, a written contract with the applicant for said service, which contract shall provide for rates not less than those charged by common carriers for similar service." (Emphasis added.)

The rule in this jurisdiction is that the findings of fact by the Utilities Commission are conclusive and binding on appeal when supported by competent, material, and substantial evidence in view of the entire record. *Utilities Comm. v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972); *Utilities Comm. v. Tank Lines and Utilities Comm. v. Transport Co.*, 34 N.C. App. 543, 239 S.E. 2d 266 (1977), *appeal dismissed*, 294 N.C. 363, 242 S.E. 2d 633 (1978). "Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E. 2d 325, 332 (1962). We concede that the order in question could have been more artfully drawn; however, the order is more than the mere recital of testimony taken at the hearing before the examiner. We hold that the entire record supports Findings of Fact Nos. 17 and 18, and the Commission's findings are conclusive and binding upon us on review, in that, they are supported by competent, material, and substantial evidence. *Utilities Commission v. Radio Service, Inc.*, 272 N.C. 591, 158 S.E. 2d 855 (1968); *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890 (1963).

Specific Type of Service

Applicant filed a written contract under which it would provide transportation of certain property for Schlitz by motor vehicle for compensation. Applicant conformed to the threshold definition of a contract carrier. G.S. 62-3(8). Protestant contends applicant failed to establish by competent, material, and substantial evidence that: (1) Schlitz had a need for a specific type of service; and (2) service is not otherwise available by existing means of transportation. We do not agree.

Mr. Erwin testified:

"The automated trailers have rollers which are recessed below the floor level when not in use and are hydraulically raised when required for the loading or unloading operation. This equipment requires considerable maintenance, and CTI has the experience and mechanically trained personnel to provide proper preventive maintenance for dependable delivery to deep production lines of the Schlitz brewery running without interruption.

. . . .

The scheduled delivery of material to the brewery is critical and must be consistent and dependable, as there is usually minimum room for storage of bottles in the brewery. Therefore, in a manner of speaking, the custom rollerbed trailers are considered a required part of the production line of the brewery. Production is usually on three shifts per day and five days per week. During peak production periods, bottle deliveries are sometimes required seven days per week.

Contract Transporter, Inc., is also the exclusive carrier of cans between the Schlitz can plant, brewery and warehouse. This carrier is familiar with the needs of Schlitz and gives extraordinary custom service, not only with specialized equipment but during all hours of the night and weekends when service is required.

* * *

Van trailers equipped with automatic unloaders such as the Essex system are what I have referred to as special equipment. It is a good system in my experience. The Applicant, Contract Transporter, has the Essex type of equipment which is satisfactory for our needs at Winston-Salem.

* * *

To summarize our company's transportation needs, for forty percent of our traffic we need the rollerbed equipment service to be available and continuous. For the remaining

sixty percent of our traffic between Wilson and Winston-Salem we do not have a need for any specialized equipment, but we have the need for continuity of service."

Protestant contends the evidence shows that only 40 percent of the future movements from Wilson to Winston-Salem would be in rollerbed equipment and that it does not follow that the need for regular van equipment on the other 60 percent is also a specific need. The Commission with its experts found that applicant could meet the needs of the shipper over that of a common carrier which must serve the public generally. We hold that the Commission's findings of fact and conclusions of law are supported by the evidence in the record before us. *Utilities Comm. v. McCotter, Inc.*, 283 N.C. 104, 194 S.E. 2d 859 (1973); *Utilities Commission v. Transport*, 260 N.C. 762, 133 S.E. 2d 692 (1963).

G.S. 62-94(e) provides: "Upon any appeal, the rates fixed, or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable." The evidence was sufficient to permit and sustain the Commission's findings of fact, conclusions, and the decisions based thereon. *See Utilities Comm. v. McCotter, Inc., supra.*

Impairment of Public Service

Protestant contends that applicant has not met its burden (1) under NCUC Rule R2-15(b) of showing that the specific type of service is not otherwise available by existing means of transportation and (2) under G.S. 62-262(i)(2) by showing that its proposed operations will not unreasonably impair the efficient public service of common carriers. Protestant relies on *Utilities Comm. v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526 (1968), to support its contentions. This Court, in *Utilities Comm. v. Transport Co.*, 10 N.C. App. 626, 631, 179 S.E. 2d 799, 803 (1971), stated:

"Protestants strongly rely on the case of *Utilities Commission v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526 (1968). The case at hand is clearly distin-

guishable. In the cited case the applicant for a permit to operate as a contract carrier for a specified shipper offered no proof that the shipper had a need for a specific type of service not otherwise available by existing means of transportation; applicant's evidence showed that the only purpose in obtaining the permit was to increase the profits of the applicant; this court held that a finding by the Utilities Commission that the applicant met the test of a contract carrier was not supported by the evidence and the permit was improperly granted. In the case at hand the *need* for the specialized services by Limestone was shown."

We hold that the evidence in the record supports the findings and conclusions reached that Schlitz showed a need for a specific service which was not otherwise available.

The order of the Utilities Commission is

Affirmed.

Judge CLARK concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting:

In my judgment the applicant has failed to sustain its burden of proving that the service proposed by applicant is not otherwise available by existing means of transportation. I vote to reverse the order of the Commission.

IN THE MATTER OF THE WILL OF LOUIS DEMPSEY LAMB, DECEASED

No. 801SC143

(Filed 5 August 1980)

1. Wills § 13– will of nonresident – copy filed in N.C. – caveat proper

Where a certified or authenticated copy or exemplification of a will of a

nonresident together with the proceedings had in connection with its probate in another state is allowed, filed and recorded by the clerk of superior court in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk, a caveat to the will may be properly entered.

2. **Executors and Administrators § 3– foreign administrators – no appointment of ancillary administrators – suspension of further proceedings in N.C. proper**

Propounders of a will who were appointed personal representatives by a Virginia court clerk but neither applied for nor were granted ancillary letters had no authority to administer the property of decedent in N.C.; therefore, the trial court did not err in ordering propounders "to suspend all further proceedings in relation to said Estate, except the preservation of the property, collection and payment of all just indebtedness . . . pending a resolution of these issues by trial upon their merits."

APPEAL by propounders from *Barefoot, Judge.* Heard in PASQUOTANK County, by agreement, on 8 November 1979 on motion of propounders, Mildren L. Papuchis and Alice L. Ferrell, to dismiss this action and on motion of caveators for a "Restraining Order Pendente Lite." Order signed by Judge Barefoot dated 8 November 1979. Heard in the Court of Appeals 10 June 1980.

Louis Lamb died on 21 February 1979 and his purported will was admitted to probate in Virginia on 23 February 1979. At that time, two of his children (hereinafter the "propounders") were issued letters of administration. On 22 May 1979 his widow and four of decedent's other children (hereinafter the "caveators") filed a "Bill to Impeach Will" in Virginia. Then, on 2 November 1979, the caveators filed a caveat to the purported will with the Clerk of Superior Court in Perquimans County, North Carolina, where deceased owned property at his death, seeking to restrain the propounders from proceeding further with the administration of the estate pending the resolution of the issues raised by the caveat. In the caveat, the caveators alleged that on 11 May 1979 they submitted an exemplified copy of the purported will, offered for probate in Virginia, to the Clerk of Superior Court in Perquimans County, and that it "was allowed, filed and recorded as the Last Will and Testament of . . . , deceased, as per N.C. G.S. Sec. 31-27" by the Clerk of Superior Court.

The Clerk of Superior Court of Perquimans County transferred the case to Superior Court for trial and directed the propounders to suspend all further proceedings concerning the estate, except the preservation of the property and collection and payment of debts and taxes, until the court resolved the issues. Propounders moved to dismiss the North Carolina caveat pursuant to Rule 12(b) for lack of subject matter jurisdiction and failure to state a claim for relief.

Superior Court Judge Barefoot denied the propounders' motion to dismiss and enjoined the propounders from further proceedings regarding the estate, except preservation of the property and the collection and payment of debts, pending resolution of the issues by trial on the merits. Propounders gave notice of appeal from this order.

Twiford, Trimpi, Thompson & Derrick, by Russell E. Twiford, John G. Trimpi and O.C. Abbott, by James A. Beales, Jr., for the caveators.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., for the defendant propounders.

MARTIN (Robert M.), Judge.

The issue raised by the first two assignments of error is whether a caveat may be entered to the recordation of the exemplification of a will and its probate in another state pursuant to G.S. 31-27. If so, the denial of propounders' motion to dismiss the caveat for lack of subject matter jurisdiction was proper. An appeal lies immediately from the refusal to dismiss a cause for want of jurisdiction. *Kilby v. Dowdle*, 4 N.C. App. 450, 166 S.E. 2d 875 (1969).

The record in the present case indicates (1) apparent due probate of the will of Louis Dempsey Lamb in Virginia Beach, Virginia, (2) a certified and authenticated copy or exemplification of such will and of the order of probate produced and exhibited before the Clerk of Superior Court of Perquimans County, (3) the filing and recordation of said will by the Clerk of Superior Court of Perquimans County pursuant to G.S. 31-27

and (4) the entry of a caveat to the recordation of the exemplification of the will and foreign order of probate.

The proposition that there can be a valid caveat to the recordation of an exemplification or authenticated copy of a will was approved by Chief Justice Stacy in *In re Will of Chatman*, 228 N.C. 246, 45 S.E. 2d 356 (1947), upon the authority of *McEwan v. Brown*, 176 N.C. 249, 97 S.E. 20 (1918). The propounders have sought to persuade this Court that the caveat in *Chatman* was proper because the exemplified copy of the will in that case had, in fact, been probated by the Clerk of Superior Court of New Hanover County whereas the will of Louis Dempsey Lamb in the present case has not been probated by the Clerk of Superior Court of Perquimans County. The propounders contend that where there is no duly probated will there can be no properly constituted caveat under G.S. 31-32 which provides that a caveat may be entered to the "probate" of a will.

[1] We have examined the record on appeal in *Chatman* and agree that an order of probate by the Clerk of Superior Court of New Hanover County appears therein although it is not referred to in the court's reported opinion of that case. Chief Justice Stacy in *Chatman* states that the caveat appears "to the recordation of the exemplification of the will and the proceedings had in connection with its [South Carolina] probate ... " 228 N.C. at 247, 45 S.E. 2d at 357. The decision allowing the caveat does not rest upon the probate of the will in this State but upon its recordation. Moreover, an examination of the record in *McEwan*, the case upon which *Chatman* relies, reveals only that the exemplification of the will and of its probate in Virginia was "allowed, filed,and recorded" in this State. We hold that where a certified or authenticated copy or exemplification of a will of a nonresident together with the proceedings had in connection with its probate in another state is allowed, filed and recorded by the clerk of superior court in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk, a caveat to the will may be properly entered.

We note that G.S. 28A-26-8, which states that an adjudication of a claim rendered in any jurisdiction in favor of or against any personal representative of the estate of a nonresident dece-

dent is binding on the ancillary personal representative in this State and on all parties to the litigation, "is limited to adjudication of *claims;* therefore, it does not change current North Carolina law which permits a caveat in this state to a will probated in the domicile when such will purports to pass title to real property in this state." Aycock, Article 26 — Foreign Personal Representatives and Ancillary Administration, 11 Wake Forest L. Rev. 75, 80 (1975).

Defendants by their third and fourth assignments of error contend that the court committed prejudicial error in ordering a preliminary injunction against the propounders, who were appointed personal representatives of the estate of decedent in Virginia, enjoining them from proceeding with the administration of the estate.

The Clerk of Superior Court of Perquimans County, having jurisdiction over the caveat, proceeded under G.S. 31-33 and G.S. 31-36 to transfer the cause to the superior court for trial and to order the propounders to suspend proceedings under the will. Thereupon propounders motioned the superior court to dismiss the action for lack of subject matter jurisidiction and for failure to state a claim. The propounders did not appeal to the superior court from the order of the clerk directing the propounders to suspend proceedings under the will and the propriety of the clerk's order under G.S. 31-36 is not before us. When the clerk of court transferred the cause to the civil issue docket for trial by jury, jurisidiction to determine the whole matter in controversy as well as the issue of *devisavit vel non,* passed to the superior court. G.S. 1-276; *In re Will of Wood,* 240 N.C. 134, 81 S.E. 2d 127 (1954). Therefore, Judge Barefoot had full jurisdictional power and authority to rule on caveators' motion for a temporary restraining order against propounders enjoining them from proceeding further in the administration of the estate until a resolution of the issues raised in the caveat.

[2] Propounders argue that because the only personal representatives of the estate were appointed by the Clerk of Circuit Court of Virginia Beach and because there are no personal representatives of the estate appointed by the clerk in North

Carolina, the court cannot prohibit personal representatives duly appointed by the Court in Virginia from proceeding with their duties. We do not agree.

"Letters testamentary and letters of administration have no legal force or effect beyond the limits of the state in which they are granted. That is, the personal representative cannot by virtue of his appointment exercise power over the decedent's property which is located in a state other than the one in which he was appointed unless authorized by the law of such state." 1 N. Wiggins, Wills and Administration of Estates in N.C. § 224 (1964). It is clear that the propounders, domiciliary personal representatives of a nonresident decedent, could have been granted ancillary letters testamentary upon application to the clerk of superior court of Perquimans County pursuant to G.S. 28A-26-3 governing ancillary administration. The domiciliary personal representatives of the nonresident decedent, after qualifying as ancillary personal representatives in this State, would then be authorized to administer the North Carolina estate of the nonresident decedent. G.S. 28A-26-5; 1 N. Wiggins, Wills and Administration of Estates in N.C. § 225 (Supp. 1978). However, since the propounders have not applied for or been granted ancillary letters, they have no authority to administer the property of decedent in North Carolina. It follows, therefore, that the court did not err in ordering propounders "to suspend all further proceedings in relation to said Estate, except the preservation of the property, collection and payment of all just indebtedness, as may be allowed by Order of the Court pending a resolution of the issues by trial upon their merits."

The propounders by their fifth assignment of error contend that the trial court committed prejudicial error in making findings of fact not supported by competent evidence in the record. We agree that Findings of Fact Nos. 4 and 9 are unsupported by the record. However, we do not find prejudicial error as these facts are not necessary to support the order of the trial court. As to the propounders' contention that there is no evidence to support the finding that "the paperwriting dated December 9, 1977, was allowed, filed and recorded as the Last Will and Testament of Louis Dempsey Lamb by the Clerk of Superior Court of

Perquimans County . . .," the propounders concede in the statement of facts in their brief that the caveators "filed" an exemplified copy of said will in the office of the clerk of court. The caveators in a verified complaint allege that the same was "allowed, filed and recorded" by the clerk of superior court, and the propounders concede that "[b]y so doing, we are entirely satisified that the will is legally sufficient to pass title to the real estate located in Perquimans County, North Carolina." Furthermore, it appears from the record that the will and order of probate in Virginia was submitted to the clerk for recordation. While it may have been better practice for the clerk to have issued an order that the exemplification of the will and its probate, which had been produced and exhibited before him, be allowed, filed and recorded, we are satisfied that the evidence supports the necessary finding of fact that this has been done. The remaining findings of fact are supported by the evidence and are sufficient to support the order of the court denying the motion to dismiss the caveat and entering a temporary restraining order against propounders. The order of the court is

Affirmed.

Judges HEDRICK and MARTIN (Harry C.), concur.

STATE OF NORTH CAROLINA v. BOBBY DARDEN

No. 808SC121

(Filed 5 August 1980)

1. **Criminal Law § 89.6– bias of witness – exclusion of evidence – failure of record to show excluded answer – repetitious testimony**

The trial court in a rape case did not err in excluding testimony by defendant as to whether a State's witness had threatened him and that he and the State's witness had a "difference over a money deal" and "it's like he's got it in for me" where the record failed to show what defendant's testimony would have been to the question about threats, and where the rape victim testified against defendant and the credibility of the State's

witness was not critical, and evidence of the possible bias of the State's witness against defendant had already been entered into the record when defendant testified that he and the witness "don't get along too good" and that they had "reasons for not getting along."

2. **Criminal Law § 128.2– failure to declare mistrial after jury deliberated for some time**

The trial court did not abuse its discretion in failing to declare a mistrial when the jury foreman stated after the jury had deliberated for one hour and thirty-five minutes that it was doubtful that the jury could reach a verdict if it deliberated further the first day or when the jury requested additional evidence after deliberating for twenty-five minutes the next day. G.S. 15A-1235(d).

3. **Criminal Law § 122.2– instructions urging jury to reach agreement – no coercion**

The trial court in a rape case did not coerce a verdict when the jury requested additional evidence after deliberating for some two hours and the court instructed the jury that a failure to agree would mean that more time of the court would be spent in a retrial of the action and that it was the duty of the jurors to do whatever they could to reconcile their differences and reach a verdict if such was possible without the surrender of any juror's conscientious convictions.

APPEAL by defendant from *Brown, Judge.* Judgment entered 29 November 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 6 June 1980.

Defendant was found guilty of the offense of second degree rape and was sentenced to a term of imprisonment.

The state presented evidence tending to show that on 28 September 1979, as Pamela Bryan was driving defendant to his house, he forced her to stop the car and to have sexual intercourse with him without her consent. Both defendant and John Smith, whom Pamela had been visiting, had requested that she drive defendant home from Smith's house. Defendant's evidence tended to show that he did not see Pamela Bryan on 28 September 1979, that he did not go to Smith's house that night, and that he was in Goldsboro at the time of the alleged rape.

After the court's charge, the jury retired at 4:38 p.m. for deliberations. It returned to the courtroom at 6:12 p.m., and the following colloquy occurred:

COURT: Mr. Foreman, I take it the jury has not arrived at a verdict?

MR. ROBITALLE: Yes, sir.

COURT: Do you feel like if you were permitted to deliberate some more today that you might be able to reach a verdict?

MR. ROBITALLE: In my mind it's doubtful.

The judge then asked the jury to return at 9:30 the next morning. After deliberating from 9:30 a.m. until 9:55 a.m., the jury returned to the courtroom and heard the judge read the following handwritten note, sent by the foreman to request additional evidence before returning a verdict:

11/29/79

Judge Brown:

We the jury respectfully request further information to help us render a fair and equitable decision.

The results of the complete physical examination of Pam made at Wayne Memorial Hospital was not provided by the State.

Since the results of this exam may have a direct influence on the results of this trial, we respectfully request the state provide the jury with these results:

Sincerely,
George C. Robitalle
Jury Foreman

The court then further charged the jury as follows:

The jury has heard all the evidence in the case. There will be no further evidence presented. You are asked to make your decision on the evidence as you heard it in this court-

room during the trial of this case. Let me say ladies and gentlemen to you before you retire to resume your deliberations: it is apparent to the court that the jury apparently is having some difficulty in reaching a verdict in the case, and I presume that you realize what a disagreement means; it means that more time of the court will have to be consumed in the trial of this action again. I do not wish to force or coerce you in any way to reach a verdict but it is your duty to try to reconcile your differences and reach a verdict if it can be done without the surrender of one's conscientious convictions. You have heard all the evidence in the case. A mistrial, of course, will mean that another jury will have to be selected to hear the case and the evidence again. A jury will have to ultimately answer the issue in this case and I feel that you are as qualified as any jury to answer the issue. The court recognizes the fact that there are sometimes reasons why jurors cannot agree. The court wants to emphasize the fact that it is your duty to do whatever you can to reason the matter over together as reasonable men and women and to reconcile your differences if such is possible without the surrender of conscientious convictions and to reach a verdict in the case.

The jury deliberated from 10:00 a.m. until 11:12 a.m., when a verdict of guilty was returned. Each juror, upon being polled, stated that the announced verdict was his verdict. Defendant appeals from the judgment of the court.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

J. Faison Thomson Jr. for defendant.

MARTIN (Harry C.), Judge.

[1] Defendant's first assignment of error is the trial court's sustaining objections by the state to certain evidence offered by defendant and allowing the state's motion to strike certain evidence. On direct examination of defendant, he testified as follows:

> When I saw him [John Smith] about ten o'clock at Holloman's Store, we just looked at each other, me and John. We don't get along too good. He said something like, you know, well it won't much. I don't recall what it was he said; it won't nothing; see, we don't get along; so we don't speak; we got reasons for not getting along.

Defendant was then asked whether Smith "made any threats to you?" This question was objected to; the objection was sustained. Then, in response to the question "Why don't you and John Smith get along?" defendant answered:

> A. We ain't got along about, since April. We had a difference over a money deal; we don't speak. It's like he's got it in for me.

An objection was sustained, and the court allowed the state's motion to strike. Defendant argues that it was error to exclude this testimony "as to a possible basis for the bias of the State's witness, John Christian Smith."

The record fails to show what answer defendant would have given had the objection to the question concerning threats by Smith not been sustained. It cannot, therefore, be determined that the court's ruling, even if erroneous, was prejudicial. *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978). We note, parenthetically, that defendant had already testified that Smith "said something like, you know, well it won't much. I don't recall what it was he said; it won't nothing."

Defendant cites *State v. Honeycutt*, 21 N.C. App. 342, 204 S.E. 2d 238, *cert. denied*, 285 N.C. 593 (1974), as clear authority for admitting the evidence of possible bias on the part of Smith, a witness for the state. In that case the Court held that defendant was prejudiced by the refusal of the trial court to allow him to testify about a previous altercation he had had with a witness for the state, stating that the evidence should have been admitted to show bias. The witness was the state's only witness to the murder for which the defendant was being tried. The Court found the credibility of the witness critical in the

case, because when he testified at two earlier trials the jury was unable to reach a verdict. Defendant was convicted at his third trial when the witness was not present but the transcript of his earlier testimony was read to the jury. Not only was defendant deprived of the opportunity to further cross-examine the witness and to have the jury observe the witness's demeanor, but his burden was "prejudicially compounded" by the court's refusal to allow him to testify about the earlier altercation.

The circumstances are quite different in this case. The victim of the alleged rape, Pamela Bryan, had already testified against the defendant; the credibility of John Smith was not "critical." Although the court allowed the state's motion to strike defendant's testimony that he and Smith had a "difference over a money deal" and "[i]t's like he's got it in for me," there is in the record defendant's evidence that he and Smith "don't get along too good" and "got reasons for not getting along." It was not error for the court to disallow repetitive evidence when evidence of the possible bias had already been entered into the record. This assignment of error is overruled.

[2] Defendant next argues that the court's failure to declare a mistrial, either at the end of the first day of the trial or after receiving the note from the jury foreman the next morning, constitutes reversible error. We do not agree. Defendant relies upon N.C.G.S. 15A-1235(d) for his position: "If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury." Contrary to defendant's contention that it was "clearly incumbent" upon the judge to declare a mistrial, this statute does not mandate the declaration of a mistrial; it merely permits it. Even assuming that the response of the jury foreman after one hour and thirty-four minutes of deliberation the first day and twenty-five additional minutes the second day made it apparent to the judge that there was no "reasonable possibility of agreement," the action of the judge in declaring or failing to declare a mistrial is reviewable only in case of gross abuse of discretion. *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971). Defendant has failed to carry the burden of showing such abuse here.

[3] Defendant's final assignment of error is that the court prejudiced the defendant by its second charge to the jury, after receipt of the note. Again, his argument is that N.C.G.S. 15A-1235 was not complied with. Subsection (c) of this statute reads:

> If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

This statute, as indicated by its title, *Length of deliberations; deadlocked jury,* is applicable in the event the jury is deadlocked. The record in our case fails to show that the jury was deadlocked or unable to agree. In its response to the jury's request for further information, the court stated that "it is apparent to the court that the jury apparently is having some difficulty in reaching a verdict." It went on to caution the jury that a disagreement meant that more time of the court would be spent in a retrial of the action. The legislature by this statute did not undertake to set out what the trial judge must instruct the jury or to limit the instructions the trial judge could give. The test remains whether the charge as a whole is coercive. Isolated mention of the necessity to retry the case does not warrant a new trial unless the charge as a whole is coercive. *State v. Alston,* 294 N.C. 577, 243 S.E. 2d 354 (1978). We do not find that the charge as a whole coerced a verdict in this case. The assignment of error is therefore overruled.

In defendant's trial we find

No error.

Judges WEBB and WELLS concur.

WALTER ARNELL WEST v. G.D. REDDICK, INC.

No. 8023DC144

(Filed 5 August 1980)

Limitation of Actions § 18.1; Rules of Civil Procedure § 41.1– statute of limitations – judgment on pleadings – voluntary dismissal – failure to reinstitute action within one year

In an action to recover damages for personal injuries allegedly caused by defendant's negligence, the trial court properly granted defendant's motion for judgment on the pleadings based on the three-year statute of limitations where the pleadings showed that the present action was not filed within three years after the accident and that plaintiff had previously taken a voluntary dismissal without prejudice but failed to reinstitute his action within one year from the date of the voluntary dismissal prescribed in G.S. 1A-1, Rule 41(a)(2). The question of when the one-year period under Rule 41(a)(2) begins if there was an appeal from the order allowing the voluntary dismissal is not properly before the appellate court where the record fails to show that an appeal was taken from plaintiff's voluntary dismissal.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Kilby, Judge.* Order entered 19 October 1979 in District Court, WILKES County. Heard in the Court of Appeals 10 June 1980.

Plaintiff filed a complaint in this action on 28 November 1978, seeking damages for personal injuries sustained as a result of the alleged negligence of defendant. Plaintiff alleged he was an invitee upon the commercial premises of defendant on 25 July 1974 when the accident occurred. In its answer defendant, among other defenses, asserted the three-year statute of limitations, N.C.G.S. 1-52. Defendant sought dismissal of plaintiff's action on the grounds that previously plaintiff had taken a voluntary dismissal without prejudice of his action but had failed to reinstitute his action within one year from the date of the voluntary dismissal, 15 September 1977. Defendant then filed a motion for judgment on the pleadings, which was granted by the court. Plaintiff appeals from this order.

Vannoy, Moore and Colvard, by J. Gary Vannoy and Michael E. Helms, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Keith W. Vaughn, for defendant appellee.

MARTIN (Harry C.), Judge.

In his brief plaintiff appellant presents the question for our review as follows: Did the trial court err in allowing the defendant's motion for judgment on the pleadings based upon the three-year statute of limitations? On the record before us in this case, we must answer this question in the negative.

The date of the filing of the complaint is 28 November 1978. The date of the alleged accident is 25 July 1974. The face of the complaint itself discloses that the applicable three-year period for bringing negligence actions has expired. We discover, however, from defendant's answer that on 15 September 1977 plaintiff took a voluntary dismissal without prejudice, but again the complaint reveals that this action was not brought within the one-year period prescribed in N.C.G.S. 1A-1, Rule 41(a)(2). Clearly, based upon the pleadings, the court correctly dismissed plaintiff's action.

In his oral argument counsel for appellant sharpened the question for review as follows: When does the one-year period under Rule 41(a)(2) commence if there has been an appeal taken from the order allowing the voluntary dismissal? Because we hold that this narrower question is not properly before the Court at this time, we decline to answer it.

Appellant informs us in his brief and in oral argument that in response to Judge Kivett's signing an order allowing plaintiff's voluntary dismissal on 15 September 1977, defendant appealed from that order, and that the Court of Appeals filed an opinion affirming the order 17 October 1978. He argues that by instituting this case on 28 November 1978, only forty-two days after that filing date, plaintiff timely filed his complaint under Rule 41(a)(2).

Appellant's crucial problem is that the record in this case fails to disclose such subsequent history of the prior action. There is not the slightest hint in the record that an appeal was

taken from the voluntary dismissal. In fact, the only mention of the voluntary dismissal itself is made by the defendant, not the plaintiff appellant. The Court of Appeals can judicially know only what appears of record. *In re Sale of Land of Warrick*, 1 N.C. App. 387, 161 S.E. 2d 630 (1968). Appellant's brief is not a part of the record on appeal. *Civil Service Bd. v. Page*, 2 N.C. App. 34, 162 S.E. 2d 644 (1968). Matters discussed in a brief but not found in the record will not be considered by this Court. *Warrick, supra.* It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court. *Mooneyham v. Mooneyham*, 249 N.C. 641, 107 S.E. 2d 66 (1959).

Although this defect in the record on appeal was repeatedly pointed out to appellant's counsel at oral argument, he failed to move the Court either to amend the record or to take judicial notice of such facts contained in our records which might support appellant's argument. The matters appellant argues simply are not before us.

The trial court properly granted defendant's motion for judgment on the pleadings.

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge HEDRICK dissents.

Judge HEDRICK, dissenting:

I agree with the majority that the question argued in plaintiff's brief and on oral argument — *i.e.*, when does the one-year period under G.S. § 1A-1, Rule 41(a)(2), commence if an appeal has been taken from the order allowing the voluntary dismissal — is not properly raised in the record on appeal, as provided by the North Carolina Rules of Appellate Procedure. However, to prevent a manifest injustice, I feel we should suspend the rules pursuant to Rule 2, N.C. Rules App. Proc., and consider the question on its merits, since the matter not in the record is an opinion of this Court in the same case reported at 38 N.C. App.

370, 248 S.E. 2d 112, filed 17 October 1978, and counsel during oral argument suggested that we surely could take judicial notice of our own decisions.

When we examine the opinion of this Court filed in the first appeal, we learn that the defendant appealed from an order denying its motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(2), and an order allowing plaintiff to take a voluntary dismissal pursuant to Rule 41(a)(2). Both orders were affirmed by this Court in the opinion filed 17 October 1978. After the opinion of this Court was filed, plaintiff commenced his action in the District Court by re-filing his complaint on 28 November 1978.

Thereafter, the District Court, in allowing defendant's motion for judgment on the pleadings, ruled that the plaintiff had not re-commenced his action within one year from the date of the order allowing the voluntary dismissal. Plaintiff now argues that since the order allowing the voluntary dismissal and the order denying defendant's motion to dismiss was on appeal, he had one year from the date of the filing of this Court's opinion within which to re-file.

G.S. § 1A-1, Rule 41(a)(2) provides:

> Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

The order allowing the voluntary dismissal did not provide that the action must be re-commenced within a shorter period of time. Thus, the sole question posed is: When does the one-year period begin to run?

Plaintiff cites and relies upon *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E. 2d 720 (1960), and *Parrish v. Uzzell*, 41 N.C. App. 479, 255 S.E. 2d 219 (1979). Defendant cites and relies upon *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234, *cert. allowed*, 295 N.C. 552, 248 S.E. 2d 725 (1978). I find all these cases distinguishable and not determinative.

In the present case plaintiff *had* obtained proper service, but the defendant appealed from the denial of his 12(b)(2) motion. Plaintiff almost immediately sought and was granted a voluntary dismissal pursuant to Rule 41(a)(2), and defendant likewise appealed from this order. To me, it would have been nonsensical to have required plaintiff to re-file his action pending the determination in this Court of the validity of the voluntary dismissal, as well as the validity of service. For example, if such were the case, plaintiff could have found himself in the middle of a lawsuit which he had no right to pursue had this Court reversed either order in the first appeal. Obviously, any delay in the final determination of plaintiff's claim was occasioned by defendant's appeal, not by plaintiff's failure to re-file pending the appeal. In my opinion the one-year period of time within which the plaintiff was required to re-file commenced to run on the date the opinion of this Court filed 17 October 1978 was certified to the trial court.

I vote to reverse the order of the District Court and remand for further proceedings.

LUCILLE H. MABRY, MOTHER; SHEILA MABRY WHITLEY, SISTER; FRANK W. MABRY, BROTHER; CLAY DANIEL MABRY, DECEASED EMPLOYEE, PLAINTIFFS v. BOWERS IMPLEMENT COMPANY, EMPLOYER JOHN DEERE INSURANCE COMPANY, CARRIER DEFENDANTS

No. 7910IC1179

(Filed 5 August 1980)

Master and Servant § 70– workers' compensation – distributive education student – computation of average weekly wage

Employees who are employed in distributive education programs may

not be fairly and justly classified as full-time for purposes of the Workers' Compensation Act; therefore, the Industrial Commission erred in determining a deceased minor employee's average weekly wage on the basis of eleven weeks during the summer when he worked full-time, and the Commission should have averaged the eleven weeks of full-time with the forty-one weeks of part-time employment contemplated in his distributive education job at the undisputed hourly rate of $2.65 in order to reach a result fair and just to both the employee and employer.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award entered 21 September 1979. Heard in the Court of Appeals 21 May 1980.

Clay Daniel Mabry, a minor, died on 24 August 1978 as a result of injuries received by him in an accident arising out of and in the course of his employment with defendant Bowers Implement Company (Bowers). Mabry was not survived by dependents. Mabry was hired by Bowers on 31 May 1978 as a distributive education employee. At the time he was employed by Bowers, Mabry was an eleventh grade student. Under the distributive education program, students attend school for half a day and work in a trade half a day. Mabry worked at Bowers under this type of employment from 31 May 1978 to 8 June 1978, when he began working full time for Bowers. On 24 August 1978, he returned to school and resumed his part-time employment with Bowers — from 1:00 p.m. to 5:00 p.m., five days a week. His rate of pay at all times he was employed by Bowers was $2.65 per hour.

Hearing Commissioner Roney found that Mabry earned $1,303.90 in his employment with Bowers over a seventy-nine day period, that his average weekly wage was $115.57. Deputy Commissioner Roney further found that defendant Bowers covered its worker's compensation risk with a standard policy of insurance, the premium for which was based on anticipated payroll subject to policy year audit, and that Mabry's "salary" was by reasonable inference included in Bowers' payroll for the purposes of premium computation. Upon his findings of fact, Deputy Commissioner Roney entered the following pertinent conclusions of law:

1. "Where the employment prior to the injury extended

over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employees earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained." N.C.G.S. 97-2(5). Use of actual earnings to compute, as above described, decedent's average weekly wages does not yield a figure unfair and unjust to defendant carrier where the premium for assumption of defendant employer's workmen's compensation risk is based on actual payroll, inclusive of decedent's salary. N.C.G.S. 97-93; N.C.G.S. 97-98.

2. Decedent's average weekly wages were $115.57. N.C.G.S. 97-2(5). The compensation rate for death in this claim is $77.04. N.C.G.S. 97-29.

On appeal, Commissioner Roney's order was affirmed by the Full Commission, and from that order, defendants bring this appeal.

Coble, Morton, Grigg & Odom, by Ernest H. Morton, Jr., for plaintiff appellees.

Teague, Campbell, Conely & Dennis, by George W. Dennis III, for defendant appellants.

WELLS, Judge.

The sole question presented on this appeal is whether the Commission erred in calculating Mabry's average weekly wage for compensation purposes. The pertinent portions of G.S. 97-2(5) are as follows:

Average Weekly Wages. — "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided

by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of 18 years, sustains a permanent disability or dies leaving dependents surviving, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon a wage sufficient to yield the max-

imum weekly compensation benefit. Compensation for temporary total disability or for the death of a minor without dependents shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than 52 weeks and then the compensation may be increased in proportion to his expected earnings.

* * *

The "averaging" question has been before our courts on a number of previous occasions, involving a variety of factual backgrounds. A previous case with a factual basis closely analogous to the one now before us is *Liles v. Electric Co.*, 244 N.C. 653, 94 S.E. 2d 790 (1956). In *Liles* the deceased worker was a college student. Because of his college schedule, he had no set hours of employment, but worked as his schedule allowed. His work week varied from a low of seventeen and one-half hours to a high of fifty-one hours during the eleven weeks he worked. Based upon the total number of weeks worked and his total pay over the eleven week period, his average weekly pay was $28.88. At the Industrial Commission hearing, his employer testified that other workers employed by the company for the same type of work worked an average of forty-six and one-half hours per week, at seventy-five cents per hour for an average of $34.88 per week. The Commission considered the various statutory schemes for averaging and concluded that by reason of the casual nature of Liles' employment it would be impractical to compute his average weekly wage by basing it on his average earnings for the previous fifty-two weeks. The Commission further concluded that "the deceased employee's average weekly wage, based upon the earnings of a person of the same grade and character employed in the same class of employment in the same locality or community was $34.88."

The Supreme Court found this conclusion to be in error, holding that a person of the same grade and character employed in the same class of employment would be a part-time, not a full-time worker. The Court further held that in such circumstances, the employee's average weekly wages should be computed by dividing the employee's earnings over the period

of employment by the number of weeks or parts thereof during which the employee earned wages, subject to the proviso that by such method, results fair and just to both parties be obtained. In other words, in *Liles* the Court rejected as unfair and unjust a method which emphasized the worker's earnings during periods of full employment to the exclusion of consideration of the part-time nature of the employment.

A more recent case, *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E. 2d 447 (1966), while involving a somewhat different factual situation, is supportive of the reasoning, logic, and result of *Liles*. The thrust of the Court's decision in both *Liles* and *Joyner* is that to be fair and just to both employee and employer in such cases, the Commission must recognize that the employment involves periods of peak and less than peak employment. Similarly, we hold that employees who are employed in distributive education programs — by the very nature of their employment program — may not be fairly and justly classified as full-time for purposes of the Worker's Compensation Act. An employer's participation in these programs accepts at the threshold the limitations on the employee's available work time associated with school attendance.

Plaintiff argues that the decision of our Supreme Court in *Hensley v. Caswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979) compels us to affirm the Commission's determination here because the provisions of G.S. 97-2(5) relating to minors require that Mabry's average weekly wage be computed so as to yield the maximum weekly compensation benefit. We do not agree. *Hensley* is distinguishable on the facts. It did not involve an employee working under a distributive education program. Under a distributive education program, there are no "adults" employed in a "similar or like class of work" in the sense these terms are used in the statute.

The Commission erroneously concluded that because there was evidence that the employer had paid a worker's compensation insurance premium based upon Mabry's actual earnings from his employment with Bowers, his compensation basis should be classified as full. The "fair and just" language found in G.S. 97-2(5) relates to determining what the employee would

have earned but for the injury. While the premium paid by the employer for worker's compensation insurance coverage may be competent evidence as to the parties' recognition of the worker's status, it is not in any sense determinative as to the "fair and just" result as contemplated under G.S. 97-2(5).

The facts in this case require the Commission to average the eleven weeks of full-time with the forty-one weeks of part-time employment of Clay Daniel Mabry contemplated in his distributive education job with Bowers Implement Company, at the undisputed hourly rate of $2.65. By so doing, the Commission will reach a result fair and just to both employee and employer.

This matter is remanded to the Full Industrial Commission for entry of an order and award consistent with this opinion.

Reversed and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

CLINTON S. FORBIS, JR. AND WIFE, NANCY M. FORBIS v. GERALD DOUGLAS HONEYCUTT AND WIFE, PATRICIA ARROWOOD HONEYCUTT

No. 8019SC22

(Filed 5 August 1980)

Brokers and Factors § 3– listing agreement with real estate agent – no power to enter contract to convey

In an action for specific performance of a contract to convey certain real property, plaintiff's complaint was insufficient to state a claim for relief where plaintiffs alleged a listing agreement between defendants and their real estate agent, their offer to purchase, and delivery of $600 earnest money, but the listing agreement did not vest in the real estate agent the authority to enter into a binding contract to convey the disputed property.

Judge WEBB dissenting.

APPEAL by plaintiffs from *Mills, Judge*. Judgment entered 19 November 1979 in Superior Court, CABARRUS County. Heard in the Court of Appeals 23 May 1980.

This action was brought by plaintiffs on 21 August 1979 seeking specific performance of a contract to convey certain real property situated in Cabarrus County. In their complaint plaintiffs alleged defendants are the owners of real property located in Cabarrus County and that on 13 July 1979 defendants executed an exclusive listing contract wherein the property was listed for sale for $62,500 with Kiser Beaver Real Estate, Inc. The listing contract was attached to and incorporated into the complaint. Plaintiffs further alleged that they executed a written offer to purchase the property, and delivered the offer to Kiser Beaver Real Estate, Inc. together with earnest money in the amount of $600.00. Plaintiffs alleged that they were ready, willing and able to comply with their offer to purchase, but that defendants refused to execute a deed to them. Plaintiffs prayed that defendants be required to execute a warranty deed to them, free of encumbrances, upon payment of $62,500.00.

Defendants answered, alleging as a first defense that plaintiffs' complaint failed to state a claim against defendants upon which relief can be granted. Defendants admitted their ownership of the property, the execution by them of the listing agreement, the execution by plaintiffs of their offer to purchase and their delivery of the earnest money, and admitted that they had refused to deliver a deed to plaintiffs.

Defendants moved to dismiss under G.S. 1A-1, Rule 12(b)(6) on the grounds that the complaint failed to state a claim upon which relief could be granted. Following a hearing, their motion to dismiss was allowed. Plaintiffs appeal from that order.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for the plaintiff appellants.

Carroll & Scarbrough, by James F. Scarbrough, for the defendant appellees.

WELLS, Judge.

We hold that the trial court correctly dismissed plaintiffs' complaint. The argument in this case is not over the question of whether plaintiffs' statement of their claim is adequate to give

defendants sufficient notice of the claim asserted to enable them to answer and defend. The factual details set out in the complaint are clear. The argument is whether plaintiffs' claim is legally sufficient.

Our courts have held that 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 the claim which would entitle plaintiff to relief. The rule generally precludes dismissal except in those cases 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*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E. 2d 640 (1979). In that defendants have admitted the essential allegations of the complaint, we are presented with a clean, clear question of law as to the legal consequences of defendants' execution of the listing agreement and plaintiffs' responding offer to purchase.

The listing agreement is between defendants, as owners of the disputed property, and Kiser Beaver Real Estate, Inc. defendants' agent. The key provisions of the listing agreement are as follows:

> That in consideration of the mutual covenants herein set forth below, the parties each agree with the other:
>
> The Owner hereby gives to the Agent the exclusive right to sell the property hereinafter listed at the price and upon the terms set forth below or at such other price as the parties hereto may agree upon. This listing contract shall continue until midnight, the last hour of 13 October 1979.
>
> Property to be sold: 1616 Longbow Drive, Kannapolis, North Carolina 28081
>
> Sale Price: Sixty two thousand five hundred dollars Dollars ($62,500.00).
>
> * * *

It is understood and agreed that if the property is sold during the period set forth herein, Owner will execute and deliver a fee simple deed with the usual covenants of warranty, subject only to current ad valorem taxes (which are to be prorated on the calendar year basis to the date of closing the transaction), existing easements, rights-of-way, and restrictive covenants, if any, and the following encumbrances . . . :

1st Mortgage – Citizens S & L, Kannapolis Bal. 24,500.00 Payment 266.00 PIT 9% loan

Owner agrees to give a purchaser possession of the property by at the time of final settlement.

The Owner agrees to enter into contract of sale with and to convey said property by good and sufficient deed with usual warranties to such ready, willing and able purchaser for the price and on the terms and conditions herein stated . . . .

..*

Plaintiffs argue that the listing agreement, their offer to purchase, and the delivery of the $600 earnest deposit, all taken and considered together, formed the basis of a contract of sale and purchase between them and defendants. While accepting, *arguendo*, the proposition that plaintiffs' offer to purchase might ultimately be construed as an acceptance of defendants' offer to sell, this is not the dispositive or determining aspect of this case. The threshold question in this case is whether the listing agreement vested in the real estate agent the authority to enter into a binding contract to convey the disputed property. We hold that it does not. While this appears to be a case of first impression in this State, and we therefore have no precise precedent in North Carolina, cases from the great majority of jurisdictions in the United States hold that a real estate broker listing agreement such as the one in this case does not confer such authority on the broker.

> A real-estate broker, under an ordinary contract of employment, has no implied authority to execute a contract of sale in behalf of his principal. Such authority must be specifically conferred upon him or necessarily implied from the terms of the particular contract or the particular circumstances . . . .
>
> ***[T]he limited power inherent in the conventional relationship of owner and broker [is] merely to find a purchaser with whom the owner may negotiate with the object of entering into a contract of sale . . . .
>
> It has been held that there is no implied authority to execute a contract of sale from a mere listing of the property with a broker, even though the owner specifies the terms of the sale; from a mere employment to find a purchaser or to sell real estate, even though an exclusive power of sale is given; from an employment to negotiate or effect a sale; from an authorization to accept a deposit or close a deal or bargain, from merely giving the broker a specified price at which the property is to be sold; from a request for a further report from the broker; or from an acceptance of an offer from the broker . . . .

12 Am. Jur. 2d, Brokers § 71, pp. 824-826 (1964). *See also,* Annot., *Power of Real-Estate Broker to Execute Contract of Sale In Behalf of Principal,* 43 A.L.R. 2d 1014 (1955). The thrust of these cases is supported by dicta in *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186 (1908). Since a real estate broker is commonly understood to be an agent with restricted powers, one who deals with him is held to a knowledge of the extent of the agent's authority. *Strickland v. Bingham,* 227 N.C. 221, 41 S.E. 2d 756 (1947). We note that plaintiffs in this case have not alleged either that defendants themselves accepted plaintiffs' offer to purchase or that defendants authorized their agent to accept the offer.

The order of the trial court must be

Affirmed.

Judge MARTIN (Harry C.) concurs.

Judge WEBB dissents.

Judge WEBB dissenting:

I dissent from the majority. I believe that it was error to dismiss the action because the plaintiff could recover under some set of facts as alleged in the complaint. It appears to me that the listing agreement authorized Kiser Beaver Real Estate, Inc. to sell the property. If the evidence shows that plaintiff accepted the offer to sell as made through defendant's agent, this made a valid contract to convey. I vote to reverse the judgment of the superior court.

L.M. HAMMERS v LOWE'S COMPANIES, INC.

No. 793SC352

(Filed 5 August 1980)

1. **Contracts § 25.1– breach of contract – insufficient complaint**

Plaintiff's complaint failed to state a claim for breach of contract to furnish plans for and to provide a contractor to construct a house where the allegations showed that the parties never agreed upon final plans for the house which plaintiff wanted or upon a fixed price and that all that occurred was that extended negotiations took place, during the course of which defendant continued to propose plans and prices which plaintiff continued to find unacceptable.

2. **Negligence § 22– failure to negotiate satisfactory agreement – no claim for relief in tort**

Although plaintiff alleged that defendant engaged in "negligent, willful, and deceptive negotiations and tactics" and that defendant's actions were "tortious in nature," plaintiff's complaint failed to state a claim for relief in tort where the specific facts alleged show no more than that plaintiff continued to be disappointed in negotiations which failed to produce from defendant an offer to build a house in accordance with plans which plaintiff would approve and at a price which plaintiff would agree to pay.

3. **Unfair Competition § 1– failure to negotiate satisfactory agreement – no unfair trade practice**

Defendant's continued proposal of plans and prices for construction of a house which plaintiff found unacceptable did not constitute an unfair trade practice in violation of G.S. 75-1.1.

Hammers v. Lowe's Companies

APPEAL by plaintiff from *Fountain, Judge.* Judgment entered 7 February 1979 in Superior Court, CRAVEN County. Heard in the Court of Appeals 28 November 1979.

Plaintiff initiated this action on 9 November 1978 to recover damages incurred as the result of defendant's breach of an alleged agreement to furnish plans for and to provide a contractor to construct a house. In his complaint plantiff alleged as a first claim for relief the following: In mid-1977 plaintiff reached an agreement with a developer in Craven County to exchange an undeveloped lot which plaintiff owned for a lot in a development then known as Treasure Lake. As a condition to the exchange, the developer required that plaintiff engage a contractor to build a home on the Treasure Lake lot. After receiving cost estimates from several building contractors in the New Bern area, plaintiff consulted an agent of defendant Lowe's to obtain another estimate. He submitted to defendant's agent a scale drawing of the house desired and designated the type and quality of building materials to be used. Plaintiff informed defendant's agent of his agreement with the Treasure Lake developer. After considering plaintiff's scale drawing and proposals, defendant's agent, intending to procure plaintiff's business, told plaintiff that defendant would be responsible for procuring the final building plans, retaining a contractor, and constructing plaintiff's house, with appliances selected by plaintiff, on the Treasure Lake lot, for a total "turn-key" cost of "approximately $35,000.00." Plaintiff agreed and paid $85.00 to defendant on 10 September 1977. Relying on defendant's agent's promise to send plans and a price breakdown within two weeks, plaintiff made no attempts to contact other contractors. On 1 November 1977, defendant submitted a written "formal bid" which stated $40,102.00 as the total cost, along with plans "for plaintiff's approval" which were substantially different from those requested, and plaintiff promptly notified defendant that he wished the plans redrawn and that the cost was unacceptable. After several months' delay and despite plaintiff's repeated requests for prompt action, defendant submitted new plans and a total cost quotation of $47,021.20 on 27 February 1978. After plaintiff again told defendant that the plans and the cost were unacceptable, defendant submitted another set of plans and cost quotations on 1 May 1978 which were identical to

those rejected on 27 February 1978. Plaintiff alleged that because of defendant's breach of the contract on or about 1 May 1978 he was forced to contract to have an inferior house built for $45,167.00 and that he had suffered damages in the amount of at least $15,000.00.

In his second claim for relief, plaintiff alleged that defendant, knowing that plaintiff was relying on defendant's expertise and that he was unable personally to supervise construction, had willfully represented that Lowe's would assume complete responsibility for the construction of plaintiff's house in order to induce plaintiff to accept Lowe's services and then to attempt to cause him to accept a building cost much higher than that originally agreed upon. He further alleged that defendant knew or should have known that it could not profitably construct the house for a cost of $35,000.00. In a final claim for relief, plaintiff alleged that defendant's conduct constituted a violation of G.S. 75-1.1, and prayed for an award of treble damages under G.S. 75-16 and attorney fees under G.S. 75-16.1.

On 11 January 1979 defendant moved under G.S. 1A-1, Rule 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. From the order granting defendant's motion, plaintiff appeals.

Robert H. Shaw, III, and Michael P. Flanagan for plaintiff appellant.

Gaither M. Keener, Jr. for defendant appellee.

PARKER, Judge.

Plaintiff attempted to state three claims for relief: first, a claim for damages for breach of contract; second, a claim for damages, including punitive damages, for conduct of the defendant which plaintiff characterized as "tortious in nature"; and third, a claim for treble damages for violation of G.S. 75-1.1. We agree with the trial judge that plaintiff failed to state any claim upon which relief can be granted. Accordingly, we affirm the judgment dismissing plaintiff's action on the grant of defendant's motion made under Rule 12(b)(6).

[1] As to the claim for breach of contract, plaintiff in paragraph 10 alleged that defendant's agent "told plaintiff that defendant would be responsible for procuring the final plans for the house, retaining a building contractor, and constructing plaintiff's house complete with appliances . . . for a total 'turn-key' cost of 'approximately $35,000.00.' " In paragraph 11 plaintiff alleged that "[p]laintiff accepted defendant's proposal," and in paragraph 25 plaintiff alleged that "[d]efendant never carried out the obligations existing under the contract entered into between plaintiff and defendant." Considered in isolation from the remaining paragraphs of the complaint, these allegations might be sufficient under the "notice" theory of pleadings, *see Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), to withstand a Rule 12(b)(6) motion. They set forth an offer by defendant (though to do exactly what and for what price is left somewhat vague), an acceptance by plaintiff, and a breach on the part of the defendant. Therefore, had these been the only allegations in the complaint, it is possible that the motion to dismiss plaintiff's first claim should have been denied. We need not decide that question, however, since these were not the only allegations in the complaint, and when all of plaintiff's allegations are taken into account and considered together, it becomes abundantly clear that no contract ever resulted from the negotiations which took place between the parties. No final plans for the house which plaintiff wanted and no fixed price were ever agreed upon between the parties. All that occurred was that extended negotiations took place, during the course of which defendant continued to propose plans and prices which plaintiff continued to find unacceptable. When, as here, the complaint discloses facts showing that no contract was ever made between the parties, such disclosure necessarily defeats plaintiff's claim for breach of contract, and that claim was properly dismissed.

[2] As to plaintiff's second claim for relief, although plaintiff alleged in general terms that defendant engaged in "negligent, willful, and deceptive negotiations and tactics," and characterized defendant's actions as being "tortious in nature," such general allegations do not serve to create an actionable tort where the specific facts alleged show none to exist. The specific facts which plaintiff alleged show no more than that he con-

tinued to be disappointed in negotiations which failed to produce from the defendant an offer to build a house in accordance with plans which plaintiff would approve and at a price which plaintiff would agree to pay. Defendant's continued failure to make a proposal to plaintiff's liking gave rise to no actionable claim for relief, and plaintiff's second claim was properly dismissed.

[3] Finally, as to plaintiff's third claim, we find in the facts alleged no violation of G.S. 75-1.1. Admittedly, the language of that statute, proscribing as it does "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," is extremely broad, so broad and vague, indeed, as to render the triple damage penalty provided by G.S. 75-16 in a private action brought for violation of the vague language of G.S. 75-1.1 at least of questionable validity.[1] On the present record, however, we do not reach that constitutional question. As broad as the language of G.S. 75-1.1 is, we find it does not embrace a situation such as is disclosed by the allegations in plaintiff's complaint. We hold that defendant's failure to negotiate an agreement on terms satisfactory to plaintiff simply did not constitute a violation of G.S. 75-1.1. Defendant's third claim for relief was properly dismissed.

[1]It should be noted that no private right of action for treble damages similar to that provided by G.S. 75-16 is available for enforcement of the equally broad language of §5 of the Federal Trade Commission Act, 15 U.S.C. §45, *Federal Trade Commission v. Klesner*, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929), enforcement of the Federal Act being by procedures which, in general, put the person accused of violating that Act on notice before penalties or sanctions are applied. *See Marshall v. Miller*, 47 N.C. App. 530, 268 S.E. 2d 97 (1980). Unlike the Federal Act, G.S. 75-16 confers upon the plaintiff in a private action the right to recover treble damages, which are punitive in nature, on proof he has been damaged by a violation of the vague language of G.S. 75-1.1 by a defendant who has not knowingly and willfully violated G.S. 75-1.1 and who has had no notice that his conduct may have violated that statute other than such notice as is contained in the vague language of the statute itself. In *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975), the only case in which our Supreme Court has approved an award of treble damages under G.S. 75-16 for a violation of G.S. 75-1.1, no question of constitutionality of the penalty provision was raised; in addition, stipulations of the parties and uncontradicted evidence in that case established that the defendants had engaged in conduct which at least three members of the Court considered to be "outrageous" and to constitute aggravated fraud, clearly a willful violation of G.S. 75-1.1.

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

ALVIN VOLKMAN AND WIFE, CAROL F. VOLKMAN v. DP ASSOCIATES, A PARTNERSHIP COMPOSED OF DAVID L. MCNAMEE AND PHILIP E. CARROLL; DAVID L. MCNAMEE, INDIVIDUALLY; PHILIP E. CARROLL, INDIVIDUALLY; AND DP ASSOCIATES OF GREENVILLE, INC.

No. 793SC1169

(Filed 5 August 1980)

Partnership § 1.2; Estoppel § 4.3– existence of partnership – estoppel to deny partnership – issues of fact – summary judgment improper

In an action to recover damages from defendant partnership which allegedly consisted of the two individual defendants, the trial court erred in granting summary judgment for one defendant where genuine issues of fact existed as to whether defendant was in fact a partner, whether he had spoken or acted in such a way as to be estopped from denying his partnership, or whether he led plaintiffs to believe that the other individual defendant had apparent authority to act in his behalf as a partner.

APPEAL by plaintiffs from *Smith (Donald L.), Judge.* Judgment entered 15 October 1979 in Superior Court, PITT County. Heard in the Court of Appeals 20 May 1980.

Plaintiffs brought suit alleging that they entered into a contract with DP Associates for construction advice in building a residence and that the contract was breached with damages resulting to them. Plaintiffs brought suit against DP Associates, which they alleged was a partnership, David L. McNamee and Philip E. Carroll as individuals, who were alleged to be partners in DP Associates, and DP Associates of Greenville, Inc., the alleged corporate successor in interest to DP Associates. Before any answers were filed, interrogatories were served on plaintiffs by defendant Carroll. These interrogatories sought information on what basis plaintiffs made their claim that Carroll was a partner with McNamee in DP Associates.

Plaintiffs answered defendants' interrogatories indicating the following. At an early meeting in 1976, McNamee informed

Mr. Volkman, who was authorized to act for his wife, that "he either had just commenced business, or was going into business with Philip E. Carroll." Subsequently, Mr. Volkman received correspondence from McNamee on DP Associates letterhead, and he assumed the "DP" was derived from the given names of the individual defendants, David and Philip. Prior to the signing of the contract, McNamee introduced Carroll to Mr. Volkman at the DP Associates' office where Carroll said, "I hope we'll be working together." Carroll identified McNamee as the person primarily concerned with Volkman's business with DP Associates but that he would also be available.

Mr. and Mrs. Volkman reviewed the written contract in the DP Associates office on 21 January 1977 with McNamee. McNamee suggested it might be advantageous to use a straight contractor's form to clearly identify DP Associates as acting as virtual general contractor. He then left the room saying, "I will ask Phil," and when he returned, he said they would use the contract with initialed modifications. After the signing of the contract but before construction of the house began, Mr. Volkman was in the office of DP Associates and again saw and conversed with Carroll who said to him in the course of the conversation, "I am happy that we will be working with you." During construction, Mr. Volkman visited the office of DP Associates on numerous occasions and saw Carroll there. During one visit, he expressed concern about construction delays to Carroll, who told him not to worry because McNamee would take care of it. Mr. and Mrs. Volkman have no documents tending to show a partnership existed. All money was paid to DP Associates. They never saw Carroll on the construction site and knew of no other construction supervised by Carroll. They understood they were purchasing Carroll's services and construction expertise through DP Associates.

All defendants except Carroll filed answer on 4 September 1979. Carroll filed answer on 6 September 1979 denying the allegations of the complaint against him. On 5 September 1979, Carroll moved for summary judgment on the basis that the pleadings, affidavits and answers to interrogatories showed that Carroll was not a partner in DP Associates. An affidavit by McNamee supporting the motion for summary judgment states

that McNamee is not and never has been in partnership with Carroll and that Carroll received no income, profits, salary or other remuneration from the Volkman job.

The trial court entered an order dismissing Carroll as a party defendant because no issue was raised as to whether Carroll was a partner in DP Associates. Plaintiffs appeal.

Everett and Cheatham, by Edward J. Harper II, for plaintiff appellants.

Gaylord, Singleton and McNally, by A. Louis Singleton, for defendant appellees.

VAUGHN, Judge.

The question raised on this appeal is not whether plaintiffs proved that Carroll was a partner. That burden will be upon plaintiffs when they go to trial. The question is whether defendant carried his burden of showing there was no genuine issue as to whether Carroll was a partner. It is true that Carroll and his alleged partner, defendant McNamee, denied the existence of a partnership. Both of these defendants, however, are interested in the outcome of the lawsuit. Plaintiffs should have the opportunity to test their credibility at trial. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). Summary judgment is an extremely drastic remedy that should be awarded only where the truth is quite clear. The requirement that such judgment be entered only where there is no genuine disputed factual issue and the party is entitled to judgment as a matter of law should be cautiously observed. *Kessing v. Mortgage Co.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Even the slightest doubt should be resolved in favor of the nonmovant. The answers to the interrogatories indicate that there is at least a question as to whether Carroll was a partner. *See Reddington v. Thomas*, 45 N.C. App. 236, 262 S.E. 2d 841 (1980). If at trial plaintiffs are unable to prove a partnership in fact, they may be able to show that Carroll should be held as a partner by estoppel or under the agency theory of apparent authority.

The Uniform Partnership Act as adopted in this State provides that "[t]he law of estoppel shall apply . . . ." G.S. 59-34(b). The essentials of equitable estoppel or estoppel *in pais* are a representation, either by words or conduct, made to another, who reasonably believing the representation to be true, relies upon it, with the result that he changes his position to his detriment. *Boddie v. Bond*, 154 N.C. 359, 366, 70 S.E. 824, 827 (1911); *Yancey v. Watkins*, 2 N.C. App. 672, 163 S.E. 2d 625 (1968); *cert. den.*, 275 N.C. 139 (1969); Restatement (Second) of Agency § 8B (1958). "[I]t is essential that the party estopped shall have made a representation by words or acts and that someone shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction." 2 Williston, Sales § 312 (rev. ed. 1948).

As well as making the "law of estoppel" expressly applicable to partnerships, the Uniform Partnership Act as adopted in this State sets forth in more detail the conditions for liability as a partner by estoppel in G.S. 59-46 which provides:

> Partner by estoppel. – (a) When a person, by words spoken or written, by conduct, or by contract, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.
>
> (1) When a partnership liability results, he is liable as though he were an actual member of the partnership.
>
> (2) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting

to the contract or representation as to incur liability, otherwise separately.

Liability by estoppel may result either from defendant Carroll's representation of himself as a partner "by words spoken or written" or "by conduct" or defendant Carroll's "consent" to such a representation by another. The pleadings and answers to interrogatories of Mr. and Mrs. Volkman indicate they may be able to show that Carroll by his oral statements to them and conduct in their presence and by his consent to the representations of McNamee to the Volkmans, some of which were in the presence of Carroll, represented himself as a partner and should be estopped to deny such association. They may be able to show further they relied upon these representations not knowing them to be false and that based upon the representations of Carroll and McNamee, the Volkmans changed their position and were thereby damaged. Defendant has failed to show that there can be no question of fact on the issue of partnership by estoppel. *See Lazarus v. Goodman*, 412 Pa. 442, 195 A. 2d 90 (1963).

In addition to an estoppel theory of liability, Carroll may be liable under apparent or ostensible authority, a theory of agency law applicable to partnerships. G.S. 59-34(c). There is virtually no difference between estoppel and apparent authority. Both depend on reliance by a third person on a communication from the principal to the extent that the difference may be merely semantic. Despite its title, "Partner by Estoppel," G.S. 59-46 "provides for a form of liability more akin to that of apparent authority than to estoppel." Painter, *Partnership by Estoppel*, 16 Vand. L.J. 327, 347 (1963). If this view is taken, the liability of the person seeking to deny partner status is not based on estoppel to deny agency or authority but on the objective theory of contract law, *i.e.*, a person should be bound by his words and conduct. Thus, when Carroll told Mr. Volkman, "I am happy that we will be working with you" and conducted himself as he did in the DP Associates office in the presence of Mr. Volkman, the trier of the facts may find he was indicating a willingness to be bound by the statements and acts of McNamee, that Carroll held himself out as a partner of McNamee in CP Associates, that McNamee had apparent authority to act for Carroll and

that the Volkmans reasonably relied upon this holding out. If so, he is bound as if he directly dealt with the Volkmans.

It was error for the trial court to grant summary judgment for defendant Carroll. Defendant has not conclusively shown that plaintiffs cannot possibly prove a claim against him because of an estoppel to deny the liability or because of his holding out to the Volkmans of apparent authority in McNamee to act in his behalf as a partner.

Reversed and Remanded.

Judges PARKER and HEDRICK concur.

PIEDMONT CONSULTANTS OF STATESVILLE, INC. v. GEORGE J. BABA AND WIFE, BETTY BABA

No. 7922DC960

(Filed 5 August 1980)

1. **Brokers and Factors § 6.1– commission for sale of land – purchaser procured by plaintiff**

The trial court properly entered summary judgment for plaintiff real estate agent in an action to recover a commission for procuring a purchaser for land owned by defendants where the evidence on motion for summary judgment showed that the parties entered into a contract giving plaintiff the exclusive right to sell the land for 180 days for $35,000 and providing that plaintiff would be entitled to a commission of 10% if the land was sold by anyone within the 180 days or if sold within an additional 180 days to "a purchaser originally procured by" plaintiff; plaintiff placed its "For Sale" sign on the land; the purchaser saw the sign on the property and contacted plaintiff's agent with reference to purchasing the property; plaintiff's agent discussed the sale of the property with the purchaser; the purchaser thereafter contacted defendant owners, who sold the property to the purchaser for $35,000; the sale occurred within 180 days after the exclusive right to sell had expired; and defendants did not pay plaintiff any commission on the sale.

2. **Brokers and Factors § 4.1– real estate broker – no breach of fiduciary duty**

The trial court properly entered summary judgment in favor of plaintiff real estate broker on defendants' counterclaim for breach of plaintiff's fiduciary duty where all the evidence on motion for summary judgment showed that defendant owners prevented plaintiff from carrying out its

duties when they undertook direct negotiations with the ultimate purchasers to the exclusion of plaintiff.

APPEAL by defendants from *Martin (Lester), Judge.* Orders entered 21 August 1979 in District Court, IREDELL County. Heard in the Court of Appeals 15 April 1980.

Plaintiff, a real estate agency, sued defendants to recover a $3,647.00 commission allegedly earned by it in procuring a purchaser for defendants' 22 1/2 acres of land located in Chambersburg Township, Iredell County.

Defendants filed an answer denying that plaintiff procured the purchaser of the land, but admitted that plaintiff had informed them of the purchaser's interest. They also filed a counterclaim alleging plaintiff's breach of fiduciary duty and negligence in the performance of its duties.

Plaintiff filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure and a motion for entry of summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. The trial court, after considering the pleadings, the interrogatories and the answers filed thereto, the depositions of the purchasers, and the affidavit of the male defendant, entered summary judgment in favor of plaintiff in the original action and on the counterclaim. Defendants appealed.

Homesley, Jones, Gaines, Dixon & Fields, by Wallace W. Dixon, for plaintiff appellee.

Isenhower & Long, by David L. Isenhower, for defendant appellants.

ERWIN, Judge.

Defendants contend that the trial court committed error in two respects: (1) The trial court erred in granting plantiff's motion for summary judgment. (2) The trial court erred in granting plaintiff's motion to dismiss defendants' counterclaim. We do not agree.

G.S. 1A-1, Rule 56(c), of the Rules of Civil Procedure provides the standard for summary judgment:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

The text of Rule 56 of the North Carolina Rules of Civil Procedure providing for summary judgment and that of Rule 56 of the Federal Rules of Civil Procedure are practically the same. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

> "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined . . . . If it appears that there is a genuine issue to be tried, the motion is denied and the case allowed to proceed to trial in the usual way. A summary judgment should not be granted unless the truth is clear . . . .
>
> * * *
>
> The determination of what constitutes a 'genuine issue as to any material fact' is often difficult."

3 Barron & Holtzoff, Federal Practice and Procedure § 1234 (C. Wright ed. 1958).

[1] The contract for the sale of the property in question is an Exclusive Listing Contract which was entered into between the parties on 8 December 1977 and provided in part:

> "You have the exclusive right to sell for the sale of my property consisting of Approximately (22.5) (G.J.B.) 24 acres near the intersection of S.R. # 2318 & 2342 in Chambersburg Township, Iredell County . . . . [F]or 180 days for a price of $35,000 (or at a greater or lower price if I accept). The professional service and expense of advertising and showing the property shall be entirely borne by you; and in

> consideration thereof you shall be entitled to a commission of 10% if the property is sold within said period, by whomsoever sold, and after the termination of this exclusive right to sell, if sold within 180 days to a purchaser originally procured by you.

Neither plaintiff nor defendants denied the contract or contested any provisions thereof.

The following additional facts are uncontested: (1) that plaintiff placed its "For Sale" sign on the property in question; (2) that Douglas A. Haneline saw the sign on the property and by reason of such, contacted plaintiff's agent on or about 2 or 3 May 1978 with reference to purchasing the property; (3) that plaintiff's agent discussed the sale of the property with Haneline, who thereafter contacted defendants with reference to the purchase of the land; (4) that defendants sold the property to the Hanelines on these terms — $35,000 paid by a cash down payment, execution of a deed of trust to Federal Land Bank, and a second deed of trust to defendants for the balance; (5) that the sale occurred within 180 days after the exclusive right to sell had expired and was sold to a purchaser originally introduced by plaintiff; and (6) that defendants did not pay plaintiff any commission for the sale of the property in question.

Our Supreme Court stated the rules governing cases relating to commissions of brokers in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 250-51, 162 S.E. 2d 486, 491 (1968), as follow:

> "Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228; *Martin v. Holly*, 104 N.C. 36, 10 S.E. 83. If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commsision [sic] provided the case is not taken out of the rule by the contract of employment. *Trust Co. v. Goode*, 164 N.C. 19, 80

> S.E. 62. The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to 'a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms.' 12 C.J.S. *Brokers* § 91, p. 209 (1938). *Accord*, 12 Am. Jur. 2d *Brokers* § 190 (1964)."

When we consider the rules relating to summary judgments and the rules relating to payment of a broker's commission, we are compelled to hold that summary judgment was proper for plaintiff. We do not find any issue of material fact to be tried. Plaintiff was the procuring cause of the sale in a direct manner, by introducing the purchasers to the owners of the property. Haneline's first contact with plaintiff came after he noticed the "For Sale" sign on the subject property. Defendants agreed and sold their property to the Hanelines on terms agreeable to them for $35,000.

The terms of the Exclusive Listing Contract are clear that "in consideration thereof you [plaintiff] shall be entitled to a commission of 10% if the property is sold within said period, by whomsoever sold, and after the termination of this exclusive right to sell, if sold within 180 days to a purchaser originally procured by you." *See Insurance & Realty, Inc. v. Harmon*, 20 N.C. App. 39, 200 S.E. 2d 443 (1973). This assignment of error is overruled.

[2] We note that plaintiff's motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), of the Rules of Civil Procedure was treated by the trial court as a motion for summary judgment pursuant to Rule 56. "A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E. 2d 611, 627 (1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The trial court's order reads:

"THIS CAUSE having come on to be heard on motion of plaintiff to dismiss the counterclaim of the defendants for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and the Court having considered matters outside the pleadings, being the interrogatories and answers filed thereto, the admissions filed pursuant to the request for admissions, the deposition of Douglas Allan Haneline and the deposition of John Wayne Haneline and the affidavit of George J. Baba, the Court does treat this motion as one for summary judgment and having heard oral argument and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED, that plaintiff's motion to dismiss which the Court treats as a motion for summary judgment is in all respects granted, and it is further ORDERED, ADJUDGED AND DECREED that defendants have and recover nothing of the plaintiff by their counterclaim."

If plaintiff failed to execute its fiduciary duties as alleged in the counterclaim, said failure was caused by the defendants. Defendants prevented plaintiff from fully carrying out its duties when they undertook direct negotiations with the ultimate purchasers to the exclusion of plaintiff. These facts are not contested, and as a result, summary judgment was proper.

Judgment affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JERRY MAINES AND STATE OF NORTH CAROLINA v. STEVE DUNN

No. 8023SC195

(Filed 5 August 1980)

Burglary and Unlawful Breakings § 5.9; Larceny § 7.4– breaking and entering and larceny – possession of recently stolen property

The evidence was sufficient to support the conviction of both defendants of felonious breaking and entering and felonious larceny under the doctrine of possession of recently stolen property where it tended to show that a store was broken into between 9:00 p.m. on 5 July and the morning of 6 July; a blue water repellant coat and other items were missing from the store; defendants were apprehended at 10:25 p.m. on 7 July in an automobile containing the stolen coat and other items similar to those stolen from the store; and one defendant was driving the automobile and the other defendant owned the automobile and was a passenger in the front seat.

Judge HEDRICK concurring in part and dissenting in part.

APPEAL by defendants from *McConnell, Judge.* Judgments entered 18 October 1979 in Superior Court, ASHE County. Heard in the Court of Appeals 9 June 1980.

Defendants were each indicted for felonious breaking and entering and felonious larceny.

Pauline Milam testified that on 5 July 1979 she closed and locked her grocery store/service station around 9:00 p.m. and when she returned the next morning, she discovered a back window broken out and a rock lying on the floor. Items missing from her store included her blue water repellant coat, cigarettes, a necklace, toothbrushes, cigarette papers and "Ford" caps.

Lieutenant Zane Tester of the Boone Police Department testified that when he pulled defendant Dunn's car on 7 July 1979 at approximately 10:25 p.m., he observed defendant Maines driving the car and defendant Dunn in the front passenger seat, with two other men in the rear seat of the car. Detecting the strong odor of alcohol on defendant Maines, he took all parties to the police station. While at the police station a message was received about the Milam break-in and Dunn, as own-

er of the vehicle, was requested to sign a consent to search form, which he did after being informed of his constitutional rights. Police searching the vehicle found paper bags containing cigarettes and cigarette papers in the trunk of the car, a blue nylon windbreaker coat in the back seat of the car, and two new toothbrushes in the glove compartment. They removed a necklace from defendant Dunn and a "Ford" cap from one of the rear seat passengers.

Defendant Maines denied being with defendant Dunn on 5 July 1979 and presented an alibi. He denied knowing that any of the stolen property was in Dunn's car and stated that the only reason he was driving the car was because he was more sober than the others.

Defendant Dunn denied breaking into the Milam store and stealing any property. He testified explaining where he had gotten the various items found in his car and on his person and presented an alibi for 5 July and 6 July 1979.

The jury returned verdicts as to each defendant of guilty as charged. From imposition of an active sentence on the larceny charge and a suspended sentence on the breaking and entering charge, each defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Vannoy & Reeves, by Wade E. Vannoy, Jr., for defendant Maines.

Johnston, Johnston and Worth by Allen Worth, for defendant Dunn.

MARTIN (Robert M.), Judge.

Defendants argue the court erred in denying their motions to dismiss at the close of the evidence.

The State relied on the doctrine of possession of recently stolen property. Possession of stolen property shortly after the

time of the theft raises an inference of the possessor's guilt of the larceny as well as of the breaking and entering necessary to gain access to the property, which is then submitted to the jury along with other evidence for its determination of guilt. *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976). The circumstances under which the doctrine may be applied were enumerated in *State v. Fair* as follows: (1) that the property described in the indictment was stolen, (2) that the property shown to have been possessed by defendant was the stolen property, and (3) that the possession was recently after the larceny.

The first condition is satisfied by Mrs. Milam's testimony as to the break-in of her building and her positive identification of the coat described in the indictment. Although Mrs. Milam could not specifically identify the other items listed in the indictment as being her property, the general verdict of guilty which was returned by the jury will stand as being presumed to relate only to the felonious larceny of the identified coat. *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966).

The requirement of the second condition of the doctrine is met by the testimony which established defendant Maines as the driver of the car containing the stolen property and defendant Dunn as owner of the car and being present in the front passenger seat. As to defendant Maines, one who has the power to control and intent to control the access to and use of a vehicle is presumed to also have possession of the known contents of that vehicle. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). As to defendant Dunn, his possession of the stolen goods is implied by his ownership of the vehicle, his presence in the vehicle, and his exercise of authority over the vehicle in consenting to its search by the police officers. *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046, 34 L. Ed. 2d 498, 93 S.Ct. 547 (1972). The above facts which imply possession by the defendants are merely to be considered by the jury along with other evidence but they do justify the denial of defendants' motions for nonsuit. *State v. Earley*, 38 N.C. App. 361, 247 S.E. 2d 796 (1978).

As to the final condition, the goods were taken sometime between 9:00 p.m. on 5 July 1979 and the morning of 6 July 1979;

defendants were apprehended around 10:25 p.m. on 7 July 1979, a maximum time lapse of 49½ hours. The facts and circumstances of each case determine whether the lapse of time between the theft of the goods and when the defendant is found in possession of the goods is too great to allow the doctrine to apply. If the stolen property is of a type not normally or frequently found in commerce, then a longer time inference will be sustained. *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). We conclude that the possession of Mrs. Milam's coat by the defendants was sufficiently recent after its theft to permit application of the doctrine of possession of recently stolen property. *See State v. Jolley*, 262 N.C. 603, 138 S.E. 2d 212 (1964) (per curiam).

In the defendants' trial we find

No error.

Judge MARTIN (Harry C.) concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK, (concurring in part and dissenting in part):

I concur with the majority with respect to the defendant Dunn. However, I respectfully dissent from the majority decision with respect to the defendant Maines. The majority has ignored the salient fact in the *Maines* case that the owner of the automobile, the defendant Dunn, was a passenger when the defendant Maines was driving the automobile in which the stolen coat was found. While the defendant Dunn as owner/occupant of the car had constructive possession of the stolen article, *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046, 93 S.Ct. 547, 34 L. Ed. 2d 498 (1972), it is my opinion that the driver of a vehicle is not presumed to have constructive possession of the contents of the vehicle when the owner is an occupant, absent some evidence that the driver had knowledge of the stolen character of the contents of the vehicle, or the nature of the property in question is such as to give notice to the driver of its contraband character.

In the present case there is no evidence that the defendant Maines knew that the blue coat identified by the witness Milam was stolen, and certainly there is nothing in the nature of the coat itself to give the defendant notice that it was stolen. In my opinion the trial judge should have granted defendant Maines' motion for judgment as of nonsuit, and I vote to reverse.

ROSENTHAL'S BOOTERY, INC. v. DAVID SHAVITZ

No. 8021SC137

(Filed 5 August 1980)

Usury § 1– time loan was made – applicability of amended statute

In an action to recover damages for an alleged usurious loan made by defendant, the trial court erred in failing to make a finding as to when the loan was made, since plaintiff contended that the loan was made on 1 July 1969, and the statute governing interest rates on commercial loans, G.S. 24-8, was amended effective 2 July 1969.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 15 November 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 10 June 1980.

This is a civil action wherein plaintiff seeks to recover damages for an alleged usurious loan made by defendant. In a complaint filed 5 September 1978 plaintiff asserted that plaintiff as borrower and defendant as lender had entered into a $70,000 loan "[o]n or about" 1 July 1969; that a note evidencing the loan and bearing interest at the rate of nine percent per year was duly executed; and that the rate was usurious, thus entitling plaintiff to recover $47,250 from defendant.

Defendant filed an answer admitting the execution of the loan, but generally denying that the interest rate exceeded that allowed by law.

At a trial before the judge without a jury, plaintiff offered evidence tending to show that plaintiff and defendant agreed on the terms and conditions of the note in late May or early

June 1969; that plaintiff received a check from defendant prior to 1 July 1969 and dated 1 July 1969; that the check was in the amount of $60,880 which represented the $70,000 loan less a $3,150 six-month interest payment, less a $6,000 balance on a previous note, and plus a $30 interest rebate on the old loan. Upon receiving the check, which plaintiff claimed to have deposited on 1 July, but which was not posted to plaintiff's account until 2 July, plaintiff prepared a note to evidence the parties' agreement. The note was dated 1 July 1969 and mailed from plaintiff's office in Winston-Salem to defendant in Fayetteville. It provided for interest at the rate of nine percent yearly to be paid semi-annually in advance. In addition to the interest payments, principal payments in the amount of $5,000 every six months were to be made from 1 January 1972. The note had been paid in full at the time of trial.

Defendant's evidence tended to show that he is 76 years old and was retired at the time he agreed to loan $70,000 to the plaintiff. The president of plaintiff, Stanley Rosenthal, at the time was defendant's son-in-law. Defendant gave Rosenthal a check for $60,880 in late June, and Rosenthal gave him an "IOU." Some time later, after 4 July 1969, defendant received the executed note from plaintiff, showing an interest rate of nine percent. Defendant testified, "I was pleased with that rate but I never asked him for it."

At the close of all the evidence, Judge Hairston made the following pertinent findings of fact:

> [T]he Court finds that the defendant loaned to the plaintiff $70,000 in late June or early July, 1969; that the check representing part of the payment to the plaintiff by the defendant was dated July 1, 1969, . . . ; that said check was deposited by the plaintiff on July 2, 1969, and debited to the account of the defendant on July 7, 1969; that after depositing said check in its account on July 2, 1969, the plaintiff corporation executed a note by mail to the defendant . . . ; that said note is dated July 1, 1969, . . . ; that Stanley Rosenthal, . . . testified that he did not know when he mailed the note to the defendant, but that it was mailed after the deposit of the check; that said note was mailed by the plain-

tiff to the defendant not earlier than July 2, 1969, and received by the defendant after said date, but not before July 3, 1969;

. . .

The judge thereafter entered the following pertinent conclusions of law:

. . .

(2) That the note herein was not usurious under the laws of this State in effect as of July 2, 1969; . . .

. . .

(4) That the Court did not pass on the applicability of the use of the usury statutes in North Carolina prior to July 2, 1969, as the loan in question herein was not closed until the note was received by the defendant in Fayetteville, . . . sometime between July 3, 1969 and July 7, 1969, therefore said statutes were not applicable in the instant case.

From a judgment that plaintiff have and recover nothing of defendant, plaintiff appealed.

Wilson & Redden, by John W. Sherrill, for the plaintiff appellant.

Morrow, Fraser & Reavis, by John F. Morrow, for the defendant appellee.

HEDRICK, Judge.

The ultimate issue presented by this case is whether the loan in question was usurious. Resolution of this issue depends on whether the loan was made on or before 2 July 1969 since the statute governing interest rates on commercial loans, G.S. § 24-8, was amended effective 2 July 1969. Prior to the effective date of the amendment, the legal interest rate on loans of $30,000 or more to corporations stood at eight percent. The

uncontroverted evidence of record before us is that this loan bore interest at the rate of nine percent. Thus, the case can be resolved only by determining when the loan was made.

An examination of the judgment entered by the trial judge reveals that the judge made no finding as to this critical issue, *i.e.*, when was this loan made. At a trial before the judge without a jury, it is the duty of the judge to "*find the facts specially* and state separately his conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence." *Heating and Air Conditioning Associates, Inc. v. Myerly*, 29 N.C. App. 85, 88, 223 S.E. 2d 545, 547, *cert. denied and appeal dismissed*, 290 N.C. 94, 225 S.E. 2d 323 (1976) (emphasis added); G.S. § 1A-1, Rule 52. The necessity for this requirement is plain: Without such findings and conclusions, the appellate courts cannot determine whether the judge correctly found the facts or applied the law thereto. *Jones v. Murdock*, 20 N.C. App. 746, 203 S.E. 2d 102 (1974).

It appears that Judge Hairston based his conclusion that the loan in this case was not usurious on the finding that the loan was not "closed" until the note was received by defendant "sometime between July 3, 1969 and July 7, 1969, ..." Defendant cites us to *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), where the Court indeed concluded in a similar situation that a loan was "closed" and "made" on a date subsequent to the statute's amendment. However, in *Kessing* the parties had done no more than *agree* to make a loan and approve the application for the loan prior to 2 July 1969. No documents had been executed or exchanged; no checks had been written, delivered or disbursed prior to 8 July 1969. Thus, the Court was able to conclude that the loan was "made" on 9 July 1969, the day the loan agreement was executed. In brief, in *Kessing* the "closing" date was contemporaneous with the "making" date of the loan.

It is not necessary, however, that the actual closing date of this loan be determined, even if such a determination could be made from this record, for it is the making date which controls the ultimate determination whether the loan was usurious. *Kessing v. National Mortgage Corp., supra.* As the *Kessing*

Court recognized, the making date can certainly precede the actual closing date. It follows that Judge Hairston's finding that the loan was "closed" after 2 July 1969 is not sufficient to settle the issue whether this loan was usurious. Moreover, the situation presented in the case at bar is readily distinguishable in several particulars from that described in *Kessing* and, upon remand, in determining the crucial issue of when the loan was made, the court should take into account the following uncontradicted facts:

1. The parties negotiated for the loan before 2 July 1969.

2. The check for the loan in the amount of $60,880 was dated 1 July 1969. (In *Kessing* the check was dated 8 July 1969.)

3. The note evidencing the loan was dated 1 July 1969. (In *Kessing* the note was dated 9 July 1969.)

4. G.S. § 25-3-114(3) provides: "Where the instrument . . . is dated, the date is presumed to be correct."

5. The defendant charged and the plaintiff paid interest on the loan in advance at the rate of nine percent *from* 1 July 1969, not from a later date.

6. The first semi-annual installment which was due and payable six months after the making of the note was due 1 January 1970.

7. Thereafter, each successive semi-annual payment was due on either 1 July or 1 January.

8. The loan papers were transmitted to the defendant on or after 2 July 1969.

Each of these factors must be weighed to determine the essential factual issue of when this loan was made.

For the reasons stated, the judgment is vacated and the cause is remanded to the Superior Court for the judge to find the facts specially from the record evidence as to all the mate-

rial issues raised by the evidence, state separately the conclusions of law, and enter the appropriate judgment.

Vacated and remanded.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. ANNETTE JOHNSON PUGH

No. 806SC11

(Filed 5 August 1980)

1. **Assault and Battery § 14.5– assault with deadly weapon with intent to kill inflicting serious injury**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury, defendant's comment about "getting it on" at the time of the crime together with the nature of the wounds inflicted upon the victim showed circumstances from which the jury could reasonably infer that defendant possessed the requisite specific intent to kill the victim.

2. **Assault and Battery § 15.3– intent to kill – instructions adequate**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury, the trial court's instruction on intent to kill did not give the jury the impression that it could infer an intent to kill solely from defendant's commission of the crime of assault with a deadly weapon inflicting serious injury.

3. **Assault and Battery § 16.1– assault with deadly weapon with intent to kill inflicting serious injury – submission of lesser offense not required**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury where the evidence showed that defendant stabbed the victim with a large knife, thereby inflicting serious injury, the trial court did not err in failing to charge the jury on the lesser included offense of assault with a deadly weapon.

4. **Constitutional Law § 74; Criminal Law § 48– impeachment of defendant – failure to state certain facts to officer – no improper use of defendant's silence**

An officer's testimony that defendant failed to say anything about deceased having a pistol or about threats by deceased to blow her brains out did not constitute a use of defendant's post-arrest silence in violation of the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution and was properly admitted to impeach defendant's testimony at trial by showing inconsistencies between that testimony and her prior statement to the officer.

State v. Pugh

APPEAL by defendant from *Small, Judge.* Judgment and commitment entered 6 September 1979 in Superior Court, BERTIE County. Heard in the Court of Appeals 14 May 1980.

Gillam, Gillam & Smith, by Lloyd C. Smith, Jr., for the defendant appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

WELLS, Judge.

In this case the defendant was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious bodily injury upon Mary Bond Craig, in violation of G.S. 14-32(b). The State's evidence tended to show that at about 5:00 p.m. on 25 December 1978 the victim, Mary Bond Craig, drove to Leroy Speller's house to take Mr. Speller to a Christmas dinner. At the time she called on Mr. Speller, defendant was present in the house and said, "Leroy ain't going nowhere [sic]." Defendant stated, "Okay, let's get it on," and stabbed Mrs. Craig with a butcher knife in her breast and upper right arm. Mrs. Craig fell to the floor fracturing her arm. Defendant admitted cutting Mrs. Craig in the arm with the knife, but denied that she caused any of Mrs. Craig's other injuries. Defendant claimed that the stabbing occurred in self defense when Mrs. Craig was prepared to draw a pistol on her.

[1] In her first assignment of error, defendant contends the trial court erred in failing to grant her motion for a nonsuit. Viewed in the light most favorable to the State, defendant's comment about "getting it on" together with the nature of the wounds inflicted upon Mrs. Craig shows circumstances from which the jury could reasonably infer that defendant possessed the requisite specific intent to kill Mrs. Craig. *See, State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Reives*, 29 N.C. App. 11, 222 S.E. 2d 727 (1976), *disc. rev. denied*, 289 N.C. 728, 224 S.E. 2d 675 (1976). This assignment of error is overruled.

[2] The defendant next assigns as error that portion of the trial court's charge to the jury instructing the jury on the statutorily required "intent to kill." Defendant argues that the charge could have given the jury the impression that it could infer an intent to kill solely from defendant's commission of the crime of assault with a deadly weapon inflicting serious injury. Had the charge been susceptible of such an interpretation, prejudicial error would have resulted. *See, State v. Parks, supra.* In the present case, however, the trial court in its charge carefully distinguished the offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury from the lesser included offense of assault with a deadly weapon inflicting serious bodily injury, and properly charged the jury as to all elements of the greater offense. This assignment of error is overruled.

[3] Defendant also assigns as error the trial court's failure to charge the jury on the lesser included offense of assault with a deadly weapon. The evidence in this case shows that defendant stabbed Mrs. Craig with a large knife and, that if there was an assault here at all, it was with a deadly weapon which inflicted serious bodily injury. *State v. Davis*, 33 N.C. App. 262, 234 S.E. 2d 762 (1977); *State v. Williams*, 31 N.C. App. 111, 228 S.E. 2d 668 (1976), *disc. rev. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1976). This assignment of error is overruled.

[4] Defendant also assigns as error the admission of rebuttal testimony of Deputy Sheriff Morris as to inconsistencies between defendant's post-arrest voluntary statement and her exculpatory testimony at trial. After receiving her *Miranda* rights the defendant voluntarily submitted a statement to Sheriff Morris which was introduced by the State at trial without objection from the defendant. The statement was exculpatory in nature, stating that Mary Craig walked into Leroy Speller's house, told Speller she was taking him to her house and went into the bathroom and put "something" in her bra. According to the statement, Mary Craig then stood in front of the defendant, said that she would "take all three of us together" and "do you want to make something of it," and had started to reach into her bra when the defendant stabbed her. Deputy Sheriff Morris testified that he asked the defendant

other questions after she had submitted the statement, and that defendant said she did not see any weapon. At trial, the defendant testified that Mary Craig put a pistol in her bra and said that she would, "blow my God damned brains out."

The testimony of Morris admitted by the trial court to which the defendant objects is as follows:

Q. Did the defendant, Annette Pugh, ever state to you anything about any pistol when you talked with her?

MR. SMITH: OBJECTION.

THE COURT: OVERRULED.

* * *

A. No, she did not. She never has.

* * *

Q. Did Annette Pugh, on August 28, 1978, ever tell you that — December 28, 1978, ever tell you that Mary Bond Craig stated, "God damn, I'm going to blow your brains out — I'm going to blow your God damned brains out — G-d brains out?"

MR. SMITH: OBJECTION.

THE COURT: OVERRULED.

A. No, sir, she did not.

Q. Did Annette Pugh, on December 25, 1978, ever tell you that Mary Bond Craig had the knife in her hand and must have stabbed herself in the breast?

MR. SMITH: OBJECTION.

THE COURT: OVERRULED.

* * *

A. No, sir, she did not.

Q. Did Annette Pugh ever indicate to you on December 28, 1978, that she had anything else to say to you other than what she put down on this statement?

A. No sir.

MR. SMITH: OBJECTION.

THE COURT: Well, the answer having been made before the objection was lodged, OBJECTION OVERRULED.

Defendant argues that the admission of this testimony constitutes a use of defendant's post-arrest silence in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendant cites *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976) in support of her argument. In *Doyle, supra*, the Supreme Court of the United States held that a defendant in a criminal proceeding who presents an exculpatory story for the first time at trial may not be impeached by his silence after he has been given his *Miranda* rights, the Court stating that the use of a defendant's silence in such a manner violates his Fourteenth Amendment due process rights. The Court reasoned that the ambiguity of post-arrest silence (*see e.g., United States v. Hale*, 422 U.S. 171, 45 L.Ed. 2d 99, 95 S.Ct. 2133 (1975)) as well as the implicit guarantee stated in the *Miranda* warning itself that the defendant's silence will not be used against him, mitigated against this practice. The case now before us is clearly distinguishable from *Doyle*. Here, the testimony of Deputy Morris served to impeach defendant's statement at trial by showing inconsistencies between that testimony and her prior statement. We have previously held that evidence of such inconsistencies is admissible to impeach the in-court testimony of a defendant. *State v. Fisher*, 32 N.C. App. 722, 233 S.E. 2d 634 (1977). This assignment of error is overruled.

No error.

Judges WEBB and MARTIN (Harry C.) concur.

JAMES N. ELLIS, JR. v. SMITH-BROADHURST, INC., and JACK MEDLIN

No. 8018SC118

(Filed 5 August 1980)

1. **Insurance § 1; Unfair Competition § 1– unfair trade practices statute – applicability to insurance industry**

Unfair and deceptive acts and practices in the insurance industry are not regulated exclusively by the insurance statutes, G.S. 58-54.1 *et seq.*, and may constitute the basis of recovery under G.S. 75-1.1.

2. **Unfair Competition § 1– unfair trade practice – insurance agent's misrepresentation of competitor's policy**

In an action by one insurance agent against another to recover damages for unfair trade practices based on defendant's alleged misrepresentations of plaintiff's proposed life insurance policy to a corporate client, genuine issues of material fact were presented as to whether a comparison of policies proposed by the two agencies which defendant submitted to the client contained misrepresentations and whether the alleged representations caused the client to purchase a policy from defendant and plaintiff to lose commissions on the sale.

APPEAL by plaintiff from *Albright, Judge.* Order entered 7 September 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 June 1980.

This is an action for unfair business practices committed by one insurance agent against another; specifically that defendants misrepresented plaintiff's proposed policy to a client.

Plaintiff's complaint alleged that he and defendant were competing insurance agents, that a corporate client was seeking life insurance on its president and vice president, that the corporation was negotiating with both agents and announced that it would buy the policy with the lowest net costs, that the net cost of plaintiff's policy was less than the cost of defendants'

policy, that defendants submitted a comparison of the policies which intentionally misrepresented plaintiff's policy and made it appear to cost more than defendants' policy, and that the corporation purchased defendants' policy. Plaintiff further alleged that defendant Medlin was an employee and agent of defendant Smith-Broadhurst, Inc.

Defendants' amended answer admitted that plaintiff and Medlin had been competing for the same sale, denied the allegations of wrongdoing, and raised the statute of limitations.

The trial court, after having considered depositions, affidavits, pleadings and other materials in the court file granted defendants' motion for summary judgment. Plaintiff appealed.

J. Bruce Morton and R. Horace Swiggett, Jr., for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans and Murelle, by Charles E. Nichols and Robert D. Albergotti, for defendant-appellees.

MARTIN (Robert M.), Judge.

Plaintiff assigns as error the entry of summary judgment for defendants. Summary judgment is proper only when there is no genuine issue as to any material fact and a party is entitled to summary judgment as a matter of law. G.S. 1A-1, Rule 56(c).

Plaintiff's action is based on the theory that plaintiff lost commissions as a result of defendant Medlin's making false comparisons to Industrial Air, the prospective purchaser, as to the respective earnings and net costs of the life insurance policies offered by plaintiff and defendant. Plaintiff contends that such misrepresentations are in violation of G.S. 58-54.4 which defines unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. Plaintiff further contends that misconduct prohibited by G.S. 58-54.1 *et seq.* may be the basis of recovery pursuant to G.S. 75-1.1.

On 15 April 1977, at the time plaintiff filed his complaint in this action, G.S. 75-1.1 provided in pertinent part:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) The purpose of the section is to declare, and to provide civil legal means to maintain ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

* * *

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

G.S. 75-1.1(a) and (b) were subsequently rewritten, effective as to actions commenced on or after 27 June 1977. The amendment, effective after the present action was filed, is not applicable here.

[1] Defendants contend that plaintiff cannot recover damages under 75-1.1 because unfair and deceptive acts and practices in the insurance industry are regulated exclusively by the insurance statutes, G.S. 58-54.1 *et seq.*, which do not contain a private right of action.

In *Greenway v. Insurance Co.*, 35 N.C. App. 308, 314, 241 S.E. 2d 339, 343 (1978), because this court found no misrepresentations had been made, it did not reach the issue of whether G.S. 75-1.1 "contemplates regulating the insurance industry. ..." In support of its holding that the business of selling services as a loan finder was regulated by Chapter 75, this court cited *Ray v. Insurance Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977) in which "a Federal court applying North Carolina substantive law ... held that chapter 75, as this statute was worded prior to the 1977 amendments, was applicable to the sale of insurance." *Johnson v. Insurance Co.*, 44 N.C. App. 210, 222, 261 S.E. 2d 135, 144 (1979), *rev'd on other grounds*, 300 N.C. 247, 266 S.E. 2d 610

(1980). Although not bound by the decision in *Ray*, we find it persuasive in our construction of the scope of G.S. 75-1.1. We hold, therefore, that G.S. 75-1.1 provides a remedy for unfair trade practices in the insurance industry.

[2] Upon the record in this case we find there are genuine issues of material fact in regard to whether defendants' comparison of the Home Life and National Life policies contained misrepresentations or false and misleading statements. Defendants vigorously contend that, assuming *arguendo* there was some misrepresentation or misstatement as to the relative merits of the two policies, these alleged misrepresentations did not cause any damage to the plaintiff. Plaintiff's affidavit establishes that subsequent to the purchase by Industrial Air of the policies from defendant Medlin, plaintiff prepared another net cost comparison and presented it to Industrial Air. Plaintiff advised Industrial Air of the ten day period during which the insured has the right to cancel the sale and obtain a full refund of the premium. In the proposal submitted to Industrial Air during the ten day period, plaintiff pointed out the alleged errors and misrepresentations in defendants' proposal. Nevertheless, Industrial Air, on the same day, elected to retain defendants' policy. Defendants argue that this evidence establishes that any alleged misrepresentations of the policies by defendants were not relied on by Industrial Air in making its decision to purchase defendants' policies. Hence plaintiff's damages, the commissions lost on the sale, were not caused by the alleged misrepresentations.

G.S. 75-16 provides:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

As an essential element of plaintiff's cause of action, plaintiff must prove not only a violation of G.S. 75-1.1 by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Mayton v. Hiatt's Used Cars*, 45 N.C. App. 206, 262 S.E. 2d 860 (1980). "Whether there be a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury . . . ." *Lewis v. Archbell*, 199 N.C. 205, 206, 154 S.E. 11, 12 (1930); *Mayton v. Hiatt's Used Cars*, 45 N.C. App. 206, 211, 262 S.E. 2d 860, 863 (1980). There is some evidence that Industrial Air was influenced by the alleged misrepresentations in their initial rejection of plaintiff's policy and that even after plaintiff attempted to correct the alleged misrepresentations, Industrial Air continued to rely upon the comparison made by defendants.

Upon the record as now presented we are of the opinion that there is a genuine issue of fact both as to the alleged misrepresentations and as to causal relationship between the alleged misrepresentations and plaintiff's loss of commissions from the sale.

Plaintiff's cause of action is not barred by the statute of limitations which this court has held to be three years for claims brought under G.S. 75-1.1 between 12 June 1969 and 21 March 1979. *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 259 S.E. 2d 1, *cert. denied* 298 N.C. 806, 261 S.E. 2d 919 (1979).

Summary judgment in favor of defendants is reversed.

Judges HEDRICK and MARTIN (Harry C.), concur.

ANGELA MARIE BRIDGES, DAUGHTER; MARGIE FOX BRIDGES, ALLEGED WIDOW; AND THE ESTATE OF ROBERT J. BRIDGES, DECEASED, EMPLOYEE, PLAINTIFFS v. McCRARY STONE SERVICES, INC. EMPLOYER AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7910IC1160

(Filed 5 August 1980)

1. **Master and Servant § 74– workers' compensation – disfigurement – post mortem award to dependents**

Dependents of an employee who suffers a serious bodily disfigurement due to an accident covered by the Workers' Compensation Act, but who dies due to an unrelated cause, are entitled to a *post mortem* award for serious bodily disfigurement.

2. **Master and Servant § 74– workers' compensation – award for disfigurement – no abuse of discretion**

The Industrial Commission did not abuse its discretion in awarding a deceased employee's dependents $7500 for serious bodily disfigurement of the employee where the parties agreed to the evidence which the Commission would consider in this case; the evidence tended to show that deceased had been burned and had some scarring on his arms and chest and serious disfigurement of his face; the disfigurement was permanent; and the disfigurement would affect the employee's future earning capacity.

APPEAL by Iowa National Mutual Insurance Company, insurer, from opinion and award of the North Carolina Industrial Commission entered 8 October 1979. Heard in the Court of Appeals 19 May 1980.

The deceased employee sustained an injury by accident arising out of and in the course of his employment on 30 January 1975, wherein he sustained severe burns over several portions of his body and face. Defendants admitted liability and paid the deceased employee compensation benefits for his period of temporary total disability. Thereafter on 7 November 1977, the employee died from causes other than the accident.

On 25 May 1979, a hearing was held to determine the entitlement of the deceased employee's dependents to compensation for permanent partial disability and disfigurement. On the basis of submitted medical reports, Chief Deputy Commissioner Shuford filed an opinion and award on 19 June 1979 in which he awarded benefits pursuant to G.S. 97-31(12) on the grounds that

the deceased employee sustained a thirty-two percent permanent partial disability of the left hand and an eleven percent permanent partial disability of the right hand. Defendants do not object to that portion of the award. On the basis of photographs submitted by the plaintiffs, which showed generalized scarring of the deceased employee's arms and neck and severe scarring of the face, the hearing commissioner also entered an award for disfigurement pursuant to G.S. 97-31(21) and (22) in the amount of $7,500. This award was entered despite the employee's death. Upon appeal by defendants, the full commission affirmed the results. Iowa National Mutual Insurance Company appealed.

Brock, Begely & Drye, by Floyd D. Brock, for plaintiff appellees.

Van Winkle, Buck, Wall, Starnes & Davis, by Russell P. Brannon, for defendant appellant.

ERWIN, Judge.

Defendant makes two contentions on appeal: (1) the Industrial Commission erred in failing to give due consideration to the fact of the employee's death when determining the amount of compensation to be awarded for his disfigurement; and (2) the Commission abused its discretion in awarding the plaintiffs $7,500 as compensation for the deceased employee's disfigurement. We do not agree.

[1] The first issue presented in this case was decided by this Court in *Wilhite v. Liberty Veneer Company*, 47 N.C. App. 434, 267 S.E. 2d 566 (1980). *Wilhite* held that dependents of an employee who suffers a serious bodily disfigurement due to an accident covered by the Worker's Compensation Act, but who dies due to an unrelated cause, are entitled to a *post mortem* award for serious bodily disfigurement. Judge Clark, writing for the Court in *Wilhite*, stated:

> "The introductory language of N.C. Gen. Stat. 97-31, however, does not account for the possibility that death

from another cause may cut off the healing period. The better rule, we think, is expressed by Professor Larson:

> '[I]f the injured employee dies before stabilization has taken place, the degree of impairment should not be taken as that in effect at the moment of death. The proper procedure is to make the best possible medical estimate of the probable residual disability that would have remained if the employee had lived to complete his healing period.'

2 Larson, Workmen's Compensation Law, § 58-40 at 10-258 to -259 (1976). This result, we think, is more consonant with N.C. Gen. Stat. § 97-37, which provides in relevant part:

> *'Where injured employee dies before total compensation is paid.* — When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and *dies from any other cause* than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First to the surviving whole dependents . . . *in lieu of the compensation the employee would have been entitled had he lived.*' (Emphasis supplied.)

This determination, however, does not quite resolve the question before us because no claim for disfigurement was filed before decedent's death and no adjudication of such claim was made before his death. The appellees argue that N.C. Gen. Stat. § 97-37, *supra*, only applies when the 'employee *receives* or is *entitled* to compensation' under the Act and that he cannot be so entitled if no adjudication has been made prior to his death."

We do not agree with defendant's contention which suggests that the employee's death should *ipso facto* reduce benefits due pursuant to G.S. 97-31(21) and payable pursuant to G.S. 97-37.

The Commission found:

"Plaintiff was 38 years old at the time of his death and he retained disfigurement on areas of the body other than the hands, which disfigurement is depicted by photographs which were stipulated into evidence by the parties. Such photographs show some generalized scarring on plaintiff's arms, which scarring is not particularly noticeable, as well as some scarring on the front portion of plaintiff's body, particularly just below the neck. Plaintiff's face was almost completely covered with disfigurement, which gave the skin a slickish appearance, as well as a considerable amount of reddish discoloration which covered the major portion of the face. In addition, it appeared that approximately 25 percent of plaintiff's right ear was missing, and the lips, particularly the lower lip, appeared to be quite inflamed and puffy, giving the face an almost grotesque appearance. [Such disfigurement was permanent and serious and marred plaintiff's appearance to such an extent that, had he lived, such disfigurement would tend to affect his future earning capacity and would have tended to so reduce his future earning capacity. The fair and equitable amount of compensation for such disfigurement under the terms of the Workman's Compensation Act is $7,500.]"

[2] The record shows and the Commission found that the bodily disfigurement was serious and permanent and that such would affect the employee's future earning capacity as the statute requires before compensation can be awarded. *See Davis v. Construction Co.*, 247 N.C. 332, 101 S.E. 2d 40 (1957). The parties agreed to the evidence the Commission would consider in this case, and there is not any contention that such evidence was not the best possible evidence that was available or that it was inadequate in any manner.

We do not find any abuse of discretion on the part of the Commission. The Commission made adequate findings of fact based upon competent evidence. This Court's duty in this compensation case goes no further than to determine whether the record contains any evidence tending to support the findings. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968). We hold that there was sufficient, competent evidence before

the Commission to support its findings of fact and that the findings of fact of the Commission justify its legal conclusions. *Inscoe v. Industries, Inc., supra; Willis v. Reidsville Drapery Plant*, 29 N.C. App. 386, 224 S.E. 2d 287 (1976). We find the opinion and award of the Commission to be proper in all respects. The record completely fails to show any abuse of discretion on the part of the Commission.

Judgment affirmed.

Chief Judge MORRIS and Judge CLARK concur.

DAVID J. MITCHELL v. N.C. GRANGE MUTUAL INSURANCE COMPANY

No. 809SC1

(Filed 5 August 1980)

Insurance § 122– fire insurance – limitation of coverage on homemade barns – plaintiff as agent of insurer – no constructive knowledge

In an action to determine the amount of insurance coverage afforded plaintiff under a policy of insurance issued by defendant on certain tobacco bulk curing barns plaintiff owned, the trial court erred in limiting recovery to $2500 per barn because plaintiff was an agent of Eastman & Co., which was authorized to conduct defendant's bulk barn insurance operations, and plaintiff therefore had constructive knowledge that Eastman & Co. limited the coverage afforded under its fire insurance policies on "homemade" barns to a maximum of $2500 each, since plaintiff had no way of knowing that the policy was written through Eastman & Co., as that name appeared nowhere on the face of the policy; and the fact that Eastman & Co. placed a limitation of $2500 coverage on "homemade" barns and so notified its agents was not relevant to the controversy since defendant insurer had no such limitation on the policy issued to cover plaintiff's barns.

APPEAL by plaintiff from *Riddle, Judge*. Judgment entered 31 July 1979 in Superior Court, GRANVILLE County. Heard in the Court of Appeals on 22 May 1980.

Plaintiff brought this action seeking to have the court determine the amount of insurance coverage afforded him under a policy of insurance on certain tobacco bulk curing barns he

owned. In his complaint plaintiff alleged that the defendant, N.C. Grange Mutual Insurance Co., through its agent, C. Hester Allen Insurance Agency, issued to him on 30 July 1977 a policy of hazard insurance covering six barns; that barns numbers 1, 2, 3, 4, and 5 were insured for $7,000 each, and barn number 6 was insured for $8,000; and that on 11 November 1977 a fire destroyed barns numbers 1, 2, 4, 5 and 6. Plaintiff averred that he had paid the full premium due and that the policy was in effect at the time of the fire.

Defendant filed an answer admitting that it had issued the policy of insurance in question, but claiming that plaintiff as its agent had knowledge of and was bound by underwriting instructions limiting coverage on "homemade" barns to $2,500 per barn.

The matter was tried before the judge without a jury. Evidence essential to a resolution of the controversy will be contained in our opinion. At the conclusion of the evidence, Judge Riddle entered the following pertinent findings and conclusions:

> That on July 30, 1977, the defendant N.C. Grange Mutual Insurance Company, ... issued to the plaintiff a policy of fire insurance, covering six (6) bulk tobacco curing barns owned by plaintff, barns Nos. 1 through 5 ... being insured for ... ($7,000.00) each, and barn No. 6 being insured by ... ($8,000.00). ...
>
> That on or about November 11, 1977, a fire damaged or destroyed certain of the tobacco bulk curing barns. ...
>
> That during the years 1975, 1976 and 1977 Eastman & Company, Inc., held a Power of Attorney from the defendant, N.C. Grange Mutual Insurance Company, authorizing it to conduct, among other things, the defendant's bulk barn insurance operations. In the year 1976, Eastman & Company, Inc., mailed certain underwriting instructions to all of its agents, which instructions provided in part as follows: "Homemade barns will carry a maximum liability of $2,500.00, and must be stipulated as 'homemade'."

During the year[s] 1975, 1976 and 1977, the plaintiff was licensed by Eastman & Company, Inc., as its agent to sell its lines of insurance, including bulk barn fire insurance policies written through it in the name of the defendant, N.C. Grange Mutual Insurance Company.

. . .

That the six (6) bulk tobacco curing barns insured under the policy were "homemade" barns . . . .

That plaintiff, . . . was an agent of Eastman & Company, Inc., and N.C. Grange Mutual Insurance Company, and as such, he is chargeable with constructive knowledge that the underwriting instructions sent by Eastman & Company, Inc. to its agents in 1976 limited the coverage afforded under its fire insurance policies on "homemade" bulk tobacco curing barns to a maximum of $2,500.00 each, and coverage afforded to the plaintiff under the insurance policy in question should be so limited.

From a judgment that he recover a maximum of $2,500 per barn, plaintiff appealed.

Royster, Royster & Cross, by T.S. Royster, Jr., for the plaintiff appellant.

Young, Moore, Henderson & Alvis, by Walter Brock, Jr. and Joseph W. Yates III, for the defendant appellee.

HEDRICK, Judge.

The following essential facts are uncontroverted in this matter:

1. During the year 1977 and for some years prior thereto, the defendant, N.C. Grange Mutual Insurance Company, through its agent, C. Hester Allen Insurance Agency, offered crop hazard insurance.

2. During the times pertinent to this lawsuit, the agent could write North Carolina Grange policies at least two ways: (a) directly through the facilities of North Carolina Grange, or (b) through Eastman & Company.

3. Plaintiff applied for and was issued a policy of insurance to cover his six tobacco barns for 1977. Plaintiff made his application to and the policy was written by the C. Hester Allen Agency.

4. The policy names North Carolina Grange Mutual Insurance Company as the issuing party and provides coverage in the amount of $7,000 for barns 1-5 and $8,000 for barn 6. Nowhere on the policy does Eastman & Company's name appear.

5. When plaintiff applied for the insurance, he did not request that it be written through Eastman & Company.

6. Thomas W. Allen of the C. Hester Allen Insurance Agency made the decision to and in fact did write the policy through Eastman & Company. At no time did he discuss this decision with the plaintiff.

7. In 1976 Eastman & Company sent to all its agents underwriting instructions which limited the amount of coverage available for "homemade" barns to $2,500 per barn.

8. Plaintiff's barns were "homemade."

9. Plaintiff was an agent of Eastman & Company.

10. North Carolina Grange Mutual had no such limitation on coverage for "homemade" barns during 1977.

On these facts the defendant contends, and Judge Riddle obviously agreed, that the single fact of plaintiff's employment as an agent of Eastman & Company — and therefore of the Grange — limits plaintiff's recovery under his policy of insurance with North Carolina Grange to $2,500 per barn. While we agree that plaintiff's status as Eastman's agent charged him with knowledge of Eastman's limitation on coverage for "home-

made" barns, *Powell v. Insurance Co.*, 153 N.C. 124, 69 S.E. 12 (1910), we cannot agree that this knowledge determines the controversy between the plaintiff and this defendant. To the contrary, we find it inconsequential. Likewise, the fact that the plaintiff knew Eastman was underwriting policies through the Grange is inconsequential since there is no evidence that he knew or had reason to believe that his policy was underwritten by Eastman. As we noted above, the face of the policy, as well as the application for insurance, shows only North Carolina Grange as the insurer. Indeed, the agent Allen testified that the only way the insured would know whether the policy was written directly through the Grange or indirectly through Eastman "is that the policy would have a little block in the upper right-hand corner that said Eastman & Company." No such "little block" appears on plaintiff's policy, and Allen conceded that "[n]owhere on the fact of that policy is Eastman Company mentioned." In our opinion it would be unlikely if not impossible for an insured, including this plaintiff, to reason and conclude under these circumstance that his insurance was in fact carried by Eastman and Company. All the evidence points logically to the conclusion that this policy of insurance was carried by North Carolina Grange. The fact that Eastman & Company placed a limitation of $2,500 coverage on "home-made" barns and so notified its agents is not relevant to the controversy since the defendant insurer had no such limitation on the policy issued to cover plaintiff's barns.

We hold the trial court's conclusion that plaintiff's recovery is limited to $2,500 per barn because he was an agent of Eastman and the Grange, and thus had constructive knowledge of Eastman's limitation, is erroneous for that the findings do not support the conclusion that the plaintiff had constructive knowledge of the limitation *as applied to this policy*. To the contrary, the evidence and the findings dictate the conclusion that the defendant, as insurer under the policy in question, is liable to the plaintiff for the full amount of the coverage shown on the policy.

For the reasons stated the judgment is vacated and the cause remanded to the Superior Court for the entry of an appropriate judgment for plaintiff consistent with this opinion.

Vacated and remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOSEPH CORBIN

No. 794SC929

(Filed 5 August 1980)

1. **Robbery § 4.5– driver of getaway vehicle – guilt as aider and abettor**

The State's evidence was sufficient to support defendant's conviction of armed robbery as an aider and abettor where it tended to show that one perpetrator talked to defendant about committing a robbery; defendant accompanied the two perpetrators to the robbery scene; and defendant watched the perpetrators commit an armed robbery of two persons and drove them away from the robbery scene.

2. **Criminal Law § 86.9– bias of accomplice – exclusion of testimony**

Defendant was not prejudiced when the court sustained the State's objections to questions asked defendant's alleged accomplice as to whether he had been advised of the sentence for armed robbery and whether he considered the fact that he would have a certain length of time to visit with relatives if he did one thing and another length if he did another thing where the record does not show what the witness's answers would have been and the witness was questioned at length about his plea bargain.

3. **Constitutional Law § 74– witness who pled guilty but not yet sentenced – assertion of privilege against self-incrimination**

A witness who had entered a guilty plea pursuant to a plea bargain to the same crimes for which defendant was being tried but who had not been sentenced had a right to refuse to answer questions in defendant's trial on the ground that his answers might tend to incriminate him since there was a possibility that the witness would be tried on the charges if the trial judge decided to impose a different sentence than that agreed upon in the plea bargain.

4. **Criminal Law § 102.6– guilt beyond reasonable doubt – improper jury argument – harmless error**

The prosecutor's jury argument that a juror could not believe a person is guilty without being convinced of his guilt beyond a reasonable doubt was an erroneous statement of the law and improper, but such error was not prejudicial where the court properly instructed the jury as to reasonable doubt.

APPEAL by defendant from *Tillery, Judge.* Judgments en-

tered 9 May 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals 28 February 1980.

Defendant was charged in two counts of armed robbery which were consolidated for trial. The State offered evidence including the testimony of Clive Thompson that on 29 December 1978 Clive Thompson talked to defendant in regard to committing an armed robbery. Mr. Thompson testified, "At first Mr. Corbin was kind of hesitant. He didn't want to go through with it at first. He said he was still undecided. He didn't want to do it at first, and in a way I kind of talked him into doing it." Mr. Thompson testified further that he persuaded Amando Holder to participate with them in the robbery and that the three of them drove to a bar in Jacksonville. The defendant waited in the automobile while Thompson and Holder robbed two Marines at gunpoint outside the bar. Defendant could see the robbery take place. Defendant drove Thompson and Holder away from the scene of the robbery, and the money from the robbery was divided between them.

From a prison sentence imposed after being convicted on both charges, the defendant has appealed.

Attorney General Edmisten, by Associate Attorney William R. Shenton, for the State.

Whitted, Jordan and Matthewson, by Louis Jordan, for defendant appellant.

WEBB, Judge.

[1] Defendant assigns as error the overruling of his motion to dismiss. He concedes there is sufficient evidence to convict Thompson and Holder of armed robbery but contends there is no evidence he gave them any aid, advice, counsel or encouragement. Defendant contends there is no evidence he aided or abetted in the robbery. We hold that when Mr. Thompson testified that he talked to defendant about committing a robbery, that defendant accompanied Thompson and Holder to the scene, and that defendant watched them commit the robbery and drove them away from the scene of the robbery, this was

sufficient evidence for the jury to find defendant participated in an armed robbery.

[2] Defendant also assigns as error the sustaining of objections to the following questions asked on cross-examination of Clive Thompson.

> "Q. Have you ever been advised as to the sentence of armed robbery?
>
> * * *
>
> ... Did you consider the fact that you would have a certain length of time to visit with your parents and grandparent if you did one thing and another length of time if you did another thing."

What the witness's answers to these questions would have been is not in the record so we cannot tell whether the defendant was prejudiced. The defendant contends he was entitled to have the witness answer the questions in order to show prejudice and bias toward the defendant. The witness was questioned at length in regard to his plea bargain. There was sufficient evidence of the plea bargain to show any bias from that source. We hold the defendant was not prejudiced by the sustaining of objections to the above two questions.

[3] The defendant called as a witness Amando Holder who refused to answer questions on the ground the answers might tend to incriminate him. The defendant assigns as error the refusal of the court to require Holder to answer the questions propounded. The record discloses that Holder had pled guilty, pursuant to a plea bargain, of the same armed robberies for which the defendant was being tried. He had not been sentenced. The defendant relies on *State v. Morgan*, 133 N.C. 743, 45 S.E. 1033 (1903) which holds that a person who has been pardoned for a crime cannot plead the Fifth Amendment when called to testify in regard to that crime since he can suffer no further punishment for the crime. The defendant argues that Holder cannot be punished further and should have been required to testify. A person being tried has a constitutional right

to have witnesses testify for him. This right has to yield to the right of a witness not to testify if his testimony or any information directly or indirectly derived from such testimony may be used against him in a criminal action. *See Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). In the case sub judice, Holder had pled guilty pursuant to a plea bargain. He had not been sentenced. G.S. 15A-1024 provides that if the judge decides to impose a different sentence than that agreed upon in the plea bargain, the defendant may withdraw his plea and have the case continued to the next term. There was a possibility that Holder would be tried on the charges although he had entered a plea of guilty. He had the right not to testify.

The defendant next argues that the court committed error in its recapitulation of the evidence by placing more emphasis on the evidence of the State than the evidence of the defendant. The defendant did not put on any witnesses but he did put on some favorable evidence through cross-examination. The court's recapitulation of the State's evidence covered 74 lines of the record and its recapitulation of the defendant's evidence covered 13 lines from the record. This in itself is not error. *See State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971). The defendant contends the court should have charged the defendant was "hesitant" and that such term meant he did not want to be involved. He also contends the court should have charged that after the robbery the defendant refused to take any money. There is nothing in the record to show the defendant asked for these two statements as to the evidence. The evidence shows the defendant took a part of the money. This assignment of error is overruled.

The defendant next assigns as error the reference in the charge to Clive Thompson as being an "accomplice" in the crime for which reason the court instructed the jury to scrutinize Clive Thompson's testimony. Defendant contends that by implication this describes the defendant as a principal felon. This assignment of error is overruled.

[4] The defendant next assigns as error an argument to the jury by the prosecuting attorney. After the jury retired, the court had the following argument placed in the record:

"The State argued in its argument that on many occasions when a jury goes back and deliberates, they come out and return a verdict of not guilty. We might speak to one of the jurors to find out what the reason was in rendering that verdict and the jury on many occasions . . . the jury will say that I believe the person was guilty, but I don't believe that you convinced me beyond a reasonable doubt. The State contends that this is a contradiction of terms; that indeed if you believe the person to be guilty, then you are indeed convinced beyond a reasonable doubt."

This statement by the prosecuting attorney is an erroneous statement of the law and should not have been made. A juror can believe a person is guilty and not believe it beyond a reasonable doubt. We do not believe this is too difficult for a man of average mind to comprehend. Nevertheless, we do not believe this was prejudicial error. The court properly instructed the jury as to reasonable doubt. We hold that beyond a reasonable doubt the erroneous argument is not so prejudicial as to require a new trial.

No error.

Judges HEDRICK and WELLS concur.

CENTRAL SYSTEMS, INC. v. GENERAL HEATING & AIR CONDITIONING COMPANY OF GREENVILLE, INC. AND YEARGIN CONSTRUCTION COMPANY, INC.

No. 7926SC667

(Filed 5 August 1980)

1. **Process § 3.2; Rules of Civil Procedure § 4– discontinuance of action after voluntary dismissal – new action not barred**

The fact that an action was discontinued under G.S. 1A-1, Rule 4(e) for failure to serve defendant with summons within the time allowed after plaintiff had taken a voluntary dismissal under G.S. 1A-1, Rule 41 did not bar plaintiff from bringing another action for the same cause.

2. Seals § 1– contract under seal

Defendant executed a contract under seal as a matter of law, and the 10 year statute of limitations applied to an action on the contract, where the contract stated that the parties "have executed this agreement under seal," and the word "seal" appeared under the names of the attesting witnesses who were not parties to the contract and close by the place where defendant executed the contract.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 16 March 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 February 1980.

This is an action for breach of contract. Plaintiff alleged that pursuant to a contract with General Heating and Air Conditioning Company of Greenville, Inc., it had furnished certain materials and labor for which it had not been paid. It was alleged in the complaint that the work was done under the supervision of Yeargin Construction Company. The action was dismissed as to Yeargin and Yeargin is not involved in this appeal. The plaintiff alleged that it was entitled to a judgment in the amount of $21,973.14 with interest from 1 April 1973. An action based on plaintiff's claim had been previously filed and a voluntary dismissal was allowed by order dated 28 November 1975. This action was filed on 9 November 1976. Endorsements extending the time to serve the summons were made on 13 December 1976, 7 February 1977, 12 May 1977, 8 August 1977, and 28 July 1978. Service of process was made on the defendant on 28 August 1978. On 16 March 1979 an order was entered dismissing the action. In the order of dismissal, the court made findings that the endorsement dated 28 July 1978 was made more than 90 days after the next preceding endorsement, that the action is deemed to have commenced on 28 July 1978, that it is a contract action which accrued on or about 9 April 1973, and it is barred by the statute of limitations, G.S. 1-52(1). Plaintiff appealed.

Hamel, Hamel, Welling, Pearce and Weaver, by Hugo A. Pearce III, for plaintiff appellant.

Harkey, Faggart, Coira, Fletcher and Lambeth, by Francis M. Fletcher, Jr. and Philip D. Lambeth, for defendant appellee.

WEBB, Judge.

It is clear that this action is deemed to have been commenced on 28 July 1978 since this endorsement to the summons was made more than 90 days after the last previous endorsement. *See* G.S. 1A-1, Rule 4(e). The plaintiff contends this action is not barred by G.S. 1-52(1) because it is based on a contract under seal. The defendant contends the contract is not under seal but if it is, the action is nevertheless barred because there has been a voluntary dismissal followed by a lapse of the action for failure to serve the summons. We examine first the argument of the defendant.

[1] The defendant's argument that we should not reach the statute of limitations question is based on its reading of Rule 4 in conjunction with Rule 41. A party who takes a second dismissal under Rule 41 is barred from bringing another action for the same cause and the defendant contends the same rule should apply where there has been a discontinuance under Rule 4(e) after a dismissal under Rule 41. The defendant says this is so because when the plaintiff failed to observe the requirements of Rule 4(d)(1) by not having the summons endorsed within 90 days after the endorsement of 8 August 1977, it was a failure to prosecute the action which led to the same type of dismissal as provided for by Rule 41(b). G.S. 1A-1, Rule 41(b) provides in part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits.

G.S. 1A-1, Rule 4(e) provides:

> When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or

> an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

We believe a comparison of the two sections shows that a discontinuance under Rule 4(e) is not analagous to a dismissal under Rule 41(b). Under Rule 41(b), actions are dismissed by the court on motion of defendants. Under Rule 4(e), actions are discontinued by operation of law but may be revived by an endorsement on the summons or the issuance of an alias or pluries summons. Without more substantial guidance from the words of the rule, we do not feel we should hold a discontinuance under Rule 4(e) is the same as a dismissal under Rule 41(b).

[2] As to the statute of limitations, the question posed by this appeal is whether the contract between the parties was under seal in which case G.S. 1-47(2), the ten year statute of limitations, would apply. If it is not under seal, G.S. 1-52(1), the three year statute of limitations, would apply. The defendant signed the contract in form as follows:

> In witness whereof the parties hereto have executed (d) this agreement under seal, the day and month and year written above.
>
> Attest: General Heating and Air-Conditioning Co. of Greenville, Inc.
>
> s/ Charles L. McClain Seal — s/ A.G. Clark, Pres. By Title
>
> s/ Riddick Craven Seal — s/ W.D. (Illegible) By Title

The adoption of a seal by a party to a contract has been dealt with in the following cases: *Bank v. Cranfill*, 297 N.C. 43, 253 S.E. 2d 1 (1979); *Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E. 2d 809 (1979); *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965); *Bell v. Chadwick*, 226 N.C. 598, 39 S.E. 2d 743 (1946). From a reading of these cases we believe that if it appears without

ambiguity on the face of the contract that a party signed under seal, it is held as a matter of law that the contract is under seal. If it is ambiguous as to whether a party adopted a seal, it is a jury question as to whether the party signed under seal. A corporation may adopt a seal different from its corporate seal for a special occasion. In the case sub judice, the defendant expressly stated that it "executed this instrument under seal." The word "seal" appeared under the names of Charles L. McClain and Riddick Craven. Charles L. McClain and Riddick Craven were not parties to the contract. The word "seal" could have no effect as to them. We hold that when the defendant stated it "executed this contract under seal" and the word "seal" appeared close by the place where the defendant executed the contract that as a matter of law the defendant executed the contract under seal.

We hold the superior court committed error by dismissing this action. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

CLARENCE THOMAS BREWER v. CHRISTOPHER W. MAJORS AND ORVLE EUGENE FERRELL

No. 7915SC1178

(Filed 5 August 1980)

Automobiles § 60– skid on ice – negligence in being on wrong side of road – jury question

Evidence tending to show that defendant's vehicle approached a curve in the road, slid sideways, and struck plaintiff's oncoming car on plaintiff's side of the road, and a stipulation by the parties that defendant's automobile slid on ice on the highway, did not show as a matter of law that defendant driver was on the wrong side of the road from a cause other than his own negligence.

Brewer v. Majors

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 6 August 1979 in Superior Court, CHATHAM County. Heard in the Court of Appeals 21 May 1980.

Plaintiff brought this civil action to recover damages alleged to have been caused by the negligence of defendant Majors in the operation of defendant Ferrell's automobile. The action was tried before a jury. At trial, plaintiff presented the testimony of a bus driver who came upon the scene of the accident soon after the collision, the plaintiff, the plaintiff's physician, and a portion of defendant Majors' deposition. At the close of plaintiff's evidence, defendants' motion for a directed verdict was granted by the trial court. From this judgment, plaintiff has appealed.

Blanchard, Tucker, Twiggs & Denson, by Charles F. Blanchard, for plaintiff appellant.

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

WELLS, Judge.

Plaintiff's evidence tended to show that on the morning of 14 January 1977 plaintiff was traveling in a northerly direction on State Highway 49 between Burlington and Liberty in Alamance County in his 1975 Volkswagen automobile. Defendant Majors was traveling along this road in a southerly direction in a 1970 Oldsmobile owned by defendant Ferrell. The weather was cold and misty causing patches of ice to form on the highway, and it was dark. Immediately prior to the accident, defendant Majors observed plaintiff's vehicle in the proper lane of travel. The front end of plaintiff's car appeared to Majors to be moving toward the center line of the road, but Majors could not say that plaintiff's vehicle crossed over the center line. The vehicle being driven by Majors approached a curve in the road and slid sideways striking plaintiff's oncoming car. The left side of defendants' vehicle was damaged, as was the front of plaintiff's automobile. The parties stipulated as to the ownership of the vehicles involved in the collision, that Majors had Ferrell's permission to drive his automobile at the time of the collision,

that the collision occurred on a curve, and that the automobile being operated by Majors slid on ice on the highway.

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. All the evidence which tends to support plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *accord, Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774 (1980).

Viewed in this light, we believe that plaintiff's evidence clearly permits the inference that defendant's car moved into the path of plaintiff's vehicle and that the collision occurred on plaintiff's side of the road. Considered alone, these facts present a *prima facie* case of actionable negligence which is sufficient to take the case to the jury. *See, Lassiter v. Williams*, 272 N.C. 473, 158 S.E. 2d 593 (1968); *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968); *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846 (1966); *Wallace v. Longest*, 226 N.C. 161, 37 S.E. 2d 112 (1946). Defendant, however, may rebut the inference of negligence in such cases by showing that he was on the wrong side of the road from a cause other than his own negligence. *Insurance Co. v. Chantos*, 298 N.C. 246, 258 S.E. 2d 334 (1979); *Anderson v. Webb, supra; Smith v. Kilburn*, 13 N.C. App. 449, 186 S.E. 2d 214 (1972), *cert. denied*, 281 N.C. 155, 187 S.E. 2d 586 (1972).

In *Chantos* it was stipulated that defendant was in the wrong lane, but at trial, defendant testified that he was there due to skidding on water. The Court held that the burden rested on defendant to show that he was in the wrong lane from a cause other than his own negligence. The evidence of skidding presented a jury question on this issue. In the case *sub judice*, defendants argue that plaintiff's stipulation that defendant's car skidded on the ice conclusively established that if defendant Majors was in the wrong lane, he was there from a cause other than his own negligence. We do not agree. The stipulation that

defendants' vehicle skidded on ice, while binding on plaintiff, does not conclusively resolve the issue as to whether accidental skidding was the sole cause of Majors' presence in the wrong lane.

As we understand *Chantos* and *Anderson*, the question to be resolved by the jury is not simply whether defendants' car skidded, but whether defendant Majors was in the wrong lane, and if so, whether he was there through no fault of his own. It cannot be said that the skidding of the defendants' vehicle immediately preceding the collision establishes a lack of any negligence on Majors' part, as a matter of law. It was not only Majors' duty to drive in the right-hand lane, but it was also his duty to keep his vehicle under proper control so as to avoid injury to others.

> When the condition of the road is such that skidding may be reasonably anticipated, the driver of a vehicle must exercise care commensurate with the danger, to keep the vehicle under control so as not to cause injury to another automobile, or an occupant thereof, on the highway by skidding into it. And the skidding of an automobile may be evidence of negligence, if it appears that it was caused by a failure to exercise reasonable precaution to avoid it, when the condition at the time made such result probable in the absence of such precaution. *Wise v. Lodge*, 247 N.C. 250, 100 S.E. 2d 677. An unavoidable accident, as understood in the law of torts, can occur only in the absence of causal negligence. *Baxley v. Cavenaugh*, 243 N.C. 677, 92 S.E. 2d 68.

Hardee v. York, 262 N.C. 237, 242, 136 S.E. 2d 582, 587 (1964). *See also, Mattingly v. R.R.*, 253 N.C. 746, 117 S.E. 2d 844 (1961).

On the motion of a defendant for a directed verdict the evidence must be interpreted most favorably to plaintiff, and if it is of such character that reasonable men may form divergent opinions of its import, the issue is for the jury. *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974). Such is the case here, and the judgment of the trial court must therefore be reversed.

Reversed and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

FLOYD A. WHITFIELD v. HENRY B. WINSLOW

No. 802SC28

(Filed 5 August 1980)

Trespass § 3– ponding of water – renewing trespass – action not barred by three year statute of limitations

Plaintiff's action seeking a mandatory injunction and damages based on the alleged flooding of his property resulting from the construction of a dam by defendant was not barred by the three year statute of limitations, since the injury caused by wrongfully ponding or diverting water on the land of another is regarded as a renewing trespass, and a portion of plaintiff's property was alleged to have remained submerged even at the commencement of this action.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 11 December 1979 in Superior Court, MARTIN County. Heard in the Court of Appeals 23 May 1980.

On 20 July 1979 plaintiff filed this civil action seeking a mandatory injunction and damages based upon the alleged flooding of his property resulting from the construction of a dam by defendant. Defendant did not answer, but moved for summary judgment on the grounds that plaintiff's claim was barred by the three-year statute of limitations. The trial court granted defendant's motion. Plaintiff appealed from that order.

Wilkinson & Vosburgh, by John A. Wilkinson, and Gurganus & Bowen, by Edgar J. Gurganus, for plaintiff appellant.

Griffin & Martin, by Hugh M. Martin, Everett & Cheatham, by C.W. Everett, Sr., Speight, Watson & Brewer, by William C. Brewer, Jr., for the defendant appellee.

WELLS, Judge.

This appeal presents one question for our review: Whether plaintiff's claim was barred by the statute of limitations. First we note that summary judgment was not the appropriate basis for disposition of this case at the trial level. As there were no materials before the trial court other than plaintiff's complaint, we shall treat defendant's motion as if it were a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50 (1979), *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 301 (1979). Our Supreme Court has held that a claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any statement of facts which could be presented in support of the claim. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976).

In his complaint, plaintiff alleged that he is the owner of a thirty-nine acre tract of land in Martin County, which is adjoined and abutted by land owned by defendant. Mill Branch Creek provides natural drainage from plaintiff's land to the Roanoke River, one-half of a mile to the north. In 1968 defendant constructed a dam on Mill Branch Creek near its point of entry into the Roanoke River. The original dam was thirty feet high. This construction caused water from Mill Branch Creek to back up onto plaintiff's property. This construction interfered with but did not block plaintiff's natural drainage. In 1970, defendant modified the physical configuration of the dam, raising the water level in the pond behind it by eight feet. At about this same time, defendant constructed a second dam on Mill Branch Creek, further upstream toward plaintiff's property. As a result of defendant's acts, the flow of Mill Branch Creek through plaintiff's property was reversed, with the effect of creating a pond on plaintiff's land. Plaintiff does not get any drainage by way of Mill Branch Creek, and there is no drainage whatsoever from the pond on plaintiff's land.

Plaintiff has lost the use of one and one-half acres of his land, now covered by the pond, and the value of the remainder of his land has been diminished. The pond is stagnant, has a bad odor, and breeds mosquitos. Plaintiff has expended money attempting to facilitate drainage from the pond. Plaintiff has requested defendant to modify his drainage so as to restore

plaintiff's natural drainage by way of Mill Branch Creek. Defendant has failed and refused to do so.

Plaintiff argues that he is entitled to his damages and to have the trespass eliminated. Defendant argues that if his activities have wronged plaintiff, these activities constitute a continuing trespass which began more than three years before plaintiff brought his action. Such an action would be barred under G.S. 1-52 (3), which provides that:

> For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

However, our Supreme Court has held that

> the injury caused by wrongfully ponding or diverting water on the land of another, causing damage, is regarded as a renewing rather than a continuing trespass, and, unless sustained in a manner and for sufficient length of time to establish an easement, damages therefor, accruing within three years next before action brought, can be recovered, though the injury may have taken its rise at a more remote period. [Citations omitted.]

Duval v. R.R., 161 N.C. 448, 450, 77 S.E. 311 (1913).

Since a portion of plaintiff's property is alleged to have remained submerged even at the commencement of this action, his cause of action is not barred on the face of the pleadings. The question remains whether the plaintiff can overcome the plea of the statute of limitations at trial. Our holding is only that plaintiff's suit may not be dismissed at this stage of the proceedings as barred under the statute.

Reversed.

Judges WEBB and MARTIN (Harry C.) concur.

State v. Covington

STATE OF NORTH CAROLINA v. DAVID E. COVINGTON

No. 795SC1021

(Filed 5 August 1980)

Criminal Law § 118.3– no evidence offered by defendant – summarization of defendant's contentions erroneous – defendant ridiculed by court

In a prosecution for driving under the influence where defendant offered no evidence, the trial court erred in instructing the jury that defendant contended that it was a common practice for motorists, in the early morning hours when there was little or no traffic, to exceed the speed limit and to fail to stop for red lights and that headlights were not needed because the streets were well lighted, since inherent in the court's statement of defendant's contentions was the assumption that defendant admitted that he was in fact operating a motor vehicle upon a public highway at the time the alleged offense took place and that he was driving his car without lights at an excessive speed, and the court's assumption in stating defendant's contentions that he admitted certain essential elements of the State's case was error, particularly where the manner in which those contentions were stated had the effect of ridiculing defendant before the jury.

APPEAL by defendant from *Small, Judge.* Judgment entered 11 June 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 20 March 1980.

Defendant was tried and convicted in District Court, New Hanover County, upon his plea of not guilty to a charge of driving under the influence of intoxicating liquor. He appealed to the superior court for trial de novo and the case was heard before a jury. At trial the State presented evidence as follows:

On 14 January 1979 at approximately 2:38 a.m., Officer Shay, a Wilmington police officer, was traveling in his patrol car west on Greenfield Street in Wilmington toward Thirteenth Street. As he approached Thirteenth Street, a vehicle driven by defendant approached from his right at the intersection and ran a red light. Defendant appeared to be exceeding the speed limit. Officer Shay turned south onto Thirteenth Street, turned his blue light on, and pursued defendant's vehicle. He followed defendant as he traveled south on Thirteenth Street, turned left onto Willard Street, and then left at Fifteenth Street. At that point Officer Shay saw defendant pull his car to the right hand side of the road and stop, and Shay pulled up behind the

car. Defendant got out of the vehicle. Although Officer Shay told him twice to stop, defendant began "a wobbling jog" towards some apartments to the left of where he had parked his car. Officer Shay drove the police car over curbs, grass and down through some driveway and then saw defendant run behind one of the apartment buildings. Defendant tripped and fell several times, but then got back up and ran towards another street. Officer Shay was prevented from driving further to follow defendant because an apartment building and fence were in the way. When Shay finally reached defendant, he had been stopped by another Wilmington police officer on foot. Both police officers testified that defendant had a strong odor of alcohol on his breath, his speech was slurred, and he was unsteady on his feet. Defendant was arrested.

Defendant offered no evidence at trial. The jury returned a verdict of guilty of driving under the influence of intoxicating liquor. From judgment imposing an active prison sentence defendant appealed.

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

Harold P. Laing for defendant appellant.

PARKER, Judge.

While instructing the jury on the lesser included offense of reckless driving, the trial judge stated the contentions of the state and then stated the following:

> The defendant, on the other hand, contends that you should not find him guilty of this. The defendant contending that at this time in the morning on a street such as Greenfield Street and 13th Avenue that there was very little or no traffic. In fact, there is no evidence there was any other traffic other than the police cruiser and one other vehicle, and the defendant contends that it is common practice for all motorists at such early hour in the morning to exceed the speed limit in safety and without worrying about other vehicles coming in contact with him, and that it

> was not necessary to have on headlights, due to the fact that the street is a well lighted area, and consequently, he was in town and headlights are not needed for the safe operation of a vehicle at this time of morning, and that for the same reason, since there was very [little] traffic, the defendant contends that it was not necessary to stop for the stop light, and the defendant contends that you should return a verdict of not guilty as to all charges.

Generally objections to statements of the contentions of the parties not made at the time of trial so as to permit the court to correct them are deemed waived. *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971). Where, however, the court impermissibly expresses an opinion in so stating the contentions, the question may be considered for the first time on appeal. *State v. Watson*, 1 N.C. App. 250, 161 S.E. 2d 159 (1968). Defendant contends that the above-quoted portion of the charge constituted an impermissible expression of opinion by the trial judge in violation of G.S. 15A-1232.

In the present case defendant's plea of not guilty controverted and put in issue the existence of every fact essential to constitute the offense charged and cast upon the State the burden of proving all necessary elements beyond a reasonable doubt. *State v. Swaringen*, 249 N.C. 38, 105 S.E. 2d 99 (1958). Inherent in the court's statement of defendant's contentions was the assumption that defendant admitted that he was in fact operating a motor vehicle upon a public highway at the time the alleged offense took place, and that he was driving his car without lights at an excessive speed. Defendant did not testify at trial, and the court's assumption in stating defendant's contentions that he admitted certain essential elements of the State's case was error, particularly where the manner in which those contentions were stated had the effect of ridiculing the defendant before the jury. As stated by Justice Sharp (later Chief Justice) in *State v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412 (1966):

> In a case where the State's evidence seems to establish defendant's guilt conclusively, and the judge must strain credulity to state any contrary contention for defendant,

> his obvious solution is to state no contentions at all. A simple explanation of the plea of not guilty will fulfill the requirement. As every trial lawyer knows, a judge can indicate to the jury what impression the evidence has made on his mind and what deductions he thinks it should draw from it without expressly stating his opinion in so many words. If, however, the judge intimates an opinion by his manner of stating the evidence, "by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial," he violates G.S. 1-180 [now G.S. 15A-1232] no less.

268 N.C. at 271, 150 S.E. 2d at 416.

The State contends that any error in the charge was harmless, since defendant was convicted of the offense of driving under the influence of intoxicating liquor and not of reckless driving, to which the portion of the charge excepted to referred. We disagree. G.S. 20-140, which defines the offense of reckless driving, states that the offense "shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended." Because of this relationship between the two offenses, the error in stating defendant's contention as to the lesser offense was likely to have affected impermissibly the verdict of guilty of the greater offense.

For the error noted above, defendant is entitled to a

New Trial.

Judges MARTIN (Harry C.) and HILL concur.

TORRENCE B. WILKINSON v. CHARLES INVESTMENT COMPANY, AUBREY ELAM AND DARRELL SETLIFF

No. 7926SC731

(Filed 5 August 1980)

1. **Waters and Watercourses § 1.2– siltation of pond – instructions on damages**

In an action to recover damages for siltation of plaintiff's pond allegedly caused by construction performed on defendants' adjoining land, the trial court erred in instructing the jury that plaintiff's damages could be "none" or could be "in such amount as you find by the greater weight of the evidence that plaintiff is entitled to receive."

2. **Waters and Watercourses § 1.3– alteration of flow of surface waters – siltation of pond – right to damages**

Where there was evidence that defendants altered the flow of surface water on their land so that it flowed into plaintiff's pond and caused siltation in the pond which reduced the value of plaintiff's land by $12,500, the jury could properly find that defendants' interference with plaintiff's use and enjoyment of his property was greater than it was reasonable to require plaintiff to bear without compensation.

APPEAL by defendants from *Friday, Judge.* Judgment entered 12 April 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 February 1980.

Plaintiff and defendants are adjoining landowners. In 1975, plaintiff instituted this action alleging defendants had certain construction performed on their land which had caused silt to drain into plaintiff's pond. Plaintiff testified that in his opinion the fair market value of his property before the siltation was $45,000.00 and the fair market value after the siltation was $32,500.00. Defendants offered evidence that the value of plaintiff's property had been enhanced by the construction on defendants' property. The jury awarded the plaintiff $25,000.00 in damages which the court reduced to $12,500.00.

The defendants appealed.

Childers, Fowler and Whitt, by Max L. Childers, for plaintiff appellee.

Fleming, Robinson, Bradshaw and Hinson, by Richard A. Vinroot, for defendant appellants.

WEBB, Judge.

[1] The defendants' first assignment of error pertains to the charge. The court correctly charged the jury as to how to determine damages and then concluded with the following statement:

> "It [plaintiff's damages] may be none, or it may be in such amount as you find by the greater weight of the evidence that the plaintiff is entitled to receive and recover at this issue . . . ."

The defendants contend this statement was misleading in that the jury was not limited to $12,500.00 in awarding damages, this being all the damages to which the evidence showed the plaintiff was entitled. The defendants argue that the jury showed they were confused by this charge when they awarded $25,000.00 in damages.

The defendants rely on *Highway Comm. v. Thomas*, 2 N.C. App. 679, 163 S.E. 2d 649 (1968). In that case the court charged the jury as follows:

> "The difference in these two figures will be your answer to the issue. It may be nothing or it may be any amount that you, the jury, find to be just and correct, according to the rules which the Court has laid down for your guidance."

This Court in *Thomas* held this part, as well as other parts, of the charge to be in error. It said this part of the charge was "particularly objectionable when considered" with other portions of the charge. If the case sub judice were a case of first impression we might hold that read in context with the rest of the charge that it was not error. We believe we are bound by the holding in *Thomas*. We can find no real distinction between the quoted portions of the charge in that case and this one. Under our system of *stare decisis*, we hold we are bound by the decision in *Highway Comm. v. Thomas, supra*. The court committed error in the charge.

[2] We also discuss one other assignment of error of the defendants. Defendants contend that under the holding of *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977) the claim of the plaintiff should be dismissed. The defendants contend this is so because there was no evidence that the defendants' interference with the flow of water onto the plaintiff's land was unreasonable. In *Pendergrast*, our Supreme Court adopted the rule of reasonable use with respect to surface water drainage. It stated the rule as follows:

> Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage.

In defining reasonableness the Court said:

> Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant . . . . Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence. Determination of the utility of the conduct of the defendant involves consideration of the purpose of the defendant's conduct, the social value which the law attaches to that purpose, the suitability of the locality for the use defendant makes of the property, and other relevant considerations arising upon the evidence . . . .
>
> We emphasize that, even should alteration of the water flow by the defendant be "reasonable" in the sense that the social utility arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance "if the resulting interference with another's use and enjoyment of land is

greater than it is reasonable to require the other to bear under the circumstances without compensation."

There was evidence in the case sub judice that defendants altered the flow of surface water on their land so that it flowed into the plaintiff's pond causing siltation in the pond which reduced the value of the plaintiff's land by $12,500.00. We hold that from this evidence the jury could find that although the defendants had properly utilized their land it was unreasonable to require the plaintiff to bear this burden without compensation.

For reasons stated in this opinion, there must be a new trial.

New Trial

Judges ARNOLD and WELLS concur.

ALLEN L. MIMS, JR. v. MARSHA P. MIMS

No. 7910SC729

(Filed 5 August 1980)

1. **Reformation of Instruments § 7– reformation of deed for mutual mistake – insufficiency of evidence**

Evidence was insufficient to support plaintiff's claim for reformation of a deed on the ground of mutual mistake where it tended to show that, at the time the deed for the property was delivered, both plaintiff husband and defendant wife intended that the property would be owned solely by plaintiff; a real estate salesman told plaintiff that in N. C. both the husband and wife had to be named as grantees in a deed; plaintiff then agreed that he and defendant would be grantees; and plaintiff therefore was not mistaken as to how the deed was drawn, but only as to the legal consequences of his action which would not support a claim for mutual mistake.

2. **Husband and Wife § 14; Reformation of Instruments § 1.1– presumption of gift from husband to wife – inapplicability in action for reformation of deed**

The presumption of gift which arises when a husband pays for real property and has the deed made to himself and his wife was not applicable in this action where plaintiff neither alleged nor proved any type of trust but instead based his action on a claim for reformation of a deed.

Mims v. Mims

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 21 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 26 February 1980.

Plaintiff and defendant were married in 1973 and divorced in 1977. In 1974 real property was conveyed by a deed to both parties as grantees. Two months after the divorce, plaintiff instituted this action wherein he: (1) seeks to reform the deed or (2) seeks a declaratory judgment that he is the sole owner of the realty and entitled to all proceeds from its sale. He alleged that he paid all the consideration and that both parties intended that it be his property but by mutual mistake the deed showed the grantees as Allen L. Mims, Jr. and Marsha P. Mims, his wife. Defendant made a motion for summary judgment. The court considered the pleadings, the depositions of both parties and the plaintiff's affidavit. Considered in the light most favorable to the plaintiff, these papers show that while the parties were married a parcel of real estate was purchased for which the plaintiff paid the full consideration. Both parties considered it to be the plaintiff's real estate. Plaintiff stated: "I did talk with the realtor about it at the time we made the Offer. I asked him why it had to be titled in both people's names, and he said in the State of North Carolina that it had to be . . . . Richard Smith is the one that made that comment." There was no evidence that defendant had anything to do with the way the deed was drawn.

The court granted the defendant's motion for summary judgment and dismissed both claims of the plaintiff. Plaintiff appealed.

McDaniel and Heidgerd, by L. Bruce McDaniel, for plaintiff appellant.

Gulley, Barrow and Boxley, by Jack P. Gulley, for defendant appellee.

WEBB, Judge.

[1] The plaintiff's claims are for reformation of a deed. A deed may be reformed for mutual mistake or for mistake by one party induced by the fraud or inequitable conduct of the other.

See 11 Strong's N.C. Index 3d, *Reformation of Instruments* § 1 et seq. (1978). The plaintiff does not contend that his mistake was induced by fraud or inequitable conduct on the part of the defendant. The question posed by this appeal is whether the evidence as forecast by the papers filed in this case would be sufficient for the jury to find there was a mutual mistake. If it is not so sufficient the motion for summary judgment was properly entered. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The forecast of evidence in the light most favorable to the plaintiff shows that, at the time the deed for the property was delivered, both plaintiff and defendant intended that the property would be owned solely by the plaintiff. A real estate salesman told the plaintiff that in North Carolina the husband and wife had to be named as grantees in a deed. The plaintiff then agreed that he and the defendant would be grantees. We hold this evidence does not support a claim for reformation on the ground of mutual mistake. The plaintiff, relying on a real estate agent, was mistaken as to the legal requirements in this state, and he was mistaken as to the legal effect of a deed to husband and wife as grantees. He was not mistaken as to how the deed was drawn. Mistake as to the legal consequences of an act will not support a claim for mutual mistake. *See Wright v. McMullan*, 249 N.C. 591, 107 S.E. 2d 98 (1959). Plaintiff relies on *Nelson v. Harris*, 32 N.C. App. 375, 232 S.E. 2d 298 (1977). That case involved the reformation of a deed in which the draftsman did not include a description of a lot in a deed which all parties had intended to be included. That was a mistake as to a fact as to what was included in the deed. In the case sub judice there was no mistake as to how the deed was drawn. The parties were mistaken as to the legal consequences of the deed. This mistake will not support reformation.

[2] The appellant contends that he has rebutted any presumption of a gift. In cases in which a husband attempts to impress a trust on property, it has been held that when a husband pays for real property and has the deed made to himself and his wife, the law presumes a gift to his wife which may be rebutted by clear, strong and convincing evidence. *See Bowling v. Bowling*, 252 N.C. 527, 114 S.E. 2d 228 (1960); *Honeycutt v. Bank*, 242 N.C. 734, 89 S.E. 2d 598 (1955); *Shue v. Shue*, 241 N.C. 65, 84 S.E. 2d 302 (1954); *Tarkington v. Tarkington*, 45 N.C. App. 476, 263 S.E. 2d

294 (1980); *Brice v. Moore*, 30 N.C. App. 365, 226 S.E. 2d 882 (1976). We hold this principle has no application in this case. The plaintiff has neither alleged nor proved any type of trust. *See Lawrence v. Heavner*, 232 N.C. 557, 61 S.E. 2d 697 (1950). His action is based on a claim for reformation of a deed. There was no need for a presumption of a gift to the defendant. When the deed was delivered, the gift to the defendant was complete. She became a tenant by the entirety which tenancy was converted to a tenancy in common when the divorce decree was entered. *See Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238 (1975).

The appellant also contends that the presumption that a husband who pays the purchase price intended to make a gift to the wife is unconstitutional. He says this is so because there is no such presumption that a wife who pays the purchase price intends such a gift to the husband. *See Deese v. Deese*, 176 N.C. 527, 97 S.E. 475 (1918). Since we have held the presumption is not applicable in this case, we do not consider this constitutional question.

Affirmed.

Judges ARNOLD and WELLS concur.

HOWARD LEE BOYD, EMPLOYEE, PLAINTIFF v. DAVID MITCHELL AND/OR BANNER-MITCHELL WAREHOUSE, EMPLOYER SOUTH CAROLINA INSURANCE CO., CARRIER, DEFENDANTS

No. 7910IC1019

(Filed 5 August 1980)

Master and Servant §§ 54, 56– farm laborer – injury while doing work incident to warehouse business

The Industrial Commission properly determined that plaintiff's accident was covered by a policy of worker's compensation issued to a warehouse business where the Commission found that plaintiff was employed by the warehouse owner primarily to do farm work; that at the time plaintiff was injured he was moving logs out of the owner's field so that they could be taken to a sawmill and cut into timber for use in a fence at the warehouse; and that plaintiff's work, although casual to the warehouse business, was incident thereto.

Boyd v. Mitchell

APPEAL by defendants from order of North Carolina Industrial Commission entered 9 May 1979. Heard in the Court of Appeals 18 April 1980.

On 29 March 1976, defendant David Mitchell owned several businesses: (1) the Banner-Mitchell Warehouse; (2) a fertilizer business; (3) an insurance agency; and (4) a farming operation. South Carolina Insurance Company had issued a compensation policy covering David Mitchell trading as Banner Warehouse, On 24 March 1976, the plaintiff began working for David Mitchell at $2.50 an hour. On 29 March 1976 he was moving logs out of a field owned by David Mitchell. The logs were to be taken to a sawmill and cut into timber to be used in building a fence at the Banner Mitchell Warehouse. He was in an accident which caused his left leg to be amputated.

A hearing was held before Deputy Commissioner Ben E. Roney, Jr. who found (1) that plaintiff's employment was primarily farm related and in such other capacity as required of him; (2) that on 29 March 1976 the plaintiff was logging which was not a duty involving a farming or agricultural operation although incident to clearing farm land; (3) this activity was casual to the business of the Banner-Mitchell Warehouse but was incident thereto; and (4) plaintiff was employed by David Mitchell as opposed to the Banner-Mitchell Warehouse and was injured by accident arising out of and in the course of employment with David Mitchell. Based on these findings, Deputy Commissioner Roney awarded compensation to the plaintiff. The Industrial Commission adopted the opinion and award.

The defendants appealed to this Court.

Bobby W. Rogers for plaintiff appellee.

Johnson, Patterson, Dilthey and Clay, by I. Edward Johnson and Robert W. Sumner, for defendant appellants.

MARTIN (Robert M.), Judge.

We affirm the decision of the Industrial Commission. *Johnson v. Hosiery Co.*, 199 N.C. 38, 153 S.E. 591 (1930) holds that

under G.S. 97-2 an accident is compensable if it happens in employment incident to the proper operation of a business although the employment is casual. Deputy Commissioner Roney found facts to the effect that the plaintiff was employed by David Mitchell primarily to do farm work, that at the time he was injured he was engaged in logging which was incidental to repairing Banner-Mitchell Warehouse. He concluded from this that the work although casual was incident to the warehouse business and was covered by workmen's compensation. Based on these findings of fact, we hold this conclusion was correct.

The defendants contend it was error for Deputy Commissioner Roney to find the plaintiff was engaged in logging and not agriculture when he was removing the logs from a farm field. He cites cases from other jurisdictions the language of which indicates that if timber is being removed to provide a field for farming, the work is agricultural. In the case *sub judice,* there was evidence that the logs were being removed for the purpose of repairing the warehouse. This evidence supports the finding of fact that the plaintiff was engaged in logging not agriculture.

The defendants also contend the Industrial Commission should be reversed because there was a finding of fact that the plaintiff's principal employment was primarily farm related and there was no evidence that David Mitchell's farm operations were subject to the jurisdiction of the Industrial Commission. Deputy Commissioner Roney found facts which were affirmed by the Industrial Commission from which it was concluded that the plaintiff's injury arose out of and was in the course of employment for David Mitchell doing business as Banner-Mitchell Warehouse. It was not necessary to find facts which would support the jurisdiction of the Industrial Commission as to other businesses of David Mitchell.

The defendants also contend that the workmen's compensation policy written by South Carolina Insurance Company does not cover this accident. The policy names the insured as "David J. Mitchell, individual, trading as Banner Warehouse." The exclusions in the policy are "if the insured has, under the workmen's compensation law, other insurance for

such operations or is a qualified self-insurer therefor." David Mitchell did not have other coverage for this accident and was not a qualified self-insurer. The policy issued by South Carolina Insurance Company covers the accident in the case *sub judice.*

Affirmed.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. MARVIN BAGBY

No. 809SC20

(Filed 5 August 1980)

Criminal Law § 117.4– accomplice not given immunity – no instruction to scrutinize testimony – no error

Where an accomplice was not granted immunity under G.S. 15A-1052, the trial court did not err in failing to charge the jury, absent a request by defendant, to scrutinize the testimony of the accomplice.

APPEAL by defendant from *Brannon (A.M.), Judge.* Judgment entered 17 August 1979 in Superior Court, WARREN County. Heard in the Court of Appeals 14 May 1980.

Defendant was charged with the armed robbery of Howard Eldreth, service station operator, on the night of 19 May 1979, with the taking of $185.00.

Defendant was convicted as charged. He appeals from the judgment imposing a prison term. The State's evidence consisted primarily of an accomplice, Stanley Russell, who testified he was with defendant in the robbery and that they divided the money taken.

On cross-examination Russell testified that he had pleaded guilty to the armed robbery but had not been sentenced. The District Attorney told Russell if he testified for the State, that he would recommend a minimum seven-year sentence.

The only evidence offered by defendant was Russell's transcript of plea, which indicated there had been no plea bargain.

Attorney General Edmisten by Assistant Attorney General Marvin Schiller for the State.

Charles T. Johnson, Jr. for defendant appellant.

CLARK, Judge.

The sole question raised by this appeal is whether the trial court erred in failing to instruct the jury without request that Russell, the State's principal witness, testified as an accomplice and as an interested witness under an agreement with the District Attorney for a sentence recommendation in exchange for his truthful testimony.

In support of his argument the defendant relies on the following: (1) G.S. 15A-1052(c), which requires that where immunity is granted with an order to testify the jury must be so informed before the witness testifies, and further, requires that the judge must instruct during the charge to the jury as in the case of an interested witness; (2) G.S. 15A-1054, which gives a prosecutor power to agree to charge reductions or to recommend sentence concessions upon the understanding that the suspect will provide truthful testimony as long as such arrangement is disclosed in writing to defense counsel a reasonable time before trial; and, if defense counsel is not so notified, he is entitled to a recess on grounds of surprise or other good cause; and (3) *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

We find defendant's reliance is misplaced, because we do not find in the statutes or in the *Hardy* decision any exception to the long-established rule requiring a special request by defendant to have the court charge the jury to scrutinize the testimony of an accomplice. *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. King*, 21 N.C. App. 549, 204 S.E. 2d 927 (1974).

G.S. 15A-1052(c) contains the mandatory "scrutiny" instruction when a witness testifies under immunity, but such an instruction is not mandated under an arrangement short of "immunity" (such as charge reduction or sentence concession) as provided for in G.S. 15A-1054. Nor do we find any language in *State v. Hardy, supra,* which supports defendant's argument.

Since Russell was not granted immunity under G.S. 15A-1052 but entered into an arrangement with the prosecutor for a charge reduction and concession for a minimum sentence of seven years, the trial court did not err in failing to charge the jury, absent a request by defendant, to scrutinize carefully the testimony of the accomplice Russell.

No error.

Chief Judge MORRIS and Judge ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 AUGUST 1980

BATTEN v. BATTEN No. 7926DC1193	Mecklenburg (79CVS8575)	Affirmed
BATTEN v. BATTEN No. 8026DC13	Mecklenburg (78CVD6382)	Affirmed
BROOKS v. INDUSTRIES, INC. No. 7923SC1035	Alleghany (78CVS28)	Reversed
DEHART v. DEHART No. 8018DC307	Guilford (79CVD2992)	Vacated and Remanded
GEARHART v. GEARHART No. 804DC255	Onslow (70CVD1061)	Affirmed
HADDOCK v. ELKS No. 793SC644	Pitt (78CVS126)	No Error
IN RE GIBSON No. 803DC38	Craven (79J65)	Reversed
IN RE HAYNES No. 8023DC341	Wilkes (80SP24)	Vacated and Remanded
PETTIGREW v. WAKE MEDICAL CENTER No. 7910SC1136	Wake (79CVS3050)	Affirmed
SCHIFFLI v. JENNINGS No. 8030DC317	Macon (78CVD13)	Reversed
STATE v. BAKER No. 8023SC226	Ashe (79CRS995) (79CRS998)	No Error
STATE v. BROWN No. 795SC854	New Hanover (78CR23341) (78CR23342)	No Error
STATE v. BROWN No. 8012SC274	Cumberland (79CRS33802)	No Error
STATE v. BRUNSON No. 804SC278	Duplin (79CRS5031)	No Error
STATE v. DOWNING No. 802SC267	Washington (79CRS583)	No Error

STATE v. HOLLAND No. 7916SC1182	Robeson (78CRS15549) (78CRS15550)	No Error
STATE v. HOLLOWAY No. 799SC1196	Granville (79CR772) (79CR773)	No Error
STATE v. MILLER No. 8026SC4	Mecklenburg (79CR025442)	No Error
STATE v. PINNIX No. 8017SC263	Stokes (79CR2740)	No Error
STATE v. POWELL No. 806SC300	Bertie (79CR1967)	No Error
STATE v. ROBERTS No. 8026SC333	Mecklenburg (79CRS51904)	No Error
STATE v. SLADE No. 8017SC260	Caswell (79CR2266)	No Error
STATE v. WALLACE No. 8026SC357	Mecklenburg (78CRS142684)	No Error
STATE v. WREN No. 8012SC303	Cumberland (79CRS51764)	No Error
WARD v. EDWARDS No. 7925SC1101	Catawba (79SP197)	Affirmed
WILLIFORD v. WILLIFORD No. 8011DC266	Harnett (78CVD0956)	Affirmed

STATE OF NORTH CAROLINA v. MILAN ALBERT LeDUC

No. 781SC945

(Filed 19 August 1980)

1. **Narcotics § 4– conspiracy to possess marijuana – sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction for conspiracy to possess 22.4 pounds of marijuana where it tended to show that defendant, an experienced operator of seagoing vessels, chartered a fishing trawler which was then located in Alabama; defendant was accompanied by two male companions when the negotiations for the charter occurred; the trawler was sailed down the Gulf Coast into the waters off the coast of Columbia, South America, and thence up the Atlantic Coast into North Carolina waters, at some point along the way picking up a load of marijuana; defendant's fingerprints were found on the notebook on which navigational notations were entered for the course of the voyage, thereby supporting the inference that defendant served as navigator; the trawler docked at night at an isolated point in Dare County and was almost immediately thereafter met by persons who arrived at the scene in two trucks; marijuana was unloaded from the boat into one or both of the trucks, and three persons left the scene together in the second truck; and 22.4 pounds of marijuana were found in a plastic bag on the boat.

2. **Searches and Seizures § 3– officer's initial boarding and search of boat – determination if ill or dead persons aboard – legality**

A deputy sheriff's initial boarding of a fishing trawler moored to a dock in an isolated area of Dare County and his initial search of the vessel were justified by possibly exigent circumstances where the trawler had been at the dock for over four days; all of the doors and windows of its deckhouse were open; no one was seen in or about the trawler; the trawler was tied in an unusual manner; and the deputy was not engaged in a search for evidence to be used in a criminal prosecution but was engaged in determining if anyone was aboard who was ill or dead.

3. **Searches and Seizures § 3– abandonment of boat by defendant – warrantless search by officers – no expectation of privacy**

Defendant abandoned a fishing trawler when he left it at a dock in an isolated area of Dare County and thereafter had no legitimate expectation of privacy with reference to it or its contents where he left the trawler under cover of darkness carelessly tied alongside a public dock adjacent to a public highway; he left it without spring lines to control its movement, demonstrating an indifference to its safety; he left it unattended, with all doors and windows of its deckhouse open; he left it without obtaining permission of the operators of the dock to do so and without notifying anyone in the small surrounding community of the identity of the trawler, his own identity, or his intention to return; he never did return to the dock or the county where the trawler was moored until much later when he was apprehended in Florida by agents of the F.B.I. Accordingly, none of defendant's rights were

violated by an intensive search without a warrant which officers made of the trawler and its contents after it had been moved to a Coast Guard station, and evidence obtained as a result of that search was properly admitted in defendant's trial for conspiracy to possess marijuana.

4. **Criminal Law §§ 58, 80– allowing jury to compare signatures – necessity for expert testimony**

The trial court erred in permitting the jury, unaided by competent opinion testimony, to compare a signature on a charter boat agreement with samples of defendant's signature for the purpose of determining whether the signature on the agreement was that of defendant, and the charter boat agreement was improperly admitted into evidence where there was no competent evidence that defendant was the person who signed it. G.S. 8-40.

5. **Criminal Law § 50.1– testimony by navigation expert**

The trial court properly permitted a witness who was qualified and accepted by the court as an expert in navigation on the high seas to testify as to the significance of certain charts and navigational notations found on a fishing trawler used to transport marijuana.

Judge ARNOLD dissenting.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 19 May 1978 in Superior Court, DARE County. Heard in the Court of Appeals 30 January 1979.

Defendant was indicted for felonious possession of 22.4 pounds of marijuana and for conspiring "with one or more co-conspirators who's [sic] names are unknown" to feloniously possess 22.4 pounds of marijuana. The cases were consolidated for trial, and defendant pled not guilty to each charge. At trial before the jury, the State presented evidence to show the following:

On Wednesday, 18 May 1977, Leland Wise, a longtime resident at Stumpy Point in Dare County, noticed a 65-foot diesel-powered fishing trawler bearing the name "Frances Ann" moored to the dock adjacent to Highway 264 at Stumpy Point. This dock, which was the only docking facility at Stumpy Point, was partially owned by the county and was normally used by local boats only for short periods of time to unload fish. Wise noticed that the shrimp nets on the "Frances Ann" were not hoisted in the rigging in the manner customarily employed by local fishermen nor was the boat secured to the dock in the

usual manner. It was secured by only two light lines, one at the bow and one at the stern, each line being about one-half the diameter of the lines customarily used for mooring such boats, and there were no spring lines in between to control the movement of the boat forward and backward. All of the doors and windows on the deckhouse were open, and Wise did not see any person on or about the boat.

During the succeeding days Wise continued to observe the boat and saw no change in its condition nor did he see anyone on or about it. On Sunday, 22 May 1977, he telephoned the Dare County Sheriff's Department and reported what he had seen. In response to that call, Deputy Sheriff Pledger came to the dock where the "Frances Ann" was moored. After conferring with Wise, Deputy Pledger walked up the dock to the bow section of the trawler and looked in through the open wheelhouse door. Seeing no one in the wheelhouse, he walked back down the dock toward the aft section of the trawler and looked through the open galley door. Still seeing no one, he called out, "Is anybody on board?". Receiving no response, Deputy Pledger, accompanied by Wise, boarded the trawler. He stepped to the galley door and again asked if anybody was on board. Again receiving no reply, he entered the galley.

In the galley, Deputy Pledger saw pots and pans in the sink, a coffee pot on the stove, paper plates on the table, and food lying around. He noticed a faint odor of marijuana and saw marijuana seed and green vegetable material, as well as a homemade tinfoil pipe, on the galley table. Passing through the galley area, Deputy Pledger stepped forward into the captain's quarters. Beneath the bunk in the captain's quarters was a cabinet or cupboard, the doors to which were open. Deputy Pledger could see into the cabinet and in the cabinet was a black plastic trash bag, inside of which was a brown paper bag. The two bags were torn open at the top, and the deputy could see a quantity of golden brown vegetable material inside. He reached in and got a handful of the vegetable material, looked at it, smelled it, noted it had the odor of marijuana, and then put it back in the bag.

Deputy Pledger next moved forward into the wheelhouse. A torn section of a chart of Stumpy Point Bay lay in front of the helm. He then returned aft through the deckhouse to the crew's quarters immediately behind the galley. There he found two bunks with rumpled bed linens, sleeping bags, and miscellaneous shoes, boots, and clothing. He went out on deck and opened the hatch of the after fish hold. A strong odor of marijuana came from this hold. He entered the hold and observed marijuana seed and green vegetable material on the floor and walls. He completed his inspection of the boat by entering the engine room and the forward hold.

Finding no one on the boat, Deputy Pledger conferred by his car radio with the Dare County Sheriff's Department. He then tried to start the engine on the "Frances Ann," but found the batteries were dead. After obtaining assistance from a local mechanic, he was able to start the engine, and he then ran the "Frances Ann" to the Coast Guard Station at Oregon Inlet, where he was met by the sheriff and other law-enforcement officers. During subsequent days as intensive search of the "Frances Ann" was made by Coast Guard and law-enforcement officers, including agents of the State Bureau of Investigation and the U.S. Customs Service. The boat was finally moved to the dock at Manteo, where the owners, Andrew J. Tiner and Charles Daniels of Fort Myers Beach, Florida, were ultimately permitted to reclaim it.

Raynor Laverne Twiford, a commercial fisherman who lived about 700 feet north of the Stumpy Point dock at which the "Frances Ann" was found tied, testified that some time between 2:00 and 2:30 a.m. on 18 May 1977 he woke up and went out on his porch to smoke a cigarette. He observed the "Frances Ann" at the dock at that time. It had not been there when Twiford had been at the dock about 10:00 p.m. the previous evening. It was a beautiful night without any wind, and Twiford heard a truck coming up the highway from the south. The truck backed up to the dock where the "Frances Ann" was moored. The truck had an aluminum body and a white cab and appeared to be a normal fish truck. Twiford heard noises which indicated something was being unloaded from the boat. The truck remained at the dock 20 minutes at the most. Then it pulled out

and headed north up the highway past Twiford's house. The lights on the truck were not turned on until it was about 200 yards north of Twiford's house, and Twiford did not see its occupants. After the truck left, three people left the dock where the "Frances Ann" was tied and went to the Wahoo Sportsman Fish House, an unlocked building about 200 feet south of Twiford's residence, where they remained about five minutes. Then they went back down to the dock where the "Frances Ann" was moored and drove off to the south in what sounded like a pickup truck. Twiford could not say whether the three people he saw were men or women. Twiford remained awake until he left on his boat at 4:30 a.m. and observed no more activity in the vicinity of the "Frances Ann."

SBI chemist N.C. Evans testified that his analysis showed that the bags found in the cabinet in the captain's quarters contained 22.4 pounds of marijuana and that vegetable material collected from the hold was also marijuana.

Deputy Sheriff C.C. Duvall testified that when he searched the boat while it was at the Coast Guard Station, he found marked navigational charts of the waters between North Carolina and South America on board the "Frances Ann." U.S. Customs Special Agent Michael Bromm testified he found vegetable debris on the floor in the aft hold, the ice area just forward of the aft hold, and the forepeak area. In all three spaces he observed burlap impressions in the paint on the walls to a height of 5½ feet to 6½ feet in the aft hold, 5 to 6 feet in the ice area, and 3½ feet in the forepeak area. The combined volume of these three spaces was about 370 cubic feet.

Andrew J. Tiner and Charles Daniels, commercial fishermen of Fort Myers Beach, Florida, testified that they bought the "Frances Ann" on 14 April 1977. The boat was then located at Bayou LaBatre, Alabama. Shortly after the purchase, a man who gave his name as "Milan LeDuc," accompanied by two male companions, talked with Tiner and Daniels twice at the shipyard in Alabama where the boat was located. The same man and the same two companions later approached Tiner and Daniels in Florida and discussed chartering the "Frances Ann." A Bare Boat Charter Agreement, introduced into evi-

dence, was signed on 26 April 1977 by Daniels on behalf of the owners. The instrument named "Milan A. LeDuc" of 6606 Faul St., Tampa, Florida as charterer, and chartered the boat for an initial term of three months at a rental of $3,500.00 per month payable in advance. At the time this agreement was signed by Daniels, it already bore the signature, "Milan LeDuc," on the line to be signed by the charterer. When the charter agreement was being discussed, the person with whom the owners dealt produced a Florida driver's license bearing the name "Milan A. LeDuc" and a picture which appeared to be that of the person with whom they were dealing. Tiner testified that the charterer at this meeting was accompanied by the same two individuals who had been with him during the previous encounters. Neither Tiner nor Daniels would identify the defendant at trial as the man who had chartered the "Frances Ann." Daniels testified that there had been no marijuana aboard the trawler when he inspected it in Alabama.

SBI fingerprint experts testified that as result of their search of the "Frances Ann" while it was at the Coast Guard Station, they had lifted approximately 30 latent fingerprints from various articles found on board, and that of these 19 were those of the defendant, one was Deputy Pledger's, and the remainder were fingerprints of unknown persons. A Coast Guard officer testified that in 1973 a license had been issued to "Milan A. LeDuc" to operate tow vessels up to 200 miles offshore, and an SBI expert testified that the left thumbprint which appeared on the license application was that of the defendant. There was also evidence that the "Frances Ann" was electronically well equipped for navigation at sea, having a Loran A, a Loran C, a group of CBs, a VHF, and a radar. Charts found aboard the "Frances Ann," including one entitled "South America, Colombia, and Venezuela, North Coast," and notations on sheets in a tablet or notebook found on board indicated that someone had used them to chart a course down the Gulf Coast from the vicinity of Mobile, Alabama, to points in waters off the coast of Colombia, South America, and up the Atlantic Coast to Stumpy Point, North Carolina. Defendant's fingerprints were found on a sheet in this notebook.

Other evidence will be referred to in the opinion.

The defendant did not present evidence. The jury found him not guilty on the charge of possession of marijuana and guilty of conspiring to possess marijuana. From judgment imposing a prison sentence of five years, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Donald W. Grimes for the State.

Larry G. Turner; and White, Hall, Mullen, Brumsey & Small by Gerald F. White for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the denial of his motions for nonsuit, contending the evidence was insufficient to warrant submitting the conspiracy charge against him to the jury. We do not agree.

The manner in which the evidence must be viewed by the court upon the defendant's motion for judgment of nonsuit in a criminal case was stated by Lake, J., speaking for our Supreme Court in *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), as follows:

> Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661; *State v. Virgil*, 263 N.C. 73, 138 S.E. 2d 777; *State v. Goins* and *State v. Martin*, 261 N.C. 707, 136 S.E. 2d 97. In making this determiniation, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469; *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679. Contradictions and discrepancies in the testimony of the State's witnesses are to be resolved by the jury and, for the purposes of this motion, they are to be deemed by the court as if resolved in favor of the State.

State v. Church, 265 N.C. 534, 144 S.E. 2d 624; *State v. Simpson*, 244 N.C. 325, 93 S.E. 2d 425. In determining such motion, incompetent evidence which has been admitted must be considered as if it were competent. *State v. Cutler, supra; State v. Virgil, supra.*

The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both. *State v. Cutler, supra; State v. Rowland, supra; State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. There is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the identity of the defendant as the perpetrator of it if, but only if, interpreting the evidence in accordance with the foregoing rule, the jury could draw reasonable inference of each such fact from the evidence. *State v. Rowland, supra.* If, on the other hand, the evidence so considered, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included therein, has been committed or that the defendant committed it, the evidence is not sufficient and the motion for judgment of nonsuit should be allowed.

278 N.C. at 567, 180 S.E. 2d at 759-60.

The evidence in the present case, considered in accordance with the above principles, is sufficient to support, though not to require, findings as follows:

Defendant, an experienced operator of seagoing vessels, on several dates in April 1977 negotiated with the owners of such a vessel to charter it from them. These negotiations took place in Alabama, where the boat was located, and in Florida, where the owners lived. On each occasion when these negotiations took place, defendant was accompanied by two male companions. The negotiations were finally successfully concluded on 26 April 1977, when the owners signed a charter agreement chartering the boat to defendant for an initial period of three months. Thereafter defendant took the boat from the shipyard

at Bayou LaBatre, Alabama, where it was located when the charter agreement was signed, and sailed it down the Gulf Coast into waters off the coast of Colombia, South America, and thence up the Atlantic Coast into North Carolina waters, at some point along the way picking up a load of marijuana. Defendant's fingerprints on the notebook on which navigational notations were entered charting the course of the voyage reasonably support the inference that he was the person who served as navigator. At some time between 10:00 p.m. on 17 May 1977 and 2:30 a.m. the next day, the boat docked in the darkness at Stumpy Point in Dare County, N.C. During that four-and-a-half hour interval it was met by persons unknown who arrived at the dock in two trucks. Marijuana was unloaded from the boat into one or both of these trucks, after which both trucks left the scene, three persons leaving together in the second truck. These findings, all of which are supported by the evidence either directly or by reasonable inference, would support a jury verdict finding defendant guilty of the crime of conspiracy to feloniously possess more than one ounce of marijuana in this State.

A criminal conspiracy occurs when there is an "agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *State v. Parker*, 234 N.C. 236, 241, 66 S.E. 2d 907, 912 (1951). The offense is complete when the agreement is made, the conspiracy itself being the crime and not the execution of the deed. *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935). "Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933).

Evidence that after a long sea voyage the boat docked at night at an isolated point in Dare County and was almost immediately thereafter met by persons who arrived at the scene in two trucks, furnishes solid support for the inference that the meeting took place by prior agreement. Indeed, it seems almost inconceivable that such a meeting could have occurred without prior arrangement. The inference that the purpose of the meet-

ing was to unload marijuana from the boat into one or both of the trucks is equally solidly supported by the evidence. Finally, that defendant was one of the persons who joined in making the agreement may be reasonably inferred from the evidence that he had chartered and had participated in navigating the boat during the voyage in question. It was not necessary that the identity of defendant's coconspirators be disclosed, *State v. Gallimore*, 272 N.C. 528, 158 S.E. 2d 505 (1968), it being only necessary that the State show where the unlawful agreement was entered into, since "[o]ur courts have jurisdiction of a prosecution for criminal conspiracy, if any one of the conspirators commits within the State an overt act in furtherance of the common design, even though the unlawful conspiracy was entered into outside of the State. The rationale of this principle of law is that the conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design." *State v. Goldberg*, 261 N.C. 181, 203, 134 S.E. 2d 334, 349 (1964). We hold that defendant's motions challenging the sufficiency of the evidence were properly denied.

Defendant assigns error to the denial of his motion to suppress all evidence obtained as result of the warrantless search which the officers made on board the "Frances Ann." He contends that the search of the vessel violated his Fourth Amendment rights and that the exclusionary rules should be applied. We do not agree.

Following an extensive voir dire hearing at which the State presented evidence but the defendant elected not to do so, the trial court entered an order making findings of fact, including findings

> that the boat "Frances Ann" had been tied up at a dock at Stumpy Point in Dare County from the 18th or 19th of May, 1977, until Sunday, May 22nd, 1977; that all of the windows in the deckhouse were open, and all doors that were visible were open, and no one was seen in or about the boat, and because of concern among some of the local people the Sheriff's office was notified and on Sunday afternoon, May 22nd, Deputy Sheriff Sammy Pledger arrived, and upon the

representations having been made to him by Mr. Leland Wise, a resident of Stumpy Point, concerning the manner in which the boat was tied up and its unusual circumstances, above set out, Officer Pledger decided to board the boat to determine if anyone was aboard that was ill, or if any dead body was on the boat. In the instant case the officer was not engaged in a search for evidence to be used in a criminal prosecution ... [T]hat when [the officer] entered the deckhouse he saw in the captain's quarters an open cabinet directly below the captain's bunk which contained two bags, one within the other, and also contained vegetable material which he believed and which he had reason to believe was marijuana; that when he first entered the deckhouse it had a faint odor of marijuana, and upon entering the captain's quarters the odor was more pronounced.

That he also found on a table where food had been eaten, plates containing remains of stale food, a pipe made of tinfoil, which appeared to be homemade, and also green vegetable material on the table, these last items were found in the galley which adjoins the captain's quarters.

* * * * *

The material that was found under the captain's bunk, and that which was found on the table in the galley, were in plain view of Officer Pledger ...

These factual findings, to which defendant has not excepted, are supported by evidence presented at the voir dire hearing. They fully support the conclusion that the initial boarding of the "Frances Ann" by Deputy Sheriff Pledger and the initial search which he then made of the vessel were constitutionally valid.

In *United States v. Miller*, 589 F. 2d 1117 (1st Cir. 1978), *cert. denied*, 440 U.S. 958, 59 L. Ed. 2d 771, 99 S. Ct. 1499 (1979), a yacht unknown to personnel at a marina and with no one aboard was discovered fouled in one of the marina's moorings. An employee of the marina called the Coast Guard, who in turn notified the county sheriff's office. Coast Guard officers and a deputy sheriff

boarded the yacht to investigate, in the course of their investigation finding a bill of sale and registration made out in defendant's name. On the following morning two deputies again boarded the boat, which bore the name the "COLD DUCK," to help the Coast Guard clear it from its fouled mooring lines and tow it to a marina slip. While on board they noticed marijuana debris and a navigational chart, which were in plain view. Based upon the course marked upon the chart, the officers were led to Mill Isle, a peninsula connected to the mainland by a causeway. There they found a large cache of marijuana. Prior to defendant's subsequent trial in the United States District Court on the charge of importing and possessing with intent to distribute more than 3000 pounds of marijuana, the District Court denied defendant's motion to suppress evidence of what the officers found on the boat and what they found by use of the navigational chart. *United States v. Miller*, 442 F. Supp. 742 (D. Maine 1977). In affirming defendant's conviction, the United States Court of Appeals, speaking of the first boarding which the officers made of the vessel, said:

> We have no difficulty approving the first boarding on the evening of May 13. At that point, a boat of unknown origin had been abandoned at a mooring belong[ing] to another person, where it remained for over twelve hours, fouled in its lines.
>
> A boat, like an automobile, carries with it a lesser expectation of privacy than a home or an office. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). A boat, even more than an automobile, becomes a matter of legitimate concern to public safety officials when it is found abandoned, 250 yards from shore, its dinghy still on board. The responsibility of state officials for the safety of property was triggered by these circumstances. See *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed. 2d 706 (1973) (state officials' "community caretaking functions" for vehicles involved in accidents). More important, the circumstances justified a reasonable fear of injury to life and limb, specifically a drowning. Such a combination of "community caretaking functions" and possibly

exigent circumstances amply justified intruding upon the limited privacy expectations surrounding an abandoned vessel in order to determine ownership of the boat and the safety of its mariners. *Cf. Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978) (exigent circumstances allow warrantless intrusion to perform administrative function).

* * * * *

To summarize, appellant's limited expectations of privacy in the COLD DUCK, already minimized by its abandonment at an unauthorized mooring, were not violated by entry pursuant to a reasonable belief that an emergency required an immediate search. The owner of the vessel had been missing long enough to trigger a reasonable belief of danger to life and limb and not so long as to make the proffered emergency a mere pretext.

589 F. 2d at 1125-1126.

[2] Although there are obvious differences in the factual situations presented in *United States v. Miller* and those presented in the present case, the decision in that case is persuasive authority for holding valid the initial boarding and search which Deputy Pledger made of the "Frances Ann." As already noted, the trial court found in the present case, in findings of fact which were supported by the evidence and to which no exception was taken, that in making his initial entry and search of the vessel the officer was not engaged in a search for evidence to be used in a criminal prosecution, but was engaged in determining if anyone was aboard who was ill or dead. Here, as in *Miller*, possibly exigent circumstances amply justified the officer's initial boarding of the vessel.

[3] The subsequent intensive search which the officers made of the "Frances Ann" after the boat was taken to the Coast Guard Station at Oregon Inlet presents a more serious question. From the information already obtained as result of Deputy Pledger's initial boarding of the vessel, the officers knew that it contained contraband. They also had reasonable grounds to believe that it

had recently been used to transport much larger amounts of contraband and that a careful search would probably yield fingerprints or other evidence which would enable them to identify the persons who had used the vessel for that purpose. It must be conceded that the better course would have been for the officers to have submitted their information to an impartial magistrate and to have obtained a search warrant prior to embarking upon a further search of the vessel. Despite their failure to do so, however, we find their further search did not violate defendant's Fourth Amendment rights.

A defendant in a criminal case is constitutionally entitled to have evidence obtained as result of an illegal search excluded only if his own Fourth Amendment rights were violated by the search, *United States v. Salvucci*, _____U.S._____, _____L.Ed. 2d_____, _____S. Ct._____(1980), and it has long been established that a person has no Fourth Amendment rights to property which he has abandoned. *Abel v. United States*, 362 U.S. 217, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1960); *United States v. Canady*, 615 F. 2d 694 (5th Cir. 1980); *United States v. Williams*, 569 F. 2d 823 (5th Cir. 1978); *United States v. Colbert*, 474 F. 2d 174 (5th Cir. 1973); *Parman v. United States*, 399 F. 2d 559 (D.C. Cir.), *cert. denied*, 393 U.S. 858, 21 L. Ed. 2d 126, 89 S. Ct. 109 (1968); *Feguer v. United States*, 302 F. 2d 214 (8th Cir.), *cert. denied*, 371 U.S. 872, 9 L. Ed. 2d 1101, 83 S. Ct. 123 (1962). Earlier cases expressed this in terms of the defendant's lack of "standing" to object to the search of abandoned property. Following the decision in *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978), analysis has shifted to focus upon whether a person retained any legitimate expectation of privacy in a place which he has abandoned or over property which he has discarded. Even prior to *Rakas*, some courts had adopted a similar analysis; for example, the opinion in *United States v. Colbert*, *supra*, decided in 1973, contains the following:

> The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain reasonable expectation of privacy with regard to it at the time of the search.

474 F. 2d at 176.

Applying these principles to the facts disclosed by the record in the present case, it is apparent that defendant left the "Frances Ann" under circumstances in which he could have retained no legitimate expectation of privacy with regard to it. Under cover of darkness he left the vessel carelessly tied alongside a public dock which was itself adjacent to a public highway. He left it without spring lines to control its movement, demonstrating an indifference to its safety. He left it unattended, with all doors and windows of its deckhouse open, exposing its interior alike to the elements and to the curious gaze of all who might pass by. He left it without having obtained permission from the operators of the dock to do so and without notifying anyone in the small surrounding community in Dare County either of the identity of the vessel, of his own identity, or of his intention ever to return. And finally, he never did return to the dock where the boat was moored nor to Dare County until much later when he was apprehended in Florida by agents of the Federal Bureau of Investigation.[1] On these facts it is our opinion, and we so hold, that when defendant left the "Frances

[1]This last fact, of course, could not have been known to the officers at the time the search was made. Nevertheless, it was relevant to the question whether defendant had abandoned the "Frances Ann" and may properly be considered by the court in making that determination. This question was dealt with by Burger, Circuit Judge (now Chief Justice) in the opinion in *Parman v. United States*, 399 F. 2d 559 (1969) as follows:

> Appellant points out that to justify a search by a subsequent finding of abandonment where, at the time, the officers conducting the search have no reason to believe that abandonment has occurred, places serious limitations on the deterrence rationale of the fourth amendment. This "intriguing" argument has been rejected elsewhere. *See* Judge [now Justice] Blackmun's careful analysis in *Feguer v. United States*, 302 F. 2d 214, 248-250 (8th Cir.), *cert. denied*, 371 U.S. 872, 83 S.Ct. 123, 9 L.Ed. 2d 110 (1962). We think this limitation on the deterrent effect of the exclusionary rule is implicit in the rule that a third party cannot object to illegally seized evidence. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). No recent Supreme Court decision hints any curtailing of this rule, and we see no reason for treating a person who abandons property before the search any differently from a third party.

399 F. 2d at 565.

Ann" at the Stumpy Point dock, he abandoned it and could not thereafter have had any legitimate expectation of privacy with reference to it or its contents.[2] Accordingly, we hold that none of defendant's Fourth Amendment rights were violated by the intensive search which the officers made of the vessel and its contents and the evidence obtained as a result of that search was properly admitted at defendant's trial.

[4] Defendant assigns error to the admission in evidence of the charter agreement entered into between the owners of the "Frances Ann" and the person who identified himself to the owners as "Milan A. LeDuc." Neither of the owners could identify the defendant at trial as the person who had chartered the boat from them. *Citing State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978), *State v. Austin*, 285 N.C. 364, 204 S.E. 2d 675 (1974), and *State v. Vestal, supra*, defendant contends that admission in evidence of the charter agreement bearing his name without competent evidence that he was the person who signed it constituted reversible error. We are constrained to agree. The above cited cases hold that the mere fact that a person's name appears on a document constitutes no proof that the signature is his or that he authorized it, and it is error to admit such a document in evidence in a criminal trial over the defendant's objection absent competent evidence that the signature on the document is his. In the present case the State sought to prove that the signature on the charter boat agreement was the defendant's by exhibiting the agreement together with admittedly genuine samples of defendant's signature to the jury for their comparison. Although this method of proving a disputed handwriting is approved by courts in a number of jurisdictions, including some which have statutes similar to our own, *see*

[2]We recognize that the trial court made no express finding of abandonment. It is, of course, preferable that this be done. Although that issue was not focused upon by the trial court, we find our own conclusion that abandonment occurred supported by certain of the trial court's specific factual findings and by uncontradicted evidence in the record. *See United States v. Edwards*, 602 F. 2d 458, 469 (1st Cir. 1979) (relying on specific factual findings made by the trial court to support its own conclusion that exigent circumstances existed); *United States v. Miller*, 589 F. 2d 1117, 1127 (1st Cir. 1978) (relying "on the record and the few facts found" to address legal argument on a suppression issue which was not emphasized before the trial court.)

Annot., 80 A.L.R. 2d 272 (1961), it has not been approved in this State. Our statute, G.S. 8-40, provides as follows:

> *Proof of handwriting by comparison.* — In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

After analyzing the change effected in our former practice by the enactment of this statute, Brock, J. (now Justice), speaking for this Court in *State v. Simmons*, 8 N.C. App. 561, 563, 174 S.E. 2d 627, 629 (1970), said: "However, neither G.S. 8-40, nor our rules of evidence, permits the jury, unaided by competent opinion testimony, to compare writings to determine genuineness." It was error for the court in the present case to permit the jury to do so in the face of defendant's timely objections. The charter agreement was an important part of the State's case, since it provided powerful linkage connecting defendant with the voyage of the "Frances Ann." Even though there was other evidence to show defendant's presence on the boat, we cannot say that the error in the admission of the charter agreement was harmless beyond a reasonable doubt. For that error, defendant is entitled to a new trial.

Prior to trial defendant moved to compel the State to permit defendant to inspect certain items, such as the coffee cup and radio, which were on the "Frances Ann" and from which latent fingerprints of the defendant were lifted. The State responded to this motion by showing to the court that these items were no longer in its possession since they had been left on the vessel when it was returned to its owners. The motion was denied, as was defendant's subsequent motion made pursuant to G.S. 15A-974 to suppress these items and all evidence derived from them. We find no error in these rulings. The items themselves were never admitted into evidence, and defendant has failed to show any way in which he was prejudiced by not having been given an opportunity to inspect them.

[5] We also find no error in the court's overruling defendant's objections to the testimony of Alvin Johnson, a former Coast Guard officer, concerning the significance of certain charts and navigational notations found aboard the "Frances Ann." The witness was properly qualified and accepted by the court as an expert in navigation on the high seas, and to this the defendant takes no exception. The witness's testimony related to matters within his field of expertise. There was no error in its admission.

Certain of defendant's remaining assignments of error relate to protions of the court's instructions to the jury or to other incidents occurring at the trial. Since the questions raised are not likely to arise upon another trial, we refrain from discussing them.

For the reason above noted, defendant is awarded a new trial.

New Trial.

Judge WEBB concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

I dissent. While I believe the majority decision correctly interprets the holding of this court in *State v. Simmons, supra*, I believe *Simmons* is wrongly decided. The plain language of G.S. §8-40 does allow the jury to compare writings for genuineness, and I find nothing else in our rules of evidence to require that the jury must be aided by expert testimony. Other jurisdictions, and apparently a majority, permit the trier of facts to make handwriting comparisons without the aid of experts. Moreover, I find the reasoning of the Minnesota Supreme Court in *State v. Houston*, 153 N.W. 2d 267, 269 (1967), to be sound:

> Whatever may have been the experience and competence of common-law jurors to assess the genuineness of signatures, we are of the opinion that this aptitude is one which today most laymen have been obliged to develop in

conducting their own affairs. With the widespread use of credit cards and travelers' checks, merchants and others in the field of commerce are frequently confronted with the necessity of comparing signatures. In the light of this common experience and exposure, we hold that a factfinder may, in the discretion of the court, be permitted to resolve the issue of forgery without expert assistance. Under our law it is not incumbent on jurors to accept an expert's opinion blindly. They must come to their conclusion on the basis of their own observations and experience and assessment of all the evidence before them. *Backman v. Fitch*, 272 Minn. 143, 155, 137 N.W. 2d 574, 582.

Therefore, I vote to find no error.

W.R. COMPANY, A NORTH CAROLINA CORPORATION, PETITIONER v. NORTH CAROLINA PROPERTY TAX COMMISSION, SITTING AS THE STATE BOARD OF EQUALIZATION AND REVIEW; JOHN B. LEWIS, CHAIRMAN; PAUL WHITFIELD, VICE CHAIRMAN; HAYWOOD EDMUNDSON, IV, C. DON LANGSTON, AND JOHN L. TURNER, MEMBERS, RESPONDENTS AND CUMBERLAND COUNTY, INTERVENING RESPONDENT

No. 8012SC130

(Filed 19 August 1980)

1. **Taxation § 25.4– ad valorem taxes – present use valuation – principal business of corporation – determining factors**

Factors which should be considered in determining the principal business of a corporation for present use valuation include gross income, net income or profit and its source, annual receipts and disbursements, the purpose of the corporation as stated in its corporate charter, and the actual corporate function in relation to its stated corporate purpose.

2. **Taxation § 25.4– ad valorem taxes – property of corporation – principal business of selling land – no qualification for present use valuation**

Evidence was sufficient to support the decision of the Property Tax Commission that petitioner was not a corporation which qualified for present use valuation, though it was a corporation owned by natural persons who were themselves actively engaged in farming, since the evidence tended to show that since incorporation in 1967 petitioner received $4,444,600 in gross income from the sale of land while its farming operations brought it only $31,694.42; over 99% of the gross income of petitioner came from a

source other than one qualified for present use valuation; none of this income was disbursed in a way which would contribute to the farming operations; the income instead went to retiring the mortgage indebtedness of $1,200,000 and to the income of the shareholders; the actual corporate function was to sell land; in every year of its existence except the recession year of 1974 petitioner made at least one sale of real estate; and petitioner's corporate charter stated that its purpose was to carry on and transact a general real estate business and not once was an agricultural, horticultural, or forestry activity mentioned.

APPEAL by respondents and intervening respondent from *Bailey, Judge.* Judgment entered 1 November 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 June 1980.

Petitioner sought judicial review pursuant to G.S. 150A-43 in superior court of a final decision of the Property Tax Commission sitting as the State Board of Equalization and Review. The Property Tax Commission upheld the denial by the Cumberland County Board of Equalization and Review of petitioner's 1977 application for an agricultural use value assessment pursuant to G.S. 105-277.2 to -277.7. The matter was before the Property Tax Commission on stipulated facts which can be summarized as follows.

Petitioner, a corporation with a business address in Fayetteville, North Carolina, owns certain real property between McPherson Church Road, Morganton Road and Owen Drive Bypass in Cumberland County. The property, purchased by petitioner in 1967 contains no improvements and consists of 100 clear and cultivated acres and 253.57 woodland acres. The county appraised the land for ad valorem tax purposes at $2,327,490.00. Petitioner appraised the property at $294,740.00 based on its present use value as computed by the county in accordance with its present use value schedule for rural land prepared in accordance with G.S. 105-277.6(c). Petitioner applied to the Cumberland County Board of Equalization and Review on 25 April 1977 for a present use valuation of the property which was denied. Timely appeal was made to the Property Tax Commission.

The property is a part of what is known locally as the Marsh-Purdie Farm which was listed by prior owners as 603.67 acres (460 cleared acres and 143.67 woodland acres). It had been in continuous operation as a farm from 1935 until 1955 when it was acquired by Longview Development Company which continued the farm operation. The property was Longview Development Company's only asset and the farming of this property was the only activity of the company. In November 1967, the stockholders of petitioner acquired all of the capital stock of Longview Development Company which was merged into petitioner, a North Carolina corporation chartered 10 October 1967. J.P. Riddle and Thomas Wood are the sole shareholders in petitioner. By this merger, petitioner acquired the Marsh-Purdie Farm. On 16 November 1967, petitioner executed a deed of trust for the property securing a loan of $1,200,000.00. The cleared land and woodlands which are the subject of this appeal have been continuously used as such since 1967 and prior thereto. The only sources of income to petitioner from 1967 through 1977 have been the sale of real estate, agricultural rents for lands and allotments, and, in 1977 only, the sale of crops.

Beginning in December, 1967 and each year thereafter through 1977, petitioner conveyed numerous parcels out of the 603 acre tract. A summary of these conveyances and the consideration received as indicated by revenue stamps is as follows:

YEAR	PURCHASER	NUMBER OF ACRES	CONSIDERATION INDICATED BY REVENUE STAMPS
1977	Red Lobster Inns	1.61	$ 156,500.00
	Seus Fayetteville	6.962	$ 417,000.00
	J.H. Perkins/ J.C. Ellsworth	5.57	$ 350,000.00
	V-2, Inc.	.75	$ 96,000.00
1967	John H. High	1.56	$ 109,000.00
	Frederio Pradio	.60	$ 80,000.00
	City of Fayetteville	1.33	$ 29,000.00
1975	Caldun Leasing Co.	.52	$ 88,000.00
1973	Exxon	.77	$ 180,000.00
	Herbert H. Thorp	.71	$ 51,500.00

YEAR	PURCHASER	NUMBER OF ACRES	CONSIDERATION INDICATED BY REVENUE STAMPS
1972	Best Products	5.00	$ 200,000.00
	State Highway Commission	49.30	$ 739,000.00
	Joseph Barr	2.30	$ 100,000.00
	Metropolitan Developers	.80	$ 75,000.00
	Edward's Music Co.	.344	$ 30,000.00
	J.P. Riddle	5.50	$ 11,000.00
1971	Francis Wells	1.23	$ 42,000.00
1970	Autry Chrysler Plymouth	9.50	$ 140,000.00
	Gibson Smith	90.00	$ 900,000.00
1969	Parrous Association	1.29	$ 50,000.00
	David Newton/ R.E. Bryan	1.84	$ 25,000.00
	James Hutchinson	3.50	$ 26,500.00
	J.P. Riddle/ Thomas Wood	24.87	$ 50,000.00
	Patterson Bonded Warehouse	6.00	$ 60,000.00
	Robert Hall	1.03	$ 33,000.00
1968	Gulf Oil Company	1.10	$ 95,000.00
1967	Humble Oil Company	1.82	$ 110,000.00

YEAR	EASEMENTS TO DEPARTMENT OF TRANSPORTATION	CONSIDERATION
1972		$ 1,000.00
1974		$ 199,000.00
1974		$ 1,000.00
1975		$ 100.00
TOTALS		$4,444,600.00

Beginning in 1968 and continuing through 1976, petitioner leased the remaining cleared acreage and leased the agricultural allotments applicable to the land. The cleared acreage was cultivated and produced bean and corn crops each year.

Throughout the period in question, the woodlands were cared for as forestland by petitioner. In December 1976, petitioner employed a farm operator by resolution of its board of directors and under a contract of employment. In 1977, petitioner engaged in the actual farming of the land rather than the mere leasing of the land. The income received by petitioner from farm rentals, allotment rentals and sale of crops from 1968 through 1977 is as follows.

YEAR	SOURCE OF INCOME	AMOUNT OF INCOME
1977	Lease Farm Allotments	$ 1,976.00
	Sale of Corn	$ 7,422.00
1976	Lease Farm Allotments	$ 1,077.60
	Crop Shares	$ 2,000.00
1975	Lease Farm Allotments	$ 1,055.85
	Crop Shares	$ 2,000.00
1974	Lease Farm Allotments	$ 1,378.05
1973	Lease Farm Allotments	$ 1,419.76
	Food Grain Program	$ 1,309.84
1972	Lease Farm Allotments	$ 871.05
	Food Grain Program	$ 2,425.52
1971	Lease Farm Allotments	$ 464.56
	Crop Shares	$ 1,800.00
	ASC Payments	$ 1,496.11
1970	Lease Farm Allotments	$ 348.39
1969	Lease Farm Allotments	$ 656.43
	ASC Payments	$ 2,115.10
1968	ASC Payments	$ 1,256.15
1967	Lease Farm Allotments	$ 622.00
TOTALS		$31,694.42

Petitioner had applied for present use valuation in 1976. The County Board of Commissioners requested an Attorney General's opinion which was furnished by letter dated 9 November 1976. In his opinion, the Attorney General stated,

> Pursuant to G.S. 105-277.3, "individually owned" agricultural land may qualify for special, "present use" classification. Where the owner is a corporation, "individually owned" means owned by a corporation "having as its principal business" the commercial production of crops, trees, or fruits and vegetables. All shareholders must be "actively engaged" in such activities. G.S. 105-272.2(4).
>
> We believe W.R. Company fails to qualify for the "present use" classification claimed by it because an active engagement in the commercial production of crops, trees, fruits, or vegetables, is not its "principal business." W.R. Company has no employees "farming" the property in question. W.R. Company leases or rents its property thereafter used by another for apparently qualifying purposes. Therefore, but without resolving the proper consideration to be accorded its established history of continuous land sales, it is our opinion that the "principal business" of W.R. Company is the rental of farm property, not the cultivation and harvesting, and commercial production, of farm property.

Upon receipt of this opinion, petitioner abandoned its application for 1976 present use valuation and took what it considered the necessary steps to qualify for 1977 present use valuation by corporate resolution and contract with Edgar Eden who was employed to farm the remaining portion of the Marsh-Purdie farm for petitioner.

Thomas Wood and J.P. Riddle are the sole stockholders of petitioner. Wood has been engaged in farming and other endeavors. He was born and raised on a Hoke County farm. In addition to his interest in the remainder of the Marsh-Purdie Farm held by petitioner, he operates a farm which he purchased in 1955 along with renting an additional 100 acres of adjoining land for five years. The farm was recently placed in the soil bank. Riddle purchased one of the larger farms in Cumberland County in 1961 which he operated as landlord for four years. Including his interest in the Marsh-Purdie Farm, he has acquired interests in seven other farms. In 1977, he was leasing his interest in 33,816 pounds of tobacco.

The facts stipulated by the parties were accepted by the Property Tax Commission. The Commission also found the following additional facts.

(1) That the subject property, known as the Marsh-Purdie Farm, has been continuously operated as a farm since 1935.

(2) That the property was acquired by Longview Development Corporation in 1955, which firm continued to operate it as a farm until November, 1967, when the sole stockholders of W.R. Company — J.P. Riddle and Thomas Wood — acquired the capital stock and assets of Longview Development Corporation, which was then merged into W.R. Company.

(3) That at the time of the transfer, W.R. Company obtained a loan of $1,200,000 from Cameron-Brown Mortgage Company with the 603.67 acre tract of land serving as security for the loan.

(4) That from 1968 through 1976, W.R. Company rented the cleared land and allotments for the purpose of cultivation.

(5) That during the period 1967 through 1977, appellant received income of $31,694.42 from the rental of the cleared land, the allotments, payments under government programs and, in 1977 only, the sale of corn.

(6) That beginning in 1967 with the sale of 1.82 acres to Humble Oil Company for $110,000, W.R. Company has sold at least 27 tracts or parcels and four easements from the subject tract totalling $4,444,600.

(7) That at least one sale has taken place each year since 1967 except for 1974.

(8) That three sales were made in 1976 and four in 1977.

(9) That with the exception of a 49.3 acre tract sold to the Department of Transportation for a highway and a 1.33 acre parcel sold to the City of Fayetteville, all of the sold tracts are being used or intended to be used for commercial purposes.

(10) That one of the tracts has been developed as a large regional shopping center.

(11) That as the result of these sales, the subject tract has been reduced from 603.67 acres in 1967 to 353.67 acres as of 1977.

(12) That although their principal business is real estate development, both of the shareholders of W.R. Company — Messrs Riddle and Wood — have owned and operated farms for many years.

The Property Tax Commission concluded from its review of the applicable law, evidence and findings of fact that the property did not meet the requirements of G.S. 105-277.2 to -277.7 for assessment at its agricultural or forest use value.

The Property Tax Commission elaborated on its conclusion as follows.

> From our review of the applicable law, the evidence and our findings of fact, we conclude and so decide that the subject property does not meet the requirements of the statute for assessment at its agricultural or forest use value. The parties have stipulated, and the evidence shows, that the land itself is being tended in a manner that would qualify the property for the preferential assessment. It may also be that the shareholders are "actively engaged" in the operation of the property, but we do not believe the evidence discloses any real activity on their part with respect to the cultivation of the crops or the management of the woodland. What the evidence does demonstrate, however, is that the principal activity of W.R. Company is not the commerical production of agricultural or forest products. Since acquiring the property in 1967, appellant has sold off

more than 40% of the tract and except for a tract to be used for highway and another to be used for public recreation, all of the parcels sold are being used or intended to be used for commercial purposes. One of the tracts has been developed into a large regional shopping center which influences the entire area in which the remainder of the subject property is located and strongly indicates how it will be used in the not too distant future. The subject property is in transition from agricultural and forest use to commercial use and the cultivation of crops on the land is incidental to the obvious corporate plan to sell the property for development purposes. This is also evidenced by the fact that, except for 1974 when no land was sold from the tract, the farm-related income constituted only a minor fraction of the corporation's total income. In fact, for the period 1967 through 1977, income from the sale of land or easements amount to 99.29% of the corporation's total income. In summary, we conclude that the principal activity of W.R. Company is the sale of land for development and not the commercial production of agricultural or forest products.

Petitioner sought judicial review of this order of the Property Tax Commission which affirmed the decision of the Cumberland County Board of Equalization and Review. Petitioner claimed that the conclusions by respondent that the shareholders were not actively engaged in the agricultural operation of the subject property and that the principal activity of petitioner was not the production of agricultural or forest products "were unsupported by substantial evidence in view of the entire record as submitted or that the conclusions were affected by other errors of law." The trial court reviewed the proceedings of the Property Tax Commission and reversed the decision of the Commission. The trial court upon reviewing the entire record and hearing arguments of counsel concluded "as a matter of law that the facts found by the North Carolina Tax Commission fail to support its conclusion of law that the principal activity of W.R. Company is the sale of land for development." The trial court concluded that as a matter of law, "the principal activity of W.R. Company is the commercial production of agricultural or forest products." Respondent and intervenor respondent appeal from this judgment of the trial court.

Rose, Thorp, Rand and Ray, by Herbert H. Thorp and Ronald E. Winfrey, for petitioner appellee.

Clark, Shaw, Clark and Bartelt, by Heman R. Clark, for respondent appellants.

VAUGHN, Judge.

Judicial review of a decision of the Property Tax Commission sitting as the State Board of Equalization and Review is pursuant to G.S. 150A-51, which provides:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.
>
> If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

In its judgment, the trial court concluded, as a matter of law, that "the facts found by the North Carolina Property Tax Commission fail to support its conclusion of law that the principal

activity of W.R. Company is the sale of land for development." The trial court also concluded as a matter of law that "upon review ... of the entire record ... the principal activity of W.R. Company is the commercial production of agricultural or forest products." The trial court reversed the decision of the Property Tax Commission, pursuant to G.S. 150A-51(4), because it was affected by "error of law." The trial court also reversed the Property Tax Commission decision pursuant to G.S. 150A-51(5) because it was "unsupported by substantial evidence ... in view of the entire record as submitted." The question raised by this appeal is whether petitioner, a corporation, qualifies for present use value assessment. This involves interpreting the statutory definition of a qualifying corporation in the context of the present use valuation, *i.e.*, whether the Property Tax Commission decision was "affected ... by error of law." It also involves a review of the Property Tax Commission decision pursuant to the "whole record" test to determine whether the decision is supported by competent, material and substantial evidence in view of the entire record as submitted. *See Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 181 S.E. 2d 1 (1971).

At least thirty-five states other than North Carolina have enacted some sort of preferential assessment statute which provides a lower property tax for land used for agricultural purposes. Alaska Stat. § 29.53.035 (1979); Ariz. Rev. Stat. Ann. §§ 42-136, -227 (Supp. 1979); Ark. Stat. Ann. §§ 84-483 to -486 (Supp. 1979); Cal. Gov't code §§ 65560-65570 (West Supp. 1979), Cal. Rev. and Tax Code §§ 421-430.5 (West Supp. 1979); Colo. Rev. Stat. Ann. § 39-1-103(5) (1974), § 137-1-3(6) (Supp. 1971); Conn. Gen. Stat. Ann. §§ 7-131c to -131k, 12-63 (1972); Del. Code Ann. tit. 9, §§ 8328-8337 (1975); Fla. Const. art. VII, § 4(a), Fla. Stat. Ann. § 193.461 (Supp. 1980); Hawaii Rev. Stat. § 246-12(b) (1976); Idaho Code § 63-112 (Supp. 1979); Ill. Ann. Stat. ch. 120, § 501a-1 (Smith-Hurd Supp. 1980); Ind. Code Ann. § 6-1.1-4-13 (Burns 1978); Iowa Code Ann. § 441.21 (West Supp. 1980); Ky. Const. § 172A, Ky. Rev. Stat. Ann. §§ 132.450, .454 (1979); Me. Rev. Stat. tit. 36, §§ 1101-1118 (1978); Md. Ann. Code art. 81, § 19(b) (1975); Mass. Gen. Laws Ann. ch. 61A, §§ 1-24 (West Supp. 1980); Minn. Stat. Ann. §§ 273.111, .13 (West Supp. 1980); Mo. Ann. Stat. §§ 137.017-.026 (Vernon Supp. 1980); Mont. Rev. Codes Ann. §§

15-7-201 to -215 (1979); Neb. Const. art. VIII § 1, Neb. Rev. Stat. § 77-1343 to -1348 (1976); N.J. Const. art. VIII, § 1(b), N.J. Stat. Ann. §§ 54:4-23.1 to -23.23 (Supp. 1980); N.M. Stat. Ann. § 7-36-20 (1978); Ohio Rev. Code Ann. §§ 5713.30-.38 (Anderson Supp. 1979); Or. Rev. Stat. §§ 308.345-.406 (1979); Pa. Stat. Ann. tit. 16, §§ 11941-11947 (Purdon Supp. 1980); R.I. Gen. Laws § 44-5-12 (1970); S.D. Compiled Laws Ann. § 10-6-31 to –31.3 (Supp. 1979); Tenn. Const. art. 2, § 28, Tenn. Code Ann. § 67-601(10) (1976); Tex. Const. art. 8, § 1-d (Supp. 1980); Utah Const. art. XIII, § 3, Utah Code Ann. §§ 59-5-86 to -105 (1973); Vt. Stat. Ann. tit. 32, § 3751-3760 (Supp. 1979); Va. Code §§ 58-769.4 to -769.15:1 (1974, Supp. 1980); Wash. Rev. Code Ann. §§ 84.34.010-.922 (Supp. 1980); Wyo. Stat. § 39-2-103 (1977). North Carolina provides for this preferential assessment in G.S. 105-277.2 to -277.7.

At least three reasons have been offered for the adoption of such tax legislation. First, such legislation is intended to relieve those maintaining land in a productive agricultural state rather than developing it for its commercial or residential use from rising property tax bills based on the higher value of the land in a developed, nonagricultural use. Henke, *Preferential Property Tax Treatment for Farmland*, 53 Or. L. Rev. 117, 119 n. 8 (1974); Note, *Ad Valorem Taxation for Agricultural Land in Tennessee*, 4 Mem. St. L. Rev. 127, 136 n. 38 (1973). Second, it is seen as a way of preserving arable land in fringe areas near large markets and as providing open or green spaces near these heavily populated areas. Henke, *supra*, at 120. Third, most of the legislative enactments contain provisions for penalties or tax recapture if the lands given preferential treatment are developed into nonagricultural uses which thereby provides a deterrent to such development. This type of legislation has received considerable criticism which tends to refute the three reasons for its adoption. First, the programs are for the most part applicable to all people and all lands statewide resulting in a tax windfall for those not financially pressed by taxes and tax reduction for land which is not the object of development pressures. It is an unfair subsidization of farmers and land speculators who are not in need of tax shelter. *See* Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California, 1968-69*, 24 Nat'l Tax J. 449, 455 (1971). Second, the use valuation method does not really preserve

prime agricultural land near urban cities for any great length of time but instead extends development speculation for a short period of time. Henke, *supra*, at 123-24. Third, the tax base is reduced, placing an undue burden on those holding nonagricultural land to make up the deficit, and the tax penalties and recaptures on sale in effect benefit a land speculator who can use them to reduce his ordinary income and capital gains from the sale in the year in which he makes the sale. *See* IRS Code § 164 (a) (1); G.S. 105-147(6). The penalties would likely be deductible interest. In fact, for federal income tax purposes, it may be extremely beneficial to defer these taxes to the year in which the speculator converts the property to a higher value for its use. It does not keep anyone down on the farm when the right price is offered.

The 1973 General Assembly enacted legislation permitting preferential assessment of agricultural, forest and horticultural lands which reduces the property tax burden of the landowner. 1973 N.C. Sess. Laws c. 709. The law was substantially amended in 1975. 1975 N.C. Sess. Laws c. 746. The law is presently codified in G.S. 105-277.2 to -277.7. The three special classes of land are defined by form of ownership, use, income and acreage. *Id.* -277.3(a); -277.2 (1) (2) (3). An owner of agricultural, forest or horticultural lands which have a use value higher than one of these three which is a present use may apply to the county tax supervisor to have the land appraised at its present use value. *Id.* -277.4(a). The land must be maintained in a "sound management program" which is defined as "a program of production designed to obtain the greatest net return from land consistent with its conservation and long term improvement." *Id.* 277.2(6). This provision may disqualify a weekend or hobby farmer or speculator who does not maintain these lands in a "sound management program." Once property qualifies, dual records are maintained, one reflecting the true or fair market value of the land and the other reflecting the property's value in its present use. Each county must now have a present use value schedule which insures county wide uniformity of appraisal. *Id.* -277.6(c). Property tax is paid annually on the basis of present use value. "The difference between the taxes due on the present-use basis and the taxes which would have been payable in absence of this classification, together with any interest, penalties or costs

that accrue thereon, shall be a lien on the real property of the taxpayer as provided in G.S. 105-355(a)." *Id.* -277.4(c). The tax deferral continues as long as the property is maintained in a qualifying use or until it passes to ownership outside of those qualified for the present use assessment. Upon disqualification, all deferred taxes for the preceding three years become due together with statutory interest charges which accrue as of the date the taxes would have originally become due if not for the present use valuation. *Id.; see also* G.S. 105-360(a) (2) (3). A ten percent penalty is levied on the deferred tax and interest if the property owner does not notify the county tax supervisor of the disqualifications. *Id.* -277.5.

The General Assembly limited those owners who could seek present use valuation of their property. As originally written, the present use valuation was available only for "individually owned land" which was defined in former G.S. 105-277.2(4) to mean land "owned by a natural person or persons and not a corporation." The law as written in 1973 appears to be an attempt to deprive agribusiness and development corporations of the benefits of present use valuation. Proposals were made in the 1975 General Assembly to liberalize the present use valuation statutes. House Bill 852, Senate Bill 691. When the law was rewritten in 1975, only "individually owned" agricultural, forest or horticultural land could qualify. "Individually owned" was defined as follows.

> "Individually owned" means owned by:
>
> a. A natural person or persons or
>
> b. A corporation having as its principal business one of the activities described in subdivisions (1), (2) and (3), above, the real owners of all of the shares of such corporation being natural persons actively engaged in such activities, or the spouse, siblings or parents of such persons.

G.S. 105-277.2(4). Certain corporations were thus permitted to qualify for present use valuation. These corporations can be characterized as "family corporations." *See* Institute of Gov-

ernment Property Tax Bulletin # 44 (20 August 1975). The amendment was enacted at a time when farm families were advised to incorporate for estate planning purposes. *See, e.g.*, Pinna, Wells & Harwood, Estate Planning for North Carolina Farm Families, Economic Information Report # 15, N.C.S.U., April 1974. A bill was introduced into the 1979 General Assembly which in effect would have allowed any corporate entity to obtain use value assessment for its agricultural, forest and horticultural lands. House Bill 856-Use Value Assessment for Farms. This bill was referred to the House Finance Committee. Consideration of this bill was postponed indefinitely on recommendation of the committee on 24 June 1980. 1980 N.C. House Journal, p. 186. The intent of the legislature seems quite clear. Its intent has been to be very restrictive with regard to what corporate entities can receive the benefit of present use valuation. The law is generally restrictive and answers much of the criticism leveled at such tax statutes in other jurisdictions.

[1] Under G.S. 105-277.2(4), corporate holdings are excluded unless the corporation's principal business is agriculture, forestry or horticulture and its shareholders are natural persons who are actively engaged in agriculture, forestry and horticulture or the spouse, siblings or parents of such persons. The issue in this case is whether petitioner, a corporation, qualifies for present use valuation. The intent of the legislature in limiting qualification to "[a] corporation having as its *principal business* one of the activities described . . . .", G.S. 105-277.2(4) (emphasis added), is at issue. To qualify, petitioner must have as its principal business agriculture, forestry or horticulture. The words "principal business" designate the operations of the qualifying corporation. These words have been interpreted by courts before but not in the context of this or a similar statute. *See, e.g., Hartford Steam Service Co. v. Sullivan*, 26 Conn. Sup. 277, 220 A. 2d 772 (1966); *Henderson v. Board of Examiners of Electrical Contractors*, 85 N.J. Super. 509, 205 A. 2d 333 (1964); *Norwood Shopping Center, Inc. v. MKR Corp.*, 135 So. 2d 448 (Fla. Dist. Ct. App. 1961); *Thomas v. Creager*, 107 S.W. 2d 705 (Tx. Civ. App. 1937). The narrow question of law in this appeal is by what standards *principal business* is to be determined. "Principal" is defined as "most important, consequential, or influential," Webster's Third New International Dictionary 1802

(1964), and as "[c]hief; leading; most important or considerable; primary; original." Black's Law Dictionary 1073 (5th ed. 1979). The dictionary definitions would seem to preclude either equality or plurality. There might possibly be a corporation qualifying in other respects which would have agriculture, forestry, or horticulture as a major activity with another minor activity such as sale of fertilizer, for example. The term does not, however, imply the equality or plurality which might exist in a large multifaceted conglomerate corporation. There must be criteria for determining what is or is not a principal business. Respondents advocate the sole test should be based on gross income. While gross income is undoubtedly a major criterion, we do not think it should be the sole determining factor. Another court has pointed out a simple illustration of why this is inappropriate.

> One may safely assume that revenue received by newspapers from the sale of advertising space far exceeds that derived from the sale of newspapers, and yet few people would suggest that the principal business of newspapers is commercial advertising.

Hartford Steam Service Co. v. Sullivan, 26 Conn. Sup. 277, 282-83, 220 A. 2d 772, 775 (1966). We think factors which should be looked at in determining the principal business of a corporation for present use valuation other than gross income are net income or profit and its source, annual receipts and disbursements, the purpose of the corporation as stated in its corporate charter and the actual corporate function in relation to its stated corporate purpose.

There is a constitutional requirement of uniformity in property taxation. N.C. Const. art. V, § 2(1) (2). The statute expressly indicates the constitutional base found in N.C. Const. Art. V, § 2(2) upon which special classification is made and permitted. G.S. 105-277.3(a). Petitioner has not on this appeal raised as an argument that it would be an impermissible discrimination to deny it present use valuation. *See* Hagman, *Open Space Planning and Property Taxation — Some Suggestions*, 1964 Wisconsin L. Rev. 628, 638-45 (1964); Annot. 98 A.L.R. 3d 916 (1980). Its only argument is that it, in fact, qualifies.

[2] It was the conclusion of the Property Tax Commission that petitioner's principal business was not one of the activities which would qualify it for present use assessment. In all other respects, petitioner would qualify. It is a corporation owned by natural persons who are themselves actively engaged in farming. The gross income of petitioner clearly indicates petitioner's principal business is not agriculture or forestry. Since incorporation in 1967, petitioner has received in gross income from the sales of land a total of $4,444,600.00, while its farming operations have brought it only $31,694.42. Over 99% of the gross income of petitioner comes from a source other than one qualified for present use valuation. The record indicates that none of this income was disbursed in a way which would contribute to the farming operations. Rather, it went to retiring the mortgage indebtedness of $1,200,000.00 and to the income of the shareholders. The actual corporate function is to sell land. In every year of its existence, except the recession year of 1974, petitioner has made at least one sale of real estate. This evidence on the income and activity of the corporation is sufficient to support the decision of the Property Tax Commission.

We feel the purpose of the corporation as stated in the corporate charter could be a factor in determining its principal business. The document does not appear in the record of the case. It was a stipulated fact before the Property Tax Commission that petitioner was a North Carolina corporation chartered on 10 October 1967. The charter is a public document on file with the Secretary of State. We possibly could take judicial notice of this document of public record. *Commissioners v. Prudden*, 180 N.C. 496, 105 S.E. 7 (1920); *Staton v. Railroad*, 144 N.C. 135, 56 S.E. 794 (1907); 1 Stansbury's N.C. Evidence § 13 (Brandis rev. 1973); *see also Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E. 2d 813 (1971). Although we do not base our holding on it, the charter, which was drafted before 1 October 1973 at a time when a statement of particular purpose or purposes of the corporation was required, *see* G.S. 55-7(3), 1973 N.C. Sess. Laws c. 469 s. 2, 47, is a particularly enlightening postscript to our decision. The charter states the following purposes for petitioner:

> To carry on and transact a general real estate business, including the right to take, acquire, buy, hold, maintain, rent, develop, sell, convey, mortgage, exchange, improve and otherwise deal in and dispose of real estate, chattels, real and personal property of every nature and description whatever, or any interest or right therein without limit as to amount; to convey, subdivide, plot, improve, and develop land and property for sale and otherwise; to do and perform all things needed and lawful for the development and improvement of the same for residence, trade or business; to erect and construct houses, buildings, or works of every description on any lands of the corporation, or upon other lands, and to rebuild, enlarge, alter, and improve existing houses, buildings or works; to convert and use for roads and other conveniences, and generally to deal with and improve the property of the company; and to undertake or direct the management and sale of the property, building, and land of the corporation, or any other lands.

Not once is an agricultural, horticultural or forestry activity mentioned.

Even without the corporate charter, the record supports the Property Tax Commission decision that petitioner is not a corporation which qualifies for present use valuation. The principal business of petitioner is not farming land but selling land. Such a principal business activity does not qualify for present use valuation. The decision of the trial court reversing the decision of the Property Tax Commission is

Reversed.

Chief Judge MORRIS and Judge WELLS concur.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION, AND SOUTHERN RAILWAY SYSTEMS AND NORTH CAROLINA RAILROADS, SOUTHERN TERRITORY RAIL CARRIERS (GENERALLY) AND SEABOARD COAST LINE RAILROAD (SPECIFICALLY), RESPONDENT RAILROADS, APPELLEES v. BOREN CLAY PRODUCTS COMPANY, PROTESTANT-INTERVENOR, APPELLANT

No. 7810UC1029

(Filed 19 August 1980)

1. **Carriers § 5.2– rail rates for crude earth – complaint proceeding – certain classes of evidence not required**

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, respondent railroads were not required to furnish the classes of evidence required by N.C.U.C. Rule R1–17(b), subsections (1)–(11), since those subsections were intended to apply only to general rate cases involving utilities other than railroads.

2. **Carriers § 5.2– rail rates for crude earth – complaint proceeding – use of regional cost data**

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, respondent railroads were not required to produce evidence of North Carolina expenses and revenues separated from regional data where the record as a whole contained substantial, competent and material evidence to support a finding by the Utilities Commission that the Southern Region cost data furnished by the railroads was representative of North Carolina costs.

3. **Carriers § 5.2– rail rates for crude earth – complaint proceeding – costs of shipments by protestant**

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, respondent railroads were not required to present evidence of actual costs of shipments by protestant brick company between its mine and its manufacturing plant since the appropriate group or class for the Utilities Commission's consideration was not protestant as an individual shipper at a certain mileage level but all present and future shippers of crude earth who would be affected by the scale of rates.

4. **Carriers § 5.2– increased rail rates for crude earth – complaint proceeding – emergency or change of circumstances not required**

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, the Utilities Commission was not required to make a specific finding that an emergency or change of circumstances not affecting the entire rate structure has occurred in order to allow a change in the rates. In any event, evidence showing that the existing scale of rates has become unremunera-

tive at various mileage levels such that respondents are unable to recover the fully allocated cost of providing rail service to shippers of crude earth is clearly sufficient to show a "change of circumstances" not affecting the entire rate structure.

5. **Carriers § 5.2– rail rates for crude earth – short line mileage – rates not formulated to cover costs for actual distance**

There is no merit to protestant's contention that an approved joint line rate for the movement of crude earth by rail was formulated by respondent railroads to cover their costs for the actual 151-mile distance of the movement of protestant's crude earth rather than for the shorter available rail distance of 98 miles in indirect violation of G.S. 62-145 where the protestant was charged only the lawful 100-mile rate, and the rate for the short line mileage was set on the basis of representative systemwide average unit cost data.

6. **Carriers § 5.2– rail rates for crude earth – differential between joint and single line rates**

The differential between joint and single line rates for the intrastate shipment of crude earth by rail is not unjustifiably burdensome and discriminatory, although the Utilities Commission approved tariff changes which increased single line rates 7.17% and joint line rates 18.73%, where respondent railroads presented evidence that joint line costs for a given movement will be higher than single line costs because of the necessity of interchange of equipment and additional billing, and where the evidence showed inability of the railroads to recover fully their costs even at the approved new rates.

7. **Carriers § 5.2– differential between rates for crude earth and rates for sand and gravel**

The Utilities Commission properly concluded that the differential between approved rates for the movement of crude earth by rail and existing rates for sand and gravel was not discriminatory where such conclusion was based on a finding that the rate for the movement of crude earth from protestant's mine to its manufacturing plant was $0.01 less than like shipments of sand and gravel, and this finding was based on a comparison of the approved rates for crude earth and the rate for sand and gravel which was first disapproved and later approved by the Commission.

APPEAL by protestant-intervenor from Utilities Commission, Docket No. R-66, Sub 82. Order entered 2 August 1978. Heard in the Court of Appeals 22 August 1979.

This case arose out of a protest and petition for suspension filed 29 June 1976 by Boren Clay Products seeking cancellation or withdrawal of tariff schedules filed by the Southern Freight Tariff Bureau (Southern Freight Association, agent) on behalf of Southern Railway Systems and North Carolina Railroads,

Southern Territory Rail Carriers and Seaboard Coast Line Railroad, which proposed increased intrastate rates in North Carolina for the movement of brick or tile raw materials (known as "crude earth"). The tariff schedule consists of two scales of rates, one scale applicable to "joint line" hauls, that is, those involving two rail carriers, and one scale applicable to "single line hauls," those involving one rail carrier. Within each scale the rates vary according to the mileage involved in the haul.

Protestant Boren Clay Products is a manufacturer of brick which regularly ships crude earth by rail from a mine at Boren Siding, North Carolina, to its manufacturing plant at Roseboro, North Carolina. Protestant's crude earth material is transported eleven miles from Boren Siding by Southern Railway Company and is then interchanged and transported to Roseboro by Seaboard Coast Line for a distance of approximately 140 miles. Although the actual rail distance of the movement totals 151 miles, there is a shorter available rail distance of 98 miles. Pursuant to G.S. 62-145, protestant was charged the joint line rate prior to the increase of $2.83 per net ton of crude earth based on that shorter distance. As a result of the proposed increase, the applicable joint line rate for the same haul was set at $3.36 per net ton.

By order of the Commission dated 7 July 1976, the proposed rates were suspended pending hearing. Following an evidentiary hearing, the hearing officer entered a recommended order on 4 April 1977 granting the rate increase. In that order he found that the existing single line and joint line scales of rates failed to cover fully allocated costs in all mileage blocks from 25 to 600 miles, and that in the instances where variable costs did not exceed the existing rates, contribution was minimal. He further found that the variable and fully allocated costs of Boren's actual movement of crude earth exceeded the existing rates. Concluding that the proposed tariff schedules for crude earth were just and reasonable and that the respondents were in need of such increases, the hearing examiner ordered that the order of suspension be vacated and the tariff schedules allowed to become effective. Protestant duly filed exceptions to the recommended order pursuant to G.S. 62-78. Following oral argument on those exceptions, the full Utilities Commission

entered a further order on 2 August 1978 affirming the recommended order of 4 April 1977. From that order protestant appealed.

Stern, Rendleman, Isaacson & Klepfer by Robert O. Klepfer, Jr. and Richard L. Gray for protestant-intervenor appellants.

Joyner & Howison by Edward S. Finley, Jr. for respondent railroads appellees.

PARKER, Judge.

Under G.S. 62-75 the burden of proof at the hearing before the Commission rested upon the respondent railroads to show that the proposed rates were just and reasonable. *Utilities Commission v. R.R.*, 267 N.C. 317, 148 S.E. 2d 210 (1966). The Utilities Commission found that respondents had met that burden. Upon this appeal the order of the Commission allowing the rate increase shall be deemed "prima facie just and reasonable," and protestant bears the burden of showing some error of law. G.S. 62-94. *See Utilities Com. v. R.R.*, 235 N.C. 273, 69 S.E. 2d 502 (1952).

Protestant Boren contends that in order to satisfy their burden of proving that the proposed rates for crude earth were just and reasonable, the respondents were required to, but did not: (1) supply the classes of evidence required by N.C.U.C. Rule R-17(1)-(11); (2) produce evidence of North Carolina expenses and revenues separated from systemwide costs; (3) show actual cost of affected movements; and (4) show an emergency or change of circumstances justifying the proposed increases. We conclude that respondents were not required to do so.

G.S. 62-137 provides that, in setting a hearing, the Utilities Commission "shall declare the scope of the hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, [or] a small part of the rate structure . . . ." In the present case the hearing officer expressly found in the recommended order which was affirmed by the Commission that the proceeding involved only "a small segment of the re-

spondents' rate structure." Thus, "the field of inquiry [was] limited to the comparatively narrow question of fair treatment to a group or to a class." *Utilities Commission v. Gas Co.*, 259 N.C. 558, 562, 131 S.E. 2d 303, 306 (1963).

[1] In view of the nature of the proceeding, we reject protestant's contention that respondents were required to furnish the classes of evidence required by N.C.U.C. Rule R1-17(b), subsections (1)-(11). Among the materials required by that rule are: evidence of the original cost of property, the present fair value of the utility's property, balance sheets, and the amount of cash working capital. Rule R1-17 in general substantially tracks the provisions of G.S. 62-133 and was clearly intended by the Utilities Commission to supplement that statute. Because the narrow scope of a complaint proceeding "does not justify the expense and loss of time involved," *Utilities Comm. v. Light Co.*, 250 N.C. 421, 431, 109 S.E. 2d 253, 261 (1959), it is well established that G.S. 62-133 is inapplicable to a case such as is here presented. Protestant reasons, however, that because N.C.U.C. Rule R1-17(b)(12) specifies the materials required to be furnished by Class I railroads in applying for general rate increases and states that such materials are in lieu of those required by N.C.U.C. Rule R-17(b)(1)-(11), subsections (1) through (11) must be applicable to railroads which seek a change in a small part of their rate structure. We disagree. A logical reading of N.C.U.C. Rule R1-17 leads to the conclusion that while subsection (12) applies to applications by railroads for general rate increases, subsections (1) through (11) were intended to apply to general rate cases involving utilities *other than railroads.*

[2] Protestant's challenge to respondents' failure to separate intrastate revenues and expenses from systemwide data is based upon its assignment of error to the Commission's finding that regional cost data was relevant and appropriate for use in costing the intrastate movement of crude earth in North Carolina. At the hearing respondents' principal evidence in support of their proposed rate increases for crude earth consisted of unit cost data for railroad traffic in the "Southern Region," including nine southern states plus half of Louisiana. It is true that, in a general rate case, separation of intrastate revenues and

expenses from systemwide data may be necessary, since operations of a regulated industry in two or more states are separate businesses for the purpose of rate regulation. *Utilities Commission v. Telephone Co.*, 263 N.C. 702, 140 S.E. 2d 319 (1965). In support of its contention that separation of intrastate expenses from systemwide data is necessary even in a case where, as here, only a portion of the rate structure is involved, protestant relies upon the decision of our Supreme Court in *Utilities Commission v. R.R.*, 267 N.C. 317, 148 S.E. 2d 210 (1966). In that case a group of railroads proposed a uniform increase in charges for switching services at all points in the State. At the hearing before the Commission following suspension of the proposed increases, the railroads offered evidence of costs based upon only six of the fifty-one switching yards in the State to which the proposed rates would apply. The Court held that the Utilities Commission properly denied the proposed increases on the ground that the cost figures did not justify a uniform increase, stating: "We cannot accept evidence of costs in a seaport town such as Wilmington with its docks, wharves and drawbridges as valid in a hilly or mountain section, such as Asheville or even Winston-Salem." 267 N.C. at 326, 148 S.E. 2d at 217. Subsequent to the filing of its decision in that case, the Supreme Court granted the railroads' petition for rehearing and modified its earlier opinion to emphasize that the railroads were not required to present evidence of revenue and costs at each switching yard in order to obtain a rate increase. 268 N.C. 204, 150 S.E. 2d 337 (1966). We conclude that the case relied upon by protestant does not stand for the proposition that regional unit cost data may not be offered in support of a proposed rate increase. The Court held only that evidence of cost must be shown to be representative of the actual cost of the service to be provided. Thus, the issue in the present case is not whether the carriers separated intrastate expenses from regional data, but whether there was competent, material and substantial evidence in view of the entire record to support the Commission's findings that evidence of systemwide costs is representative of North Carolina costs. If that finding is so supported, it is conclusive and binding on this appeal. *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461 (1967).

The record, viewed as a whole, discloses the following: The existing scale of rates on crude earth was established in 1962 and was applicable to both interstate and intrastate traffic. Between 1962 and 1976 the rate increased only in accordance with general rate increases for all commodities. In the mid-1970's, for the purpose of determining the cost-revenue relationship with respect to movements of crude earth, the Manager of the Commerce, Marketing and Planning Division of the Southern Railway System requested Frank Spuhler, a Senior Cost Analyst with the Southern Freight Association, to furnish data showing variable and fully allocated costs of single line and joint line movements of crude earth within the Southern Region. The costs which Mr. Spuhler furnished represented Southern Region unit cost figures for 1973 computed on the basis of a computerized cost formula which took into account accounting, statistical, and special study data for the twelve Class I railroads in the South. Those 1973 figures were further indexed to April 1976 wage and price levels. The costs were figured based upon the use of general open hopper cars with a lading weight of seventy-five tons. That data showed that the existing single line and joint line rates failed to cover fully allocated costs in all mileage blocks in the tariff scale from 25 to 600 miles, and that at certain levels even the variable cost was not covered by the rates. Increases in rates were proposed on the basis of that data so as to provide a fairer return to the railroads. At the time of the hearing before the Commission, the proposed rates had been adopted for interstate traffic and for intrastate traffic in all other states in which Southern Railway operates.

Mr. Spuhler testified before the Utilities Commission that the systemwide data was representative of North Carolina costs. The twelve Class I railroads represented in the study are members of four "systems." Ten of those railroads are members of the two systems to which the railroads operating in North Carolina belong, the Southern System and the Family Lines. Of those ten railroads, only five actually operate within the State of North Carolina. Mr. Spuhler did testify, however, that the consolidation of the different railroads into systems results in uniformity of costs for railroads within each system. The railroads which are members of the two systems operating in North

Carolina pay the same crew wages under national agreement and incur similar costs for materials, fuel, and rails. Of the two railroads represented in the cost study data which are not members of the systems operating in North Carolina, there was evidence tending to show that one pays lower wages, which has the effect of lowering the costs in the study, and that the other's differences are of minimal effect. We hold that the record as a whole contains substantial, competent and material evidence to support the Commission's finding that the Southern Region unit cost data was representative of North Carolina costs.

[3] As to protestant's contention that the carriers were required to, but did not, present evidence of actual cost of the Boren Siding-Roseboro movement affecting protestant to support its proposed increase in rates, it is significant that respondents' burden in this particular case was to establish that the rates across the mileage scale, not merely the rate at the mileage level applicable to protestant, were just and reasonable. *See* G.S. 62-75. The issue before the Commission in this case was "fair treatment to a group or to a class." *Utilities Commission v. Gas Co., supra.* Thus, the appropriate group or class for the Commission's consideration was not Boren Clay Products as an individual shipper at the 100-mile level, but the class of all present and future shippers of crude earth who would be affected by the scale of rates, of which class Boren is a member. Although protestant emphasizes that at present it is the only shipper in this State to which the joint line rate for crude earth applies, such an emphasis ignores one of the principal goals of rate making: simplification of the rate structure. *See Utilities Comm. v. Edmisten, Attorney General,* 291 N.C. 424, 230 S.E. 2d 647 (1976). If carriers were required to consider each and every small difference in cost for each and every shipper, "then there would have to be as many different schedules or rates as there are shippers. Manifestly, such a procedure would be so heavy that it would fall because of its weight. Schedules would be for individuals, and not for the public." *Public Service Com. v. State Ex. Rel. Great N.R. Co.,* 118 Wash. 629, 633-634, 204 P. 791, 793, 25 A.L.R. 186, 189 (1922). Although protestant presented some evidence of cost savings in its individual movement, there was no evidence that these savings were substantially greater than those incorporated by the carriers into the computation of the overall scale of rates, and the Commission, in reviewing the

reasonableness of the proposed scale of rates in its entirety, properly considered respondents' evidence of average unit costs.

[4] Relying on the decision of our Supreme Court in *Utilities Commission v. Light Co., supra*, protestant contends that respondents were required to present evidence of an emergency or change of circumstances that does not affect the entire rate structure. Although the Supreme Court in *Light Co.* did define a "complaint proceeding" as one which deals with an "emergency or change of circumstances" which does not affect the entire rate structure of the utility, 250 N.C. at 431, 109 S.E. 2d at 261, neither statute nor case law requires the Commission to make a specific finding that an emergency or change of circumstances has occurred. Final orders of the Commission in proceedings before it are not within the doctrine of *stare decisis*, and the purpose of a complaint proceeding may often be to adjust a single rate or scale of rates which has previously been approved without the necessity of instituting a protracted general rate case. There was competent, material and substantial evidence in the present case showing that the existing scale of rates, while perhaps adequate at the time initially approved, had become unremunerative at various mileage levels such that respondents were unable to recover the fully allocated cost of providing rail service to shippers of crude earth. Such evidence is clearly sufficient to show a "change of circumstances" not affecting the entire rate structure.

[5] Apart from its challenge to the relevance of the systemwide cost data presented, protestant contends that respondents have circumvented the provisions of G.S. 62-145 which provides:

> When there is more than one route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by the Commission for the shorter route shall be the maximum rate which may be charged, and *it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route.* (Emphasis added).

The evidence presented before the Commission disclosed that while there is a 98-mile rail route by which crude earth could be moved from Boren Siding to protestant's Roseboro plant, the actual movement is by a routing of 151 miles. Although Boren is charged the rate at the 100-mile level on the applicable tariff, it contends that the new joint line rate which the Commission approved was formulated by respondents to cover their actual costs for the 151-mile route, thus violating G.S. 62-145 indirectly. It is clear that where a rate has been set for a short line distance, a carrier which unlawfully charges a shipper the rate at the longer mileage level may not present evidence that the rate for the longer route is just and reasonable. *Utilities Commission v. R.R.*, 249 N.C. 477, 106 S.E. 2d 681 (1959). The question with respect to protestant in the present case, however, is not whether the 151-mile rate is just and reasonable as applied, because the protestant is not being unlawfully charged that rate. Instead, the question is whether the lawful rate, the 100-mile rate which Boren is charged, along with the other rates across the entire mileage scale, is just and reasonable. The evidence tends to show that the cost computation for the Boren movement, although based on the costs for the 151-mile movement, was not made until after Boren protested the tariff filing and that the rate for the short line mileage was set on the basis of representative systemwide average unit cost data. Because the evidence amply supports the Commission's finding that the existing scale of rates, including the rate applicable to Boren, was unremunerative, Boren has no cause to complain under G.S. 62-145 where it is charged the "lawful" charge, the just and reasonable charge, for the shorter route.

[6] Protestant Boren next challenges the proposed rates as discriminatory, contending that the differential between joint and single line rates, and between rates for sand and gravel and those for crude earth, is injustifiably burdensome. To be valid, a rate differential must represent substantial differences in service or conditions: "There must be no unreasonable discrimination between those receiving the same kind and degree of service." *Utilities Commission v. Teer Co.*, 266 N.C. 366, 375, 146 S.E. 2d 511, 518 (1966), *accord, Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953). Although prior to the Commission's approval of the proposed rate increase the differential between joint and single line rates was considerably less than after the

increase, respondents were not required to prove that the existing rates were no longer just and reasonable, but, instead, that the new rates in themselves were just and reasonable. *Utilities Comm. v. Edmisten, Atty. General*, 29 N.C. App. 428, 225 S.E. 2d 101, *aff'd*, 291 N.C. 424, 230 S.E. 2d 647 (1976). Although the tariff change which the Commission approved increased single line rates 7.17% and joint line rates 18.73%, respondents' evidence showed that joint line costs for a given movement will be higher than single line costs because of the necessity of interchange of equipment and additional billing. Given evidence of differing costs in providing service, it is not the function of the courts to determine that the Commission erroneously determined the rates to be reasonable. Although protestant contends that the Commission failed to make a specific finding of fact concerning the reasonableness of the discrimination between joint and single line rates as required by G.S. 62-79, we conclude that the hearing examiner's finding that the new rates on single and joint line movements will still not permit respondents' full recovery of cost adequately addresses the issue of discrimination and supports the Commission's ultimate conclusion that there is no undue discrimination in the proposed rates. Where the evidence showed inability of the carriers to recover cost even at the new approved rates, it is difficult to perceive that unreasonable discrimination against the protestant exists.

[7] Finally, as to the alleged discrimination between the approved rates and the existing rates on sand and gravel, the Commission based a conclusion that there was no undue discrimination on a finding that the proposed rate for the movement of crude earth from Boren Siding to Roseboro is $0.01 less than "like shipments of sand or gravel when handled in similar equipment, at the present Ex Parte level of rates." Protestant contends that this finding is erroneous because it is based on a comparison of the proposed joint line rate for crude earth at mileage level 100, $3.36 per net ton, with the joint line rate for sand and gravel after application of a general 4% rate increase, $3.37, which increase had been proposed by respondents but was rejected by order of the Utilities Commission dated 21 October 1976. This contention is without merit. Although the Utilities Commission did originally deny the proposed general

increase on intrastate rates, the Interstate Commerce Commission ruled on 29 September 1977 that, as a result of that denial, existing intrastate rates in North Carolina caused an unjust discrimination against and undue burden on interstate commerce. As a result of that ruling, the North Carolina Utilities Commission permitted the general increase to go into effect. Thus, when the final order granting a rate increase for movement of crude earth was issued on 2 August 1978 in the present case, the Commission properly took the general rate increase into account in comparing the joint line rates for sand and gravel with those for crude earth.

Reviewing the factual findings of the Commission, we find that the relevant issues of fact were addressed and that they fully support its conclusion that the rates at issue were just and reasonable. The order appealed from is

Affirmed.

Chief Judge MORRIS and Judge MARTIN (Harry) concur.

STATE OF NORTH CAROLINA v. ROBERT EARL PARTIN, AND EDWARD PARTIN

No. 7910SC1086

(Filed 19 August 1980)

1. **Criminal Law § 26.5; Constitutional Law § 34– assault on law enforcement officer – assault with deadly weapon with intent to kill – one transaction – separate offenses – no double jeopardy**

Prosecution of defendants under G.S. 14-34.2 for assault on a law enforcement officer with a firearm and under G.S. 14-32 for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, nor did it require the State to elect prosecution under a single statute, though the facts underlying defendants' indictment under each statute were the same, since each offense required proof of an element which did not exist in the other charge.

2. **Criminal Law § 26.5; Constitutional Law § 34– assault on law enforcement officer with firearm – assault with deadly weapon – double punishment for same offense**

Where defendants were charged with assault on a law enforcement

officer with a firearm and assault with a deadly weapon with intent to kill, arrest of judgment upon their conviction of the lesser offense of assault with a deadly weapon was required, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law enforcement officer with a firearm, and this result would punish defendants twice for the same offense.

3. **Criminal Law § 15– motion for change of venue – failure to rule on motion – no prejudice**

Proceeding to trial without ruling on defendants' motion for change of venue constituted a denial of that motion, and defendants failed to show prejudice as a result of this procedure.

4. **Criminal Law § 124– written verdicts – elements of offenses not spelled out – verdicts sufficient**

Although every element of the offenses charged was not included in the form verdicts submitted to the jury, the offenses which the jury was to consider were sufficiently identified, and there was no requirement in G.S. 15A-1237 that written verdicts contain each element of the offense to which they referred.

5. **Arrest and Bail § 6; Assault and Battery § 15.7– law officers making valid arrest – assault on officers – instruction on self-defense not required**

In a prosecution of defendants for assault on law enforcement officers with a firearm and assault with a deadly weapon with intent to kill, there was no evidence to sustain defendants' plea of self-defense based on the officers' allegedly attempting an illegal arrest or their using excessive force in the execution of that arrest where the evidence tended to show that the officers approached defendants' residence, knocked on the door, and announced their presence and intention to serve an arrest warrant on one defendant; defendants did not respond; the officers kicked in the door of defendants' house after warning that they would do so; the officers confronted defendants in a hallway and told one defendant that they had a warrant for his arrest; and fighting then began between defendants and the officers.

APPEAL by defendants from *Braswell, Judge.* Judgment entered 29 June 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 14 April 1980.

In separate bills of indictment defendants were charged with assault on a law enforcement officer with a firearm under G.S. 14-34.2 and larceny of a firearm worth over $250 in violation of G.S. 14-70. In addition, Robert Earl Partin was indicted for assault with a deadly weapon with the intent to kill inflicting serious injury under G.S. 14-32(a), and Edward Partin was indicted under G.S. 14-32(c) for assault with a deadly weapon with

the intent to kill. Defendants filed separate motions to quash the indictments returned against them for being "duplicitous" (the proper term is "duplication" of charges), which were denied. Defendants also filed separate motions for change of venue on the ground that pretrial publicity prejudiced their right to a fair trial before impartial jurors in Wake County. Nothing in the record shows the disposition of these motions.

At a joint trial of both defendants on all charges, the State presented evidence tending to show the following: On 2 May 1979 Deputy Sheriff Lockamy of the Wake County Sheriff's Department went to defendants' residence at 6009 Colonial Drive in Raleigh, North Carolina, for the purpose of serving an arrest warrant upon Robert Earl Partin on the charge of larceny. Upon arriving at the residence, Officer Lockamy observed a silver-gray Grand Prix Pontiac automobile which he had seen Robert Earl Partin driving previously. At that time, Officer Lockamy observed that a "curtain went shut" within the house and he saw a "black subject in the residence." Officer Lockamy then summoned assistance from a Deputy Matthews, who arrived shortly thereafter. Both officers were dressed in uniform with their badges showing. The two officers approached the residence, identified themselves as law enforcement officers, and knocked repeatedly on the doors and windows and rang the doorbell, all the while calling for the person within the residence to come to the door and speak with them.

Realizing that their attempts were in vain, Officer Lockamy announced that "as a last resort I would kick the rear door in," that "[i]f he [Robert Earl] didn't come to the back door, . . . I would kick the door in and come inside." The officers made an unsuccessful attempt to get the dispatcher at police headquarters to telephone the residence. The officers returned to the rear door of defendants' residence and announced their presence once again, threatening to kick the door in if no one came to the door. Officer Lockamy then "reared back and kicked the door and it flew open." Officer Lockamy drew his service revolver as he entered the kitchen, followed by Officer Matthews. The officers examined the various rooms in the house, and as they approached the remaining bedroom in their search, the

two defendants came out of that room, Robert being the first to appear. Observing that defendants had no weapons, Officer Lockamy "holstered" his revolver and put the strap back over his weapon.

As the officers confronted the defendants, Robert Earl protested their being in the residence, telling them they had "no business in here." Officer Lockamy told Robert Earl that he "had a warrant for his arrest," to which defendant Robert Earl replied: "I'll kill your mother. I'll kill you." Officer Lockamy then told defendant Robert Earl that "I know damn well you're under arrest," and proceeded to place handcuffs on defendant Robert Earl's wrists. Defendant Robert Earl "resisted" his attempts to handcuff defendant, and both defendants began fighting with the officers. A struggle ensued, and as a result defendants obtained possession of both officers' service revolvers. Defendants continued beating the officers until they struggled free and retreated. The officers hurriedly left the house while defendants fired shots at them. While Officers Lockamy and Matthews summoned assistance via police radio, the two defendants fled in defendant Robert Earl's Grand Prix Pontiac automobile. Defendants were later apprehended.

At the end of the State's evidence, defendants moved for dismissal, which was denied. Defendants offered no evidence but renewed their motions for dismissal.

A jury found defendant Robert Earl Partin guilty on two counts of assault on a law enforcement officer with a firearm, one count of assault with a deadly weapon, and one count of larceny of a firearm. Defendant Edward Partin was found guilty on identical charges. On sentencing hearing, the trial judge sentenced both defendants to two concurrent five-year prison terms for assault on a law enforcement officer with a firearm, and a two-year sentence each for the offenses of assault with a deadly weapon and larceny of a firearm, each to begin at the termination of the prior sentences.

Defendants gave timely notice of appeal from the judgments entered upon the jury verdicts.

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

James E. Brown for defendant appellants.

MORRIS, Chief Judge.

By various assignments of error, defendants contend that the constitutional prohibition against double jeopardy has been violated in this case in that defendants have been twice held in jeopardy of the same offense by their being convicted under G.S. 14-34.2 and G.S. 14-33 (b)(1), a lesser included offense of G.S. 14-32 under which both defendants were tried. For the purposes of clarity, we set out those provisions in their entirety:

§ 14-32. *Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.* — (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 20 years, or both such fine and imprisonment.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment.

(c) Any person who assaults another person with a deadly weapon with intent to kill is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment.

§ 14-33. *Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments* - . . .

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

(1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon . . . .

§ 14-34.2. *Assault with a firearm or other deadly weapon upon law-enforcement officer or fireman.* — Any person who shall commit an assault with a firearm or any other deadly weapon upon any law-enforcement officer or fireman while such officer or fireman is in the performance of his duties shall be guilty of a felony and shall be fined or imprisoned for a term not to exceed five years in the discretion of the court.

In our analysis, we find it helpful to distinguish between "prosecution" and "conviction" under these various statutes, and our discussion follows this format.

It is fundamental that in this State no person can be twice put in jeopardy for the same offense. *State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372 (1972). Jeopardy attaches "when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." *State v. Bell*, 205 N.C. 225, 228, 171 S.E. 50, 52 (1933), *quoted in State v. Ballard, supra*, 280 N.C. at 484, 186 S.E. 2d at 374. In the present case, defendants were placed in jeopardy when they were tried under the aforementioned indictments. When jeopardy attached here is, however, not at issue.

[1] In the present case *prosecution* under G.S. 14-34.2 and G.S. 14-32 does not violate the prohibition against double jeopardy nor does it require the State to elect *prosecution* under a single statute. Conceding that the facts underlying defendants' indictment of assault with a deadly weapon under G.S. 14-32(a) and (c) are the same facts which underlie defendants' indictment for assault on a law enforcement officer under G.S. 14-34.2, the two offenses, nevertheless, contain separate and distinct elements. Each offense required proof of an element which does not exist in the other charge. Under G.S. 14-34.2, the jury must find that the victim was a law enforcement officer acting

in the exercise of his official duty at the time of the assault, which is not an element of G.S. 14-32, while under G.S. 14-32(a) and (c) there must be a finding that the assault was made with an intent to kill, which is not an element of G.S. 14-34.2. Contrary to defendants' assertions, the fact that the jury returned a verdict of guilty as to G.S. 14-33(b)(1), a lesser included offense containing the same factual elements as the verdict returned as to G.S. 14-34.2, is of no moment. The fact remained that, as indicted and subsequently prosecuted, the charges against defendants under G.S. 14-34.2 and G.S. 14-32 contained separate and distinct elements. In *State v. Birckhead*, 256 N.C. 494, 500, 124 S.E. 2d 838, 843-44 (1962), the Court, following *State v. Stevens*, 114 N.C. 873, 19 S.E. 861 (1894), stated:

> If two statutes are violated by a single act or transaction, and if *each* statute requires proof of an additional fact not required by the other, the offenses are not the same.

We follow this reasoning in the present case. *Accord: State v. Evans*, 40 N.C. App. 730, 253 S.E. 2d 590, *appeal dismissed*, 297 N.C. 456, 256 S.E. 2d 809 (1979); *State v. Kirby*, 15 N.C. App. 480, 190 S.E. 2d 320, *appeal dismissed*, 281 N.C. 761, 191 S.E. 2d 363 (1972). These separable offenses are not within the purview of the double jeopardy doctrine, and we, therefore, conclude that defendants' prosecution based on these charges did not constitute an unconstitutional infringement on defendants' right to be free from double jeopardy.

By so holding, we similarly overrule defendants' fifth assignment of error in which they contend the trial court erred by failing to rule on defendants' motions to quash the indictments returned against them. Although the judge made no ruling with respect to this motion, it is clear from our discussion above concerning the validity of the indictments drawn against defendants that such a motion should have been denied. There appearing no error on the face of the indictments, defendants have suffered no prejudice by the trial court's failure to rule on defendants' motion to quash.

[2] The question remains, however, whether it is a violation of defendants' double jeopardy rights to *convict* defendants of two

separate crimes based on the same transaction. Upon their reading of the above-quoted statutes, defendants argue that they have been subjected to double jeopardy in that the same facts were used to convict each of the defendants of the offenses under G.S. 14-33 (b)(1) and G.S. 14-34.2. Defendants further contend that it is impossible to prove defendants guilty of assault upon an officer under G.S. 14-34.2 without also proving them guilty of the offense of assault with a deadly weapon under G.S. 14-33(b)(1). As support for their position, defendants cite *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972), where our Supreme Court reversed defendant's conviction of both resisting an officer and assaulting an officer, where the evidence revealed that both convictions were based on and arose out of the same criminal conduct. The Court ruled that "at the conclusion of the evidence, it had become quite clear that no line of demarcation between the defendant's resistance of arrest and his assaults upon the officer could be drawn. The assaults were 'the means by which the officer was resisted.' " 282 N.C. at 173, 192 S.E. 2d at 579. *Accord: State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967); *State v. Raynor*, 33 N.C. App. 698, 236 S.E. 2d 307 (1977).

The *Summrell* Court required the State to elect between its warrants at the close of all the evidence because the Court found that the criminal warrants themselves indicated duplicate charges, stating: "[e]ach warrant included all the elements of the offense charged in the other." 282 N.C. at 173, 192 S.E. 2d at 579. In our case, however, a different situation existed at the close of all the evidence. As the case was given to the jury, the evidence was sufficient to support convictions under both G.S. 14-32(a) and (c) (felonious assault) as well as G.S. 14-34.2. Each statute required the jury to find facts which constituted elements not found in both offenses. To have required election at this point, the court would have had to find evidence of the differing elements insufficient. This the court did not do, and the court was proper in not requiring election.

It is nonetheless also fundamental that the constitutional guaranty against double jeopardy protects a defendant from multiple *punishments* for the same offense. *State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976); *State v. Summrell, supra.* Application of this principle has been especially problematic under

circumstances where the same criminal act or transaction potentially violates different statutes. *See generally* 4 Strong's N.C. Index, *Criminal Law* § 26.5 (1976). For example, in *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976), defendant was indicted on charges of first degree murder and arson, and was found guilty as charged. The Supreme Court, by Justice Branch (now Chief Justice), arrested the judgment as to the arson charge after concluding that the trial judge erred by imposing additional punishment on the verdict of guilty of arson. Since the State had proceeded solely on the theory that the deceased victim's death was proximately caused by defendant's commission of the felony of arson, the Court reasoned, "[p]roof of the arson charge was an essential and indispensable element in the State's proof of felony-murder and as such affords no basis for additional punishment." 291 N.C. at 127, 229 S.E. 2d at 157-58. *See also State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977); *State v. Davis*, *supra; State v. Graham*, 29 N.C. App. 234, 223 S.E. 2d 842, *cert. denied*, 290 N.C. 310, 225 S.E. 2d 830 (1976).

Arrest of judgment upon defendants' conviction of assault with a deadly weapon is required in the present case. Assault and the use of a deadly weapon (in this case, a firearm) are necessarily included in the offense of assault on a law enforcement officer with a firearm (G.S. 14-34.2), for which defendants were convicted. This result punishes defendants' twice for the offense. We, therefore, arrest judgment on defendants' conviction of assault with a deadly weapon.

[3] By their sixth assignment of error, defendants argue that the trial court erred by failing to rule on their motion for change of venue. Although we can assume that defendants' motion for change of venue complied with the time requirements of G.S. 15A-952(c) and was proper in form, we cannot speculate as to why no disposition was made of the motion and what that disposition would have been if the judge had issued a ruling thereon. Proceeding to trial without ruling on defendants' motion constituted, in effect, a denial of that motion. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972). We find nothing in the record to indicate that the trial court abused its discretion by continuing on to trial, nor do we find that defendants objected to this procedure. Without deciding whether defendants'

silence constituted a waiver of their right to assign error to the court's failure to rule on their motion, we hold that defendants have failed to show prejudice as a result of this procedure. It is incumbent upon a defendant not only to show error, but to show that the error of which he complains constituted prejudice sufficient to warrant a new trial. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). This defendants have failed to do. Defendants' assignment of error is overruled.

[4] Defendants' fourth argument, referring to assignment of error No. 23, is that the trial court improperly entered judgments and commitments with respect to charges under G.S. 14-34.2 because "there was no verdict which supported the charges alleged under that statute." Defendants correctly state in their brief that an element of the offense prohibited by G.S. 14-34.2 is that the assault be committed "while such officer is in the performance of his duties." Defendants contend, however, that the verdict returned by the jury did not contain this element, and therefore the maximum offense the verdict referred to would be under G.S. 14-34 or G.S. 14-33(b)(1). This result would mean, according to defendants, that defendants could only be sentenced to a maximum prison term of two years under G.S. 14-33(b)(1) or a maximum term of six months under G.S. 14-34, as opposed to the prison term of five years under G.S. 14-34.2, the actual sentence imposed in this case.

Although we agree with defendants that a verdict which refers to only one charge amounts to an acquittal on other charges being tried simultaneously, *State v. Taylor*, 37 N.C. App. 709, 246 S.E. 2d 834, *further review denied*, 295 N.C. 737, 248 S.E. 2d 866 (1978), we are of the opinion that, in the instant case, the verdict forms given to the jury sufficiently identified and differentiated each charge so as to prevent confusion and led to the correct result. As seen above, the only offenses submitted to the jury dealing with assault were assault on a law enforcement officer with a firearm and the charge of assault with a deadly weapon with intent to kill (and its appropriate lesser included offenses). The possible verdicts as to each of these two offenses were explained to the jury and submitted separately. With respect to the charge against each defendant under G.S. 14-34.2, the trial judge instructed as follows:

> Now, I charge that for you [the jury] to find the defendant guilty of an assault with a firearm upon a law enforcement officer while such officer was in the performance of his duties, the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant . . . assaulted [a law enforcement officer] . . . .
>
> Second, that the defendant . . . used a firearm.
>
> Third, that [the victim] was a law enforcement officer . . .
>
> And fourth, that [the law enforcement officer] *was in the performance of his duties.* (Emphasis added.)

We believe that, notwithstanding the absence of each element being included in the form verdicts submitted to the jury, the offenses which the jury were to consider were sufficiently identified. We find no requirement in G.S. 15A-1237 requiring that written verdicts contain each element of the offense to which they refer. We, therefore, hold that the verdict forms submitted were sufficient to identify the offenses charged and to support the verdicts of guilty and subsequent judgment and commitment thereon. Defendants' assignment of error is, therefore, overruled.

[5] Defendants next assign error to the trial court's failure to grant their motion for special instructions concerning their alleged unlawful arrest. In North Carolina, it is well settled that a person may resist an unlawful arrest by the use of commensurate force under the circumstances. *State v. Anderson,* 40 N.C. App. 318, 253 S.E. 2d 48 (1979). Where such evidence is present at trial, the trial court is under a duty, upon motion by a defendant, to make a requested instruction. *State v. Anderson, supra.* In the case before us, however, there is no evidence which would compel a trial judge to charge the jury as defendants requested. The evidence indicates that Officers Lockamy and Matthews went to defendants' residence for the purpose of serving an arrest warrant on Robert Earl Partin for the offense of larceny. Neither defendant contests the validity of the war-

rant. Evidence tended to show that Officer Lockamy approached defendants' residence, knocked on the door, and announced his presence and intention to serve an arrest warrant on defendant Robert Earl. Concerning his initial confrontation with defendants in the hallway of defendants' house, Officer Lockamy testified: "I had the warrant in my hand with Robert Earl on it. I glanced at it. I told Robert Earl I had a warrant for his arrest." It was after this statement was made that the fighting occurred. From our review, we find no evidence that sustains defendants' plea of self-defense based on the officers' allegedly attempting an illegal arrest or their using excessive force in the execution of that arrest. Absent any evidence to support such a contention, the trial judge need not give a requested instruction on that point. *State v. Anderson, supra.* We overrule this assignment or error.

By assignment of error No. 18, defendants contend that the trial court erred by denying their motion to dismiss the assault charges against them at the end of the State's evidence. It will serve no useful purpose to review again all the evidence presented by the State on the charges issued against defendants. Suffice it to say that the evidence is plenary in support of the submission of both charges of assault, under G.S. 14-32(a) and (c) and G.S. 14-34.2, to the jury for consideration and decision. The evidence having been sufficient to support a reasonable inference of defendants' guilt, nonsuit was improper. *State v. Smith,* 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

With the exception of the arrest of judgment upon guilty verdicts as to assault with a deadly weapon, we conclude and so hold that defendants received a fair trial free from prejudicial error. We have no reasonable basis upon which to believe, even if errors were committed in the exclusion of certain evidence as ruled by the trial judge, a different result would have been reached. *State v. Hunt,* 289 N.C. 403, 222 S.E. 2d 234, *death sentence vacated,* 429 U.S. 809, 50 L. Ed. 2d 69, 97 S. Ct. 46 (1976). Defendants' remaining assignments of error are, therefore, overruled.

Assault on a law enforcement officer with a firearm — no error.

Assault with a deadly weapon — judgment arrested.

Judges PARKER and WELLS concur.

BEECH MOUNTAIN PROPERTY OWNER'S ASSOCIATION, INC., AND EUGENE BRADSHAW AND VIRGINIA D. BRADSHAW, PLAINTIFFS V. CURT SEIFART, SR. AND HARRIETTE N.W. SEIFART, DEFENDANTS; BEECH MOUNTAIN PROPERTY OWNER'S ASSOCIATION, INC., AND CHARLES E. BLACK, PLAINTIFFS V. FRED J. COLLINS, JR., AND SHIRLEY COLLINS, DEFENDANTS; BEECH MOUNTAIN PROPERTY OWNER'S ASSOCIATION, INC., AND JOHN DORRIER AND NANCY DORRIER, PLAINTIFFS V. THOMAS F. MOORE, JR., AND GEORGE K. CUTTER, DEFENDANTS

No. 7924DC900

(Filed 19 August 1980)

1. **Deeds § 20– assessment covenants – indefiniteness – unenforceability by property owners' association**

Covenants in deeds to owners of lots in a recreational development requiring the owners to be members of a property owners' association and to pay to the association "reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas," "reasonable annual assessment charges for road maintenance, recreational fees, and other charges assessed by the Association," or "all dues, fees, charges, and assessments made by that organization, but not limited to charges for road maintenance, fire protection, and security services" *are held* not sufficiently definite and certain to be enforceable, since the covenants contain no sufficient standard by which to measure the amount of a lot owner's liability for assessments, and none of the covenants identifies with particularity the property to be maintained.

2. **Deeds § 20– assessment covenants – indefiniteness not cured by articles of incorporation of property owners' association**

Even if purchasers of lots in a recreational development had constructive notice of the contents of the articles of incorporation of a property owners' association for the development, indefiniteness in assessment covenants in deeds to the purchasers was not cured by statements in the articles of incorporation that the association was organized for the purpose of establishing "reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas" and to serve as advisor to the developer "on desires of the property owners for: road improvements, skiing, golfing, swimming, private club and/or any other type recreational programs" since the statements in the articles of incorporation were equally

as indefinite as the covenants themselves. Nor could an amendment to the articles of incorporation make definite the assessment covenants which were incorporated in deeds to purchasers years before the amendment was adopted.

APPEAL by plaintiffs from *Braswell (J. Ray), Judge.* Judgment entered 18 May 1979 in District Court, WATAUGA County. Heard in the Court of Appeals 24 March 1980.

In these three cases, which were consolidated for hearing both at trial and on this appeal, plaintiffs seek recovery of unpaid assessments which they contend are owed by defendants, property owners at Beech Mountain, to the Beech Mountain Property Owners' Association, Inc.[1] The cases were heard on motions for summary judgments. Documentary evidence, affidavits, and stipulations presented in support of the motions show the following:

In the late 1960's, Carolina Caribbean Corporation, owner of large tracts of land around Beech Mountain in Watauga and Avery Counties, N.C., began development of the area. Plats were prepared and lots were thereafter sold by the developer subject to one of three sets of recorded "Declarations of Restrictions." These three, as they related to assessments, provided as follows:

1. Assessment provision applicable to lots in Ski-Way Tract, Beech Mountain Subdivision:

> It is agreed that as soon as a sufficient number of lots have been sold in this development a property owners association, to be known as the "Beech Mountain Property Owners' Association," shall be formed with one mem-

[1]Earlier cases brought by the Property Owners' Association to collect the assessments were dismissed because the Association was not then a property owner and therefore lacked capacity to enforce the covenants under which the assessments were imposed. *Property Owners' Assoc. v. Current* and *Property Owners' Assoc. v. Moore*, 35 N.C. App. 135, 240 S.E. 2d 503 (1978). Prior to instituting the present cases the Association acquired property at Beech Mountain; in addition, individual land owners at Beech Mountain have joined as plaintiffs in each of the present cases.

bership for each property owner and that this Association in conjunction with the Company shall establish reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas; it being understood that the Company shall exercise only one vote in this Association.

The defendants Seifart in Case No. 78CVD226 own a lot in the Ski-Way Tract to which this provision is applicable, having acquired title by deed dated 25 August 1970 from the developer, Carolina Caribbean Corporation.

2. Assessment provisions applicable to Condominium Sites:

It is agreed that each unit owner will join the "Beech Mountain Property Owners' Association" and shall maintain such membership so long as he owns the property, and shall pay reasonable annual assessment charges for road maintenance, recreational fees, and other charges assessed by the Association. For purposes of said Association, each unit owner shall be considered a property owner and entitled to one (1) vote, with each unit being entitled to a separate vote and subject to separate assessments, even if more than one unit is owned by one individual.

The defendants Collins in Case No. 78CVD255 own a condominium unit to which this provision is applicable, having acquired title by deed dated 15 March 1973.

3. Assessment provision applicable to Chalet Sites:

The owner of any lot subject to these restrictions shall join the Beech Mountain Property Owners' Association, and shall pay all dues, fees, charges, and assessments made by that organization, but not limited to charges for road maintenance, fire protection, and security services. The failure to pay these charges shall result in a lien upon the lot subject to foreclosure.

The defendants Moore and Cutter in Case No. 79CVD105 own a lot to which this provision is applicable, having acquired title by

deed dated 7 December 1972 from the developer, Carolina Caribbean Corporation.

In July 1970 Articles of Incorporation were issued for Beech Mountain Property Owners' Association which stated that the purposes for which the corporation was organized were:

> a. In conjunction with the Company (Carolina Caribbean Corporation, Beech Mountain) shall establish reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas.
>
> b. Act as a mediation board for grievances between property owners and the corporation.
>
> c. Advisory to the corporation on desires of the property owners for: road improvements, skiing, golfing, swimming, private club and/or any other type recreational programs.
>
> d. To improve and enhance Beech Mountain as a resort and recreation area.
>
> e. To promote association, friendship, understanding and cooperation among all members of the association.
>
> f. To promote and foster activities and programs of benefit to members and their families.

On 4 November 1975 Amended Articles of Incorporation were issued which stated the corporate purposes to be:

> (1) To promote the health, safety, and welfare of the property owners, residents and guests within Beech Mountain Resort, located in Watauga and Avery Counties, North Carolina, including all property heretofore or hereafter developed as a part of said Resort by Carolina Caribbean Corporation or its successors or assigns (which said property is hereinafter referred to as "the community").
>
> (2) To own, acquire, build, operate and maintain recreation parks, playgrounds, golf courses, swimming pools, boating,

swimming, and fishing lakes, tennis courts, ski slopes and lodges, clubhouses, and such other facilities as the members may desire, including the common grounds, footpaths, roads and streets within the community.

(3) To arrange on a collective basis for fire and security protection; street, landscape, drainage, recreation facility and other common areas maintenance; snow, garbage and trash removal and disposal, and for any other common service or facilities which the members may consider desirable.

(4) To fix assessments or charges to be levied against the members for providing said services and facilities, which assessments, if unpaid, are to become a lien on the land in the community of the member not making such payments, pursuant to the various Declarations of Restrictions as are applicable to the various property in the community.

At the times the several defendants took title to their respective properties, the developer, Carolina Caribbean Corporation, handled assessment for maintenance of roads and recreational areas, and the Property Owners' Association collected and retained membership dues only. In 1974, upon Carolina Caribbean Corporation's recommendation, the Property Owners' Association itself imposed a road maintenance assessment for developed lots of $50 per year, a road maintenance, fire and security assessment of $100 for lots with dwellings and condominium units, and a recreational maintenance assessment of $100 per lot. The Association also established dues of $10 per year and an assessment of $5 per month per dwelling or condominium for garbage collection.

The following year, 1975, Carolina Caribbean Corporation began experiencing severe financial difficulties, and it was necessary for the Property Owners' Association to take a more active role in supporting the development. In February 1975 Carolina Caribbean Corporation filed for corporate reorganization under Chapter X of the Bankruptcy Act and a trustee in bankruptcy was appointed in March 1975. At that time all recreational facilities at the Beech Mountain development, in-

cluding the ski slopes, the golf course, tennis courts, and swimming facilities were owned by Carolina Caribbean Corporation and came under the control of the trustee in bankruptcy. During the winter of 1975-1976 the Property Owners' Association entered into a short term lease with the trustee of the bankrupt developer so that the ski facilities could be operated during the ski season. Because there were sufficient revenues available from the previous year's assessments, no changes were made in the 1975 annual assessments.

When the Property Owners' Association was advised for the fiscal year 1975-1976 that it would recieve no further support from the bankrupt developer, the Property Owners' Association increased membership dues from $10 to $20, and increased the assessment for road, fire, and security by $50 for improved lots. The same assessment schedule was approved by the Association for the fiscal years 1976, 1977, and 1978.

The parties stipulated:

> The following is a list of the real property and amenities which have been deeded to the Beach Mountain Property Owners' Association, Inc. (hereinafter referred to as BMPOA) by R. O. Hutchison, as Trustee for the bankrupt developer, Carolina Caribbean Corporation:
>
> (A) The Beech Mountain Golf Course consisting of one eighteen (18) hole golf course on one hundred twenty (120) acres.
>
> (B) A 2.119 acre tract adjoining the golf course and known as the Beech Mountain Golf Course Clubhouse.
>
> (C) A 13.25 acre tract known as the Tennis Court property consisting of eight (8) paved tennis courts, a swimming pool with snack bar, and pro shop.
>
> (D) A 2.08 acre tract upon which is located the corporate offices of the Beech Mountain Property Owners' Association, Inc., and Beech Mountain Security and the maintenance operations of the Beech Mountain Property Owners' Association, Inc.

(E) Several tracts in Avery and Watauga County, consisting of the Beech Mountain Utility Corporation which provides water and sewer services for Beech Mountain. The water and sewer operations consist of:

(1) Two (2) well sites.

(2) A storage tank area consisting of a 200,000 gallon tank, a 65,000 gallon tank and a pumping station.

(3) The Pond Creek Waste Water Treatment Plant.

(4) The Grassy Gap Waste Water Treatment Plant.

(5) Lake Coffey (approximately twelve (12) acres) and adjoining water treatment plant.

(6) Tamarack Water Treatment Plant and adjoining lake (one (1) acre).

(7) The Skiloft Storage Tank Site, consisting of a twenty three thousand (23,000) gallon storage tank and pump.

(8) The Cliffs Water Storage Tank site consisting of an eight thousand (8,000) gallon tank.

(9) The Mariah Pump Station and pump.

(10) A tank site off S.R. 1331 consisting of a one hundred thousand (100,000) gallon storage tank and pump.

(11) All utility easements and rights-of-way over, through and under the property and roads located on Beech Mountain.

(12) All personal property used in the operation and maintenance of the Beech Mountain Utility Corporation.

The above stated tracts of land and personal assets have been transferred to the Beech Mountain Utility Corporation. The Beech Mountain Utility Corporation was

formed by the BMPOA Inc. and the BMPOA Inc. is the sole shareholder of the corporation.

* * * * *

(H) The BMPOA Inc. maintains and operates fifty-eight (58) miles of gravel roads within the Beech Mountain resort complex, and eighteen (18) hole golf course, a swimming pool, tennis courts, hiking trails, a security system, and supports a fire department with assessments paid by its members and income derived from its assets and operations.

(I) The tennis courts, swimming facilities, golf course and the clubhouse facilities are for the exclusive use of the members of the BMPOA Inc. in good standing and their guests; however, the public is invited to use the golf course in Spring and Fall when golf course use is less than capacity at a rate in excess of use charge to members. With respect to any facilities which the general public might use, such as the ski facilities, the public is charged a use rate in excess of the charge to a BMPOA Inc. member in good standings. The BMPOA Inc. provides no support for operation and maintenance of the ski facilities.

* * * * *

(T) The Beech Mountain Property Owners' Association, Inc. paid the following amounts for the amenities:

(a) Golf Course	$600,000.00
(b) Golf Course Clubhouse	100,000.00
(c) Recreation areas (Tennis Courts, Swimming Pool)	100,000.00

Approximately 2700 property owners at Beech Mountain pay membership dues and annual assessments to the Beech Mountain Property Owners' Association, Inc. Defendants

Seifart paid such membership dues and assessments for the fiscal years 1973-1974 and 1974-1975, but did not pay such dues and assessments thereafter. Records maintained by the Association indicate that defendants Seifart owe $874.85 for annual assessments for the years 1975-1976, 1976-1977, and 1977-1978. Defendants Collins and defendants Moore and Cutter have never paid any membership dues or assessments to the Association. Records of the Association indicate that defendants Collins owe $1,088.19 for annual assessments for the years 1974-1975, 1975-1976, 1976-1977 and 1977-1978, and defendants Moore and Cutter owe $286.59 for the years 1976-1977 and 1977-1978.

The Beech Mountain Property Owners' Association, Inc. has provided road maintenance, security patrol, fire protection, and garbage removal to defendants' homes, as well as maintaining its own facilities, even though the defendants have paid no assessments to the Association.

The district court granted defendants' motions for summary judgment. From judgment dismissing the actions, plaintiffs appeal.

Finger, Watson & di Santi by C. Banks Finger and Anthony S. di Santi; Poyner, Geraghty, Hartsfield & Townsend by John J. Geraghty and Cecil W. Harrison, Jr. for plaintiff appellants.

Clement & Miller by Paul E. Miller, Jr.; Smith, Moore, Smith, Schell & Hunter by David M. Moore, II for defendant appellees.

PARKER, Judge.

[1] The issue raised by this appeal is whether the covenants upon which the Property Owners' Association relies to assess defendants are sufficiently certain and definite to be enforceable. We hold that they are not. Accordingly, we do not address the question whether the covenants run with the land so as to be enforceable by parties other than the original grantor, Carolina Caribbean Corporation.

It is, of course, true that "[a] grantee, who accepts a deed

containing otherwise valid covenants purporting to bind him, thereby becomes bound for the performance of such covenants." *Cummings v. Dosam, Inc.*, 273 N.C. 28, 31, 159 S.E. 2d 513, 516 (1968). However, just as covenants restricting the use of property are to be strictly construed against limitation on use, *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954), and will not be enforced unless clear and unambiguous, *Hullett v. Grayson*, 265 N.C. 453, 144 S.E. 2d 206 (1965), even more so should covenants purporting to impose affirmative obligations on the grantee be strictly construed and not enforced unless the obligation be imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application. While counsel on this appeal have cited no decision of our own Supreme Court, and our own research has disclosed none, which has discussed the standard properly applicable in determining whether a particular covenant involving future assessments is sufficiently definite to be enforceable, courts of other states which have considered the question have stressed the necessity for some ascertainable standard contained in the covenant by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant. *Compare Kell v. Bella Vista Vil. Prop. Owners Ass'n.*, 258 Ark. 757, 528 S.W. 2d 651 (1975) and *Rodruck v. Sand Point Maintenance Commission*, 48 Wash. 2d 565, 295 P. 2d 714 (1956) with *Peterson v. Beekmere, Incroporated*, 117 N. J. Super. 155, 283 A. 2d 911 (1971). Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard.

Examining the three covenants at issue in the present case, we find no sufficient standard by which to measure the defendants' liability for assessments. None of the covenants identifies with particularity the property to be maintained. The first covenant, being the one incorporated by reference into the deeds for lots in the Ski-Way Tract of the Beech Mountain subdivision, refers to "reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas," and the two other covenants refer more

generally to assessments for "road maintenance." Although the parties stipulated that as of 2 May 1979 the Property Owners' Association was maintaining fifty-eight miles of gravel roads within the resort complex, as well as hiking trails, nothing in the record reflects that any of the defendants could have known at the time they accepted their deeds what roads or trails would be required to be maintained with revenues from assessments. Even more important is that there is nothing in the covenant which can guide the court should it be called upon to review the determination by the Property Owners' Association as to what particular roads and trails it elects to maintain. Two of the covenants refer to assessment charges for "recreational fees" or "recreational areas," but again no specific recreational areas are either described or referred to which are to be maintained. Even though Carolina Caribbean Corporation owned certain recreational facilities at Beech Mountain at the time the defendants acquired title to their lots, the covenants do not refer specifically to those facilities or require that the assessments be used to maintain those particular facilities.

[2] Further, even if it be assumed that the defendants and others who purchased property at the time the original Articles of Incorporation of the Beech Mountain Property Owners' Association were on record had constructive notice of their contents, the statement in those articles of the purposes for which the Association was organized is equally as indefinite as the covenants themselves. They recite in pertinent part that the Association was organized for the purpose of establishing "reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas," and to serve as adviser to Carolina Caribbean Corporation "on desires of the property owners for: road improvements, skiing, golfing, swimming, private club and/or any other type recreational programs." The subsequently adopted amendment to the Articles of Incorporation states the purposes in far greater detail, but such amendment cannot make definite the assessment covenants which were incorporated into defendants' deeds years before the amendment was adopted. Indeed, the very breadth of corporate purposes stated in the amendment and the wide-ranging activities engaged in by the Property Owners' Association under authority of its amended charter furnish

strong evidence that there is no clearly defined limiting standard by which the court can determine whether the assessment made in any particular year against any particular property owner is authorized both as to amount and purpose by the covenant applicable to his property.

It may well be that the Property Owners' Association performs a desirable function and that its activities enhance the value of all properties within its area of service. That, however, furnishes no sufficient basis for the court to decree enforcement of the assessments here in question.

Affirmed.

Chief Judge MORRIS and Judge HILL concur.

JOE K. MACE, D/B/A JOE K. MACE PLUMBING COMPANY, PLAINTIFF v. BRYANT CONSTRUCTION CORPORATION: V-Z TOP, LTD. AND ITS GENERAL PARTNER, DAVID H. HEAD; JACK E. BRYANT, INC., DEFENDANTS; GREAT AMERICAN MORTGAGE INVESTORS; GREAT AMERICAN MANAGEMENT & INVESTMENT; GREAT AMERICAN PROPERTIES — GEORGIA, INC.; MOR PROP, INCORPORATED; INTERMONT, INC.; JAMES P. FURNISS, TRUSTEE; ALEXANDER R. MEHRAN, TRUSTEE; RICHARD T. RODGERS, TRUSTEE, ADDITIONAL DEFENDANTS AND GREAT AMERICAN MORTGAGE INVESTORS; GREAT AMERCIAN MANAGEMENT & INVESTMENT; AND GREAT AMERICAN PROPERTIES — GEORGIA, INC. THIRD PARTY PLAINTIFFS v. LAWYERS TITLE INSURANCE CORPORATION AND SOUTHERN TITLE INSURANCE COMPANY, THIRD PARTY DEFENDANTS

No. 7930SC248

(Filed 19 August 1980)

1. **Laborers and Materialmen's Liens § 3– general contractor's waiver of right to file lien – no lien of subcontractor**

There was no genuine issue of material fact as to plaintiff subcontractor's claim to a lien on land pursuant to G.S. 44A-23, since, long before plaintiff filed any claim of lien, the general contractor waived its right to file a materialmen's lien against the property; plaintiff as subrogee had no greater rights than the general contractor to whom he was subrogated; and plaintiff therefore had no right to a lien on the realty.

2. **Laborers' and Materialmen's Liens § 3– no money owed general contractor – no abandonment of contract – no lien of subcontractor**

There was no material issue of fact as to plaintiff subcontractor's claim to a lien upon funds owed to the general contractor under G.S. 44A-18(1) where plaintiff made no showing in opposition to the verified statement of the owner and the general contractor that no funds were owed to the general contractor for work actually performed as of the date the general contractor and owner received notice of plaintiff's claim of lien, and plaintiff made no showing that the general contractor abandoned its contract after that date, thereby depriving plaintiff of sums which became due.

3. **Fraudulent Conveyances § 2– subcontractor not entitled to lien – no standing to attack conveyance as fradudulent**

The trial court properly granted summary judgment for defendants on plaintiff subcontractor's claim that the conveyance of land on which he claimed a lien was fraudulent as to plaintiff as a creditor, since plaintiff was not entitled to a lien on the property; plaintiff had no privity of contract with defendant owners; and plaintiff, a mere stranger, therefore had no legal standing to attack the conveyance as fraudulent.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment signed 4 December 1978 in Superior Court, MACON County. Heard in the Court of Appeals 12 November 1979.

This civil action was commenced on 30 December 1974 by plaintiff Mace against defendants Bryant Construction Corporation, V-Z Top, Ltd. and Jack E. Bryant, Inc. to recover amounts due under a construction contract and to enforce a labor lien. In his complaint plaintiff alleged the following: On or about 11 April 1973 plaintiff entered into two contracts with defendant Bryant Construction Corporation (Bryant Construction) to perform plumbing services on a job site on which Bryant Construction was the general contractor. Defendants V-Z Top, Ltd. and Jack E. Bryant, Inc. were the owners of the real property being improved. On that date plaintiff began furnishing labor and materials to the job site in Macon County and continued to do so "through the month of June 1974, and thereafter." On 26 August 1974 plaintiff filed a notice of claim of lien in the office of the Clerk of Superior Court in Macon County, the county in which the subject real property was located. Plaintiff performed his obligations under the contracts with Bryant Construction, the general contractor, but the amount of $20,213.99 was still due and owing to him from defendants. Plaintiff prayed that he recover the amount of $20,213.99 plus

interest and that the judgment be declared a lien on any funds owed or paid by defendant real property owners to Bryant Construction and on the assets of the defendants.

Between the time of filing of the complaint and 13 January 1977 when defendants filed answer, several conveyances of the subject real property took place. On 1 April 1974 V-Z Top, Ltd. had already conveyed its right, title and interest in the property to Jack E. Bryant, Inc., and on 16 July 1975, defendant Jack E. Bryant, Inc. conveyed the property to Great American Properties-Georgia, Inc. (GAP-Ga.). On 23 April 1976 GAP-Ga. conveyed the same property to Mor Prop, Incorporated, a wholly-owned subsidiary of Morgan Guaranty Trust Company. After the defendants filed answer on 13 January 1977, the property was conveyed by Mor Prop, Inc. to Intermont, Inc., on 26 May 1977.

On 13 January 1977 defendants filed answers in which they denied the material allegations of plaintiff's complaint. Defendant Bryant Construction alleged as a defense that plaintiff Mace abandoned performance of work on the job site causing defendant to suffer damages in the amount of $3,062.14, which amount defendant claimed it was entitled to recover.

On 19 July 1977 defendants V-Z Top, Ltd. and Jack E. Bryant, Inc. moved for judgment on the pleadings on the grounds that the complaint failed to allege any contract between plaintiff and defendant owners so as to render them liable. The motion was denied and, thereafter, plaintiff Mace filed an amended complaint with leave of court, in which he incorporated the allegations of the original complaint and alleged the existence of a contract between defendant Bryant Construction and defendant property owners for the improvement of the real property which was the subject of plaintiff's contract with defendant Bryant Construction. In his amended complaint plaintiff Mace alleged that Bryant Construction had abandoned its work as general contractor prior to completion of its contract with defendant owners, and that the value of the remaining contract constituted "funds" within the meaning of Chapter 44A of the General Statutes such that the release of the contract by defendant owners rendered them personally

liable. Plaintiff, as a subcontractor within the meaning of Chapter 44A of the General Statutes, sought a lien on the real property by virtue of subrogation to the lien of the general contractor to the extent of the amount owed by the general contractor to Mace, and also by virtue of the personal liability of defendant owners to plaintiff.

Plaintiff Mace stated an additional claim against defendants to have the 1975 conveyance of the subject real property from defendant owners to GAP-Ga. canceled and set aside on the grounds that it was without consideration and constituted a preference against creditors.

On 6 September 1977 plaintiff Mace filed a complaint joining as additional parties defendant, Great American Mortgage Investors (later Great American Management and Investment (GAMI)), as mortgagee of the property; and GAP-Ga. and Intermont, Inc., as owners of the improved realty subsequent to the original defendant owners. In addition, plaintiff joined the trustees under a deed of trust executed by the original defendant owners to GAMI on 17 April 1973 and the trustee under a purchase money deed of trust dated 6 May 1977 and executed by Intermont, Inc. securing a debt of $392,500.00 to Mor Prop, Inc.

The original defendants answered the amended complaint, admitting the contracts between plaintiff and defendant Bryant Construction and between Bryant Construction and owners Jack E. Bryant, Inc. and V-Z Top, Ltd. for the improvement of the Macon County property, and admitting the performance of work on the property by Bryant Construction during the summer of 1974, but denying the allegations upon which plaintiff's claims for a lien on the real property was based. In their answer, defendants GAMI, GAP-Ga., and the trustee under GAMI's deed of trust also denied the material allegations on plaintiff's amended complaint. Defendants Intermont, Inc. and the trustee under Intermont's deed of trust to Mor Prop, Inc. denied plaintiff's allegations that the conveyance from Jack E. Bryant, Inc. to GAP-Ga., its predecessor in interest, was fraudulent, and alleged that if that conveyance was fraudulent, Intermont was a purchaser for value and without notice.

Thereafter, on 12 April 1978 defendants GAP-Ga., and GAMI filed a third-party complaint against Lawyers Title Insurance Corporation and Southern Title Insurance Company to recover the amount of an indemnity deposit which GAMI had given to Lawyers Title prior to the 23 April 1976 conveyance from GAP-Ga. to Mor Prop, Inc. to cover potential liability for plaintiff Mace's claim of lien. Southern Title had originally issued a mortgagee's title insurance policy to GAMI on 20 April 1973 to insure the lien of GAMI's deed of trust. After the filing of the third-party complaint, Lawyers Title deposited the amount of the indemnity deposit, $25,208.00, with the Clerk of Court of Macon County pending the resolution of plaintiff's suit.

On 12 July 1978 defendants Intermont, Inc. and the trustee of its deed of trust to Mor Prop, Inc. moved for partial summary judgment on the grounds that they were entitled to judgment as a matter of law on plaintiff Mace's fraudulent conveyance claim. On 21 November 1978, GAMI, GAP-Ga., and Southern Title filed a motion for summary judgment on the grounds that they were entitled to judgment as a matter of law on plaintiff Mace's claim to a lien on the improved realty and on plaintiff's fraudulent conveyance claim. In support of their motion, those defendants submitted an affidavit signed on 17 April 1973 by the general partner of V-Z Top, Ltd. and the president of Jack E. Bryan, Inc. and Bryant Construction in which Bryant Construction waived its right to file a claim of lien against the subject property.

Following a hearing on the motions of Intermont, Inc. and of GAMI, GAP-Ga., and Southern Title, the trial judge entered an order concluding that there was no genuine issue of material fact on the issue of plaintiff Mace's claim to a statutory lien on the real property under Chapter 44A of theGeneral Statutes or on the issue of plaintiff's fraudulent conveyance claim, and that defendants were entitled to summary judgment on each issue as a matter of law. The trial court further found that there was "no just reason for delaying entry of final judgment" on these two issues and ordered that the clerk of court release to Lawyers Title and GAMI jointly the amount of the indemnity deposit. From summary judgment in favor of defendants on his claim to a lien on real property and on his claim of fraudulent conveyance, plaintiff Mace appealed.

Jones, Jones & Key, P.A. by Richard Melvin for plaintiff appellant.

Siler & Philo, P.A. by Steven E. Philo; Bennett, Kelly & Cagle, P.A. by E. Glenn Kelly for defendant appellees Great American Mortgage Investors, Great American Management and Investment, Great American Properties-Georgia, Inc. and Southern Title Insurance Company.

Rodgers, Cabler & Henson by J. Edwin Henson for defendant appellees Intermont, Inc. and Lawyers Title Insurance Corporation.

PARKER, Judge.

We note at the outset that although the summary judgment adjudicated fewer than all of the claims involved in this suit, the trial court found that "there [was] no just reason for delaying entry of final judgment" on the lien claim or the fraudulent conveyance claim. The judgment was final as to those claims and immediate right of appeal lies therefrom. G.S. 1A-1, Rule 54(b); *see Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

It is well established that, upon a motion for summary judgment, the movant "has the burden of showing that there is no triable issue of fact and that movant is entitled to judgment as a matter of law." *Pitts v. Pizza, Inc.*, 296 N.C. 81, 86, 249 S.E. 2d 375, 378 (1978). The nonmovant does not bear the burden of coming forward with evidentiary material in support of his claim until the movant has offered evidence which negates that claim. *Butler v. Berkeley*, 25 N.C. App. 325, 213 S.E. 2d 571 (1975). Applying these principles to the present case, we hold that the trial court did not err in concluding as a matter of law that plaintiff was not entitled to a lien on the improved real property.

Article 2 of Chapter 44A of the General Statues grants to mechanics, laborers, and materialmen certain liens upon their compliance with the procedures defined in the Article. Within the statutory scheme of Article 2, defendant Bryant Construc-

tion, having entered into a contract for the improvement of real property with the property owners (then V-Z Top, Ltd. and Jack E. Bryant, Inc.), is a "contractor," G.S. 44A-17(1), and plaintiff Mace, having entered into a contract with the "contractor" for the improvement of the same realty, is a "first tier subcontractor." G.S. 44A-17(2). Because we hold that summary judgment was properly entered on the grounds that plaintiff Mace had no substantive right to a lien upon the real property, we do not consider the questions raised by the parties on this appeal as to whether the procedural requirements of Chapter 44A were met. Under Article 2 of Chapter 44A, a lien upon real property may arise either directly or by subrogation in favor of a first tier subcontractor who furnishes labor or materials at a job site. G.S. 44A-23 provides in pertinent part as follows:

> A first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter ... Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

This statute grants to a first tier subcontractor a lien upon improved real property based upon a right of subrogation to the direct lien of the general contractor on the improved real property as provided for in G.S. 44A-8. Because the subcontractor is entitled to a lien under G.S. 44A-23 only by way of subrogation, his lien rights are dependent upon the lien rights of the general contractor. *See* Urban & Miles, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority." 12 Wake For. L. Rev. 283 374-376 (1976). Thus, if the general contractor has no right to a lien, the first tier sucbontractor likewise has no such right. As the language of G.S. 44A-23 indicates, no action of the contractor will be effective to prejudice the rights of the subcontractor without his written consent "[u]pon the filing of the notice and claim of lien and the commencement of the action." Prior to that time, however, the general contractor is free to waive its lien rights and to bar effectively the subcontractor's rights by way of subrogation.

[1] Applying these principles in the present case, we hold that there is no genuine issue of material fact as to plaintiff's cliam to a lien on the land pursuant to G.S. 44A-23. In support of their motion for summary judgment, the moving defendants submitted a document entitled "Owner's and Contractor's Affidavit." That affidavit was executed on 17 April 1973, long before plaintiff filed any claim of lien, for the purpose of inducing defendant GAMI to loan funds to finance the development of the real property at issue. In that affidavit Jack E. Bryant, as president of Bryant Construction, expressly waived Bryant Construction's right, as general contractor, to file a materialman's lien against the property. Plaintiff Mace, as subrogee, has no greater right than the party to whom he is subrogated. *Montsinger v. White*, 240 N.C. 441, 82 S.E. 2d 362 (1954); *Dowdy v. R.R.*, 237 N.C. 519, 75 S.E. 2d 639 (1953). Thus, by virtue of the general contractor's waiver, plaintiff has no right to a lien on the realty pursuant to G.S. 44A-23

Apart from the lien rights afforded by G.S. 44A-23, a lien upon realty may arise directly in favor of a first tier subcontractor under G.S. 44A-18(1) and G.S. 44A-20. The right to such a lien, unlike the right to a lien under G.S. 44A-23, may arise without regard to whether the general contractor has waived its own lien rights. G.S. 44A-18(1) provides that a first tier subcontractor who furnishes labor or materials at a job site is entitled to a "lien upon funds which are owed [by the owner of the improved real property] to the contractor with whom the first tier subcontractor dealt." Once the first tier subcontractor gives notice of his claim of lien upon funds to the owner, the owner is thereafter "under a duty to retain any funds subject to the lien or liens under [Article 2 of Chapter 44A] up to the total amount of such liens as to which notice has been received." G.S. 44A-20(a). Under G.S. 44A-20(b) and (d), the first tier subcontractor lien claimant may thereafter acquire a lien upon the improved real property by virtue of the property owner's wrongful payment after receiving notice. Those provisions read in part as follows:

> (b) If, after the receipt of the notice to the obligor, the obligor shall make further payments to a contractor or subcontractor against whose interest the lien or liens are

claimed, the lien shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice was received prior to payment.

* * * * *

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a lien upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b) . . . .

[2] The initial questions raised with respect to G.S. 44A-18 and G.S. 44A-20 in the present case, therefore, are whether plaintiff Mace was entitled to a lien upon funds owed by the owners of the improved property to Bryant Construction, the general contractor and, if so, whether the owners wrongfully paid out funds to Bryant Construction after receiving notice of plaintiff's claim of lien such that a lien on the real property arose in favor of plaintiff to the extent of those payments under G.S. 44A-20(b) and (d). The record discloses that plaintiff Mace filed a claim of lien in the office of the Clerk of Superior Court in Macon County on 26 August 1974, but that notice of the claim of lien was not given to the original owner defendants until 4 October 1974. After defendants Jack E. Bryant, Inc. and V-Z Top, Ltd. received notice on 4 October 1974, G.S. 44A-20(a) imposed upon them the duty to retain any funds owed to Bryant Construction, the general contractor, up to the amount of the claimed lien, $20,213.99. If no funds were due on that date and no funds thereafter became due, no duty would be imposed upon the owners by G.S. 44A-20, and no lien upon the land could arise in plaintiff's favor. *See Builders Supply v. Bedros*, 32 N.C. App. 209, 231 S.E. 2d 199 (1977).

The materials before the court upon the defendants' motion for summary judgment included "admissions" filed by the original defendant owners in response to a "request for admissions" filed by codefendants GAMI, GAP-Ga., and the other

defendants to the effect that no funds were owed to Bryant Construction on 4 October 1974, the date notice of claim of lien was given. Although G.S. 1A-1 Rule 36(b) provides that admissions pursuant to a request for admissions under Rule 36(a) conclusively establish the facts admitted, that rule is inapplicable in the present case. The request for admissions was made to the original defendant property owners by their codefendants. Rule 36 was clearly not intended to permit codefendants who admit facts as between themselves to bind the plaintiff, the adverse party, to those facts as admitted. However, treating the admissions signed by the original defendant owners' attorney of record and verified on personal knowledge by Jack E. Bryant, president of Bryant Construction, as an affidavit, we conclude that it was appropriate for the court to consider it upon defendants' motion for summary judgment. G.S. 1A-1, Rule 56(e). In light of this affidavit, plaintiff Mace, as the party opposing the summary judgment motion, was required to "come forward with facts, not mere allegations, which controvert[ed] the facts set forth in the moving party's case." *Conner Co. v. Spanish Inns*, 294 N.C. 661, 675, 242 S.E. 2d 785, 793 (1978). This he failed to do.

Further, it is undisputed that because of Bryant Construction's abandonment of the contract, no funds could have become due after 4 October 1974 to which plaintiff's lien could have attached. Plaintiff contends, however, that because the record shows that Bryant Construction, the general contractor, is a wholly-owned subsidiary of Jack E. Bryant, Inc., one of the original property owners, he is entitled to a lien upon funds which would have become due to Bryant Construction had the parent not directed its subsidiary to abandon the contract. This contention is without merit. The first tier subcontractor's lien upon funds contemplated by G.S. 44A-18(1) is a lien upon funds "which *are owed*," and not upon funds which *might have been owed* had the contract been completed. (Emphasis added.)

In the absence of any showing by plaintiff in opposition to the verified statement of Jack E. Bryant, Inc. and Bryant Construction that no funds were owed to Bryant Construction for work actually performed as of 4 October 1974 or of any showing that Bryant Construction abandoned its contract after that

date, thereby depriving plaintiff of sums which became due, no material issue of fact existed to be resolved at trial upon plaintiff's claim to a lien upon funds owed to the general contractor under G.S. 44A-18(1). Without any claim to a lien upon funds owed, plaintiff can claim no lien upon the real property, G.S. 44A-20(d), since the existence of a lien upon the realty granted by G.S. 44A-20(d) is dependent upon the existence of a valid lien upon funds. *Builders Supply v. Bedros, supra.*

[3] The final question presented on this appeal is whether the court erred in granting summary judgment on plaintiff's claim that the conveyance from Jack E. Bryant, Inc. to GAP-Ga. on 16 July 1975 was fraudulent as to plaintiff as a creditor. Because of our determination that plaintiff was not entitled either to a lien upon funds under G.S. 44A-18, since none were owing or paid on or after 4 October 1974, or to a lien by way of subrogation under G.S. 44A-23, it is clear that entry of summary judgment was proper. The undisputed facts show that plaintiff entered into a contract with Bryant Construction and that Bryant Construction had a contract with the owners of the Macon County property. Any right which plaintiff had to claim an interest in the real property of defendant owners which could have been affected by the conveyance arose solely from the provisions of Chapter 44A. Absent the benefit of the provisions of that Chapter which would create a special debtor-creditor relationship between him and the owners, *see Foundry Co. v. Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916) (decided under prior lien law), and absent any privity of contract with the owners, *Wilkie v. Bray*, 71 N.C. 205 (1874), plaintiff, a mere stranger, has no legal standing to attack the conveyance as fraudulent.

For the reasons stated, summary judgment entered in favor of defendants on plaintiff's claim to a lien on real property and on his claim of fraudulent conveyance is affirmed.

Affirmed

Chief Judge MORRIS and Judge ERWIN concur.

TOMMY WILLIAMS v. HYATT CHRYSLER-PLYMOUTH, INC., AND CHRYSLER CORPORATION

No. 8010DC6

(Filed 19 August 1980)

1. **Sales § 8; Uniform Commercial Code § 10– warranty of car – action against manufacturer for breach – privity not required**

The absence of contractual privity does not bar a direct claim by an ultimate purchaser against a manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser; therefore, plaintiff's claim based on the express warranty given by defendant car manufacturer that it would repair defective parts was not barred by the absence of privity with the car manufacturer.

2. **Uniform Commercial Code § 11– warranty of car – warranties not limited – opinion evidence as to value of car – exclusion error**

In an action to recover damages for an alleged breach of warranty by a car dealer and a car manufacturer, the trial court erred in excluding testimony by plaintiff purchaser as to his opinion of the value of the car with its vibration problem on the date of purchase, since plaintiff's testimony concerning the nature of the vibration problem and testimony that he drove the car 40,000 miles before it was fixed furnished ample foundation upon which his opinion as to value could be based; and because the manufacturer did not state that the limited warranty of repair or replacement of parts was exclusive and in view of the statutory presumption that remedies are cumulative rather than exclusive, all remedies provided in the Uniform Commerical Code were available to plaintiff, with the exception of recovery of consequential damages, and such testimony was therefore relevant to the amount of damages to which plaintiff was entitled in the event breach of warranty was found. G.S. 25-2-719.

3. **Uniform Commercial Code § 26– warranty of car – breach – measure of damages – car repaired – computation of offest to damages**

In an action to recover damages for an alleged breach of warranty by a car dealer and car manufacturer, plaintiff, upon a showing of such breach, would be entitled to recover the difference between the value of the vehicle as accepted and the value of the vehicle had it been as warranted; however, to the extent that the successful elimination of the vibration problem increased the value of the vehicle, defendants should be entitled to offset the damages by an amount representing that increase in value, an amount which defendants should have the burden of proving. The amount of offset to damages would be most fairly computed by determining (1) what the hypothetical depreciated value of the vehicle would have been as of the date the repairs were completed had the vehicle been as warranted, and (2) what the depreciated value of the vehicle was in its defective condition as of that same date (not taking into account the repairs made). The difference between those two figures should reflect the amount of offset to damages which the warrantor could claim.

Williams v. Chrysler-Plymouth, Inc.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 31 October 1979 in District Court, WAKE County. Heard in the Court of Appeals 22 May 1980.

Plaintiff brought this action to recover damages for an alleged breach of warranty by defendants Hyatt Chrysler-Plymouth, Inc. (Hyatt) and Chrysler Corporation (Chrysler). He alleged the following in his complaint: On 26 August 1976 he purchased from Hyatt a 1976 Dodge Ramcharger automobile manufactured by Chrysler. The vehicle was expressly warranted to be free from defects in material and workmanship by Chrysler and impliedly warranted to be merchantable and fit for its intended use by Hyatt. In fact, the vehicle was defective in that it vibrated excessively at certain speeds and on certain road surfaces. Despite plaintiff's repeated requests that the defect be remedied, defendants had not successfully done so. Plaintiff alleged that defendants' efforts to limit available remedies were ineffectual since such remedies had failed of their essential purpose, and he prayed recovery of damages.

Defendant Chrysler admitted that it had issued a written Limited Warranty on all 1976 automobiles which it manufactured, but denied that any other warranty had been made or that any breach of the express warranty had occurred. Chrysler pleaded the absence of privity of contract between it and plaintiff as a bar to recovery and cross claimed against Hyatt, alleging that in the event plaintiff recovered against Chrylser, Chrysler was entitled to idemnification and/or contribution from Hyatt, the selling dealer.

Defendant Hyatt admitted in its answer that plaintiff had purchased the automobile from it, but alleged that any warranties made were those of Chrylser and not of the selling dealer. By way of cross claim defendant Hyatt sought indemnification and/or contribution from Chrysler should Hyatt be found liable to plaintiff.

Both defendants denied the allegations of the respective cross claims.

At trial before the judge without a jury, plaintiff presented the following evidence: He purchased the 1976 Dodge Ramchar-

ger from defendant Hyatt on 26 August 1976 for a purchase price of $6,372.00. The vehicle was manufactured by Chrysler, which furnished a Limited Warranty in connection with the sale of its vehicles stating in part that:

> FOR THE FIRST 12 MONTHS OF USE OR 12,000 MILES, WHICHEVER OCCURS FIRST, ANY CHRYSLER PLYMOUTH OR DODGE DEALER WILL FIX WITHOUT CHARGE FOR PARTS OR LABOR, ANY PART OF THIS VEHICLE WE SUPPLY (EXCEPT TIRES) WHICH PROVES DEFECTIVE IN NORMAL USE.
>
> * * *
>
> This is the only warranty made by Chrysler Corporation applicable to this vehicle.

Prior to the purchase, plaintiff test drove the vehicle and noticed that it had some vibration. He was told by Hyatt's salesman that the vibration was caused by the fact that the vehicle had been on the lot for some time and that the problem would soon remedy itself. After the purchase, plaintiff found that the vibration problem worsened instead of improved. He testified:

> In addition to the rough ride which was always present in some degree, the vehicle would sometimes begin to vibrate violently, shaking the steering column, the passenger and driver seats and the gearshift lever. The gearshift lever was shaken so violently by reason of these vibrations and shimmies that the gearshift broke from its mounting. This severe vibration or shaking or shimmying would occur intermittently. Sometimes the shimmying would start if I drove over a rough spot in the road. You could drive a good distance, maybe as much as 15-200 miles, and never encounter this severe shaking. I drove the car 6 miles to work every day and can't remember having the vehicle start to shake on the trips to work. Sometimes we'd think the problem had gone away. But then the problem would reappear.

Plaintiff took the vehicle back to Hyatt the day after the purchase to complain of the problem. During 1976 he and his wife

returned the vehicle to Hyatt six to eight times in order to have the vibration eliminated, and during 1977 he returned it six or seven times. In July or August 1977 plaintiff contacted Chrysler directly concerning his complaints and thereafter made eight trips to another Chrysler dealer recommended by the manufacturer. Finally, in November 1978, a Chrysler representative successfully eliminated the vibration problem. The vehicle was completely satisfactory to plaintiff after that date.

At the close of plaintiff's evidence, both defendants moved for an involuntary dismissal under Rule 41(b) of the Rules of Civil Procedure, which motions were denied. Defendant Chrysler then presented evidence to show that Chrysler had paid for numerous repairs to plaintiff's vehicle in an attempt to remedy the problem. At the time that the Chrysler representative first inspected the vehicle in October 1977, it had 20,872 miles on it. In the representative's opinion, plaintiff's problem was his tires. In November 1978 the Chrysler representative tested the car on rough terrain and on level road surfaces, but observed no vibration problem in excess of that normal with four-wheel drive vehicles. It was then determined that the vibration of which plaintiff complained was a "lateral and vertical shake which is characteristic of Ramchargers." Although the Chrysler representative did not consider this to be a defect in the vehicle, he thereafter authorized the installation of some body mount reinforcements to decrease the lateral movement.

At the close of all of the evidence, defendants renewed their motions for involuntary dismissal. The trial judge entered an order on 31 October 1979 in which he made findings of fact from which he drew the following conclusions of law:

> 1. Because of the delay between the date on which Plaintiff first complained to defendant Hyatt Chrysler-Plymouth, Inc. of excessive vibration and shaking and the time when said complaint was eliminated, the limited remedy afforded by the sales contract entered into between plaintiff and defendant Hyatt Chrylser-Plymouth, Inc. failed of its essential purpose.
>
> 2. As a consequence of such failure, implied warranties of fitness and merchantability arose by operation of law in

favor of plaintiff from defendant Hyatt Chrysler-Plymouth, Inc.

3. Such implied warranties to plaintiff were breached by defendant Hyatt Chrysler-Plymouth, Inc., and said defendant is liable to plaintiff for the damages suffered as a consequence thereof.

4. Plaintiff having failed to establish the amount of actual damages suffered as a consequence of said breach, he is entitled to nominal damages from defendant Hyatt Chrysler-Plymouth, Inc. in the amount of ONE DOLLAR ($1.00).

5. Plaintiff is entitled to recover of defendant Hyatt Chrysler-Plymouth, Inc. the sum of TWENTY-TWO DOLLARS AND EIGHTY FOUR CENTS ($22.84) for consequential damages.

6. There was no privity of contract between plaintiff and defendant Chrysler Corporation, and said defendant is therefore not liable to plaintiff.

The court entered judgment for plaintiff against defendant Hyatt in the amount of $23.84 plus interest and ordered that plaintiff recover nothing of defendant Chrysler.

Akins, Mann & Pike, P.A. by J. Jerome Hartzell for plaintiff appellant.

Corbett & Corbett by Albert A. Corbett, Jr. for defendant appellee Hyatt Chrysler-Plymouth, Inc.

Teague, Campbell, Conely & Dennis by George W. Dennis, III for defendant appellee Chrysler Corporation.

PARKER, Judge.

[1] The trial court concluded as a matter of law that Chrysler could not be held liable to plaintiff on the grounds that there was no privity of contract between plaintiff and defendant

manufacturer. In *Kinlaw v. Long Mfg.*, 298 N.C. 494, 259 S.E. 2d 552 (1979), our Supreme Court held that the absence of contractual privity no longer bars a direct claim by an ultimate purchaser against the manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser. Here, despite plaintiff's allegations of breach of implied warranties, the action was nevertheless also one based on the express warranty given by Chrysler that it would repair defective parts. The ruling in *Kinlaw*, therefore, controls, and the absence of privity does not bar plaintiff's recovery against the automobile manufacturer. The trial court erred in concluding to the contrary.

[2] In its judgment the trial court found as a fact that plaintiff had failed to establish any damage, other than consequential damage, resulting from the breach of warranty. Plaintiff assigns error to the exclusion of the following testimony which he contends would have permitted him to prove those damages. On direct examination of plaintiff, the following occurred:

> Q. "Mr. Williams, do you have an opinion satisfactory to yourself as to the value of the 1976 Dodge Ramcharger as of the date you purchased it and with the vibration problem to which you previously testified?"
>
> A. "Yes, I do."
>
> Q. "What is that opinion?"
>
> (Objection by defendant Hyatt Chrysler-Plymouth, Inc. and by defendant Chrysler, Corporation. Objection sustained. If permitted to answer the witness would have testified: "Approximately $2,500.")

The admissibility of this testimony depends upon whether it was relevant to the issues in the case and, if so, whether plaintiff was qualified to express such an opinion. We hold that the evidence was relevant and that the witness was qualified.

This action was brought upon the theory that defendant Chrysler Corporation had breached its express limited warran-

ty that any Chrysler dealer would fix, free of charge for parts and labor, any part of the vehicle which proved defective in normal use and that the circumstances of the case were such that defendants' efforts to limit plaintiff's remedies were ineffectual because such remedies had failed of their essential purpose. The relative rights and obligations of the parties to this suit are governed by the provisions of Article 2 of the Uniform Commercial Code, codified as G.S. Ch. 25. G.S. 25-2-316 expressly permits the seller to disclaim or modify any warranty obligation. G.S.25-2-719 permits the parties to a sales contract to modify or limit the remedy available in the event of breach of an obligation under the warranty. The latter section provides as follows:

> G.S. 25-2-719. *Contractual modification or limitation of remedy.* —
>
> (1) Subject to the provisions of subsections (2) and (3) of this section . . . .
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies . . . to repair and replacement of nonconforming goods or parts; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.
>
> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Although G.S. 25-2-316 and G.S. 25-2-719 are closely related, the former is directed to the creation of a limited *duty* under the warranty, *see* Official Comment 2 to G.S. 25-2-316, whereas the latter is directed to the limitation of the *remedy* available in the event of a breach of that duty. *See generally*, White and Summers, Uniform Commercial Code, § 12-9, pp. 377-378 (1972). In the present case Chrysler Corporation effectively limited its warranty obligation pursuant to G.S. 25-2-316 by agreeing as follows:

> FOR THE FIRST 12 MONTHS OF USE OR 12,000 MILES, WHICHEVER OCCURS FIRST, ANY CHRYSLER, PLYMOUTH OR DODGE DEALER WILL FIX WITHOUT CHARGE FOR PARTS OR LABOR, ANY PART OF THIS VEHICLE WE SUPPLY (EXCEPT TIRES) WHICH PROVES DEFECTIVE IN NORMAL USE.
>
> * * *
>
> This the only warranty made by Chrysler Corporation applicable to this vehicle.

Chrysler also limited the damages available to the buyer pursuant to G.S. 25-2-719 by specifying that:

> CHRYSLER CANNOT ASSUME RESPONSIBILITY FOR ... 4) EXCEPT WHERE PROHIBITED BY LAW, CONSEQUENTIAL DAMAGES SUCH AS: LOSS OF USE OF THE VEHICLE, LOSS OF TIME, INCONVENIENCE EXPENSE FOR GASOLINE-TELEPHONE, TRAVEL, OR LODGING-LOSS OR DAMAGE TO PERSONAL PROPERTY, OR LOSS OF REVENUE.

Whether testimony by plaintiff as to the fair market value of the 1976 Dodge Ramcharger was relevant to the issue of damages depends upon the exact extent to which Chrysler did limit the available remedies. In this respect, the distinction between G.S. 25-2-316 and G.S. 25-2-719 is significant. Subsection (b) of the latter provision, which states that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive" (emphasis added), creates a presump-

tion that, in the absence of a clear expression to the contrary, remedies are cumulative rather than exclusive. *See*, Official Comment 2 to G.S. 25-2-719. The Limited Warranty in the present case implies that repair or replacement of defective parts is a remedy available to the buyer. There is, however, no language in the warranty expressly stating that such a remedy is exclusive. In view of the statutory presumption that remedies are cumulative rather than exclusive, all remedies provided in the Code are available to the buyer in the present case, with the exception of recovery of consequential damages, which the warranty specifically limits. *See, Ford Motor Company v. Reid*, 250 Ark. 176, 465 S.W. 2d 80 (1971); *cf., McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A. 2d 253 (1975).

The general measure of damages for breach of warranty allowed under G.S. 25-2-714 is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." The buyer bears the burden of proving that difference in value. *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 267 S.E. 2d 919 (1980); *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 204 S.E. 2d 188 (1974). The record in the present case discloses that plaintiff knew within one day after the date of purchase that the vibration problem in his automobile had not been remedied. To the extent that plaintiff had that knowledge and yet took no affirmative action to reject the vehicle, *see* G.S. 25-2-602, but continued to use it, he accepted the goods at that time. G.S. 25-2-606. Thus, we conclude that testimony as to the value of the 1976 Dodge Ramcharger at the time plaintiff purchased it with the vibration problem on 26 August 1976 was relevant to the issue of the amount of damages to which plaintiff was entitled in the event breach of warranty was found.

We note that plaintiff here pleaded both the express warranty given by Chrysler as well as implied warranties allegedly arising by operation of law. Because Chrysler failed effectively to limit the remedy available to the buyer for breach of warranty other than to exclude consequential damages, it was not necessary to plaintiff's recovery of damages under G.S. 25-2-714 that he prove that any such limitation of remedies had failed of

its essential purpose within the meaning of G.S. 25-2-719(2). Even if there had been a limitation which failed of its essential purpose, that failure would not have altered either the scope of Chrysler's express warranty or its disclaimer of all implied warranties. The *remedy* alone in such case would fail, but the terms of the express warranty would remain intact.

Concerning plaintiff's competency to testify to his opinion as to the value of the vehicle at the time of acceptance, the general rule is that a non-expert witness who has knowledge of value gained from experience, information, and observation may give his opinion of the value of personal property. 1 Stansbury's North Carolina Evidence § 128 (Brandis Rev. 1973). Here, prior to being asked his opinion of the value of the vehicle with the vibration problem at the time of the purchase, plaintiff had testified at length concerning the nature of the vibration problem. He further testified that during the twenty-six months he owned the Ramcharger before the problem was fixed, he drove the car approximately 40,000 miles. This testimony furnished an ample foundation upon which his opinion as to value could be based, and the trial court erred in excluding that opinion. It was competent evidence of the fair market value of the vehicle in its condition at the time of acceptance, and the weight to be accorded it was for the trier of fact to determine. On the basis of the erroneous exclusion of that relevant evidence, plaintiff is entitled to a new trial.

[3] Because it cannot be known what the evidence will show at the new trial, we express no opinion as to the merits of plaintiff's cliam of breach of warranty against either defendant dealer or defendant Chrysler. For the guidance of the trial court in the event a breach is found, however, we discuss more fully the measure of damages to which plaintiff would be entitled. Because the limited warranty effectively bars plaintiff from recovering consequential damages, his sole remedy is the recovery of the difference between the value of the vehicle as accepted and the value of the vehicle had it been as warranted. G.S. 25-2-714(2). It is undisputed, however, that the vibration problem of which plaintiff complained was eventually eliminated by Chrysler Corporation representatives, albeit not until twenty-six months had elapsed from the date of purchase, long

after plaintiff had "accepted" the vehicle. To the extent that the successful elimination of the vibration increased the value of the vehicle, defendants should be entitled to offset the damages computed under the formulation in G.S. 25-2-714(2) by an amount representing that increase in value, an amount which defendants should bear the burden of proving. *See, Stutts v. Green Ford, Inc., supra.* Even if all defects in the vehicle have been cured, that increase in value would not restore the vehicle to its value as warranted *on the date of purchase*, since depreciation must be taken into account. Thus, the amount of offset to damages is most fairly computed by determining, first, what the hypothetical depreciated value of the vehicle would have been as of the date the repairs were completed had the vehicle been as warranted and, second, what the depreciated value of the vehicle was in its defective condition as of that same date (not taking into account the repairs made). The difference between those figures should reflect the amount of offset to damages which the warrantor could claim.[1]

For the errors noted, the judgment appealed from is vacated, and the cause is remanded for a

New Trial.

Judges HEDRICK and VAUGHN concur.

[1]By way of illustration, it may be assumed that X represents the fair market value of the vehicle had it been as warranted and Y represents the actual fair market value of the vehicle at the time of acceptance. If breach of warranty has occured, the purchaser is entitled under G.S. 25-2-714(2) to recover damages in the amount of $(X-Y). Assuming that after breach has occurred, the warrantor corrects the defects on Date A, he is entitled to offset $(X-Y) by the difference between X, reduced by the amount the vehicle would have normally depreciated as of Date A had the vehicle been as warranted, and Y, reduced by the amount the vehicle depreciated in its defective condition as of Date A. The formula may be expressed thusly: Total damages recoverable by purchaser: $(X-Y) — (depreciated X — depreciated Y).

State v. Haith

STATE OF NORTH CAROLINA v. JAMES BARRY HAITH

No. 8018SC105

(Filed 19 August 1980)

1. **Homicide § 30.3– failure to instruct on involuntary manslaughter**

The trial court in a murder prosecution did not err in failing to instruct the jury on involuntary manslaughter where all the evidence showed that defendant deliberately pointed a gun toward decedent or at least in the direction of decedent's feet and that defendant intended to pull the trigger when he shot deceased.

2. **Criminal Law § 86.5– impeachment of defendant – cross-examination about marijuana found on his person**

The trial court in a homicide case did not err in permitting the district attorney to cross-examine defendant for impeachment purposes concerning a bag of marijuana found on defendant's person at the time of his arrest.

3. **Criminal Law § 89.2– uncorroborative testimony – no prejudice**

Even if an officer's testimony as to certain statements made to him by a witness did not actually corroborate the witness, defendant was not prejudiced thereby where defendant and other witnesses testified to the same information contained in the statements and where the statements corroborated the testimony of a second witness.

4. **Constitutional Law § 74; Criminal Law § 48– impeachment of defendant – failure to tell officers he acted in self-defense**

The prosecutor's impeachment of defendant by cross-examining defendant about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack by deceased when he shot deceased did not violate defendant's rights under the Fifth or Fourteenth Amendments to the U.S. Constitution or Art. I, §§ 19 or 23 of the N.C. Constitution.

APPEAL by defendant from *Seay, Judge.* Judgment entered 30 August 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 June 1980.

Defendant James Barry Haith was indicted for first-degree murder of Johnny A. Shoffner on 10 February 1979. The jury returned a verdict of second-degree murder. Defendant was sentenced to not less than twenty-five (25) nor more than thirty (30) years in the State prison.

STATE'S EVIDENCE

At trial the State first presented the testimony of Denise Haith, aged 25, defendant's sister and the deceased's girl friend. She testified that on 10 February 1979, she was living with Johnny Shoffner, the deceased, at the Bethel Apartments in Gibsonville. On the evening of said date she and deceased were physically fighting in the upstairs bedroom, and she had deceased down on the floor by his hair. Lisa Summers came upstairs and Denise let go of Johnny's hair. Denise went downstairs but later went back up and hid in the bathroom. She heard defendant, her brother, call her name from the foot of the stairs but she did not respond because she was afraid. Defendant then left, and she and the deceased went downstairs. While they were sitting on the couch and no longer arguing, defendant came in again. Defendant was mad and asked deceased why he was beating on her. Ms. Haith then saw her other brother, Walter Lee Haith (hereinafter Lee), coming into the front door with a shotgun. She and a friend pushed him out the door, and the gun went off. Defendant then got the shotgun from Lee, left the apartment and fired it towards the air. She could not see the object at which he was shooting. Lee then retrieved the gun. On cross-examination Ms. Haith testified that on 10 February 1979 the deceased and several friends started drinking alcohol at 10:00 a.m. and drank for an hour. Deceased then went to bed until 4:00 p.m. and started drinking again with his relative, Brian, from 7:30 p.m. until 10:30 p.m. She further testified that she never heard defendant threaten the deceased and that she never saw defendant with a pistol. The deceased, however, had beaten her a number of times, and on that evening she pulled a knife on him in the kitchen, because she knew he was mad and had an "attitude." Deceased had broken a lamp while chasing her and thereby frightened the Summers girls who were in the apartment. She did not invite either of her brothers to her apartment that day.

Lisa Summers, aged 16, testified that she lives at the Bethel Apartments. At 8:00 p.m. on 10 February 1979, she visited Ms. Haith's apartment. While she was there, Ms. Haith and deceased started fighting; the deceased called her a "m_____f_____b_____," and the deceased threatened to kill her several times. They had a "scuffle" over a knife that Ms. Haith had wrapped in a towel. Ashtrays, a lamp, and a chair

were broken. Ms. Summers then went home and saw the defendant at her house. She told defendant that his sister and the deceased were fighting. Defendant then walked over to his sister's house and called her. He then left and returned about 10 minutes later with his brother Lee. She helped Ms. Haith shove Lee out the door when he tried to enter with a shotgun. When they pushed him, the gun went off. Defendant appeared completely sober on said evening.

Jill Summers, aged 19, testified that she was at Ms. Haith's apartment when defendant and Lee entered. She heard a gun go off outside and told deceased to leave by way of the back door. She then saw defendant enter and exit through the front door with the shotgun. She then heard the shotgun a second time. On cross-examination she testified that defendant was never in the deceased's presence in the apartment with a shotgun because the deceased had left with no shirt on. Defendant never threatened the deceased.

David Holt, a resident of Bethel Apartments, testified that on the evening of 10 February 1979 he heard a gunshot, looked out his window but didn't see anything; he put on his clothes, walked out the front door, and, after a few minutes, he saw the defendant run in and out of his brother's house. When defendant came out, the deceased started running toward the road. The defendant started running behind him. The deceased slipped twice and then fell down. One of deceased's shoes came off. The deceased then held his hand up and said, "Man, you got me. I ain't got nothing." The defendant pointed the gun at deceased's back and clicked the gun twice. The third time he clicked the gun, it went off. The defendant then returned to his apartment.

George Foust testified that he lives close to the apartments. On the night in question he also saw the defendant shoot the deceased as the deceased was running from him. Deceased "threw up his arms, kneeled down and then he fell back in the snow."

Officer Bruce Hutchins of the Gibsonville Police Department testified that he arrived at the apartments at 8:20 p.m. on

10 February 1979. He observed the deceased lying on his back in the street. At the scene Foust told him that defendant had shot the deceased after the gun had clicked three times.

Dr. Bruce Alexander, a pathologist, testified that he performed an autopsy on deceased on 11 February 1979. In his opinion deceased died from a .22 caliber bullet which pierced his heart and lungs. Deceased's blood alcohol content was equivalent to a .30 reading on a breathalyzer.

Sandra Kay Haith, defendant's niece, aged 15, testified that on the night of 10 February 1979 she was at her grandmother's (defendant's mother) house. Defendant rushed into the house, knocked her 16-year-old brother down, went upstairs, came back down, and rushed out the door. She then saw the deceased about two or three apartments down. The deceased saw defendant and then ran. Defendant started running toward the deceased. The deceased slipped and fell. Defendant then shot deceased after the gun clicked twice. The deceased was on his hands trying to get up and was "sideways" to the defendant when the defendant shot him. The gun was pointed in a downward direction when it went off.

DEFENDANT'S EVIDENCE

Defendant testified that on the evening in question he went to his sister's apartment and asked deceased why he was beating on his sister. The deceased came towards him muttering. Lee then entered the apartment with a shotgun, and deceased left. Defendant then left the apartment and started walking towards his own apartment. The deceased started running towards him and threatening to get him. Defendant ran into his apartment, obtained a revolver and then left his apartment to "get his fiancee" who was at another apartment. When he exited his apartment, he saw deceased at least two apartments down. The deceased stated, "I'm going to get you." He then started coming towards defendant. Defendant pulled his revolver out, clicked it twice and then fired downward as deceased was attempting to get up from the icy street about five steps away. The deceased had been coming towards him and was trying to turn but had slipped when the shot was fired.

Defendant fired the gun because he was "scared" for his life; he had no intent to kill decedent. Later in the evening defendant was arrested and gave a written statement to the police.

Defendant also presented the testimony of eight people who testified as to defendant's excellent character and reputation in the community.

Other necessary facts will be stated in the opinion.

Attorney General Edmisten by Special Deputy Attorney General Charles J. Murray for the State.

Public Defender Wallace C. Harrelson for defendant appellant.

CLARK, Judge.

[1] Defendant's first assignment of error is that the court erred in failing to charge the jury that they could find the defendant guilty of involuntary manslaughter. In *State v. Wrenn*, 279 N.C. 676, 681, 185 S.E. 2d 129, 132 (1971), Mr. Justice Huskins, writing for the Court, explained:

> "Where, under the bill of indictment, it is permissible to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. [Citations omitted.] Erroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the court's charge. . . ."

Our task, then, is to determine whether the evidence would support a charge on involuntary manslaughter. "Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without*

intention to kill or inflict serious bodily injury." *State v. Wrenn, supra,* 279 N.C. at 682, 185 S.E. 2d at 182. "[O]ne who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills," commits involuntary manslaughter. *State v. Coble,* 177 N.C. 588, 591, 99 S.E. 339, 341 (1919); *State v. Boldin,* 227 N.C. 594, 42 S.E. 2d 897 (1947). Similarly, "'[w]here one engages in an unlawful and dangerous act, such as "fooling with an old gun," *i.e.,* using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. (Citations omitted)'" *State v. Stimpson,* 279 N.C. 716, 724, 185 S.E. 2d 168, 173 (1971).

Defendant cites the following testimony by defendant as evidence that the firing of the gun by defendant was without intention to kill or without intention to inflict serious bodily injury:

> "I got a weapon because I was going back over to get my fiancee."
>
> "Well, as I clicked it, he must have realized I had it because he tried to run back and that's when he slipped and the revolver went off."
>
> "I fired this gun because I was scared for my life. I did not have any intention of killing Johnny Shoffner. I fired the shot downward."
>
> "I am telling this Court and this jury that I was afraid of Johnny Shoffner. I didn't stay home because I went to get my fiancee."
>
> "When I got outside I intended to go over to Deedee's. I didn't go because he was coming at me."
>
> "No, I didn't aim right at him. I aimed downward. It was done more or less at his legs and the concrete."

The State, on the other hand, argues that, by taking excerpts from the defendant's testimony out of context, the defendant attempts to establish that there is evidence to show that

the defendant did not intentionally pull the trigger, that it was an accident, or that he did not aim at the victim. The State argues that the defendant's own evidence shows that he intentionally pulled the trigger of the revolver and at the very least he aimed the revolver at the victim's legs thereby intending to inflict serious bodily injury. In addition, the State emphasizes the following testimony by defendant:

> "I did not shoot the man after he had turned and was leaving and running from me. I shot him, and he was coming towards me when he slipped on the ice. He was still in pursuit of coming to me. Yes, he was in pursuit of coming to me. Yes, coming right at me. He fell down, fell forward. And that's when *I shot him. I tried to shoot him* the first time when he was about four steps from my door. I am telling this Court and this jury that *I shot and killed Johnny Shoffner* about a half door down in front of my front door. . . ." (Emphasis supplied.)

Earlier in his testimony, defendant also stated:

> "When he got about five or steps away, at that position, he was more or less left and off balance because he couldn't get his foot —. At the time he was going to get me, that's when I took out the revolver. I took out the revolver. The revolver was pointed down where — it was at a level of my waist. I had pulled it out and I had it right up in here. *I clicked it twice. Well, as I clicked it, he must have realized I had it because he tried to run back and that's when he slipped* and the revolver went off. *I pulled the revolver three times.* To show His Honor and the members of the jury what position he was in at the time *I fired the third shot* when it went off, he was more or less — he was trying to turn but he slipped on the ice. . . ." [Emphasis supplied.]

We agree with the State. In this case there is no evidence that the defendant did not intend to pull the trigger. In fact, he intended to pull the trigger three times. Furthermore, defendant deliberately pointed the gun at the deceased, at the very least, in the direction of deceased's legs. This is not the case where, for example, the gun went off while the defendant and

victim were fumbling with the gun, *State v. Davis*, 15 N.C. App. 395, 190 S.E. 2d 434 (1972); where the gun went off when the deceased grabbed a gun lying across defendant's knees, *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963); where the defendant threw up a gun and it went off, *State v. Graham*, 38 N.C. App. 86, 247 S.E. 2d 300 (1978); or where the defendant "fired his pistol *away from*" the deceased and did not intend to "shoot at, near, or *in the direction of the deceased*," *State v. Ward*, 300 N.C. 150, 155-56, 266 S.E. 2d 581, 585 (1980). (Emphasis added in second quotation.) This assignment of error is overruled.

[2] Defendant's next argument is that the trial court erred in allowing the District Attorney to cross-examine him concerning a bag of marijuana allegedly found on defendant's person at the time of his arrest. We do not agree. "A defendant who elects to testify in his own behalf surrenders his privilege against self-incrimination and knows he is subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such cross-examination for impeachment purposes is not limited to conviction of crimes but encompasses any act of the witness which tends to impeach his character. (Citations omitted.)" *State v. McKenna*, 289 N.C. 668, 684, 224 S.E. 2d 537, 548 (1976). The marijuana was properly introduced for impeachment purposes.

[3] The defendant next contends that the trial court erred in allowing testimony for corroborative purposes when it did not corroborate the witnesses or their testimony and was highly prejudicial. In this argument defendant refers to the testimony of Officer Hutchins that related to an out-of-court statement by a previous State witness, George Foust. In particular, defendant objects to the officer's statement that Mr. Foust told him that he heard the gun click three times, and that the deceased threw his hands up in the air and said, "You've got me, man, I don't have a gun." Officer Hutchins also stated that Foust had told him that "on the fourth time the gun clicked that it discharged." Assuming that this statement was not corroborative, we fail to see how this evidence was prejudicial to the defendant since the defendant himself said that he pulled the trigger three times, as did defendant's niece and Foust. Similarly, while it is true that Foust did not testify on direct examination

as to what the deceased said when he threw up his hands, David Holt did so testify, and since Holt was impeached by defendant, the fact that Foust had repeated the same statement to Officer Hutchins would be corroborative of Holt's statement. Furthermore, given the strength of the State's case, with three eyewitnesses, we fail to see how the trial court's error, if any, would change the outcome of defendant's trial. N.C. Gen. Stat. § 15A-1433(a).

[4] The final argument presented by defendant is that the trial court erred in allowing the District Attorney to cross-examine the defendant as to whether he told the officer, while making a statement in custody, that he was acting to protect himself from attack by the deceased. That statement by defendant provides in relevant part:

> "Johnny came from around the corner saying he was going to get me. I then went into the house and got a .22 caliber pistol and came back out. He, Johnny, kept on running his mouth about he was going to get me, and he took off running and I shot at him one time and that was it. I then went back into the house. This statement is of my own free will and I have been advised of my rights, and I understand them. No pressure or coercion of any kind has been used against me."

This statement was prepared by Detective D.L. DeBerry, was witnessed by Officers DeBerry and Summers, and was initialed and signed by the defendant. At trial, while cross-examining the defendant, the prosecutor attempted to impeach defendant by asking the following questions concerning his statement:

> "Q. Didn't say anything at all to the officers about calling out or going back over there because you were concerned about her welfare?
>
> MR. HARRELSON: OBJECTION.
>
> THE COURT: OVERRULED.
>
> A. No, sir.

Q. You didn't say a word about Johnny Shoffner coming at you, did you?

A. I don't remember.

* * * *

Q. You never told either of these officers investigating this crime that you shot this man in self-defense while you were in fear for your life, did you?

A. I don't remember."

There is no doubt that the questions submitted by the prosecutor do not violate the Fifth or Fourteenth Amendments to the United States Constitution. Very recently, in *Jenkins v. Anderson*, ___U.S.___(No. 78-6809), (Filed 10 June 1980), 48 U.S.L.W. 4693, 4696, 40 C.C.H. S. Ct. Bull. B2837, B2847, the United States Supreme Court held that "[t]he use of prearrest silence to impeach a defendant's credibility does not violate the Constitution." The majority opinion, however, explicitly noted that it did "not force any state court to allow impeachment through the use of prearrest silence." *Id.* We hold that under the facts of this case that the above questions proffered by the prosecutor also do not violate Article I, Sections 19 or 23 of the North Carolina Constitution. We note that defendant not only waived his right to remain silent by making a statement to the police officers while he was in custody and after he had been informed of his rights, but also chose to take the stand at trial and to testify in his behalf. We emphasize that we do not reach the determination of whether the North Carolina Constitution would permit questioning as to prearrest silence in the fact situation presented in *Jenkins, supra. See, e.g., State v. McCall*, 286 N.C. 472, 482-487, 212 S.E. 2d 132, 138-141 (1975), and *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974). Similarly, for the reasons expressed by the dissents of Mr. Justice Marshall and Mr. Justice Brennan in *Jenkins, supra*, 48 U.S.L.W. at 4697, we expressly refuse to hold that the North Carolina Constitution will permit, under all circumstances, that a criminal defendant who testifies in his own behalf may be impeached by some form of his prearrest silence.

No error.

Chief Judge MORRIS and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. CHARLES SILSBY FEARING

No. 791SC1197

(Filed 19 August 1980)

1. **Automobiles § 131– hit and run driving – absence of fault no defense**

A driver violates G.S. 20-166(a) if he does not stop immediately at the scene of an accident, and the absence of fault on the part of the driver is not a defense to the charge of failing to stop at the scene of an accident.

2. **Automobiles § 131– hit and run driving – elements**

To support a verdict of guilty under G.S. 20-166(a), the State must prove that defendant was driving the automobile involved in the accident at the time it occurred; the vehicle defendant was driving came into contact with another person resulting in injury or death; and defendant, knowing he had struck a victim, failed to stop immediately at the scene.

3. **Automobiles § 131.1– hit and run driving – defendant's knowledge that he hit person – sufficiency of evidence**

Evidence was sufficient to show that defendant had knowledge that he had been involved in an accident resulting in injury or death to some person where the evidence tended to show that defendant was aware of the tremendous damage to his vehicle resulting from something coming into contact with his automobile on the highway; the damage indicated that whatever defendant hit came into contact with his automobile at three points; when the windshield "exploded" the inside dashboard of the automobile was smashed; defendant told an officer who investigated the accident scene the next day that he may have hit a signpost with his automobile the night before and that he had struck something as he was driving in the general area where deceased's body was found; he knew he had hit something but did not stop to investigate because of his concern for a sick, screaming passenger in his backseat; and defendant, while looking for the deputy sheriff at the county health clinic, saw that a woman was being examined and remarked, "Maybe we hit her."

4. **Automobiles § 131.1– hit and run driving – defendant's exculpatory statements – dismissal not required**

In a prosecution for hit and run and death by vehicle, there was no merit to defendant's contention that certain exculpatory statements made by him to officers, that he had no knowledge that he had hit another person, compel-

led the granting of his motion to dismiss, since the State offered plenary evidence to contradict defendant's statements and to permit a jury to find that he did have such knowledge.

5. **Automobiles § 113.1– death by vehicle – sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for death by vehicle under G.S. 20-144.4 where the evidence tended to show that defendant was driving his car at 8:00 p.m. at 30-40 mph; from the area where deceased's body was found and for at least 175 feet in the direction from which defendant was coming there were no trees or other obstructions; it was stipulated that deceased came into contact with defendant's vehicle; at the time the collision occurred defendant had reached down under his seat, gotten a towel, and was handing the towel to a passenger in the backseat; and the jury could infer from the evidence that defendant should have been aware of deceased's presence on or around the highway, and should have been able to take emergency measures to prevent hitting a person on the paved portion of the highway.

6. **Automobiles § 131.2– hit and run driving – sick passenger – instruction on justification and excuse not required**

In a prosecution for hit and run and death by vehicle, evidence that there was a sick passenger in defendant's vehicle did not warrant a separate instruction on legal justification and excuse.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 29 June 1979 in Superior Court, CHOWAN County. Heard in the Court of Appeals 12 May 1980.

Defendant was charged in separate bills of indictment with failing to stop his automobile at the scene of an accident (hit and run) under G.S. 20-166(a) and death by vehicle under G.S. 20-141.4. The two charges were consolidated for trial, and defendant was convicted of both offenses. Defendant was sentenced to prison terms of not more than three years for hit and run, and not more than one year for the offense of death by vehicle, to run concurrently with the prior sentence.

Evidence presented at trial tended to prove the following: On 19 February 1979, Cloise Creef, the deceased, was 87 years old and lived in an apartment along Highway 64-264 in Dare County near Manteo, North Carolina. Between 6:30 and 7:00 p.m. on that day, Creef left his apartment and was not seen again until he was found dead the next day in a ditch along the highway. Creef was known to have a considerable drinking habit, and an autopsy revealed a blood-alcohol level of .29%.

On 20 February 1979, at about 2:00 p.m., Trooper J.W. Bonner of the North Carolina Highway Patrol investigated the area in which Creef's body was found. The body was on the north side of Highway 64-264 and about 10 feet from the road. Creef had sustained injuries to the head and other parts of the body, and there were many cuts and bruises throughout, including a severing of the cervical spine in four places. From his measurements, the paved portion of the highway at that point was 22 feet wide, with solid white lines marking each edge of the pavement and broken lines indicating the middle of the road. Defendant lived only about three-fourths of a mile from the scene of the accident.

While Trooper Bonner investigated the incident, defendant approached the officer and requested that he examine a sign post which defendant said he may have hit with his automobile the night before. Defendant told Trooper Bonner that the previous night he had struck something as he was driving along Highway 64-264 in the general area where Creef's body was found. Afterwards, defendant, Trooper Bonner and another patrolman travelled to an automobile body repair shop where defendant had taken the automobile for repairs. En route to the body shop, defendant, after being advised of his *Miranda* rights, related that on the previous evening he had been in Manteo at Fernando's Alehouse, of which he was the proprietor, with some friends; that he left the Alehouse and drove west on Highway 64-264; that he was travelling about 35-40 miles per hour and was "not driving erratic;" that he did not run off the road and was driving in a "straight line;" that as he drove, a girl in the back seat became sick, and he "reached under the seat and got a towel and turned around and was handing this towel to her when all of a sudden the windshield exploded."

On cross-examination, Trooper Bonner stated that he "never found any indication that the vehicle had left the paved portion of the highway or found any indication that the vehicle had crossed the center of the highway." There was, in addition, no indication "that the vehicle was traveling at an excessive speed and I found no brake marks, or tire marks." Defendant admitted that he had two glasses of wine to drink before the incident, but there was nothing to indicate that defendant was

under the influence when he drove or that his driving was in any way affected by the wine. When asked if he stopped to investigate the cause of this damage to the car, defendant replied, "No, the girl in the back seat started screaming at that time, and I continued on towards my house." In addition, defendant stated that he did not even slow down, because at that time his main concern was the girl who was sick and screaming in the back seat, and he thought it was best to get her to his house. It does appear, however, that defendant did return to the vicinity where the incident occurred later that night in an effort to discover what he had hit. Defendant stated that "when he got back to where the windshield had exploded, [he] drove up and down the highway there several times looking around to see if [he] could see anything."

Examination of the automobile involved in the incident revealed that the right half of the windshield was missing; there was a dent in the hood "about the size of a basketball," "the front grille was bent; the dashboard on the inside of the automobile was torn; and a wooden strip located close to the windshield on the inside of the car was broken." Broken glass was scattered on the floor below the right passenger's seat in both the front and rear of the automobile. Examination of the windshield and glass fragments therefrom revealed the presence of human blood, although not of a sufficient quantity to determine the type. Similar glass fragments were taken from Creef's body when it was examined at the local morgue. In addition, paint found among Creef's clothes matched paint samples taken from defendant's vehicle. Further examination of the vehicle revealed that there were three points of impact on the automobile: the front bumper, the front portion of the hood; and the windshield. The windshield was apparently broken by some force "to the extent that the inside of the dash was dented." There was a hole in the windshield with a diameter of approximately four to six inches. There was an abraded area on the cowl near the right windshield wiper blade. This was immediately in front of the break in the windshield. Immediately inside the area where the break occurred there was a wooden piece of molding which was broken. Beneath the wooden strip of molding the vinyl material on the dash was broken and cracked, and immediately beneath this, the metal portion of the dash

was dented. The vehicle appeared to have been washed in the areas where the damage was located. Several photographs were admitted into evidence as exhibits illustrating these damages. The jury was permitted to examine the automobile outside the courtroom.

During the course of the trial, the State and defendant stipulated that the body of Cloise Creef came into contact with the front end of the automobile driven by defendant on 19 February 1979.

Further evidence revealed that defendant visited the health clinic in Dare County looking for the Dare County Deputy Sheriff. Upon arriving at the clinic defendant saw that a woman was being examined and remarked, "Maybe we hit her."

After the trial, and after notice of appeal was given, defendant filed a motion for appropriate relief based, in part, on the State's refusal to provide defendant with certain exculpatory information. From the judgment entered upon the verdicts and the trial court's denial of his motion for appropriate relief, defendant appealed.

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

Charles Aycock III, and Stewart and Hayes, by David K. Stewart and Brenton D. Adams, for defendant appellant.

MORRIS, Chief Judge.

By assignements of error Nos. 15 and 38, defendant contends that the court improperly denied his motion to dismiss the charge of leaving the scene of an accident.

In determining the sufficiency of the evidence to go to the jury, all of the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference deducible therefrom. *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978). When so viewed, that evidence must be sufficient to permit a rational trier of fact to find guilt beyond a

reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

[1] G.S. 20-166(a), upon which defendant was charged and convicted, provides:

> The driver of any vehicle involved in an accident or collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident or collision, and any person violating this provision shall upon conviction be punished as provided in G.S. 20-182 [providing for punishment of from one to five years in prison and for fine of not less than $500.00, or both, with automatic revocation of defendant's operator's license].

The general purpose of this statute is to facilitate investigation of automobile accidents and to assure immediate aid to anyone injured by such collision. *State v. Smith*, 264 N.C. 575, 142 S.E. 2d 149 (1965). A driver violates this section if he does not stop immediately at the scene of the accident. *State v. Norris*, 26 N.C. App. 259, 215 S.E. 2d 875, *appeal dismissed*, 288 N.C. 249, 217 S.E. 2d 673 (1975), *cert. denied*, 423 U.S. 1073, 47 L. Ed. 2d 83, 96 S. Ct. 856 (1976). Furthermore, the absence of fault on the part of the driver is not a defense to the charge of failing to stop at the scene of an accident. *State v. Smith, supra.*

[2] To support a verdict of guilty under G.S. 20-166(a), the State must prove that defendant was driving the automobile involved in the accident at the time it occurred; that the vehicle defendant was driving came into contact with another person resulting in injury or death; and that defendant, knowing he had struck the victim, failed to stop immediately at the scene. *State v. Overman*, 257 N.C. 464, 125 S.E. 2d 920 (1962). Knowledge of the driver that his vehicle has been involved in an accident resulting in injury to a person is an essential element of this offense. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967); *State v. Ray*, 229 N.C. 40, 47 S.E. 2d 494 (1948).

[3] In the present case, defendant argues that there was no evidence which showed that he had knowledge that he had been involved in an accident resulting in injury or death to some

person. We disagree. Without further detailing the evidence submitted at trial, we find that the evidence showed that defendant was aware of the tremendous damage to his vehicle resulting from something coming into contact with his automobile on the highway; that the damage to the automobile indicated that whatever defendant hit came into contact with his automobile at three points, and that when the windshield "exploded" the inside dashboard of the automobile was smashed. These facts, in addition to the circumstances surrounding defendant's statements and actions after the accident, support a reasonable inference that defendant knew he had been involved in an accident resulting in injury to a person, notwithstanding the fact that there may also be reasonable inferences to the contrary. *See State v. Glover, supra; State v. Smith,* 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

[4] Defendant's contention that certain exculpatory statements made by him to officers, that he had no knowledge that he had hit another person, compel the granting of his motion to dismiss, is without merit. Although a defendant's exculpatory statements which exonerate a defendant, if offered by the State and not contradicted by other evidence, ordinarily compel nonsuit, *State v. Ray, supra,* the defendant's statement does not prevent the State from showing that the facts and circumstances were different. *State v. Freeman,* 31 N.C. App. 93, 228 S.E. 2d 516, *cert. denied,* 291 N.C. 449, 230 S.E. 2d 766 (1976); *State v. Glover, supra.* Here, the State offered plenary evidence to contradict defendant's statement that he had no knowledge, and to permit, although not compel, a jury to find that he did have such knowledge. Defendant's motion to dismiss the charge under G.S. 20-166(a) was, therefore, properly denied. By so holding, we also overrule defendant's thirty-ninth assignment of error that the court erred by failing to charge the jury on the effect of exculpatory statements made by the defendant which were offered by the State.

[5] Defendant next argues that the trial court should have dismissed the charge of death by vehicle under G.S. 20-141.4 because, according to defendant, there was no evidence which showed that defendant violated the statute cited in the indictment, or any other law, which would constitute the proximate

cause of Cloise Creef's death. The indictment of death by vehicle returned against defendant charged that he violated G.S. 20-174(e) in that he operated his automobile "without exercising due care to avoid colliding with a pedestrian upon the roadway, without giving warning by sounding horn when necessary, and without exercising proper precaution upon observing a confused and incapacitated person upon such roadway . . . ." This section is an adoption of the rule at common law that "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." *Lewis v. Watson*, 229 N.C. 20, 26, 47 S.E. 2d 484, 488 (1948).

Under G.S. 20-174(e), a motorist has the duty, which is applicable to all motorists generally, to operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when special hazards exist with respect to pedestrians, and give warning of his approach by sounding his horn if the circumstances warrant. *Morris v. Minix*, 4 N.C. App. 634, 167 S.E. 2d 494 (1969). In determining whether defendant breached his duty of care and in doing so violated G.S. 20-174(e), we must review the evidence presented under the standard for review of motions to dismiss previously discussed.

The evidence indicates that defendant was driving west on Highway 64-264 at about 8:00 p.m. at a rate of speed of 30-40 miles per hour. From the area where Creef's body was found and for at least 175 feet eastward, there were no trees or other obstructions along the northern side of the highway. A grassy shoulder about 10 feet wide bordered the road at that point. The ditch in which Creef was found ran along the northern edge of the shoulder. An open field occupied the immediate area beyond the ditch.

It was stipulated that Creef came into contact with defendant's vehicle. The point of impact, as determined from the damage to defendant's automobile, appeared to be the right front portion of the vehicle. Since there was no evidence tending to show that defendant's vehicle ever left the paved portion of the road, the inference is that the collision occurred on the paved portion of the westbound lane within several feet from

the shoulder of the road. At the time the collision occurred, defendant had reached down under his seat, gotten a towel, and was handing the towel to a passenger in the back seat of the automobile. At this point, defendant testified, the "windshield exploded."

Defendant strongly urges that there is no evidence that, at the time the incident occurred, he was violating a motor vehicle law either by speeding, by failing to sound his horn upon observing Creef in or about the highway, or by failing to do everything within his means to prevent the collision upon seeing Creef in the highway. Despite this argument, we conclude that when the evidence is reviewed in the light most favorable to the State, and the State is given the benefit of every reasonable inference to be drawn therefrom, the evidence is sufficient to permit a jury to find defendant guilty of failing to exercise due care in the operation of his vehicle. It is reasonable to infer from the evidence that defendant should have been aware of Creef's presence in or around the highway, and should have been able to take emergency measures to prevent hitting a person on the paved portion of the highway. Since the evidence is sufficient to permit conviction for a violation of G.S. 20-174(e), it follows that submission of the charge of death by vehicle based on a violation of that section was proper. In so holding, we add that the evidence permits a finding by the jury that defendant's collision with Creef was the proximate cause of Creef's death.

[6] Defendant further assigns error to the trial court's failure to charge the jury on the defense of justification and excuse, arguing that the presence of a sick and "hysterical" woman in the automobile is sufficient evidence to warrant such an instruction.

"The trial judge must charge the jury on all substantial and essential features of a case which arise upon the evidence, even when, as here, there is no special request for the instruction." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977). In his instructions to the jury on the charge of failing to stop at the scene of an accident, the court included the instruction that defendant's failure to stop must be "willful, that is, intentional

and without justification or excuse." *See* N.C.P.I. — Criminal 271.50. We find no evidence which would support the instruction for which defendant contends. Evidence that there was a sick passenger in defendant's vehicle does not warrant a separate instruction on legal justification and excuse. This assignment of error is overruled.

We have carefully examined defendant's remaining assignments of error and find them without merit. Defendant received, in our opinion, a fair trial free from prejudicial error.

No error.

Judges CLARK and ERWIN concur.

OROWEAT EMPLOYEES CREDIT UNION v.
KATHRYN M. STROUPE AND SMITH CHEVROLET COMPANY

No. 8027SC150

(Filed 19 August 1980)

Guaranty § 1; Contracts § 2.1; Bills and Notes § 7– endorsement of check – contractual guaranty of transfer of vehicle title to lender

The endorsement by defendant car purchaser and defendant car dealer of a check from plaintiff lender immediately below a statement on the back of the check that endorsement guarantees legal title to plaintiff of a specifically described automobile created a contractual guaranty that title to the automobile would be placed in plaintiff for which the purchaser and dealer served as equal co-guarantors. Therefore, where defendant dealer instead placed legal title in the name of defendant purchaser, plaintiff could proceed against defendants jointly and severally to recover its damages arising out of the breach of the contractual guaranty.

APPEAL by defendant Smith Chevrolet Company from *Thornburg (Lacy H.), Judge.* Judgment entered 27 December 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 11 June 1980.

Plaintiff is an employee credit union chartered as a corporation under the laws of the State of California. The defend-

ant, Kathryn M. Stroupe, is a citizen and resident of Gaston County, North Carolina. Defendant, Smith Chevrolet Company, is a North Carolina corporation, which has its principal office in Gaston County, North Carolina.

On 1 February 1978, the defendant, Kathryn M. Stroupe, purchased a 1978 Chevrolet Monza automobile from the defendant, Smith Chevrolet Company, For Six Thousand One Hundred Seventy-eight and 14/100 Dollars ($6,178.14). The car was paid for in full by a check, dated 1 February 1978, drawn on plaintiff Oroweat Employees Credit Union (hereinafter Oroweat) and made payable jointly to Kathryn M. Stroupe (hereinafter Stroupe) and Smith Chevrolet Company (hereinafter Smith Chevrolet). The following wording was printed on the reverse side of the check immediately above the place where both defendants placed their endorsements:

> "Endorsement hereon acknowledges payment in full and guarantees legal title to Oroweat Employees Credit Union on the below described vehicle:
>
> Make: Chevrolet
>
> Model: Monza Spider
>
> Serial No.: 1RO7U8U125744
>
> Year: 1978."

Immediately below the statement appears the name "Kathryn M. Stroupe" and a stamp stating as follows: "Deposit only with The Citizens National Bank at Gastonia, N.C., to the credit of Smith Chevrolet Co., Inc."

Prior to the endorsement of the above-mentioned check, the defendant, Smith Chevrolet Company, had legal title to the automobile. Instead of issuing a certificate of title to Oroweat, defendant Smith Chevrolet placed the legal title in the name of defendant Stroupe.

Defendant Stroupe made one payment to plaintiff on her loan sometime prior to 31 March 1978. Thereafter, she made no

further payments. Oroweat sent defendant Stroupe delinquent notices in April, May and July of 1978. On 11 September 1978, J.T. Denis, Manager, Oroweat Employees Credit Union, wrote a letter to the sales manager of Smith Chevrolet, in which letter Oroweat informed Smith Chevrolet that they had not received the title to the automobile and that pursuant to the conditional endorsement, Oroweat had been guaranteed legal title to the subject automobile. At this time plaintiff learned that Smith Chevrolet did not transfer title to the automobile to Oroweat but instead placed the title to the vehicle in the name of Kathryn M. Stroupe. No other communications were made between Oroweat and Smith Chevrolet prior to or between the time of negotiation of Oroweat's check and the letter of 11 September 1978.

On 20 December 1979, the cause came before the trial court, sitting without a jury, and after having considered the pleadings, affidavits, the standard buyer's order form, the 11 September 1978 letter of Oroweat, Kathryn Stroupe's promissory note, the security agreement between Oroweat and Kathryn Stroupe, Kathryn Stroupe's application for a loan, the automobile loan trust agreement, the wording on the reverse side of the Oroweat check, and the arguments of counsel, the trial court made the following findings of fact and conclusions of law:

> "6. The wording on the reverse of the check was unambiguous and plain in its requirement that negotiation or endorsement thereof constituted a guarantee that the title to the automobile was to be placed in Plaintiff.
>
> 7. Defendant Smith Chevrolet Company should in the exercise of reasonable diligence have known of the restrictive wording of the endorsement on the reverse of the check, and was on notice from the time of its endorsement thereon that it should place title to the automobile in the name of Plaintiff.
>
> 8. Defendant Smith Chevrolet Company endorsed the check and recieved the money therefrom and placed the title in the name of Defendant Stroupe, contrary to the provisions of the wording on said check.

9. The interval of time between the negotiation of the instrument and the inquiry of Plaintiff regarding the whereabouts of the title was not unreasonable under all the circumstances.

CONCLUSIONS OF LAW

* * * *

3. The language found on the back of the check issued by the Plaintiff to the Defendants constituted an offer, the endorsement of which constituted an acceptance by the Defendants; thus, a contract was made which required title to the vehicle in question to be placed in the Plaintiff.

4. The Defendant Kathryn M. Stroupe is primarily liable on the obligation, and the Defendant Smith Chevrolet Company is secondarily liable on the obligation."

The judgment awarded to plaintiff the sum of $5,927.36 and provided that defendant Smith Chevrolet recover from defendant Stroupe any portion of the recovery paid by Smith Chevrolet.

Whitesides & Robinson by Henry M. Whitesides and Arthur C. Blue, III for plaintiff appellee.

Garland & Alala by James B. Garland and Brooke Lamson for defendant appellant.

CLARK, Judge

We note at the outset that defendant-appellant Smith Chevrolet has failed to set forth in its brief its assignments of error and the respective record pages as required by Rule 10 of the N.C. Rules of Appellate Procedure. Normally this results in the dismissal of an appeal pursuant to Appellate Rule 10(a), but, because of the commercial significance of this appeal, and in the interest of justice, we elect to consider this appeal pursuant to Appellate Rule 2.

The arguments of defendant-appellant Smith Chevrolet, the only appellant herein, can be summarized as follows: (1) The language on the check was not unambiguous and plain because the purported guaranty would be contrary to the provisions of § 20-57 and § 20-4.01(26) of the North Carolina General Statues and therefore Smith Chevrolet acted correctly in placing title in the name of Kathryn Stroupe; (2) the language on the back of the check is not a restrictive endorsement; (3) the exercise of reasonable diligence would not have led to knowledge of the language on the back of the check; (4) the contract between Stroupe and Oroweat mandated that title be placed in Stroupe's name; (5) Oroweat acted unreasonably in waiting six months to collect its debt from defendant Stroupe; (6) the language on the back of the check does not constitute a contract requiring title to be placed in the plaintiff because there was no meeting of the minds, because Smith Chevrolet had no notice that it was signing a contract and because there was no additional consideration; (7) plaintiff has failed to show damages; and (8) upon the authority of the unpublished opinion, *Durham v. Metrolina National Bank* (C-B-79-39, D.C. W.D.N.C., Charlotte Division 1979), decided in the United States Bankruptcy Court, an automobile dealer who endorses a check which provides on its reverse side that, "Endorsement of this check warrants that a lien had been placed in favor of [lender]," is not bound by such endorsement.

We do not agree with defendant's contentions. For the sake of clarity, we note that this case does not involve an issue of accord and satisfaction. An accord and satisfaction arises out of a settlement of a dispute over a pre-existing debt or obligation, *see, e.g., Dobias v. White,* 239 N.C. 409, 80 S.E. 2d 23 (1954), whereas the instant case involves the creation of the initial contractual obligations. Nor does this case involve the effect of a restrictive endorsement within the meaning of N.C. Gen. Stat. §§ 25-3-205 and -206. The purpose of these statutes is to regulate the negotiability of, and liability of intermediary financial institutions on, checks upon which the restrictive endorsements are made. Consequently, defendant's argument pertaining to restrictive endorsements and lack of consideration are not relevant to the controversy.

Nor do we agree with defendant that the language on the reverse side of the check was ambiguous, or that the exercise of reasonable diligence would not have led to a knowledge of the language on the back of the check. All one would have to do is *read* the language before the check was endorsed. Undoubtedly, the check was handed to a salesman or an officer of the dealership before the check was handed to the clerk who stamped it for deposit. Even if this were not so, the failure of the dealership to establish any procedure to deal with checks with conditional, restrictive or qualified endorsements, however they may be defined, does not absolve the dealership from liability based on its failure to comply with the conditions on the check.

The issue before us is simply a matter of contract. The credit union in effect said, "If you want our money, you have to protect us by putting title in our name, and here is the make, model, serial number and description necessary for you to do so. Endorsement of this check is a guarantee that this is done." Both Stroupe and Smith Chevrolet endorsed the check as joint payees. There was an offer (the language on the back of the check), acceptance (endorsement), and exchange of consideration (title to the credit union, money to the joint payees). While we have found no North Carolina cases directly on point, two cases, *Federal Employees Credit Union v. Capital Automobile Company*, 124 Ga. App. 144, 183 S.E. 2d 39 (1971), and *United Bank of Fairfax v. Dick Herman Ford, Inc.*, 215 Va. 373, 210 S.E. 2d 158 (1974), support this result. Both cases involved contract actions in which the lending institution placed language on the back side of the checks providing that endorsement guaranteed that a first lien on the chattel had been established in the name of the lender. In both cases the courts enforced the plain language on the back of the check. Furthermore, *South Division Credit Union v. Deluxe Motors, Inc.*, 42 Ill. App. 3d 219, 355 N.E. 2d 715 (1979), cited by defendant, did not say that the language on the check therein was not enforceable because it was not a restrictive endorsement, but rather that the court would not imply a "limited time period" requirement that was not in the language on the back of the check.

Defendant, however, argues that they have in substance complied with the contract, if any, by placing the title in

Stroupe because plaintiff's Loan Trust Agreement with Stroupe contemplates title to be placed in Stroupe and because N.C. Gen. Stat. § 20-57 requires that title be placed only in the name of an "owner," which, by definition set forth in N.C. Gen. Stat. § 20-4.01(26), excludes a chattel mortgagee without possession of the chattel. We agree with defendant that plaintiff in its role as mortgagee cannot be the "owner" within the meaning of N.C. Gen. Stat. § 20-57, but we cannot accept plaintiff's logical leap to the conclusion that, since Smith Chevrolet only had the statutory "power" to place title in Stroupe's name, defendant had no obligation to give full force and effect to the language preceding defendant's endorsement. If defendant could not perform pursuant to the terms of the endorsement, it should have refused to negotiate the check and it should have returned the check to Oroweat; in other words, it should not have entered into the contract. Defendant may not now assert as a defense impossibility due to a legislative enactment which existed at the time the parties entered into the contract and which would not recognize the transfer contemplated by defendant. *Hazard v. Hazard*, 46 N.C. App. 280, 264 S.E. 2d 908 (1980). The following statement in *Durant v. Powell*, 215 N.C. 628, 634, 2 S.E. 2d 884 (1939), even though in the context of an accord and satisfaction, applies equally as well to the instant case:

> "This Court has held in numerous cases that when on the face of the check is stated the purpose for which it is given, or the *condition of the payment which it represents*, the party to whom it is given or sent cannot accept and use it and afterwards repudiate the condition. ... Business transactions cannot be safely conducted upon secret reservations of mind that are totally inconsistent with the open acts. ... (Citations omitted and quotation marks omitted)" (Emphasis added.)

While this Court is not bound by any interpretation of North Carolina law made by the federal bankruptcy court, we have seriously considered the reasoning as well as the total lack of authority in *Durham v. Metrolina National Bank, supra*, and, for the reasons discussed above, we decline to adopt the holding in that case.

We note that because we have held that the language on the back of the check is not ambiguous, we do not need to look at other documents to interpret the meaning of the language.

We now turn to the appropriate standard of damages. The trial court awarded damages in the amount of $5,927.36, representing the principal of the loan less the payment made by defendant Kathryn M. Stroupe, together with interest from the 1st day of April, 1978, and the costs of this action. This award represents the amount that Oroweat would be entitled to recover from Stroupe on Stroupe's promissory note. The award also represents the amount which Oroweat could recover from Smith Chevrolet on the contract by endorsement; provided, however, that Oroweat could not recover from Smith Chevrolet an amount greater than the value of the vehicle as of 1 April 1978. Oroweat can only be placed in the same position as if the contract had been performed, and, under the facts of this case, if the contract had been performed, Oroweat could have sold the vehicle as of the date of the breach and applied the proceeds to the balance of Stroupe's loan. We note that once Oroweat has proven the default by Stroupe and the amount of unpaid principal on the outstanding loan, and if Smith Chevrolet contends that the value of the automobile is less than the balance due on the note, the burden is then on Smith Chevrolet to prove the value of the vehicle at the time of the buyer's default. On remand Smith Chevrolet may seek to determine the value of the automobile as of 1 April 1978.

The trial court ruled that Stroupe was primarily liable on the obligation and that Smith Chevrolet was secondarily liable on the obligation. We think that in so ruling the trial court misapplied the applicable principles of law but nonetheless achieved the proper result. The action in this case is based upon a contract of "guaranty" arising out of the endorsements of Smith Chevrolet and Stroupe on the back of Oroweat's check; it does not involve a guaranty of Smith Chevrolet on the promissory note executed by Stroupe in favor of plaintiff.

Technically speaking, this contract is not one of classical guaranty in its truest form because each of the guarantors has a direct principal obligation to transfer title to plaintiff, 38 Am.

Jur. 2d *Guaranty* §§ 1, 2, 3 (1968); nonetheless, given the guaranty language on the contract, we find that the application of guaranty principles leads to a just and equitable result in this case. Consequently, we hold that both Stroupe and Smith Chevrolet serve as equal co-guarantors on the endorsement. "Guarantors are each liable for an equal proportionate share of the principal obligation, *as between themselves*, in the absence of any showing or agreement to the contrary." However, "where one guarantor receives property or other security which constitutes a means of indemnity for, or immunity from, loss, it inures to the benefit of all co-guarantors." 38 C.J.S. *Guaranty* § 114 (1943); 38 Am. Jur. 2d *Guaranty* § 128 (1968).

As applied to the facts of the instant case, we interpret these general principles to mean that Oroweat may proceed against Stroupe or Smith Chevrolet, jointly and severally, to recover its damages arising out of the breach of the contractual guaranty that title would be placed in Oroweat. If Oroweat, as in effect here, has proceeded against Smith Chevrolet alone, Oroweat is entitled to recover the full amount of its damages for this breach from Smith Chevrolet. Smith Chevrolet is in turn entitled to recover from Stroupe the value of the automobile as of 1 April 1978 because Stroupe had a duty to apply the property or security, *i.e.*, the title to the automobile, which constituted a means of indemnity or immunity from loss for the benefit of all guarantors.

Finally, we hold that Oroweat did not act unreasonably in electing to send notices of nonpayment to Stroupe for several months before notifying Smith Chevrolet that it had not delivered title to Oroweat. We note, also, that even if Oroweat had given Smith Chevrolet notice of Stroupe's default as early as April 1978, there was very little that Smith Chevrolet could do to protect itself since title had already been placed in the name of Stroupe.

Modified and Remanded for proceedings consistent with this opinion.

Judges PARKER and WEBB concur.

EDWARD T. SMITH, AND DEBORAH B. SMITH v. WILL A. HUDSON, INDIVIDUALLY AND IN HIS CAPACITY AS AGENT FOR WILL HUDSON, LIMITED, A CORPORATION, AND IN HIS CAPACITY AS AGENT FOR FIRST NATIONAL REALTY, INC., A CORPORATION, AND WILL HUDSON, LTD., A CORPORATION, AND FIRST NATIONAL REALTY, INC., A CORPORATION

No. 7910SC1111

(Filed 19 August 1980)

1. **Frauds, Statute of § 3; Contracts § 25.3– lack of consideration – statute of frauds – failure to plead defenses**

In an action to recover damages for breach of contract for the sale of land and construction of a house thereon, defendants failed to plead affirmatively in their answer the defenses of consideration and the statute of frauds, and defendants thereby waived their right to assert these defenses.

2. **Frauds, Statute of §§ 2.1, 6.1– contract to convey land and build house – description of land adequate – statute of frauds inapplicable to construction of house**

In an action to recover damages for breach of a contract for the sale of land and construction of a house thereon, the contract met the requirements of the statute of frauds since the description of the underlying land in the offer to purchase as "Lot #66, Sherwood Forest S/D" and "the property located at 601 King Richard Road, Raleigh, N. C. 27610" was sufficient to meet the specificity requirements of the statute; furthermore, the statute of frauds does not apply to the construction of a house, as compared to a house already built, because a house not built is not an interest in realty.

3. **Vendor and Purchaser § 1.1; Frauds, Statute of § 6.1– contract to construct improvements on realty – no written agreement required**

Though it is the better parctice for all contracts for the construction of improvements on realty to include the written specifications of the structure to be built and the contents to be included therein, it is not required in this jurisdiction that such a contract be in writing.

4. **Contracts § 26.1– contract to convey land and build house – parol evidence admissible**

In an action to recover damages for breach of a contract for the sale of land and construction of a house thereon where defendants neither invoked the parol evidence rule as to any prior negotiations leading to the signing of the purchase agreement nor challenged any of plaintiffs' oral testimony as in any way inconsistent with the terms of the written purchase agreement, the parol evidence was admissible to establish the whole of the contract even though only part of the agreement was reduced to writing.

5. **Vendor and Purchaser § 1– contract to convey land and build house – breach – sufficiency of evidence**

Evidence was sufficient to show that a contract for the construction of a

house was made between the parties and that defendant breached this contract where the evidence tended to show the existence of a written contract, signed by the individual defendant, to purchase a specifically described parcel of realty upon which a 1400 square foot house with certain features would be built at the cost of $35,000; an oral agreement between the parties that the hallways in the house were to be 42 inches wide, that the garage was to be wider to accommodate plaintiff's special van, that the bathroom basin was to be specifically placed, and that other specified measures would be taken to accommodate the needs of plaintiff who was confined to a wheelchair; the transfer of earnest money to defendant and acceptance thereof by defendant on two different occasions; defendant's selection of a set of house plans and defendant's offer in his letter to provide plaintiffs with "plans, spec. etc." even though he could not build their house; defendant's promise after plaintiffs obtained a loan commitment to start construction within a few days; defendant's statement, although a purportedly false statement, that a building permit for the house had been obtained; defendant's request to build the house facing a road other than the one originally agreed on; and defendant's letter to plaintiffs that he would be unable to build their home "because of health reasons and other circumstances."

6. **Vendor and Purchaser § 1– contract to convey land and build house – purchasers' ability to comply with loan commitment terms – no showing required**

In an action to recover damages for breach of a contract for the sale of land and construction of a house thereon, there was no merit to defendants' contention that plaintiffs could not recover because they failed to show that they could have complied with all the terms of their loan commitment, since the written offer to purchase was contingent only upon the ability of the plaintiffs to obtain a thirty year loan; there was no evidence of any requirement in the contract between plaintiffs and defendants that the specific terms of the loan commitment must be met or that other lenders could not be sought; the obligation of plaintiffs under the loan commitment to supply the title insurance, survey, etc. would not have arisen prior to the time of closing; and defendant's letter stating that he could not construct the house eliminated any requirement that plaintiffs fulfill any subsequent obligations under the contract.

APPEAL by plaintiffs from *Canaday, Judge*. Judgment entered 5 July 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 14 May 1980.

This is an action for damages arising out of a contract for the sale of land and the construction of improvements thereon. The evidence of plaintiff-appellants, Edward T. Smith and Deborah B. Smith, tends to show that in December 1975, Edward Smith was approached by defendant Will Hudson, the pro-

prietor of Will Hudson, Ltd., concerning the plaintiffs' interest in buying or building a house. During the months of January or February 1976, the Smiths and Hudson had numerous conversations concerning the design of a "barrier-free" house to accommodate the needs of Edward Smith, who was confined to a wheelchair.

On 10 March 1976, the parties executed an "offer to purchase" on a standard form provided by the Raleigh Board of Realtors. The contract provided for the sale of "house and Lot #66 Sherwood Forest S/D House consisting of about 1400 Square Feet heated area and extra width single car garage." The contract price was $35,000 with $500 to be paid as earnest money, and an additional $1,300 to be paid upon delivery of the deed to the purchaser. The following conditions and subsequent strike-outs were also added in the contract:

"1. Builder to purchase lot from present owner, purchase price is included in this agreement.

2. Builder to landscape all front side and twenty feet to rear of house.

3. Buyer to pay closing cost in excess of Seven Hundred Dollars and pre-paid items. Builders to pay Seven Hundred Dollars toward closing cost.

*4. ~~Special orthopedic tub and shower to be included.~~

*5 ~~Ramps to be included on all exterior doors to made adaptable for wheel chair.~~

6. Buyer to select carpet and appliances from Builders Sampler.

7. Buyer to select all exterior and interior colors.

8. Central air to be included with gas heat."

* [Subsequent deletions by the parties.]

The contract was subject to a payment of $33,200 representing the balance of the purchase price to be paid by "obtaining a conventional loan for thirty years (30)."

Following the execution of the offer to purchase agreement, the plaintiffs went to Raleigh Savings & Loan Association to inquire about a loan. At this time, Marshall Haywood, a loan officer for Raleigh Savings & Loan Association, examined the Smiths' financial statement and informed them that they did not have sufficient funds in March to obtain the loan in question.

On 23 April 1976, the Smiths' original check for $500, for earnest money deposit, was received in the mail. No letter of explanation for the return of the check was included. The check had not been deposited to the account of Will Hudson, Ltd., or any other account. Edward Smith then called Mr. Hudson concerning the check, at which time Mr. Hudson stated that, since the plaintiffs had not had the required amount of money in their savings for the closing and down payment, he thought the money would be better put to use by plaintiffs. The plaintiffs asked Mr. Hudson "very emphatically" if the return of the check negated the plaintiffs' offer to purchase and the defendants' commitment to build the house. Mr. Hudson responded negatively and went on to say that he felt very comfortable with the agreement, that he had a good understanding about the agreement, and that he was still committed to building the house once the plaintiffs had obtained a definitive loan commitment from Raleigh Savings & Loan.

On 22 July 1976, Raleigh Savings & Loan Association made a loan commitment to Edward Smith in the amount of $33,200, payable in monthly installments over a thirty-year period at an interest rate of 9¼%. The loan commitment was to expire on 1 November 1976. Mr. Smith telephoned Mr. Hudson to inform him of the loan commitment. In response to Mr. Smith's question as to when defendant would start building, Hudson replied that he would start within a week or ten days. Similarly, Marshall Haywood, of Raleigh Savings & Loan Association, informed Hudson by telephone that the loan had been approved.

Mr. Haywood also inquired as to when Hudson would start to construct the house, and Hudson's response was that he would start construction within a week or ten days. On several occasions Mr. Smith communicated to defendant that the loan commitment would expire on 1 November 1976.

Approximately a month after notifying defendant of the loan commitment, the Smiths went by to inspect the construction site and found no evidence of construction activity. Upon telephone inquiry by plaintiffs as to why no construction had begun, Mr. Hudson stated that all his crews were busy meeting deadlines elsewhere and that he would move to the plaintiffs' site as quickly as possible. About two weeks later the Smiths visited the house site and again saw no evidence of any construction activity. Mr. Smith called defendant Hudson again to ask why no construction had been started and Hudson's response was that they were still behind on deadlines on other sites. At this time defendant Hudson stated that a building permit had been issued, but upon investigation by Mr. Smith a week later, he was informed by a Raleigh City Clerk that no building permit had been issued. Two days later the plaintiff called Mr. Hudson to ask him again if he were able to start construction. At that time defendant asked Mr. Hudson if he thought he could meet the November 1 deadline, and Mr. Hudson responded that he could not meet the November 1 deadline, but that he could meet it within seven to ten days of November 1. Thereafter, Mr. Smith obtained approval from Mr. Haywood to extend the deadline to 1 December 1976. Mr. Hudson then stated that he needed money to get started, and during the same day, the plaintiffs went to Mr. Hudson's office and gave him another check for $500.

On 7 October 1976, the plaintiffs wrote a long two-page letter, single-spaced, to defendant stating that the loan commitment date had been extended to 1 December 1976; that the defendant had repeatedly acted in disregard of his contractual obligations; and that the plaintiffs demanded that defendant take immediate steps to start construction at the house site. On 8 October 1976, the plaintiffs received the following letter on the stationery of Will Hudson, Ltd. from defendant:

"I am sorry to inform you that we, Hudson Homes, Inc., will not be able to build your home at this time because of health reasons and other circumstances. However, I will be delighted to provide you with plans, spec., etc. If you are still interested in Lot #66, Sherwood Forest, we/I can work something out for you on the lot also."

At the close of the plaintiffs' evidence, the defendants moved for a directed verdict for the following reasons: (1) failure to comply with the statute of frauds; (2) lack of consideration; (3) the parties never reached an agreement as to the essential terms of the contract; and (4) the plaintiffs could not show that they were able to comply with all the terms of their loan commitment.

The plaintiffs now appeal from the judgment of the trial court granting the defendants' motion for directed verdict.

Shyllon, Shyllon & Ratliff by Ernest E. Ratliff for plaintiff appellants.

Seay, Rouse, Johnson, Harvey and Bolton by George H. Harvey for defendant appellees.

CLARK, Judge.

[1] At the outset we note that defendants failed to plead affirmatively in their answer the defenses of failure of consideration and the statute of frauds as required by N. C. Gen. Stat. § 1A-1, Rule 8(c), and they thereby waive their right to assert these defenses. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820 (1960); *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E. 2d 867 (1971). Although not wholly determinative, it is significant that defendants made no motion to amend their pleadings and plaintiffs had no notice that such a defense would be raised. *Grissett v. Ward, supra; Young v. Young*, 43 N.C. App. 419, 259 S.E. 2d 348 (1979), (failure to plead laches under Rule 8(c)).

[2] Even if defendants had effectively pled N.C. Gen. Stat. § 22-2, the contract nonetheless meets the requirements of the statute. First, the description of the underlying land, in the

offer to purchase, "Lot #66, Sherwood Forest S/D," "the property located at 601 King Richard Road, Raleigh, N. C. 27610" was sufficient to meet the specificity requirements of the statute of frauds. Furthermore, N.C. Gen. Stat. § 22-2 does not apply to the construction of a house, as compared to a house already built, because a house not-built is not an "interest in realty." *Rankin v. Helms*, 244 N.C. 532, 94 S.E. 2d 651 (1956); Webster, Real Estate Law in North Carolina, §§ 12 to 18 (1971) (real fixtures). *See also, Thompson v. Horrell*, 272 N.C. 503, 158 S.E. 2d 633 (1968); *Gurganus v. Hedgepeth*, 46 N.C. App. 831, 265 S.E. 2d 922 (1980); *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E. 2d 772 (1970) (cases interpreting "interests in land" within N.C. Gen. Stat. § 1-76).

[3] "In most construction and home improvement contracts, the contract will be for services or for labor and materials and not a sale of goods within Article 2 of the [Uniform Commercial] Code." 1 Anderson, Uniform Commercial Code, § 2-105.11 (1970) and § 2-201.15 (1979 Cum. Supp.). In some circumstances, however, the sale of building materials to be used in the construction of a house may come within the statute of frauds provisions of the Uniform Commercial Code if the value of the building supplies (as goods) prior to construction exceeds $500.00. N.C. Gen. Stat. § 25-2-201; *Lowe's Companies, Inc. v. Lipe*, 20 N.C. App. 106, 201 S.E. 2d 81 (1973). In *Lowe's* the contract at issue was between the supplier and either the builder or the party for whom the house was to be built. The statute of frauds in N.C. Gen. Stat. § 25-2-201 was successfully pleaded as a defense. In the instant case, however, the contract was a "hybrid" contract to purchase an unspecified mixture of goods and services and the statute of frauds was not pleaded. Consequently, while we believe that it will always be the better practice that all contracts to construct improvements on realty include the written specifications of the structure to be built and the contents to be included therein, we can find no authority in this jurisdiction requiring that such a contract be in writing.

[4] Similarly, in addition to their failure to assert the statute of frauds, the defendants have neither invoked the parol evidence rule as to any prior negotiations leading to the signing of the

purchase agreement nor challenged any of plaintiffs' oral testimony as in any way inconsistent with the terms of the written purchase agreement, and as a consequence, the parol evidence was admissible to establish the whole of the contract even though only part of the agreement was reduced to writing. *Rankin v. Helms, supra;* N.C. Gen. Stat. § 25-2-202 (b); 32A C.J.S. *Evidence* § 1003(14)b. (1964).

The remaining two issues are, therefore, whether the plaintiffs introduced sufficient evidence from which it could be concluded that a contract was formed and breached by defendants and whether the plaintiffs were required to show that they could comply with the terms of the loan commitment from Raleigh Savings and Loan Association.

[5] The plaintiffs offered the following evidence of contract formation: (1) the existence of a written contract, signed by defendant Hudson, to purchase a specifically described parcel of realty upon which a 1400 square foot house with certain features, including an orthopedic shower and entrance ramp to accommodate the handicaps of Mr. Smith (these latter provisions were subsequently deleted by mutual agreement of the parties); (2) an oral agreement between Mr. Hudson and Mr. Smith that the hallways in the house were to be 42 inches wide, that the garage was to be wider to accommodate plaintiff's special van; that the bathroom basin was to be specifically placed; that the lot was to be graded to create the appropriate inclines; that the electrical outlets were to be placed 12 to 15 inches from the floor; and that the doors were to be 36 inches wide; (3) the transfer of earnest money to Hudson, and acceptance thereof by Hudson on two different occasions; (4) defendant Hudson's selection of a set of house plans and the defendant Hudson's offer in his letter of 8 October 1976, to provide plaintiffs with "plans, spec. etc." even though he could not build their house; (5) the defendant Hudson's promise in September to start construction within a few days; (6) defendant Hudson's statement (although a purportedly false statement) that a building permit for the house had been obtained; and (7) defendant Hudson's request to build the house facing Providence Road rather than King Richard Road. The evidence is sufficient for a jury to conclude that the plaintiffs and defendants entered into a con-

tract whereby Hudson, through one of his corporations, was to construct a barrier-free home according to the plans and specifications agreed upon by the parties and that plaintiffs were to pay defendants a total of $35,000 for the lot with the house constructed thereon.

The defendants argue that there was never a "meeting of the minds" between the parties and that the "offer to purchase" was not a contract but only an agreement to start negotiations. We do not agree. The cases *Boyce v. McMahan*, 285 N.C. 730, 732, 208 S.E. 2d 692 (1974); *Elks v. Insurance Co.*, 159 N.C. 619, 75 S.E. 2d 808 (1912); and *Howell v. C. M. Allen & Co.*, 8 N.C. App. 287, 174 S.E. 2d 55 (1970), relied upon by the defendants to establish this position, are inapposite. In *Boyce* there was a writing stating that "[t]he parties hereto agree to supplement this preliminary agreement by executing a more detailed agreement at some specific and subsequent date to be agreed to by the parties hereto." In the instant case there was no such "contract to contract" at some future date. The plaintiffs' evidence tends to show that any changes which occurred were modifications of an already existing contract as opposed to an agreement to contract *in futuro*. In *Elks* there was a series of letters evidencing negotiations leading to a contract to make a loan, a contract which was held not to be consummated since there had been no agreement as to the terms of the loan, when the loan was payable, and the lender's priority in the security. Similarly, in *Howell*, the essential price term was missing. In the case at bar the price, the settlement date, and when the contract amounts were to be paid were all specified in the written offer to purchase which was signed as "accepted" by defendant Hudson.

[6] The defendants argue, however, that the plaintiffs cannot recover because they have failed to show that they could have complied with all of the terms of the loan commitment issued by Raleigh Savings and Loan. We see no merit in this argument. The written offer to purchase is contingent only upon the ability of the plaintiffs to obtain a conventional thirty-year loan and there is no evidence of any requirement in the contract between plaintiffs and defendants that the specific terms of the Raleigh Savings and Loan Commitment must be met or that

other lenders could not be sought. Furthermore, the obligation of plaintiffs under the loan commitment to supply the title insurance, survey, etc. would not have arisen prior to the time of closing. Hudson's letter of 8 October 1976 stating that he could not construct the house eliminated any requirement that the plaintiffs fulfill any subsequent obligations under the contract.

The plaintiffs have offered enough evidence from which a jury could conclude that a contract between the parties was made and that defendants breached this contract, thereby entitling plaintiffs to recover, as a minimum, nominal damages. No issue of damages was raised in this appeal.

The judgment of the trial court is Reversed and the cause is Remanded.

Chief Judge MORRIS and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. OTHA JAMES BELL

No. 8012SC65

(Filed 19 August 1980)

Criminal Law § 101.4– permitting jury to take exhibits to jury room – absence of consent by defendant – harmless error

The trial court erred in permitting the jury to take written statements of defendant and two witnesses into the jury room during its deliberations without defendant's consent, G.S. 15A-1233(b), but such error was not sufficiently prejudicial to warrant a new trial where it does not appear that the error could have changed the outcome of the trial. Nor was defendant prejudiced by the court's refusal also to submit to the jury the first statement made by defendant to an officer where a portion of the statement had been deleted.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 3 October 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 21 May 1980.

Defendant was indicted for second-degree murder by feloniously and with malice killing Dexter L. McCoy in violation of N.C. Gen. Stat. § 14-17. The jury found defendant guilty of voluntary manslaughter, and a sentence of fifteen to twenty years was imposed.

STATE'S EVIDENCE

The testimony of each witness will be summarized separately because of the nature of defendant's arguments on appeal. The defendant presented no evidence.

James Edward McLaurin, a Cumberland County Deputy Sheriff, testified that at 9:00 p.m. on 16 April 1979, while investigating a call about a shooting, he found a black male, Dexter McCoy ("Pondie"), lying face down on the ground and a black female, Betty Mae Smith, leaning over him on the corner of James Street and Frederick Avenue. Officer Edward Schneider arrived and they went into the house at 614 Frederick Avenue, the home of defendant Otha James Bell. Defendant Bell stated that a black man had entered his home; that the man was "messing" with defendant; that defendant asked the man to leave; that the man did not leave and that Bell then stabbed him. Bell was polite, normal and acted as if nothing had happened.

Betty Mae Smith testified that she had known the deceased for four or five years and had been his girl friend for three years. Ms. Smith had for one week worked for defendant at a rate of twenty dollars a week running defendant's small beer establishment. On 16 April 1979 Ms. Smith had been living with deceased (Pondie) for two weeks. On that date she went to the defendant's house to get change to open up the "joint." At about 3:00 p.m. the defendant came in and asked Ms. Smith to have sex with him. She left to go to defendant's house and had intercourse with him. Before she left she asked for her "weekly pay" and the defendant said she would have to wait until the morning. She returned to the store. Pondie came into the store and she told him that she did "it" with defendant and Pondie asked her for the money. After she told Pondie what defendant had said, Pondie, Phyllis Denise LeSane and she went to defend-

ant's house. Defendant asked her for the change, at which time she gave him the change and asked defendant again for her money. Defendant told her that he did not have it then, and he did not want to get it from his stash. She walked out and told Pondie that defendant would not pay her until the next day. Pondie got mad. They went to the door and defendant hollered for them to come inside. The two went back in the house, leaving Denise on the porch. Pondie said, "I think you owe Betty some money," and Pondie and defendant started arguing. Defendant said that Pondie had nothing to do with it. They were in the kitchen. Pondie told defendant that he (Pondie) was going to get the money before he left, and he was going to "up him" (defendant) for the ten dollars. Defendant asked Pondie to leave. After about five minutes, defendant walked out of the room, went into the bedroom a couple of minutes, then came back in and pushed Pondie out of the way. Pondie said, "Don't push me any more." Defendant went to the door and asked both of them to leave. Pondie was standing facing her with his back toward defendant. Defendant opened a drawer, and, as Pondie was turning around slowly, defendant stabbed Pondie once with a butcher knife. Pondie ran out the door. She asked if she could use the phone and defendant "grabbed the knife after" her. She ran out. She never saw a weapon in the hand of Pondie. Defendant had been drinking that day.

Larry Marshall Brown and William Huggins, medical technicians with the Cumberland County Ambulance Service, testified that McCoy had no signs of life when they arrived on the scene.

Phyllis Denise LeSane stated that she went with Pondie and Betty to defendant's house; that she stayed outside when Pondie and Betty went in; that she never heard Pondie's voice, but she heard defendant tell them to leave; and that the next thing she knew was that Pondie came out holding his bleeding chest.

Edward Leroy Schneider, a police officer with the Cumberland County Sheriff's Department, testified that on 16 April 1979, at about 9:00 p.m., he responded to a call about a stabbing. He pulled up beside Officer McLaurin's vehicle. The black

woman in McLaurin's car said that the man in the house stabbed McCoy. After the officers went to defendant's house, knocked and identified themselves, defendant came to the door, identified himself as "O.J. Bell" and said, "He shouldn't have messed with me." The officers read defendant his rights. When they asked defendant what happened, defendant said, "Yes, I stabbed the boy"; "[h]e shouldn't have messed with me"; "[h]e come in here and started messing with me and I cut him." Defendant then stated that he had used a butcher knife, washed the blood off and put it back in the drawer. Defendant also stated that he had sex with Betty and had paid her ten dollars, but that she came back with this man saying "it" cost twenty dollars.

Floyd Thomas, Director of the City Bureau of Identification, identified the 11-½ inch knife, described the house and stated that McCoy had no weapons on his person.

Harold Lee Brigman, a detective in the Cumberland County Sheriff's Department, testified that he took a statement from Phyllis LeSane. In this statement Ms. LeSane stated that she had stayed outside while Dexter and Betty went inside; that she overheard someone arguing; that Dexter came out the front door holding his chest; that Betty went back to ask defendant to use the phone to call for help and he would not let her use it; and that the argument between defendant and McCoy had something to do with money that defendant owed Dexter McCoy.

Brigman also took a statement from Betty Mae Smith, in which she stated, in relevant part:

> "I asked Bell again for my money for the week and he said he would give it to me in the morning. ... I told Pindy. ... Pindy got mad and told me that he wanted me to go back in there with him to get my money. ... Bell answered the door and we walked in the kitchen. Pindy asked Bell if he didn't owe Betty some money for this week's work. Bell said no, not really, because I had borrowed Ten dollars from him; then Pindy told him that he still owed me Ten dollars out of the Twenty dollars. They kept on arguing about the money, saying the same thing over and over. Finally Bell

walked away and went into the bedroom. They quit talking for a moment and then Bell told Pindy and me to get out of his house. Pindy told him he was not leaving until he got my money; then Bell walked back into the kitchen and pushed Pindy out of the way; then he opened a drawer and grabbed up a knife. He then stabbed Pindy in the chest with the knife; then Pindy ran out the door and I ran behind him . . . ."

Ms. Smith also stated that she saw defendant stab Dexter Leon McCoy in the chest with a brown-handled butcher knife, and that at no time did McCoy have a weapon.

Claude Maxwell, a detective with the Cumberland County Sheriff's Department stated that, at about 9:30 p.m. on 16 April 1979, after advising defendant of his rights, he took a statement from defendant in which defendant stated, in relevant part:

"Me and a girl whose name I know as Betty were at my house at 614 Frederick Avenue. We went to bed and she got up and went out and met a man and she brought him back to the house. They knocked and I opened the door and said come on in and they both came in. The man said, 'How about upping Twenty dollars to this girl,' and I said, 'What do you have to do with it?' He said that I owed the girl some money. I then told him I had loaned the girl Ten dollars last week. He then turned to the girl and asked her why she didn't tell him about it. He then told me to give her Ten more dollars to make it Twenty dollars. He then bowed up and I told him to get out; that I was dealing with the woman, not the man. He kept arguing about the money and I picked up the knife and busted him with it."

Defendant also stated that McCoy did not hit defendant or grab defendant; that McCoy was "standing with his hands in his pockets"; and that he stabbed defendant in the kitchen one time with a butcher knife.

Finally, Charles Lewis Wells, a pathologist with Cumberland County Hospital, testified: That McCoy's wound was about ten inches deep and that his right coronary artery, his tricuspid valve, and his right ventricle were all severed; that in his opin-

ion the cause of McCoy's death was a stab wound to the heart accompanied by shock, hemorrhage and tamponade; and that immediate medical attention would not have prevented McCoy's death.

The State rested its case, the court properly instructed the jury on second-degree murder, voluntary manslaughter and self-defense. The jury retired but then returned to the courtroom and asked for the exhibits of the statements of the three people involved — the defendant, Betty Mae Smith and Phyllis Denise LeSane. The jury requested that they be allowed to take the exhibits into the jury room and asked for an instruction on malice. A bench conference was held. The defendant's counsel objected to and did not consent to submission of the material to the jury. The court, "over objection of the defendant and conceiving it to be in the best interest of justice and conceiving the request to be an appropriate one," allowed the jury to take the exhibits into the jury room. The court then stated for the record:

> "The Court feels that in the practicality of trials, that occasions can and do arise when it causes more harm not to send the requested materials to the jury than when it does — to send the requested materials to the jury; and the Court could not conceive of any appropriate words it could have said which would have alleviated mental inquiry in the minds of the Jurors as to why the Court did not send the exhibits — or to which counsel objected to the sending of the exhibits to the Jury and the Court concludes that in the overall administration of justice, there is nothing per se so overriding within the context of either statement as to unduly prejudice either party to the Jury; and in summary, the Court feels this was a proper exercise of the due administrations [*sic*] of justice and that it was a proper function of the inherent power of the Court to accede to a proper request by the Jury, and therefore, the Court did it."

Thereafter defense counsel moved that a statement by defendant given to Schneider, except for a portion ("he was [a] convicted felon") excised due to defendant's pretrial motion *in limine*, also be submitted to the jury. The court, after quoting

G.S. 15A-1233(b) and quoting the excised portion, felt that submitting the statement without the excised portion would positively prejudice one side or the other, and thereafter denied the request of defense counsel.

Attorney General Edmisten by Associate Attorney Francis W. Crawley for the State.

Assistant Public Defender James R. Parish for defendant appellant.

CLARK, Judge.

Defendant contends that the trial court committed reversible error by permitting the jury during deliberation to take three witnesses' statements into the jury room in violation of N.C. Gen. Stat. § 15A-1233, which statute provides in relevant part:

> "(b) *Upon request* by the jury and *with consent* of all parties, the judge *may in his discretion* permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take *additional material or first review other evidence relating to the same issue* so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit." [Emphasis added.]

We do not agree with defendant's contention. There is no doubt that, pursuant to N.C. Gen. Stat. § 15A-1233(b), *supra*, it was error for the trial court to submit the statements to the jury without the consent of defendant. The question before us, then, is whether such error is sufficiently prejudicial to warrant a new trial. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would

have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant . . . ." N.C. Gen. Stat. § 15A-1443(a).

Defendant, however, correctly cites *Gooding v. Pope*, 194 N.C. 403, 140 S.E. 21 (1927); *Brown v. Buchanan*, 194 N.C. 675, 140 S.E. 749 (1927); *Nicholson v. Eureka Lumber Co.*, 156 N.C. 59, 72 S.E. 86 (1911); *Williams v. Thomas*, 78 N.C. 47 (1878); *Burton v. Wilkes*, 66 N.C. 604 (1872); *Watson v. Davis*, 52 N.C. 178 (1859) and *Outlaw v. Hurdle*, 46 N.C. 150 (1853), for the proposition that at common law it was reversible error to allow, over objection, the jury to take evidence into the jury room in civil cases. The defendant explains, in addition, that our Supreme Court has also stated in *dicta* that it was error to allow, over objection, the jury to take evidence into the jury room in a criminal case. *State v. Stephenson*, 218 N.C. 258, 10 S.E. 2d 819 (1940).

We note, however, that in *State v. Haltom*, 19 N.C. App. 646, 199 S.E. 2d 708 (1973), *cert. denied*, 284 N.C. 619, 201 S.E. 2d 691 (1974), written prior to the enactment of N.C. Gen. Stat. § 15A-1233, this Court held that prejudice must be shown in order that permission to take evidence into the jury room be reversible error. *See also, Gooding v. Pope, supra*, where the court found no prejudicial error and *State v. Stephenson, supra*, 218 N.C. at 265 where the court stressed the "especially objectional" features of the writings sent to the jury room. In consideration of the rule that statutes must be construed to be in derogation of common law, we elect to reaffirm *State v. Haltom* in view of N.C. Gen. Stat. § 15A-1443(a). *See, Brown v. Buchanan, supra*, 194 N.C. at 679 (effect of statute on this common law rule). Defendant neither raised at the trial level, nor argued for the first time on appeal (were he allowed to do so), that his constitutional right to a jury trial has been denied, and we do not address that question; consequently, N.C. Gen. Stat. § 15A-1443(b) does not apply.

We have carefully considered defendant's argument that the error was in fact prejudicial because the three written statements, set out in detail above, presented the State's case in the strongest possible light while points elicited during the trial testimony of Betty Smith and Phyllis Denise LeSane, also

set out in detail above, were not allowed to be taken back to the jury room. In particular, defendant argues that the statements sent to the jury room did not fully show that McCoy was the aggressor, as did the testimony presented at trial. We note, however, that the statement of Betty Mae Smith sent to the jury room did in fact indicate that "Pondie got mad"; that Pondie said that defendant owed Betty money and that defendant and Pondie argued while in defendant's house. That Pondie said he would "up" defendant as well as defendant's statement that Pondie was "messing" with him were also included in defendant's statement sent to the jury. The evidence against defendant, both the testimony presented at trial and that presented in the statements sent to the jury, was substantial. Even considering that testimony showing Ms. Smith's relationship to the deceased, hence her potential bias, was not sent to the jury room, such evidence was presented to the jury at trial. Defendant has failed to meet his burden of showing how the alleged error would have changed the outcome of the trial.

For the same reason, we find that the error, if any, of the trial court in failing to submit defendant's first statement to the jury is without prejudice to the defendant. In addition, we note that N.C. Gen. Stat. § 15A-1233(b) does not require a trial judge to submit all other statements to the jury and, in light of the fact that a portion of defendant's first statement had been deleted, we cannot say that the trial court abused its discretion in refusing to allow the jury to take this statement into the jury room.

No error.

Chief Judge MORRIS and Judge ERWIN concur.

McCormick v. Peters, Comr. of Motor Vehicles

DORAN DYER McCORMICK, PETITIONER v. ELBERT L. PETERS, JR., COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 8010SC30

(Filed 19 August 1980)

1. **Automobiles § 2.4– driver with alcohol problem – revocation of license – sufficiency of findings to support order**

Findings and conclusions by the Driver License Medical Review Board were sufficient to support its order that petitioner not be granted driving privileges where the Board found that petitioner had an alcohol problem; the Board gave fair consideration to the recommendation of petitioner's physician that he be granted driving privileges, but the recommendation did not have to be expressly rejected by the Board; and the Board's determination that petitioner suffered from such a disease "as would serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle" fully resolved the issue of whether, upon all the evidence, it appeared that it was safe to permit petitioner to exercise driving privileges. G.S. 20-9.

2. **Automobiles § 2.4– revocation of driver's license because of alcohol problem – sufficiency of evidence**

Evidence was sufficient to support findings by the Driver License Medical Review Board that petitioner had an alcohol problem which affected his ability to operate a vehicle safely and that he should not be licensed to drive where the evidence tended to show that petitioner had been convicted four times of driving under the influence of intoxicating liquor; in 1976 when his license was cancelled, the Board concluded that petitioner had "a severe alcohol problem with petitioner having established himself as a very dangerous drinking driver who cannot or will not control his drinking and driving"; after the Board ordered in 1976 that petitioner not be licensed until he had totally abstained from alcohol consumption for one year, petitioner did abstain for the requisite period and regained his license; on 20 January 1979, however, petitioner was again arrested for driving under the influence; on a medical report form which petitioner's personal physician completed, the doctor indicated in response to the question "has applicant ever had ... an alcohol or drug problem" that the patient "denies any"; and the doctor recommended that petitioner be licensed without restriction.

Judge HEDRICK dissents

APPEAL by petitioner from *Hobgood (Hamilton H.), Judge.* Judgment entered 11 October 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 3 June 1980.

This is an appeal from a judgment sustaining the decision and order of the North Carolina Driver License Medical Review Board that petitioner not be granted driving privileges.

In December 1976 petitioner appeared before the North Carolina Driver License Medical Review Board for review of an order of the Division of Motor Vehicles revoking his driving privileges. Upon review of petitioner's driving record, the Board found that he had been convicted of driving under the influence on four occasions, the most recent convictions having been in October 1972 and April 1974. Concluding that petitioner suffered from "a severe alcohol problem," the Board sustained the order withdrawing his driving privileges and ordered that he not be permitted to drive until he had demonstrated that he had maintained control over the problem by totally abstaining from the consumption of alcoholic beverages for at least a twelve-month period. Petitioner appealed from that decision to the superior court, but while that appeal was pending, petitioner's driving privileges were restored in January 1978 upon recommendation of the Driver Medical Adviser at the Division of Health Services, conditional upon medical reexamination in one year.

On 20 January 1979 petitioner was again arrested for driving under the influence of intoxicating liquor. At trial the State elected to proceed against him on a charge of reckless driving, of which petitioner was convicted on 1 February 1979. On 22 February 1979 petitioner was reexamined for licensing and was informed that he could retain his license pending evaluation by the Driver Medical Adviser at the Division of Health Services. That evaluation was completed on 26 March 1979 and cancellation of petitioner's driving privileges was recommended. On 28 March 1979 petitioner was formally notified that his license had been canceled. Pursuant to G.S. 20-9(g)(4), petitioner requested review by the North Carolina Driver License Medical Review Board of the order of the Division of Motor Vehicles canceling his operator's license. At the hearing before the Board in June 1979, Division of Motor Vehicles' records pertinent to the petitioner's driving history were considered. Petitioner offered the certificate of a medical examination by his personal physician,

Dr. Pressley Rankin, in which Dr. Rankin concluded that petitioner should be licensed without restrictions. Based on the documentary evidence and testimony presented at the hearing, the Board entered on order in which it found, among other facts, that petitioner "has an alcohol problem" and drew the following conclusions:

> 1. That petitioner is afflicted with or suffering from such physical or mental disability or disease as would serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, such disease being: an alcohol problem, with a history of driving while intoxicated; and the Commissioner's Order of Cancellation of driving privileges is justified and should be sustained.
>
> 2. That petitioner should not be granted driving privileges until he has demonstrated that he has gained and can maintain control over his problem with alcohol by totally abstaining from the consumption of alcoholic beverages for a period of not less than twelve months, such period not to begin earlier than January 20, 1979, nor should he be granted driving privileges at any time unless he is otherwise in good physical and mental health and documents such with competent medical evidence.
>
> 3. That after the granting of driving privileges at any time, petitioner should submit to medical and license examinations at periodic intervals thereafter and the results of such examinations should be furnished to the Division of Motor Vehicles.

Following the entry of the Board's decision and order, petitioner filed a petition for judicial review pursuant to G.S. 150-43, challenging the Board's findings, conclusions and decision on the grounds that they are unsupported by competent, material and substantial evidence in view of the entire record as submitted. Judgment was entered in Superior Court, Wake County, affirming the decision and order of the Medical Review Board. From that judgment petitioner appealed.

Attorney General Edmisten by Associate Attorney Jane P. Gray and Deputy Attorney General William W. Melvin for the State.

Joslin, Culbertson, Sedberry & Houck by Charles H. Sedberry for petitioner appellant.

PARKER, Judge.

Relying upon the statutory scheme of G.S. 20-9, petitioner contends that the findings of the Medical Review Board are insufficient to support the Board's order that he not be granted driving privileges and that the order of the Division of Motor Vehicles withdrawing those privileges be sustained.

G.S. 20-9(e) provides generally as follows:

> The Division [of Motor Vehicles] shall not issue an operator's or chauffeur's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways . . . .

Subsection (g) of G.S. 20-9 creates an express exception to the mandatory language of subsection (e) by specifying that the Division "may" issue a license to any applicant covered by subsection (e) if that person is otherwise qualified to obtain a license and if that person has submitted to a physical examination by a licensed physician who has furnished a certificate to the Division of Motor Vehicles. G.S. 20-9(g)(3) specifies that:

> The Commissioner is not bound by the recommendation of the examining physician *but shall give fair consideration to such recommendation* in exercising his discretion in acting upon the application, *the criterion being whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle.* The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by

> opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety. (Emphasis added).

Pursuant to G.S. 20-9(g)(4), the Commissioner's denial of driving privileges is subject to review by the Driver License Medical Review Board, and the applicant seeking review is entitled to a full evidentiary hearing. Any decision adverse to the applicant must be in writing and accompanied by findings of fact, consisting of the Board's conclusions on each contested issue of fact, and conclusions of law.

[1] In the present case the Medical Review Board found that petitioner has an alcohol problem and concluded that he is "afflicted with or suffering from such physical or mental disability or disease as would serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, such disease being: an alcohol problem, with a history of driving while intoxicated . . . ." That determination by the Board brings petitioner into the class of determination by the Board brings petitioner into the class of persons specified in G.S. 20-9(e) to whom "[t]he Division shall not issue an operator's or chauffeur's license." Petitioner contends, however, that because he submitted the physician's certificate specified in G.S. 20-9(g), the statutory exception to G.S. 20-9(e), recommending that he be granted driving privileges, the Medical Review Board, upon review of the decision of the Commissioner of Motor Vehicles, was required by G.S. 20-9(3) to state expressly that it was rejecting the recommendation and to make a specific finding as to "whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle." We agree that the Board was required by G.S. 20-9(3) to "give fair consideration to" the recommendation of petitioner's physician, Dr. Rankin, but we do not agree that his recommendation that petitioner be licensed had to be expressly rejected.

In its 12 July 1979 decision and order, the Board did find "[t]hat on the Medical Report Form dated February 27, 1979,

Dr. Pressley R. Rankin, Jr. states that petitioner denies any problem with alcohol." That finding makes clear that the Medical Review Board considered Dr. Rankin's recommendation as required by statute, and implicit in the Board's further finding "[t]hat petitioner has an alcohol problem" is a rejection of that recommendation in the light of the other evidence presented. We hold further that the Board's determination that petitioner suffers from such a disease "as would serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle" fully resolves the issue of whether, upon all the evidence, it appears that it is safe to permit petitioner to exercise driving privileges. No other finding was required under G.S. 20-9.

[2] Having determined that the Board's findings and conclusions are sufficient to support the Medical Review Board's order, we next consider whether the evidence supports those findings. Where, as here, the action of an administrative agency is subjected to review, the governing standard is whether the agency findings or conclusions are supported by competent, material and substantial evidence in view of the entire record. "[T]he 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 538, 541 (1977); *accord, Chesnutt v. Peters, Comr. of Motor Vehicles*, 300 N.C. 359, 266 S.E. 2d 623 (1980). Viewed in its entirety, the record in the present case tends to show the following:

Petitioner has been convicted four times of driving under the influence of intoxicating liquor. In 1976 when his license was canceled, the Medical Review Board concluded that petitioner had "a severe alcohol problem with petitioner having established himself as a very dangerous drinking driver who cannot or will not control his drinking and driving." After the Board ordered in 1976 that petitioner not be licensed until he

had totally abstained from alcohol consumption for one year, petitioner did abstain for the requisite period and regained his license. On 20 January 1979, however, petitioner was again arrested for driving under the influence. At the hearing before the Board he testified as follows concerning the incident:

> On the occasion that I was charged with driving under the influence, I had been up to the Moore County Hospital to see my wife in the mental health ward, and I don't know, from seeing all of those people that way I just got worried about her and all. I started home and I didn't want to go to the house because I would be there by myself and I decided to shoot a game of pool. I went down there shooting pool and I drank about four of those small beers and then I started home and they stopped me.
>
> As to the condition of the road, it had been raining all night and the glasses were fogged up and it was wet. There was not too much traffic on the road. The place I started from was about a mile from my home, and I was on my way home. The officer stopped me in Ellerbe. I had been drinking beer, and he smelled it on my breath. He charged me with driving under the influence. I did not have an attorney that appeared with me. At the trial they just charged me with reckless driving . . . .
>
> I am not taking any medicine for alcohol. I do not feel like I have an alcoholic problem. As to how much alcohol I drink, since I got my license back it's none, hardly. When I was arrested, I had been over to the hospital to see my wife. I went down there to shoot pool because my wife was not at home. That's the first time I have been away from home at night since we've been married. There have not been any other occasions that I was drinking and driving a car. I don't drink any kind of alcohol besides beer. As to how often I drink alcohol since my license were reinstated, after I've worked twelve hours, I have stopped and carried it home, but I wouldn't drink it until I got home. I have done that twice, maybe three times. That's the only times I've drank any alcohol, about three times. I have not missed any work due to my health. I work six days a week most of the time, once in a while seven.

On the Medical Report Form which petitioner's personal physician, Dr. Rankin, completed, the doctor indicated in response to the question "[h]as applicant ever had ... [a]n alcohol or drug problem" that the patient "denies any." Dr. Rankin recommended in that report that petitioner be licensed without restriction.

Even considering Dr. Rankin's favorable report, we conclude that the record furnishes substantial, material and competent evidence to support the Board's determination that petitioner has an alcohol problem which affects his ability to operate a vehicle safely, and that he should not be licensed at the present time. The weight to be accorded Dr. Rankin's report was for the Medical Review Board to determine, and where the evidence presents two conflicting views, it is not the function of this Court to review the Board's judgment.

The judgment of the superior court sustaining the decision and order of the North Carolina Driver License Medical Review Board is

Affirmed.

Judge VAUGHN concurs.

Judge HEDRICK dissents.

FRANCES H. TRACY, PETITIONER v. HENRY B. HERRING AND WIFE, CHARLOTTE M. HERRING; KATHLEEN HERRING STANLEY AND HUSBAND, JOHN K. STANLEY; LAURA ELLA HERRING (WIDOW), RESPONDENTS

No. 798SC957

(Filed 19 August 1980)

Wills § 57– construction of testator's will as to amount passing to wife

Where testator devised and bequeathed to his wife under Item II of his will "such portion, or share, of my estate as shall, when added to the items of property specified in Paragraphs (1), (2) and (3) following next below, result in a total equal to one-half of my adjusted gross estate [as that term is used in the U.S. Internal Revenue Code]"; Paragraphs (1), (2) and (3) to which testa-

tor referred included the amount of insurance proceeds payable on testator's death, the value of all property held jointly with his wife, and the value of all property determined to be vested in his wife under the residuary clause of the will; and immediately following such provision, the testator directed that "property included in that portion of this Item that precedes Paragraphs (1), (2) and (3) above, shall include" certain specified interests in described tracts of land, including a one-half undivided interest in a 192.75 acre tract and a 66 acre tract, it was *held* that testator did not intend to limit the total amount of his property passing to his wife to one-half the value of his adjusted gross estate as determined for federal estate tax purposes but that he intended that his wife was to receive the items of property mentioned in Paragraphs (1), (2) and (3) *as well as* the specified interests in the several tracts (including the one-half undivided interest in the 192.75 acre tract and the 66 acre tract), and if the value of all those items did not equal one-half of testator's adjusted gross estate, then his wife was to receive such additional share as would equal that amount.

APPEAL by petitioner from *Stevens, Judge.* Judgment signed 13 July 1979 in Superior Court, LENOIR County. Heard in the Court of Appeals 14 April 1980.

Petitioner instituted a special proceeding before the Clerk of Superior Court of Lenoir County seeking partition of real property. She alleged that she and respondents Henry B. Herring, Kathleen Herring Stanley and Laura Ella Herring had acquired title as tenants in common to four tracts of real property located in Lenoir County by devise under the wills of Henry L. Herring deceased, and Ozora Creech Herring deceased. Petitioner prayed that a Commissioner be appointed to sell the described lands for partition.

Respondents Henry B. Herring and wife, Charlotte B. Herring answered the petition, admitting that Henry L. Herring had died testate on 14 January 1969 and that Ozora Creech Herring had died testate on 8 April 1974, but denying that all of the respondents were owners of the tracts as tenants in common. As to the First and Second Tracts described in the petition, Henry B. Herring pled sole seizin.

The case was heard before the judge without a jury in Superior Court, Lenoir County. The parties stipulated that the sole issue for determination was the interest which Henry B. Herring held in the First and Second Tracts described in the

petition. The evidence, insofar as it is undisputed, showed the following:

Respondents Henry B. Herring, Kathleen Herring Stanley, and Laura Ella Herring, and petitioner Frances Herring Tracy are the children of Henry L. Herring and wife Ozora Creech Herring. On 12 November 1965 Henry L. Herring and wife conveyed to Henry B. Herring by deed an undivided one-half interest in the First and Second Tracts described in the petition. The First Tract is located in Falling Creek Township, Lenoir County, North Carolina and contains 192.75 acres. The Second Tract, also located in Falling Creek Township, contains 66 acres.

On the same date the deed was executed, Henry L. Herring and Ozora Creech Herring executed separate wills. Henry L. Herring died on 14 January 1969 and his will dated 12 November 1965 was duly probated. His will directed in pertinent part as follows:

ITEM II

> I give, bequeath and devise unto my beloved wife, Ozora Creech Herring, such portion, or share, of my estate as shall, when added to the items of property specified in Paragraphs (1), (2) and (3) following next below, result in a total equal to one-half of my adjusted gross estate as the same is hereinafter defined. The items of property referred to in the sentence next preceding are:
>
> (1) The amount of the proceeds of any insurance policies on my life which shall be payable to my wife and determined to be includible in my gross estate for federal estate tax purposes; and,
>
> (2) The value of any and all property, whether real or personal, held by my wife and myself, whether as tenants by the entireties, in joint bank accounts, as joint bank accounts, as joint tenants, or otherwise, and determined to be includible in my gross estate for federal estate tax purposes; and,

(3) The value of any and all property which shall become vested in my wife under Item X of this Last Will and Testament.

My "adjusted gross estate" as used in this Last Will and Testament is to be defined as the adjusted gross estate as used in the United States Internal Revenue Code in determining my net estate and the maximum marital deduction thereon under said Internal Revenue Code.

Property included in that portion of this Item that precedes Paragraphs (1), (2) and (3) above, shall include:

* * *

(c) A one-half undivided interest in and to those certain tracts or parcels of land lying and being in Falling Creek Township, Lenoir County, North Carolina, one containing 192.75 acres, more or less, and the other containing 66 acres, more or less, and being designated as "Second Tract" and "Third Tract", in that certain deed vesting title to said lands in me, and recorded in Book 211, page 153, in the Lenoir County Registry, and including the premises whereon I formerly resided and which are now occupied by my son, Henry B. Herring and his family.

Ozora Creech Herring died testate on 8 April 1974. Her will dated 12 November 1965 was admitted to probate on 2 May 1974. Item II of that instrument provided in part:

ITEM III

In the event my said husband shall not be living at the time of my death, then, and in such event, I give and devise all of my real property unto my children as follows:

* * *

(3) Unto my beloved son, Henry B. Herring, all of my property interest and estate in those two certain tracts or parcels of land, lying and being in Falling Creek Township,

Lenoir County, North Carolina, one containing 192.75 acres, more or less, and the other containing 66 acres, more or less, including the premises whereon I formerly resided and being a part of the lands heretofore known as the "Old Herring Homeplace . . . ."

In a judgment signed 13 July 1979 the trial court made findings that the wills of Henry L. Herring and Ozora Creech Herring were executed together, that from an examination of the wills and the circumstances surrounding the testators the intent of the testators could be determined, and that Henry B. Herring was conveyed by said wills an undividied one-half interest in the First and Second Tracts described in the petition. Judge Stevens concluded, therefore, that the First and Second Tracts were not subject to partition as prayed for in plaintiff's complaint. From that judgment petitioner appealed.

Thomas B. Griffin for petitioner appellant.

Wallace, Langley, Barwick & Landis by F.E. Wallace, Jr. and R.F. Landis II for respondent appellees, Henry B. Herring and wife, Charlotte M. Herring.

PARKER, Judge.

At the time of his death in 1969, Henry L. Herring owned an undivided one-half interest in the 192.75-acre tract and the 66-acre tract at issue here, having conveyed the other one-half undivided interest to his son Henry B. Herring by deed on 12 November 1965. Ozora Creech Herring, who died five years after her husband in 1974, specifically devised to Henry B. Herring all of her interest and estate in the same two tracts. She acquired title to that property, if at all, from her husband by devise. Thus, whether Henry B. Herring is the sole owner of the property depends upon an interpretation of the will of Henry L. Herring.

The guiding principle in the interpretation of wills is that the intent of the testator, as determined from the four corners of the instrument, should govern. *Kale v. Forrest*, 278 N.C. 1, 178 S.E. 2d 622 (1971); *Efird v. Efird*, 234 N.C. 607, 68 S.E. 2d 279

(1951). If the provisions of the will are ambiguous, the court should consider the circumstances surrounding the testator at the time of execution as an aid to determining that intent. *Moore v. Langston*, 251 N.C. 439, 111 S.E. 2d 627 (1959).

In the present case the court viewed the wills of Henry L. Herring and Ozora Creech Herring together and from the "circumstances and conditions surrounding the testators" found that Henry B. Herring acquired a one-half undivided interest in the two tracts by virtue of those wills. If that finding is supported by competent evidence in the record, it is binding on this appeal. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971); *Knutton v. Cofield*, 273 N.C. 335, 160 S.E. 2d 29 (1968). We hold that there was ample competent evidence to support the court's ultimate finding.

Petitioner contends that under Item X of the will of Henry L. Herring, by which the testator devised a one-half undivided interest in "[a]ll the rest and residue of my estate" to his wife, Ozora Herring acquired a one-fourth undivided interest in 192.75-acre tract and the 66-acre tract and that under Item II she acquired only such additional interest in those tracts as would be required in value when added to the other property passing to her under the will, to equal one-half of the testator's adjusted gross estate. We agree with the trial judge that the will of Henry L. Herring does not compel the conclusion that the testator intended such a result.

Under Item II of his will, Henry L. Herring devised and bequeathed to his wife "such portion, or share, of my estate as shall, when added to the items of property specified in Paragraphs (1), (2) and (3) following next below, result in a total equal to one-half of my adjusted gross estate [as that term is used in the United States Internal Revenue Code]." The property specified in Paragraphs (1), (2) and (3) to which the testator referred included the amount of insurance proceeds payable on the testator's death, the value of all property held jointly with his wife, and the value of all property determined to be vested in his wife under the residuary clause of the will. This language, viewed out of context, suggests that the testator intended to limit the total amount of property passing to his wife to one-half

of the value of his adjusted gross estate as determined for federal estate tax purposes. Immediately following that provision, however, the testator directs that "[p]roperty included in that portion of this Item that precedes Paragraphs (1), (2) and (3) above, *shall include*" (emphasis added) certain specified interests in described tracts of land, including a one-half undivided interest in the 192.75-acre tract and the 66-acre tract at issue.

The estate tax return filed on behalf of the estate of Henry L. Herring discloses that if the value of the property passing to Ozora Creech Herring under Paragraphs (1), (2) and (3) of Item II is added to the value of the specified interests in the tracts which the testator directs shall be included in the portion of Item II preceding Paragraphs (1), (2) and (3), the total is greater than one-half the value of the testator's adjusted gross estate. Thus, the apparently limiting language of the first part of Item II conflicts directly with the clearly mandatory language of the latter part of Item II.

The rule is well established that apparently inconsistent clauses in a will should be harmonized and that effect should be given to each phrase used by the testator. *Schaeffer v. Haseltine*, 228 N.C. 484, 46 S.E. 2d 463 (1948); *Williams v. Rand*, 223 N.C. 734, 28 S.E. 2d 247 (1943). Applying this rule, we conclude that the logical interpretation of the will is that the testator's primary intent, as expressed in the latter part of Item II, was that the described interests in the tracts mentioned therein should in all events pass to his wife. His secondary intent, as expressed in the first part of Item II, was to take full advantage of the maximum federal estate tax marital deduction available to him at the time. Construed in this manner, Item II directed that Ozora Creech Herring receive the items of property mentioned in Paragraphs (1), (2) and (3) *as well as* the specified interests in the several tracts (including the one-half undivided interest in the 192.75-acre tract and the 66-acre tract). If the value of all of those items of property did not equal one-half of the testator's adjusted gross estate, then Ozora Creech Herring was to receive such additional share as would equal that amount.

To the extent that the will of Henry L. Herring was ambiguous because of these conflicting provisions in Item II, it was appropriate for the trial judge to read that will in conjunction with the will of Ozora Herring. *See Smith v. Creech*, 186 N.C. 187, 119 S.E. 3 (1923). The wills of husband and wife were both executed on 12 November 1965 in the presence of the same two witnesses. The husband's will specifically referred to the disputed tracts as "including the premises whereon I formerly resided *and which are now occupied by my son, Henry B. Herring and his family.*" (Emphasis added). In her will Ozora Herring directed that in the event her husband predeceased her, their son Henry B. Herring was to receive all of her interest in the 192.75-acre tract and the 66-acre tract. The deed by which Henry B. Herring acquired title to the undisputed one-half undivided interest in the two tracts was also executed on the same day as execution of his parents' wills. The contemporaneous execution of the deed to Henry B. Herring and the will of Ozora Herring are unquestionably circumstances which surrounded Henry L. Herring at the time he executed his own will, and the contents of these documents support the inference that his broad testamentary plan was to devise the tracts at issue to his wife in the knowledge that upon her death sole title to the property would vest in his son.

Because of our conclusion that there was ample competent evidence to support the trial court's ultimate finding, we do not consider petitioner's assignments of error directed to the admission of certain testimony at trial. Even if it be conceded that certain evidence was erroneously admitted, there is nothing upon this record to show that the ultimate finding of fact was influenced thereby. The order appealed from adjudging Henry B. Herring the sole owner of the First and Second Tracts described in the petition is

Affirmed.

Chief Judge MORRIS and Judge WELLS concur.

STAHL-RIDER, INC. v. STATE OF NORTH CAROLINA; NORTH CAROLINA CENTRAL UNIVERSITY OF THE UNIVERSITY OF NORTH CAROLINA; W. EDWARD JENKINS; AND C.C. WOODS CONSTRUCTION COMPANY

No. 8010SC52

(Filed 19 August 1980)

1. **Appeal and Error § 6.6– action against State – denial of motion to dismiss – immediate appeal**

An immediate appeal lies under G.S. 1-277(b) from the trial court's refusal to dismiss a suit against the State on the grounds of governmental immunity.

2. **State § 4– contract with State – action for breach of contract – motion to dismiss properly denied**

In an action by a heating and air conditioning contractor to recover extra expenses and costs incurred in performing its contract with defendants, the trial court properly denied defendants' motion to dismiss for lack of subject matter and personal jurisdiction, since the provisions of G.S. 143-135.3 clearly granted plaintiff the right to bring its action against the State, and plaintiff's allegation that it was entitled to damages contemplated under the contract for breach of contract was sufficient to withstand defendants' motion to dismiss.

APPEAL by defendants from *Bailey, Judge.* Amended order entered 20 November 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 4 June 1980.

Plaintiff brought this civil action, seeking to recover monetary damages against defendants State of North Carolina and North Carolina Central University (Central). The essential allegations of the complaint are: On 30 April 1973, the plaintiff domestic corporation entered into a contract with the State to provide and install the heating and air conditioning systems in the Communications Building to be constructed on the campus of Central. The contract provided that plaintiff was to receive the sum of $326,400 for its work. Attached to the complaint were supplemental conditions, article 18 of which provided that all contractors on the project were to complete their work no later than 540 calendar days from 12 July 1973, the designated commencement date of the project. Under the terms of the contract, the project completion date was to have been 20 December 1974. Serious and lengthy delays, unrelated to plaintiff's responsibi-

lities, occurred after the commencement date of the project, such that plaintiff was prevented from beginning its work inside the building until August 1974. Specifically, the complaint alleges:

> Because plaintiff was delayed and prevented from beginning to work inside the building until August 1974, and because, through no fault of its own, it was not able to complete its obligations until some time in the latter part of March, 1976, plaintiff incurred extra expenses and costs in the amount of $27,911.83 due to the fact that the project was not completed within the time stipulated by the contract.

Defendants' failure to provide a job site within a reasonable time after the commencement of the project constituted a breach of contract and caused plaintiff's loss and damage. Pursuant to the provisions of G.S. 143-135.3, plaintiff filed its claim for increased costs with the Department of Administration of the State of North Carolina. Upon denial of its claim by the Department, plaintiff appealed to the Secretary of Administration. After hearing, plaintiff's claim was again denied by the Department of Administration, following which plaintiff brought this action.

Defendants answered plaintiff's complaint, admitting the contract, but denying the validity of plaintiff's claim, and moved to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1), (2), and (6) for lack of subject matter and personal jurisdiction and for failure to state a claim upon which relief could be granted. Following a hearing at which the trial court considered the pleadings, briefs of the parties, and arguments of counsel, an order was entered denying defendants' motions to dismiss. Defendants have appealed from that order.

Johnson, Gamble & Shearon, by George G. Hearn, for the plaintiff appellee.

Attorney General Rufus L. Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

WELLS, Judge.

The sole exception preserved by defendants and presented in this appeal concerns whether the trial judge erred in denying their motions to dismiss for lack of jurisdiction over the subject matter and the person.

Plaintiff contends that the trial court's order denying defendants' motions to dismiss is interlocutory and therefore not appealable. The question of appealability of trial court orders and judgments has been the subject of a number of decisions of this Court and of our Supreme Court. In these decisions, we find a consistent thread of jurisprudential philosophy in opposition to allowing appeals from interlocutory orders or from judgments less than final. To paraphrase Justice Ervin and others speaking for our appellate courts, the basic message seems to be, 'if there is work left to be done at the trial level, let the matter lie there until the trial court has completed its task.' In this spirit, we must of course recognize that the trial court's denial of a motion to dismiss for lack of jurisdiction is clearly interlocutory, there having been no final disposition of the matter on its merits in any sense. Were we free to exercise our judgment in this case in the way we believe it ought to be exercised in the interest of a sound and consistent jurisprudential philosophy, we would not hesitate to hold in this case that defendants' appeal cannot lie. We are not free to do so, however, because we find that the legislature has directed us to allow such appeals.

G.S. 1-277 provides:

> (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.
>
> (b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

Since its first enactment in 1967, this section and G.S. 7A-27 have codified the rules as to the stage at which cases are appealable. There have been innumerable decisions of our appellate courts concerning rights of appeal pursuant to the provisions of current G.S. 1-277(a) and its predecessor sections in the Consolidated Statutes. *See, e.g., 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); *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980). The provisions of subsection (b), however, were not contained in our statutes prior to 1969. 1967 N.C. Sess. Laws, ch. 954, § 3(j). From G.S. 1-277(b) it is clear that an immediate appeal lies from an adverse ruling as to the personal, *in rem* or *quasi in rem* jurisdiction of the court at any stage of the proceedings.

[1] The State cannot be sued in its own courts or elsewhere unless it has expressly consented to such suits. *Dalton v. Highway Com.*, 223 N.C. 406, 27 S.E. 2d 1 (1943). No court has jurisdiction to entertain a suit against the sovereign unless the sovereign has consented. *Cf., United States v. Sherwood*, 312 U.S. 584, 85 L.Ed. 1058, 61 S.Ct. 767 (1941) (neither the United States Court of Claims nor any other court has jurisdiction to entertain suits against the United States except as Congress has consented). *See also*, 81A C.J.S., States § 298, pp. 942-948 (1977); 72 Am.Jur. 2d, States § 99, pp. 490-491 (1974). We have previously held that an immediate appeal lies under G.S. 1-277(b) from the trial court's refusal to dismiss a suit against the State on grounds of governmental immunity. *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E. 2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E. 2d 297 (1975).[1/] In this light, we hold that the present appeal may be maintained.

[1/] *Acorn v. Knitting Corp.*, 12 N.C. App. 266, 182 S.E. 2d 862 (1971), *cert. denied*, 279 N.C. 511, 183 S.E. 2d 686 (1971) and *Allen v. Trust Co.*, 35 N.C. App. 267, 241 S.E. 2d 123 (1978) are clearly distinguishable from the case at bar. *Acorn* did not involve a challenge to the jurisdiction of the trial court and we did not reach the issue we decide here. In *Allen* the defendant sought dismissal of plaintiff's state court action on grounds that the Federal district courts had exclusive original jurisdiction to entertain suits under ERISA. We held that the lower court's refusal to dismiss that action was not immediately appealable. Exclusive Federal jurisdiction being a matter of *subject matter* and not *personal* jurisdiction, G.S. 1-277(b) was inapplicable to that case.

[2] While we thus recognize and uphold defendants' right to appeal pursuant to the provisions of G.S. 1-277(b), we nevertheless hold that the trial court correctly denied their motions to dismiss for lack of personal jurisdiction. The provisions of G.S. 143-135.3 clearly grant plaintiff the right to bring this action in the Superior Court of Wake County:

> § 143-135.3. Procedure for settling controversies arising from contracts; civil actions on disallowed claims. — Upon completion of any contract for construction or repair work awarded by any State board to any contractor, under the provisions of this Article, should the contractor fail to receive such settlement as he claims to be entitled to under terms of his contract, he may, within 60 days from the time of receiving written notice as to the disposition to be made of his claim, submit to the Secretary of Administration a written and verified claim for such amount as he deems himself entitled to under the terms of said contract, setting forth the facts upon which said claim is based. In addition, the claimant, either in person or through counsel, may appear before the Secretary of Administration and present any additional facts and arguments in support of his claim. Within 90 days from the receipt of the said written claim, the Secretary of Administration shall make an investigation of the claim and may allow all or any part or may deny said claim and shall have the authority to reach a compromise agreement with the contractor and shall notify the contractor in writing of his decision.
>
> As to such portion of the claim which may be denied by the Secretary of Administration, the contractor may, within six months from receipt of the decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.
>
> * * *

> The submission of the claim to the Secretary of Administration within the time set out in this section and the filing of an action in the superior court within the time set out in this section shall be a condition precedent to bringing an action under this section and shall not be a statute of limitations.
>
> The provisions of this section shall be deemed to enter into and form a part of every contract entered into between any board of the State and any contractor, and no provision in said contracts shall be valid that is in conflict herewith.
>
> * * *

The plaintiff has alleged it is entitled to damages contemplated under the contract for breach of contract. For jurisdictional purposes, these allegations are sufficient to withstand defendants' motions to dismiss under G.S. 1A-1, Rule 12(b)(2).

Defendants argue, however, that *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972), *rehearing denied*, 281 N.C. 317 (1972) is controlling here and supports their argument that the trial court should have dismissed plaintiff's claim. Our reading of *Harrison* compels us to say that we do not find it analogous. In *Harrison*, the trial court's ruling was, in essence, on defendant's motion for summary judgment. The trial court in *Harrison* ruled on the merits of plaintiff's claim. In the case *sub judice*, the only question before us is whether the trial court had personal jurisdiction over the defendant in this cause, and we hold that it did.

The judgment of the trial court is

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. THOMAS EUGENE DAVIS

No. 801SC133

(Filed 19 August 1980)

1. **Receiving Stolen Goods § 2– indictment for receiving stolen goods – conviction of possession of stolen goods**

A defendant indicted for feloniously receiving stolen goods in violation of G.S. 14-71 could properly be convicted of felonious possession of stolen goods in violation of G.S. 14-71.1, since the crime of possession of stolen goods is included in the crime of receiving stolen goods.

2. **Criminal Law §§ 23, 79.1– jury informed by court about codefendants' guilty pleas – no prejudice to defendant**

The trial court did not err in advising the jury during the trial that defendant's two codefendants had withdrawn their not guilty pleas and entered pleas of guilty where there is nothing in the record indicating prejudice to defendant, and where defendant failed to object or to request a mistrial or instructions to the jury.

3. **Criminal Law § 75.15– statements while intoxicated**

Statements made by defendant to an officer were not inadmissible on the ground defendant was intoxicated where the evidence did not show that defendant was so drunk as to be unconscious of the meaning of his words.

Judge VAUGHN dissenting.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 2 October 1979, Superior Court, GATES County. Heard in the Court of Appeals 10 June 1980.

Defendant was charged, by indictment proper in form, with breaking and entering and larceny, and receiving property knowing it to have been feloniously stolen. After the jury was empanelled and at a time when the jury was in the courtroom, the court announced that two co-defendants had withdrawn their not guilty pleas and entered pleas of guilty. Thereafter the State announced that as to defendant Davis, it would proceed "upon the theory of the third count of the bill of indictment, that being the theory of receiving stolen goods knowing them to be stolen," a violation of G.S. 14-71.1. The court instructed the jury that defendant was charged with "possession of property which was feloniously taken, which is possessing property which the defendant knew or had reasonable grounds

to believe had been stolen as a result of a breaking and entering." The jury was given as possible verdicts "(1) Guilty of possession of property feloniously stolen; or (2) not guilty." Defendant was convicted of possession of property feloniously stolen and appeals from the judgment entered on the verdict.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Hopkins and Allen, by Grover Prevatte Hopkins, for defendant appellant.

MORRIS, Chief Judge.

The evidence, briefly summarized, tended to show that defendant was in the company of co-defendants Green and Duff and was first observed by Officer McLawhorn sitting in a car parked near a laundromat. The officer observed defendant leave the car and return to the car "in a staggering motion." The officer moved to a better vantage point behind some hedges and watched Green and Duff take tires from the back of the laundromat and put them in the car in which defendant remained seated in the middle of the front seat, sometimes leaning over and sometimes sitting up straight. Green and Duff got in the car with defendant still seated in the middle of the front seat, and they drove off. The officer stopped the car and arrested Duff and defendant. Green ran. Defendant was intoxicated but not drunk, according to the officer. According to defendant, he was drunk and remembered very little about his companions putting the tires in the car.

[1] He was convicted of *possession* of property feloniously stolen, a violation of G.S. 14-71.1, an offense with which he was not charged, the indictment having charged him with receiving stolen goods, a violation of G.S. 14-71. This, defendant argues, is error requiring arrest of judgment. We do not agree.

G.S. 14-71 and G.S. 14-71.1 are identical in language except that the word "possess" is substituted in G.S. 14-71.1 for the word "receive" in G.S. 14-71. In *State v. Kelly*, 39 N.C. App. 246, 248, 249 S.E. 2d 832, 833 (1978), we said:

> While it is true that a defendant cannot be convicted of *receiving* stolen property which he has stolen himself, such is not the case in a charge of *possession* of stolen property. The concept of "receiving" involves someone other than defendant stealing the property and then transferring possession of it to the defendant. A defendant cannot "receive" property from himself.

While all of the elements of receiving are not present in a charge of possessing, the converse is not true. Clearly all the elements of possession *are* present in the charge of receiving. G.S. 15-170 provides that a defendant, upon the trial of any indictment, may be convicted of the crime charged in the indictment "or of a less degree of the same crime . . . ."

> A defendant brought to trial under an indictment, proper in form, may, if the evidence so warrants and the trial is free from error, be properly convicted of the offense charged in the indictment or of a lesser offense all of the elements of which are included in the offense charged in the indictment and all of which elements can be proved by proof of the allegations of fact contained in the indictment. G.S. 15-170; *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535; *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44; *State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233. See also: 41 AM.JUR. 2d, Indictment and Information, § 313; Wharton, Criminal Law and Procedure, § 1799.

State v. Aiken, 286 N.C. 202, 205, 209 S.E. 2d 763, 765 (1974), and cases there cited; *State v. Craig*, 35 N.C. App. 547, 241 S.E. 2d 704 (1978).

We are of the opinion that the crime of possession of stolen goods (G.S. 14-71.1) is included in the crime of receiving stolen goods (G.S. 14-71) and the court properly submitted that offense to the jury.

[2] It appears from the record that during a court recess, two co-defendants withdrew their pleas of not guilty and entered guilty pleas. After the jury returned to the courtroom, the judge so advised the jury. Defendant, on appeal, assigns this as error.

It is accepted procedure in criminal courts to allow a defendant to enter a guilty plea at any time the court is in session. Frequently, where a defendant is being tried with co-defendants, one or more defendants may withdraw a not guilty plea and enter a guilty plea — to the offense charged or another offense. "The Court, however, should be careful to see that such practice works no undue prejudice to another party on trial, (citations omitted.)" *State v. Bryant*, 236 N.C. 745, 747, 73 S.E. 2d 791, 792 (1953). *See also State v. Kerley*, 246 N.C. 157, 97 S.E. 2d 876 (1957). Here there is absolutely nothing in the record indicating prejudice to defendant. Indeed, he made no motion for a mistrial, nor request for instructions to the jury, nor did he interpose any objection of any kind. Ordinarily, the court will not consider questions not properly presented by objections duly made at trial and exceptions duly taken thereto assigned as error. *Koury v. Follo*, 272 N.C. 366, 158 S.E. 2d 548 (1968). Even if this question were properly before us, and it is not, the record discloses no prejudice to defendant.

[3] Defendant also assigns error to the admission of certain statements made while intoxicated on the ground that he knowingly could not have made the statements. Defendant testified that he was drunk when the offense occurred. The arresting officer testified that he obviously had been drinking, but was aware of what was going on, talked coherently, was not confused, and understood the questions asked. The court found as a fact that the statement made by defendant was made freely, voluntarily and intelligently after a free and intelligent waiver of his constitutional rights. A highway patrolman testified that he observed defendant and that he probably would have blown .15% on the breathalyzer. Defendant concedes that the law on this question is set forth in *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), that unless a defendant "is so drunk as to be unconscious of the meaning of his words" his intoxication does not render his statement inadmissible. He urges, however, that we overrule the prior decisions and adopt a standard similar to that used in cases involving the operation of a motor vehicle. We are in thorough accord with *Logner* and are, of course, bound by it.

Finally defendant assigns error to the charge of the court with respect to constructive possession. The charge of the court clearly apprised the jury of the law with respect to actual and constructive possession. The jury could not have been misled.

In defendant's trial we find

No error.

Judge WELLS concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

Although I think there is considerable merit in the logic of my colleagues, I must, with some misgiving, dissent. Defendant was arraigned and tried on a bill of indictment charging him with a violation of G.S. 14-71. He was convicted of violating a separate statute, G.S. 14-71.1. He stands, consequently, convicted of a statutory crime with which he was not charged. Every defendant is entitled to be informed of the accusation against him and be tried accordingly. Certainly he should be advised of the statute he is alleged to have violated. We are not faced with common law crimes, but with two separate criminal statutes proscribing different conduct. The punishment prescribed for violating the statutes is identical. Neither crime is a crime of a lower degree than the other. They are not the same offenses in law as well as fact. Receiving stolen goods and possessing them are component transactions in violation of distinct statutory provisions making them crimes. It seems that if the General Assembly had intended the result reached by the majority when, in 1977, it enacted G.S. 14-71.1, it would have simply amended G.S. 14-71 by striking the words "receive" and "received" and inserting in lieu thereof the words "possess" and "possessor." It did not do this and has not seen fit to repeal G.S. 14-71 since G.S. 14-71 was enacted. It also seems to me that the reasoning of the majority would permit a conviction under G.S. 14-71.1, the "possession" statute, on an indictment charging only larceny on the premise that all the elements of "possession" are present in the indictment for larceny because

clearly one cannot steal another's property and carry it away without possessing it with knowledge that it had been stolen.

For the reasons stated, I would arrest judgment.

STATE OF NORTH CAROLINA v. WILLIAM KELLAM

No. 8017SC45

(Filed 19 August 1980)

Searches and Seizures § 13– defendant living in parents' house – consent to search given by neighbor – evidence properly admitted

In a prosecution for breaking and entering and larceny, the trial court did not err in allowing into evidence items seized from the home of defendant's parents since the parents resided in Hawaii but maintained the home in N. C.; a next door neighbor was given a key and was told to live in the house if she wished and to look after it; an officer, who had been told that defendant was living in his parents' house, asked the neighbor for the key which she surrendered; the neighbor had rights to control, access and possession of the home which were equal to defendant's, if not exclusive; defendant knew that the neighbor was supposed to be looking after the house and his reasonable expectation of privacy was thereby diminished; and the neighbor was reasonably apparently entitled to give or withhold consent to a search of premises within the meaning of G.S. 15A-222.

APPEAL by defendant from *Smith (David I.), Judge.* Judgments entered 8 June 1979 in Superior Court, STOKES County. Heard in the Court of Appeals 19 May 1980.

Defendant was presented with two indictments for breaking and entering, and larceny of certain items from the home of Harold Boles on 16 January 1979 and on 8 March 1979. On 6 June 1979, defendant pled not guilty and moved that the Court suppress all evidence in the search of the residence of Mr. and Mrs. Tony Anthony in Pinnacle, North Carolina, on or about 16 January 1979, by members of the Stokes County Sheriff's Department. On the same day defendant moved that the Court suppress his statement made to the Stokes County Sheriff's Department. Evidence, summarized below, was presented to the court. On 8 June 1979, the court entered an order denying defendant's motion to suppress, and defendant, with the court's

permission, withdrew his plea of not guilty and entered a plea of guilty reserving his right of appeal.

STATE'S EVIDENCE

On 16 January 1979 a break-in was reported at the home of Harold Boles on Boles Street in Pinnacle, North Carolina.

Detective Ray Von Collins and Deputy Richard Bowman answered the call and went to the Boles home. Mr. Boles told the officers that he suspected the break-in had been committed by defendant because defendant had been seen in the area and defendant's natural parents own the home across the street from Boles' home.

Defendant is the natural son of Mr. and Mrs. Tony Anthony, but he was adopted by Charles Kellam, Sr. and his wife when defendant was small. Defendant lived with his adoptive parents in Pinnacle until the death of his adoptive father, after which defendant went to live with his natural parents in Hawaii. Mr. Tony Anthony is retired from the military service and lives in Hawaii with his wife and several children; however, the Anthonys maintain a home in Pinnacle for use during visits there. The Anthonys had given a key to their Pinnacle house to Mrs. R. J. "Fronie" Clark, who was told to look after the house and to live in the house if she wanted to live there. Mrs. Clark lived next door to the Anthony home, and she had, in fact, lived in the Anthony home during one winter.

On the evening of 16 January 1979, when the officers went to the Boyles home, they were told by Mr. Boles that Mrs. Clark had a key to the Anthony home. The two officers and Mr. Boles went to the home of Mrs. Clark and obtained a key from her to go into the Anthony home, at which time the officers found in the linen closet, basement and two bedrooms several items which had been taken from the Boles home. On 19 January 1979 Officer Collins obtained a warrant for the arrest of defendant.

On 8 March 1979 a second break-in was reported at the Boles home. Upon investigation, Officer Collins learned that defendant and David Reynolds had been seen about 200 yards

from the Boles home, at which time defendant and Reynolds were walking down the street with a duffle bag similar to one reported taken from the Boles home.

On 9 March 1979 Officer Collins arrested defendant at Pilot Mountain at about 5:30 p.m., and the defendant was driven to the jail in Danbury where they arrived about 6:15 p.m. At approximately 6:30 p.m. defendant was advised of his rights, and at 6:41 p.m. he was questioned by Officer Collins and the Sheriff. Defendant was fed at 7:30 p.m. and he did not ask for food, water or cigarettes prior to 7:30 p.m. Defendant was twice advised that he was being questioned concerning the breakings and enterings at the Boles residence. Defendant signed his name at the bottom of the form advising him of his rights and stated to Officer Collins that, because he had been in prison before, he understood his rights.

During the questioning period Officer Collins told defendant and "emphasized" that he "had searched the Anthony house and had gotten and returned a good portion of the items taken out of the house." During the course of this interview, the defendant admitted breaking into the Boles home on 8 March 1979 but denied going into the Boles home on 16 January 1979.

A second interview of the defendant by Officer Collins occurred on 13 March 1979 when the defendant asked the officer to come to his cell. The defendant was advised of his rights but refused to sign the acknowledgment of rights form. The defendant then admitted for the first time that he had been involved in both break-ins. Defendant did sign a rights form on 14 March 1979.

Defendant's Evidence

The defendant was fired from his job at Tyson Food in Dobson, N. C., and, with the permission of his mother, moved into the Anthony home in Pinnacle on 26 December 1978. Defendant lived in the home from that date until 16 January 1979. The defendant "knew Mrs. Clark was supposed to be looking after the house."

When questioned about the interrogation by Officer Collins, defendant stated that the "only reason I answered his questions was because of the evidence I saw in the room there where I was." The defendant recognized the evidence he saw at the interview as several items which he had left in the house on the 16th of January.

Other necessary facts will be stated in the opinion.

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

Jerry Rutledge for defendant appellant.

CLARK, Judge.

Defendant presents two questions for review: (1) whether the trial court erred in denying the defendant's motion to suppress evidence seized during a warrantless search of the Anthony home on 16 January 1979; and (2) whether the trial court erred in denying the defendant's motion to suppress the statements made by the defendant to Officer Collins on three different occasions. We resolve both of these questions against the defendant.

The defendant's primary contention is that Mrs. Clark could not give any consent which would overcome the privacy rights of the defendant as occupant of the Anthony house. While we recognize that this case presents an extended application of the doctrine permitting certain third-party consents to warrantless searches without probable cause, we do not agree with defendant's position. In *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242, 249 (1974), it was stated by Mr. Justice White that, "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." The *Matlock* opinion, at *id.*, fn. 4, also quoted with approval, *United States v. Sferas*, 210 F. 2d 69, 74 (7th Cir. 1954), for the proposition "that where two persons have equal rights to the use or occupation of premises, either may give consent to a

search, and the evidence thus disclosed can be used against either." *See also,* Annot., 31 A.L.R. 2d 1078 § 6 (1953).

The critical facts are provided in the testimony of Mrs. Clark:

> "Mr. & Mrs. Anthony [the owners of the searched house] gave me a key when they left to go to Hawaii last fall. They told me to look after their house. They told me that no one had permission to go into that house but me and my husband. On or about the 16th day of January, 1979, this officer [Bowman] . . . came and asked for the key to the house. He told me for what purpose. I gave him the key. He said he wanted to look in the house and see if anything was missing. I gave him the key.
>
> * * * *
>
> She [Mrs. Anthony] told me and my mother that we could stay there she wanted us to stay over there. The first time we stayed over there was through the winter, the first year, and so the other time I just kept check on the house.
>
> * * * *
>
> I never raised a question or mentioned to him about his staying there. I just asked him how did he get in. He told me he had a key . . . .
>
> * * * *
>
> They [the owners] did not tell me that the defendant was going to stay in the house at any time. They never told me that the defendant had permission to go into the house . . . ."

Under the authority of *Matlock* we hold that Mrs. Clark's consent is effective against defendant's Fourth Amendment claim, for the evidence suggests that Mrs. Clark had equal, if not exclusive, rights to control, access and possession of the home. While not necessarily a controlling factor, it is significant that Mrs.

Clark had been given the key to the Anthony home by the owners of the home. *See e.g.*, U.S. ex rel. *Cabey v. Mazurkiewicz*, 431 F. 2d 839, 843-44 (3d Cir. 1970) (wife inadvertently given key held not sufficient consent); *United States v. Harris*, 534 F. 2d 95 (7th Cir. 1976) (permission to use apartment but without key); *United States v. Long*, 524 F. 2d 660 (9th Cir. 1975) (wife, who was joint owner and had joint control of house but who was not living in the house occupied by husband, could consent to entry even though husband had changed locks where wife had keys to house before locks were changed). It is also significant that defendant knew that Mrs. Clark "was supposed to be looking after the house," for his reasonable expectation of privacy was thereby diminished, especially since much, but not all, of the incriminating evidence was found in "common areas" of the house, *i.e.*, the basement and linen closet. *Matlock, supra*, 415 U.S. at 171, n. 7. While it is true that Mrs. Clark did not occupy the Anthony home at the same time as the defendant, she, nevertheless, did not surrender her full possessory rights in the premises as might be true in the case of a hotel clerk who rents a hotel room to a guest, *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856, *rehearing denied*, 377 U.S. 940, 84 S. Ct. 1330, 12 L. Ed. 2d 303 (1964), or one who stands in the position of a landlord relative to a tenant's leased premises, *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961). Mrs. Clark at all times maintained "joint access and control for most purposes." *Matlock, supra*, 415 U.S. at 171, n. 7.

In addition to the above case law, N.C. Gen. Stat. § 15A-221 provides that a warrantless search and seizure may be conducted if consent to the search is given. Similarly, N.C. Gen. Stat. § 15A-222 provides in pertinent part that:

> "The consent needed to justify a search and seizure under G.S. 15A-221 must be given
>
> * * * *
>
> (3) By a person who by ownership *or otherwise* is reasonably apparently entitled to give or withhold consent to a search of premises." (Emphasis supplied.)

We hold that subsection (3) of N.C. Gen. Stat. § 15A-222 is consistent with the language in *Matlock, supra,* that permission may be "obtained from a third party who possessed *common authority or other sufficient relationship to the premises* or effects sought to be inspected." 415 U.S. at 171 (emphasis added). Under the facts of this case, Mrs. Clark was "reasonably apparently entitled to give or withhold consent to a search of premises" within the meaning of N.C. Gen. Stat. § 15A-222.

We do not have to reach defendant's argument that his testimony was the "poisonous fruit" of the illegal search and should therefore be suppressed, because we have already held that the search of the Anthony home was not in violation of defendant's Fourth Amendment rights.

Affirmed.

Chief Judge MORRIS and Judge ERWIN concur.

MEREDITH HOGGARD v. WILLIAM M. (JIMMIE) UMPHLETT

No. 806SC66

(Filed 19 August 1980)

Master and Servant § 23.2; Negligence § 30.3– injuries to employee – paint can thrown in fire by child – no negligence by employer

In an action to recover damages for injuries suffered by plaintiff when an aerosol paint can exploded while plaintiff was tending a fire on defendant's premises, the evidence was insufficient for the jury on the issue of defendant's negligence where it tended to show that plaintiff was employed as a general laborer by defendant; plaintiff followed defendant's directions to rake his yard, to place empty paint cans in defendant's trash trailer, and to put any paint cans which were not empty beside the door to defendant's shop; a pile of pine straw and branches was being burned by defendant approximately 50 feet from defendant's house and 50 feet from defendant's shop; plaintiff began tending the fire when defendant and a visitor went into defendant's house; the visitor told defendant that a child who lived next door was playing around the fire or throwing things into the fire; defendant immediately ran the child away; defendant had repeatedly run such child off his property and had constructed a fence to keep the child from running across his yard; and approximately two to three minutes after defendant

chased the child away, plaintiff stuck a pitchfork into the fire to rake the ashes and an aerosol can of paint exploded, causing substantial injuries to plaintiff, since (1) the attractive nuisance doctrine does not apply; (2) the case does not involve an instrumentlity which is dangerous *per se* or as used; (3) defendant did not fail to maintain a safe place to work; (4) plaintiff should have had equal knowledge of the dangerous condition; and (5) it was not foreseeable by defendant that the child would pick up an aerosol can next to defendant's shop and throw it in the fire, and the visitor's warning to defendant about the child placed no duty on defendant to inspect the fire or to warn his employee as to the potential danger of an exploding can.

APPEAL by defendant from *Small, Judge.* Judgment entered 12 September 1979 in Superior Court, BERTIE County. Heard in the Court of Appeals 4 June 1980.

On 17 April 1978 plaintiff filed a complaint seeking to recover damages for injuries suffered by plaintiff when an aerosol paint can exploded while plaintiff was tending a fire under the direct supervision of the defendant on the defendant's premises. The defendant alleged contributory negligence. The matter was tried before a jury and defendant's motions for a directed verdict at the close of the plaintiff's evidence and at the close of all the evidence were denied. The jury returned a verdict that the defendant was negligent, that the plaintiff did not by his own negligence contribute to his injuries, and that the plaintiff was entitled to recover $6,500 from the defendant.

Only the evidence relevant to the issue of liability will be summarized below. As there is little, if any, conflict between the evidence submitted by plaintiff and defendant, we elect to summarize the evidence in chronological order.

On or about 4 October 1976, plaintiff, 22 years old, was living in a trailer on defendant's premises and was employed as a general laborer by defendant. On the Friday before the occurrence of the explosion of the paint can which injured plaintiff, defendant told plaintiff to rake his yard, to place any empty paint cans in defendant's trash trailer, and to put any paint cans, aerosol or otherwise, which were not empty in or beside the door of defendant's shop. Plaintiff performed as he was requested, and all of the paint cans were placed either beside the shop door or in the trailer. The cans in the trailer were hauled off the day before the explosion.

On Monday, the day of the explosion, plaintiff did no more raking and, for most of the day, cleaned up the other side of the shop and hauled refrigerators. The defendant was burning the pile of pine straw and branches which had been raked together by plaintiff on Friday. The fire was lit around 3:00 or 4:00 p.m., but by the time the accident occurred, sometime between 5:00 and 7:30 p.m., the fire had burned down to a pile of ashes eight to ten inches from the ground at the highest point, and approximately four feet by four feet in area. At this time Beatrice Robbins came to visit the defendant to talk with him about the possibility of buying his house. Defendant asked plaintiff if he would like a cup of coffee and plaintiff responded, "No, thank you," and that he was "looking after eating some grapes." Defendant then handed plaintiff his pitchfork and asked plaintiff if he would stir up the fire and rake the ashes so that the pile would be smaller. Defendant went in the house to talk with Ms. Robbins. Plaintiff went over to the fire, raked the ashes into a smaller pile, and then went over to the grapevine, located 15 feet away from the fire, to eat some grapes. The fire was approximately 50 feet from the back of the house and approximately 50 feet from defendant's shop.

After defendant had been in the house for approximately ten to fifteen minutes, Ms. Robbins told defendant, "That little boy is throwing stuff in the fire or playing in the fire." Defendant went to the door and yelled, "Git," and the child left. The child was Irvin Kelly, Jr., and lived next door to defendant. Defendant stated that he had told the child to get out of his yard "twenty-five thousand times" because the child threw things at defendant's ducks. Defendant had put up a wire fence to keep the child from running through his yard. Plaintiff was standing between the grapevine and the fire when defendant yelled at the child. Defendant did not go out and inspect the fire after the child left. Approximately two to three minutes later, plaintiff went to the fire and stuck the pitchfork into the fire in an attempt to rake the ashes. At that time an aerosol can of red paint exploded, thereby causing plaintiff substantial injuries. Plaintiff, however, was unaware that any child had entered the yard within a short period prior to the time of the explosion. There was nothing in the record to suggest that plaintiff heard defendant yell at the child to get away from the fire.

Pritchett, Cooke & Burch by W.L. Cooke for plaintiff appellee.

Rodman, Rodman, Holscher & Francisco by Edward N. Rodman for defendant appellant.

CLARK, Judge.

Defendant's sole assignment of error is that there was insufficient evidence to go to the jury on the issue of his negligence. The question ultimately boils down to a determination as to whether the statement by Ms. Robbins that the child was playing around the fire or had thrown something in the fire was sufficient to give rise to a duty on the part of defendant to inspect the fire or to warn his employee as to the potential danger of an exploding can. This question in turn depends upon whether defendant could foresee that, without having been seen by plaintiff, the child would pick up an aerosol can in or next to defendant's shop which was located approximately 50 feet from the fire, and that the child would deliberately take the aerosol can and throw it on the burning coals. We hold that defendant was not guilty of actionable negligence.

First, we note that this case does not involve an attractive nuisance. The evidence suggests that the defendant repeatedly ran the child off his property, that he constructed a fence to keep the child from running across his yard, and that the defendant ran the child away immediately upon learning of the child's presence on the property. Consequently, there is no permissible inference that, because defendant had an attractive nuisance, he is therefore liable for any injury to a child or others incurred as a result of the child's attraction to defendant's property.

Second, this case does not involve an instrumentality which is dangerous *per se*, or dangerous as used, since the cans in question were stacked, *by plaintiff*, against the shop 50 feet away from the fire. For the same reasons, the defendant did not fail to keep a safe place to work. Again, the plaintiff's own testimony was that all the paint cans had been picked up by him and either thrown away in the trash trailer or stacked up next

to the door of defendant's shop. We can find no failure to keep a clean and safe place to work when plaintiff was employed for the purpose of cleaning up and did in fact clean up prior to the accident. The result might be different if the facts indicated that paint cans lay in abandon on the ground in close proximity to the fire. Here, however, there is no evidence in the record that the defendant was or should have been aware of a dangerous condition on his property, and we note that the mere stacking of paint cans next to his shop 50 feet away from a purportedly watched fire 4 feet by 4 feet by 8 inches in size does not give rise to a "dangerous condition," notwithstanding the fact that a child had from time to time been seen on the property.

Third, it is the general rule that one has no duty toward another who has or should have equal knowledge of the dangerous condition. *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967). It was plaintiff's duty to watch the fire. Plaintiff, being outside and only 15 feet away from the fire, as compared with the fact that defendant was at least 50 feet away from the fire and inside a house, should have seen the child, or, at least after the defendant yelled at the child, should have known of the presence of the child or that the fire might have been disturbed in some way.

The employer does not *ipso facto* serve as the insurer for all injuries which may occur to an employee during the course of the employment relationship. Assuming the Workers' Compensation Act does not apply, negligence is a prerequisite for the employer's liability, and negligence cannot be presumed from the mere fact that there has been an accident or injury. *King v. Bonardi*, 267 N.C. 221, 227, 148 S.E. 2d 32 (1966); *Crisp v. Medlin*, 264 N.C. 314, 141 S.E. 2d 609 (1965).

We have diligently researched the North Carolina case law and have not found a case which is apposite on its facts. Nonetheless, we hold that the general principles of the law of negligence still apply, that, despite plaintiff's hardship, the record presents insufficient evidence to go to the jury on the question of negligence and that the trial court erred in denying defendant's motion for a directed verdict.

Reversed.

Chief Judge MORRIS and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. A. D. SMITH, JR. AND ALEXANDER McRAE

No. 8016SC54

(Filed 19 August 1980)

1. **Criminal Law § 155.1– record on appeal not timely filed**

Defendants' appeal was subject to dismissal where they filed their record on appeal 159 days after notice of appeal was given, and no timely motion was made to extend the 150 day limit provided by the Rules of Appellate Procedure.

2. **Narcotics § 3.1– conspiracy to sell heroin – events occurring after crime charged – competency – continuing offense**

In a prosecution of defendants for conspiracy to possess heroin occurring on or about 10 July 1977, the trial court did not err in permitting a witness to testify concerning events transpiring on 22 February 1978, since the evidence for the State, which came from inside the conspiracy, revealed the unlawful possession, sale and delivery of heroin prior to 10 July 1977 and thereafter, and the wording of the indictments indicated a continuing offense.

3. **Criminal Law § 169– challenged evidence – similar evidence subsequently admitted**

Testimony concerning drug transactions which was challenged by defendants was competent where substantially the same evidence was thereafter elicited on cross-examination of another witness by defense counsel; defendants could not avail themselves of the exception to the rule applicable when the objecting party offers the evidence solely for the purpose of impeaching the credibility of the subject testimony, since defendants' questions went far beyond the scope of the State's presentation of the witness's criminal history and amplified the information the witness gave on direct examination; and the challenged testimony was competent because it would permit a jury to find that the acts were done in furtherance of the conspiracy charged in the bill of indictment.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 9 August 1979 in Superior Court, ROBESON County. Heard in the Court of Appeals 20 May 1980.

Defendants were indicted, tried and convicted of conspiring to possess a controlled substance, heroin, with the intent to sell "on the 10th day of July and prior thereto, 1977." From sentence of imprisonment, defendants appealed.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Barrington, Jones, Witcover, Carter & Armstrong, by C. Bruce Armstrong, for the defendant Alexander McRae and Moses, Diehl & Pate, by Philip A. Diehl for the defendant A. D. Smith, Jr.

MARTIN (Robert M.), Judge.

[1] Notice of appeal was given by both defendants in open court on 9 August 1979. Their joint record on appeal was filed 15 January 1980 which is 159 days after giving notice of appeal. Rule 12(a) of the Rules of Appellate Procedure provides that: "Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." No timely motion was made pursuant to App. Rule 27(c) to extend the 150-day limit by this court nor petition for writ of certiorari filed pursuant to App. Rule 21. For violation of the rules the appeal may be dismissed. *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), *disc. rev. denied* 299 N.C. 123, 261 S.E. 2d 924 (1980). (Petition by defendants for writ of certiorari to the North Carolina Court of Appeals allowed 8 January 1980); *In re Allen*, 31 N.C. App. 597, 230 S.E. 2d 423 (1976).

We have chosen, however, to consider the appeal on its merits pursuant to Rule 2 of the Rules of Appellate Procedure.

[2] In their first argument, defendants contend the court erred in permitting the testimony of Violet Faulk as to events transpiring on 22 February 1978. They argue that such events had no relevance to the alleged offense for which the defendants were being tried, to wit: conspiracy to possess heroin occurring on or about 10 July 1977. We do not agree.

The evidence for the State, coming from inside the conspiracy, reveals the unlawful possession, sale and delivery of heroin prior to 10 July 1977 and thereafter. The wording of the indictments indicates a continuing offense. Violet Faulk testified on cross-examination that she turned to heroin in October 1975; that "A.D. Smith turned me on to heroin." She stated that in the last part of 1975 "we had a $300.00 per day habit, my husband and I." She further testified on cross-examination: "We got money to support our habit from Mike's selling drugs. My husband would pay A.D. for the drugs he had given him beforehand. At that time we were selling drugs from our house ... near Red Springs."

The evidence for the State further tends to show that Mike Faulk procured heroin from the defendants and in 1977 sold it at Myrtle Beach from and after 15th or 16th of July for more than a month and from a money standpoint for about $15,000 to $20,000. "Each time I got drugs, I got them from A.D. Smith, Jr. at Alex's house at Rennert. Excuse me, I didn't go and get them every time. They were brought to me on a couple of occasions by A. D. Smith, Jr. When we met at Alex's house, he was present on every occasion but one."

[3] Defendants except to certain testimony included in the State's redirect examination of the witness Violet Faulk. The testimony is as follows:

> Every time we were on methadone, A. D. Smith would come and give us heroin free. When we came back from Illinois, he gave Mike two $300.00 spoons for free to get Mike back to selling heroin for him again. Then we had to pay for the drugs.
>
> Q. Now, the attorneys have asked you about something that happened on February the 22nd, 1978, when you pled guilty to selling heroin, among other things, to G. J. Arnold. Where did this take place?
>
> A. At Alexander McRae's house in Rennert.
>
> Q. Where was G. J. Arnold when you sold him the dope with respect to Alexander McRae's house.

A. He was outside in the car.

Q. All right, where had you gotten the dope to sell G. J. Arnold?

OBJECTION. (Both Defendants)

THE COURT: OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 6

DEFENDANT McRAE'S EXCEPTION NO. 1

A. From inside Alexander McRae's house from Alexander McRae.

MR. BARRINGTON: Motion to strike.

THE COURT: OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 7

DEFENDANT McRAE'S EXCEPTION NO. 2

Q. All right, now, earlier that day, that is earlier on February 22, 1978, had you been in the presence of A. D. Smith and G. J. Arnold?

A. Yes, sir.

Q. And had there been a conversation at that time?

A. Yes, sir.

Q. And had that conversation been between you and A. D. Smith?

A. Yes, sir.

Q. And concerning what, please, ma'am?

MR. BARRINGTON: OBJECTION.

THE COURT: OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 8

DEFENDANT McRAE'S EXCEPTION NO. 3

A. I went to A. D. Smith to buy the heroin for G. J. Arnold, but A. D. said he was out, and before that period, A. D., Mike and I had bought a $600.00 spoon of heroin from A. D. Smith, and he had only give us one $300.00 spoon, and –

MR. BARRINGTON: OBJECTION.

THE COURT: Well, I'll sustain the objection.

Q. All right, was G. J. Arnold present and there when you talked to A. D. Smith about wanting some heroin and he said he was out?

A. Yes, sir.

MR. BARRINGTON. Move to strike her answer to that last question.

THE COURT: OVERRULED.

DEFENDANT McRAE'S EXCEPTION NO. 4

We think the testimony challenged by defendant Smith's exceptions 6 and 7 and defendant McRae's exceptions 1 and 2 was competent because substantially the same evidence was thereafter elicited on cross-examination of Mike Faulk by counsel for McRae in the following testimony:

Q. In case number 78CRS8059, if you were not charged and convicted with on the 22nd day of February, 1978, feloniously conspiring with Violet Faulk to possess and deliver a controlled substance, to wit: heroin?

A. Yes, sir.

Q. You were found guilty of that, were you not?

A. Yes, sir.

Q. I'll ask you if you were not, in case 78CRS8058, allegedly occurring on February 22, 1978, charged and found guilty with sale of a controlled substance, to wit: heroin to one G. J. Arnold?

A. Yes, sir, that was a buy G. J. and my wife made from Alex McRae.

The defendants cannot avail themselves of the exception to the rule applicable when the objecting party offers the evidence solely for the purpose of impeaching the credibility of the subject testimony, *State v. Godwin*, 224 N.C. 846, 32 S.E. 2d 609 (1945), because the appellants' questions went far beyond the scope of the State's presentation of Violet Faulk's criminal history and amplified the information Violet Faulk gave on direct examination. *State v. VanLandingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); 1 Stansbury's N.C. Evidence § 30 (Brandis Rev. 1973).

Moreover, we think the testimony challenged by defendant Smith's exceptions 6, 7 and 8 and defendant McRae's exceptions 1, 3 and 4 was competent because such evidence would permit a jury to find that the acts were done in furtherance of the conspiracy charged in the bill of indictment and during the pendency thereof, the same not having been terminated or abandoned. *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969). There is nothing in the evidence to the effect that either of the appellants withdrew from the conspiracy before 22 February 1978 but their overt act on that date was committed in furtherance of the design which had theretofore been formed. *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963). It was still a "going concern" and the acts of each conspirator were admissible in evidence against all parties to the agreement. *State v. Gallimore*, 272 N.C. 528, 158 S.E. 2d 505 (1968); *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958); *State v. Gibson*, 233 N.C. 691, 65 S.E. 2d 508 (1951); *State v. Williams*, 216 N.C. 446, 5 S.E. 2d 314 (1939). Appellants' first argument is not sustained.

We do not agree with appellants' second argument that the court committed prejudicial error in permitting G. J. Arnold to testify as to events transpiring 22 February 1978. It was brought out on cross-examination of Violet Faulk that Arnold had seen her on 22 February 1978. Testimony that she had been in the presence of A. D. Smith came in without objection. If the quoted statement of Smith indicated a sale of heroin it constituted an admission relevant upon a charge of conspiracy. The acts and declaration of each conspirator made in furtherance of the object of the conspiracy are admissible in evidence against all parties to the agreement, regardless of whether they are present or whether they had actual knowledge of the acts or declarations. *State v. Gibson, supra.*

We find no prejudicial error in the court's admission into evidence of telephone records. Moreover, the State produced substantial other evidence implicating defendants. *State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975).

Defendants' fourth and fifth arguments are without merit.

In the trial we find no error sufficiently prejudicial to require a new trial.

No error.

Judges ARNOLD and HILL concur.

CITY OF ELIZABETH CITY, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF v. LFM ENTERPRISES, INC., A NORTH CAROLINA CORPORATION; NORTHEASTERN MOTORS, INC., A NORTH CAROLINA CORPORATION; AND LUCIEN F. MORRISETTE, INDIVIDUALLY AND AS STOCKHOLDER, OFFICER AND DIRECTOR OF LFM ENTERPRISES, INC., AND NORTHEASTERN MOTORS, INC., DEFENDANTS

No. 801DC136

(Filed 19 August 1980)

1. Rules of Civil Procedure § 56.1– summary judgment before answer filed

Summary judgment was properly entered for plaintiff approximately

six months after plaintiff commenced its action, although defendants had not yet filed their answer, where plaintiff's papers made out a *prima facie* case in support of its motion, and defendants did nothing to rebut plaintiff's facts, since defendants could have come forward with evidence in opposition to the motion even though they had filed no answer.

2. **Municipal Corporations §§ 30.3, 31– zoning ordinance – action for injunction – attack on ordinance – failure to exercise available remedies**

Where defendants failed to exercise the remedies available to them under a zoning ordinance by seeking judicial review of a denial of their request for a variance from the planting strip provision of the ordinance, they could not collaterally attack the validity of the planting strip provision in plaintiff city's action for an injunction requiring them to comply with the ordinance.

APPEAL by defendants from *Chaffin, Judge.* Judgment and orders entered 14 November 1979 in District Court, PASQUOTANK County. Heard in the Court of Appeals 10 June 1980.

On 2 May 1979 the plaintiff City filed a complaint against defendants LFM, Northeastern and Morrisette seeking a mandatory injunction to enforce compliance with various city ordinances. In its complaint, as its first cause of action, the City alleged: LFM is the fee simple owner of a parcel of land bounded on the west by Highway 17, which lies entirely within the City's extraterritorial planning and zoning boundaries. Northeastern is the lessee of said property, and Morrisette is the principal stockholder, director and president of both defendant corporations. On 11 July 1977 the City adopted Article X of its Land Use Zoning Ordinance pursuant to Article 19 of Chapter 160A of the General Statutes. Section 2.21 of this Article provides that where commercial uses or districts abut or are adjacent to residential, institutional or apartment use, a ten-foot wide planting strip or screen, consisting of closely planted hedge, shrubs, trees and other vegetation shall be provided along the entire property line abutting said residential, institutional or apartment use. Section 2.24 provides that within any district, except the C-4 District, all new development on lots that front on Highway 17 shall provide a twenty-five foot wide planting strip along the inside of the property line abutting the major street.

On 13 June 1977 and 8 May 1978 defendants sought and obtained approval for the rezoning of the subject property from

a residential classification to a commercial C-3 classification. On 21 July 1978 LFM sought and obtained from the City a permit to build a metal building on the property, the zoning classification being shown on the permit as commercial C-3. Defendants later applied to the City Board of Adjustment requesting a variance from the requirements of the ordinance, to allow them to install a ten-foot planting strip rather than the twenty-five foot strip required by the ordinance. The request was denied on 17 January 1979. Defendants were given sixty days to comply with the planting strip ordinance. The City sought a mandatory injunction to enforce the planting strip ordinance.

In its second cause of action, the City alleged that defendants had willfully and wrongfully occupied the building without permitting final inspection by the City's Building Inspector and without obtaining from him a certificate of compliance, in violation of G.S. 160A-423. The City sought an injunction and order of abatement from the enforcement of this statute.

On 4 June 1979 defendants obtained an extension of time through 2 July 1979 to file answer or other responsive pleadings. Defendants, on 27 June 1979, filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(1) through (7), a motion for judgment on the pleadings under Rule 12(c), and a motion for summary judgment under Rule 56. On 26 September 1979 the City filed a request for calendaring the action on the civil action motion calendar with the Clerk of Superior Court. The City, on 4 October 1979, filed a motion for summary judgment. On 26 October 1979 the defendants filed a motion to continue the hearing on the motion for summary judgment calendared by the City. In their motion, defendants asserted that plaintiff's motion for summary judgment was premature and requested that they be allowed the statutory period in which to file answer in the event their motion to dismiss was denied.

On 29 October 1979 the District Court heard the various motions and entered orders dismissing the complaint against Morrisette with the consent of the parties, denying the motion to dismiss as to the remaining defendants, denying the defendants' motion to continue the hearing on the City's motion for

summary judgment, and granting the City's motion for summary judgment on both causes of action. All of these orders were entered 14 November 1979. Defendants LFM and Northeastern appeal.

Wilson & Ellis, by J. Kenyon Wilson, Jr., M.H. Hood Ellis and David W. Boone, for the plaintiff appellee.

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

WELLS, Judge.

To reach the heart of the matter before us, we recapitulate the events in the proceedings below:

1. 4 May 1979 — Plaintiff served its verified complaint on defendants.

2. 4 June 1979 — defendants obtained an extension of time to file answer or other responsive pleadings until 2 July 1979.

3. 27 June 1979 — defendants filed motions to dismiss, for judgment on the pleadings and summary judgment.

4. 26 September 1979 — plaintiff filed a request that the cause be calendared on the civil action motion calendar.

5. 4 October 1979 — plaintiff moved for summary judgment.

6. 24 October 1979 — defendants moved to continue the hearing on plaintiff's motion for summary judgment.

7. 29 October 1979 — defendants' motion to dismiss and plaintiff's motion for summary judgment came on for hearing. Defendants' motion was denied; plaintiff's motion was granted.

[1] Defendants, citing *Village, Inc. v. Financial Corp.*, 27 N.C. App. 403, 219 S.E. 2d 242 (1975), *disc. rev. denied*, 289 N.C. 302, 222 S.E. 2d 695 (1976), argue that they were entitled to twenty days after the denial of their motion to dismiss in which to answer, and therefore the hearing and granting of plaintiff's motion for summary judgment was premature. We believe the case before us is controlled by *Real Estate Trust v. Debnam*, 299 N.C. 510, 263 S.E. 2d 595 (1980). In the *Debnam* case, defendant moved to dismiss, did not answer, and filed no papers rebutting plaintiff's papers in support of its motion for summary judgment. The Court stated, 299 N.C. at 513, 263 S.E. 2d at 598:

> G.S. 1A-1, Rule 56(a) provides that a party may move for summary judgment "at any time after the expiration of 30 days *from the commencement of the action.*" [Court's emphasis.] As the Court of Appeals held, even if defendants had filed their answer, they cannot rest on that responsive pleading when the party moving for summary judgment has *prima facie* established that he is entitled to it. The party opposing the motion must come forward with additional evidence in opposition to the motion. Defendants could have come forward with this evidence, *e.g.*, in the form of affidavits, even though they had filed no answer. Summary judgment was correctly entered for the plaintiff and we affirm the Court of Appeals on this issue.

Plaintiff's papers in this case made out a *prima facie* case in support of its motion. Defendants obviously had knowledge of the facts and circumstances underlying the dispute and after almost a six-month interval did nothing to rebut plaintiff's facts. We hold that under these circumstances, defendants were not entitled to delay consideration of the summary judgment motion until they filed an answer and that summary judgment was not entered prematurely.

[2] In a separate assignment of error, defendants attempt to call into question the validity of that portion of plaintiff's zoning ordinance requiring a twenty-five foot planting strip. Plaintiff's complaint shows that in a previous proceeding before the Elizabeth City Board of Adjustment, defendants sought to obtain a variance from this portion of the ordinance so as to

allow them to install a ten foot strip instead. This request was denied, and defendants apparently did not seek judicial review of the action of the Board of Adjustment by way of certiorari as provided by G.S. 160A-388(e). Defendants failed to exercise the remedies available to them under the zoning ordinance and may not as a defense to the plaintiff's action for injunctive relief collaterally attack the validity of the ordinance. *See, Durham County v. Addison*, 262 N.C. 280, 136 S.E. 2d 600 (1964); *City of Hickory v. Machinery Co.*, 39 N.C. App. 236, 249 S.E. 2d 851 (1978). All of defendants assignments of error are overruled and the judgment of the trial court is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

E. F. HUTTON AND COMPANY, INC., AND JAMES GARLAND WEAVER
v. FRED SEXTON

No. 8026SC131

(Filed 19 August 1980)

1. **Contracts § 27.1– purchase of commodities futures – existence and breach of contract – sufficiency of evidence**

There was sufficient evidence to take plaintiff's case to the jury on the issues of existence and breach of contract and damages where the evidence tended to show that an account executive with plaintiff contacted defendant in an effort to sell contracts for commodities futures to defendant; defendant executed an E.F. Hutton, Inc. customer agreement; defendant authorized plaintiff's account executive to buy two contracts of soybeans and four contracts of soybean oil; the orders were promptly executed; at the close of the market day, the account executive called defendant and asked him to send a check for $10,000 to cover the transactions, defendant having sustained a loss of approximately $9,000; defendant refused to pay; the account executive informed defendant that, if he did not remit $10,000, the contracts would be liquidated and the paper loss would then become a real loss; and defendant informed him that he had no intention of remitting the $10,000.

2. **Contracts § 28– account executive of stock brokerage firm – contract with customer – improper instructions**

In an action by a stock brokerage firm and an account executive with the firm to recover for breach of contract to purchase certain commodity fu-

tures, the trial court's instructions which permitted the jury to find whether there was a contract between the account executive and defendant, whether there was a breach, and the amount of damages require a new trial, since the complaint alleged no contract between the account executive and defendant; the evidence showed no contract between the two; and the claim of the account executive was rooted in his being subrogated to a portion of the claim of plaintiff firm for which he worked.

APPEAL by plaintiff from *Howell, Judge.* Judgment entered 14 September 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 June 1980.

This action was brought to recover judgment against defendant for breach of contract for the purchase of soybean and soybean oil commodity futures.

At trial, plaintiffs' evidence consisted of the testimony of plaintiff Weaver and Newton Martin, both account executives of Hutton, a customer's agreement signed by defendant, and four commodity purchase order forms. Weaver testified on direct that he was employed by plaintiff Hutton as an account executive specializing in commodities. Between March 1976 and April 1977 he contacted defendant a number of times in efforts to sell contracts for commodities futures to defendant. On 23 March 1977, defendant executed an E. F. Hutton, Inc. customer agreement. On 4 or 5 April 1977, he called defendant to recommend that defendant purchase soybeans and soybean oil contracts. He called defendant three or four days later to make the same recommendation. On 12 and 13 April 1977, he called defendant again to recommend such purchases, stating to defendant that he thought soybeans were undervalued.

On 13 April defendant authorized him to buy two contracts of soybeans and four contracts of soybean oil. The orders were promptly executed. At about 11:15 on that morning, he called defendant to inform him that the two contracts for soybeans were purchased at a price of $10.54 a bushel and the contracts for soybean oil were purchased at $31.65 a bushel. At about 1:20 P.M. on the same day he called defendant to inform him that due to market conditions on soybeans, defendant had approximately $4,000 in losses on the contracts. He recommended that defendant retain his contracts through the close of that market

day. After the market closed that day, he called defendant again and asked him to send a check for $10,000 to cover the transactions. Defendant indicated his hesitancy to send payment. The next morning, he visited defendant to inform him that his loss was about $9,000.00. Defendant refused further requests for payment for the purchases. He informed defendant that if he did not remit $10,000.00 the contracts would be liquidated and the paper loss would then become a real loss. Defendant informed him later that day that he had no intention of remitting the $10,000.00. Defendant did not instruct him whether to sell or hold the contracts.

On cross-examination, Weaver testified that the contracts were liquidated on the following day at losses totalling $13,158.90. Soybeans went back up three days after and if defendant had "stayed in his position, he would not have lost any money." Hutton deducted $1,500 or $2,000 from his salary against the losses on defendant's contracts.

Martin testified that he spoke with defendant by telephone on 13 April and explained the condition of the soybean market and defendant's losses. He had previously opened defendant's account with Hutton and placed the transactions. He discussed with defendant the method of payment for his transactions. On 14 April he called defendant to inquire if defendant intended to honor his order and to advise defendant that he would probably incur substantial losses. Defendant indicated that he would not send any money. He then informed defendant that if "the client breaches the faith in regard to an order that ... Hutton requires that the position be liquidated immediately." Defendant said he had no intention of sending the money, and his "position" was immediately liquidated "at the market".

On cross-examination, Martin testified that he had paid a portion of the losses sought to be recovered by Hutton. His testimony was that he could not say exactly how much, but that the amount he paid could have been as much as between $3,000.00 and $13,000.00. At the close of the plaintiff's evidence, the trial court granted defendant's motion for a directed verdict as to plaintiff E. F. Hutton, but denied it as to plaintiff Weaver. The jury returned a verdict in favor of plaintiff Weaver in the

sum of one dollar. Plaintiff Weaver's motion for a new trial on the issue of damages was denied. Plaintiff Hutton appeals from the granting of defendant's motion for directed verdict as to it. Plaintiff Weaver appeals from the denial of his motion for a new trial on damages.

Walker, Palmer & Miller, P.A., by Douglas M. Martin, for plaintiff appellants.

Edgar R. Bain for defendant appellee.

WELLS, Judge.

[1] We first address plaintiff Hutton's argument that the trial court erred in granting defendant's motion for a directed verdict as to it. 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 the 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. 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. *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974); *Home Products Corp. v. Motor Freight, Inc.,* 46 N.C. App. 276, 264 S.E. 2d 774, *disc. rev. denied,* 300 N.C. 556,___S.E. 2d___(1980). Viewed in this light, we hold that there was sufficient evidence to take Hutton's case to the jury on the issues of existence and breach of contract, and damages. Since there must be a new trial as to Hutton, we do not reach its other assignments of error.

[2] Plaintiff Weaver assigns as error the portion of the trial court's instructions to the jury on the issue of damages, contending that the court's instructions improperly limited the jury to an award of lost commission income or nominal damages, thereby prohibiting the jury from considering the monetary loss suffered by Weaver as a result of deductions made by Hutton from his salary or commissions. The error goes deeper than that. The issues submitted to the jury and their answers were as follows:

1. Was there a contract between the plaintiff, James Garland Weaver and the defendant, Fred Sexton, as alleged in the Complaint.

ANSWER: YES.

2. If so, did the defendant, Fred Sexton, breach the contract, as alleged by the plaintiff, James Garland Weaver?

ANSWER: YES.

3. What amount of damages is the plaintiff, James Garland Weaver, entitled to recover of the defendant, Fred Sexton, for breach of contract?

ANSWER: $1.00.

Upon these issues, the trial court charged the jury generally as to the law applicable to contract, breach of contract, and damages, all within the context of an alleged contract between Weaver and defendant. The complaint alleged no contract between Weaver and defendant. The evidence showed no contract, express or implied, between Weaver and defendant. Plaintiff Weaver's claim, if any, is rooted in his being subrogated to a portion of Hutton's claim, *see, Insurance Co. v. Insurance Co.*, 277 N.C. 216, 176 S.E. 2d 751 (1970), and it is upon this theory of law that the trial judge should have instructed the jury. Weaver is entitled to a new trial.

Weaver argues, however, that his new trial should be limited to the issue of damages alone. We disagree. For the reasons stated earlier, the matter must be retried *in toto*.

The judgment of the trial court granting defendant's motion for a directed verdict as to plaintiff Hutton and the court's order denying plaintiff Weaver's motion for new trial are reversed, and the case is remanded for a new trial as to all parties.

Reversed and remanded.

Chief Judge MORRIS and Judge VAUGHN concur.

State v. Fuller

STATE OF NORTH CAROLINA v. SUSAN FULLER (A/K/A HARRIET SUSAN PERRY)

No. 7915SC1088

(Filed 19 August 1980)

1. **Criminal Law § 134.2– guilty verdict in one county – presentence report – judgment in another county**

In using the word "adjudged" in G.S. 15A-1331(b) with respect to determining when a person has been "convicted" of an offense, the legislature was not referring to the formal entry of judgment by the court but rather to the return by the jury of a verdict of guilty. Therefore, the court was authorized by G.S. 15A-1334(c) to enter judgment and commitment against defendant in Chatham County upon a verdict of guilty returned by a jury after trial in Orange County where the court had ordered a presentence report since defendant had been adjudged guilty in Orange County even though prayer for judgment was continued in that county.

2. **Criminal Law § 99.9– court's question to witness – no expression of opinion**

The trial judge did not express an opinion in violation of G.S. 15A-1222 in asking a witness to "describe what this defendant did," since the purpose of the question was to clarify testimony by the witness in which he used the word "they."

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 25 June 1979 in Superior Court, CHATHAM County for Orange County. Heard in the Court of Appeals 14 April 1980.

Defendant was indicted for the felonious larceny of a 10-inch color television set and other merchandise from Roses Stores, Inc. in Chapel Hill, N.C. After trial at the 29 May 1979 Session of Superior Court in Orange County, the jury returned verdict finding defendant guilty. Upon return of the verdict, the judge presiding entered the following order:

> It is now ORDERED:
>
> At this session the Defendant entered a plea of not guilty to the felony of larceny. A Jury was empannelled [sic] and heard evidence for the State and for the Defendant, and later returned a verdict of guilty of larceny of property value of more than $200. The Court in its discretion Orders a presentence investigation be made by the Probation Department. That the report be made to this Judge and the

Superior Court in Chatham County which begins June 25, 1979. Prayer for Judgment is continued until this session.

This 31 Day of May, 1979.

s/ Henry A. McKinnon Jr.
Presiding Judge

On 25 June 1979 Judge McKinnon, presiding over Superior Court in Chatham County, entered judgment sentencing defendant to prison for a term of two years. From this judgment, defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward for the State.

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

PARKER, Judge.

[1] Two questions are presented on this appeal: first, whether the court had jurisdiction to enter judgment and commitment against defendant in Chatham County upon a verdict of guilty returned by a jury after trial in Superior Court in Orange County; and second, whether the court erred in the course of the trial by expressing an opinion on a question of fact to be decided by the jury. We hold that the court had jurisdiction and find no error in the trial.

As to the first question, the procedure followed by the trial judge in the present case was expressly authorized by G.S. 15A-1334(c), which provides as follows:

> *Sentence Hearing in Other District.* — The judge who orders a presentence report may, in his discretion, direct that the sentencing hearing be held before him in another county or another judicial district during or after the session in which the defendant was convicted. If sentence is imposed in a county other than the one where the defen-

dant was convicted, the clerk of the county where sentence is imposed must forward the records of the sentencing proceeding to the clerk of the county of conviction.

We find this statute applicable in the present case. In contending to the contrary, defendant points to the language of G.S. 15A-1331(b) which provides that "[f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." Defendant contends that G.S. 15A-1334(c) cannot apply in the present case because, under her reading of G.S. 15A-1331(b), she was never "convicted" in Orange County, since prayer for judgment was continued in that county and therefore she was not "adjudged" guilty in that county.

Defendant's contention is based on a misinterpretation of G.S. 15A-1331(b). In a criminal trial in superior court a defendant's guilt can only be established by a properly entered and accepted plea of guilty or of no contest, or by the verdict of a jury. Absent a plea of guilty or of no contest, guilt can never be established by *judgment* of the court, but only by a *verdict* of the jury. However, in returning a verdict of guilty, it is sometimes said that the jury "adjudged" the defendant guilty. It was in this sense that the legislature used the word "adjudged" in G.S. 15A-1331(b). We conclude, and so hold, that by use of the word "adjudged" in G.S. 15A-1331(b) with respect to determining when a defendant has been "convicted" of an offense, the legislature was not referring to the formal entry of judgment by the court but rather to the return by the jury of a verdict of guilty. Accordingly, we hold that the trial judge in the present case was expressly authorized by G.S. 15A-1334(c) to hold the sentencing hearing and to impose judgment in Chatham County.

[2] The second question presented by this appeal is based on appellant's second assignment of error in which she assigned as error:

2. The trial court's statement to the State's witness, "Describe what this defendant did," on the ground that the same constitute [sic] an expression of opinion that the defendant, in fact, engaged in the criminal activity with which she was charged.

This assignment of error was based on the following incident at the trial. During the course of direct examination by the Assistant District Attorney of the manager of Roses Store, the witness testified that he had observed the defendant and a companion checking over a color television set with a 10-inch screen which was on display on a table in the store. The following exchange then occurred:

> QUESTION [By the Assistant District Attorney]: All right. And what, if anything, occurred at that time?
>
> ANSWER: I observed the two individuals. They picked up the television. They walked down the side aisle.
>
> DEFENSE COUNSEL: OBJECTION, your Honor, to they.
>
> COURT: Well, overruled. Describe how you say they did. Was [sic] both of them carrying it?
>
> ANSWER: The lady sitting in the courtroom, your Honor.
>
> COURT: Did what?
>
> ANSWER: Picked up . . .
>
> COURT: You said they carried it, more than one carrying it?
>
> ANSWER: No, sir.
>
> COURT: Describe what this defendant did.
>
> ANSWER: The defendant picked up the T.V. in the box or picked up the carton containing the television, walked down the side aisle, cut across through the center of the store.

We find no merit in defendant's contention that by asking the witness to "[d]escribe what this defendant did," the court expressed an opinion on any question of fact in violation of G.S. 15A-1222. It is well established that "the trial judge may direct

questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it." *State v. Freeman*, 280 N.C. 622, 627, 187 S.E. 2d 59, 63 (1972). This was all that was done in the present case. The trial judge expressed no opinion in violation of G.S. 15A-1222.

No Error.

Chief Judge MORRIS and Judge WELLS concur.

HOWARD GREY THOMPSON AND BILLIE BETH THOMPSON v. TONY LESTER KYLES AND PINE STATE STEEL CORPORATION

No. 7920SC509

(Filed 19 August 1980)

1. **Damages § 3.4– continuous pain – compensation per specific time period – argument proper**

It is proper to argue to a jury to compensate at a certain amount per specific time period when there is evidence of continuous pain.

2. **Damages § 16.4 – pain suffered by plaintiff – physician's testimony – sufficiency of evidence**

In an action to recover for personal injuries sustained in an automobile accident, testimony by a physician that plaintiff visited her office at regular intervals from 20 June 1975 through 21 January 1976 and that plaintiff had pain in her legs on each visit was sufficient evidence from which the jury could conclude that plaintiff was in pain during the entire period.

3. **Trial § 11– personal injury action – mental anguish – jury argument**

In an action to recover for personal injuries sustained in an automobile accident, a reference to mental anguish suffered by plaintiff did not require a reversal, particularly in light of the fact that there was no objection to the argument at the time it was made.

4. **Damages § 17.3– mental anguish – instructions adequate**

In an action to recover for personal injuries sustained in an automobile accident, there was no merit to defendants' contention that the trial court erred in charging on mental anguish without recounting the evidence as to mental anguish.

5. **Trial § 52– award in personal injury action – failure to set aside as excessive**

Defendants failed to show an abuse of discretion by the trial court in

failing to set aside as excessive a verdict awarding plaintiff $23,000 for injuries sustained in an automobile accident.

APPEAL by defendants from *Seay, Judge.* Judgment entered 17 February 1979 in Superior Court, RICHMOND County. Heard in the Court of Appeals 10 January 1980.

The defendants appeal from judgments based on jury verdicts for property damages in the amount of $1,335.00 to Howard Grey Thompson and personal injury in the amount of $23,500.00 to Billie Beth Thompson. The plaintiffs had been damaged in a collision between an automobile owned by Howard Grey Thompson and driven by Billie Beth Thompson and a truck owned by Pine State Steel Corporation and driven by Tony Lester Kyles.

Van Camp, Gill and Crumpler, by James R. Van Camp and Douglas R. Gill, for plaintiff appellees.

Stanley W. West for defendant appellants.

WEBB, Judge.

The defendants' first assignment of error raises the question of the propriety of a per diem or fixed formula argument to the jury by the plaintiffs' attorney as to damages for pain and suffering by Billie Beth Thompson. A per diem argument is an argument to the jury to award damages for pain and suffering at a certain rate per day, hour, or minute of pain and suffering. The plaintiffs' attorney in the case sub judice made the following argument to the jury:

> "If you break this pain from days and you say how many minutes of some type of pain that is for you to decide over that period of time is that you come to 81,000 minutes, and this is based on 15 hours a day, not 24 hours, keeping somebody up or being up for that period of time, generally, undergoing some form of discomfort and pain, that is 81,000 minutes. Don't consider a dollar a minute, 50 cents a minute — about 25 cents a minute, 10 cents a minute, 81,000 minutes for this period of time. That's 12 weeks, 90 days. I

have already got it down. (Referring to poster board). By the way that's 1260 hours, considering 15 hours a day, 15 hours for those many days.

Now, how about the pain for the other 210 days which we admit is diminished, it's not as bad, is getting better .... We'll get up to January 21. 210. You can consider this 81 minutes, it has to be more than many minutes for 90 days, approximately 3 times as many minutes. You have got 3150 hours ... for pain and suffering. (Referring to poster board). What is it worth?"

The plaintiffs contend this is not a per diem argument because at no place is it suggested there was an actual computation or mathematical formula to calculate the money value of pain. We believe the argument was designed to get the jury to measure the pain and suffering in units of time, and this would be a per diem argument. The propriety of per diem arguments has not been decided in this jurisdiction. In *Jenkins v. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1 (1965), our Supreme Court reversed the superior court for allowing a per diem argument when the evidence did not show the plaintiff had continuous pain. Citing G.S. 84-14, the Court pointed out "[c]ounsel have a wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case supported by the evidence, and to argue the law as well as the facts."

[1] Per diem arguments have been considered by the courts of other jurisdictions. *See Botta v. Brunner*, 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331 (1958); *Franco v. Fujimoto*, 47 H. 408, 390 P. 2d 740 (1964); *Certified T.V. and Appliance Company v. Harrington*, 201 Va. 109, 109 S.E. 2d 126 (1959); *4-County Electric Power Ass'n v. Clardy*, 221 Miss. 403, 73 So. 2d 144, 44 A.L.R. 2d 1191 (1954); *Flaherty v. Minneapolis & St. Louis Railway Co.*, 251 Minn. 345, 87 N.W. 2d 633 (1958); and *McLaney v. Turner*, 267 Ala. 588, 104 So. 2d 315 (1958). The jurisdictions which have rejected per diem arguments have done so on the basis that the threshold of pain is different for different people, a price cannot be put on pain so that it can be evaluated by a specific time period, and the monetary valuation of pain is not subject to mathematical calculation. These jurisdictions say that a per-

son must receive a fair and reasonable compensation for pain and suffering and it has to be left to the jury to determine what is a fair and reasonable compensation. The difficulty we have with this reasoning is that in determining a fair and reasonable compensation for pain and suffering for the entire period, the jury must take into account the very things these courts have said they must not take into account in computing damages for pain and suffering for specific time periods. If it is in evidence that a person is in pain for a certain period of time, we believe he is entitled to argue to the jury that they can consider the amount of pain and suffering endured during the specific time periods that comprise the entire period. It may be true that a price cannot be put on pain. Nevertheless, juries compensate parties for pain and suffering by awarding money damages. We hold it is proper to argue to a jury to compensate at a certain amount per specific time period when there is evidence of continuous pain.

[2] The defendants contend that it was improper to allow this argument by plaintiffs' attorney because there was not evidence that Billie Beth Thompson was in constant pain during the period. Dr. Tillie Caddell testified as to visits made to her office by Billie Beth Thompson at regular periods from 20 June 1975 through 21 January 1976. She testified that on each visit Billie Beth Thompson had pain in her legs. We hold this is evidence from which the jury could conclude Billie Beth Thompson was in pain during the entire period.

[3] The defendants next assign error to the following argument made to the jury by plaintiffs' attorney:

> "How about the mental anguish? . . . How much? Maybe not a whole lot for that. You have got a lady who is not in her twilight years yet, I would say, she's going to live many more years. How many times, maybe not more than 5 or 6 years, maybe she can get over it, maybe next year she can get over it."

There was no evidence that Billie Beth Thompson was suffering with permanent mental anguish and defendants contend plaintiffs' counsel, by arguing as he did, argued something that

was not in the record. There was no objection to the argument at the time it was made. It is arguable that this was not an argument that Billie Beth Thompson had permanent mental anguish. We hold the impropriety of this argument does not require a reversal. *See State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

[4] The defendants next assign as error the court's charge to the jury that they could award damages in such "amount as you find by the greater weight of the evidence is fair compensation for the actual physical pain and mental suffering and mental anguish which are the immediate and necessary consequences of the injury." There was evidence that Billie Beth Thompson suffered mental anguish after the accident in that she now has to stop on the side of the road when she sees a truck approaching. The court did not recount this part of the evidence in its charge and defendants contend it was error to charge on mental anguish without recounting the evidence as to mental anguish. The defendants did not ask the court to recount this part of the evidence when the charge was given. This assignment of error is overruled.

[5] The defendants next assign as error the failure of the court to set aside the verdict as excessive, having been given under the influence of passion or prejudice. The defendants argue that there was special damages of approximately $600.00 with no permanent injuries and a jury verdict of $23,000.00 for Billie Beth Thompson is clearly excessive. It is largely within the discretion of the trial court as to whether to set aside a verdict. We hold no abuse of discretion has been shown in the case sub judice. *See Samons v. Meymandi*, 9 N.C. App. 490, 177 S.E. 2d 209 (1970).

In their last assignment of error, defendants ask this Court to remit the judgment. This we decline to do.

No Error.

Judges VAUGHN and MARTIN (Harry C.) concur.

CITY OF SALISBURY, NORTH CAROLINA v. KIRK REALTY CO., INC.

No. 8019SC70

(Filed 19 August 1980)

Eminent Domain § 11; Judgments § 19– irregular judgment – failure to show injury or meritorious defense

Where commissioners of appraisal filed their report on 20 April 1979, judgment entered by the clerk on 2 May 1979 was irregular, since it was entered before the expiration of the statutory period of 20 days allowed for the filing of exceptions, but the trial court properly refused to set aside the judgment since respondent failed to show that it affected his rights injuriously and that he had a meritorious defense.

APPEAL by defendant from *Mills, Judge.* Judgment entered 15 November 1979 in Superior Court, ROWAN County. Heard in the Court of Appeals 4 June 1980.

Petitioner instituted a special proceeding whereby it sought to condemn property owned by respondent which was situate in an area designated for urban redevelopment, alleging that the parties had been unable to agree on the compensation to be paid respondent by petitioner, and asking for appointment of commissioners to appraise the property. The respondent's answer denied that plaintiff had bargained in good faith and asked for appointment of commissioners of appraisal. Appraisers were appointed by order of the Clerk, and the appraisers, under proper instructions, viewed the premises, heard the evidence presented to them, and filed their report assessing damages at $103,997.93. The report was filed 20 April 1979. No exceptions thereto were filed. On 2 May 1979, the Clerk entered judgment on the commissioners' report. On 30 August 1979, respondent filed written notice of appeal to the Superior Court of Rowan County "pursuant to the provisions of G.S. 40-20." On 1 October 1979, the respondent, by writing filed with the Clerk, withdrew its appeal and, on the same day, filed a motion to vacate the 2 May 1979 judgment entered on the commissioners' report "on the grounds that said Judgment is irregular in that it violates the requirements of N.C. Gen. Stat. § 40-19; and that accordingly, the Judgment so rendered is invalid and voidable, and should be vacated and set aside." Accompanying the motion was an affidavit of counsel for re-

spondent stating that the judgment was entered prior to the expiration of the 20-day period which G.S. 40-19 provides as the period within which persons interested in the land may file exceptions to the report.

On 4 October 1979, the Clerk denied the motion "for failure of the Respondent to allege and show that said judgment injuriously affects the Respondent's rights and that it has a meritorious defense."

On 5 October 1979, respondent filed written notice of appeal to Superior Court. Respondent also filed two affidavits to the effect that the property had been appraised at $164,000 and that certain sales in the area were not considered as comparables. The record does not contain any evidence presented to the commissioners.

On 15 November 1979, the Superior Court entered an order denying the motion to vacate giving as reasons for the denial the identical reasons given by the Clerk.

From entry of that order respondent appeals to this Court.

Coughenour, Linn and Short, by Stahle Linn and Carl W. Short, Jr., for petitioner appellee.

Thomas M. King for respondent appellant.

MORRIS, Chief Judge.

Because the judgment of 2 May 1979 was entered by the Clerk before the expiration of the statutory period of 20 days allowed for the filing of exceptions, it is an irregular judgment, *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953), but stands as the judgment of the court until set aside by a proper proceeding therefor.

> To set aside a judgment for irregularity, it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party. The objection cannot be made by appeal, or an independent action, or by

> collateral attack. The time for such motion is not limited to one year after the judgment is rendered, but it must be made by the party affected and within a reasonable time to show that he has been diligent to protect his rights. The application should also show that the judgment affects injuriously the rights of the party and that he has a meritorious defense; otherwise, it would be useless to set aside the judgment.

Wilson and Wilson, 2 McIntosh North Carolina Practice and Procedure, § 1715, pp. 165-166 (2d ed. 1956).

The procedure for setting aside an irregular judgment is now found in G.S. 1A-1, Rule 60 (b)(6). *See* Comment by Dean Dickson Phillips, Wilson and Wilson, 2 McIntosh North Carolina Practice and Procedure, § 1720 p. 93 (2d ed. 1970 Supp.). We do not find anything in the Rule or any comment thereto which changes the requirements from those set out in *Collins* — a showing by the moving party that the judgment affects his rights injuriously and that he has a meritorious defense.

If no request is made by either party to a hearing on a motion, the trial judge is not required to find the facts upon which he bases his ruling. G.S. 1A-1, Rule 52 (a)(2). Here neither party requested that the court find facts. No facts were found. "In such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment." *Haiduven v. Cooper*, 23 N.C. App. 67, 69, 208 S.E. 2d 223, 225 (1974).

Without the presumption, it is clear from this record that the meritorious defense claimed by respondent is that, in his opinion, the property is worth more than the compensation set by the commissioners. This is also the only possible way the judgment affects respondent's rights injuriously. It is just as obvious that any evidence he had with respect to value or comparables should have been, and very probably was, presented to the commissioners of appraisal.

The judgment denying the motion to set aside the 2 May 1979 judgment must be

Affirmed.

Judges CLARK and ERWIN concur.

MARY SUSAN FURCHES v. ASHLEY PRESNELL MOORE

No. 803DC291

(Filed 19 August 1980)

Appeal and Error § 6.3– denial of change of venue – interlocutory order – premature appeal

Defendant's purported appeal from an interlocutory order denying defendant's motion for a change of venue pursuant to G.S. 1-83(2) for the convenience of the witnesses and the ends of justice is dismissed as premature.

APPEAL by defendant from *Ragan, Judge.* Order filed 19 November 1979 in District Court, CARTERET County. Heard in the Court of Appeals 30 July 1980.

Neil B. Whitford for plaintiff appellee.

Alexander & McCormick, by Sydenham B. Alexander, Jr. and John G. McCormick, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant attempts to appeal as a matter of right to this Court from the discretionary order of the trial court denying defendant's motion for change of venue pursuant to N.C.G.S. 1-83(2), for the convenience of witnesses and the ends of justice. Defendant cannot so do. The order of Judge Ragan was an interlocutory order, not finally disposing of the case. N.C. Gen. Stat. 7A-27(c). It does not fall within the provisions of N.C.G.S. 7A-27(d), which allows appeal as a matter of right from certain interlocutory orders. Defendant's appeal must be and is

Dismissed.

Judges ARNOLD and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 AUGUST 1980

BOARD OF TRANSPORTATION v. MILLER No. 7926SC1192	Mecklenburg (75CVS7023)	Dismissal of Appeal Affirmed
CHESTER v. HELTON No. 8025SC175	Caldwell (79CVS256)	Affirmed
CHURCH v. BURTON No. 7919SC1184	Randolph (79SP59)	Appeal Dismissed
GASKILL v. EVINRUDE MOTORS No. 793SC1109	Carteret (78CVS530)	Remanded
JACKSON v. T.A. LOVING CO. No. 798SC1079	Wayne (78CVS1966)	Affirmed
LASSITER v. WILLIAMS No. 7911SC1053	Johnston (78CVS0320)	Reversed and Remanded
O'DWYER v. HOSPITAL No. 807SC177	Wilson (79CVS104)	Affirmed
SALTER v. PETERS No. 793SC1039	Carteret (79CVS36)	Reversed
STATE v. BARRINO No. 7926SC1139	Mecklenburg (79CR9309)	No Error
STATE v. CAPPS No. 8018SC223	Guilford (79CRS32381)	No Error
STATE v. FERGUSON No. 806SC18	Halifax (78CR11376)	No Error
STATE v. HUNT No. 8016SC213	Robeson (79CRS13308)	No Error
STATE v. PILKINGTON No. 8010SC44	Wake (78CRS61437)	No Error
STATE v. SAUNDERS No. 8019SC246	Randolph (79CRS7429)	No Error
STATE v. TROUTMAN No. 8019SC285	Rowan (78CRS15666)	No Error

WHEELER v. WHEELER No. 8010DC229	Wake (77CVD4834)	Affirmed
WISE v. LAUGHRIDGE No. 7929SC611	McDowell (76CVS268)	New Trial

STATE OF NORTH CAROLINA, ON RELATION OF PETER GILCHRIST, DISTRICT ATTORNEY FOR THE 26TH JUDICIAL DISTRICT, PLAINTIFF v. JOHN F. HURLEY, JR., ROBERT BLACKMON AND PAR-A-DICE HEALTH CLINIC, DEFENDANT

No. 8026SC91

(Filed 29 August 1980)

1. **Nuisance § 10– action to abate public nuisance – sufficiency of complaint**

A complaint in an action to abate a nuisance pursuant to G.S. Ch. 19, Art. 1, is sufficient if it denominates the type of nuisance sought to be abated and the conduct complained of is declared a nuisance under the statute. Therefore, a complaint was sufficient to state a claim to abate a nuisance where it alleged that defendants maintained a place which is used in the regular course of business as a house of prostitution.

2. **Nuisance § 8.1– public nuisance – place operated for prostitution – statute not vague – meaning of prostitution**

G.S. Ch. 19, Art. 1 is not unconstitutionally vague or overbroad in describing one type of public nuisance as a place of business regularly operated or maintained for purposes of "prostitution," and as used in Ch. 19, Art. 1, "prostitution" includes the offering or receiving of the body, in return for a fee, for acts of vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, or physical contact with a person's genitals, pubic area, buttocks or breasts.

3. **Nuisance § 10– action to abate public nuisance – bond not required for restraining order – no arbitrary State action**

A nuisance action brought by the district attorney acting for the State does not constitute arbitrary and capricious State action because the State is not required by G.S. 19-2.1 to post a bond as security against the possibility that a temporary restraining order or injunction might erroneously issue while a private citizen who institutes a nuisance action is required by G.S. 19-2.1 to post such a bond, since a district attorney acts as an officer of the law for all citizens and is neither authorized nor expected to act in furtherance of private aims or ambitions.

4. **Constitutional Law § 23.1; Nuisance § 10– public nuisance – restraining order without bond or notice – no taking of property without due process**

The fact that the district attorney, upon filing a nuisance complaint, can obtain a temporary restraining order pursuant to G.S. 19-2.3 without posting bond and without notice to the persons restrained does not constitute the taking of private property without due process or equal protection since the statute does not authorize the seizure or destruction of property but merely preserves the status quo until a hearing can be held; the statute establishes a procedure for the owner of the property in question immediately to challenge the validity of the temporary restraining order and places the burden of its continuance on the district attorney; and the procedure mandated by

G.S. 1A-1, Rule 65(b) applies to the issuance of the temporary restraining order.

5. **Constitutional Law § 70; Nuisance § 10– action to abate public nuisance – general reputation of building or other place**

There is no merit in defendants' contention that the statute allowing the admission into evidence of the general reputation of the building or place allegedly constituting a public nuisance, G.S. 19-3(c), permits an unconstitutional taking of property in a trial by rumor, hearsay and innuendo and denies them their right of cross-examination.

6. **Constitutional Law § 18; Nuisance § 10– public nuisance statutes – application to place used for prostitution – no First Amendment violations**

Application of the public nuisance statutes, G.S. Ch. 19, Art. 1, to a place of business regularly operated or maintained for purposes of prostitution does not violate the right of the owner and his invitees to freedom of association as guaranteed by the First Amendment to the U.S. Constitution.

7. **Nuisance § 10– abatement of public nuisance – health clinic operated for prostitution**

The State's evidence was sufficient for the jury on the issue of whether defendant Par-A-Dice Health Clinic should be abated as a public nuisance on the ground that it was regularly operated or maintained as a house of prostitution where it tended to show that during the period from 30 July 1976 to 30 July 1978, at least seven different police officers dressed in civilian clothes visited the Par-A-Dice Health Clinic at various times; on each occasion a female employee described the types of massages available, quoted prices, led the officer to a room equipped with a table and mirrors, and told him to undress; thereafter, the same or a different female would come into the room and begin the massage; she would attempt to ascertain whether the customer was a police officer by asking questions about his occupation and requesting to see some identification; when satisfied that the customer was not a police officer, the masseuse solicited the customer for acts of intercourse or crime against nature for a fee which ranged from $30 to $80; officers made seven arrests at the Par-A-Dice Health Clinic for solicitation for crime against nature or prostitution and two arrests for masturbatory massage; twelve police officers testified that the Par-A-Dice Health Clinic had a reputation as a house of prostitution; and several officers testified that most of the females arrested for solicitation posted bond and returned to work at the Par-A-Dice.

8. **Nuisance § 10; Costs § 4.2; Attorneys at Law § 7.5– action to abate public nuisance – attorney and referee fees**

In an action in which the court abated the nuisance known as the Par-A-Dice Health Clinic on the ground that it was regularly operated or maintained as a house of prostitution, the court's findings supported its award as costs of abatement of a fee of $4,000 to plaintiff's attorney for his work through the trial, a fee of $707 to the referee appointed to determine the gross income received in the operation of the Par-A-Dice as a house of

prostitution, and an additional fee of $1,526 to plaintiff's attorney for work in determining the gross income and preparing the referee's report.

9. **Nuisance § 11– abatement of public nuisance – forfeiture of amount of gross income**

In an action in which the court abated the nuisance known as the Par-A-Dice Health Clinic because it was regularly operated or maintained for purposes of prostitution, the referee's findings showing that the total gross income generated by the operation of the Par-A-Dice from 1 July 1976 through 1 February 1979 was $43,650 were conclusive where defendants made no exceptions to the findings, and the findings supported the court's judgment ordering that the individual defendant forfeit the sum of $43,650 pursuant to G.S. 19-6 to the general funds of the city and county governments wherein the nuisance was located.

APPEAL by defendants from *Gavin, Judge,* and *Johnson, Judge.* Judgments entered 14 February 1979 and 5 September 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 5 June 1980.

On 16 January 1979 the State, on relation of Peter Gilchrist, District Attorney for the 26th Judicial District, filed a complaint in the Superior Court of Mecklenburg County alleging that the defendant Par-A-Dice Health Clinic was being operated and maintained as a place "which in the regular course of business is used for the purpose of lewdness, assignation, and prostitution, . . ." The complaint further averred that the owners and operators of the subject premises either knew or in the exercise of reasonable diligence should have known that the premises were so used. Alleging that the real and personal property associated with the business constituted a "general and public nuisance," the complaint, among other relief requested, prayed that the defendants be permanently enjoined from maintaining and operating a nuisance on the premises.

On the same day the State moved pursuant to Chapter 19 of the General Statutes for a preliminary injunction "to abate the continuing nuisance" at the Par-A-Dice Health Clinic, and for a temporary restraining order to restrain the defendants "from removing or in any manner interfering with the personal property and contents of the place where the nuisance is alleged to exist" pending a determination on the merits. In support of the motion, the State offered the affidavit of Charlotte Police Offi-

cer D.R. Harkey, who in essence avowed that the Par-A-Dice is regularly operated as a house of prostitution. Thereupon, Judge Snepp issued an order wherein he found that probable cause existed to believe that a nuisance as defined by G.S. § 19-1 *et seq.* was being maintained at the business known as the Par-A-Dice Health Clinic. His order restrained the defendants from removing or interfering with the personal property of the premises, prohibited them from engaging in any prescribed conduct on or about the property, and directed the officer serving the order upon the defendants to "forthwith make and return unto the Court an inventory of the personal property and contents situated in the premises." The documents were served and the inventory completed the same day. No property was seized from the premises.

On 5 February 1979 defendants filed an answer denying the essential allegations of the complaint. They also filed a motion to dismiss the action pursuant to G.S. § 1A-1, Rule 12(b)(6), on the grounds that the plaintiff had failed to state a claim for relief for that their alleged conduct did not constitute a nuisance within the meaning of the statute, and that the statute is unconstitutionally vague and overbroad, denies due process in several respects, and has a "chilling" effect on "the right to meet, socialize, and assemble . . ." The motion was denied.

Prior to trial the defendant Hurley, owner of the premises, entered a confession of judgment wherein he agreed to pay any costs assessed against and unsatisfied by the defendant Blackmon, operator of the Clinic, and to refrain from leasing any property to Blackmon "for use by him in any endeavor which is in violation" of any order entered against Blackmon.

At trial plaintiff's evidence tended to show the following:

Charlotte Policeman M.F. Green, working in an undercover capacity, went to the Par-A-Dice on 30 July 1976. While he was being massaged, Sherrill Duncan solicited him for the act of fellatio. She quoted a price of $65. Green arrested and booked her for soliciting for a crime against nature. She pleaded guilty to the lesser offense of soliciting for prostitution.

Green testified further that the Par-A-Dice has a reputation as being a "front" for a house of prostitution and that Sherrill Duncan has a reputation of being a prostitute.

Dressed in civilian clothes, Charlotte Policeman L.M. Cochrane, Jr. went to the Par-A-Dice on 9 July 1977 and was told by Miranda Renee and Jacqueline Bailey that he could have fellatio or intercourse for $45 although "there might be another girl [there] that would do it cheaper." Cochrane charged Renee and Bailey with soliciting for crime against nature. The charges were reduced to soliciting for prostitution. To Cochrane's knowledge, the Par-A-Dice "operates as a front for prostitution," and Bailey and Renee have reputations for being prostitutes.

On a visit to the Par-A-Dice on 30 July 1978, Officer D.R. Harkey, working as an undercover agent, received a "topless massage" for $20 which consisted of "rubbing on my chest, putting powder on my groin area, massaging my penis, and this sort of thing." During the massage the girl said, "Your time is running out. Is there anything else you want?" When he asked her what she meant, she responded, "Well, baby, you're going to have to tell me because you might be a cop and I'm not going to get busted for soliciting, . . ." Harkey arrested her for massage ordinance violation. He testified that the Clinic's reputation is as a front for prostitution.

On 4 September 1977 Sergeant L.J. Blake of the Charlotte Police Department dressed in casual clothes and drove to the Par-A-Dice in his personal car "with a cover officer parked close by." He paid $20 for a topless massage. As the girl, identified as Mary Brigman, rubbed his back, she asked him, "Would you like for me to finish up with the French or the hand relief." When he asked her what a French consisted of, she told him it was a "blow job" [fellatio] and that it would cost $30 more. He asked if he could get anything else, and she replied, "I only give straight sex or lay to preferred customers." Blake charged her with soliciting for a crime against nature, and she was convicted of soliciting for prostitution. He said her reputation is that of a prostitute and that the Par-A-Dice has a reputation as a house of prostitution.

Officer L.R. Snyder, dressed in civilian clothes, went to the Par-A-Dice on 12 May 1977. He paid $20 to June Carpenter for a topless massage. While she massaged him, she told him that for $80 he could get a "special," that is, a "half and half" [fellatio and vaginal intercourse] and anal intercourse. He arrested her and she pleaded guilty to solicitation for prostitution. Snyder said the reputation of the Par-A-Dice "is a place where you can go and purchase sex, ..."

On 4 April 1977 Angela Gardner solicited Officer S.C. Cook for fellatio for $40 or intercourse for $50. He arrested her for solicitation for crime against nature. Cook returned to the Par-A-Dice on 5 October 1977, was offered a masturbatory massage by Jacqueline Bailey, and arrested her for violation of the City massage parlor ordinance. He said the Clinic's reputation is that of a house of prostitution.

On 18 July 1978 Officer J.E. Sorrow, working undercover, was solicited by Rebecca Saunders for fellatio for $25 or "straight" intercourse for $20. She also told him he could get a "half and half" for $30. He arrested her for soliciting for crime against nature. When they arrived at the magistrate's office, the defendant Blackmon, who posted bond for Saunders, said to Officer Sorrow, "As long as you have been around, I thought all my girls knew you."

Four other officers testified that the Par-A-Dice has a reputation as a house of prostitution.

Defendants offered no evidence.

At the close of the plaintiff's evidence, the trial judge submitted the following issues to the jury which were answered by it as indicated:

> 1. Did the premises known as the Par-A-Dice Health Clinic ... constitute a nuisance within the meaning of General Statute 19-1 ... between the dates of July, 1976 and February, 1979?
>
> ANSWER: YES

2. Did the defendant, Robert Blackmon, have knowledge or reasonable ground, between the dates of July, 1976 and February 1979, to know of the nuisances carried on on the premises known as the Par-A-Dice Health Clinic . . .?

ANSWER: YES

Judgment was entered on the verdict on 14 February 1979, ordering that the nuisance known as the Par-A-Dice Health Clinic be abated; permanently enjoining the defendant Blackmon from maintaining such nuisance; and ordering an accounting of all funds received by Blackmon in the operation of the Par-A-Dice as such nuisance, pursuant to G.S. § 19-6. The judgment further provided for the appointment of a referee to conduct the accounting and ordered that attorney's fees in the amount of $4,000 be paid the State's attorneys "for the prosecution of this case through the trial thereof, . . ."

Thereafter, on 9 July 1979 the referee filed a detailed report which concluded that the total gross income generated by the operation of the Par-A-Dice from 1 July 1976 through 1 February 1979 was $43,650. Defendants filed no exceptions to the report. Plaintiff then moved for its adoption. On 5 September 1979 Judge Johnson, after a hearing, entered final judgment adopting the referee's report, ordering that the plaintiff recover $43,650 from the defendant Blackmon, setting the referee's fee at $707, and ordering that defendants pay additional attorney's fees of $1,526 to the State's attorneys.

To the entry of each judgment, defendants appealed.

Rodney W. Seaford and Paul L. Whitfield for the plaintiff appellee.

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

B.R. Batts, Keith M. Stroud, and J. Reid Potter, for the defendant appellants.

HEDRICK, Judge.

[1] Defendants assign as error the denial of their motion to dismiss the action for its failure to state a claim for which relief can be granted. They argue first that the alleged conduct at the Par-A-Dice Health Clinic does not constitute a nuisance within the meaning of the statute. The statute under which these defendants were prosecuted in pertinent part proscribes the following conduct:

> §19-1. *What are nuisances under this Chapter* — (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs ..., or illegal possession or sale of obscene or lewd matter, ...

Included among the types of nuisances catalogued in G.S. § 19-1.2 is the following:

> (6) Every place which, as a regular course of business is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs ..., or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs ..., or prostitution, are held or occur.

Chapter 19 further directs that the action to abate the nuisance be commenced "by the filing of a verified complaint alleging the facts constituting the nuisance." G.S. § 19-2.2.

In the case before us the verified complaint contains the following pertinent paragraph:

> 8. That the plaintiff's relator is informed, believes, and therefore alleges that the said building and premises known as the Par-A-Dice Health Clinic is now, and for some considerable period of time prior to the filing of this Petition and Complaint has been, operated and maintained as a

place which in the regular course of business is used for the purpose of lewdness, assignation, and prostitution, where the operators and patrons openly engage in illicit sex acts, prostitution, and the massage of private parts for hire as proscribed by Charlotte City Ordinances.

It must be remembered that the function of a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6), is to test the legal sufficiency of the complaint, not the facts which support it. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The allegations of the complaint are treated as true, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), and the complaint is adequate if it gives the defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and to prepare for trial, and to show the type of case brought. *Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971); *Presnell v. Pell*, 39 N.C. App. 538, 251 S.E. 2d 692 (1979). This is precisely the concern to which section 19-2.2, *supra*, addresses itself: that is, a complaint in an action brought pursuant to Chapter 19 is sufficient so long as it denominates the type of nuisance the abatement of which is prayed for, and such conduct is declared a nuisance under the statute. It follows that the complaint in the present case is clearly sufficient to state a claim for which relief could be granted since it alleges the maintenance of a place which is used in the regular course of business as a house of prostitution. No more is necessary. Defendants' contentions that their motion to dismiss the complaint should have been granted because the alleged acts of prostitution "were much too few and far between" to constitute a regular course of business clearly challenge the sufficiency of the evidence and thus are meritless at the pleading stage.

The heart of the defendants' attack on the complaint, and the crucial issue posed by this appeal, lies in the defendants' assertion that Chapter 19 as interpreted and applied in this case is unconstitutional. At the outset we point out that "legislative acts are presumed to be constitutional," and, where possible, the Courts will construe the statute to comport with constitutional mandates. State *ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 260, 250 S.E. 2d 603, 609 (1979), *vacated on*

other grounds, U.S. , 100 S.Ct. 1593, 63 L.Ed.2d 782 (1980).

[2] The defendants' broad attack splinters into several specific charges, the first of which requires us to grapple with their contention that the term "prostitution" is vague and overly broad.

It is true, as defendants point out, that "prostitution" is not defined in Chapter 19. Section 19-1 is cross-referenced, however, to G.S. § 14-203 which deals with criminal prosecution for prostitution. In section 14-203 "prostitution" is defined "to *include* the offering or receiving of the body for sexual intercourse for hire, and ... the offering or receiving of the body for indiscriminate sexual intercourse without hire." [Our emphasis.] While we believe the latter part of the definition proscribing "indiscriminate sexual intercourse" would raise serious constitutional questions if attacked as vague and overbroad, [*but see State v. Demott*, 26 N.C. App. 14, 214 S.E. 2d 781 (1975), which holds, without discussion, that the section *in toto* is constitutional], it is not necessary that we face those questions since the conduct claimed to constitute prostitution in this case obviously activates only the former category proscribing sexual intercourse for hire.

A criminal statute will be declared void for vagueness when, by its proscription, an individual can be held "criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L. Ed. 989, 996 (1954). *See also Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L.Ed. 2d 605 (1974); *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) (*per curiam*); *State v. Lowry*, 263 N.C. 536, 139 S.E.2d 870, *appeal dismissed and cert. denied*, 382 U.S. 22, 86 S.Ct. 227, 15 L.Ed.2d 16 (1965). But, since few words in the English language are mathematically precise, we have noted that no more than a reasonable degree of certainty can be demanded of a criminal statute. *State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970). Thus, it is that "[a]ll the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." *Rose v. Locke*, 423 U.S.

48, 50, 96 S.Ct. 243, 244, 46 L.Ed.2d 185, 188 (1975) (*per curiam*).

We find it inconceivable that persons of ordinary intelligence would have to guess at the meaning of "prostitution." While in our opinion the statute defining "prostitution" could be more precisely written [see *e.g.*, *People v. Block*, 71 Misc. 2d 714, 337 N.Y.S. 2d 153 (1972) (describing and interpreting certain provisions of the Prostitution Article of the Penal Law of New York, especially Penal Law §§ 230.00, 235.20(3), and 245.10(2))], at the very least the statute forbids sexual intercourse for hire. That language is explicit enough. The conduct thus circumscribed could not be more clearly described. *See Adams v. Commonwealth*, 215 Va. 257, 208 S.E.2d 742 (1974), which holds that an attempt to commit prostitution requires an offer to engage in sexual intercourse for pay; *see also Cherry v. State*, 306 A.2d 634 (Md. App. 1973), reported at 77 A.L.R. 3d 507, wherein the Court observed that the term "prostitution," as defined in a provision of that State's criminal code to *mean* the offering or receiving of the body for hire, could not be more precise; *Salt Lake City v. Allred*, 20 Utah 2d 298, 437 P. 2d 434 (1968) ("sexual intercourse for hire" is sufficiently clear to be understood by persons of ordinary intelligence).

Furthermore, reference to the criminal code — *i.e.*, G.S. § 14-203 — is not required to understand what the term "prostitution" means or, in our opinion, what conduct is encompassed within its meaning. We are not inadvertent — and we doubt that few are — to the activity's common, if not accurate, reputation as "the world's oldest profession." The term is precise on its face and gives fair notice of what is forbidden. *Accord, Morgan v. Detroit*, 389 F. Supp. 922 (E.D. Mich. 1975). We decline defendants' invitation to interpret the term so narrowly as to exclude the conduct charged in this record. We hold that prostitution plainly includes the offering or receiving of the body, in return for a fee, for acts of vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, or physical contact with a person's genitals, pubic area, buttocks or breasts. We hasten to add that our cataloguing of these acts of sexual behavior is not intended to exclude other acts of sexual conduct offered or received for pay.

It is clear from the foregoing that, in describing as one type of nuisance a place of business regularly operated or maintained for purposes of prostitution, Chapter 19 is not unconstitutionally vague or overbroad.

[3] Defendants next mount a constitutional challenge to those provisions of Chapter 19 which govern the procedure to be followed to abate the alleged nuisance. Specifically, they charge that G.S. § 19-2.1 permits the State, acting through the district attorney, to deprive individuals of property without due process of law because the State is not required to post a bond as security against the possibility that a temporary restraining order or injunction might erroneously issue. Thus, defendants argue, the statute "constitutes arbitrary and capricious state action."

This Court has noted that a district attorney not only has the authority to maintain an action pursuant to Chapter 19, but also the "implied *duty* to do so as an advocate of the State's interest in the protection of society." State *ex rel. Jacobs v. Sherard*, 36 N.C. App. 60, 63, 243 S.E.2d 184, 187, *cert. denied*, 295 N.C. 466, 246 S.E.2d 12 (1978) [Emphasis added]. That a private citizen is required to post a bond upon instituting a nuisance action under Chapter 19 is in our opinion wholly irrelevant to the issue of the district attorney's authority under the statute to act on behalf of all North Carolina citizens to abate and enjoin activities declared by our law to be nuisances.

Even so, we find the distinction entirely reasonable. As noted above, the district attorney acts for all citizens of this State to promote the general good and to protect the health, safety, morals and welfare of all. *See* State *ex rel. Taylor v. Carolina Racing Association, Inc.*, 241 N.C. 80, 84 S.E.2d 390 (1954); State *ex rel. Carpenter v. Boyles*, 213 N.C. 432, 196 S.E. 850 (1938); State *ex rel. Jacobs v. Sherard, supra.* In these matters the district attorney is often prompted to act by the rumblings of public discontent and often wields the sword of public approval. Furthermore, the district attorney proceeds as an officer of the law and is neither authorized nor expected to act in furtherance of private aims or ambitions. A private citizen, on the other hand, even though authorized to commence an

action pursuant to Chapter 19, might readily and reasonably be expected to act at the instance of wholly private considerations without much regard for the opinion and welfare of the many. At any rate, an individual harkening to the command of purely idiosyncratic concerns over activities he or she deems nuisances might be forgiven more promptly for his or her inattention to the public good. The district attorney, however, has no authority under our laws to proceed, nor should expect forgiveness from our citizens for proceeding, other than in furtherance of the general good. Thus, the provision of the statute requiring a private citizen to post a bond, while the district attorney is not required to do so, is a valid distinction and does not thereby constitute arbitrary and capricious state action.

[4] In passing, we are compelled to observe further that the *institution* of a nuisance action by the district attorney pursuant to section 19-2.1 does not constitute a "taking" of property simply because the district attorney is not required to post a bond along with the filing of the complaint. Defendants' contentions to the contrary are patently meritless. However, defendants also argue that the procedures authorized by G.S. §§ 19-2.2 and 19-2.3, whereby the district attorney upon the filing of the complaint can apply for a preliminary injunction and can seek and obtain a temporary restraining order [TRO], constitute an unconstitutional taking of private property. Defendants strenuously argue this point in view of the fact that no bond is required to protect their interests against the issuing of an erroneous order.

We cannot agree. In the first place ample protection is furnished by the statute itself (§ 19-2.3) which provides in pertinent part as follows:

> [T]he Court may, on application ... showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the

> decision of the court granting or refusing [a] preliminary injunction and until further order of the court thereon.
>
> Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order.
>
> Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.
>
> . . . The officer serving such temporary restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Clearly, the statute does not authorize the seizure or destruction of property, nor do defendants contend such a thing happened. Defendants were merely restrained from removing the property during the life of the TRO. The fact that an inventory of the personal property is mandated has been held a constitutional procedure in that it merely allows an officer to enter a business which is open to the public and make an inventory of items of personal property in plain view. *Fehlhaber v. State,* 445 F. Supp. 130 (E.D.N.C. 1978).

Most significantly, the provision provides plenary protection in these respects: It establishes a procedure for defendants to challenge immediately the validity of the temporary restraining order and places the burden of its continuance solely on the complaining party. We note that these defendants did not attempt to avail themselves of a hearing within 24 hours of the order's issuance, as the statute allows. To the contrary, they did nothing during the life of the TRO. The record reveals that the order was entered and served on 16 January 1979. The inventory was conducted the same day. Yet, the defendants failed to act at all, much less to complain, until some three weeks later when they filed on 5 February 1979 their answer and motion to

dismiss, challenging among other things the constitutionality of the provision which allowed the order to issue. We do not mean to suggest that defendants thereby waived their right to test the constitutionality of the procedure, but their delayed reaction certainly reduces the force of their argument that they were deprived of their property without due process of law. This observation brings us to and interrelates with our second point: The provision is plainly made subject to G.S. § 1A-1, Rule 65(b), which governs as follows the procedure to be followed in issuing temporary restraining orders:

> A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period. . . .

There is nothing in the record to suggest that the procedure mandated by Rule 65(b) was not followed in every particular. Moreover, the order recites that it expires within 10 days, and no application for an extension of the order appears of record. Presumably then, the order expired on 26 January 1979, some 10 days before the defendants made an appearance in the action. Although the plaintiff gave notice that he would seek a hearing on his application for a preliminary injunction on 26 January 1979, according to the record he took no action pursuant to that notice. It appears, then, that from the expiration of the TRO on 26 January 1979 until the trial of the matter on the merits on 5 February 1979, defendants were free to use and dispose of their property as they saw fit. We fail to perceive how they were injured in being unable to remove that property from the premises from 16 January until 26 January, especially in

light of the fact that they had an avenue to contest the validity of the TRO immediately upon its issuance.

Moreover, the ex parte temporary restraining order serves the sole purpose of preserving the status quo until a hearing can be had. *Lambe v. Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971). The procedure neither contemplates nor authorizes the deprivation of property and, so long as certain procedural safeguards are afforded (such as definite duration), it is a universally accepted and employed procedure. *See generally* D. Dobbs, *Remedies* § 2.10 (1973); Fed. R. Civ. Pro. 65. Thus, although the procedure is drastic, it operates within an emergency context which recognizes the need for swift action, but passes constitutional muster because it immediately affords defendants notice and an opportunity to be heard. It follows that defendants' assertion that Chapter 19 violates due process because it "permits the Court to restrain defendants without notice" is wholly without merit. For the same reasons, we reject the defendants' contentions that the procedure denies them the equal protection of the law.

[5] Defendants next would engage us in skirmishes on constitutional grounds with respect to the manner of proving and the quantum of proof required to establish that the activity alleged to be a nuisance ought to be enjoined. They argue first that section 19-3(c) which allows the admission into evidence of the general reputation of the building or place allegedly constituting a nuisance "permits an unconstitutional taking of property in a trial by rumor, hearsay, and innuendo," and denies them their right of cross-examination. Our Supreme Court has previously upheld this provision of Chapter 19, State *ex rel. Carpenter v. Boyles*, *supra*, and we are in complete accord with the holding in that decision that such evidence is admissible. Moreover, the record shows that defendants vigorously cross-examined the State's witnesses who testified regarding the reputation of the Par-A-Dice as to the basis for their testimony. We find no merit in this argument.

Second, defendants contend the statute is unconstitutional because it requires only that the allegations of the complaint be "sustained to the satisfaction of the court," *at a hearing upon*

an application for a preliminary injunction. G.S. § 19-2.5. While we have no doubts that the quantum of proof comports with constitutional requirements, we do not confront the question since the record indicates that no action was taken pursuant to an application for a preliminary injunction, if indeed one was made. As we noted above, according to the record, after the issuance and expiration of the temporary restraining order, the matter came on for a full and final hearing on the merits before a jury. The provision of the statute now attacked by defendants was never called into play, and they therefore have no reason to complain.

[6] Finally, defendants challenge the constitutionality of Chapter 19 on the ground that it "has such a 'chilling' effect as to deny the owner and his invitees the right to meet, socialize, and assemble ..." We do not believe the freedom of association guaranteed by the First Amendment to the U.S. Constitution was intended to extend to association for purposes of prostitution, and we so hold.

In sum, with respect to all arguments raised by defendants, we hold that the trial judge properly denied the motion to dismiss the action.

[7] The next major question posed by this appeal challenges the sufficiency of the evidence to be submitted to the jury. Defendants thus assert that the judge erred in denying their "motion to dismiss" at the close of the evidence.

Again, we have no trouble disagreeing with defendants' position. The evidence for plaintiff is plenary and in brief establishes the following:

During a two-year period from 30 July 1976 to 30 July 1978, at least seven different police officers dressed in civilian clothes and visited the Par-A-Dice Health Clinic. As a matter of course upon entering the building, the officer would be approached by a female employee who would inquire what he wanted. She would describe the types of massages available, quote prices, and lead him to a room equipped with a table and mirrors. He would be told to undress. Thereafter, the same or a different

female would come to the room and begin the massage. She would attempt to ascertain whether the customer was a police officer by asking questions about his occupation and requesting to see some identification. On at least seven occasions investigated by these officers, the masseuse was apparently satisfied that the customer was not a police officer for the officers made seven arrests for seven separate solicitations for acts of intercourse or crime against nature. Each such solicitation was offered in return for a fee which ranged from $30 to $80. Additionally, at least two arrests were made for acts of masturbatory massage. As this opinion makes clear, each act solicited in this record is included within the definition of "prostitution."

Moreover, twelve police officers testified that the Par-A-Dice Health Clinic had a reputation as a house of or "front" for prostitution. The testimony of several officers showed that most of the females arrested for solicitation posted bond and returned to work at the Par-A-Dice.

Defendants offered no evidence. Thus, on this record there is no evidence that the Par-A-Dice Health Clinic was used for any lawful business purpose, even that of a legitimate massage parlor. Rather, all the evidence tends to show that the Clinic was operated in the regular course of business solely for purposes of prostitution. At least the jury could so find.

Defendants argue, however, that the evidence is insufficient because only two of the acts charged in this record occurred after the effective date of the present nuisance statute, G.S. § 19-1 *et seq.* While it is true that Chapter 19 was *amended* by 1977 Session Laws, c. 819, the amendments primarily affected only certain provisions relating to obscenity. The inclusion of houses of prostitution under the umbrella of public nuisance law has existed at least since 1913, and the statutory language of Chapter 19 defining the business of prostitution as a nuisance has survived relatively unchanged. Defendants' contentions that the nuisance statute does not cover acts of prostitution commited prior to 1 August 1977, the effective date of the latest amendments, hardly deserve discussion.

We hold the trial judge correctly denied the defendants'

motion for a directed verdict and properly submitted this case to the jury.

Defendants have also challenged the court's denial of their motion to strike a portion of the pleadings and their motion for instructions on the meaning of the verb "satisfied." Suffice it to say that we have reviewed defendants' arguments with respect to each of these assignments of error and find them devoid of merit. We affirm the rulings of the trial judge in each instance.

[8] Next, defendants assign error to the court's allowance of attorneys' fees and referee's fees, arguing that the amounts awarded were "exorbitant and unreasonable." G.S. § 19-8 authorizes the payment of costs to the prevailing party in a nuisance abatement proceeding, including "such fee for the attorney ... as may in the court's discretion be reasonable remuneration for the services performed by such attorney." G.S. § 19-6 authorizes an accounting to be ordered and provides in pertinent part that the costs of abatement "include, but are not limited to, reasonable attorney's fees. ..." Clearly, fees awarded to the plaintiff's attorneys and to the court-appointed referee in this case were a matter within the court's discretion, and, absent an abuse of that discretion, such amounts will not be disturbed on appeal. State *ex rel. Bowman v. Fipps*, 266 N.C. 535, 146 S.E.2d 395 (1966).

The judgment entered herein upon the verdict of the jury that the Par-A-Dice Health Clinic constituted a nuisance documents in detail those factors considered by the judge in arriving at a fee of $4,000 for plaintiff's attorney. Specifically, the judge found as a fact that counsel for plaintiff had represented the State throughout the proceeding, "including the investigation of the original allegations dating back to November 1978, research, the preparation of all pleadings, the appearance at two previous hearings in this cause, and the preparation for trial and three full trial days with his Associate, ..." These findings are sufficient to support the award and affirmatively demonstrate its reasonableness. With respect to the award of an additional attorney's fee and referee's fees, the order entered 5 September 1979 recites the number of hours spent by both parties in conducting the accounting procedure and preparing

the referee's report. Again the order affirmatively demonstrates the basis for the reasonableness of the fees awarded. We hold that defendants have failed to show an abuse of the courts' discretion, and thus the ruling allowing the fees will not be disturbed.

[9] Finally, defendants attack the adoption by the trial court of the referee's report. They argue that the inclusion of gross income received at the Par-A-Dice prior to 1 August 1977, the effective date of the amended version of G.S. § 19-6 which authorizes the accounting procedure, "is so arbitrary and capricious as to violate, clearly, due process of law." They cite no authorities in support of their position. Nor, as plaintiff points out, did they object to the report and note exceptions thereto when it was filed, as provided for in G.S. § 1A-1, Rule 53(g)(2). In *Coburn v. Roanoke Land and Timber Corp.*, 257 N.C. 222, 226, 125 S.E.2d 593, 596 (1962), our Supreme Court discussed the purpose fulfilled by the exceptions to a referee's report, and stated: "*[I]n the absence of exceptions to the factual findings of a referee, such findings are conclusive* . . ., and where no exceptions are filed, the case is to be determined upon the facts as found by the referee." [Emphasis in original.] Thus, in the present case the facts found by the referee respecting the gross income of the Par-A-Dice are conclusive and support the judgment entered thereon.

The judgments appealed from in all respects are affirmed.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. VIRGINIA ELECTRIC AND POWER COMPANY

No. 8010UC29

(Filed 29 August 1980)

1. **Electricity § 3; Utilities Commission § 24– rate change based on change in fuel cost – heat rate – plant availability – consideration by Utilities Commission improper**

Pursuant to G.S. 62-134(e) a public utility may apply to the Utilities Commission for authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation of electric power, and the Commission, on its own motion or upon request of an interested rate payor, may consider and determine a decrease in rates or charges based solely upon a decrease in the cost of fuel; therefore, insofar as the Commission in the present cases considered and passed upon the cost of fuel used by defendant in the generation of electric power during the periods in question by considering the reasonableness of the prices paid by defendant for such fuel, it acted within the scope of the statutorily prescribed procedure, but insofar as the Commission considered and based its determination upon such factors as defendant's heat rate and plant availability in these proceedings, it went beyond the scope of the procedure authorized by G.S. 62-134(e).

2. **Electricity § 3; Utilities Commission § 24– rate change based on fuel cost – heat rate and plant availability defined – factors to be considered in general rate case**

Heat rate describes the ratio between the amount of heat, expressed in Btu's, required to produce a kilowatt-hour of electrical energy, and "plant availability," in the context of these proceedings, refers to the extent to which a particular electrical generating unit is available to produce electricity during a given period of time and is also expressed in terms of a ratio, called the "capacity factor," representing the relationship between actual generation of electricity from that unit during a given period of time to the theoretical maximum possible generation during the same period. Heat rate and capacity factor furnish convenient measuring devices by which to evaluate the overall efficiency with which a particular electrical utility system is operated, and the Utilities Commission should take into account the efficiency of a company's operation in fixing its rates in a general rate case as provided in G.S. 62-133, but plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. 62-134(e).

APPEAL by Virginia Electric and Power Company (Vepco), respondent in Docket No. E-22, Sub 236 and applicant in Docket Nos. E-22, Sub 239 through Sub 244, from order of the Utilities Commission dated 31 July 1979 entered in said Dockets, and

appeal by Vepco, applicant, from order of the Utilities Commission dated 24 August 1979 entered in Docket E-22, Sub 246.

On 18 September 1978 the North Carolina Utilities Commission instituted Docket No. E-22, Sub 236 by issuing its "Order of Investigation" into "the underlying causes for the high cost of service of Vepco resulting in substantially higher electric rates in North Carolina in its service area than the electric rates in the service areas of other electric utilities in North Carolina." The order listed the following six specific factors contributing to Vepco's cost of service to be investigated:

> 1. The allocation formulae and procedures that have been used in assigning Vepco's generation and transmission plant and system operating costs between its wholesale and retail service, respectively, in West Virginia, Virginia, and North Carolina, the three states which Vepco serves.
>
> 2. The high cost of meeting air pollution standards for Vepco's generating plant in the Washington, D.C., air quality areas, and its possible effect on North Carolina retail consumers.
>
> 3. The reasonableness of Vepco's heavy dependence upon high cost oil-fired generation of electricity as compared to the lower cost generation by Duke Power Company (DUKE) and Carolina Power and Light Company (CP&L) from coal-fired and nuclear generators.
>
> 4. The reasonableness of the load factor experienced by Vepco in the utilization of its generation plant.
>
> 5. The efficiency and line losses incurred in serving North Carolina from generating plants located in Virginia and West Virginia.
>
> 6. Vepco's high cost of construction of recent new generating plants.

In addition, the order directed:

7. Investigation of all other factors which may cause the disparity between Vepco's retail rates in the 22 counties served by Vepco in North Carolina and the areas of North Carolina served by other electric utilities.

The Commission requested its Public Staff to conduct the investigation and report its findings and ordered Vepco to file its response.

On 22 January 1979 the Public Staff filed its report and Vepco filed its response. Thereafter, public hearings were held in four towns in Vepco's service area and in Raleigh on dates between 24 April and 11 May 1979, at which witnesses presented by the Public Staff and by Vepco, as well as public witnesses, appeared and testified. On 1 July 1980 the Public Staff and Vepco filed briefs and proposed orders.

During the pendency of the foregoing proceedings in Docket No. E-22, Sub 236, Vepco filed applications pursuant to G.S. 62-134(e) for adjustments in its rates based solely on changes in cost of fuel. These included applications for such adjustments for each of the months of February through July 1979, which were designated Docket Nos. E-22, Sub 239 through Sub 244 inclusive. (The filing in Docket No. E-22, Sub 244 also requested authority to increase the fuel component of its basic rates to be in effect during the billing months of July through December 1979.) In each case the Public Staff proposed adjustments to reflect the disallowance of certain fuel costs, and in each proceeding Vepco filed an "Undertaking to Refund" the difference between the fuel adjustment factor approved by the Commission and the factor as calculated by the Public Staff, pending the outcome of the investigation being conducted on Docket No. E-22, Sub 236, subject, however, to judicial review.

On 31 July 1979 the Commission entered its order in combined Docket No. E-22, Sub 236 and Sub 239 through Sub 244, inclusive, entitled "Order Reducing Allowed Fuel Cost to Reasonable Levels and Directing Refunds." In this order the Commission ordered Vepco to make refunds in Docket No. E-22, Sub 239 through 244, based primarily on its finding:

17. That Vepco's fuel expenses are excessive and should be adjusted in these and future proceedings to remove unreasonable costs associated with poor system fossil-fired heat rate and low availability at the Mt. Storm station and Chesterfield Units 5 and 6.

The Commission also found in this order that Vepco's management had acted imprudently by not pursuing a program to effect the reconversion of five of its oil-fired generating units to coal and directed that "effective January 1, 1981, Vepco's rates for North Carolina retail electric service should be adjusted to remove excess expenses associated with oil-fired generation" from these five units.

Vepco filed exceptions to the Commission's 31 July 1979 order entered in the dockets above referred to and gave notice of appeal from that order to the Court of Appeals.

On 31 July 1979 Vepco filed its application pursuant to G.S. 62-134(e) to adjust its rates based solely on the cost of fuel for the billing month of September 1979, which application was given Docket No. E-22, Sub 246. On 24 August 1979 the Commission entered its order in that proceeding, applying the same heat rate and availability adjustments which it had used in its 31 July 1979 order from which Vepco had already appealed. Vepco filed exceptions to the 24 August 1979 order entered in Docket No. E-22, Sub 246, and appealed from that order to the Court of Appeals.

Vepco's appeal from the 31 July 1979 order entered in the combined Dockets E-22, Sub 236 and 239 through 244, inclusive, and its appeal from the 24 August 1979 order entered in Docket No. E-22, Sub 246, were consolidated for purposes of hearing in the Court of Appeals.

Joyner & Howison by R.C. Howison, Jr.; and Hunton & Williams by Guy T. Tripp III and Edgar M. Roach, Jr. for Virginia Electric and Power Company, appellant.

Jerry B. Fruitt and Paul L. Lassiter for Public Staff, North Carolina Utilities Commission, appellee.

PARKER, Judge.

In its 31 July 1979 order entered in combined Dockets E-22, Sub 236 (the investigatory proceeding initiated by the Commission) and Dockets E-22, Sub 239 through 244, inclusive (the proceedings brought by Vepco under G.S. 62-134(e) to adjust its rates and charges solely upon the increased cost of fuel used in the generation of electric power), the Commission expressly found that the allocation formulae and procedures used by the Commission in Vepco's general rate case proceedings had correctly allocated Vepco's generation plant and system operating costs between its wholesale and retail service, respectively, in Virginia, West Virginia, and North Carolina. The Commission also found that Vepco's comparatively high rates for electric service in North Carolina were not the result of costs to meet air pollution standards for Vepco's generating plant in the Washington, D.C., air quality area, or of unreasonable load factors, or of unreasonable transmission and line losses, or of inappropriate allocation of losses to Vepco's North Carolina retail operation, or of excessive costs of constructing generating plants. To these findings, all of which relate to matters which were the subject of investigation in the investigatory proceeding, Docket E-22, Sub 236, and all of which were favorable to Vepco, appellant has, of course, taken no exception.

By this appeal, appellant challenges the Commission's finding that "Vepco's fuel expenses are excessive and should be adjusted in these and future proceedings to remove unreasonable costs *associated with poor system fossil-fired heat rate and low availability*" (emphasis added) of certain of its generating plants. Appellant contends that the Commission committed error by taking into account *in proceedings brought under G.S. 62-134(e)*, the factors of "heat rate" and "low availability" of plant as the basis for its determination that appellant's fuel expenses were excessive and should be adjusted. We agree with appellant's contention and accordingly reverse the Commission's orders.

At the outset, we note that the Public Staff initially contended before the Commission that Vepco's fuel expenses were excessive because: (1) Vepco had paid excessive prices for coal

under long-term contracts with Island Creek Coal Company, Laurel Run Mining Company (a Vepco subsidiary), and Appolo Fuels, Inc.; (2) Vepco had not reconverted its oil-fired units to coal as rapidly as it should have; and (3) Vepco was experiencing a poor heat rate and poor availability of its large low-cost coal-fired generating units. As to the first factor, the Commission expressly found as a fact "[t]hat the prices paid for coal under the Island Creek, Laurel Run, and Appolo Fuel contracts for the test periods under consideration herein should not be adjusted." Further, in discussing this finding the Commission said:

> In summary, the Commission concludes that Vepco's long-term coal contracts are reasonable. An examination of Vepco's overall coal procurement activities demonstrates that Vepco's coal purchases compare favorably with those of Duke and CP&L, the utilities chosen by the Public Staff for its comparison. Further, that although the prices paid for coal under the Island Creek, Laurel Run, and Appolo Fuels contracts for the test periods under consideration herein are higher than the Commission would prefer to see, they are not excessive when viewed in the total context of the evidence of record in this proceeding.

As to the second factor, the Commission expressly found "[t]hat since early 1977, Vepco has known with certainty that significant net savings would result from the reconversion to coal-fired generation" of certain of its generating units and "[t]hat, upon passage of the Clean Air Act Amendment in November 1977, timely and responsible action by Vepco's management would have resulted in conversion to coal-fired generation of certain of its oil-fired units . . . *by no later than January 1, 1981*." (Emphasis added.) On these findings, the Commission expressly refused to consider any tardiness in Vepco's reconverting its oil-fired units to coal as a factor *in any of the present fuel adjustment proceedings*, limiting its ruling in this regard to a warning that it would do so effective 1 January 1981.

It is thus apparent that the sole basis for the Commission's finding in the present proceedings that Vepco's fuel expenses were too high and should be adjusted downward was its consid-

eration of the factors of poor heat rate and low plant availability, the factors which Vepco contends, and which we agree, were not properly before the Commission for consideration in proceedings brought under G.S. 62-134(e).

By enacting G.S. 62-134(e) in 1975, the General Assembly terminated effective 1 September 1975 the use of a fossil-fuel adjustment clause as a rider to an electric utility company's regular rate schedule[1] and replaced it with a statutorily prescribed procedure. Insofar as pertinent to the present proceedings, G.S. 62-134(e) provides:

Change of rates; notice; suspension and investigation.

(e) Notwithstanding the provisions of this Article, upon application by any public utility for permission and authority to increase its rates and charges based solely upon the increased cost of fuel used in the generation or production of electric power, the Commission shall suspend such proposed increase for a period not to exceed 90 days beyond the date of filing of such application to increase rates. Upon motion of the Commission or application of any person having an interest in said rate, the Commission shall set for hearing any request for decrease in rates or charges based solely upon a decrease in the cost of fuel. The Commission shall promptly investigate applications filed pursuant to provisions of this subsection and shall hold a public hearing within 30 days of the date of the filing of the application to consider such application, and shall base its order upon the record adduced at the hearing, such record to include all pertinent information available to the Commission at the time of hearing. The order responsive to an application shall be issued promptly by the Commission but in no event later than 90 days from the date of filing of such application. A proceeding under this subsection shall not be considered a general rate case ...

[1]Our Supreme Court held in Utilities Comm. v. Edmisten, Attorney General, 291 N.C. 327, 230 S.E. 2d 651 (1976) that the Utilities Commission had acted within its statutory authority in permitting an electric utility to utilize a fossil fuel adjustment clause as an adjunct, or rider to its regular rate schedule.

[1] By the clear and express language of this statute, the legislature has provided a procedure by which a public utility may apply to the Utilities Commission for authority to increase its rates and charges *based solely upon the increased cost of fuel* used in the generation of electric power and by which the Commission, on its own motion or upon request of an interested rate payor, may consider and determine a decrease in rates or charges *based solely upon a decrease in the cost of fuel.* The procedure provided is an expedited one "and shall not be considered a general rate case."[2] Insofar as the Commission in the present cases considered and passed upon the cost of fuel used by Vepco in the generation of electric power during the periods in question by considering the reasonableness of the prices paid by Vepco for such fuel, it acted within the scope of the statutorily prescribed procedure. Insofar as the Commission considered and based its determination upon such factors as Vepco's heat rate and plant availability in these proceedings, it went beyond the scope of the procedure authorized by G.S. 62-134(e).

[2] "Heat rate" is the term used to describe the ratio between the amount of heat, expressed in Btu's, required to produce a killowatt-hour of electrical energy. "Plant availability," in the context of these proceedings, refers to the extent to which a particular electrical generating unit is available to produce electricity during a given period of time and is also expressed in terms of a ratio, called the "capacity factor," representing the relationship between actual generation of electricity from that unit during a given period of time to the theoretical maximum possible generation during the same period. Obviously, the low-

[2]This clear legislative declaration that a proceeding under G.S. 62-134(e) "shall not be considered a general rate case" controls to take such proceedings out from the general authority granted the Commission by G.S. 62-137 which provides:

> *§62-137. Scope of rate case.* — In setting a hearing on rates upon its own motion, upon complaint, or upon application of a public utility, the Commission shall declare the scope of hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return.

er the heat rate, the more efficient is the conversion of fuel into electricity, and the higher the capacity factor, the greater the availability of the plant to produce electrical power. Obviously, also, an electrical utility company which operates its system with a low heat rate and with a high capacity factor from its lower cost generating plants operates more efficiently than one which has a high heat rate and low capacity factor from such plants. In short, heat rate and capacity factor furnish convenient measuring devices by which to evaluate the overall efficiency with which a particular electrical utility system is operated.

Overall system efficiency ultimately depends upon management decisions made over a long period of time. These involve such questions as when and how often to replace expensive equipment, the number of maintenance employees to be kept on the payroll and the training to be given them, the amount and frequency of planned "down time" to be devoted to preventive maintenance, and the amount and cost of standby equipment required for such planned maintenance "down time." In making these decisions management must also take into account such factors as the cost of capital and the availability of funds required to implement them and must balance the need for achieving maximum plant efficiency against the financial costs of achieving that goal.

Review of such management decisions by the Utilities Commission *in a general rate case* is not only entirely appropriate but even necessary, for poorly maintained equipment justifies a subtraction from both the original cost and the reproduction cost of existing plant before weighing these factors in ascertaining the present "fair value" rate base of the utility's properties as required by G.S. 62-133, *see Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972), and serious inadequacy of a utility company's service, whether due to poor maintenance of its equipment or to other causes, is one of the facts which the Commission is required to take into account in determining what is a reasonable rate to be charged by the particular utility company for the service it proposes to render. *See Utilities Comm. v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970).

We do not question that the efficiency with which a particular electrical utility company converts its fuel into electricity has a direct and significant bearing upon that company's fuel cost. Obviously it does. Nor do we question the necessity for the Utilities Commission to take into account the efficiency of the company's operations in fixing its rates in a general rate case as provided in G.S. 62-133. Obviously it should. We hold only that plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. 62-134(e). After all, the legislature enacted that section, not as a substitute for a general rate case, but to provide an expedited procedure by which the extremely volatile and uncontrollable prices of fossil-fuels could be quickly taken into account in a utility's rates and charges. There is no such volatility in plant efficiency which depends upon long range maintenance decisions and practices carried out over a long period of time. We hold that the Commission erred in ordering rate reductions and ordering Vepco to make refunds based on changes made by the Commission in Vepco's fuel costs by taking into account the factors of heat rate and plant availability.

We also hold that the Commission erred in its order of 31 July 1979 by directing

> 4. That for billing periods after December 31, 1980, Vepco shall file fuel expenses showing an adjustment to reflect coal fired generation from Chesterfield Units 2 and 4, Portsmouth Units 3 and 4, and Possum Point Unit 4.

These were the generating units which the Commission found should be reconverted from oil to coal at least by 1 January 1981. It may well be that when 1981 comes, prudent management of Vepco's generating plant would call for reconverting the named units from oil-fired to coal. Whether that will be so can be better determined at that time. The Commission lacked statutory authority to make that determination seventeen months in advance.

Insofar as inconsistent with this opinion, the orders appealed from are reversed and the cases consolidated for hearing on this appeal are remanded to the Utilities Commission for further proceedings not inconsistent herewith.

Reversed and remanded.

Judges HEDRICK AND VAUGHN concur.

JOHN WARD AND WIFE, BONITA LOUISE WARD v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 7926SC1093

(Filed 29 August 1980)

1. **Municipal Corporations § 21– adoption of sewer line constructed by another – duty of maintenance**

A municipal corporation which adopts sewer lines constructed by third persons becomes responsible for maintenance and liable for injuries resulting from lack of due care in upkeep. This duty of maintenance includes the duty of exercising a reasonable degree of watchfulness so as to keep the sewerage system free from obstruction, but liability may only arise where the municipality has actual or constructive notice of an obstruction or defect and fails to act.

2. **Municipal Corporations § 21; Negligence § 6.1– backflow of sewerage line – res ipsa loquitur inapplicable**

The doctrine of *res ipsa loquitur* was inapplicable in an action against defendant city to recover damages caused by the backflow of sewage into plaintiffs' home where the evidence disclosed that the immediate cause of the backflow was obstruction of a lateral sewerage line by foreign objects, which obstruction in turn likely resulted from the slippage of a joint of pipe when a bell broke, since the fact that an obstruction occurred or that a pipe dropped because of a broken bell does not exclude all inferences other than the inference that defendant was negligent.

3. **Municipal Corporations § 21– backflow of sewerage line – obstruction in line – failure to show negligence by city**

In an action against defendant city to recover damages caused by the backflow of sewage into plaintiffs' home, plaintiffs' evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in failing properly to maintain, inspect and repair the sewer line serving their home where it tended to show that the immediate cause of the backflow was an obstruction of the line by foreign objects, which obstruction in turn likely resulted from the slippage of a joint of pipe caused by a broken bell, and that defendant city may not have inspected or cleaned the sewer lines serving plaintiffs' home between October 1974 when defendant accepted the system upon annexing the area and November 1976 when the backflow occurred, but plaintiffs offered no evidence to show that the broken bell causing the pipe to drop or the obstruction in the line had been present for a sufficient

period of time so as to place defendant city on notice of the defects or to show that an inspection would have disclosed their presence.

4. **Municipal Corporations § 21– backflow from sewerage line – action against city – contract, implied warranty and trespass theories inapplicable**

Theories of breach of contract to carry sewage away from plaintiffs' home, breach of implied warranty that the sewerage system was fit for its intended purpose and trespass on the case were inapplicable in an action against defendant city to recover damages caused by the backflow of sewage into plaintiffs' home, since negligence is the sole basis of municipal liability for damages caused by the overflow of a sewerage system.

APPEAL by plaintiffs from *Howell, Judge.* Judgment entered 30 July 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1980.

This is an action against the City of Charlotte to recover damages caused by the backflow of sewage into a private home.

Plaintiffs are the owners of a house and lot located on Foxworth Drive in Olde Providence subdivision in Charlotte, N.C. On 18 October 1974 the City of Charlotte annexed an area which included plaintiffs' property, and assumed maintenance responsibility for the sewage system in the subdivision which a private developer had originally constructed. Thereafter, plaintiffs utilized municipal water and sewer services. On 22 November 1976, 980 gallons of raw sewage backed up into the plaintiffs' home from a sewer line maintained by the City, causing extensive damage to plaintiffs' personal property and to the home itself. By letter dated 29 November 1976, plaintiffs gave notice of a claim for damages to the City of Charlotte, but the City refused to pay the claim.

On 12 November 1977 plaintiffs filed this action against defendant City of Charlotte to recover damages. In their complaint they alleged that the backflow had occurred as a proximate result of defendant's negligent failure properly to inspect, maintain, repair and keep unobstructed the sewer line serving their home. Plaintiffs also alleged the existence and breach of a continuing contract between the parties under the terms of which the City agreed to carry sewage away from plaintiffs' house and lot in exchange for monthly payments. As additional claims for relief, plaintiffs alleged that the backflow of sewage

into their home constituted a breach of the City's implied warranty of the fitness of its sewerage system and they pled trespass "on the case." Plaintiffs prayed recovery of $6,511.81 plus interest.

Defendants answered the complaint, admitting that the backflow had occurred and that damage had resulted, but denying any liability for breach of contract, breach of implied warranty, negligence, or trespass.

At trial before a jury defendant moved for a directed verdict at the close of plaintiffs' evidence, which motion was granted. Evidence pertinent to the question presented on this appeal will be discussed in the opinion. From judgment granting defendant's motion for a directed verdict, plaintiffs appealed.

Newitt & Bruny by Richard M. Koch for plaintiff appellants.

Jones, Hewson & Woolard by Harry C. Hewson and Hunter M. Jones for defendant appellee.

PARKER, Judge.

In their complaint, plaintiffs sought recovery of damages on the grounds of negligence, breach of contract, breach of an implied warranty of fitness, and trespass "on the case." Their appeal from the trial court's granting of defendant's motion for directed verdict presents the question whether their evidence, viewed in the light most favorable to them, was sufficient to justify a verdict in their favor on any of these grounds. We agree with the trial court that it was not and accordingly affirm.

It is, of course, well settled that in passing on a motion by defendant for a directed verdict in a jury case, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The evidence in the present case, viewed in the light most favorable to the plaintiffs, shows the following:

The sewerage system in the area in which plaintiffs reside was originally installed by a private developer. The City of Charlotte accepted the system for maintenance on 18 October 1974. Insofar as it affects plaintiffs' home on Foxworth Drive, the system consists of three lateral sewage lines which intersect at a manhole one block above the home and directs the sewage from other parts of the residential area into an eight-inch lateral line which runs down beside plaintiffs' house in a generally north-south direction perpendicular to Foxworth Drive. Plaintiffs' home is connected to the eight-inch lateral line by a four-inch pipeline. The lateral line then continues and intersects into a manhole on the main line on Foxworth Drive in front of the home. Although the level of plaintiffs' house is about three feet higher than the elevation of that manhole, it is lower than the manholes upstream from plaintiffs' home on the eight-inch lateral line to which the four-inch line from plaintiffs' home is connected.

On 22 November 1976, Bonita Ward arrived at the parties' home and discovered sewage flowing out of the back door. Raw sewage backflowed into the house through two of the bathrooms in the house and flooded a substantial portion of the first story in the house causing extensive damage. John Ward contacted the Charlotte-Mecklenburg Utility Department, and city crews arrived that afternoon to help clear the sewage. The emergency crew inspected the line and discovered "a rock approximately baseball size and a small handful of what appeared to be plumber's yarn" in the lateral line running beside the house. The following day, a city crew dug a hole a few feet south of the southerly margin of Foxworth Drive in front of plaintiffs' house to determine what caused the partial blockage and found one joint of pipe in the lateral line which had dropped approximately two inches as the result of a broken bell.

Prior to 22 November 1976, plaintiffs had never experienced any problems with their own sewerage system. Occasionally, the manhole below the house on Foxworth Drive had overflowed, and city employees had washed the street down with water. Plaintiffs' expert witness, Ralph D. Johnson, Jr., a civil engineer, testified that overflow from that manhole could not have been caused by any blockage in the lateral line run-

ning on the side of plaintiffs' house, but rather would have been caused by a stoppage downstream the line on Foxworth Drive. Neither of the plaintiffs ever saw any city employees inspect or clean the sewer lines servicing their home. Because its record system was not comprehensive enough in the period prior to November 1976 to permit retrieval of such information, the City of Charlotte showed no record of inspection or cleaning of the system in plaintiffs' area before the sewage backflow into plaintiffs' home occurred, although the City does periodically clean any system accepted for maintenance.

Plaintiffs' expert witness, who works for an engineering firm specializing in sanitary engineering, testified that, in his opinion, a municipality should inspect lines at least every two or three years, which would include an inspection of the manholes and the lines leading from any manhole which the city has reason to believe are in need of attention. If the sewage flow is sluggish in a particular line, a procedure known as "lamping," by which lights are shone through opposite ends of the pipe, should be used. There is also a method of inspection using t.v. cameras, although that method is expensive and time consuming. Mr. Johnson testified that he had no personal knowledge as to how many feet along plaintiffs' line it would have been possible to see had the lamping procedure been used.

[1] We hold as a matter of law that plaintiffs' evidence establishes that they have no basis for relief and that the directed verdict for defendant was properly entered. The general rule is that a municipal corporation which adopts sewer lines constructed by third persons becomes responsible for maintenance and liable for injuries resulting from lack of due care in upkeep. *Johnson v. Winston-Salem*, 239 N.C. 697, 81 S.E. 2d 153 (1954), *accord, Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E. 2d 35 (1966). The duty of maintenance includes the duty of exercising a reasonable degree of watchfulness so as to keep the sewerage system free from obstruction. *Hotels, Inc. v. Raleigh, supra.* However, a municipal corporation is not an insurer of the condition of its sewerage system, and liability may only arise where the municipality has acutal or constructive notice of the existence of an obstruction or defect and fails to act. *See* 18 McQuillin, Municipal Corporations, § 53.125, p. 466 (1977); *Printing Co. v. Raleigh*, 126 N.C. 516, 36 S.E. 33 (1900).

[2] In the present case, plaintiffs alleged that defendant was negligent in failing properly to maintain, inspect, and repair the sewer line serving their home. They contend that because the City's sewer lines are buried beneath the ground and are hidden from view, the doctrine of *res ipsa loquitur* should be applied here such that the mere evidence that the backflow occurred is sufficient to establish their prima facie case and to place upon the defendant the burden of producing evidence to explain the occurrence. We do not agree. The doctrine of *res ipsa loquitur* is a mode of proof applicable in cases where the nature of the accident or occurrence is by itself sufficient evidence of negligence to establish the plaintiff's prima facie case. *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785 (1954). The doctrine is applicable only where the instrumentality causing the damage is shown to be under the exclusive management and control of the defendant and the accident is one which in the ordinary course of events does not happen if those in control use proper care. *O'Quinn v. Southard*, 269 N.C. 385, 152 S.E. 2d 538 (1967). It is not applicable where all the facts causing the occurrence are known and testified to at trial; where more than one inference can be drawn from the evidence as to the cause of the injury; or where the existence of negligent default is not the more reasonable probability. *Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9 (1957).

Even if it be conceded that the City of Charlotte exercised exclusive control over its sewer lines, all of the facts causing the backflow in the present case were known and were testified to at trial. The evidence disclosed that the immediate cause was obstruction of the lateral sewerage line by foreign objects, which obstruction in turn likely resulted from the slippage of a joint of pipe. Further, the fact that an obstruction occurred or that a pipe dropped because of a broken bell does not exclude all inferences other than the inference that the defendant was negligent as plaintiffs alleged. For these reasons the doctrine of *res ipsa loquitur* is inapplicable here, and it was necessary for plaintiffs to establish their prima facie case of negligence by direct proof. This they failed to do.

[3] In support of their allegation that defendant was negligent in failing properly to inspect and to repair the sewer lines in their area, plaintiffs offered expert testimony concerning inspection procedures which municipalities should use and evi-

dence that the City of Charlotte had no means of retrieving records to ascertain whether the system had been inspected or cleaned prior to the sewage backflow on 22 November 1976. In spite of the absence of such records, there is evidence in the record that any sewerage system accepted by the City for maintenance receives periodic cleaning. Assuming *arguendo* that the sewer lines serving plaintiffs' home had not been inspected or cleaned between October 1974 when defendant accepted the system for maintenance and November 1976 when the incident occurred, plaintiffs still have offered no evidence to show that the broken bell causing the pipe to drop or the obstruction in the line had been present for a sufficient period of time so as to place the City on constructive notice of the defects or to show that an inspection would have disclosed their presence. Although plaintiffs' evidence showed that overflows from the manhole in front of their home had occurred on occasion, there was uncontradicted testimony that such overflows would have been caused by stoppages downstream from the manhole, in a line separate from that through which the sewage eventually backflowed into plaintiffs' house. Upon this record, no prima facie case of negligence has been shown.

[4] In addition to their claim based on negligence, plaintiffs also sought relief on the ground of breach of defendant's "contract" to carry sewage away from their home, breach of an implied warranty that the sewerage system was fit for its intended purpose, and trespass on the case. In accord with the prevailing rule that the sole basis of municipal liability for damages caused by the overflow of a sewerage system is negligence, *see* Annot. 59 A.L.R. 2d 281, § 2, p. 288 (1958), we hold that none of these grounds afford plaintiffs the right to relief. The application of any one of them to a case such as is presented here would effectively make a municipality an absolute insurer of the condition of its sewerage system. This we decline to do.

The judgment appealed from granting defendant's motion at the close of plaintiffs' evidence for a directed verdict is

Affirmed.

Judges HEDRICK and VAUGHN concur.

State v. Cox

STATE OF NORTH CAROLINA v. ALBERT COX, JAMES EARL COVINGTON AND GRAELYN R. GODFREY

No. 801SC227

(Filed 2 September 1980)

1. **Rape § 4.3– character of prosecutrix – motion to strike evidence denied**

The trial court in a first degree rape prosecution did not err in denying defendants' motion to strike character evidence given on direct examination, since each witness stated that she had formed an opinion as to the character and reputation of the prosecutrix; each then stated her opinion; this was the proper procedure; the evidence was admitted without objection; the character or reputation of the prosecutrix was not a real issue in the case; and the answers given by the witnesses on cross-examination explained the foundation upon which the witnesses' testimony was based.

2. **Criminal Law § 89.3– corroborating witness – no limiting instruction given by court**

The trial court did not err in allowing a corroborating witness to state whether the in-court testimony of the prosecutrix varied from the statement he had taken from her, and the trial judge was not required to give a limiting instruction in the absence of a request by defendants.

3. **Kidnapping § 1.2; Rape § 5– sufficiency of evidence**

In a prosecution for rape and kidnapping, evidence was sufficient to be submitted to the jury where it tended to show that the three defendants acted in concert; defendants induced the prosecutrix into their car on the pretense of going one place but then took her, against her will, to another; and the prosecutrix testified without reservation that each defendant raped her.

4. **Criminal Law § 113.6– three defendants – instructions as to each given separately**

Where the trial court carefully listed each element of each offense, including the lesser offense, for each of the three defendants and instructed the jury as to each defendant separately from the other defendants, the charge was not susceptible to a construction that the jury should convict all defendants if it found one defendant guilty.

5. **Criminal Law §§ 14, 15– no challenge to venue – crime committed in one county – trial in another county – jurisdiction of superior court**

There was no merit to defendants' contention that the trial court erred in permitting the jury in Pasquotank County to convict them for the offenses which occurred outside the county, even in another State, since defendants failed to raise questions of venue and jurisdiction at trial, and, had a question been raised, the evidence clearly showed that prosecutrix was in Pasquotank County when the kidnapping occurred; the evidence showed that each defendant raped the prosecutrix in Rocky Mount, N.C.; and the Super-

ior Court would have jurisdiction of the offense of rape committed anywhere in the State.

6. **Criminal Law § 113.7– acting in concert – failure to instruct – error**

In a prosecution of three defendants for kidnapping and first degree rape, the trial court erred in failing to instruct the jury on the issue of acting in concert with respect to the kidnapping charge against two of the defendants.

APPEAL by defendants from *Barefoot, Judge.* Judgments entered 31 August 1979 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 13 June 1980.

Defendants were indicted on charges that on or about the third day of March, 1979, in Pasquotank County, they unlawfully, willfully, and feloniously did ravish Angela Pettiford by force and against her will by overcoming her resistance by the use of a knife, at a time when each defendant was over 16 years of age, said offenses constituting first degree rape under G.S. 14-21. Defendants were also indicted on charges of kidnapping arising out of the same incident, said indictments alleging that on or about the third day of March, 1979, in Pasquotank County, they unlawfully and feloniously kidnapped Angela Pettiford, a person over 16 years of age, without her consent, for the purpose of committing rape. Defendants were tried together, and each was convicted of second degree rape and kidnapping. Each defendant was sentenced to an active term of imprisonment of not less than 30 nor more than 40 years on each charge. The sentences were to be served consecutively.

STATE'S EVIDENCE

The State's evidence tended to show that on 2 March 1979, the prosecutrix, Angela Pettiford, a freshman at Elizabeth City State University, lived on campus. At approximately 12:00 midnight, Ms. Pettiford was paged by the student on duty at the reception desk in her dormitory and told that she had a visitor in the lobby. Upon entering the lobby, she observed her cousin, defendant Cox, who was dressed in a military uniform. Cox told her he had been unsuccessful in trying to find a cousin of theirs, who was also a student at Elizabeth City State University, and that he was looking for a place to sleep and some food. The

prosecutrix offered to show him which dormitory their cousin lived in.

After changing clothes, she asked a girlfriend on her hall to walk across campus and back with her while she took defendant Cox to her cousin's dormitory. Ms. Pettiford walked out of the dormitory with defendant Cox, who then suggested that they drive to the dormitory. Her girlfriend lingered momentarily in front of the dormitory talking to some friends while Ms. Pettiford and defendant Cox walked toward his car, a two-door Volkswagen. When she arrived at the car, she noticed defendants Covington and Godfrey seated in the car. Defendant Cox told her they were hitchhikers he had picked up earlier. Ms. Pettiford got into the back seat and directed her cousin, who was driving the car, to the dormitory in question. However, Cox did not turn into the dormitory parking lot and instead drove off campus toward a nearby shopping mall.

Ms. Pettiford protested that she could not go off campus and asked defendant Cox to take her back to her dormitory. After driving past Albemarle Hospital, Cox turned into a newly built subdivision, where his car got stuck in a ditch. All the occupants except Cox got out of the car to help push the car out of the ditch. A young man who lived in the subdivision drove up in a four wheel drive truck and helped pull the car out of the ditch. At that time, Ms. Pettiford asked the young man to take her back to the Elizabeth City State University campus; however, defendant Cox spoke up and said that he would take her back. Nevertheless, after he got on U.S. Highway 17, he began heading away from Elizabeth City. The prosecutrix continued to ask her cousin to take her back to school. Cox replied by saying, "O.K., it's party time." Prior to that time, she heard defendants Covington and Godfrey referred to as "Dave" and "Joe." Neither defendant Covington nor Godfrey said anything up to that point. Thereafter, defendant Godfrey took out a can of beer and a large bottle of wine from behind the back seat. When Ms. Pettiford declined to drink anything, defendant Cox said, "O.K. boys, pull out the toys," at which time, defendant Godfrey displayed a butcher knife and held it up to her face. Thereafter, defendants forced the prosecutrix to drink beer and wine.

During this time, defendant Cox was still driving the car. Defendant Cox told defendant Covington to get in the back seat with the prosecutrix and Godfrey. The prosecutrix was then forced to have oral sex and sexual intercourse with defendants Covington and Godfrey. Cox then stopped the car, and while the co-defendants got in the front seat, Cox got in the back seat and had sexual intercourse with the prosecutrix against her will. The prosecutrix was not aware of her location or the time when the sexual contacts took place, although she stated, "We were probably in Elizabeth City." She was drunk and finally fell asleep in the back seat.

When she was awakened about 6:00 a.m. on 3 March, she found she was in Alexandria, Virginia. The defendants took her to an apartment occupied by defendant Cox, where he forced her to have sexual intercourse again in a bedroom of the apartment. The prosecutrix continued to ask to be returned to school. At about 12:00 noon on 3 March, defendants and Ms. Pettiford left Alexandria and headed south into North Carolina. However, defendant Cox drove to Rocky Mount, where he checked into a Holiday Inn Motel. That evening from about 8:30 p.m. until 1:00 a.m. on Sunday, 4 March, defendants each repeatedly had sexual intercourse with the prosecutrix against her will. Sometime after 8:00 a.m. that Sunday morning, defendants took the prosecutrix to the bus station in Rocky Mount, where they put her on a bus to Elizabeth City. Upon arriving in Elizabeth City, Ms. Pettiford called her roommates and asked them to pick her up. Ms. Pettiford's boyfriend accompanied her roommates to the bus station, at which time, she broke down and told them she had been kidnapped and raped by defendants.

The State presented the corroborative testimony of a Pasquotank County deputy sheriff and an SBI agent, to whom the prosecutrix gave statements; the prosecutrix's roommates and boyfriend; the young man who pulled defendant Cox's car out of the ditch during the early morning hours of 3 March; two character witnesses for the prosecutrix, who served as residence directors at Elizabeth City State University; and a physician who examined the prosecutrix on the evening of 4 March. The physician found no signs of injury in the vaginal area, but he did find traces of degenerative sperm.

State v. Cox

DEFENDANTS' EVIDENCE

Defendant Cox testified that he and Ms. Pettiford are first cousins; that he is married; that on the Friday in question, he left Alexandria, Virginia for Fort Meyer, Virginia, where he picked up his friends, Godfrey and Covington, in his 1974 two-door Volkswagen for a trip to Nashville, North Carolina; that he decided to go to Elizabeth City to see if his cousin, Ronald Richardson, wanted to go home with him; that he could not find Ronald; and that he then went over to see his cousin, Angela, at her dormitory on campus at Elizabeth City State University. Defendant Cox asked her if there was any place where they could get something to eat, some beer, and herbs for his friends, Godfrey and Covington, who were sitting in his car and who were introduced to Ms. Pettiford. Defendant agreed that his car got stuck in the mud in the Pine Lake Section early Saturday, 3 March 1979, and was pulled out with a Blazer operated by State's witness John Bulman. Defendant testified, "All of us decided to go to my apartment to pick up a change of clothes," because our clothes were muddy. Defendant Cox stated that he had sex with Angela in his apartment in Virginia and once or twice in the Holiday Inn in Rocky Mount. Godfrey and Covington both had sex with her in Rocky Mount but not in Virginia. All sexual intercourse was with prosecutrix's consent. Cox denied that he kidnapped his cousin from the campus.

Defendants Covington and Godfrey each admitted having sex with prosecutrix in the car after the car was pulled out of the mud in Elizabeth City, in Virginia, and in Rocky Mount; that the prosecutrix consented to such; that she was not kidnapped; and that they first met the prosecutrix on the date of the events in question.

The jury found the defendants guilty of second degree rape and kidnapping. From the judgment entered and sentences imposed, defendants appealed.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Twiford, Trimpi, Thompson & Derrick, by John G. Trimpi and C. Everett Thompson, for defendant appellants.

ERWIN, Judge.

Defendants make several assignments of error common to each defendant. We find no error in the trial as to defendant Cox; however, we are compelled to award a new trial to defendants Covington and Godfrey on the kidnapping charges for the reasons that follow.

Witness Dorothy Newby testified:

"In my capacity as resident director I have had an occasion to become acquainted with the young lady by the name of Angela Pettiford. I did have an occasion from time to time to see Ms. Pettiford at or about the campus during the last school year in 1978-1979.

Q. And I ask you whether or not you had an opportunity and occasion to form some opinion about the character and reputation of Angela Pettiford?

OBJECTION.

OVERRULED.

Q. You can answer the question. Did you form some opinion?

A. Yes.

Q. And was that opinion based upon the information there on the campus community, or your contact with her on campus?

A. My contact with her on campus.

Q. And what is your opinion as to the character and reputation of Angela Pettiford?

A. My opinion is that she is a very nice young lady, and has a very good character."

On cross-examination, she testified:

"Q. Who have you heard discuss her reputation?

A. I haven't heard anyone discuss her reputation.

MR. ROSSER: Move to strike her testimony.

COURT: I didn't hear your question.

MR. ROSSER: I asked her who had she heard discuss the reputation of Angela Pettiford, and she said she had heard no one discuss it. And I move to strike the testimony as to her character, and reputation.

COURT: I am Denying your Motion."

Witness Shirley Barnes testified:

"I have particular concern with Bias Hall, the freshman dormitory at Elizabeth City State. I have been employed at Elizabeth City State for five years. At Bias Hall for two years. I have had an opportunity to become personally acquainted with Angela Pettiford during the school year 1978-1979. To my knowledge she was a resident of Bias Hall. I would see her everyday or two possibly, depending on how my schedule was. From my personal observations in and about the campus community I did form an opinion satisfactory to myself as to the character and reputation of Angela Pettiford. As to what my opinion as to her character and reputation is, she is a very nice young lady."

On cross-examination, she testified:

"Q. Have you heard anyone discuss her character and reputation prior to today?

A. No.

MR. ROSSER: Move to strike.

COURT: Denied.

EXCEPTION NO. 2"

[1] Defendants contend that the trial court should have allowed his motions to strike the evidence admitted on direct examinations, and in failing to do so, the court committed prejudicial error. We do not agree.

Each witness stated that she had formed an opinion as to the character and reputation of the prosecutrix; thereafter, each stated her opinion. This procedure was the correct one. *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), *modified*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976); *see Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972). The evidence was admitted without objection. The character or reputation of the prosecutrix was not a real issue in the case. The answers given by the witnesses on cross-examination explained the foundation upon which the witnesses' testimony was based. This aided the jury in determining what weight, if any, should be given to the evidence in question. We do not find prejudicial error in the court's denying defendants' motion to strike the evidence given on direct examination. Defendants must show that the error was material, prejudicial, and amounted to a denial of some substantial right. *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966); 4 Strong's N.C. Index 3d, Criminal Law, § 169.1, p. 866. Defendants have not shown prejudice, and this assignment of error is overruled.

[2] Defendants contend that the trial court erred in allowing a corroborating witness to invade the province of the jury and draw his own conclusion as to whether the in-court testimony of the prosecutrix varied from the statement he had taken from her. Detective O.L. Wise was asked by Mr. Watts:

> "Q. And at any point of time in her statement to you did she say anything different from what she testified to here?
>
> OBJECTION.
>
> OVERRULED.
>
> EXCEPTION NO. 3
>
> A. No, sir."

A prior, consistent statement of the witness to strengthen her credibility is admissible. "And it makes no difference, in this State at least, whether such evidence appears in a verbal or written statement, nor whether verified or not." *Bowman v. Blankenship*, 165 N.C. 519, 522, 81 S.E. 746, 747 (1914). *See* 1 Stansbury, N.C. Evidence (Brandis rev. 1973), § 51. Defendants did not request an instruction restricting the use of the evidence which corroborates the testimony of the witness. This admission of the evidence and the failure of the trial judge to give a limiting instruction is not error. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 53 L.Ed. 2d 226, 97 S.Ct. 2178 (1977); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958). This assignment of error is overruled.

[3] Defendants contend that the trial judge erred in denying their motions to dismiss at the close of all the evidence. This assignment of error is wholly without merit. The evidence presented by the State and taken in the light most favorable to it was sufficient to submit to the jury each offense charged and to support a verdict thereon. The evidence clearly shows that the defendants acted in concert from the very beginning. Defendant Cox gave instructions to defendants Covington and Godfrey, who followed them, and Cox drove his car transporting the prosecutrix against her will. All defendants were present at the scene and appeared to act in a common plan or purpose to commit the crime of kidnapping. *See State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). The prosecutrix testified without reservation that each defendant raped her. Such evidence was sufficient to overrule defendants' motion and submit the case to the jury on the charges of rape against each defendant.

[4] In defendants' fourth assignment of error, they contend that the trial court erred in not instructing the jury that the guilt or innocence of each defendant should be considered separately from the guilt or innocence of the others as to each of the offenses. We do not agree.

Our Supreme Court has held in several cases that when two or more defendants are jointly tried for the same offense, a charge which is susceptible to the construction that the jury

should convict all if it finds one guilty is reversible error. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Williford*, 275 N.C. 575, 169 S.E. 2d 851 (1969); *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230 (1969); *State v. Harvell*, 256 N.C. 104, 123 S.E. 2d 103 (1961).

The trial court was careful to list each element of each offense, including the lesser included offense, for each of the three defendants and instructed the jury as to each defendant separate from the other defendants. We do not see the charge as being susceptible to a construction that the jury should convict all the defendants if it finds one guilty. To us, the charge fairly and correctly presented the law in the cases. *See State v. Valley*, 187 N.C. 571, 122 S.E. 373 (1924). We overrule this assignment of error.

[5] By their fifth and sixth assignments of error, defendants contend that the trial court, by its charge, permitted the jury to convict defendants on both offenses "for what happened outside the County of Pasquotank, even in another state." We fail to find any error.

G.S. 15A-952 provides the procedure for a defendant in a criminal case to raise the questions of venue and jurisdiction. Here, defendants failed to raise either question. Failure to raise the question of venue before or during the trial constitutes a waiver. G.S. 15A-952(e). Had the question of venue or jurisdiction been raised at trial, the evidence would have clearly shown that prosecutrix was in Pasquotank County when the event relating to the offense of kidnapping occurred. The State's evidence constituted a *prima facie* showing that this offense occurred in Pasquotank County and was sufficient to support a conclusion that the offense occurred in Pasquotank County and to fix venue in that county.

The record does not reveal that the first rape by each defendant did not occur outside of Pasquotank County. The evidence tended to show that each defendant raped the prosecutrix in Holiday Inn No. 2 in Rocky Mount, North Carolina. The Superior Court, our trial court of general jurisdiction, would have jurisdiction of the offense of rape anywhere in the State. The

Superior Court in Pasquotank County would have jurisdiction to hear and decide the occurrences which happened in Rocky Mount, although in another county. Improper venue would not oust jurisdiction of the Superior Court in session in Pasquotank County. Each defendant raised two defenses at trial: (1) that prosecutrix consented to go with them to Virginia and Rocky Mount; and (2) that each act of sexual intercourse was with consent.

[6] Assignment of Error No. 7 reads: "The trial judge erred in failing to apply the law regarding acting in concert with respect to the kidnapping charges levied against each of the joint defendants." We find merit in this assignment of error as it relates to defendants Covington and Godfrey. The trial court instructed the jury adequately with reference to acting in concert on the offenses of rape. A study of the complete charge leads us to conclude that the trial court should have instructed the jury on the issue of acting in concert with respect to the kidnapping charge against defendants Covington and Godfrey. The failure to so charge entitled defendants Covington and Godfrey to a new trial on the offense of kidnapping. We find no error in the trial of defendant Cox. The evidence tends to show that he initiated and directed the shockingly wicked acts against his first cousin.

Defendant Covington is awarded a new trial in Case No. 79CRS1552, wherein he is charged with the offense of kidnapping. Defendant Godfrey is awarded a new trial in Case No. 79CRS1554, wherein he is charged with the offense of kidnapping.

We find no error in Case No. 79CRS793 (second degree rape) and Case No. 79CRS794 (kidnapping) against defendant Cox. We find no error in Case No. 79CRS1553 (second degree rape) against defendant Covington and no error in Case No. 79CRS1555 (second degree rape) against defendant Godfrey.

Judges ARNOLD and HILL concur.

State v. Trapper

STATE OF NORTH CAROLINA v. PATRICK M. TRAPPER (79-CRS-38), NUNZIO JAMES LOMBARDO (79-CRS-107), DENNIS LOMBARDO (79-CRS-109), VINCENT SERGE LORUSSO (79-CRS-46), and CLARK WILLIAM OLDENBROOK (79-CRS-48)

No. 792SC1188

(Filed 2 September 1980)

1. **Searches and Seizures § 23– marijuana odor detected during license check – probable cause for search warrant**

A magistrate properly issued a warrant to search a truck on the basis of an officer's affidavit that a strong odor of marijuana was detected while a driver's license check was being made since the affidavit did not show on its face that the driver's license check was improper.

2. **Searches and Seizures § 12– stopping of truck for investigation**

An officer had articulable reasons for believing that a truck might contain marijuana and could properly stop the truck for further investigation, and the investigation of the truck was reasonable in extent and time, where the officer saw suspicious activity at premises near the coast; the officer had been fired upon while keeping the premises under surveillance from the water; the officer had seen a boat aground in the area of the premises without a satisfactory reason for its being there; the officer saw the truck leave the premises at midnight; officers stopped the truck and the driver showed them a proper license and registration card; the officers inspected the truck carefully from the outside and detected the odor of marijuana; and the truck and driver had been detained only ten minutes when the odor of marijuana was detected and the driver was placed under arrest.

3. **Searches and Seizures § 39– warrant to search housetrailer – search of storage shed**

Officers did not exceed the scope of a warrant authorizing them to search a housetrailer when they searched a storage shed approximately 30 feet from the housetrailer where there was a concrete walkway connecting the shed and the housetrailer and the shed was a part of the curtilage of the housetrailer.

4. **Searches and Seizures § 41– execution of warrant – knock and announce requirements**

Officers gave adequate notice of their identity and purpose before entering a housetrailer to serve a search warrant where the officers knocked on the front door of the housetrailer and identified themselves as officers, the door was opened, and an officer read the warrant to the owner of the housetrailer. G.S. 15A-249; G.S. 15A-251.

5. Criminal Law § 98.2– motion to suppress evidence – sequestration of defendants rescinded – absence of prejudice

Defendants were not prejudiced when the trial court sequestered all defendants who intended to testify as well as the State's witnesses at a hearing on motions to suppress evidence where the court rescinded its order of sequestration and permitted all witnesses, including defendants, to return to the courtroom before the first witness at the hearing completed his direct testimony.

APPEAL by defendants from *Strickland, Judge.* Judgment entered 13 August 1979 in Superior Court, HYDE County. Heard in the Court of Appeals 25 April 1980.

The defendants were indicted for various crimes connected with the possession and sale of marijuana. Prior to trial the defendants made motions to suppress as evidence marijuana which had been confiscated after searches of a vehicle driven by the defendant Trapper and a building on property owned by the defendant Nunzio Lombardo. A hearing on the motions to suppress was held before Judge Godwin. The evidence at the hearing showed that Charlie Carrowan is a Deputy Sheriff of Hyde County. Approximately two years prior to January 1979, the defendant Nunzio Lombardo purchased a tract of land approximately one-half mile from Mr. Carrowan's home. A housetrailer was placed on the property. Mr. Carrowan had some complaints from a neighbor about noises that sounded as if they came from boat motors and trucks in the area of Mr. Lombardo's property. On one occasion Mr. Carrowan arranged to have a 60-foot boat named the "Lady Barbara" towed from Fortiscue Creek which runs in front of the Lombardo property. The operator of the boat told Mr. Carrowan that it had been driven into the creek from the Pungo River by the wind. Based on his knowledge of the wind at the time the boat had run aground, Mr. Carrowan did not believe this was true. Mr. Carrowan then began a surveillance of the Lombardo property from the water. Several shots were fired in his direction which he believed came from the Lombardo property. After that, he began a surveillance of the Lombardo property from the land side. He considered the amount of traffic abnormal but he did not observe any illegal activity.

On 13 January 1979 Mr. Carrowan received information that a truck had entered the Lombardo property. He began a

surveillance of the property at approximately 6:30 p.m. At approximately midnight, he saw clearance lights coming up the road on the Lombardo property to the highway. Mr. Carrowan followed the truck for some distance before stopping it. He testified, "As far as I could observe the driver of this truck was not breaking any motor vehicle laws." He also testified, "As to whether it was my intent to conduct a search of this truck, if I had further reason to search this truck such as if he denied me the privilege to look or anything else that he had to hide, anything that would give me any idea he had something to hide, yes, I intended to search it."

The defendant Trapper was the driver of the truck and he gave Mr. Carrowan a proper driver's license and registration card. A few minutes after the truck was stopped, Deputy Sheriff Melvin Collins and Trooper Darrell Bass of the Highway Patrol, arrived to assist Mr. Carrowan. Approximately ten minutes had elapsed after the truck was stopped when Trooper Bass walked around the truck four times. He testified he smelled the odor of marijuana emanating from the passenger side of the truck. The other two officers then went to the passenger side and smelled the odor of marijuana. The defendant Trapper was placed under arrest and Deputy Sheriff Collins went to procure a search warrant. The affidavit for the search warrant made by Deputy Sheriff Collins contained the following statement:

> "The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: a strong odor or marihuana [sic] was noticed as a license check was being made on driver of said vehicle. Information was given in confidence and from a very reliable informant, also."

A search warrant was issued and a search of the truck revealed it contained several bales of marijuana.

A warrant was then procured to search the property of Nunzio Lombardo. During this search several bales of marijuana were found. Judge Godwin made findings of fact consistent with the evidence and overruled the motions to suppress. Each defendant pled guilty at a later term of court. All defendants appealed from the sentences imposed.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Herman E. Gaskins, Jr., Joel Hirschhorn, and Smith, Patterson, Follin, Curtis, James and Harkavy, by Michael K. Curtis, for defendant appellants.

WEBB, Judge.

We note at the outset that our Supreme Court has recently held in *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979) that if a defendant intends to appeal from a ruling on a suppression motion after a plea of guilty, he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will lose his right of appeal. The record is not clear in this case that any notice of intention to appeal was given the prosecutor or the court. We shall consider the appeal on its merits.

The defendants contend that we should reverse and order the evidence of the marijuana suppressed. They argue that the affidavit submitted to the magistrate to search the truck did not support the issuance of a search warrant for the truck; that if the affidavit did support the issuance of the search warrant for the truck, the testimony at the hearing on the motions to suppress showed the evidence on which the affidavit was made was illegally obtained; the warrant to search the premises of Nunzio Lombardo was based on the invalid warrant to search the truck which makes it an invalid warrant; that even if the warrant to search the premises of Nunzio Lombardo was a good warrant, the officers exceeded the scope of the warrant in their search; and that the officers did not properly serve the warrant to search the premises.

[1] In order for a magistrate to issue a search warrant, he must have evidence before him from which he can find probable cause that a crime has been committed and probable cause that evidence of the crime may be on the premises to be searched. *See Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). We hold that the affidavit in the case sub judice which contained the statement "a strong odor or marihuana [sic] was

noticed as a license check was being made on driver of said vehicle" was evidence from which a magistrate could conclude that there was probable cause that the driver of the truck was in possession of marijuana and the marijuana might be found by a search of the truck. The word "or" was clearly a typographical error. The maker of the affidavit intended to use the word "of" in the context of the sentence. The defendants, relying on *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979) contend that the affidavit showed on its face that the evidence was illegally obtained since it stated the odor of marijuana was detected while a license check was being made. *Prouse* held that evidence of marijuana was unconstitutionally obtained when a patrolman made a random stop of a car because he "wasn't answering any complaints." There was no reason to think the driver of the vehicle was violating any law at the time he was stopped. The United States Supreme Court held this intrusion violated the driver's Fourth and Fourteenth Amendment rights. The Supreme Court recognized that some driver's license checks are constitutionally permissible giving as one example a checkpoint operation in which all cars proceeding past a certain point are stopped. When the magistrate examined the affidavit in the case sub judice, it did not show what kind of driver's license check had been made. The affidavit did not show on its face that the driver's license check was improper. The magistrate did not err in issuing the warrant for a search of the truck.

[2] The defendants' next contention is that the hearing before Judge Godwin showed that the evidence used to procure the search warrant for the truck was illegally obtained. They contend first that the odor of marijuana was not obtained under a plain view. *See State v. Blackwelder*, 34 N.C. App. 352, 238 S.E. 2d 190 (1977). We do not believe the plain view doctrine is dispositive of this case. The defendants also contend that Mr. Carrowan did not have a valid reason to stop the truck and if he did, the officer could not detain the truck after the driver's license and registration check had revealed nothing irregular.

The United States Supreme Court has in several cases passed on the question of detaining persons for investigation without probable cause to believe the persons have committed

crimes. *See Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979); *Delaware v. Prouse, supra; United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed. 2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). We believe these cases hold that, consistent with the Fourth and Fourteenth Amendments, a person or vehicle may be detained for further investigation by a law enforcement officer without a warrant and without probable cause to believe a crime has been committed if the officer has a reasonable suspicion, that can be articulated, that a crime is being committed. The detention must not be unreasonable in length and the investigation must be reasonable. In the case sub judice, Mr. Carrowan was an experienced law enforcement officer; we take judicial notice of the fact that Hyde County is on the coast of North Carolina in an area which is regularly used by smugglers of marijuana; Mr. Carrowan had seen activity in the area of the Lombardo premises which made him suspicious; he had been fired upon while keeping the property under surveillance from the water; and he had seen a boat aground in the area of the premises without a satisfactory reason to him for its being there; and on 13 January 1979 at approximately 12:00 midnight, he saw a truck leave the premises of Nunzio Lombardo. We hold these are articulate reasons that could give rise to a suspicion on Mr. Carrowan's part that marijuana was being carried on the truck. He had a right to stop the truck for further investigation. We also hold the investigation was reasonable in extent and in time. The defendant Trapper was not interrogated. The officers did not open the truck body. They inspected it carefully from the outside until they detected the odor of marijuana. This took approximately ten minutes. Mr. Trapper's Fourth and Fourteenth Amendment rights were not violated. We hold that the evidence on which the warrant was issued to search the truck was not illegally gained.

The defendants' argument as to the validity of the warrant to search the Lombardo property is based on the invalidity of the warrant to search the truck. Since we have held that the warrant to search the truck was valid, we hold the search warrant for the Nunzio Lombardo premises was also valid.

[3] The defendants also contend the officers exceeded the scope of the warrant in searching the premises of Nunzio Lom-

bardo. The affidavit described the premises to be searched as follows:

> "A housetrailer, double wide, white, owned by Nunzio J. Lumbards [sic], Rt. 1, Scranton, N.C. located on North East side Fortescue [sic] Creek. That the house is approx. .2 mile off of RPR 1145 and is approx. .5 mile west of intersection of RPR 1145 & RUPR 1144. Said house is surrounded by several acres of land owned by Lumbards [sic]."

The warrant directed the officers to conduct a search of the place "described in [the] application." A search of the housetrailer did not reveal any marijuana. The officers also searched a tin shed approximately 30 feet from the housetrailer where they found several bales of marijuana. It is well settled that when a search is made pursuant to a warrant, the scope of the search is limited to the area described in the warrant. *See United States v. Davis*, 557 F. 2d 1239 (8th Cir. 1977); *Keiningham v. United States*, 287 F. 2d 126 (D.C. Cir. 1960); *Rising Sun Brewing Co. v. United States*, 55 F. 2d 827 (3d Cir. 1932). The question posed by this appeal is whether they were authorized to search a tin shed which was 30 feet away and used for storage by the occupants of the housetrailer when the warrant directed the officers to search the housetrailer. The closest case to this one which we have been able to find is *State v. Travatello*, 24 N.C. App. 511, 211 S.E. 2d 467 (1975). In that case this Court held a search of the defendant's premises did not exceed the scope of the warrant by including a search of a tool shed as well as the house itself. The case does not make it clear whether the warrant only directed a search of the house. We hold that under the warrant in the case sub judice, the officers properly searched the tin storage shed. The evidence was that it was a shed used for storage approximately 30 feet from the housetrailer. There was a concrete walkway connecting the housetrailer to the shed. Judge Godwin found the shed was a part of the curtilage and the officers did not exceed the scope of the warrant by searching the shed. We believe he was correct in this finding.

[4] The defendants next contend that the officers in serving the search warrant for the Nunzio Lombardo residence did not give adequate notice of their identity and purpose before entering the premises and therefore violated the Fourth and Four-

teenth Amendments to the United States Constitution and they also violated G.S. 15A-249 and G.S. 15A-251. State Bureau of Investigation Agent Lewis Young testified that in serving the warrant, the officers went to the front door of the house-trailer, knocked on the door and identified themselves as officers. The door was opened and Mr. Carrowan read the warrant to Nunzio Lombardo. Judge Godwin found that the warrant was executed by reading it to Nunzio Lombardo. We hold that the serving of the warrant for the search of Nunzio Lombardo's premises did not violate his constitutional rights, or his rights under Chapter 15A of the General Statutes.

[5] The defendants' last assignment of error deals with the exclusion of the defendants from the courtroom for a part of the hearing on the motions to suppress the evidence. At the start of the hearing, the defendants moved that the State's witnesses be sequestered. The court allowed this motion and then on its own motion sequestered all the defendants who intended to testify. The first witness for the State was Charlie Carrowan. While he was testifying on direct examination, the court rescinded its order of sequestration and allowed all witnesses, including the defendants, to return to the courtroom. The defendants cite textbook authority for the proposition that a party to an action who is also a witness cannot be sequestered. *See* 88 C.J.S. *Trial* § 68 (1955). We do not pass on this question in the case sub judice. The parties were allowed to return to the courtroom before the first witness had completed his testimony in chief. We hold the defendants have not shown they were prejudiced by being excluded from the courtroom for a short period of time.

No error.

Judges MARTIN (Robert M.) and HILL concur.

Hollar v. Furniture Co.

CHARLENE HOLLAR, EMPLOYEE, PLAINTIFF v. MONTCLAIR FURNITURE COMPANY, INC. EMPLOYER; THE TRAVELERS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 8010IC113

(Filed 2 September 1980)

Master and Servant §§ 55.3, 56– workers' compensation – fall from fainting – accident – whether injury arose out of employment

Plaintiff furniture worker was injured by accident when she fainted and fell on her employer's premises in the course of her work. However, the cause must be remanded to the Industrial Commission for a determination as to whether plaintiff's injury arose out of her employment where the Commission failed to make sufficient findings of fact on the question of whether plaintiff's fainting was caused solely by an idiopathic condition or by the conditions of her employment.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award entered 19 October 1979. Heard in the Court of Appeals 6 June 1980.

On 26 July 1977 plaintiff was injured when she fainted on the employer's premises in the course of her work. After a hearing on her claim for worker's compensation benefits, Deputy Commissioner Denson made certain findings and concluded that plaintiff's injuries were compensable under G.S. 97-2(6) as having resulted from an accident arising out of and in the course of her employment. Without altering the Deputy Commissioner's findings of fact the full Commission reversed her conclusion and held plaintiff's injuries were not compensable. From the order of the full Commission, plaintiff appeals.

Gaither & Wood, by Allen W. Wood III, for plaintiff.

Gene Collinson Smith for defendant.

WELLS, Judge.

The sole question brought forward by plaintiff in this case is whether the full Industrial Commission erred in concluding that plaintiff did not sustain an injury by accident arising out of and in the course of her employment under G.S. 97-2(6).

In an appeal from an award of the Industrial Commission, the scope of our review is limited. If the findings of fact are supported by competent evidence and are determinative of the question at issue in the case, we must accept such findings as final and then determine whether they justify the legal conclusions of the Commission. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E. 2d 283, *disc. rev. denied*, *300* N.C. *374*, *267* S.E. 2d *676* (1980). In the case at bar Deputy Commissioner Denson made the following pertinent findings which the full Commission adopted without addition or modification:

> 1. In July, 1977, plaintiff had worked for defendant-employer in the spring-up department for several years.***
>
> 2. Prior to that time, plaintiff had not been subject to fainting or black-out spells. On July 26, 1977, plaintiff's work environment was extremely hot and ventilation was poor. Plaintiff and a fellow employee, Jerry Self, had just finished putting two large rolls on rollers; as plaintiff was walking around a table she suddenly, for an unexplained reason, felt as if she were passing out and called to Jerry to catch her. He did so, but plaintiff's back struck the floor and she passed out.

* * *

For an injury to be compensable under the Worker's Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977); *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E. 2d 660, *cert. denied*, 281 N.C. 154, 187 S.E. 2d 585 (1972). In the case now before us, there is no dispute as to whether plaintiff's injury was sustained in the course of her employment. We therefore move on to the next question: Was there an accident? The answer must be in the affirmative. In *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963), the claimant received a head injury when he fell at work. Justice Moore, speaking for our Supreme Court, said:

> The deceased employee was injured by accident. To prove an accident in industrial injury cases it is not essential that there be evidence of any unusual or untoward condition or occurrence causing a fall which produces injury. The fall itself is the unusual, unforeseen occurrence which is the accident. *Robbins v. Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20. A fall is usually regarded as an accident. *Cole v. Guilford County*, 259 N.C. 724, 727, 131 S.E. 2d 308.

260 N.C. at 437, 132 S.E. 2d at 867.

Two of the three necessary elements of a valid claim having been established, we now consider the third: Did this accidental injury arise out of plaintiff's employment? To narrow our inquiry, we first note that, despite comments to the contrary found in Commissioner Denson's order, plaintiff's fall does not come within the "unexplained" category of falls, and we therefore do not consider previous cases, or authorities, dealing with "unexplained" falls as being precisely in point or controlling here. *See, e.g., Taylor v. Twin City Club, supra.*

In the case before us, it is clear that plaintiff fell because she fainted. The question then narrows to why plaintiff fainted. From the evidence before the Commission, it is not possible to reach a determination as to whether plaintiff fainted from an idiopathic cause or condition, naturally occurring circumstances not related to any condition of her employment, or conditions or circumstances related to her employment. Commissioner Denson's findings of fact are not determinative of this issue, and since the full Commission did not add to or vary those findings of fact, its order suffers from the same deficiency.

Although in many cases falls from idiopathic causes or conditions have been held to be compensable, *see*, 1 Larson's Workmen's Compensation Law §§ 12.10-12.14 (1978), the findings of fact in this case do not justify a conclusion that plaintiff's fall resulted from any preexisting condition of her health. The Commission's finding that prior to the fall suffered by plaintiff she had not been subject to fainting or "black-out spells" does not permit any inference as to the cause of her fainting on this occasion. Nor does plaintiff's testimony that she had not previously fainted for thirty-four years permit any

such inference. Similarly, the Commission's finding that plaintiff was working in a very hot, poorly ventilated building does not lead to an inference that these work-related conditions contributed to her fainting.

The majority of the full Commission found *Buchanan v. Highway Commission*, 217 N.C. 173, 7 S.E. 2d 382 (1940) controlling on the issue concerning whether plaintiff's injury arose out of her employment. In *Buchanan*, the claimant was employed by the State Highway Commission. His duties required him to lift a scoop filled with dirt. On the day in question, while he was lifting the scoop in the ordinary manner without anything unusual happening, the employee became sick and blind and was unable to work. In denying compensation, the Court did not discuss the medical evidence in the case. The case, however, did not involve a fall. Nor did the Court recite that there was any evidence or other indication that an accident *per se* was involved.

In the case before us Commissioner Vance dissented from the opinion of the full Commission, based on *Taylor v. Twin City Club, supra,* and *Robbins v. Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20 (1941). In *Robbins*, which did involve a fall, the Court sustained an award of compensation, holding:

> When claimant was injured she was engaged in performing one of the duties of her employment. When she reached up to the rack, for some undisclosed reason she lost her balance and fell. There is no evidence tending to show that the fall was caused by a hazard to which the workman would have been exposed apart from the employment or from a hazard common to others. It had its origin in a risk connected with the employment. Hence, we are unable to say that the Commission was not justified in concluding that it was connected with and flowed from the employment as a rational consequence.

220 N.C. at 247, 17 S.E. 2d at 21. Thus, it is clear that in *Robbins* there was evidence from which the Commission could have inferred that the cause of plaintiff's fall was work-related. There is no such evidence in the record before us.

Taylor also involved a fall, albeit an unexplained one. The deceased workman was found on his employer's premises unconscious and bleeding from a severe head wound. There was medical evidence that the workman's cause of death was bleeding from his scalp wound. The Hearing Commissioner found as a fact that the "deceased died as a direct result of the injury by accident . . . ." The full Commission upheld the award of compensation. On appeal to our Supreme Court, defendants argued that because there was also medical evidence that the deceased suffered from angina and that his disease caused his death, the cause of the fall was idiopathic. The Court, regarding the Commission's finding of "injury by accident" as binding, affirmed the award. There was no showing in *Taylor* of any unusual risk or hazard associated with the workman's work or work environment.

In comments contained in her order, Deputy Commissioner Denson cites *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97 (1946); *DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77 (1947); and *Taylor* in support of her conclusion that plaintiff's injury was compensable. In *Rewis*, plaintiff fell to his death from the twelfth floor of a building. The evidence was that plaintiff suffered from idiopathic ulcerative colitis, and that after entering the men's washroom on the twelfth floor, he felt faint, went to an open window for air, slipped on the slick floor and fell through the window to his death. The heart of the Court's opinion may be found in the following portion of the opinion:

> The deceased was in the course of his employment. He was at a place where his work carried him. He had become faint from a preexisting idiopathic condition. He fell to his death by reason of an accident in slipping on the slick tile. At the time of the fall he was endeavoring to get himself into condition so as to be able to continue his employment. Such an act is regarded as an incident of the employment. Hence, there was a causal connection between the employment and the injury.

226 N.C. at 328, 38 S.E. 2d at 99. Thus, while fainting was incidentally involved in *Rewis*, plaintiff's syncopic condition was not directly controlling. The fact that the immediate cause

of the plaintiff's fall was his slipping on the slick floor seems to be the keystone.

In *DeVine*, the deceased, who was known to suffer from mild epileptic seizures, was fatally injured when he fell and struck his head on the cement platform on which he was standing. The Commission's order contained a statement that, "The Commission is of the opinion that ... the fall caused the death of plaintiff's deceased and that he was subject to a peculiar hazard on account of being required to stand on the cement platform and lower the flag." The Court, in a very brief opinion, built upon the Commission's findings and conclusions and affirmed. *DeVine* must be distinguished because in that case, the Commission found a "peculiar hazard" aspect of the employee's employment. That element is missing from the case *sub judice*.

In the case before us defendants argue that plaintiff's fall was due to an idiopathic condition and was therefore not compensable, citing *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963) and *Crawford v. Warehouse*, 263 N.C. 826, 140 S.E. 2d 548 (1965). In *Cole*, the decedent fell on the courthouse steps when her leg gave way, causing her to break her hip. The Commission awarded compensation. In reversing the Commission's award, the Court held that decedent's fall "was idiopathic — that is, one due to the mental or physical condition of the particular employee." 259 N.C. at 728, 131 S.E. 2d at 311. In *Cole*, there was no showing of special hazard, or any other condition of the physical environment which might have contributed to the fall, and therefore *Cole* must be distinguished from the case at bar.

However, Justice (later Chief Justice) Sharp, writing for the Court in *Cole*, quoted with approval from *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951):

> "(T)he better considered decisions adhere to the rule that where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. *But not so*

where the idiopathic condition is the sole cause of the injury." [Court's emphasis.]

259 N.C. at 728, 131 S.E. 2d at 311. Justice Sharp went on to say:

> The opinion in *Vause* referred to 5 Schneider's Workmen's Compensation Text (Permanent Ed.), § 1376, where the author states: "(T)he question that usually determines whether the injury is compensable is, did the employee's working conditions contribute to the fall and consequent injury or was the accident solely due to the employee's idiopathic condition which might have caused him to fall in his home with the same injurious results? If it is the latter the employer is not liable, if the former he is liable."

259 N.C. at 728, 131 S.E. 2d at 312.

In *Cole*, Justice Sharp stated that claimants' falls in *Rewis v. Insurance Co., supra*, and *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476 (1960), were in the class of injuries arising out of both the idiopathic condition of the workman and hazards incident to the employment, and, under these circumstances, the employer is held liable.

In *Crawford*, the plaintiff suffered from grand mal seizures and fell to the floor while pushing a hand truck, injuring himself. The Commission denied compensation. The Court, citing *Cole*, affirmed, holding that where an idiopathic condition of a workman is the sole cause of an injury, compensation may not be awarded. In *Crawford*, there was no evidence of special hazard or that plaintiff's work environment in any way contributed to his fall, and this case must therefore be distinguished from the case now before us.

Plaintiff cites *Robbins, Taylor*, and *Fields v. Plumbing Co.*, 224 N.C. 841, 32 S.E. 2d 623 (1945) in support of her argument that plaintiff's injuries were compensable. In *Fields*, the deceased workman was working in an enclosed area, using hot lead to caulk joints in a pipe. On the day in question the outside temperature reached 104° F. The Industrial Commission found

that the deceased workman was subjected to a greater heat hazard than the public generally, that the deceased suffered a heat stroke and died from it, and that his death resulted from injury by accident which arose out of and in the course of his employment. The Supreme Court affirmed. The nub of the Court's opinion may be found in the following excerpt:

> The question, then, on the present record is whether plaintiff's intestate's death may reasonably be attributed to the increased temperature occasioned by the manner and method employed in doing the work, or should it be ascribed to natural causes. Either inference seems permissible. Hence, the determination of the Industrial Commission that the additional hazard created by the artificial heat was the direct and superinducing cause of plaintiff's intestate's death is conclusive on appeal. [Citations omitted.]

224 N.C. at 843, 32 S.E. 2d at 624.

We do not believe, however, that the work environment alone is conclusive on the question of causation. Physical exertion may in and of itself be the precipitating cause of an injury by accident within the meaning of G.S. 97-2(6). *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E. 2d 283; *disc. rev. denied*, 300 N.C. 374, 267 S.E. 2d 676 (1980). The circumstances and conditions of the work environment must, therefore, be considered together with the element of exertion required of the employee in performing the employment.

Out of the cases we have reviewed, there seems to emerge a clear line of distinction: (1) Where the injury is clearly attributable to an idiopathic condition of the employee, with no other factors intervening or operating to cause or contribute to the injury, no award should be made; (2) Where the injury is associated with any risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury.

The issue in this case is whether plaintiff's fainting was caused in any part by the conditions or circumstances of her employment. While the findings of fact made by Deputy Commissioner Denson would not dispel the possibility that plaintiff's work environment and exertion, which were risks of her employment, caused her to faint, from the complete absence of medical evidence in the record no inference is permissible as to whether plaintiff's fainting was caused by an idiopathic condition or from the conditions of her employment. The full Commission did not disturb the findings of the Deputy Commissioner. We recognize that the plenary powers of the Commission are such that upon review, it may adopt, modify, or reject the findings of fact of the Hearing Commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608 (1962). However, the Commission's order in the case before us does not, in fact, contain sufficient findings of fact on the issue of the cause of plaintiff's fainting, and it is therefore not determinative of the issues in this case. *See, Brewer v. Trucking Co., supra.*

The case must be remanded to the Industrial Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

CALVIN E. PEEBLES v. HAROLD MOORE

No. 7910SC1163

(Filed 2 September 1980)

1. Rules of Civil Procedure § 55– entry of default – written motion not required – effect of untimely answer

There was no merit to defendant's contention that entry of default was improperly entered because there was no written motion for entry of default

and because his answer, though untimely, constituted a bar to the entry of default, since the use of a written motion is not mandatory; and an untimely answer is accepted by the clerk only as a "proffered" filing, and as such never becomes a part of the record absent a proper motion to extend the time for filing; and defendant did not plead or otherwise appear within the thirty days allowed to respond to plaintiff's complaint.

2. **Rules of Civil Procedure § 55.1 – failure to set aside default – abuse of discretion**

In an action to recover damages for personal injuries allegedly due to defendant's negligence, the trial court abused its discretion in failing to set aside an entry of default where defendant's failure timely to file his answer was due to an inadvertence on the part of defendant's insurer and not due to any fault of his own; defense counsel promptly filed an answer upon discovering that a mistake had been made; defendant's delay in filing answer did not prejudice plaintiff; and allowing default would do an injustice to defendant.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 13 September 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 19 May 1980.

On 24 January 1979 plaintiff commenced this action to recover damages for personal injuries allegedly due to defendant's negligence. Defendant answered on 6 March 1979, thirty-seven days after being served with the complaint on 28 January 1979. In his answer, defendant denied the material allegations in the complaint, and pleaded plaintiff's contributory negligence. On 9 April 1979, pursuant to G.S. 1A-1, Rule 55(a) of the North Carolina Rules of Civil Procedure, default was entered by the Assistant Clerk of Superior Court, Wake County. On that same day, plaintiff filed a reply to defendant's allegation of contributory negligence, alleging that defendant had the last clear chance to avoid injury to plaintiff but failed to do so. On 24 April 1979, defendant moved to set aside the entry of default on the grounds that defendant's failure to answer timely was due to inadvertence, that defendant had a meritorious defense to plaintiff's claim, and that defendant's tardiness in answering the complaint caused plaintiff no prejudice. Before hearing on defendant's motion to set aside entry of default, plaintiff moved on 4 May 1979 for judgment by default, supported by his sworn affidavit.

On 22 May 1979, defendant filed the affidavit of John F. Hester, Claims Attorney for Nationwide Mutual Insurance

Company, defendant's automobile liability insurance carrier, in support of his claim of inadvertence. That affidavit stated as follows:

> 1. The undersigned did receive notice of the lawsuit styled herein and called the offices of Ragsdale & Liggett on February 9, 1979. On such occasion, he spoke to the secretary to Mr. George R. Ragsdale, to whom defense of the case would be assigned. He gave the name of the case to the secretary and informed her that he would be sending the file to the office of Ragsdale & Liggett in about seven days.
>
> 2. On February 12, 1979, some three days later, some unknown employee of Nationwide who works in the Office Personnel Department, whose job it was to retrieve files from the Claims Department, removed the file in the above-entitled case from the desk of the undersigned. The removal of the file was unknown to the undersigned.
>
> 3. The removal of the file and the fact that Answer was not filed within the time allowed by law did not come to the attention of the undersigned until March 5, 1979, when the undersigned received a telephone call from the plaintiff's attorney. The undersigned telephoned Mr. George R. Ragsdale on that date and Answer was filed the following day.
>
> 4. The removal of the file from the desk of the undersigned effectively prevented the case from being placed on Nationwide's automatic diary. Had the case been diaried, the whereabouts of the file would have automatically surfaced well in advance of the time for Answer and the proposed plans to assign the case to Mr. Ragsdale's firm and instruct him to answer within the time allowed by law would have been accomplished. The action of an employee in Office Personnel, unknown to the undersigned, is the event which occasioned the default, and is entirely inadvertent and accidental.

On 13 September 1979, the trial court entered an order denying defendant's motion to set aside entry of default on the ground that defendant had not shown good cause. In addition, the trial court granted plaintiff's motion for judgment by de-

fault on the issue of liability, based on defendant's failure to plead or otherwise appear in the time allowed by law. The issue of damages was held for future determination. On 14 September 1979, defendant filed notice of appeal.

Sanford, Adams, McCullough and Beard, by J. Allen Adams and William George Pappas, for plaintiff appellee.

Ragsdale and Liggett, by George R. Ragsdale and Jane Flowers Finch, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant's first assignment of error is to the trial court's entry of default against him. Defendant argues that there is no record of a written motion for entry of default having been filed with the clerk, and that his answer, although untimely, constituted a bar to the entry of default. We believe, however, that entry of default was proper.

With respect to the necessity of a written motion for entry of default, under Rule 55, "[w]hile it may be better practice to file a written motion, ... the use of a written motion is [not] mandatory." *Sawyer v. Cox*, 36 N.C. App. 300, 304, 244 S.E. 2d 173, 176, *cert. denied*, 295 N.C. 467, 246 S.E. 2d 216 (1978). Default shall be entered "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment ... and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or *otherwise* ... ." (Emphasis added.) G.S. 1A-1, Rule 55(a) (1979 Cum. Supp.)

Defendant cites several decisions which purportedly support the proposition that "when an answer has been filed, whether before or after the time for answering had expired, so long as it remains filed of record, the clerk is without authority to enter a judgment by default." *White v. Southard*, 236 N.C. 367, 368, 72 S.E. 2d 756, 757 (1952); *Rich v. R.R.*, 244 N.C. 175, 92 S.E. 2d 768 (1956); *Bailey v. Davis*, 231 N.C. 86, 55 S.E. 2d 919 (1949). These decisions turn on the principle that the filing of an answer divests the clerk of jurisdiction to act upon a request to enter default, and that for the clerk to obtain jurisdiction, the

answer must be removed from the record by a motion to strike the answer. Without so moving, a plaintiff was said to have waived his right to move for entry of default.

Decisions under the modern Rules of Civil Procedure appear to have modified this procedure. In *Crotts v. Pawn Shop, Inc.*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972), defendant filed its answer twelve days after expiration of the time allowed by Rule 12(a)(1) for filing answer. On plaintiff's appeal from the trial court's setting aside entry of default against defendant, Judge Brock (later Chief Judge), for this Court, stated:

> Before depositing its answer with the clerk defendant did not move under Rule 6(b) for enlargement of time to file answer, therefore, its tardily deposited answer did not constitute a bar to the entry of default. Under the circumstances, the answer was merely proffered for filing. Defendant has not yet made a motion under Rule 6(b) for enlargement of time to file answer, and, therefore, no answer has been filed.

16 N.C. App. at 394, 192 S.E. 2d at 56.

There is a critical difference between the decisions cited by defendant and *Crotts*. In *Bailey v. Davis, supra*, for example, the Court recognized an untimely answer, although not filed "within the meaning of the law," as a method of shifting the burden to the plaintiff to move to strike the answer from the record. In *Crotts*, however, the Court held that an untimely answer is accepted by the Clerk only as a "proffered" filing, and as such never becomes part of the record, absent a proper motion to extend the time for filing. We believe the analysis in *Crotts* is the better reasoned view and is in keeping with the spirit of the time limits of the Rules of Civil Procedure. This procedure both requires adherence to the time limits imposed as a house-keeping function and provides a suitable remedy for the litigant who may inadvertently fail timely to plead.

Two recent decisions by this Court suggest a modification to the rule in *Crotts*. In *Furniture House, Inc. v. Ball*, 31 N.C.

App. 140, 228 S.E. 2d 475 (1976), we held that the service of answer is both a "pleading" and an "appearance" for purposes of Rule 55, which provides that default can be entered only if defendant fails to "plead" or is otherwise subject to default and that default judgment can be entered only if defendant fails to "appear". Similarly, in *Roland v. Motor Lines, Inc.*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977), we concluded that a letter, sent by defendant to plaintiff's attorney and the clerk of court acknowledging plaintiff's complaint and setting out reasons for its denial of plaintiff's claim, constituted an "appearance" for the purposes of Rule 55, thus barring the entry of default judgment. In both decisions, the appearance was performed within 30 days after service of summons and complaint upon the defendant. Although the nature of response required of a defendant has been expanded by these decisions to include certain actions which constitute an appearance, strict adherence to the 30-day limitation still obtains.

In the case before us, defendant did not plead or otherwise appear within the time allowed to respond to plaintiff's complaint. We, therefore, conclude and so hold that sufficient grounds existed upon which to enter default.

The recent decision of *Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 101 (1980), supports this result. There, our Supreme Court held that for the purposes of summary judgment, a defendant's failure to file answer does not constitute a conclusive admission of the allegations in a plaintiff's complaint. The Court, however, in distinguishing summary judgment from default, stated:

> [W]e do not suggest that a defendant may simply refuse to answer plaintiff's complaint and thereby indefinitely forestall litigation. If after he receives the complaint and summons, defendant fails to file answer within the 30 day period as required by G.S. 1A-1 Rule 12(a) (1) plaintiff may move for entry of default under G.S. 1A-1 Rule 55(a), and thereafter seek judgment by default under G.S. 1A-1 Rule 55(b). Rule 55(a) provides specifically that entry of default would have been appropriate here. In its pertinent part, Rule 55(a) provides as follows:

> "(a). ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead ... and that fact is made to appear by affidavit [or] motion of attorney for the plaintiff, ... the clerk shall enter his (the party failing to file) default."

In Wright and Miller, Federal Practice and Procedure: Civil, § 2688, it is stated:

> "Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default ... and, failing that, to contest the amount of recovery." (*See Harris v. Carter*, 33 N.C. App. 179, 234 S.E. 2d 472 (1977) holding G.S. 1A-1 Rule 55 to be the counterpart to Federal Rules of Civil Procedure Rule 55.)

When default is entered due to defendant's failure to answer, the substantive allegations raised by plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment are deemed admitted. *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 509, 181 S.E. 2d 794, 798 (1971). However, following entry of default in favor of plaintiff, defendant is entitled to a hearing where he may move to vacate such entry. His motion to vacate is governed by the provisions of G.S. 1A-1 Rule 55(d) which provides as follows:

> "(d) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)."

In moving for relief of judgment pursuant to Rule 55(d), the burden is on the defendant, as the defaulting party, not to refute the allegations of plaintiff's complaint, nor to show the existence of factual issues as in summary judgment, but to show *good cause* why he should be allowed to file

answer to plaintiff's complaint. *See Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970).

299 N.C. at 720-21, 264 S.E. 2d at 105. It is obvious that defendant's position is inconsistent with the holding in *Bell v. Martin, supra.* In light of *Crotts* and *Bell* we conclude that defendant's untimely answer did not constitute a bar to the entry of default and that entry of default was proper.

We next consider the propriety of the denial of defendant's motion to set aside entry of default.

An entry of default is an interlocutory and ministerial act, *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E. 2d 97 (1975), and, therefore, is more easily set aside than a default judgment. While setting aside a default judgment under G.S. 1A-1, Rule 60(b) generally involves a showing of excusable neglect and a meritorious defense, *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978), to set aside an entry of default, all that need be shown is good cause. G.S. 1A-1. Rule 55(d); *Bell v. Martin, supra; Crotts v. Pawn Shop, Inc., supra; Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). What constitutes "good cause" depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly "where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant." *Whaley v. Rhodes, supra*, 10 N.C. App. at 112, 177 S.E. 2d at 737, *quoting Teal v. King Farms Co.*, 18 F.R.D. 447, 448 (E.D. Pa. 1955).

We certainly agree with plaintiff that the "rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E. 2d 617, 619 (1974). At the same time, however, we must recognize that "[c]ourts generally favor giving every litigant a fair opportunity to present his side of a disputed controversy." *Miller v. Miller*, 24 N.C. App. 319, 321, 210 S.E. 2d 438, 439 (1974). Inasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry

of default so that the case may be decided on its merits. *Howard v. Williams*, 40 N.C. App. 575, 253 S.E. 2d 571 (1979).

In a number of decisions, this Court has affirmed the setting aside of an entry of default.

In *Whaley v. Rhodes, supra*, plaintiff filed a complaint seeking damages based on defendant's negligence. Defendant did not answer. After the 30-day period for answering expired, plaintiff filed an affidavit and motion for default, and the clerk entered a default against the defendant. Defendant thereafter moved to set aside the entry of default, "asserting that he had turned over the complaint to his insurance agent who assured him that a copy of the complaint would be sent to the insurance company who would take care of the matter; that after three weeks he checked again with his insurance agent and was assured that everything was being taken care of; that he was next advised that an entry of default had been made against him . . . ." 10 N.C. App. at 109, 177 S.E. 2d at 736. The trial court, setting aside the entry of default, found *inter alia*, that there were no intervening equities that would prejudice plaintiff by allowing defendant to file an answer. This Court affirmed that determination, finding the facts supportive of the trial court's order.

In *Crotts v. Pawn Shop, Inc., supra*, this Court upheld the setting aside of default entered where defendant answered twelve days after the expiration of the time allowed to file responsive pleadings.

In *Hubbard v. Lumley*, 17 N.C. App. 649, 195 S.E. 2d 330 (1973), plaintiff served defendant with complaint and, after defendant failed to answer within 30 days, plaintiff moved for entry of default, which was granted. Defendant answered on the same day that default was entered, and moved to set aside entry of default. The trial court set aside entry of default and ordered that defendant's answer be filed. Affirming the setting aside of entry of default, the Court found that defendant's failure timely to plead was due to some uncertainty as to whether defendant's insurer was responsible for his defense, and there was some mistake between defendant and his insurer

as to when the answer was due. The Court noted that upon learning of the mistake, defendant promptly filed answer, two days late.

In *Miller v. Miller*, 24 N.C. App. 319, 210 S.E. 2d 438 (1974), defendants failed to file answer to plaintiff's complaint, and default was subsequently entered against him. Defendants moved to set aside the entry of default, alleging that after being served with the summons and complaint, they met with certain town officials who advised them that the town would handle the suit against them, the town apparently failing to defend the action. This Court upheld the trial court's setting aside the entry of default based on this inadvertence.

This Court has likewise affirmed the denial of a motion to set aside entry of default on numerous occasions. For instance, in *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E. 2d 395 (1980), defendant was served with complaint on 7 June 1978 and the suit papers were misplaced and not relocated until 12 July 1978, the day entry of default was made. We held that there was no abuse of discretion in the trial court's finding that such an inadvertence did not constitute "good cause". Similarly, in *Howell v. Haliburton, supra,* upon which plaintiff relies, defendant failed to answer or otherwise appear, and default was entered against it. On motion to set aside the entry of default, defendant showed by affidavit that after receiving the complaint and summons defendant notified its liability insurer and mailed the summons and complaint to the insurer. The insurer took no affirmative action to answer or otherwise defend the action until it was notified of the entry of default. Affirming, the Court noted particularly the fact that defendant's insurer paid no attention to the lawsuit until more than eight months after being notified of plaintiff's claim:

> Such continued inattention distinguishes the instant case from the situations presented in *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735, and in *Hubbard v. Lumley, supra.* When the trial court exercises its discretion in considering a motion to set aside an entry of default, it is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law. At the same time,

> however, it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity.

22 N.C. App. at 42, 205 S.E. 2d at 619.

[2] In the present case, we do not find the degree of inattention so evident in *Howell*. It appears, from the materials presented on motion to set aside entry of default, that defendant's failure timely to file his answer was due to an inadvertence on the part of defendant's insurer, and not due to any fault of his own. It further appears that defense counsel promptly filed an answer upon discovering that a mistake had been made.

Although such inadvertence may not be excusable, we believe that the circumstances of this case support a showing of sufficient cause to set aside entry of default. We find that the delay in answer did not prejudice plaintiff, and it appears that allowing default here would do an injustice to defendant. As in *Whaley*, we find in this case that the equities favor setting aside of default. In light of the general disfavor toward default, we find that the trial court abused its discretion in failing to set aside default, and we believe that justice will best be served by allowing this case to be tried on its merits. We, therefore, reverse the trial court's denial of defendant's motion to set aside entry of default and remand this case to the trial court for further proceedings not inconsistent with this opinion.

Our holding renders unnecessary review of the trial court's order granting plaintiff's motion for default judgment.

Reversed and remanded.

Judges CLARK and ERWIN concur.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION v. UNDERWRITERS NATIONAL ASSURANCE COMPANY, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA

No. 7910SC766

(Filed 2 September 1980)

Insurance § 1; Judgments § 39– deposit made by defendant for N.C. policyholders – title to deposit in Commissioner of Insurance – Indiana court judgment not res judicata

Where defendant made a $100,000 deposit in N.C. for the protection of its N.C. policyholders, the title and rights to the deposit were vested in the Commissioner of Insurance, the Treasurer, and the State, and since defendant did not hold title to the deposit, it was not an asset of the company subject to an Indiana rehabilitation proceeding; therefore, because the Indiana court lacked jurisdiction of the subject matter and *in personam* jurisdiction over the Commissioner of Insurance or Treasurer, it could not determine the statutory rights of the N.C. policyholders in the deposit made by defendant, and the Indiana court's decision was not entitled to full faith and credit in N.C. and was not *res judicata*. G.S. 58-188.5 *et seq.*

APPEAL by defendant Underwriters National Assurance Company from *Bailey, Judge*. Judgment entered 11 April 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 29 February 1980.

On 12 January 1978 plaintiff (hereinafter Guaranty Association) filed a complaint against defendant, an insurance company domiciled in Indiana (hereinafter UNAC) seeking a judgment declaring the Guaranty Association's right to have a deposit, made by UNAC, applied to meet UNAC's obligations to North Carolina policyholders. The facts leading up to this complaint are as follows: UNAC was qualified to do business and was carrying on the business of selling accident and disability insurance in North Carolina until 4 October 1974, when UNAC voluntarily withdrew from doing business in North Carolina. In June 1973 the North Carolina Insurance Commissioner informed the President and Chairman of the Board of UNAC that a $100,000 deposit for the protection of North Carolina policyholders would be required as a condition to allowing UNAC to do business in North Carolina. UNAC made the required

$100,000 deposit on 27 September 1973, which was registered as follows: "Treasurer of the State of North Carolina in trust for the Underwriters National Assurance Company and the State of North Carolina as their respective interests may appear under Article 20, Chapter 58-188.5 of the North Carolina General Statutes." That deposit continues to be held by the North Carolina Insurance Commissioner.

In 1974 the Indiana Department of Insurance concluded that UNAC's reserves were inadequate to meet policy obligations and decided to take action in the Indiana Courts to petition for rehabilitation of UNAC on 5 August 1974.

The Rehabilitator undertook the administration and rehabilitation of UNAC under the supervision of the Superior Court of Marion County, Indiana. As the rehabilitation progressed, the North Carolina Commissioner advised the Guaranty Association of developments bearing upon its obligations to North Carolina policyholders.

On 10 December 1975, notices were mailed to all policyholders, including the policyholders then in North Carolina regarding conditional policyholder class representation or exclusion therefrom. This notice to policyholders provided in part: "Any person so requesting exclusion will not participate in any recovery of the intervening class, and will not be bound by the results of the litigation, insofar as his status as a member of such class is concerned. As a policyholder, however, he may be bound by a judgment effecting policyholders, if any is entered, including any reorganization plan approved by the Court in the rehabilitation proceeding."

On 27 May 1976 the Rehabilitator sent a formal notice to the state insurance guaranty associations and directed their attention to part X(C) of the proposed plan dated 23 April 1976. This notice was also sent to the North Carolina Insurance Commissioner. The last paragraph of part X(C) provided:

> The guaranty associations in some states may have obligations to UNAC policy owners as a result of the UNAC rehabilitation proceeding. Moreover, to the extent such

guaranty associations do have obligations, there is a possibility that these guaranty association may seek to recover from UNAC sums paid to UNAC policy owners. The Rehabilitation Plan should resolve UNAC's contingent liability to any guaranty association by determining that UNAC has no further obligation or liability to any guaranty association.

On 8 June 1976 the Guaranty Association together with other state guaranty associations moved to intervene in the Indiana rehabilitation proceeding in "an effort not only to protect the rights of the Guaranty Associations, but also to accommodate the Petitioner (Rehabilitator) in his efforts to effectuate an orderly and equitable rehabilitation of the Respondent (UNAC)." The Guaranty Association was permitted to intervene in the rehabilitation proceeding and was represented by counsel at a hearing on 9 June 1976 concerning the proposed plan of rehabilitation. At the hearing the Guaranty Association objected to the provisions of the initial plan and made suggested changes. These suggested changes were agreed to by the Rehabilitator and were incorporated into a proposed plan tentatively approved by the rehabilitation court on 19 July 1976.

Subsequently, the intervening guaranty associations asked the rehabilitation court to approve a form letter to policyholders residing in North Carolina and seven other states and to approve in concept a service contract which would provide for UNAC to continue to administer the insurance policies on which each intervening guaranty association had obligations. The request of the intervening guaranty associations was granted by the rehabilitation court.

On 22 November 1976 the rehabilitation court entered an Order and Memorandum Approving the Plan of Rehabilitation in Settlement of Claims and Litigation. Part of the order provided in part:

> In consideration of the provisions of the Rehabilitation Plan, the claims of the UNAC policy owner class representatives are compromised and dismissed . . . . Whether or

> not any policy owner is a member of a class pursuant to Trial Rule 23, in order to fix and determine UNAC's obligations after rehabilitation, all claims of UNAC policy owners against UNAC are compromised and dismissed . . . .

The order of rehabilitation allowed UNAC to increase the guaranty premiums on the noncancellable disability insurance policies. The order of rehabilitation also cancelled obligations owed by UNAC pursuant to the return of premium rider which provided that if no claim was made under the policyholder's basic insurance coverage for a period of ten years, most of the premiums paid during that 10 year period would be returned to the policyholder. The policyholders having return of premium riders were entitled to receive 15.68% of the additional amount paid for the return of premium rider prior to the insolvency date and were entitled to no return on the basic policy premium.

Paragraph 1 of the rehabilitation court's findings of fact in the order approving the final plan of rehabilitation provided: "The Court has jurisdiction over the subject matter and over the parties, including UNAC, . . . all UNAC policy owners, . . . State Insurance Guaranty Associations . . ." In its order, the court stated:

> To the extent that any claim, objection or proposal which was or could have been presented in this rehabilitation proceeding is inconsistent with the Plan, that claim, objection or proposal is overruled and relief to that extent denied. Without limiting the generality of the preceding sentence, all claims of litigation by any past or present UNAC policy owners, . . . against UNAC or the Rehabilitator, except as provided in the Plan, are hereby compromised, settled and dismissed.

On 8 June 1977 the UNAC and the eight intervening guaranty associations filed a joint "Petition for Instructions Concerning a Service Contract Between Underwriters National Assurance Company and Each of the State Insurance Guaranty Associations." On 14 June 1977 the rehabilitation court gave its permission to do all acts reasonably necessary or appropriate to implement and carry out an approved Service

Contract. UNAC then sent the Guaranty Association the court-approved Service Contract. The Guaranty Association added the following language to the Service Contract without the approval of the rehabilitation court:

> It is expressly agreed, however, that the Guaranty Association and Underwriters explicitly reserve all their rights and remedies in connection with any deposits made by Underwriters with the Commissioner of Insurance of North Carolina, including deposits understood to total . . . $100,000, which rights and remedies are governed by North Carolina law.

The Guaranty Association's president signed this altered document on 13 October 1977 and returned it to UNAC. Thereafter the President of UNAC returned the executed Service Contract accompanied by a letter of transmittal. In the letter the President indicated that he understood that the added paragraph was designed simply to recite that neither the Guaranty Association nor UNAC had waived any claims that it may have in connection with the North Carolina deposits. The President then indicated that UNAC took the position that Guaranty Association had no claims to the deposit, since the plan of rehabilitation had the effect of shutting off rights that North Carolina citizens and/or the Guaranty Association might otherwise have had to the deposits. After receiving this letter the Guaranty Association filed its complaint in North Carolina for declaratory judgment.

In its answer UNAC alleged that the Indiana Court's rehabilitation order should be given full faith and credit; that the security deposit at issue was an asset of UNAC and subject to the jurisdiction of the rehabilitation court; that the Guaranty Association acknowledged jurisdiction of the rehabilitation court by appearing in said rehabilitation proceedings; and that the rehabilitation order was *res judicata*.

On 13 July 1978 UNAC filed a Petition for Instructions with the Rehabilitation Court concerning the impact of the North Carolina action. After notice and hearing on this petition, an order was entered on 22 November 1978. The Indiana Court concluded:

> The Court's final Order and the Plan fully adjudicated and determined that the North Carolina deposit was an asset of (and its use was to be determined by) the rehabilitated Underwriters, and any claim existing as of the date of adoption of the Plan against the deposit by the North Carolina Association or by any policy owner or creditor of Underwriters was compromised, settled and dismissed by the final Order and the Plan.

The Guaranty Association appealed this Order, and that appeal is still pending.

After the Indiana Court had acted, Guaranty Association, the North Carolina Insurance Commissioner and Treasurer joined in a motion for summary judgment. On 12 March 1979 UNAC also filed a motion for summary judgment. On 11 April 1979 the trial court entered summary judgment for the Guaranty Association.

Allen, Steed and Allen, by William S. Patterson, Charles D. Case and Ann Hogue Pappas for the plaintiff.

Purrington, McNamara & Pipkin, by Ashmead P. Pipkin, for the defendant Underwriters National Assurance Company.

MARTIN (Robert M.), Judge.

The question presented for review is whether plaintiff's motion for summary judgment was properly granted. This is a proper case for a declaratory judgment, G.S. 1-254, and the Guaranty Association is entitled to maintain the action. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). The propriety of a summary judgment in such action is governed by the same rules applicable to other actions, G.S. 1A-1, Rule 56(a) and (b) and 57. Here, there is no substantial controversy as to the facts disclosed by the evidence and the legal significance of those facts presents the questions in dispute. It was unnecessary for the Guaranty Association to show that it had suffered any loss or had any right impaired in order to maintain the action. Rather, the Association had to show that it would ultimately suffer a loss or have a right impaired. *Newman Machine*

Co. Newman, 2 N.C. App. 491, 163 S.E. 2d 279 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E. 2d 63 (1969).

The trial court entered an order which found "specified facts without substantial controversy," made conclusions of law and ordered that:

> 1. The UNAC policyholders residing in North Carolina on August 5, 1974, are entitled to have the deposit made by UNAC for the sole protection of North Carolina policyholders liquidated and to have the proceeds applied to meet the pre-rehabilitation obligations owed to them by UNAC to the extent those obligations were defaulted upon as a result of the insolvency of UNAC and the subsequent rehabilitation proceeding in Indiana.
>
> 2. To the extent that the proceeds of the deposit made by UNAC for the sole benefit of North Carolina policyholders fulfill the contractual obligations owed by UNAC to North Carolina policyholders, the Guaranty Association is not liable to North Carolina UNAC policyholders under the Guaranty Act.
>
> 3. UNAC has no interest in the deposit made by it in North Carolina for the sole benefit of North Carolina policyholders except in such sums as remain after the sale of the deposited securities and application of the proceeds for payment of all pre-insolvency obligations owed by UNAC to policyholders residing in North Carolina on August 5, 1974.
>
> 4. This Court shall retain jurisdiction in order to grant such further supplemental relief based on the declaratory judgment herein rendered, whenever necessary or proper, as by law is provided, and extending to all matters germane to the powers and duties of the Guaranty Association.
>
> 5. The Commissioner of Insurance shall promptly proceed to liquidate the deposit made by UNAC for the benefit of North Carolina policyholders and apply the proceeds to meet the pre-rehabilitation obligations owed by UNAC to North Carolina policyholders.

6. The counterclaim of UNAC against the Guaranty Association requesting damages incurred by reason of frivolous and improper acts of the Guaranty Association in commencing this action is hereby dismissed.

The crux of UNAC's argument is that any claim against it, or its assets, was compromised during rehabilitation in the Indiana Court and the judgment discharging the company's liability for all claims which the court did not allow is *res judicata* and entitled to full faith and credit as required by the United States Constitution. The authorities cited by UNAC support the proposition that pre-rehabilitation contractual rights that were modified pursuant to a plan of rehabilitation cannot be enforced by resorting to the general assets of the rehabilitated insurance company.

The Guaranty Association contends that the rights of North Carolina policyholders and, through subrogation, the Guaranty Association are not contractual rights and that their claims are statutory rights. They argue that these statutory rights are based upon the laws of North Carolina dealing with deposits made by non-domestic insurance companies for the protection of North Carolina policyholders.

The Guaranty Association is an organization created by statute to which all life, accident and health insurers doing business in North Carolina are required to belong. When an insurance company doing business in North Carolina becomes insolvent, it is the Guaranty Association's duty to see to it that all contractual obligations owed to North Carolina policyholders are fulfilled. Absent the availability of deposits or assets that can be used to meet the contractual obligations of the insolvent insurer, the Guaranty Association must assess its member companies and use those assessments to fulfill the contractual obligations of the insolvent insurer.

G.S. 58-155.66, in describing the purpose of the Guaranty Act, states: "To provide this protection, (i) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages . . . ." G.S. 58-155.68, in addressing the construction to be given the Guaranty Act, states: "This article shall be liberally construed to effect the purpose under G.S.

58-155.66 which shall constitute an aid and guide to interpretation." Section 58-155.72(9)(a) of the Guaranty Act specifically contemplates payments by the Guaranty Association for payments of contractual obligations or continuation of coverage and states that the Guaranty Association shall be subrogated to rights against the assets of any impaired insurer for such payments.

The Guaranty Association seeks a judgment declaring the Guaranty Association's right to have UNAC's deposit applied to meet UNAC's obligations to North Carolina policyholders and excluding UNAC from any interest in the deposit except as to any interest that might remain after the deposit is applied to payment of the contractual obligations of UNAC to residents of North Carolina.

G.S. 58-155.69(6) defines "impaired insurer" as:

> an insurer which after the effective date of this Article, becomes insolvent and is placed under a final order of liquidation, rehabilitation, or conservation by a court of competent jurisdiction . . .

Thus, despite the fact that UNAC has been rehabilitated, it is an impaired insurer and its defaulted obligations continue to exist for purposes of the Guaranty Act.

G.S. 58-155.78(c) provides that the Guaranty Association is deemed a creditor of the impaired insurer to the extent of assets of the impaired insurer attributable to covered policies, reduced by any amount to which the Guaranty Association is entitled by subrogation.

The Guaranty Association acknowledged its statutory liability to North Carolina UNAC's policyholders with regard to the increase in guaranteed premiums and the default on the return of premium riders allowed by the Rehabilitation Order.

It is undisputed that the deposit made by UNAC is located in North Carolina and is held in trust. It is the manifest intention of the North Carolina Legislature that the *title* and *rights* to securities deposited in accord with Article 20, Chapter 58-

188.5 *et seq.* are vested in the Commissioner of Insurance, the Treasurer and the State. *Continental Bank and Trust Co., v. Gold*, 140 F. Supp. 252 (E.D.N.C. 1956). The Indiana Court did not have the necessary personal jurisdiction over the Commissioner of Insurance and the Treasurer. Since UNAC did not hold title to the deposit, it was not an asset of the company subject to the Indiana rehabilitation proceeding. Thus, neither the trust property nor the Commissioner and Treasurer were subject to the judicial jurisdiction of the court in Indiana. Because the Indiana court lacked jurisdiction of the subject matter and in personam jurisdiction to determine the statutory rights of the North Carolina policyholders in the deposit made by UNAC, the Indiana Court's decision is not entitled to full faith and credit in North Carolina and is not protected by the doctrine of *res judicata.*

The Guaranty Association will ultimately be required to pay the policyholders pursuant to its statutory liability. Once paid, the Guaranty Association will become subrogated to any rights of these policyholders in the deposit under G.S. 58-155.72(9)(a). Consequently, it may assert those rights at this time in a declaratory action.

Having thus determined that the North Carolina policyholders are protected by the special deposit made by UNAC and also by the statutory liability of the Guaranty Association, we hold that it is proper that the deposit of the defaulting company should first be applied to the loss to the policyholders rather than the Guaranty Association whose members will ultimately be required to pay the remaining claims of the policyholders pursuant to their statutory liability.

In light of the Guaranty Association's assumption of liability with regard to UNAC defaults, it had clearly defined rights in the deposits made by UNAC by its statutory subrogation rights. G.S. 58-155.72(9). It seeks no more than it and the North Carolina policyholders are entitled to under the North Carolina Statutes. The court declared those rights and in its decision we find no error.

No error.

Judges CLARK and ERWIN concur.

COUNTY OF CUMBERLAND, PLAINTIFF v. EASTERN FEDERAL CORPORATION, DEFENDANT; COUNTY OF CUMBERLAND, PLAINTIFF v. TART'S T.V. FURNITURE & APPLIANCE CO., INC. AND TART'S INVESTMENT CORPORATION, DEFENDANTS

No. 7912DC1195

(Filed 2 September 1980)

1. **Counties § 5.1; Municipal Corporations § 30.13– county sign ordinance – nonconforming use – amortization period – constitutionality**

Provision of a county sign ordinance requiring nonconforming uses to be discontinued within three years from the effective date of the ordinance, thus giving the owner of a nonconforming sign a three-year period in which to amortize or depreciate the cost of the sign, is reasonable and does not provide for an unconstitutional "taking" of property.

2. **Constitutional Law § 18; Counties § 5.1; Municipal Corporations § 30.13– county sign ordinance – free speech**

Provisions of a county sign ordinance do not infringe upon defendants' rights of free speech since the ordinance does not attempt to censor the content of signs or to impose any prior restraints on expressions of any kind.

3. **Counties § 5.1; Municipal Corporations § 30.13 – county sign ordinance – aesthetic considerations – lawful exercise of police power**

A county sign ordinance could lawfully be based upon aesthetic considerations. However, the sign ordinance in question was a legitimate exercise of the county's police power for reasons in addition to aesthetic considerations since the sign provisions are incorporated within a comprehensive zoning ordinance which is directly related to the public safety, health, morals or general welfare; the aesthetic impact of billboards and signs is an economic fact which might bear heavily upon the enjoyment and value of property; the uncontrolled display of billboards and signs can distract motorists and thereby create hazards to vehicular traffic and pedestrians; and the sign provisions are coupled with other zoning provisions such as setbacks, land use classifications, parking control and density requirements.

4. **Counties § 5.1; Municipal Corporations § 30.13– county sign ordinance – no enforcement in municipalities – equal protection**

A county sign ordinance 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 because the county will not enforce the ordinance with respect to any person owning or operating a sign in certain municipalities within the county since counties may not exercise zoning authority within a city which has enacted a zoning ordinance, G.S. 153A-320, and counties may defer from zoning within cities pursuant to G.S. 153A-342.

Cumberland County v. Eastern Federal Corp.

APPEAL by defendants from *Cherry, Judge.* Judgments entered 11 October 1979 in District Court, CUMBERLAND County. Heard in the Court of Appeals 21 May 1980.

The plaintiff-county (the "County") is a corporate body politic organized pursuant to Chapter 153A of the General Statutes of North Carolina. Defendant Eastern Federal Corporation ("Eastern Federal") is a North Carolina corporation which has erected and maintained a sign at 4707 Bragg Boulevard, Cumberland County, North Carolina. Defendant Tart's Investment Corporation ("Tart's Investment") is the owner of real property upon which defendant Tart's T.V., Furniture and Appliance Co., Inc. ("Tart's T.V."), maintains a place of business and upon which Tart's T.V. has erected and maintained a sign.

In No. 77CVD3127 the County alleged that Eastern Federal installed and continued to maintain a sign in excess of one hundred (100) square feet in area in violation of Section 9.442 of the Cumberland County Zoning Ordinance. The County further alleged that the sign was a nonconforming use not carried on within a structure as defined in Sections 5.1 and 5.21 of the Zoning Ordinance and that the sign had not been discontinued as required by Section 5.21 of the Zoning Ordinance. The County sought a Permanent Prohibitory Injunction and Order of Abatement commanding the defendant to modify or discontinue its sign so as to conform with the Cumberland County Zoning Ordinance. It is stipulated that Eastern Federal erected the sign in 1963, approximately nine years prior to the enactment of the sign provisions of the Cumberland County Zoning Ordinance; that the Eastern Federal sign has not been changed in any appreciable degree since the time of installation, and that said sign has the total surface area of approximately 700 square feet. It is also stipulated that the defendant's sign was at all times, and is, a nonconforming use in relation to the Zoning Ordinance. The present market value of the sign in question is $15,000.

In 77CVD3129, it was stipulated that defendants Tart's Investment and Tart's T.V. erected the subject sign in 1971,

approximately two years prior to the enactment of the sign provisions of the Cumberland County Zoning Board. It is also stipulated that the subject sign has a total surface area of approximately 680 square feet and that the subject sign has not been changed in any appreciable degree since the time of installation on the land of Tart's Investment. At all times the defendants' sign was and is a nonconforming use in relation to the Zoning Ordinance. Plaintiff County sought relief similar to that sought in 77CVD3127.

In both cases it was stipulated that the County had not attempted and did not contemplate attempting to enforce the Cumberland County Zoning Ordinance with respect to any person owning or operating a sign of any type in the City of Fayetteville, the Town of Hope Mills and the Town of Spring Lake, for the reason that the County contended that it had no jurisdiction, and therefore no legal authority, to enforce its Zoning Ordinance within the named municipal corporations.

At the 22 January 1979 Civil Session of the District Court of Cumberland County, the trial judge consolidated the two cases for the purpose of trial and rendered partial summary judgment in favor of the plaintiff. The defendants, and each of them, in apt time, duly excepted and preserved their exceptions. At the 24 September 1979 Civil Session of the District Court of Cumberland County, upon proper stipulation of the plaintiff and the defendants, the trial judge entered final judgment in favor of the plaintiff in both cases. Both defendants appealed to the Court of Appeals of North Carolina and, pursuant to Rule 5(a) of the North Carolina Rules of Appellate Procedure, joined their appeals.

Other necessary facts will be stated in the opinion.

Heman R. Clark and Garris Neil Yarborough for plaintiff appellee.

Williford, Person & Canady by N.H. Person; and McCoy, Weaver, Wiggins, Cleveland & Raper by Richard M. Wiggins for defendant appellants.

CLARK, Judge.

The defendants do not challenge the applicability of the Cumberland County Zoning Ordinance to their respective signs. Rather, they challenge the constitutionality of the Ordinance as applied to their respective cases. We note at the outset that " '... it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when such ordinance is adopted it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so.' (Citations omitted) This is true when the constitutionality of an ordinance is attacked, and no law or ordinance will be declared unconstitutional unless clearly so and every reasonable intendment will be made to sustain it." (Citations omitted.) *Victory Cab Co. v. Shaw*, 232 N.C. 138, 142, 59 S.E. 2d 573, 576 (1950).

[1] Defendants first challenge Section 5.21 of the Ordinance as permitting an unconstitutional "taking." That provision provides, *inter alia*, that "[a]ll nonconforming uses carried on within a structure, except those which are incidental and necessary to activities within a structure, shall be discontinued within three years from the effective date of this ordinance ... ." The three-year rule, in effect, allows the owner of the nonconforming sign a three-year period in which he may amortize or depreciate the cost of the sign. The validity of such a provision was specifically upheld by our Supreme Court in *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975), *appeal dismissed*, 422 U.S. 1002, 95 S. Ct. 2618, 45 L. Ed. 2d 666 (1975); Note, 11 Wake Forest L. Rev. 754 (1975). While it is true that *Joyner* explicitly did not decide whether the ordinance therein would be considered "reasonable" had the defendant been the owner in fee of the land upon which the salvage yard was located, we can see no compelling reason for distinguishing in the instant case between whether the owner of the sign is a lessee or an owner in fee of the land upon which the sign is situated, for it is the sign, as a real fixture, and not the underlying land, which is the subject of the amortization, and it is the visual effect of the sign, not the underlying land, which is the subject of regulation. Consequently, we hold that the amortization provision of the ordinance was reasonable as applied to defendants.

[2] The defendants contend that the ordinance also denies them their free speech guarantees of Article I, Section 14 of the North Carolina Constitution. We do not agree. While it is true that commercial speech is protected under the First Amendment of the United States Constitution, and similarly under Article I, Section 14 of the North Carolina Constitution, *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), it is nonetheless true that commercial speech, like other varieties of speech, is subject to reasonable time, place, and manner restrictions. *State v. Wiggins*, 272 N.C. 147, 158, 158 S.E. 2d 37 (1967); *Variety Theatres, Inc. v. Cleveland County*, 15 N.C. App. 512, 190 S.E. 2d 227, *affirmed*, 282 N.C. 272, 192 S.E. 2d 290 (1972), *appeal dismissed*, 411 U.S. 911, 93 S. Ct. 1548, 36 L. Ed. 2d 303 (1973). The ordinance in this case makes no attempt to censor the content of the signs nor does it impose any prior restraints on expressions of any kind. As applied to defendants, we hold that the sign provisions of the Cumberland County Zoning Ordinance do not infringe defendants' rights of free speech.

[3] Defendants' next argument is that the ordinance unconstitutionally attempts to regulate land use for aesthetic purposes only. On the contrary, aesthetic considerations have long been recognized as legitimate governmental concerns. We think this is particularly true when outdoor advertising is involved. The North Carolina General Assembly, in the context of interstate and primary highways, has already articulated a forceful policy statement on outdoor advertising:

> "Section 136-127. *Declaration of policy.* — The General Assembly hereby finds and declares that outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways but that erection and maintenance of outdoor advertising signs and devices in areas in the vicinity of the right-of-way of the interstate and primary highways within the State should be controlled and regulated in order to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in highways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness

> of traffic regulations and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the state, *and to preserve and enhance the natural scenic beauty of the highways* and areas in the vicinity of the State highways and to *promote the reasonable, orderly and effective display of such signs, displays and devices* . . . ." (Emphasis supplied.)

While careful to note that it was not expressing an opinion, our Supreme Court, in *State v. Vestal*, 281 N.C. 517, 524, 189 S.E. 2d 152, 157 (1972), recognized the "growing body of authority" that "the police power may be broad enough to include reasonable regulation of property use for aesthetic reasons only." As clearly and simply stated by Mr. Justice Douglas, in his majority opinion in *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27, 38 (1954):

> "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, *aesthetic* as well as monetary. It is within the power of the legislature to determine that the community should be *beautiful* as well as healthy, *spacious* as well as clean, well-balanced as well as carefully patrolled . . . ." (Emphasis supplied.)

See, generally, Annot., 81 A.L.R. 3d 486 (1977); Annot., 80 A.L.R. 3d 630 (1977); Annot. 41 A.L.R. 3d 1397 (1972); Annot., 21 A.L.R. 3d 1222 (1968). We recognize that several North Carolina Supreme Court cases have held that, while preserving and enhancing aesthetic qualities are legitimate governmental objectives, an ordinance may not be based solely upon the aesthetic considerations. *Little Pep Delmonico Restaurant v. City of Charlotte*, 252 N.C. 324, 113 S.E. 2d 422 (1960); *State v. Brown*, 250 N.C. 54, 108 S.E. 2d 74 (1959); *In re Parker*, 214 N.C. 51, 197 S.E. 706 (1938), *appeal dismissed*, 305 U.S. 568, 59 S. Ct. 150, 83 L. Ed. 358 (1938); *MacRae v. City of Fayetteville*, 198 N.C. 51, 150 S.E. 810 (1929). More recently, in *A-S-P Associates v. City of Raleigh*, 298

N.C. 207, 216, 258 S.E. 2d 444, 450 (1979), our Supreme Court, while refraining from endorsing such a broad concept of the police power as that based upon aesthetic values alone, nonetheless held that aesthetic regulation constituted a legitimate governmental objective when applied to historically significant areas.

We find it hard to conceive that our constitutional founders believed that visual blight and ugliness were a fundamental aspect of our national heritage or that our state and local governments were to be powerless in protecting the beauty and harmony in our human as well as our natural environments. Given the cautious wording of our Supreme Court in A-S-P Associates, *supra*, we do not go so far as to say in all cases that purely aesthetic considerations may be the basis for reasonable governmental regulation of land use. We do hold, however, that the Cumberland County sign ordinance in this case could lawfully be based upon aesthetic considerations and we see no need to play with euphemisms to reach this result.

We do not, however, have to rely solely upon aesthetic considerations to uphold the Cumberland County Zoning Ordinance as within the County's legitimate police power. First, we note that the sign provisions are incorporated within a comprehensive zoning ordinance which is directly related to the public safety, health, morals or general welfare. A-S-P Associates, *supra; Schloss v. Jamison*, 262 N.C. 108, 136 S.E. 2d 691 (1964). Second, "[t]here are areas in which aesthetics and economics coalesce, areas in which a discordant site is as hard an economic fact as an annoying odor or sound." *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 198 A. 2d 447, 449 (1964). Thus it has been held that the aesthetic impact of billboards is an economic fact that might bear heavily upon the enjoyment and value of property. *Id.* Third, it is common knowledge that uncontrolled display of billboards and signs can distract travelling motorists and thereby create hazards to vehicular traffic and to pedestrians. Finally, we note that the sign provisions are coupled with other zoning provisions in the ordinance, such as setbacks, land use classifications, parking control and density requirements.

[4] Defendants' final argument is that the ordinance is unconstitutional because it is not uniformly enforced, and in particular, because the County refuses to enforce the ordinance within specified municipalities within the County. We see no merit in defendants' contention. First, N.C. Gen. Stat. § 153A-320, provides:

> "*Territorial jurisdiction.* — Each of the powers granted to counties by this Article, by Chapter 157A, and by Chapter 160A, Article 19 may be exercised throughout the county *except as otherwise provided in G.S. 160A-360.*" (Emphasis supplied.)

N.C. Gen. Stat. § 160A-360 in turn provides, in relevant part, that:

> "(a) All of the powers granted by this Article [Article 19] may be exercised by any city within its corporate limits."

In particular, part 3 of Article 19 of Chapter 160A provides for the zoning authority of cities and other municipalities. By the specific wording of N.C. Gen. Stat. § 153A-320, the counties may not exercise zoning authority within a city which has enacted a zoning ordinance.

Moreover, we agree with the County that counties can defer from zoning within cities pursuant to N.C. Gen. Stat. § 153A-342, which provides that counties may zone an area less than their entire jurisdiction and that they may divide their "territorial jurisdiction into districts of any number, shape, and area that [they] may consider best suited to carry out the purposes of [part 3 of Article 18 of Chapter 153A]." N.C. Gen. Stat. § 153A-342 also specifically permits creation of zoning areas which may be regulated differently than other areas in the county. We hold that the statutory authority permitting such districting and classification of areas for purpose of land use regulation has a reasonable basis and that, as applied in the facts of this case, the zoning ordinance neither denies the defendants' equal protection under the Fourteenth Amendment of the United

States Constitution nor the similar language in Article I, Section 19 of the North Carolina Constitution. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied*, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Affirmed.

Chief Judge MORRIS and Judge ERWIN concur.

STATE OF NORTH CAROLINA v. SHEILA DAVIS
No. 805SC153

(Filed 2 September 1980)

1. **False Pretense § 1– falsification of expense records – no false pretense**

The falsification of expense records cannot in itself constitute the crime of false pretense.

2. **False Pretense § 3.1– checks written for train tickets – false statement in voucher – insufficiency of evidence of false pretense**

In a prosecution for obtaining property by false pretenses where the evidence tended to show that defendant, a town official with the authority to draw checks, wrote checks to an attorney which were co-signed by a town council member and which were paid by the bank, that defendant obtained Amtrak tickets in return for the checks, and that vouchers in support of the checks falsely described the expenditure as being for "miscellaneous printed information" and "copies of legal case," defendant's motion for nonsuit should have been granted, since the evidence did not show that the information written on the expense vouchers induced the town to part with its money or in any way caused the payments to be made.

3. **Municipal Corporations § 9– checks written by town finance officer for train tickets – vouchers for different items – negligent discharge of duties**

Evidence was sufficient to support a reasonable inference that defendant town manager acted negligently or carelessly in the discharge of her duties in violation of G.S. 159-181 where it tended to show that she signed two checks on the account of the town for "miscellaneous printed information" and "copies of legal case" while the expenditures were actually for the purchase of Amtrak train tickets for travel to a presidential inauguration.

4. **Municipal Corporations § 9– town finance officer – checks written for train tickets – approval of invalid claim – failure to preaudit**

The trial court properly submitted the charges of approving an invalid claim and failure to preaudit by defendant town finance officer to the jury where the evidence tended to show that defendant purchased train tickets to

the presidential inauguration both for members of the town council and for persons not employed by the town and the expenditure therefore consisted of both valid and invalid obligations of the town; moreover, the fact that town council members knew of or approved of the expenditure of funds for persons not employed by the town or that defendant acted at the direction of the mayor in ordering tickets for a friend of the town and his wife did not either validate the expenditures or relieve defendant, as finance officer, of liability for approving a false, invalid or erroneous claim in violation of the duties imposed upon her by law.

5. **Municipal Corporations § 9– town finance officer's approval of false claim – making false report – election not required**

The State was not required to elect between the offenses of approving a false claim in violation of G.S. 159-181 and making a false report, since the elements of the two charges were not the same.

APPEAL by defendant from *Small, Judge.* Judgment entered 28 June 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 June 1980.

The defendant, Sheila Davis, was brought to trial at the June 25, 1979 session of New Hanover Superior Court. The defendant was charged in two indictments, five counts each, with the crimes of false pretenses, approving fraudulent claim, making false report, failure to preaudit, and failure to keep accurate records.

The evidence presented at trial shows that the defendant was the Town Manager of the Town of Carolina Beach, North Carolina. Two checks, in the amount of $248 and $31 were issued by the Town to Mr. George Anderson. These checks were signed by the defendant and a member of the Carolina Beach City Council. The expenditure of these funds was for the purchase of Amtrak train tickets for travel by rail from Raleigh, North Carolina to Washington, D.C. to the presidential inauguration of President Jimmy Carter. The vouchers prepared in support of these expenditures did not indicate the purchase of train tickets. The voucher in support of the $248 check described the expenditure as a purchase of copies of a legal case involving litigation of the demolition of the Daykmer House. (Spelling varies in record. In indictment and copy of voucher it is Daykmer.) The voucher in support of the $31 check described that expenditure as for the purchase of materials.

The State first presented the testimony of several members of the City Council of Carolina Beach who were on the Council in the latter part of 1976 and the beginning of 1977. They testified that they recalled discussing which Council members would attend the Inauguration in January 1977; that the Town's newspaper published news of the Council's invitation to the Inauguration; that the Council did not vote on whether the Town would pay for the train tickets to Washington and that it was not customary to vote on such matters; that money was allocated in the budget of the Town for travel expenses of the Town Council and employees. No mention of the trip to Washington was ever made in the Council Minutes.

Robert Lyons, Jr., a professional engineer who had done work for the Town, testified that in November 1976 he and defendant travelled to Washington to determine the status of the Town's application for an Economic Development Administration (hereinafter EDA) grant; and that they conferred with the chief counsel of EDA who he believed was named Anderson.

H.S. Jackson, Superintendent of the Carolina Beach State Park, testified that he obtained his and his wife's train tickets through defendant; and that he could not remember whether he paid for said tickets.

George Anderson, a United States Attorney in Raleigh, testified that in the latter part of 1976 and early 1977 he was in charge of making train reservations to the Inauguration. He further testified that in late November 1976 he received a letter from defendant requesting train reservations for Mr. and Mrs. Richard B. Kepley, Mr. and Mrs. Ernest N. Bame, defendant and her husband, and Mr. and Mrs. Pete Jackson. Enclosed was a check to Anderson for $248. In early December 1976 defendant sent Anderson another letter requesting one more train ticket. She enclosed a check for $31.00. These checks were endorsed and deposited by Anderson. Anderson further testified that he did not recognize defendant and did not know whether he had ever met her.

Mrs. Thompson, defendant's secretary, testified as to the procedure which was followed for drawing checks on the Town account. Under the procedure a copy of each check was to be

attached to a voucher and filed. A voucher was to be filled out at the same time or before the check was drawn. Mrs. Thompson could not recall being involved in the preparation of the two checks and vouchers at issue. She further testified that she had been unable to find copies of the two letters to Anderson in the Town records.

Neil Godfrey, an SBI Agent, testified that during his investigation of the matters at issue he took into custody the two checks and vouchers from the Town records. He obtained copies of the two letters to George Anderson from Anderson's office. Anderson told Godfrey that he had never done any legal work for the Town. On 14 September 1978 and 20 October 1978 Godfrey talked with defendant about the investigation. Defendant told him that she, her husband and son, and the Kepleys attended the Inauguration; that the Town paid for their motel rooms; that she personally paid for the train tickets with her own money and that the checks to Anderson were for legal work he had done for the Town. Defendant further told him that she preaudited every check until she was appointed Town Manager and then instructed her office employees to preaudit each check; that the Town did not pay any of the Jacksons' expenses at the Inauguration; that she may have asked Anderson to get the train tickets and that she may have inadvertently indicated legal work on the vouchers for the checks to Anderson.

Defendant testified that prior to coming to Carolina Beach, she was Town Clerk and Secretary to the Town Manager in Wilson. While holding her positions at Carolina Beach, she worked 12 to 18 hours a day, seven days a week. Sometimes she signed 100 checks at a time. The vouchers rarely came to her desk with the checks. She remembered signing the two letters to Anderson and thought that the two checks were attached to the letters when she signed them. Her explanation for the checks and vouchers was as follows: She did not remember when she signed the checks or the two vouchers. Even though the vouchers were dated the same as the checks, they were probably filled out at a later date. Most likely the two checks were placed on her desk without vouchers. When she saw that they were drawn to an attorney, she assumed they were for legal work performed and indicated so on the vouchers.

Upon the motion of the defendant, the Court struck count 5 of each indictment, failure to keep accurate records, finding that Section 2-2003 of the Code of Ordinances of the Town of Carolina Beach was unconstitutional. The jury found the defendant guilty on the remaining four counts of each Bill of Indictment. Upon the verdict, the Court consolidated counts 2, 3, and 4 of each indictment for judgment and ordered the defendant to pay a fine of $250.00. Upon the verdict, the Court consolidated count 1 in each indictment for judgment and ordered that the defendant be imprisoned for a term of three years in the North Carolina Department of Correction. This sentence was suspended for three years and the defendant was placed on probation. The defendant was further ordered to pay a fine of $1,000.00, pay the cost of court, and pay restitution to the Town of Carolina Beach in the amount of $279.00. From this judgment the defendant appeals.

Attorney General Edmisten by Assistant Attorney General Elizabeth C. Bunting and Assistant Attorney General Kaye R. Webb for the State.

W.G. Smith and Bruce H. Jackson, Jr., and George H. Sperry, for the defendant.

MARTIN (Robert M.), Judge.

Defendant contends that the trial court erred when it failed to grant defendant's motions to dismiss counts one, two, three, and four of each indictment at the conclusion of all the evidence.

Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of defendant being the perpetrator of such offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Count one of each indictment charges defendant with the crime of obtaining property by false pretenses in violation of G.S. 14-100. Each count alleges, in essence, that defendant did "unlawfully, willfully, knowingly, designedly, feloniously, and

with intent to deceive and defraud falsely present and represent unto the Town of Carolina Beach," that public expenditures in the amount of $31.00 and $248.00 were for "miscellaneous printed information" and "copies of legal case" whereas the expenditures were actually for the purchase of Amtrak train tickets and that by means of such false pretense knowingly caused the Town to pay certain sums of money for the purchase of train tickets.

The essential elements of the crime of obtaining property by false pretenses are as follows: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin,* 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980).

[1,2] Under the circumstances of this case, there is no evidence that the information written on the expense voucher, the alleged misrepresentation, was the means by which defendant obtained property from the Town. The falsification of expense records cannot in itself constitute the crime of false pretenses. It is essential that the false pretense must have included the transfer of money or property. There must be a causal relationship between the representation alleged to have been made and the obtaining of the money or property. In the present case, defendant, a town official with the authority to draw checks, wrote a check to Attorney George M. Anderson which was cosigned by council member Whitley and which was paid by the bank. In return for the check defendant obtained Amtrak tickets. The evidence does not show that the statement or voucher induced the Town to part with its money or in any way caused the payment to be made. While the misrepresentation of the purpose of the expenditure in the voucher may be false, the State has not shown that defendant obtained property based upon the false voucher. *See State v. Cronin, supra.* Because the State has not established a causal relationship between the voucher and the obtaining of the property, defendant's motions for nonsuit should have been granted on counts one of each indictment.

[3] The three remaining counts of each indictment concern the liability of an officer or employee of local government under G.S. 159-181 which governs the enforcement of the Local Government Finance Act.

> Count II of each indictment alleges essentially that the defendant, as Town Manager, Finance Officer, and Town Treasurer did *"unlawfully, willfully, with deceit and the intent to defraud"* (emphasis added) make false written statements and false reports by use of vouchers that certain checks were for matters other than expenditures for train tickets in violation of GS 159-181.
>
> Count III of each indictment alleges essentially that the defendant, as Town Manager, Finance Officer, and Town Treasurer did *"unlawfully, willfully, with deceit and intent to defraud"* (emphasis added) make false written statements and false reports by use of vouchers that certain checks were for matters other than expenditures for train tickets in violation of GS 159-181.
>
> Count IV of each indictment alleges essentially that the defendant, as Town Manager, Finance Officer, and Town Treasurer did *"unlawfully, willfully, with deceit and an intent to defraud"* (emphasis added) fail to "pre-audit" obligations and disbursements represented by checks used for the purchase of train tickets in violation of GS 159-25(a)(2) and 159-181.

Defendant contends that there is no substantial evidence to support a reasonable inference that defendant acted knowingly, designedly, willfully and with intent to defraud.

In order for the State to prove official misconduct proscribed by G.S. 159-181, it is not necessary for the State to prove a corrupt intent or wilful design to cheat and defraud the public. "Every public officer is bound to perform the duties of his office faithfully, and to use reasonable skill and diligence, and to act primarily for the benefit of the public." *Avery County v. Braswell*, 215 N.C. 270, 275, 1 S.E. 2d 864, 867 (1939). The foundation of liability of public officers has been expressed as follows:

"However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a wilful want of care in the discharge of their official duties, which injures the public." *State v. Anderson*, 196 N.C. 771, 773, 147 S.E. 305, 306 (1929) (construing G.S. 14-230 which governs the wilful failure of a public officer to discharge his duties); *State v. Hatch*, 116 N.C. 1003, 1006, 21 S.E. 430, 431 (1895). We think there is sufficient evidence to support a reasonable inference that defendant acted negligently or carelessly in the discharge of her duties in violation of G.S. 159-181.

[4] As to count four of the indictments, wilful failure to preaudit, defendant further contends that the prosecution against defendant is inconsistent with the State's evidence that the purchase of train tickets was not a valid expense of the Town. In *State v. Davis*, 45 N.C. App. 72, 262 S.E. 2d 827 (1980), we held that the duty to preaudit does not arise until there is a valid obligation of the Town. In the present case, defendant purchased train tickets to the Presidential Inauguration both for members of the Town Council and for persons not employed by the Town. There is sufficient evidence, therefore, that the expenditure of funds for the purchase of train tickets consisted of both valid and invalid obligations of the Town. The fact that Town Council members knew of or approved of the expenditure of funds for persons not employed by the Town or that defendant acted at the direction of the Mayor in ordering tickets for a friend of the Town and his wife does not either validate the expenditures or relieve defendant, as finance officer, of liability for approving a false, invalid or erroneous claim in violation of the duties imposed upon her by law. *Avery County v. Braswell*, 215 N.C. 270, 1 S.E. 2d 864 (1939). Thus, where the evidence shows that the expenditures contained both valid and invalid items, the court properly submitted the charges of approving an invalid claim and failure to preaudit to the jury.

[5] Defendant, by her seventh assignment of error, contends the court erred in not allowing the defendant's motion to require the State to make an election as to counts two and three in each indictment. Defendant contends the acts alleged in counts

two and three, the acts of signing the checks and writing the purpose of the expenditure on the voucher, are the same acts, thus allowing the defendant to be twice convicted and sentenced for the same criminal offense. Defendant relies on *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972).

While it is true that both charges arise out of the same transactions, the elements of the two charges are not the same. The elements of approving a false claim in violation of G.S. 159-181 are (1) that the defendant was a finance officer, other officer or employee of local government (2) that in such capacity she approved a claim or bill, and (3) that at the time she approved the claim or bill she knew it was fraudulent, erroneous or otherwise invalid. The elements of making a false report in violation of G.S. 159-181 are (1) that defendant was a finance officer, other officer or employee of local government (2) that the written statement, in this case the voucher, was required by rules and regulations established by the Town of Carolina Beach for the lawful disbursement of funds, and (3) that defendant made a written statement on a voucher knowing that a portion of it was false. Because the elements of the two charges of approving a valid claim and making a false statement are not the same the State was not required to make an election between counts two and three. *State v. Evans*, 40 N.C. App. 730, 253 S.E. 2d 590 (1979).

Defendant by her seventh, eighth, tenth, eleventh and twelfth assignments of error contends the court erred in its instructions and charge to the jury. We note that as to the tenth through twelfth assignments of error that defendant did not bring the alleged misstatement of defendant's contentions to the court's attention nor did she request specific instructions or object to those portions of the court's charge about which she now complains. Nevertheless we have carefully reviewed the entire charge and find no prejudicial error. We have also examined defendant's first through fourth assignments of error and find them to be without merit. In view of our holding, it is not necessary for us to discuss defendant's ninth assignment of error relating to the court's charge on false pretenses.

Counts 1 of case No. 78CRS24117 and case No. 78CRS24119 are reversed.

In Counts 2, 3, and 4 of case No. 78CRS24117 and case No. 78CRS24119 we find no error.

Judges HEDRICK and MARTIN (Harry C.), concur.

MARION C. NORWOOD v. SHERWIN-WILLIAMS COMPANY, A CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF OHIO AND DOING BUSINESS IN NORTH CAROLINA

No. 7914SC889

(Filed 2 September 1980)

Negligence § 57.5– pallet protruding into store aisle – injury to customer – contributory negligence

In an action to recover for personal injuries received by plaintiff when she tripped over a pallet which protruded into the aisle of defendant's store, the evidence showed that plaintiff was contributorily negligent as a matter of law where it showed that the pallet supported a tall display; nothing obstructed plaintiff's view of the corner of the pallet which was in the aisle; plaintiff did not look down; and plaintiff should have seen the pallet in the exercise of ordinary care.

Judge WELLS dissenting.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 2 April 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 March 1980.

This action involves a claim by plaintiff for personal injury incurred on 9 November 1974 when she tripped over a pallet which protruded into the aisle of a store operated by the defendant. The pallet was three or four inches off the floor and supported a tall display in the center. It was placed at the end of a counter and the edge of the pallet extended three or four inches into the aisle. The plaintiff was in the defendant's store at approximately 11:45 a.m. to purchase art supplies. After making her selection of art supplies, she started walking down the aisle toward the cash register. Nothing obstructed her view of the corner of the pallet that was in the aisle. The manager of the store testified: "The lighting fixtures in the retail part of the store are eight feet tubular lighting running parallel with the store. I believe there are four different sections of lighting

and they run the length of the store, four tubes per section." The plaintiff testified: "The floor was poorly lit or it looked shadowed. The counter on the right shadowed the aisle. The display also shadowed the aisle." The plaintiff also testified: "I walked down this aisle . . . I did see this display standing out in the corner of my eye. I could tell there was something tall there, but I wasn't looking down at the floor because I thought that display went all the way down to the floor." The plaintiff tripped on the pallet, suffering an injury.

At the end of all the evidence the defendant made a motion for a directed verdict which was denied. The jury returned a verdict for the plaintiff. The court then entered a judgment notwithstanding the verdict for the defendant. Plaintiff appealed.

Watson, King and Hofler, by R. Hayes Hofler III and Malvern F. King, Jr., for plaintiff appellant.

Haywood, Denny and Miller, by John D. Haywood and Charles H. Hobgood, for defendant appellee.

WEBB, Judge.

If the defendant was entitled to a directed verdict at the end of all the evidence, the judgment notwithstanding the verdict was properly entered. *See Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). We hold that all the evidence shows the plaintiff was contributorily negligent and we affirm the judgment of the superior court.

A plaintiff who trips or falls over an object on the premises of another is barred from recovery by his or her contributory negligence if the object is in a position at which the plaintiff would have seen it had he or she looked. *See Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1 (1964); *Jones v. Pinehurst, Inc.*, 261 N.C. 575, 135 S.E. 2d 580 (1964); *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338 (1963); *Little v. Oil Corp.*, 249 N.C. 773, 107 S.E. 2d 729 (1959); *Porter v. Niven*, 221 N.C. 220, 19 S.E. 2d 864 (1942); *Farmer v. Drug Corp.*, 7 N.C. App. 538, 173 S.E. 2d 64 (1970). The plaintiff, relying on *Hunt v.*

Meyers Co., 201 N.C. 636, 161 S.E. 74 (1931) contends that there was evidence in this case that the area in which the pallet was placed was dark or shadowed such that she could not see the pallet. The difficulty with this argument is that the evidence does not show the shadows prevented the plaintiff from seeing the pallet. She testified she did not look down. She did not testify that she looked and the shadows prevented her from seeing the pallet. Plaintiff also contends that the lady at the cash register, the tall display on the pallet, the merchandise along the aisle, and the impulse items diverted her attention from the pallet. Our Supreme Court has held in *Walker v. Randolph County*, 251 N.C. 805, 112 S.E. 2d 551 (1960) that a person is excused from seeing what he should ordinarily have seen by a condition which might divert the attention of a prudent person from looking. In that case Randolph County maintained a bulletin board which extended 19 inches over a staircase. The plaintiff was looking up for a notice on the board and fell down the steps. We do not believe we should extend this doctrine of diversion to say that a person may reasonably be diverted from seeing what he or she should have seen by the normal activities in a retail store.

We hold that the pallet was in plain view where the plaintiff should have seen it by the exercise of due care.

Affirmed.

Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting:

Plaintiff's evidence in this case showed that while walking along an aisle in defendant's store, her foot caught under a plywood pallet which was protruding into the aisle and was elevated about three inches off the floor. The pallet supplied the base upon which a tall paint sprayer display was mounted. Plaintiff noticed the paint sprayer display but did not see the protruding pallet before she caught her foot underneath it. The aisles of the store were very narrow and crowded with merchan-

dise. Where the paint sprayer display was located the aisle was not over two and one-half feet wide. The corner of the pallet stuck out into the aisle approximately three or four inches. Plaintiff's foot was seriously injured as a result of its being caught underneath the protruding pallet. Plaintiff also presented extensive evidence as to the nature and extent of her injury, but the foregoing fairly summarizes her evidence as to defendant's negligence.

At the close of plaintiff's evidence, defendant's motion for directed verdict was denied. Defendant presented the testimony of Richard McDaniel who was defendant's assistant store manager at the time of plaintiff's injury. He testified as to the location and design of the display pallet. There were two aspects of his testimony which we regard as favorable to plaintiff. We quote:

> The pallet was in an open area because it was a fairly large device used for spraying houses and commercial work and it is something that you set it out there and you don't want a whole lot of things to distract from it. We really didn't have anything else to put around it at the time. It was more or less as a display.
>
> * * *
>
> To my knowledge, the base of the display was constructed of two by fours as the base and plywood nailed to the top of it. The plywood would have been four inches off the floor. The edges were exposed. There was bare plywood sticking out around the base, and there was an overhang.

Defendant also presented the testimony of Crandall Nelson, defendant's store manager at the time of plaintiff's injury. There was one aspect of his testimony we regarded as favorable to plaintiff. We quote:

> The pallet and the display itself were located right in the middle of the busy area in front of the wrapping counter. That pallet was constructed so that it had the plywood

edges exposed. It was painted and had carpet on it. We did not have a drop cloth on top of it. The very edge of the pallet was painted and smooth. There was no guard around it. There was nothing to warn customers that this low-lying pallet was there; we did not put up a sign there. We figured the 2 X 4 would act as a kick-board. I built these pallets and I let the 2 X 4's underneath serve as a kick-board. A customer's foot could have gone underneath there but not very far.

The airless pump spray gun was probably four and one-half feet high. It was a sort of turquoise color. Back through a period of the sixties to 1975, the merchandising idea at that time was the mass-marketing idea. The idea was to pile high and let it fly. We never did go along with that too much.

At the close of all the evidence, defendant's motion for directed verdict was again denied. Following the charge of the court, the jury answered the issues as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the Complaint?

ANSWER: 'Yes.'

2. Did the plaintiff contribute to her own injuries as alleged in the Answer?

ANSWER: 'No.'

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

ANSWER: '$90,000.00.' "

Upon the jury's verdict on 2 March 1979, the trial court entered judgment for plaintiff in the amount of $90,000.00. On 6 March 1979, defendant moved for judgment notwithstanding the verdict. On 2 April 1979, the trial court entered an order granting defendant's motion for judgment n.o.v.

The majority opinion holds that the evidence shows plaintiff to have been contributorily negligent because she failed to see the pallet which "was in plain view where the plaintiff should have seen it in the exercise of due care." We must respectfully disagree.

Plaintiff's evidence must be taken in the light most favorable to her. *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974); *Home Products Corp. v. Motor Freight, Inc.,* 46 N.C. App. 276, 264 S.E. 2d 774 (1980). To the extent defendant's evidence explains or clarifies plaintiff's evidence, it must be considered in the light most favorable to plaintiff. In that light, plaintiff's and defendant's evidence clearly shows that a large display was mounted by defendant in a crowded, busy area of the store. The display was mounted to attract the attention of customers. The display reached near eye level. It was mounted on a pallet elevated from the floor by about four inches, a height sufficient to create the illusion of floor level, but with an overhang under which there was room for plaintiff's foot to catch. This condition, created by defendant, constituted a hidden danger, a danger with which plaintiff could not reasonably be expected to discern, observe, or otherwise be aware of. In the words of Justice Ervin, plaintiff's conduct

> must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, 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).

Under such circumstances as were deliberately created by defendant in this case, we do not believe it was the duty of the plaintiff to anticipate that defendant's display would be mounted on a pedestal not flush with the floor, protruding in such a way that if she did not tiptoe around it, she might catch her foot underneath it.

In its motion for judgment n.o.v., defendant included a conditional motion for a new trial, which was denied by the trial court. Under these circumstances, the verdict for plaintiff should stand and the matter should be remanded to the trial court with instructions to reinstitute the judgment in her favor. *See*, G.S. 1A-1, Rule 50.

DEVELOPMENT ASSOCIATES, INC., PETITIONER v. THE WAKE COUNTY BOARD OF ADJUSTMENT: JAMES R. FULLWOOD, CHAIRMAN; BILLY G. HINTON; RUSSELL BUXTON; JOHN E. TANTUM; RALPH E. SMITH; J.H. COBB; AND BERNARD ALLEN; THE COUNTY OF WAKE; AND JOHN G. SCOTT, WAKE COUNTY DIRECTOR OF PLANNING; H. ERNEST McDONALD AND STATE OF NORTH CAROLINA, RESPONDENTS

No. 8010SC169

(Filed 2 September 1980)

1. **Municipal Corporations § 31– zoning – review of decision of board of adjustment – reasonable time within which to file petition**

The superior court had the discretion to determine whether a petition for certiorari to review a decision of a county board of adjustment was timely filed where there was no statutory provision as to the time for filing the petition at the time in question, and the court did not abuse its discretion in determining that a delay in filing the petition of 49 days after the decision of the board of adjustment was announced at the hearing and 35 days after its written order was issued was not an unreasonable delay. Former G.S. 153A-345(e).

2. **Counties § 5.2; Municipal Corporations § 30.11– zoning ordinance – exemption for farming – dog breeding and kennel operation**

Dogs do not constitute "livestock," and a dog breeding and kennel operation does not constitute "farming" so as to exempt the property used therefor from a county's zoning authority pursuant to G.S. 153A-340.

APPEAL by respondent McDonald from *Smith, Donald L., Judge.* Judgment entered 25 September 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 12 June 1980.

In October 1976, petitioner acquired approximately 193 acres of land in Wake County within the zoning jurisdiction of Wake County and zoned for Residential-20 use and began its

development for single family residential purposes in the same year. In April 1977, McDonald acquired approximately 2.5 acres of land in the same general location and adjacent to that of the petitioner, after having filed with the Wake County Planning Department a farm exemption statement claiming exemption from the same county zoning provisions under which the use of the petitioner's land was regulated. McDonald, with the County's permission, then began development of his land for a dog breeding and boarding kennel facility for which he claimed the above exemption.

On 30 January 1978, petitioner requested the Wake County Planning Director to apply the zoning regulations of the Wake County Zoning Code to McDonald's property so as to revoke the farm exemption statement-permit and prevent the use of the property for dog breeding and boarding. The Wake County Planning Director denied the request. In February 1978, petitioner appealed the denial to the Wake County Board of Adjustment. The Board of Adjustment affirmed the Planning Director's decision by an order dated 20 April 1978. Petitioner, on 23 May 1978, filed a petition for review and certiorari in Wake County Superior Court, requesting that the Board's order be vacated. An order and writ of certiorari were granted on 1 June 1979 by the Superior Court, and on 25 September 1979, the Court entered its judgment reversing the Board of Adjustment's order. Respondent McDonald appealed.

Lake & Nelson, P.A., by Broxie J. Nelson, for petitioner.

Bode, Bode & Call, P.A., by W. Davidson Call, for respondent McDonald.

Assistant Wake County Attorney Arthur M. McGlauflin for respondent Wake County.

WELLS, Judge.

[1] Respondent's first assignment of error presents the question of whether petitioner's petition for writ of certiorari was timely filed. At the time the writ was sought in this case, G.S.

153A-345(e)[1/] provided that, "[e]ach decision of the board [of adjustments] is subject to review by the superior court by proceedings in the nature of certiorari." Respondent argues that a delay in seeking the writ of forty-nine days after the decision of the board of adjustments was announced at the hearing and thirty-five days after its written order was issued was an unreasonable delay, and that for this reason petitioner's application for the writ should have been denied. Prior to the 1979 amendment to G.S. 153A-345(e) our statutes made no provision as to the time within which the writ of certiorari might issue in cases of this type. Under such circumstances, it was within the sound discretion of the superior court as to whether the writ was timely sought, and in the absence of a clear abuse of that discretion, we do not find error here. *Cf.*, Rule 21(c), N.C. Rules of Appellate Procedure (petition for certiorari to the Supreme Court or Court of Appeals of North Carolina must be filed without reasonable delay).

[2] In his second and third assignments of error, respondent calls into question the conclusions of the trial court that the Wake County ordinance is invalid and that his dog-breeding operation does not qualify for the farm exemption under State law. G.S. 153A-340 contains the legislative grant of power to counties to enact zoning ordinances. In pertinent part, it provides:

> For the purpose of promoting health, safety, morals, or the general welfare, a county may regulate and restrict

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[1/]G.S. 153A-345(e) was amended effective 1 January 1980 to provide in relevant part:

> . . . Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review to the superior court shall be taken within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to the appellant, whichever is later. The decision of the board may be delivered to the appellant either by personal service, or registered mail or certified mail return receipt requested.

1979 N.C. Sess. Laws, ch. 635.

(1) The height, number of stories, and size of buildings and other structures,

(2) The percentage of lot that may be occupied,

(3) The size of yards, courts, and other open spaces,

(4) The density of population, and

(5) The location and use of buildings, structures, and land for trade, industry, residence, or other purposes, except farming.

These regulations may not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to the regulation.***

Next, we consider the pertinent parts of the Wake County Code, found in Section 1-1-36(A):

(A) AGRICULTURAL OR FARMING PURPOSES:

All realty, and all buildings and structures whatsoever, being or to be used for agriculture, farming, livestock, or poultry operations and all forestry land shall be exempt from each and every provision of this ordinance. Agricultural or farming purposes shall be realty, buildings or other structures which fall into any one of the following classifications:

(1) Any area of realty which is comprised of forty (40) acres or more;

(2) Any area smaller than forty (40) acres which yields an annual gross income of five hundred dollars ($500) or more from any agricultural, farming, livestock or poultry operation, exclusive of home gardens.

Judge Smith rules that to the extent that Wake County Code Section 1-1-36(A) attempts to restrict the provisions of G.S. 153A-340, it is invalid. Since we hold that petitioner's dog-

breeding operations are not "farming" activities within the meaning of G.S. 153A-340, we do not reach the issue as to the validity of the County's ordinance insofar as it purports to restrict the definition of the farm exemption contained in the statute.

Respondent argues that the proposed dog-breeding operation is a farming activity and not subject to the county's zoning authority under G.S. 153A-340. Although the terms "farm" and "farming" are nowhere defined in G.S. 153A-340, whether the legislature intended to include dog-breeding activities within the meaning of these terms can reasonably be inferred from other statutory sources.

Chapter 106 of the General Statutes relating to agriculture contains numerous references to animals and livestock. To some extent, these terms are used interchangeably. A careful examination of these various statutory provisions leaves the clear impression that dogs are not regarded as livestock under Chapter 106. For instance, Article 35B contains the Livestock Dealer Licensing Act, and G.S. 106-418.8(2) provides, "The term, 'livestock' means cattle, sheep, goats, swine, horses and mules . . . ." Article 35, entitled "Public Livestock Markets", speaks in terms of "cattle, swine, or other livestock." *Accord*, G.S. 106-411. G.S. 106-407(1) exempts from the requirements of the article, "[a] market where horses and mules exclusively are sold." The only references to dogs which we find in Chapter 106 are the vaccination requirements of Article 34, Part 7.

Article 3 of Chapter 68 of the General Statutes deals with fencing requirements for livestock. G.S. 68-15 provides, "The word 'livestock' in this Chapter shall include, but shall not be limited to, equine animals, bovine animals, sheep, goats and swine." In *Meekins v. Simpson*, 176 N.C. 130, 96 S.E. 894 (1918), our Supreme Court interpreted the term livestock as used in G.S. 68-15, as not to include dogs.

Chapter 67 of the General Statutes, entitled "Dogs", deals with dogs so as clearly to distinguish them from livestock. G.S. 67-1 provides:

> Liability for injury to livestock or fowls. — If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit.

Article 5 of Chapter 67 is entitled "Protection of Livestock and Poultry from Ranging Dogs."

Looking to the tax laws for further guidance, we note that G.S. 105-277.2(1) provides that

> "Agricultural land" means land and improvements thereon constituting a farm tract actively engaged in the commercial production or growing of crops, plants or animals under a sound management program. (This definition includes woodland and wasteland which are a part of a farm tract.)

While the term "animal" is not further defined in Chapter 105, we find that in G.S. 153A-153 the General Assembly has provided that: "A county may levy an annual license tax on the privilege of keeping dogs and other pets within the county," and has thus indicated an intent to classify dogs as pets rather than livestock. G.S. 105-164.4(1)g establishes a reduced sales tax rate in the sale of certain machinery and accessories to "dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock."

In *Hinson v. Creech*, 286 N.C. 156, 209 S.E. 2d 471 (1974), our Supreme Court was dealing with the exemption of agricultural employment under the Worker's Compensation Act, G.S. 97-2(1). We find the following passage from the Court's opinion in *Hinson* helpful here:

> Traditionally, agriculture has been broadly defined as "the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, including every pro-

> cess and step necessary and incident to the completion of products therefrom for consumption or market and the *incidental* turning of them to account." 3 Am. Jur. 2d *Agriculture* § 1 (emphasis supplied); *see Keeney v. Beasman*, 169 Md. 582, 182 A. 566. This traditional definition has been extended to encompass the storage and marketing of agricultural products. *H. Duys & Co. v. Tone*, 125 Conn. 300, 5 A. 2d 23; *Bucher v. American Fruit Growers Co.*, 107 Pa. Super. 399, 163 A. 33; *see generally* 3 C.J.S. *Agriculture* § 2.

286 N.C. at 159-160, 209 S.E. 2d at 474.

G.S. 62-241, dealing with negligence presumed from killing livestock, provides as follows:

> When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company . . . .

In an early case, interpreting the foregoing statute, *Moore v. Electric Co.*, 136 N.C. 554, 48 S.E. 822 (1904) our Supreme Court held that dogs are not included in the category of cattle or livestock.

Chapter 14 of the General Statutes contains three separate provisions pertaining to the larceny of animals pertinent to the issue in this case. G.S. 14-84 provides that the larceny of any dog shall be a misdemeanor; while G.S. 14-85 provides that if any person shall "pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony . . . ."

A careful analysis of the legislative intent as expressed in these statutory enactments and decisions of our Courts leads us to the conclusion, and we so hold, that under our laws dogs are not included in the classification of livestock and that dog breeding and the operation of a dog kennel are not "farming" activities within the meaning of G.S. 153A-340. Accordingly,

respondent's property is subject to the zoning restrictions enacted by Wake County.

The judgment of the trial court reversing the order of the Board of Adjustments is

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

C & O DEVELOPMENT COMPANY, PLAINTIFF v. AMERICAN ARBITRATION ASSOCIATION, DEFENDANT; G. J. HOPKINS, INCORPORATED, INTERVENOR; NELLO L. TEER COMPANY, INTERVENOR

No. 8011DC168

(Filed 2 September 1980)

1. **Arbitration and Award § 5; Judgments § 37.4– subject matter to be arbitrated – prior binding judgment – authority of court to determine**

It was within the authority of the trial court to determine whether the subject matter of a demand for arbitration had been previously litigated between the parties and reduced to a judgment binding on them.

2. **Arbitration and Award § 5; Judgments § 37.4– arbitration of bonus claim barred by prior judgment**

Arbitration of defendant's claim that it was entitled to a $100,000 bonus for completing electrical and mechanical work on a hotel in a timely and workmanlike manner was barred where a judgment in an earlier action between the same parties finally determined the issues asserted by defendant in its demand for arbitration.

APPEAL by defendant G. J. Hopkins, Inc. from *Pridgen, Judge.* Judgment entered 3 October 1979 in District Court, JOHNSTON County. Heard in the Court of Appeals 12 June 1980.

On 13 September 1978 Hopkins filed with defendant American Arbitration Association (AAA) and served notice upon plaintiff and Teer of its demand for arbitration pursuant to a contract between Teer and Hopkins. The purpose of the arbitration was to obtain payment of a $100,000 bonus which Hopkins alleged was owing to it under a contract with Teer. On 5 Janu-

ary 1979 C & O brought this action to enjoin the arbitration proceedings. Hopkins and Teer intervened as additional parties defendant.

Following extensive pretrial proceedings, the matter was heard by Judge Pridgen in the absence of a jury on 24 September 1979, and the court's judgment was entered 3 October 1979. Judge Pridgen's order contained extensive findings of fact relating to prior dealings between the parties and the record of events preceding the filing of Hopkins' demand for arbitration.

In summary, Judge Pridgen found that in September 1975, C & O entered into a contract to build a two-hundred room hotel for the government of Abu Dhabi, United Arab Emirates in the City of Abu Dhabi. On 5 September 1975 C & O contracted with Teer, as construction manager, to build the hotel. On 6 February 1976 Teer subcontracted with Hopkins to furnish labor and materials incident to the electrical and mechanical aspects of the hotel. The parties agreed that the contracts would be construed under the laws of the State of North Carolina. The subcontract between Teer and Hopkins provided that Hopkins would be paid all of its costs for labor and materials, plus ten percent overhead and ten percent profit, and that Hopkins would be entitled to a bonus of $100,000 on the condition that its work was completed in a timely and workmanlike manner. Under the contract between C & O and Teer, C & O was liable to Teer for any payment by Teer to Hopkins of a bonus upon completion of the work in a timely and workmanlike manner. The contracts between C & O and Teer and between Teer and Hopkins respectively provided for arbitration of disputes arising out of the construction project under the respective contracts. In the spring of 1976, Teer's involvement in the electrical and mechanical aspects of the project was phased out, and all dealings for those aspects of the project were subsequently handled directly between C & O and Hopkins. Hopkins submitted all statements of account to C & O for payment, and C & O made payments due directly to Hopkins. C & O and Hopkins dealt directly within the provisions of the subcontract with Teer, and C & O ceased dealing with Teer. During the construction of the hotel, C & O paid Hopkins the total sum of $1,220,158.23, its last payment being made on 3 October 1977. On

27 October 1977 Hopkins commenced a civil action in Roanoke County, Virginia alleging that C & O was indebted to Hopkins in the sum of $156,870.52 by virtue of an account stated arising out of its direct contractual dealings with C & O, the petition further alleging that none of the indebtedness had been paid.

Additionally, the trial court in the present case found that C & O, in its answer in the Virginia action, had contended that Hopkins' work was not done in a workmanlike fashion, that Hopkins had not performed its responsibilities in a timely manner, and that Hopkins was therefore not entitled to recovery. C & O further counterclaimed for losses and expenses incurred to repair and cure defective labor and materials furnished by Hopkins, in the total sum of $171,599. The Virginia suit was tried before a jury in July and August 1978. After the presentation of evidence, arguments of counsel and other instructions of the court, the jury returned a verdict in favor of Hopkins in the sum of $18,482.99 plus interest, and in favor of C & O upon its counterclaim in the sum of $7,500 plus interest. On 3 August 1978, upon Hopkins' motion to set aside the verdict the court entered final judgment in favor of Hopkins in the sum of $20,785.81 plus interest, and in favor of C & O in the sum of $7,500 plus interest. Neither Hopkins nor C & O appealed the Virginia judgment, and the judgment was paid in full by C & O.

The trial court entered judgment permanently restraining the AAA from conducting any further proceedings with respect to the demand for arbitration filed by Hopkins, restraining Hopkins from conducting any other arbitration proceedings arising out of the same claim for relief, and restraining Teer from initiating arbitration on its own behalf or in behalf of Hopkins arising out of the same claim for relief. From this judgment intervenor defendant Hopkins appeals.

Mast, Tew, Nall & Lucas, P.A., by George B. Mast and Joseph T. Nall, for the plaintiff appellee.

Osterhoudt, Ferguson & Natt, P.A., Salem, Virginia, by Charles H. Osterhoudt, and Daughtry, Hinton, Woodard, Murphy & Ragland, P.A., by Stephen C. Woodard, Jr., for intervenor defendant G. J. Hopkins.

WELLS, Judge.

[1] The first issue we must resolve concerns the justiciability of the present action — whether the trial court had authority to enjoin arbitration on grounds of *res judicata* or collateral estoppel. Defendant argues that G.S. 1-567.3[1/] limits the basis upon which a court may stay arbitration proceedings solely to the issue of whether a written agreement to arbitrate a particular dispute exists and that all other matters, including factual and legal issues, are the proper subject matter of the arbitration itself. It is defendant's position that the courts may determine

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[1/] G.S. 1-567.3 provides as follows:

> Proceedings to compel or stay arbitration. — (a) On application of a party showing an agreement described in G.S. 1-567.2, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
>
> (b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.
>
> (c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein. Otherwise the application may be made in any court of competent jurisdiction.
>
> (d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
>
> (e) An order for arbitration shall not be refused or a stay of arbitration granted on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

any factual or legal issues involved only after the arbitration award has been entered. While we have found no cases in this State or other jurisdictions dispositive of this precise issue under the Uniform Act, it is our opinion that the extent of a judgment's binding effect is a matter for judicial determination. *Cf., Rembrandt Ind. v. Hodges Int.*, 38 N.Y. 2d 502, 381 N.Y.S. 2d 451, 344 N.E. 2d 383 (1976) (the scope of an arbitration award and its *res judicata* effect are issues properly determinable by the court and not the arbitrators); *accord, Weinberger v. Friedman*, 41 A.D. 2d 620, 340 N.Y.S. 2d 720 (1st Dep't 1973). We do not believe that in enacting the Uniform Act, the General Assembly intended to grant arbitrators the authority to determine the *res judicata* or collateral estoppel effect of a prior judgment. The arbitrability of various issues and disputes under the Uniform Act has, in general, been determined to be a matter for the courts to decide. *See, e.g., Ferris College v. Faculty Ass'n*, 72 Mich. App. 244, 249 N.W. 2d 375 (1976), *cert. denied*, 399 Mich. 861 (1977); *Layne-Minnesota Co. v. Regents of the University*, 266 Minn. 284, 123 N.W. 2d 371 (1963). We hold that it was within the authority of the trial court to determine whether the subject matter of the demand for arbitration had been previously litigated between the parties and reduced to a judgment binding upon them.

[2] Defendant also maintains that the arbitration here is not barred under the doctrine of *res judicata* or collateral estoppel because the issue in the proposed arbitration was not fully litigated and determined between the parties in the prior Virginia court proceedings. The basic principles of estoppel by judgment are succinctly set forth in *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973). 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 competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right determined, involving identical parties or parties in privity with a party or parties to the prior suit. Such a judgment operates as an estoppel not only as to the issues actually reduced to judgment in the former proceeding, but also as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable

diligence, could and should have brought forward. *Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977); *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822 (1940). Issues which could have been litigated in the prior suit but were not are said to be "merged" into the prior judgment. *Behr v. Behr*, 46 N.C. App. 694, 266 S.E. 2d 393 (1980). Similarly, a party to a judgment is barred from litigating or relitigating issues in an arbitration proceeding which are raised or could have been raised in the prior action. *Cf.*, Domke on Commercial Arbitration, § 39.04, pp. 338-339 (1968) (prior arbitration award constitutes a bar to subsequent suit or arbitration arising out of the same cause of action or dispute). Judge Pridgen found that the same issues asserted in the demand for arbitration were asserted by Hopkins in the prior Virginia court proceeding and were fully determined there. The evidence clearly supports this finding and we are therefore bound by it. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

Upon his findings, Judge Pridgen correctly concluded that the parties in this action and in the demand for arbitration are the same or were in privity with the parties in the Virginia action, that the judgment in that action finally determined the issues between the parties asserted by Hopkins in its demand for arbitration, and that Hopkins is barred by that judgment from proceeding further in its demand for arbitration.

Affirmed.

Chief Judge MORRIS and Judge VAUGHN concur.

ARTHUR L. HILL AND WIFE, FRANCES W. HILL v. TOWN OF HILLSBOROUGH

No. 8015SC114

(Filed 2 September 1980)

1. Municipal Corporations § 43– road built by city on plaintiffs' land – sufficiency of evidence

In an action to recover damages for the continuing trespass of defendant town there was sufficient competent evidence to support the trial court's

finding that defendant's road and utility lines were on plaintiffs' property where the evidence tended to show that plaintiffs' surveyors established plaintiffs' property lines by physical survey, and their survey showed the location of defendant's road and utility lines on plaintiffs' property.

2. **Estoppel § 4.3– landowner mistakenly pointing out boundaries – no reasonable reliance on representation – equitable estoppel inapplicable**

In an action to recover damages for the continuing trespass of defendant town which allegedly constructed a road across plaintiffs' property, the fact that one plaintiff had mistakenly pointed out to defendant's agents where he believed the corners of his property line to be did not entitle defendant to judgment in its favor on the theory of equitable estoppel, since it was not reasonable for defendant to rely on the casual, informal opinion of the property owner as to the actual boundaries of the property when defendant had employed professional surveyors capable of determining this information for themselves.

3. **Municipal Corporations § 43– road built on plaintiffs' land – evidence of value**

In a continuing trespass case testimony by plaintiffs' expert appraisal witness that, in her opinion, their land was worth $6,000-$10,000 before a road was built and $100-$300 after the road was built was sufficient to support the trial court's findings of fact with respect to the value of the property.

APPEAL by defendant from *Battle, Judge.* Judgment entered 31 October 1979 in Superior Court, ORANGE County. Heard in the Court of Appeals 6 June 1980.

This action was commenced by the plaintiff landowners for damages for the continuing trespass of the defendant town. Plaintiffs alleged in their complaint that they were the owners in fee of a certain parcel of land in Orange County and that during 1974, the defendant took possession of a portion of this parcel, constructing a roadway from the southwest corner of the property to the northeast corner and placing power and sewer lines along the road. Defendant admitted construction of the road and utility lines, but denied that it had encroached on plaintiffs' land. The town further defended on grounds that prior to the construction of the road and utility lines, plaintiff Arthur Hill had shown to defendant's engineers the location of a corner in his property line and indicated to them where his property line was, and that defendant's construction did not encroach upon plaintiffs' property. Defendant alleged that plaintiffs' action was barred under the doctrine of equitable estoppel. The action was heard before Judge Battle in the absence of a jury.

At trial, plaintiff Arthur Hill testified that he and his wife were the owners of lot number 12 in the Whitfield Farm Subdivision, that in 1974 defendant constructed a road and water and electrical lines across lot number 12, and that neither he nor his wife had given permission for said construction. It was stipulated that plaintiffs had received no compensation from defendant for any easement in the vicinity of plaintiffs' property.

George C. Love, Jr., testified for plaintiff that he was a registered land surveyor, that he had examined a plat of lot number 12 made by Kenneth J. Sinclair, a registered land surveyor employed by him, and that he had gone upon the land with Sinclair to verify the property lines shown on Sinclair's plat. Sinclair, testifying for plaintiff, stated that he had surveyed lot number 12 and prepared a plat showing the results of his survey. Defendant's road crossed lot number 12. Elsie C. Smith, a local realtor, testified for plaintiffs as to the value of plaintiffs' property before and after the road was built.

Defendant offered the testimony of William Thomas Hott, James W. Wilder, and John B. Pridgen, Jr. Hott testified that he was employed by the engineering firm of Rose, Pridgen, and Freeman as a survey crew party chief and that he conducted preliminary survey work in the Whitfield Farm Subdivision in an effort to locate defendant's easement. Hott stated that while the work was going on, plaintiffs informed him that he was on their property. He arranged a meeting with the plaintiff Arthur Hill and Pridgen for the purpose of having Hill show them where his property lines were. Hill met with him and Pridgen and showed them certain points on a map of the area and told them that these points were the western corners of lot number 12, and that the road was constructed parallel to the line where plaintiff Arthur Hill had indicated to them his western property line ran. Hill had told them that the road was constructed west of that line. On cross-examination, Hott testified that he surveyed the area before the road was built and that in his opinion, when the road was constructed it was not on plaintiffs' property. Hott did not know whose property the road was on.

Pridgen testified that he was a registered engineer and land surveyor, that he met with Hott and Hill at the site of

defendant's easement, and that Hill identified his western line on defendant's map of the vicinity. On cross-examination, he testified that "[w]e had very little choice but to accept what Mr. Hill said was his established line."

Wilder testified that he sold lot number 12 to the plaintiffs and that if the property line was located where plaintiffs contended, the line would go through his property. On cross-examination, Wilder testified he had not had his line run and that he did not know where his lines were. Plaintiff Arthur Hill testified on rebuttal that he "walked the property off" with Pridgen and others, but that he did not know where his line was until it was surveyed.

The trial judge entered the following pertinent findings of fact:

* * *

2. The property of the plaintiffs is correctly shown on the map prepared by George C. Love, Jr. dated December 14, 1977, and introduced in this trial as Plaintiff's Exhibit #2.

3. The defendant, Town of Hillsborough, a Municipal Corporation, contracted with the firm of Rose, Pridgen and Freeman, a construction and surveying company, to assist the Town in the construction of a water reservoir and an access road leading from Highway 70-A to the water reservoir site which was to be located to the north of plaintiffs' property. Representatives of Rose, Pridgen and Freeman, acting on behalf of the Town of Hillsborough, commenced to survey the property and were surveying in the vicinity of the plaintiffs' property. A meeting was held between the plaintiff Arthur L. Hill, and representatives of the Town of Hillsborough and Rose, Pridgen and Freeman, at the site of the proposed road. At this time the plaintiff, Arthur L. Hill, pointed out what he thought were the stakes for the western line of his property. Instead of pointing out the correct stake which would have been the stake at the northwest corner of the property, the stake at the northeast corner of

the property was incorrectly identified as representing a stake in the western lines of the plaintiff[s'] property.

4. The Town of Hillsborough then caused the access road to be constructed. It was the intention of the Town of Hillsborough to construct the line along the western boundary of the plaintiffs' property and for the road not to in any way come upon plaintiffs' property. However, the access road as constructed crosses diagonally across plaintiff's *[sic]* property from its southwest corner to its northeast corner as shown on the plat introduced into evidence as Plaintiffs' Exhibit #2.

5. The plaintiffs at no time have executed any document of any kind granting to the defendant, Town of Hillsborough, any easement over their property.

* * *

8. That the fair market value of plaintiffs' property immediately prior to the construction of the road and the water line by the Town of Hillsborough was Six Thousand Dollars ($6,000.00). That the fair market value of the plaintiffs' property immediately after the construction of the road and the water line and the taking of the easement by the Town of Hillsborough was Five Hundred Dollars ($500.00).

9. The plaintiffs have received no compensation from the Town of Hillsborough.

Upon these findings of fact, the trial judge entered judgment for the plaintiffs. From the trial court's denial of defendant's motion for an involuntary dismissal at the close of the evidence and entry of judgment for the plaintiffs, defendant appeals.

F. Lloyd Noell for the plaintiffs.

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

WELLS, Judge.

[1] Defendant's main arguments are that the plaintiffs' evidence failed to establish the true boundary line between the property of the parties and that upon the evidence, plaintiffs were estopped to complain of the location of defendant's road and utility lines. It is settled law that where the case is tried by the judge without a jury, the court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence might sustain findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). From the evidence it is clear that plaintiffs' surveyors established plaintiffs' property lines by physical survey, and that their survey tends to show the location of defendant's road and utility lines on plaintiffs' property. There was accordingly sufficient competent evidence to support the trial court's operative findings of fact fixing the location of defendant's road and utility lines on plaintiffs' property.

[2,3] Defendant argues that since the trial court found that prior to the construction of the road, plaintiff Arthur Hill had mistakenly pointed out to defendant's agents where he believed the corners of his property line to be, defendant was entitled to judgment in its favor on the theory of equitable estoppel. The requirements for application of the doctrine of equitable estoppel were set forth by our Supreme Court in *Matthieu v. Gas Co.*, 269 N.C. 212, 216, 152 S.E. 2d 336, 340 (1967), quoting from *Boddie v. Bond*, 154 N.C. 359, 365-366, 70 S.E. 824, 826-827 (1911):

> "In order to constitute an equitable estoppel, there must exist a false representation or concealment of material fact, with a knowledge, actual or constructive, of the truth; the other party must have been without such knowledge, or *having the means of knowledge* of the real facts, must not have been culpably negligent in informing himself; it must have been intended or expected that the representation or concealment should be acted upon, and the party asserting the estoppel must have reasonably relied on it or acted upon it to his prejudice . . . . It is a species of fraud which

forms the basis of the doctrine, and to prevent its consummation is its object." [Emphasis ours.]

Accord, Yancey v. Watkins, 2 N.C. App. 672, 163 S.E. 2d 625 (1968). From the evidence in this case it is plain that it was simply not reasonable for the defendant to rely on the casual, informal opinion of the property owner as to the actual boundaries of the property, when the defendant had employed professional surveyors capable of determining this information for themselves. The doctrine of equitable estoppel was accordingly not applicable. In its fourth assignment of error, defendant argues that the evidence does not support the trial court's findings of fact with respect to the value of plaintiffs' property taken by defendant. Plaintiffs' expert appraisal witness testified that in her opinion lot number 12 was worth between $6,000 and $10,000 before the road was put on the lot and that after the road was put on the lot, the lot could be worth between $100 and $300. We find that this evidence was clearly sufficient to support the trial court's findings of fact with respect to the value of the property.

The judgment of the trial court must be

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

STANTON M. HOFFMAN v. RALPH D. EDWARDS, DIRECTOR NORTH CAROLINA DEPARTMENT OF CORRECTION, DIVISION OF PRISONS, OFFICIALLY

No. 7910SC1105

(Filed 2 September 1980)

1. **Habeas Corpus § 2.3; Convicts and Prisoners § 2– prison inmate – complaint within jurisdiction of Inmate Grievance Commission – failure to exhaust administrative remedies – no habeas corpus jurisdiction**

The superior court had no jurisdiction to entertain a prison inmate's petition for a writ of habeas corpus where the inmate's grievance concerned a disciplinary hearing and fell within the jurisdiction of the Inmate Grievance Commission, and the record does not show that the inmate filed a

complaint with the Inmate Grievance Commission or that he exhausted his administrative remedies.

2. **Habeas Corpus § 2.3; Convicts and Prisoners § 2– prison inmate – grievance – exhaustion of administrative remedies – no conflict with guarantee of habeas corpus**

The statute requiring an inmate to exhaust his administrative remedies before he is entitled to judicial review of a grievance or complaint within the jurisdiction of the Inmate Grievance Commission, G.S. 148-113, does not conflict with constitutional and statutory provisions guaranteeing the privilege of the writ of habeas corpus, Art. I, § 21 of the N.C. Constitution, G.S. 17-1, and G.S. 17-2, since G.S. 148-113 only prescribes the method by which the inquiry into the lawfulness of an inmate's detention is to be conducted.

ON writ of certiorari to review the order of *Martin (John C.), Judge.* Order entered 30 July 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 14 May 1980.

Stanton Hoffman, an inmate of the North Carolina Department of Correction, filed a petition for a writ of habeas corpus alleging that he had been unlawfully and unconstitutionally imprisoned and restrained of his liberty (1) in violation of his Fourteenth Amendment due process rights and (2) in violation of the Department of Correction's own rules and policies.

Hoffman, according to his petition, had been incarcerated at the Rockingham County Prison Unit. On 17 May 1979, he was charged with assault, failure to obey an order, and possession of funds in excess of the authorized amount. An Area Disciplinary Committee convicted Hoffman of these offenses, and as a direct result of the assault conviction, Hoffman was demoted to closed custody and placed in intensive management by a reclassification subcommittee of the Division of Prisons. Since his reclassification, Hoffman has been held in administrative segregation at the Caswell County Prison Unit.

During the disciplinary hearing, no statements were taken from witnesses or given to the investigating officer by Hoffman. He was not given the right to assistance in representation by a member of the staff of his prison unit, the officer appointed to assist him in the preparation of his defense was ineffective, and Hoffman was not given an opportunity to gather evidence on his behalf.

On 30 July 1979, Hoffman filed a motion seeking issuance of a temporary restraining order and a preliminary injunction. The trial court issued a temporary restraining order on the same day and issued writs of habeas corpus *ad testificandum* one day later. On 1 August 1979, the State filed an application for temporary stay of the trial court's order in this Court, which was allowed on the same day. The State also petitioned for a writ of certiorari on 1 August 1979. We issued a writ of certiorari to review the trial court's order on 26 September 1979.

Attorney General Edmisten, by Special Deputy Attorney General Jacob L. Safron and Associate Attorney Richard L. Kucharski, for the State.

Thompson & McAllaster, by Carolyn McAllaster, for respondent appellee.

ERWIN, Judge.

Respondent Hoffman (original petitioner) sought to invoke the habeas corpus jurisdiction of the trial court pursuant to G.S. 17-7.

G.S. 17-1 provides that "[e]very person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed," while G.S. 17-2 provides that "[t]he privileges of the writ of habeas corpus shall not be suspended." These two statutes are the statutory codification of Article I, § 21 of the North Carolina Constitution which provides:

> "Sec. 21. *Inquiry into restraints on liberty.* Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended."

Traditionally, the writ of habeas corpus was thought to issue only to ascertain whether the court which imprisoned the

person seeking the relief had jurisdiction of the matter or whether the court had exceeded its power. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962); *In re Stevens*, 28 N.C. App. 471, 221 S.E. 2d 839 (1976). Whatever the case may have been, it is clear now that the scope of a court's habeas corpus jurisdiction is much broader.

G.S. 17-33 provides in pertinent part:

> "§ 17-33. *When party discharged.* — If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appears on the return to the writ that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:
>
> . . . .
>
> (2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged."

This is the provision which respondent Hoffman sought to invoke to activate the trial court's habeas corpus jurisdiction, although United States constitutional violations were alleged. The State raises the argument that the trial court had no jurisdiction to hear Hoffman's petition since Hoffman had failed to exhaust his administrative remedies. We now turn to examine the validity of this argument.

G.S. 148-113 provides:

> "§ 148-113. *Judicial review.* — No court shall entertain an inmate's grievance or complaint within the jurisdiction of the Inmate Grievance Commission unless and until the complainant has exhausted the remedies provided in this

> section. Upon the final decision of the Secretary of Correction, the complainant shall be entitled to judicial review thereof. Proceedings for review shall be instituted in the General Court of Justice of Wake County, Superior Court Division. Review by the court shall be on the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings and shall be limited to a determination of whether there was a substantial basis to support the action or ruling of the Secretary and whether there was a violation of any right of the inmate protected by federal or State constitutional requirements or laws. No judicial review order or judgment provided for in this section shall have the effect of res judicata or collateral estoppel in any action brought by an inmate in a United States District Court."

There is no dispute that Hoffman's grievance falls within the jurisdiction of the Inmate Grievance Commission, and the record does not show that he filed a complaint with the Inmate Grievance Commission or that he exhausted his administrative remedies. We are only allowed to take cognizance of that which is within the record before us. *See Hall v. Hall*, 235 N.C. 711, 71 S.E. 2d 471 (1952); 1 Strong's N.C. Index 3d, Appeal and Error, § 22.1, p. 237. Thus, the essential question becomes whether the trial court had jurisdiction to hear the writ of habeas corpus. Respondent argues that G.S. 148-113 is unconstitutional and refers us to Article I, § 21 of our State Constitution. We hold that G.S. 148-113 is constitutional.

[1] As we have already pointed out, the writ of habeas corpus, as it existed at common law, was not thought to issue to review all deprivations of liberty. It is only through legislative grace that the remedy has been extended. In 1 Strong's N.C. Index 3d, Administrative Law, § 2, p. 63, it is stated: "When the legislature has provided an effective administrative remedy, it is exclusive. The remedy provided by statute for the enforcement of a right created by statute is exclusive, and the party asserting such right must pursue the prescribed remedy, and exhaust his administrative remedies before resorting to the courts." (Footnotes omitted.) *See also Church v. Board of Education*, 31 N.C. App. 641, 230 S.E. 2d 769 (1976), *cert. denied*, 292 N.C. 264, 233

S.E. 2d 391 (1977). Here, the Legislature, which created the remedy, has prescribed the procedure whereby relief is to be attained, *i.e.*, pursuant to G.S. 148-113, and Hoffman must follow it.

[2] What effect does G.S. 17-1 and G.S. 17-2 have on our analysis? "Statutes dealing with the same subject matter must be construed in pari materia, and harmonized, if possible, to give effect to each." (Footnotes omitted.) 12 Strong's N.C. Index 3d, Statutes, § 5.4, p. 69. As we construe the statutes, no irreconcilable conflicts exist. The purpose of G.S. 17-1 and G.S. 17-2 is to insure that a remedy is provided to inquire into the lawfulness of respondent Hoffman's restraint. G.S. 148-113 prescribes the method by which the inquiry is to be conducted. The "suspension" of the writ which is prohibited means the denial of the right to demand an investigation into the cause of his detention. *See State v. Towery*, 143 Ala. 48, 39 So. 309 (1905). This respondent has been afforded. Our analysis is supported by the general rule: "Generally, habeas corpus may not be resorted to until all other available remedies for relief have been exhausted. Accordingly, the petitioner must have properly pursued all legal and administrative remedies before a writ of habeas corpus may be employed." (Footnotes omitted.) 39 C.J.S., Habeas Corpus, § 11, pp. 483-84.

Respondent Hoffman argues that we should treat his State habeas corpus petition as an action filed pursuant to 42 U.S.C. § 1983 (as amended 1979). The short answer to this argument is that respondent Hoffman's learned counsel instituted this action in the Superior Court invoking its habeas corpus jurisdiction under G.S. 17-7 and may not now seek to invoke other jurisdictional grounds not pleaded.

[1] For the foregoing reasons, we hold that the trial court did not have jurisdiction to issue a writ of habeas corpus prior to respondent's exhaustion of his administrative remedies. Accordingly, we hold that the trial court had no authority to issue the temporary restraining order nor the writs of habeas corpus *ad testificandum.*

The order entered below is

Reversed.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. KENNETH PORTER

No. 7915SC956

(Filed 2 September 1980)

1. **Rape § 4– psychological damage to rape victim – cross-examination to show source other than defendant – limitation proper**

In a prosecution for second degree rape where the prosecuting witness's father testified concerning psychological damage to his daughter and the State used this evidence to corroborate the prosecuting witness's testimony that she had been raped, there was no merit to defendant's contention that he was entitled to ask the prosecuting witness whether she had been living with a man at the time of the alleged rape and whether she had an abortion subsequent to the alleged rape in order to show that the psychological damage to the prosecuting witness had come from another source since the answers to those questions would not tend to impeach the testimony of the prosecuting witness's father.

2. **Rape § 4.3– cross-examination of prosecutrix – limitation not denial of constitutional rights**

There was no merit to defendant's contention that G.S. 8-58.6(b), restricting his right to cross-examine the prosecuting witness in a rape prosecution, denied him his Sixth Amendment right to cross-examine a witness against him or that it violated fundamental fairness for him to be subject to a broader range of cross-examination than the principal witness appearing against him, since the statute changed the rule of evidence in such a way that matters collateral to the issues on trial could not be introduced into evidence, and this change did not violate defendant's right to cross-examine witnesses; and since fundamental fairness does not require that the scope of cross-examination of all witnesses be precisely the same.

3. **Rape § 4– pillow taken from crime scene 12 days later – admissibility in rape case**

The trial court in a rape prosecution did not err in allowing into evidence a pillow taken 12 days after the alleged rape from the sofa on which the crime occurred, and evidence that tests revealed the presence of sperm on the pillow was properly admitted, though defendant contended that he had had sex relations with his wife on the sofa two or three weeks before the alleged crime and contended that seizure of the pillow was too remote in time to have any relevance in this case, since defendant's contentions went to the weight of the evidence and not to its admissibility.

State v. Porter

APPEAL by defendant from *Graham, Judge.* Judgment entered 9 May 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 4 March 1980.

Defendant was tried for second degree rape. The prosecuting witness testified that on 18 November 1978 she was at the home of the defendant to assist him and his wife in caring for their baby. She fell asleep on the couch and woke up with the defendant on top of her. She testified he had intercourse with her against her will. Defendant denied that he had intercourse with the prosecuting witness.

The defendant was convicted of assault with intent to commit rape. From an active prison sentence imposed, the defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for the State.

Hunt and Abernathy, by George E. Hunt, for defendant appellant.

WEBB, Judge.

[1] Defendant's first assignment of error is to the court's refusing to allow the defendant to ask the prosecuting witness (1) whether she had been living with a man at the time of the alleged rape and (2) whether she had an abortion subsequent to the alleged rape. The court sustained objections to these questions pursuant to G.S. 8-58.6(b) which provides:

> (b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complaint [sic] and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

The father of the prosecuting witness testified that he noticed a personality change in his daughter after 18 November 1978 so that she did not want to go to school, she "acted kind of funny towards me and my brother" and did not seem to want to be around "men folks." He testified further that after she had talked to a detective some two weeks after the incident, "she began getting back to her old self." The defendant contends that when the State used this evidence of psychological damage to the prosecuting witness to corroborate her testimony that she had been raped, he was entitled to propound these two questions to show that the psychological damage to the prosecuting witness had come from another source.

Before it ruled on the propriety of the questions, the superior court held an *in camera* hearing. The prosecuting attorney stated at this hearing that the prosecuting witness's doctor had determined the conception, which was aborted, had taken place five or six weeks after 18 November 1978. There was not an objection to this statement by the prosecuting attorney and neither side disputes the date of conception on this appeal. We do not believe this incident of sexual conduct which occurred several weeks after her father testified she was "getting back to her old self," could be used to impeach his corroborating testimony as to the personality change that occurred at the time of the alleged rape.

In regard to the question as to whether the prosecuting witness was living with her boyfriend, there is nothing in the record as to what her answer would have been. She did testify

at one point that she was living with her parents. Assuming the answer would have been that she was living with her boyfriend, we hold the answer was properly excluded as not impeaching the testimony of the prosecuting witness's father. He limited the time of her personality change from 18 November 1978 until she talked to the detective two weeks later. There was no showing that the time she purportedly lived with her boyfriend was limited to this period.

The defendant also contends the statute excludes only evidence of sexual behavior that occurred prior to the alleged incident for which the defendant was charged. The defendant argues that the questions which he proposed to ask were in regard to sexual behavior on or after 18 November 1978, and it was error not to allow them. As we read the statute there is no such limitation. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends that G.S. 8-58.6(b) is unconstitutional as applied to him. He argues that by restricting his right to cross-examine the prosecuting witness, he has been denied his Sixth Amendment right to cross-examine a witness against him. He argues further that it violates fundamental fairness for him to be subject to a broader range of cross-examination than the principal witness appearing against him.

A party does not have a constitutional right to any particular rule of evidence. *See Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970). He does have a constitutional right to cross-examine witnesses appearing against him. G.S. 8-58.6(b) changes the rule of evidence in such a way that matters collateral to the issues on trial may not be introduced into evidence. We hold this change in the rule of evidence does not violate the defendant's constitutional right to cross-examine witnesses who appear against him.

As to the argument that it violates fundamental fairness to allow questions of the defendant that are not allowed as to the prosecuting witness, we do not believe the scope of cross-examination of all witnesses has to be precisely the same to

meet constitutional muster. The defendant's second assignment of error is overruled.

[3] The defendant's third assignment of error is to the introduction in evidence of a pillow taken from the couch on 30 November 1978. After the pillow was introduced into evidence, a stipulation was read to the jury that a microscopic examination of specimens taken from the pillow revealed the presence of spermatozoa. The defendant testified that he had sex relations with his wife on the sofa two or three weeks before 18 November 1978. Defendant contends the seizure of the pillow was too remote in time to have any relevance in this case. Defendant contends the State should have been required to prove the condition of the pillow on 30 November 1978 was substantially the same as it had been on 18 November 1978, that there had been no intervening causes which would have resulted in the spermatozoa found on the pillow, and the spermatozoa could have been the result of the sexual assault described by the prosecuting witness.

The pillow was seized by the officers 12 days after the alleged rape. It was identified by the prosecuting witness as being from the couch. We hold the court did not abuse its discretion in admitting the pillow and the accompanying testimony into evidence. *See* 1 Stansbury's N.C. Evidence § 90 (Brandis rev. 1973). The arguments of the defendant as to why it should not have been introduced go to the weight of the evidence and were for the jury's determination. Defendant relies on *State v. Kelly*, 227 N.C. 62, 40 S.E. 2d 454 (1946). In that case our Supreme Court held it was prejudicial error in a driving under the influence case to admit testimony that the defendant was drunk 12 hours after the time it was charged he was driving under the influence of an intoxicating beverage. The Court pointed out that sobriety can vary widely over a 12-hour period. In the case sub judice, the condition of the pillow was not subject to the same circumstances.

The defendant's fourth assignment of error is to the court's submission of the charge of assault with intent to commit rape. He contends that there is no evidence of this lesser included charge. He concedes that this has been held not to be an error

against the defendant. *See State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). He asks us to hold it was prejudicial error in this case. To do so, we would have to overrule our Supreme Court which we do not have the power to do. We also note that the defendant stipulated the charge of assault with intent to commit rape would be submitted to the jury. He cannot now complain that it was so submitted.

No error.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. WANDA TERRY SOWDEN

No. 7912SC1023

(Filed 2 September 1980)

1. **Searches and Seizures § 23– search warrant for narcotics – probable cause**

An officer's affidavit was sufficient to support a finding of probable cause for the issuance of a warrant to search defendant's home for heroin where it stated that the officer was told by an informant that heroin could be bought from defendant at her home; the officer searched the informant and found no drugs; the officer gave the informant money, went with him to defendant's home, waited outside the home and watched the informant enter the home; the officer watched the informant return from defendant's home; and the informant gave the officer a package containing a white powder which was tested and found to contain heroin.

2. **Bills of Discovery § 6; Criminal Law § 128.2– failure to comply with discovery order – mistrial – discretion of court**

It should be left to the discretion of the trial court as to whether a mistrial is an "appropriate order" within the meaning of G.S. 15A-910(4) for the State's failure to comply with a discovery order.

3. **Bills of Discovery § 6; Criminal Law § 128.2– failure to disclose defendant's statement – use at trial – denial of mistrial – no abuse of discretion**

The trial court did not abuse its discretion in the denial of defendant's motion for a mistrial because the State presented evidence of an oral inculpatory statement of defendant which it had not disclosed pursuant to discovery conducted by defendant where the court instructed the jury not to consider such evidence.

State v. Sowden

4. **Criminal Law § 117.3– instruction on officer as interested witness – no reference to "undercover agent"**

In a prosecution for possession of heroin with intent to sell and deliver, the trial court did not commit reversible error in failing to refer to an officer as an "undercover agent" in its instructions on the officer as an interested witness.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 5 June 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 March 1980.

Defendant was tried for the possession of heroin with intent to sell and deliver. The State's evidence tended to show that on 8 November 1978 Leroy McLamb, an undercover drug agent with the Cumberland County Sheriff's Department, accompanied an informant to the defendant's home in Fayetteville. The informant went into the home and returned with a package containing heroin. McLamb obtained a search warrant and returned with other officers to the defendant's home. After entering the home, one of the officers observed a package of white powder fall to the floor as the defendant ran to the back of the house. The package contained heroin. The defendant presented no evidence.

From a sentence imposed after the defendant was convicted, the defendant has appealed.

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

Assistant Public Defender Rebecca J. Bosley for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the validity of the search warrant. Defendant contends the evidence seized in the search of her home should have been excluded from evidence because the affidavit by Mr. McLamb was not sufficient for the magistrate to find there was probable cause that

there was heroin in the home. Mr. McLamb said in the affidavit, in substance, that he had been told by an informant that he could buy heroin from the defendant in her home at 602 Hicks Avenue in Fayetteville; that he strip searched the informant and found no currency or narcotics; that he gave the informant money and went with him to 602 Hicks Avenue; that he waited outside the house and watched the informant enter the house; and that he saw the informant come out of the house and return to the presence of Mr. McLamb. Mr. McLamb further stated in the affidavit that the informant then gave him a white powder which was tested and found to contain heroin. The magistrate issued a search warrant for the residence at 602 Hicks Avenue in Fayetteville based on this affidavit.

The rule governing the issuance of search warrants has been stated in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). As we read that case, a search warrant, to be valid, must be based on factual or circumstantial evidence presented to a neutral and detached judicial officer which provides the judicial officer with a substantial basis to find probable cause that there is evidence on the premises which may be used in a criminal prosecution. A mere affirmance or belief by the affiant that such evidence is present is not enough. We hold that the affidavit of Mr. McLamb, in which he stated that he searched the informant and found no drugs; that he gave the informant currency and watched him enter the residence at 602 Hicks Avenue; that he watched the informant return from 602 Hicks Avenue and that the informant then gave Mr. McLamb heroin is evidence from which a magistrate would have a substantial basis to find probable cause that heroin was present at 602 Hicks Avenue.

The defendant urges that the search warrant is invalid under *Aguilar* because there was no basis in the affidavit for judging the reliability of the informant. *Aguilar* stated what has been called the two-pronged test to be used when the affiant is relying on a statement by an informer. We do not believe it has any application in this case because Mr. McLamb was not relying on a statement by an informer. His affidavit was based on things he had observed.

The defendant's first assignment of error is overruled.

The defendant's second assignment of error is to the court's denial of a motion for mistrial. The defendant had conducted pretrial discovery and the State, in furnishing to defendant oral statements made by defendant which might be used at trial, had stated:

> "Sowden stated to police that John Medlock lived in the house at 602 Hicks Ave. with her and that he was asleep on the bed 20 mins. before execution of the search warrant."

During the direct examination of Mr. McLamb he testified: "She stated that John Medlock lived there and she wasn't taking all the blame." Upon objection by the defendant, the court instructed the jury to disregard this statement.

[2, 3] It appears from the record that the State violated Article 48 of Chapter 15A by using an oral statement of the defendant which it had not disclosed pursuant to the discovery conducted by the defendant. It appears that the statement given to the defendant pursuant to the discovery did not inculpate her, and the statement to which Mr. McLamb testified did inculpate her. We note from the record that the prosecuting attorney seemed to be as surprised at the testimony as the defendant's attorney. G.S. 15A-910 provides:

> If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may:
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (4) Enter other appropriate orders.

In this case the court instructed the jury not to consider this testimony. The defendant did not request a continuance or

recess. The defendant made a motion for a mistrial. The fourth alternative listed under G.S. 15A-910 is that the court may "[e]nter other appropriate orders." It would appear that this would include the entering of an order for mistrial. We believe it should be left to the discretion of the superior court as to whether a mistrial is an appropriate order. We hold that in this case the court did not abuse its discretion by denying a motion for a mistrial. The court immediately instructed the jury to disregard the testimony. There was other strong evidence of the defendant's guilt. We cannot hold that the defendant suffered prejudicial error by the denial of the motion for mistrial.

[4] Defendant's third assignment of error is to the charge of the court. The defendant requested that the court give an instruction as to Mr. McLamb as an interested witness in accordance with the Pattern Jury Instructions which provide at N.C.P.I. — Crim. 104.30 as follows:

> "You may find from the evidence that State's witness (name witness), is interested in the outcome of this case because of his activities as an (informer) (undercover agent). If so, you should examine his testimony with care and caution in light of that interest. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence."

The court charged as follows:

> "Now, you may find that Officers McLamb and Baker are interested witnesses; that is to say, that they are interested in the outcome of this trial by reason of their position as investigating and arresting officers, and in deciding whether or not to believe such a witness you should take and may take his interest into account, but if after doing so you believe the testimony of such witness in whole or in part you should treat what you believe the same as any other believable evidence in the case."

The defendant objects to this instruction because the court did not refer to Mr. McLamb as an undercover agent. This Court

has held that a police officer is not an interested witness as a matter of law. *State v. Richardson*, 36 N.C. App. 373, 243 S.E. 2d 918 (1978). It has held it is reversible error not to give an instruction in general accordance with the Pattern Jury Instructions if requested by defendant if an undercover agent is involved. *State v. Black*, 34 N.C. App. 606, 239 S.E. 2d 276 (1977). We do not believe it is reversible error not to refer to the officer as an undercover agent if the charge is otherwise substantially in accord with the Pattern Jury Instructions. We note that in the case sub judice that Mr. McLamb testified he was an undercover agent. It was not in his capacity as an undercover agent, however, that he made the investigation and arrest of the defendant.

We also note that the court in this case varied from the Pattern Jury Instructions in another respect. Rather than instructing the jury to "examine his testimony with care and caution" the court instructed the jury they "should take and may take his interest into account." We believe the charge given was not quite as strong for the defendant as the Pattern Jury Instruction charge. Nevertheless, we hold it is not such a substantial variation as to be reversible error.

No error.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. BARBARA K. BIRKHEAD, DAVID B. BIRKHEAD, MARTIN C. SMITH, WILLIAM H. MATTHEWS

No. 7910SC1176

(Filed 2 September 1980)

1. Trespass § 13– forcible entry – instructions on required force proper

In a prosecution of defendants under G.S. 14-126 for forcible entry, the trial court did not err in instructing the jury that the multitude of persons entering the property would be sufficient to constitute the required force and that the only force required was the force necessary to remain on the premises after having been requested to leave, since defendants acted in concert with approximately twenty other persons in staging a sit-in at the

premises of a utility company; their number was of such magnitude that only by yielding to their continued presence could the utility avoid a breach of the peace, once defendants and their companions had refused to leave as requested; and in such a situation, the original entry, though peaceful, became unlawful, though no other force was used.

2. **Trespass § 13– forcible entry – instruction on expulsion not required**

In a prosecution of defendants under G.S. 14-126 for forcible entry where defendants staged a sit-in on the premises of a utility company, the trial court did not err in failing to instruct the jury that to convict defendants of forcible entry, it must find that defendants expelled the utility from its premises.

3. **Trespass § 13– forcible entry – sit-in at utility company – sufficiency of evidence**

In a prosecution of defendants under G.S. 14-126 for forcible entry, evidence was sufficient to be submitted to the jury where it tended to show that Carolina Power & Light Co. was the owner of an estate at 411 Fayetteville Street in Raleigh; defendants and twenty other demonstrators staged a sit-in in the eleventh floor lobby even though they were asked to leave by a properly identified Carolina Power & Light official; the group's occupation of the lobby caused some Carolina Power & Light employees to alter their mail deliveries and others to forego use of the lobby; and Carolina Power & Light officials allowed the demonstrators to remain because they were without means to remove the demonstrators without breaching the peace.

APPEAL by defendants from *Clark (Giles R.), Judge.* Judgments entered 16 August 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 24 April 1980.

The State's evidence tends to show that on 9 April 1979 around 10:00 a.m., defendants along with twenty other demonstrators entered the premises at 411 Fayetteville Street occupied by Carolina Power and Light Company (hereinafter CP&L). Their stated purpose was to stop construction of the Shearon Harris Nuclear Plant being built by CP&L. Upon entry into the lobby of the building, the demonstrators were met by Mr. C.H. Cline, Jr., manager of the corporate headquarters facility at 411 Fayetteville Street, who asked if he could be of assistance. Someone in the group said, "No," and said that they were going to the twelfth floor to talk to some executives of the company. The group proceeded into two of the high-rise elevators and pushed the elevator button for the twelfth floor. A CP&L official in each elevator stopped the elevators on the eleventh floor. The demonstrators were informed that there was no space on the twelfth floor to accommodate them and

were asked to go into a conference room on the eleventh floor. The demonstrators got off the elevators, entered the eleventh floor lobby, formed a circle around the lobby with interlocked arms and stated that "they were not going to leave the elevator lobby until all construction was stopped on the Shearon Harris Nuclear Plant."

Due to the presence of the demonstrators, CP&L officials were denied full access to the eleventh floor; its mailroom employees were forced to change their delivery routes; and a meeting scheduled to be held in the conference room by CP&L executives was cancelled. During the period of occupation, the demonstrators sang songs and clapped. Between 3:00 p.m. and 3:30 p.m., Mr. Cline identified himself to the group and asked them to leave the premises. They refused. Around 6:30 p.m., defendants along with other members of the group were arrested by members of the Raleigh Police Department and charged with violation of G.S. 14-126.

Defendants' evidence tended to show that the eleventh floor lobby was freely accessible to CP&L officials and that no violence occurred, nor were any threats made. On the contrary, they and the CP&L officials joked, talked about matters of common interest, and were extremely cordial to each other.

Defendants were convicted of violation of G.S. 14-126 in District Court, appealed to Superior Court, and were convicted of the offense in Superior Court. From judgments entered, they appeal.

Attorney General Edmisten, by Associate Attorney William R. Shenton, for the State.

Deborah Greenblatt, for defendant appellants.

ERWIN, Judge.

[1] Defendants' initial assignment of error is that the trial court erred in charging the jury that the only force required to constitute forcible entry would be the force necessary to remain on the premises after having been asked to leave. Under the

facts as disclosed by the record, we find no prejudicial error in the charge.

To constitute the offense of forcible trespass, there must be a demonstration of force, as with weapons or multitude of people, so as to make a breach of the peace or directly tend to it, or be calculated to intimidate or put in fear. *State v. Covington*, 70 N.C. 71. "The gist of the offense of forcible trespass is the high-handed invasion of the actual possession of another, he being present forbidding," *State v. Earp*, 196 N.C. 164, 167, 145 S.E. 23, 25 (1928), and the other need not be put in fear; it is only necessary that the force be such that the party in possession must yield to avoid a breach of the peace. *Id.*

In the instant case, the trial court instructed the jury, first, that the multitude of persons entering the property would be sufficient to constitute the required force. This instruction was without error. *See State v. Ray*, 32 N.C. (10 Ired.) 39; *State v. Simpson*, 12 N.C. (1 Dev.) 504. Furthermore, we find no error in the trial court's second instruction:

> "Now, as to the failure of the defendant to leave the premises, I instruct you that even though a person enters premises peacefully, if such person thereafter refused to leave the premises upon the order of the person in lawful possession of those premises, then such person would be a trespasser from the beginning and such failure to leave would constitute a forcible entry into the premises. So it is that the State must prove to you beyond a reasonable doubt that the defendant refused to leave the premises after having been ordered to do so by someone in possession of the property. The only force that is required in that instance is the force that would be necessary to remain on the premises after having been requested to leave."

Had defendants acted individually, this instruction would be clearly erroneous.[1] *See State v. Mills*, 104 N.C. 905, 10 S.E. 676

[1]We believe that the Supreme Court's statement in *State v. Clyburn*, 247 N.C. 455, 101 S.E. 2d 295 (1958), intimating that a mere refusal to leave by a single individual would sustain a conviction under G.S. 14-126 was mere dictum, since the court was faced with convictions under G.S. 14-134, and our case law requires a greater demonstration of force than the technical trespass.

(1890), and *State v. Covington*, 70 N.C. 71. However, here defendants acted in concert with approximately twenty other persons in staging a sit-in. Their number was of such a magnitude that only by yielding to their continued presence could a breach of the peace be avoided, once they had refused to leave as requested. In such a situation, the original entry, though peaceful, becomes unlawful, though no other force is used. *See* G.S. 14-126; *State v. Tyndall*, 192 N.C. 559, 135 S.E. 451 (1926); *State v. Woodward*, 119 N.C. 836, 25 S.E. 868 (1896); *State v. Davis*, 109 N.C. 809, 13 S.E. 883 (1891).

[2] Defendants next assign as error the trial court's refusal to instruct the jury on forcible entry as they requested.

Since their first argument that the trial court erred in its instruction on the necessary force to sustain a conviction has been rejected, defendants' similar argument under this assignment of error is overruled. Thus, we need only address defendants' argument that the trial court committed prejudicial error in not instructing the jury that to convict defendants of forcible entry, it must find that defendants expelled CP&L from the premises located at 411 Fayetteville Street. We find no error.

Defendants were convicted under G.S. 14-126. While expulsion of possession must be alleged where actual ouster has occurred, we do not believe that such an allegation is essential when the basis for charging defendants with violation of G.S. 14-126 is because of a refusal to leave. Thus, we find the decision in *State v. Bryant*, 103 N.C. 436, 9 S.E. 1 (1889), distinguishable and hold that the trial court did not err in refusing to instruct on expulsion.

[3] Defendants' final assignment of error is that its motion to dismiss should have been granted, based on their foregoing argument of insufficiency of force. Since we have already rejected the contention as to sufficiency of evidence of force, we need only consider the sufficiency of the evidence to meet the other elements.

The State's evidence tended to show that CP&L was the owner of an estate in the premises at 411 Fayetteville Street;

that defendants and twenty other demonstrators staged a sit-in in the eleventh floor lobby, even though they were asked to leave by a properly identified CP&L official; that the group's occupation of the lobby caused come CP&L employees to alter their mail deliveries and others to forego use of the lobby; and that CP&L officials allowed the demonstrators to remain, because they were without means to remove the demonstrators without breaching the peace. This evidence was sufficient to withstand defendants' motion to dismiss.

In the defendants' trial, we find

No error.

Judges HEDRICK and ARNOLD concur.

BOBBY FLOARS TOYOTA, INC. v. CHARLES EDWARD SMITH, JR. AND STELLA L. SMITH

No. 808DC167

(Filed 2 September 1980)

Infants § 2– purchase of car by minor – contract not disaffirmed within reasonable time after majority – ratification of contract

Defendant who executed an installment loan contract for the purchase of an automobile while a minor did not disaffirm his contract within a reasonable time after reaching the age of majority by relinquishing the automobile to plaintiff dealer ten months after reaching majority. Furthermore, defendant ratified the contract by continuing to possess and operate the automobile and continuing to make the monthly installment payments for ten months after becoming eighteen years of age and thereby waived his right to disaffirm the contract.

APPEAL by plaintiff from *Ellis (Kenneth R.), Judge.* Judgment entered 6 September 1979 in District Court, WAYNE County. Heard in the Court of Appeals 12 June 1980.

Defendant Charles Edward Smith, Jr., purchased an automobile from plaintiff on 15 August 1973. On that date defendant was seventeen years old, and would have his eighteenth birthday on 25 September 1973. Defendant executed a purchase

money security agreement to finance $2,362, the balance due on the purchase price of the automobile, payable in 30 installments of $99.05 each. Plaintiff subsequently assigned the purchase money security agreement to First Union National Bank (First Union). After having made eleven monthly payments pursuant to the installment loan contract, ten of which were made after his eighteenth birthday, defendant voluntarily returned the automobile to plaintiff, and defaulted on his payment obligations. Upon default, First Union reassigned the purchase money security agreement to plaintiff, which proceeded to sell the automobile at public auction. At the time of sale a balance was owing on the purchase money security agreement of $1,521.52. The automobile was sold for $700, leaving a deficiency of $821.52. After its demand of defendants for payment of the deficiency was refused, plaintiff instituted this action to recover damages in the amount of the deficiency.

On hearing, the trial court, sitting as jury, found that defendant Charles Edward Smith, Jr., was a minor at the time he purchased the automobile and that he properly "disaffirmed the contractual obligation with the plaintiff by voluntarily relinquishing said automobile approximately ten months after attaining his majority." The court concluded further that "this ten month period is a reasonable time within which to disaffirm his contractual obligations under the circumstances of this case." The court also found that defendant Stella L. Smith, defendant's mother, signed the purchase money security agreement only in the capacity of a witness, and incurred no liability. From the judgment dismissing plaintiff's complaint, plaintiff appeals.

David M. Rouse for plaintiff appellant.

No counsel contra.

MORRIS, Chief Judge.

The only question posed for review is whether defendant Charles Smith's voluntary relinquishing the automobile ten months after attaining the age of majority constitutes a timely disaffirmance of his contract with plaintiff.

The rule in North Carolina regarding a minor's contract liability is as follows:

> It is well settled that the conventional contracts of an infant, except those for necessities and those authorized by statute, are voidable at the election of the infant and may be disaffirmed by the infant during minority or within a reasonable time after reaching majority. *Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E. 2d 19; *Fisher v. Motor Co.*, 249 N.C. 617, 107 S.E. 2d 94; *Collins v. Norfleet-Baggs*, 197 N.C. 659, 150 S.E. 177; *Chandler v. Jones*, 172 N.C. 569, 90 S.E. 580.

Insurance Co. v. Chantos, 293 N.C. 431, 443-44, 238 S.E. 2d 597, 605 (1977); *Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E. 2d 19 (1970); *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968). "[W]hat is a reasonable time depends upon the circumstances of each case, no hard-and-fast rule regarding precise time limits being capable of definition." *Insurance Co. v. Chantos*, 25 N.C. App. 482, 490, 214 S.E. 2d 438, 444, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 624 (1975).

This concept of "reasonable time" is more fully explained in *Weeks v. Wilkins*, 134 N.C. 516, 522, 47 S.E. 24, 26 (1904), where the Court quoted from Devlin on Deeds, Vol. I, sec. 91:

> The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one, on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance, executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act,

> he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it.

This rule was cited and applied in many early cases, sometimes modified by a special rule applying exclusively to conveyances of land, where the court in some situations deemed three years after majority as a reasonable time within which to disaffirm a deed or mortgage executed before majority. *Faircloth v. Johnson*, 189 N.C. 429, 127 S.E. 346 (1925); *Hogan v. Utter*, 175 N.C. 332, 95 S.E. 565 (1918); *Chandler v. Jones*, 172 N.C. 569, 90 S.E. 580 (1916); *Baggett v. Jackson*, 160 N.C. 26, 76 S.E. 86 (1912); *Weeks v. Wilkins, supra.*

Applying the general rule in an action involving a contract concerning personalty, the Court in *Hight v. Harris*, 188 N.C. 328, 124 S.E. 623 (1924), for example, held that an infant may avoid such a contract on account of his infancy during his minority or on coming of age, "if he acts promptly in the matter." 188 N.C. at 330, 124 S.E. at 624. *See also Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977); *Eubanks v. Eubanks, supra.* In *Insurance Co. v. Chantos*, 25 N.C. App. 482, 214 S.E. 2d 438, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 624 (1975), this Court stated that "the defendant's silence or acquiescence for eight months after reaching majority may work as an implied ratification, that determination depending upon whether his failure to disaffirm within that eight-month period was within a reasonable time . . . ." 25 N.C. App. at 490, 214 S.E. 2d at 444. In the instant case, we believe that ten months is an unreasonable time within which to elect between disaffirmance and ratification, in that this case involves an automobile, an item of personal property which is constantly depreciating in value. Modern commercial transactions require that both buyers and sellers be responsible and prompt.

We are of the further opinion that defendant waived his right to avoid the contract. The privilege of disaffirmance may be lost where the infant affirms or otherwise ratifies the contract after reaching majority. Our Supreme Court has held that, under the particular circumstances, certain affirmations or conduct evidencing ratification were sufficient to bind the

infant, regardless of whether a reasonable time for disaffirmance had passed. *E.g. Watson v. Watson*, 204 N.C. 5, 167 S.E. 389 (1933) (acceptance of proceeds from sale of land); *Baggett v. Johnson, supra* (inaction); *Weeks v. Wilkins, supra* (delay); *Gaylord v. Respass*, 92 N.C. 553 (1885) (inaction); *Caffey v. McMichael*, 64 N.C. 507 (1870) (act of ownership); *McCormic v. Leggett*, 53 N.C. 425 (1862) (acceptance of payment). *See also Chandler v. Jones, supra. See generally* 43 C.J.S. *Infants* § 168 (1978); Simpson on Contracts §§ 106-108 (2d ed. 1965). Application of this rule often leads to an equitable result, particularly where the infant can be fairly said to have recognized and adopted as binding a contract under which the infant accepts the benefits of the contract to the prejudice of the other party.

In the present case, it is clear that defendant Smith recognized as binding the installment note evidencing the debt owed from his purchase of an automobile. It is undisputed that he continued to possess and operate the automobile after his eighteenth birthday, and he continued to make monthly payments as required by the note for ten months after becoming eighteen. In fact, defendant's conduct in returning the automobile and acquiescing in default being entered against him is strong evidence that defendant recognized the security agreement, which provided for repossession after default, as controlling. There is no evidence to indicate that defendant ever made a demand for rescission of the contract because of his infancy or that he ever had any intention of doing so. We hold, therefore, that defendant's acceptance of the benefits and continuance of payments under the contract constituted a ratification of the contract, precluding subsequent disaffirmance. *Watson v. Watson, supra.*

Reversed and remanded.

Judges VAUGHN and WELLS concur.

J.G. BURNETTE AND W.R. BURNETTE, CO-EXECUTORS OF THE ESTATE OF MAGGIE E. BURNETTE v. FIRST CITIZENS BANK AND TRUST COMPANY

No. 7910SC1187

(Filed 2 September 1980)

1. **Uniform Commercial Code § 36– forged signature – reasonable care of depositor in discovering forgery – jury question**

In an action to recover $13,500 withdrawn from plaintiff's savings account at defendant bank without her authorization, plaintiff was not barred by G.S. 25-4-406(2)(b) from establishing her right to recover her losses from defendant since evidence that plaintiff, a 95 year old woman, examined her bank statements during 1976-1977 to see if they showed she had the right amount in the account, that she did not detect that any numbers had been erased or substituted, and that she noticed white tape on the statement but thought the bank was responsible for the tape raised a jury question as to whether plaintiff failed to exercise reasonable care and promptness in examining the statements to discover her unauthorized signature.

2. **Uniform Commercial Code § 36– item paid on unauthorized signature – time during which recovery cannot be had**

Any item paid by a bank in good faith on an unauthorized signature, even though payment is made from an account different from the one in which the bank customer was negligent in failing to report an unauthorized signature, would be governed by G.S. 25-4-204(2)(b), which precludes a customer's recovery from a bank "on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature."

3. **Uniform Commercial Code § 36– savings account withdrawal slip as instrument and item**

A savings account withdrawal slip is an instrument and an item within the meaning of G.S. 25-4-104(g).

4. **Uniform Commercial Code § 36– series of unauthorized signatures – time during which recovery cannot be had**

The effect of G.S. 53-52, which precludes recovery of losses by a depositor from a bank for payment of a forged check or other order to pay money unless within 60 days after the receipt of such voucher by the depositor, depositor notified the bank that such check or order so paid is forged, has been altered by G.S. 25-4-406(2)(b) so that, when there has been a series of unauthorized signatures or alterations by the same person, the depositor cannot recover payments made by the bank during a period of time commencing within 14 days after the customer has first received one such item and ending with the time that the bank receives notice, and this applies only if the customer has been negligent under G.S. 25-4-406(1).

ON writ of certiorari to review judgment entered by *Bailey, Judge.* Judgment entered 25 May 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 21 May 1980.

Plaintiff, Mrs. Maggie Burnette, a ninety-five year old woman, filed this action to recover the sum of $13,500 withdrawn from her savings account at defendant bank without her authorization.

Plaintiff's troubles began when she took in a boarder named Linda Blalock in 1975. Ms. Blalock received her mail in the same mailbox as plaintiff and sometimes picked up plaintiff's mail for her. Beginning 30 March 1976, Ms. Blalock withdrew sums totaling $13,500 from plaintiff's account. In each instance, she forged plaintiff's signature on the withdrawal slip; then, she would place the money in plaintiff's checking account and write out a check naming herself as payee.

Plaintiff failed to discover the fraud until April 1977, even though defendant mailed her quarterly statements concerning the savings account balance and monthly statements regarding her checking account balance. Plaintiff was unable to detect the scheme, because Ms. Blalock intercepted the checking account statements and delayed their delivery for substantial periods so that she could doctor them. Even though her quarterly interest checks had become smaller, plaintiff attributed that fact to the bank's taking out a little bit more for its services.

Defendant filed an answer alleging G.S. 25-4-406 and G.S. 53-52 as well as other defenses as bar to plaintiff's claim. Summary judgment motions were made by both parties and denied. Plaintiff presented her evidence. At the conclusion of her presentation, defendant moved for a directed verdict which was allowed. Plaintiff gave notice of appeal, but the appeal was not timely perfected. Plaintiff petitioned for a writ of certiorari which we allowed. During the pendency of this case, plaintiff died, and the co-executors of her estate, J.G. Burnette and W. Raymond Burnette, were substituted as plaintiffs.

Duncan A. McMillan, for plaintiff appellants.

Reynolds & Howard, by E. Cader Howard, for defendant appellee.

ERWIN, Judge

> "'On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff.'" (Citation omitted.)

Kelly v. Harvester Co., 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971).

[1] Plaintiff's evidence, when viewed in the light most favorable to her, tends to show that when she received her checking account statements during the period 1976-1977, she examined them to see if they showed she had the right amount in the account. She did not detect that any numbers had been erased or substituted. Beginning in May 1976, she noticed white tape on the statement, but thought the bank was responsible for the tape.

From this evidence, a jury question arises whether plaintiff failed to exercise reasonable care and promptness to examine the statements and items to discover her unauthorized signature. This is the statutory standard. *See* G.S. 25-4-406.

Plaintiff's actions in notifying defendant bank of unauthorized signatures on checks is relevant to her recovery of unauthorized withdrawals from her savings account because of G.S. 25-4-406(2)(b). G.S. 25-4-406(2)(b) precludes a customer's recovery from a bank "on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature." *See also Coleman v. Brotherhood State Bank*, 3 Kan. App. 2d 162, 592 P. 2d 103 (1979). The term *item* is defined in G.S. 25-4-104(g) as any instrument for the payment of money even though it is not negotiable.

[2,3] A savings account withdrawal slip is an instrument and an item. *Coleman v. Brotherhood State Bank, supra.* The official comment to G.S. 25-4-406 indicates that one of the principal consequences of G.S. 25-4-406 is to shift the burden of loss on the customer where the customer's failure to exercise reasonable care allows a wrongdoer to repeat his misdeeds. If that is the case, it would seem to follow that any item paid by the bank in good faith on an unauthorized signature, even though payment is made from an account different from the one in which the bank customer was negligent in failing to report an unauthorized signature, would likewise be governed by G.S. 25-4-406(2)(b), *see Coleman v. Brotherhood State Bank, supra,* and we so hold. Accordingly, we hold that plaintiff was not barred by G.S. 25-4-406(2)(b) from establishing her right to recover her losses from defendant since a jury question exists as to her negligence in failing to examine the statement of her checking account to discover her unauthorized signature.

Plaintiff would be barred from recovery of any loss sustained on any item paid prior to 1 April 1976 by G.S. 25-4-406(4).

[4] Defendant relies on the provision of G.S. 53-52 which precludes recovery of losses by a depositor from a bank for payment of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor, the depositor notifies the bank that such check or order so paid is forged.

The North Carolina Comment to G.S. 25-4-406 states in pertinent part:

> "*Subsection (2):* Subsection (2) (b) changes the rule of GS 53-52 on the time within which a depositor must report his own unauthorized signature: GS 53-52 uses an automatic 60-day test, i.e., (a) for forgeries reported within 60 days of day the customer receives his voucher, he can recover; but (b) for forgeries not reported within the 60 days, he cannot recover.
>
> When there has been a series of unauthorized signatures or alterations by the same person, subsection (2) (b)

has a special rule. It provides, in effect, that a depositor cannot recover payments made by the bank during a period of time commencing with 14 days after the customer has first received one such item and ending with the time that the bank receives notice. These rules apply only if the customer has been negligent under subsection (1)."

We believe the commentator's interpretation of the effect of G.S. 25-4-406(2)(b) on G.S. 53-52 is consistent with the legislative intent and hold that G.S. 25-4-406(2)(b) alters the effect of G.S. 53-52 as mentioned. *See* 12 Strong's N.C. Index 3d, Statutes, § 5.4, pp. 69-70.

Plaintiffs allege three causes of action. One of the claims was based on emotional disturbance. Plaintiffs' evidence was insufficient to support a verdict on this theory. *See Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979).

The trial court's entry of a directed verdict as to the claim of emotional disturbance is

Affirmed.

The trial court's entry of a directed verdict as to plaintiffs' other claims is

Reversed.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. ELBANKS WHITE

No. 8023SC102

(Filed 2 September 1980)

1. **Jury § 6.3– examination of prospective juror – question concerning reasoning process**

The trial court did not err in refusing to permit defendant to ask a prospective juror on *voir dire* examination whether she understood "that

your personal opinion as to the facts not proven cannot be considered by you as a basis for your verdict."

2. **Rape § 4.3– prior conduct of prosecutrix – refusal to permit defendant to testify at voir dire**

In this prosecution for assault with intent to commit rape, the trial court did not err in refusing to permit defendant to testify at a *voir dire* hearing to determine whether testimony as to prior conduct of the prosecutrix was admissible under G.S. 8-58.6(b)(3) as evidence of a pattern of sexual behavior closely resembling defendant's version of the alleged encounter and in postponing its ruling on the admissibility of the testimony of prior conduct until after it had heard defendant's version of the events in question.

3. **Rape § 4.3– prior sexual conduct of prosecutrix – inadmissibility**

In a prosecution for kidnapping and assault with intent to commit rape in which defendant testified that the prosecutrix came to his house and "sat down on the bed and started to pull her clothes off," testimony by a defense witness that on a prior occasion the prosecutrix came to his house and started beating on him and "cuddled up" when he held her to stop her from hitting him was not evidence "of a pattern of sexual behavior so distinctive and so closely resembling defendant's version of the alleged encounter" so as to be admissible under G.S. 8-58.6(b)(3).

4. **Criminal Law § 42.6– admissibility of knife – showing of chain of custody not necessary**

It was not necessary for the State to prove the chain of custody of a knife where the prosecutrix testified that the knife "looks like" the one used by defendant in kidnapping and assaulting her.

5. **Kidnapping § 1.2– child under sixteen – taking without consent of parents**

Evidence that a child under the age of sixteen was at home without her parents and was taken from the home against her will is circumstantial evidence from which the jury may conclude beyond a reasonable doubt that the child was taken from the home without the consent of either parent.

6. **Criminal Law § 114.3– instructions – failure to use word "alleged" – no expression of opinion**

The trial court did not express an opinion that defendant was guilty of kidnapping or assault with intent to commit rape when, on three occasions in the final mandate, he failed to use the word "alleged" before "assault with intent to commit rape" where the court was instructing the jury in each instance that it would have to be satisfied beyond a reasonable doubt that the confinement of the victim was an independent act separate from the assault with intent to commit rape in order to find defendant guilty of kidnapping.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 2 August 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 4 June 1980.

The defendant was convicted of kidnapping and assault with intent to commit rape. From an active sentence imposed, he appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

William C. Gray, Jr. for defendant appellant.

WEBB, Judge.

The defendant has brought forward seven assignments of error. We discuss them seriatim.

[1] The defendant's first assignment of error deals with a question that he was not allowed to ask a prospective juror on the *voir dire* examination. The defendant's attorney propounded the following question to which an objection was sustained.

> "MR. GRAY: Do you understand, Mrs. Blevins, that your personal opinion as to the facts not proven cannot be considered by you as a basis for your verdict?"

In examining prospective jurors, counsel has the right to ask questions which may elicit information to determine whether challenge for cause exists and to enable counsel to exercise intelligently peremptory challenges. The regulation of the inquiry rests largely in the trial court's discretion. The trial courts have been affirmed in this state in excluding questions which tend to inquire into the reasoning process a juror would use in reaching a verdict. *See State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972). We hold it was within the discretion of the trial court as to whether to allow the question excluded in this case.

[2] The defendant's second and third assignments of error deal with the exclusion of certain testimony under G.S. 8-58.6. The State's evidence was that the defendant had taken a 13-year-old girl from her home to his home against her will and attempted to rape her. The defendant tendered Randy Miller as a

witness who would have testified that on a previous occasion the prosecuting witness had come to his house without being invited and "talked for a while and then she started playing and started beating on me" and "cuddle[d] up" when he held her to stop her from hitting him. He then gave her a spanking. The court held a *voir dire* hearing at which the witness testified to the above evidence. The defendant offered to testify at the *voir dire* hearing to determine whether this testimony was admissible and the court refused to allow him to testify. The court stated it would rule on the admissibility of the witness's testimony after it had heard the defendant's version.

The defendant contends that the court erred in not allowing the defendant to testify at the *voir dire* hearing and in forcing the defendant to take the stand in order to make this evidence of the prosecuting witness's prior sexual conduct admissible. We hold this contention is without merit. If the testimony of the witness had been admissible under G.S. 8-58.6(b) it would be under subsection (3) which provides evidence is admissible which:

> Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented . . . .

At the time of the *voir dire*, the proffered testimony clearly did not resemble the version of the encounter which had been received into the evidence. The court was correct in waiting until a version closely resembling the proffered testimony was offered by the defendant. If it took his own testimony to offer this version, that is a judgment in trial tactics which the defendant had to make. The defendant's second and third assignments of error are overruled.

[3] The defendant's fourth assignment of error is to the exclusion of the testimony of Randy Miller. Defendant testified that the prosecuting witness came to his house. He said:

> "I went to the door at that time. And it was Carolyn Cardwell. I opened the door and she come on in. She said her daddy had gone to the break and she sat down on the bed and started pulling her clothes off. I had on just my shorts. Yes, sir, I had been laying down asleep. I looked over at her and well it kind of tickled me in a way, how little she was, and I just went and put my pants on."

In order for Randy Miller's testimony to be admissible it must be "so distinctive and so closely resembling the defendant's version of the alleged encounter" as to tend to prove the prosecuting witness consented or the defendant reasonably believed she consented to the alleged encounter. It is true that the version of the defendant and Randy Miller were similar in that each said the prosecuting witness came to his house. In the defendant's version "she started pulling her clothes off." In Randy Miller's version she started beating on him and "cuddle[d] up" when he held her. We do not believe these versions are "so distinctive and so closely resembling" that Randy Miller's testimony tends to prove the prosecuting witness consented or the defendant could have reasonably believed she consented to the alleged encounter. The defendant's fourth assignment of error is overruled.

[4] The defendant's fifth assignment of error is to the admission into evidence of a knife. The prosecuting witness testified that the defendant had a knife in his hand during a part of the time when he was assaulting her. A knife was handed to her and she testified "I seen the blade but I didn't exactly see the handle ... It looks like the one he had." The defendant argues that a chain of custody was not proved. For this evidence it was not necessary to prove a chain of custody. *See State v. Morehead*, 16 N.C. App. 181, 191 S.E. 2d 440 (1972).

[5] The defendant's sixth assignment of error is to the court's failure to allow his motion to dismiss the charge of kidnapping. In the case sub judice, the evidence was that neither parent of the prosecuting witness was at home at the time she was taken from the home by the defendant. Both her parents testified, and neither testified she was taken from the home without his or

her consent. It is an element in the crime of kidnapping any person under the age of sixteen that the victim be removed without the consent of a parent or legal custodian. We hold that the evidence that a child is at home without her parents and is taken from the home against her will is circumstantial evidence from which the jury could conclude beyond a reasonable doubt it was done without the consent of either parent.

[6] The defendant's last assignment of error deals with the charge. The defendant contends that in his final mandate on the kidnapping charge, Judge McConnell expressed an opinion as to the guilt of the defendant by three times using the expression "assault with intent to commit rape" rather than "alleged assault with intent to commit rape." In each instance Judge McConnell was instructing the jury that they would have to be satisfied beyond a reasonable doubt that the confinement was an independent act separate from the assault with intent to rape in order to find the defendant guilty of kidnapping. We hold this was not an expression of opinion by the court that the defendant was guilty of kidnapping or assault with intent to commit rape.

No error.

Judges MARTIN (Harry C.) and WELLS concur.

COMMERCIAL CREDIT EQUIPMENT CORPORATION v. WILLIAM L. THOMPSON, JR. AND JENNIE H. THOMPSON

No. 8026DC71

(Filed 2 September 1980)

Fraud §9– sale of tractor – installment sales contract – other equipment added – sufficiency of allegations of fraud

In an action to recover on an installment sales contract for the purchase of a tractor, the trial court erred in entering judgment on the pleadings for plaintiff assignee of the contract where defendants' allegations that several amounts of money in the "cash price" column of the purported contract were added after they signed it, that they were told by a duly authorized agent or partner of the tractor sales company, acting within the course and scope of

his agency, that he wanted to add used equipment which defendants already owned to the contract in order to provide insurance on the equipment, and that defendants, acting in reliance on this misrepresentation, allowed said items to be added, not knowing that additional amounts would be added to the contract were sufficiently particular to raise a genuine issue as to fraud.

ON writ of certiorari to review judgment of *Black, Judge.* Judgment entered 27 August 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 June 1980.

Plaintiff (herinafter Commercial Credit) filed its complaint against defendants (hereinafter the Thompsons) alleging therein that Commercial Credit is the owner and holder of a certain contract executed by the Thompsons, that the Thompsons have defaulted on their payments under the contract and owe Commercial Credit a balance of $4,915.44, and that the Thompsons have refused Commercial Credit's demands for payment of the balance. The contract in question was dated 17 April 1973 and entitled a "Purchase Security Agreement." The contract listed the Thompsons as the buyers, Harris Tractor and Implement Company (hereinafter Harris Tractor) as seller and secured party (assignor), and Commercial Credit as assignee of the contract. The equipment allegedly sold to the Thompsons for $10,718.13 was listed in the contract.

The Thompsons filed an answer wherein they admitted that Commercial Credit was the owner of the contract. They alleged that several amounts of money in the "cash price" column of the purported contract were added after they signed said contract; that a fraud was perpetrated upon them, in that they were told by a duly authorized agent or partner of Harris Tractor, acting within the course of and scope of his agency and employment, that he wanted to add the used equipment to the contract in order to provide insurance on the equipment; that the Thompsons, acting in reliance on this misrepresentation, allowed said items to be added, not knowing that the additional amounts would be added to the contract; and that they have suffered damages. The Thompsons denied that they owed any money on the contract.

As a counterclaim, the Thompsons alleged that Ms. R.M. Harris, now Ann Harris Hanks (hereinafter Ms. Hanks), was a

partner of Harris Tractor at the time of the contract and was an agent of Commercial Credit with regard to procuring contracts such as the contract in question. (Ms. Hanks signed the contract for Harris Tractor.) The Thompsons further alleged that Ms. Hanks and her agent perpetrated the described fraud upon them and that they were not given credit for the down payment on the new equipment in the amount of $3,908.98. The Thompsons prayed for punitive damages in the amount of $25,000. Commercial Credit denied the allegations of the counterclaim.

The Thompsons then filed a third-party complaint against Ms. Hanks wherein they alleged that they purchased several pieces of new farm equipment (described in the contract) from Harris Tractor; that Ms. Hanks or her agent perpetrated a fraud upon the Thompsons by telling them that she wanted to add several pieces of used equipment, which already belonged to the Thompsons, to the purchase agreement for the purpose of obtaining insurance coverage on these articles of equipment; that the Thompsons were not given credit for the down payment on the new equipment; and that they did not receive a copy of the contract until several years after 1973. Ms. Hanks denied the allegations of fraud in her answer.

Commercial Credit filed interrogatories inquiring: (1) as to whether, at the time of the signing of the purported contract, the Thompsons realized that the contract would be assigned to Commercial Credit; (2) as to the amount of annual payment the Thompsons expected to pay under the contract; (3) as to the number of annual payments the Thompsons expected to pay; and (4) as to the date and amount of each payment made on the contract. The Thompsons responded that: (1) they were not aware of the assignment; (2) and (3) they did not know the amount or number of annual payments; and (4) at the time, they did not have sufficient information to provide the dates and amounts of their payments, but they believed all payments had been made to Commercial Credit.

Commercial Credit filed a motion for entry of judgment on the pleadings. The motion was allowed. The court found that the pleadings established that Commercial Credit is the owner and holder of the purchase security agreement admittedly ex-

ecuted by the Thompsons; that the balance due and owing is $4,915.44; that the Thompsons were given notice with respect to attorney's fees; and that their answer failed to raise a meritorious defense as against Commercial Credit's cause of action. Defendants appealed.

Fairley, Hamrick, Monteith & Cobb, by Laurance A. Cobb and F. Lane Williamson, for plaintiff appellee.

Chambers, Stein, Ferguson & Becton, by John W. Gresham, for defendant appellants.

ERWIN, Judge.

The sole question raised by defendants is: "Did the trial court err in granting plaintiff's motion for judgment on the pleadings?" We answer, "Yes."

Plaintiff contends that the judgment is proper, in that the Thompsons admitted either expressly or by implication all the material facts necessary to plaintiff's claim for relief and did not allege a viable affirmative defense against plaintiff. Specifically, the Thompsons, in their answer, admitted execution of the contract and generally denied that any debt was owed. Further, plaintiff argues that the Thompsons failed to allege the affirmative defense of payment and failed to allege fraud in the factum or fraud in the treaty with particularity.

Our Supreme Court, in *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974), held as follows with reference to judgment on the pleadings: "All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion."

The Thompsons alleged the following in their answer:

> "It is admitted upon information and belief that the plaintiff is the owner of the purported contract attached to the Complaint; however, the defendants allege upon information and belief that several amounts of money in the

money column of the purported contract were added to the purported contract after they signed it and further, upon information and belief, the defendants allege that a fraud was perpetrated upon them in that they were told by either a duly authorized agent or partner of Harris Tractor & Implement Co. acting within the course and scope of his agency and employment that they wanted to add the used equipment to the contract in order to provide insurance on it, and defendants, acting in reliance on this misrepresentation allowed said items to be added, not knowing that they were giving a lien on said items of equipment and not knowing that the additional amounts of money would be added to the contract, and therefore defendants have suffered damages."

We hold that the Thompsons' answer raises a material issue of fact when the allegations are taken in the light most favorable to the Thompsons; thus, the entry of judgment on the pleadings was improper. The issue of fraud was pleaded, in our opinion, with sufficient particularity to withstand plaintiff's motion for judgment on the pleadings. *See Ragsdale v. Kennedy, supra; Johnson v. Owens,* 263 N.C. 754, 140 S.E. 2d 311 (1965); *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919 (1956).

G.S. 25A-25(a) provides:

"§ 25A-25. *Preservation of consumers' claims and defenses.* — (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness shall not exceed amounts paid by the buyer under the contract."

The sale of goods to be used primarily for agricultural purposes is a consumer credit sale. G.S. 25A-2. Plaintiff, as an assignee of the seller, is subject to defendants' plea of fraud. Thus, defendants' defense is not a baseless one.

The trial court erred in entering a judgment on the pleadings.

The judgment entered below is

Reversed.

Chief Judge MORRIS and Judge CLARK concur.

HOMER W. TRULL v. C.B. McINTYRE, JR. INDIVIDUALLY AND AS CO-EXECUTOR OF THE ESTATE OF C.B. McINTYRE, SR., DECEASED, AND SECURITY BANK AND TRUST COMPANY, CO-EXECUTOR OF THE ESTATE OF C.B. McINTYRE, SR.

No. 8020SC117

(Filed 2 September 1980)

1. **Executors and Administrators § 9– lease executed by executor – lack of authority – no personal liability for breach of lease**

A person who executes a lease as executor of an estate and represents to the lessee that he has authority to do so is not personally liable for a breach of the lease when an examination of the will on record would have revealed the executor did not have authority to execute the lease.

2. **Principal and Agent § 7– lease signed for mother by son – no undisclosed principal – son not personally liable for breach**

Where defendant's parents owned a tract of farmland as tenants by the entirety, the mother executed a power of attorney with the father named as her attorney in fact and defendant as an alternate, the father died, and defendant executed a lease of the farmland to plaintiff, defendant could not be held personally liable for a breach of the lease, since there was no evidence that defendant acted for an undisclosed principal when he signed the lease for his mother.

APPEAL by plaintiff from *Howell, Judge.* Judgment entered 4 October 1979 in Superior Court, UNION County. Heard in the Court of Appeals 6 June 1980.

This is an action by the plaintiff for breach of contract. The plaintiff alleged that he had entered into a lease agreement for certain farmland with C.B. McIntyre, Jr. as executor of the estate of C.B. McIntyre, Sr. A copy of the will of C.B. McIntyre, Sr. was attached to the complaint which showed that some

farmland had been left in trust with the Security Bank and Trust Company as trustee under the will of C.B. McIntyre, Sr. The will did not give the executors the power to execute a lease. The evidence showed that C.B. McIntyre, Jr. executed a lease as executor of the estate of C.B. McIntyre, Sr. for two tracts of farmland, one of which had been owned by C.B. McIntyre, Sr. and one of which had been owned as tenants by the entirety by C.B. McIntyre, Sr. and his wife, Ruby McIntyre. Ruby McIntyre was living at the time the lease was executed. There was a general power of attorney recorded in the Office of the Register of Deeds under which Ruby McIntyre appointed C.B. McIntyre, Sr. as her attorney in fact with C.B. McIntyre, Jr. as an alternate attorney in fact. The plaintiff testified that he was told by C.B. McIntyre, Jr. that C.B. McIntyre, Jr. had authority to execute the lease, and he made no further inquiry. The lease was for the crop years 1977, 1978, and 1979. The plaintiff paid the rent and farmed the land in 1977. In February 1978 the plaintiff received a letter from the defendant Security Bank and Trust Company advising him that it would not ratify or agree to the lease contract. The plaintiff was not allowed to farm the land in 1978 or 1979.

At the close of the plaintiff's evidence, the court granted the defendants' motion for a directed verdict. Plaintiff appealed.

Harry B. Crow, Jr. for plaintiff appellant.

Dawkins, Glass and Lee, by W. David Lee, for defendant appellees.

WEBB, Judge.

[1] There are three defendants in this action — C.B. McIntyre, Jr., individually; C.B. McIntyre, Jr., as co-executor of the estate of C.B. McIntyre, Sr.; and Security Bank and Trust Company as co-executor of the estate of C.B. McIntyre, Sr. The plaintiff concedes the execution of the lease by C.B. McIntyre, Jr. as executor was of no effect in leasing the land which had been owned by C.B. McIntyre, Sr. The plaintiff contends it is a jury question as to whether C.B. McIntyre, Jr. is individually liable.

The plaintiff argues this is so because there was evidence that C.B. McIntyre, Jr. represented to the plaintiff that he had the authority to sign the lease and the plaintiff did not know otherwise. The question posed by this argument is whether a person who executes a lease as executor of an estate and represents to the lessee that he has the authority to do so is personally liable when an examination of the will on record would have revealed the executor did not have the authority to execute the lease. We cannot find a case on all fours with the case sub judice. In *Griffin v. Turner*, 248 N.C. 678, 104 S.E. 2d 829 (1958) our Supreme Court refused to make an implied warranty of a power to convey for a person who had been appointed by the administrators of an estate as agent to sell property. In that case all parties knew the administrators did not have the power to sell the real property which had belonged to the deceased. In *Hedgecock v. Tate*, 168 N.C. 660, 85 S.E. 34 (1915) our Supreme Court held an administrator of an estate not personally liable on a contract to convey. In that case all parties knew the administrator did not have the power to convey. The Court said by way of dictum: "Thus, where all the facts touching the agent's authority or its source, are equally within the knowledge of both parties, who act thereupon under a mutual mistake of law as to the liability of the principal, the agent cannot be held."

We find the reasoning of *Hedgecock* persuasive. In this case C.B. McIntyre, Jr.'s authority to sell was a matter of public record. The fact that C.B. McIntyre, Jr. was mistaken as to his authority to lease the property should not make him individually liable to the plaintiff when the plaintiff, by examining the public records, could have determined the authority of C.B. McIntyre, Jr.

[2] The plaintiff also contends that C.B. McIntyre, Jr. should be held personally liable as to the land that C.B. McIntyre, Sr. and his wife owned as tenants by the entirety. He contends that C.B. McIntyre, Jr. acted for an undisclosed principal when he signed the lease for Mrs. McIntyre. An agent who makes a contract for an undisclosed principal may be held personally liable. *See* 10 Strong's N.C. Index 3d, Principal and Agent § 7 (1977). The lease executed by the plaintiff had a place for execution by Mrs. McIntyre. The plaintiff offered into evidence a

power of attorney from Mrs. McIntyre to her husband with C.B.McIntyre, Jr. as the alternative attorney in fact. We can find no evidence of an undisclosed principal. We hold that the action was properly dismissed as to C.B. McIntyre, Jr. as an individual.

As to C.B. McIntyre, Jr., as executor of the estate of C.B. McIntyre, Sr., we hold the same reasoning applies as in his case as an individual. He had no authority as executor to bind the trustee or Mrs. McIntyre and this should have been known to the plaintiff. We hold the action was properly dismissed as to C.B. McIntyre, Jr. as executor of the estate of C.B. McIntyre, Sr.

The plaintiff contends that under G.S. 28A-13-5 and G.S. 28A-13-6(e) the bank is bound by the actions of its co-executor. G.S. 28A-13-5 provides that if two personal representatives are vested with an interest in property, they hold it as joint tenants. G.S. 28A-13-6(e) provides for the exercise of power vested in two personal representatives. In the case sub judice, C.B. McIntyre, Jr. did not have any title in the real property and he did not have any power to lease it. These two sections have no application in this case.

The plaintiff also contends that when he farmed the land and paid the rent in 1977, the bank was estopped from denying the plaintiff the right to lease it for the crop years 1978 and 1979. The plaintiff cites no authority and advances no reasoning as to why estoppel should apply. We hold the bank has not taken any action which would make it inequitable for it to refuse to ratify the lease. The action was properly dismissed as to the bank.

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

State v. Bracey

STATE OF NORTH CAROLINA v. FREDERICK BRACEY, JR.

No. 795SC1140

(Filed 2 September 1980)

1. **Criminal Law § 92.3– consolidation of three robbery cases for trial – no single plan or scheme**

The trial court erred in consolidating for trial three indictments charging defendant with common law robberies on 17 April 1979, 25 April 1979 and 26 April 1979, although each robbery occurred within a two-block area of Market Street in Wilmington and each robbery was committed in a similar manner in that two men would enter a small business in the afternoon and one man would assault the victim while the other took money from the cash register, since a scheme or plan to commit a series of robberies in the future is not a "series of acts or transactions" constituting a single scheme or plan within the meaning of G.S. 15A-926(a).

2. **Constitutional Law § 75– self-incrimination – defendant's testimony on motion to suppress**

Where defendant testified at a hearing on a motion to suppress his confession that he was under the influence of PCP or "bam" at the time he confessed, defendant's right against self-incrimination was not violated when the State was permitted to ask defendant on cross-examination at the trial whether he used "bam," since the State did not use defendant's statement at the suppression hearing against him or ask him if he had testified at the suppression hearing that he used "bam."

APPEAL by defendant from *Bruce, Judge.* Judgment entered 2 August 1979 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 April 1980.

The defendant was charged in three separate indictments for three separate crimes of common law robbery. The robberies were alleged to have occurred over a ten-day period on 17 April 1979, 25 April 1979 and 26 April 1979. The cases were consolidated for trial over the objection of the defendant. The evidence showed that each robbery occurred within a two-block area of Market Street in Wilmington. Each of the robberies was done in a similar manner in that two men would enter a small business in the afternoon and one of the two men would assault the victim while the other took money from the cash drawer. Defendant was found not guilty of two of the charges and guilty of a third. From a prison sentenced imposed, he has appealed.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for the State.

D. Webster Trask for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the consolidation of the three charges for trial. G.S. 15A-926 provides in part:

> (a) Joinder of offenses. — Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan . . . .

If these three charges could be consolidated under this statute, it would be because they are a "series of acts or transactions . . . constituting part of a single scheme or plan." From the evidence it could be concluded the defendant and another person had a scheme or plan to conduct a series of robberies. The question in this case is whether that fits the statutory definition.

In *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978) our Supreme Court held a charge of assault with intent to commit rape was properly consolidated with a charge of rape which occurred three hours later. The Court said: "The sexual assaults . . . within a time span of three hours were 'parts of a single scheme or plan' by defendant to satisfy his sexual desires on the afternoon of 3 May 1976." The rationale of that case was that two separate charges may be consolidated if the scheme or plan is to accomplish one thing. We do not believe it applies in this case. We believe that implicit in the holding of *Greene* is the requirement that there be a transactional connection or a continuing program of action involving the crimes charged in order to consolidate them for trial. In the case sub judice there was no transactional connection or continuing program of action in regard to the three separate armed robberies. We hold that this

scheme or plan to commit a series of several different robberies in the future is not a "series of acts or transactions" constituting a single scheme or plan within the meaning of the statute. It was error to consolidate the three separate charges for trial.

[2] We shall discuss one of the defendant's other assignments of error as its subject may recur at a new trial. The defendant made a motion to suppress a confession. At the hearing on the motion to suppress, he testified he was under the influence of PCP or "bam" at the time he made the confession. At the trial the prosecuting attorney asked the defendant whether he used "bam." The defendant, relying on *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L. Ed. 2d 1247 (1968) contends his objection to this question should have been sustained. In *Simmons* the defendant moved to suppress as evidence a suitcase containing incriminating items which he contended was seized in an unlawful search. He testified at a hearing on the motion to suppress that the suitcase was similar to a suitcase he owned and the clothing inside it was his. The motion to suppress was denied, and his statement as to ownership of the suitcase and clothes was used against him at the trial. The United States Supreme Court held this to be error. The Supreme Court reasoned that since it was necessary for him to show that he owned the suitcase and its contents in order to have standing to challenge the search and seizure, he had to testify to this at the hearing to suppress. The Court held he should not be required to give up his Fifth Amendment right against self-incrimination in order to assert his Fourth Amendment right against unreasonable search and seizure. The defendant argues in this case that he should not be required to relinquish his Fifth Amendment right against self-incrimination when he asserts that right in a motion to suppress a confession. He argues this will be the effect if the State is allowed to cross-examine him in regard to matters about which he testified at the motion to suppress his confession.

We believe there is an important distinction between *Simmons* and the case sub judice. In *Simmons* the prosecution used the defendant's statement against him. In the case sub judice the prosecuting attorney did not ask the defendant if he had testified he used "bam." She asked the defendant if he used

"bam." The information as to the defendant's use of "bam" could have come from a source other than defendant's testimony at the suppression hearing. If the State has evidence which is otherwise relevant it should not be made incompetent by the defendant's testifying to it on a motion to suppress. We hold it was proper for the prosecuting attorney to question the defendant as to his use of "bam." She did not ask him whether he testified at the suppression hearing that he had used "bam."

The other assignments of error by the defendant are without merit or involve matters that may not recur at a subsequent trial.

New trial.

Judges MARTIN (Robert M.) and HILL concur.

STATE OF NORTH CAROLINA v. JOHN TURNER, JR.

No. 8015SC198

(Filed 2 September 1980)

Criminal Law § 122 – failure to admonish jury before overnight recess – no reversible error

Failure of the trial court to admonish the jury pursuant to G.S. 15A-1236 prior to an overnight recess was not reversible error per se; defendant failed to show that he was prejudiced by the court's failure to admonish; and defendant and his counsel, who were present in the courtroom when the overnight recess was ordered, should have called the court's attention to its failure to admonish if they were concerned about such omission.

APPEAL by defendant from *Herring, Judge.* Judgment entered 5 October 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 11 June 1980.

Defendant was charged with the misdemeanor larceny of a man's suit from Sellars Department Store in Burlington on 25 May 1979. He was convicted as charged in District Court,

appealed, was again convicted in Superior Court, and he appeals from the judgment imposing a confinement term of 12 months, with Work Release recommended.

The evidence for the State tends to show the following: Two employees in the men's department of the store observed defendant take two shirts to the dressing room; he came out wearing one of the shirts and looked in the mirror; he then took a three-piece white suit from the rack into the dressing room; he came out of the dressing room; both employees noticed that defendant had a bulge around the midriff; he put back the two shirts and walked out of the store. One employee went to the dressing room but was unable to find the white suit. The other employee followed defendant, saw him get in a car and drive off. The police department was called and given the license number on the car. After a police broadcast the automobile was located at a trailer home where defendant resided with his sister. A policeman and the two employees drove to the trailer. Defendant's sister refused to let the police search the trailer. After about forty-five minutes the police returned with a search warrant. The suit was not found.

Defendant testified that he went to the store to buy a shirt, that he selected a shirt and tried it on but did not buy it. He denied that he took a suit to the dressing room and from the store.

No brief filed for the State.

Frederick J. Sternberg for defendant appellant.

CLARK, Judge.

The issue raised by this appeal is whether the failure of the trial court to admonish, the jury as required by G.S. 15A-1236 is reversible error.

G.S. 15A-1236 provides as follows:

(a) The judge at appropriate times must admonish the jurors that it is their duty:

(1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;

(2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;

(3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;

(4) To avoid reading, watching, or listening to accounts of the trial; and

(5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

The record on appeal discloses that the jury retired to the jury room for its deliberations. After deliberating for some time the trial judge ordered their return to the courtroom. In response to a question from the judge, the jury foreman reported that their numerical division was eight to four. The judge then ordered a recess until 9:30 a.m. the following morning.

The record on appeal does not reveal that the trial judge admonished the jury as required by G.S. 15A-1236 before declaring the overnight recess or at any other time. In oral argument defense counsel, in response to questions from this panel, stated that on several occasions at the beginning of the weekly sessions the trial judge conducted a jury orientation during which he admonished the jury as required by the statute; but counsel was not present for the jury orientation at the beginning of the session in which the case before us was tried and thus did not know whether such admonishment had been made to the jurors empaneled in this case.

Clearly it would be an appropriate time to so admonish the jury immediately before an overnight recess, and particularly so if the jury had not been admonished theretofore as the record on appeal indicates in this case. The trial court erred in failing to comply with G.S. 15A-1236. The question is whether the error is such that the trial court result should be altered and the case remanded for a new trial.

Errors by the trial court should be corrected by the appellate courts if the error is prejudicial to a litigant because the most important purpose of appellate review is to insure justice under law. G.S. 15A-1443(a) provides in pertinent part that "[a] defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." This statutory definition is a substantial prototype of the case law existing before the enactment of the statute. *See, State v. Stanfield,* 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham,* 30 N.C. App. 67, 226 S.E. 2d 387 (1976).

But there is an exception to the general rule that trial error is reversible only if harmful or prejudicial. The exception is recognized by G.S. 15A-1443(a) which provides, in pertinent part, as follows: "Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se."

Trial errors which are deemed prejudicial or "deemed reversible per se" obviate the need for a litigant to show harm to his cause. Such errors generally violate established rules or procedures in the courts and justify reversal because they are prejudicial to the administration of justice. In *State v. Bindyke,* 288 N.C. 608, 220 S.E. 2d 521 (1975), it was held that the presence of an alternate juror in the jury room "during the jury's deliberations" violates Article I, Section 24 of our State Constitution and G.S. 9-18 and constitutes reversible error *per se. Id.* at 627, 220 S.E. 2d at 533. The *Bindyke* decision was followed by this Court in *State v. Rowe,* 30 N.C. App. 115, 226 S.E. 2d 231 (1976), which held that the mere presence of the alternate juror

when the jury began their discussion and deliberation voided the trial.

In our opinion the *Bindyke* decision does not control the case *sub judice*. The failure of the trial judge to admonish the jury at an appropriate time in violation of G.S. 15A-1236 does not involve the violation of a constitutional right. Nor do public policy and practical considerations preclude in this case any hearing to determine whether the failure to admonish prejudiced the defendant. It is noted that defendant and his counsel were present in the courtroom when the overnight recess was ordered. If defense counsel was concerned about the failure of the trial judge to admonish the jury, it would have been a simple matter for defense counsel to call to the attention of the judge such failure to admonish. Extending the reversible error *per se* rule to all violations of Chapter 15A of the General Statutes would result in many new trials for mere technical error, a result not intended by the legislature in light of the provisions of G.S. 15A-1443.

We have carefully examined defendant's other assignments of error and find them to be without merit.

No error.

Judges PARKER and WEBB concur.

RADFORD T. ELLER EMPLOYEE v. PORTER-HAYDEN COMPANY, EMPLOYER, HARTFORD ACCIDENT AND INDEMNITY COMPANY, CARRIER

No. 7910IC1081

(Filed 2 September 1980)

Master and Servant § 68.1– workers' compensation – asbestosis – disablement more than two years after last exposure to asbestos

The Industrial Commission properly concluded that plaintiff's disablement from asbestosis resulted more than two years after his last exposure to asbestos dust in his employment by defendant and that plaintiff's workers' compensation claim was barred by G.S. 97-58 where the Commission found upon supporting evidence that plaintiff became disabled on 30 May 1975;

plaintiff was not exposed to the hazard of asbestosis for 30 work days, or parts thereof, during his last period of employment by defendant from 24 June 1973 to 26 July 1973; and plaintiff's last exposure to cotton dust in his employment by defendant occurred from 4 October 1972 to 2 February 1973.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 29 August 1979. Heard in the Court of Appeals 12 May 1980.

Plaintiff filed a notice of accident with the North Carolina Industrial Commission (Commission) on 24 February 1977. At a hearing on 20 July 1978, the parties stipulated that the plaintiff was employed by Porter-Hayden Company from 10 April 1972 through 7 February 1973 and from 24 June 1973 through 26 July 1973. Between those periods, plaintiff was employed by AC&S in North Carolina from 23 April 1973 through 22 June 1973, a period of more than 30 work days. The parties further stipulated that plaintiff's medical reports would be admitted into evidence. The evidence showed that plaintiff was diagnosed as having Grade II asbestosis resulting in a 70 percent disability.

Plaintiff testified that he is 63 years old and was employed since 1941 as an insulator. During that time, he worked for several employers in North Carolina, West Virginia, Georgia, and Tennessee. During the ten years prior to stopping work, plaintiff worked at least two years in North Carolina. Sometime in 1972, the insulation industry "started switching to" asbestos-free insulation. During plaintiff's last two periods of employment with Porter-Hayden in North Carolina, he was exposed to asbestos dust. From 26 July 1973 until 30 May 1975, plaintiff was employed by various insulation companies in Georgia, Tennessee, and West Virginia, his last employment being for eleven months with Johns Manville in West Virginia. Plaintiff was exposed to asbestos dust during that period of time, including his employment with Johns Manville which terminated on 31 May 1975, except for a three-day period in June or July 1975.

Plaintiff was first informed that he had contracted asbestosis in August 1975. Plaintiff filed a workers' compensation claim in West Virginia. On advice of his attorney in West Virginia, he

withdrew his claim for failure to meet the jurisdictional requirements of the West Virginia Act.

Deputy Commissioner Haigh found that plaintiff suffers from asbestosis, Grade II, that plaintiff's last injurious exposure was during his employment with Johns Manville Sales Corporation, and that defendant Porter-Hayden Company and its carrier were not liable for any compensation payments. The full Commission set aside the opinion and award of Deputy Commissioner Haigh and substituted its own opinion and award therefor finding that: plaintiff had contracted asbestosis, Grade II; plaintiff became disabled on 30 May 1975; plaintiff was last exposed to the hazards of asbestosis during his period of employment with Johns Manville Sales Corporation in West Virginia; plaintiff was last exposed to the hazards of asbestosis in North Carolina while employed by AC&S from April through June 1973; and plaintiff's claim against defendants Porter-Hayden Company and its carrier is barred by G.S. 97-57 and G.S. 97-58. Plaintiff appealed.

Young, Moore, Henderson & Alvis, by Charles H. Young, Jr. and Robert C. Paschal, for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by George W. Dennis III, for defendant appellees.

ERWIN, Judge.

Plaintiff makes two arguments on appeal, that the Commission erred in two respects in this case: (1) in concluding as a matter of law that plaintiff's disablement resulted more than two years after his last injurious exposure to asbestos dust in his employment by defendant in North Carolina and (2) in concluding as a matter of law that defendant is not the employer in whose employment plaintiff was last injuriously exposed within the provisions of G.S. 97-57 and that defendant is not liable for compensation payable for plaintiff's disablement. For the reasons that follow, we affirm the Commission.

We note that the findings of fact of the Industrial Commission are conclusive on appeal only when supported by compe-

tent evidence, and the Court, on appeal, may review the evidence to determine as a matter of law whether there is any evidence tending to support the findings of fact and whether such findings justify the legal conclusions and decisions of the Commission. *McRae v. Wall*, 260 N.C. 576, 133 S.E. 2d 220 (1963); *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951); *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977).

In view of the above rule, we now examine the record in that light.

G.S. 97-58(a) provides, *inter alia*, that "an employer shall not be liable for any compensation for asbestosis ... unless disablement or death results within two years after the last exposure to such disease."

The Commission made the following findings of fact, *inter alia:*

> "7. Plaintiff has the occupational disease, Asbestosis, Grade II, and from that occupational disease became disabled 30 May 1975. Plaintiff's disability is 70 percent.
>
> 8. Plaintiff was not exposed to the hazard of asbestosis for 30 working days, or parts thereof, during his employment by Porter-Hayden Company in North Carolina from 24 June 1973 to 26 July 1973.
>
> EXCEPTION NO. 2
>
> 9. Plaintiff was exposed to the hazard of asbestosis within seven consecutive calendar months for 30 working days or more, or parts thereof, during the term of his employment by Porter-Hayden Company in North Carolina from 4 October 1972 to 2 February 1973.
>
> EXCEPTION NO. 2A"

The Commission concluded as a matter of law, *inter alia:* "Plaintiff's disability resulted more than two years after his

last injurious exposure to asbestos dust in his employment by Porter-Hayden Company in North Carolina."

In Conclusion of Law No. 5, the Commission used the terms *plaintiff's disability* rather than the statutory required terms *plaintiff's disablement.* G.S. 97-58(a). The Commission also used the terms *his last injurious exposure to asbestos dust,* when the Commission should have used the terms *his last exposure to asbestos dust.* However, the results reached by the Commission will not be disturbed by us.

In *Autrey v. Mica Co.,* 234 N.C. 400, 408, 67 S.E. 2d 383, 389 (1951), our Supreme Court stated: "It is pertinent here to note that the statute G.S. 97-58(b) provides that 'the time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has the same.' " In the case *sub judice,* employee was notified of his disablement by competent medical authority on 1 August 1975, and his claim was timely filed with the Commission on 24 February 1977. G.S. 97-58(b).

The Commission found that plaintiff was not exposed to the hazard of asbestosis for 30 work days, or a part thereof, during his employment by defendant from 24 June 1973 to 26 July 1973. This finding established plaintiff's last exposure to asbestos dust with defendant to be from 4 October 1972 to 2 February 1973. We hold that the evidence supports the finding of fact that plaintiff's disablement resulted more than two years after his last injurious exposure to asbestos dust in his employment with defendant Porter-Hayden. G.S. 97-58(a).

In view of the conclusions we have reached on the first contention of plaintiff, it is not necessary to consider the second contention to dispose of this case on appeal.

The opinion and award of the Commission is affirmed and remanded to make technical corrections as set out in this opinion.

Affirmed and remanded.

Chief Judge MORRIS and Judge CLARK concur.

HARTFORD ACCIDENT AND INDEMNITY COMPANY v. DEAN'S SHOP-RITE, INC.

No. 7921SC1098

(Filed 2 September 1980)

Uniform Commercial Code § 33– unauthorized signature on checks – good faith acceptance of checks – negligence contributing to unauthorized signature

Where an employee of a YMCA signed and delivered a signature card to the bank where the YMCA maintained an account, the employee cashed a number of forged or unauthorized checks with defendant grocery store, plaintiff paid the YMCA for its loss and was subrogated to the YMCA's position, and plaintiff brought an action against defendant to recover the amount of the unauthorized checks, the trial court properly entered summary judgment for defendant, since (1) defendant regularly cashed checks for its customers, the YMCA employee had been a customer for ten years, and defendant, in good faith, cashed the checks in accordance with the reasonable commercial standards of its business; and (2) the YMCA, by waiting approximately a year from the time the first check was cashed before notifying defendant the checks were unauthorized, did by its negligence substantially contribute to the making of the unauthorized checks. G.S. 25-3-406.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 30 August 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 4 June 1980.

This is an action in which the plaintiff asks for a judgment in the amount of $4,785.31 for certain checks drawn on the account of the Young Men's Christian Association of Winston-Salem with Wachovia Bank and Trust Company (Wachovia). Wachovia is a party defendant but it is not involved in this appeal. The plaintiff alleged that Beverly Massie, an employee of the YMCA, signed and delivered a signature card bearing her signature to Wachovia contrary to her duties and without any authority to do so from her employer. Beginning on or about January 1976 and continuing through May 1976, she cashed a number of forged or unauthorized checks with the defendant. The checks were drawn on the YMCA account with Wachovia and were paid when presented to Wachovia. Plaintiff paid the YMCA for its loss and was subrogated to the YMCA's position.

The defendant filed answer and moved for summary judgment. The answers to interrogatories and affidavits filed in

support and in opposition to the motion for summary judgment revealed that the manager of defendant had known Beverly Massie for approximately 10 years prior to January 1976. The defendant operated a grocery store in King, North Carolina, at which it cashed checks for its customers. Personal checks were taken at the cash register for groceries and checks for larger amounts were cashed after approval "at the window in the front office." The defendant had cashed checks for Beverly Massie on previous occasions. She had cashed three checks which were returned for insufficient funds which she made good immediately after she was called in regard to them. The defendant was not informed of any problem with the checks drawn on the YMCA account with Wachovia until March 1977. On 11 March 1977 a detective with the City of Winston-Salem Police Department went to the defendant store in the course of an investigation in regard to the checks. He heard the manager of the store ask his wife "if she thought that Massie was into cashing forged checks again." Upon inquiry from the detective, the manager stated that he knew Beverly Massie had forged some checks at an earlier time.

The court granted the defendant's motion for summary judgment. Plaintiff appealed.

Hudson, Petree, Stockton, Stockton and Robinson, by Grover G. Wilson, for plaintiff appellant.

Blackwell, Blackwell, Canady and Eller, by Jack E. Thornton, Jr., for defendant appellee.

WEBB, Judge.

The only question presented by this appeal is whether the motion for summary judgment was properly allowed. We hold that it was.

G.S. 25-3-406 provides:

> Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from

> asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

From reading this statute, if the defendant paid the checks in good faith and in accordance with the reasonable commercial standards of its business and the YMCA, by its negligence, substantially contributed to the making of the unauthorized checks by Ms. Massie, the plaintiff is barred from recovery.

We examine first the actions of the defendant. G.S. 25-1-201(19) provides:

> "Good faith" means honesty in fact in the conduct or transaction concerned.

The evidence in all the papers filed shows the defendant was honest in fact. It cashed the checks in good faith. All the evidence also showed the defendant regularly cashed checks for its customers. Personal checks were taken at the cash register for groceries from regular customers. Checks for larger amounts were cashed after approval at the window in the front office. Beverly Massie had been a customer for 10 years. We hold that the checks were cashed in accordance with the reasonable commercial standards of defendant's business. It may be that the defendant should have been more cautious since it knew Beverly Massie had previously cashed forged checks. That is not the test of G.S. 25-3-406. The defendant did in good faith cash the checks in the reasonable commercial standards of its business.

We next turn to the question of whether the YMCA, by waiting approximately a year from the time the first check was cashed before notifying the defendant the checks were unauthorized, did, by its negligence, substantially contribute to the making of the unauthorized checks. The statute does not define negligence. G.S. 25-4-406 makes provision for notifying a bank of unauthorized checks within certain time periods after bank statements have been received in order to hold the bank liable. We believe this is a standard of reasonable conduct which

should apply in regard to notifying other payors. We hold that by waiting approximately one year after the first check had been passed before notifying the defendant that the checks were unauthorized, the YMCA, by its negligence, substantially contributed to the making of the unauthorized checks.

If the evidence as forecast by the papers relied on by the court in the hearing on the motion for summary judgment were offered at trial the defendant would be entitled to a directed verdict in its favor. The motion for summary judgment was properly allowed. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

BOARD OF TRANSPORTATION v. DON F. PIERCE AND WIFE, MRS. DON F. PIERCE; COUNTY OF BUNCOMBE; CITY OF ASHEVILLE; JAMES H. CRAFT AND WIFE, DOROTHY MARIE CRAFT; PAUL M. YOUNG LESSEE; J.W. YOUNG, LESSEE; YOUNG ASSOCIATES, INC., LESSEE; G.F. TURNER, TRUSTEE; AND FIRST AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE

No. 7928SC835

(Filed 2 September 1980)

1. **Eminent Domain § 7.8; Highways and Cartways § 5– judgment granting highway right of way – sufficiency of description**

A 1938 judgment giving the State Highway and Public Works Commission a "right of way one hundred feet in width measured 50 feet on either side of the centre line of the concrete pavement laid during the year 1929" contained a sufficient description of the acquired right of way.

2. **Eminent Domain § 7.8; Highways and Cartways § 5; Registration § 1– judgment granting highway right of way – absence of registration**

A highway right of way easement granted by a judgment in a condemnation proceeding is good as against bona fide purchasers for value of the servient tenement although the judgment was not recorded in the Office of the Register of Deeds.

APPEAL by defendants from *Lewis, Judge.* Order entered 21 May 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 March 1980.

The plaintiff instituted this action to condemn property owned by the defendants Pierce and leased by the defendants Young. Prior to trying the condemnation issue, the court had a hearing to determine the amount of land to be taken for a highway easement. The plaintiff claimed pursuant to a 1938 Buncombe County Superior Court judgment that it had an existing right of way for a public road extending beyond a ditch in front of the defendants' property. Defendants, who hold their title through *mesne* conveyances from the executors of the estate of Eleanor G. Hildebrand, denied the right of way extended beyond the ditch. From an order settling the issues and holding that plaintiff's easement extended beyond the ditch, the defendants appealed.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Bennett, Kelly and Cagle, by Harold K. Bennett, for defendant appellants.

WEBB, Judge.

The defendants appeal from an interlocutory order which they may do in this case. *See Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772 (1967).

[1] The appellants contend that the description in the 1938 judgment under which the State Highway and Public Works Commission acquired a right of way was not a proper description. The appellants argue that the right of way is not described specifically enough in the judgment to give the plaintiff any interest in the property. The judgment provides the State Highway and Public Works Commission shall have a "right of way one hundred feet in width measured 50 feet on either side of the centre line of the concrete pavement laid during the year 1929." If this description is such that the boundaries to the right of way could have been located with certainty on the

ground at the time the judgment was entered in 1938 or it furnished the means of locating them with certainty by reference to something extrinsic, it is a sufficient description. *See Supply Co. v. Nations*, 259 N.C. 681, 131 S.E. 2d 425 (1963). Mr. B.E. Bumgarner, an engineer for the Board of Transportation, testified that he surveyed the property in preparation for the taking which is the subject of this action. He testified he was able to locate the concrete road which was laid in 1929 and later covered with asphalt. He testified further that he could locate the edge of the concrete and from this determine the center line of the highway constructed in 1929. We hold that this was sufficient for the right of way boundary 50 feet from the center line of the highway to be located. If it could be done in 1979, it could have been done in 1938.

The appellants' rely on *In re Simmons*, 5 N.C. App. 81, 167 S.E. 2d 857 (1969). In that case this Court affirmed the dismissal of a petition in which the City of Greensboro attempted to condemn property for the widening of a street. The petition asked for the condemnation of whatever property the respondent owned within 22 feet of the center of Church Street. The petition did not say where the existing edge of the right of way was located. This Court held that the petition should have been dismissed because it did not describe the property to be condemned. In the case sub judice, the property to be condemned is described with specificity in the complaint.

We note that a lawsuit involving the right of way in question has three times been to our Supreme Court. *See Hildebrand v. Telegraph Co.*, 216 N.C. 235, 4 S.E. 2d 439 (1939); 219 N.C. 402, 14 S.E. 2d 252 (1941); 221 N.C. 10, 18 S.E. 2d 827 (1942). The parties at that time apparently had no difficulty determining the right of way lines.

During his testimony, Mr. Bumgarner testified, over the objection of the defendants, that he used unrecorded plats of surveys made in 1929, 1955 and 1969 to assist him in his survey. The appellants assign this as error. Since we have held that the description in the 1938 judgment was sufficient to locate the boundary of the right of way, it was not error to allow Mr. Bumgarner to testify as to how he conducted the survey, including testimony as to the use of old plats.

[2] The 1938 judgment was not filed in the Office of the Register of Deeds. The appellants ask us to hold that for this reason, the judgment does not give plaintiff a valid easement against the defendants since they are bona fide purchasers for value of the property. Appellants concede that for us to reach this holding we would have to overrule *Light Co. v. Bowman*, 228 N.C. 319, 45 S.E. 2d 531 (1947). We do not have the power to overrule our Supreme Court.

Affirmed.

Judges HEDRICK and WELLS concur.

FREDERICK COUNTY DSS, STATE OF MARYLAND EX REL. AMY RIDGWAY, MOTHER v. GARY SKINNER

No. 7929DC1010

(Filed 2 September 1980)

1. **Judgments § 37– summons in prior action not issued – prior action a nullity – no res judicata**

There was no merit to defendant's contention that a previous action with identical parties and identical subject matter in which the court held that plaintiff did not have standing to sue was res judicata as to this action, since the court in the previous action found that a summons had not been issued; if a summons had not been issued, the action was a nullity and the court's recital that plaintiff did not have standing to sue was of no effect.

2. **Parent and Child § 10– Uniform Reciprocal Enforcement of Support Act – assignment of claim – proper party to bring action**

When an obligee in another state makes an assignment of her rights under the Uniform Reciprocal Enforcement of Support Act to a subdivision of that state, that subdivision is a proper party to bring an action in this state.

3. **Parent and Child § 10– Uniform Reciprocal Enforcement of Support Act – issuance of summons**

Statement in the record that "SUMMONS issued on 2 April 1979 showing service on Gary Skinner by leaving copies with Debbie Skinner on April 3, 1978, appears on copy in the original transcript on file with the clerk" was a sufficient showing of the service of the summons; furthermore, though a mother had assigned her claim under the Uniform Reciprocal Enforcement of Support Act to a department of social services in Maryland, a Maryland court did not have to issue a summons in order to give jurisdiction to the District Court of Henderson County. G.S. 52A-11.

APPEAL by plaintiff from *Guice, Judge*. Judgment entered 6 August 1979 in District Court, HENDERSON County. Heard in the Court of Appeals 18 April 1980.

This is an action under G.S. Chapter 52A, the Uniform Reciprocal Enforcement of Support Act. The same plaintiff instituted an action in February 1978 against the defendant for support of the same child. On 24 April 1978 the action was dismissed by order of Judge Gash. The order recited that a summons had not been issued and the plaintiff did not have standing to bring the action. No appeal was taken from this order. Amy Ridgway then commenced an action which was dismissed by Judge Gash on the ground she had assigned her claim to the Frederick County, Maryland Department of Social Services and she did not have standing to bring the action. No appeal was taken from this order. On 22 March 1979 the case sub judice was filed. It was dismissed on 6 August 1979. The court in its order gave no reasons for the dismissal. Plaintiff appealed.

Attorney General Edmisten, by Assistant Attorney General Henry H. Burgwyn, for plaintiff appellant.

Prince, Youngblood, Massagee and Creekman, by Boyd B. Massagee, Jr. and James E. Creekman, for defendant appellee.

WEBB, Judge.

[1] The defendant argues that in a previous case with identical parties and identical subject matter, the court held the plaintiff did not have standing to sue. No appeal was taken in that case and the defendant contends the question of the plaintiff's standing is res judicata. *See Shaw v. Eaves*, 262 N.C. 656, 138 S.E. 2d 520 (1964). The difficulty with this argument is that the plaintiff's standing could not have been determined in the previous case. In that case the court found a summons had not been issued. If a summons had not been issued, the action was a nullity and the court's recital that plaintiff did not have standing was of no effect.

[2] The appellee also contends that the Frederick County, Maryland Department of Social Services does not have standing to bring this action. He bases this argument on the language of G.S. 52A-8.1 which provides in part:

> Whenever a county of this State furnishes support to an obligee, it has the same right to invoke the provisions hereof as the obligee to whom the support was furnished ....

The original Section 8 of the Uniform Act provides as follows:

> If a state or a political subdivision furnished support to an individual obligee it has the same right to initiate a proceeding under this Act as the individual obligee ....

The appellee argues that the General Assembly, by changing the words of the Act when it was adopted in this state, intended to prohibit a governmental entity other than a "county of this State" from bringing an action in this state. We do not believe we should so interpret the statute. In the case sub judice, Amy Ridgway has made an assignment of her claim to the Frederick County DSS. The statute allows a county of this state to bring an action if it has furnished support without an assignment. We hold that when an obligee in another state makes an assignment of her rights under the Uniform Reciprocal Enforcement of Support Act to a subdivision of that state, that subdivision is a proper party to bring an action in this state. We believe, from reading the whole Act, that it should be given a liberal interpretation to carry out its purposes.

[3] The defendant next contends that the record does not show that a summons was served on the defendant. Page One of the record contains the following statement:

> "SUMMONS issued on 2 April 1979 showing service on Gary Skinner by leaving copies with Debbie Skinner on April 3, 1979, appears on copy in the original transcript on file with the clerk."

We hold this is a sufficient showing of the service of the summons.

The defendant also contends that it was proper to dismiss the action because no summons was issued in Maryland. The defendant cites the Maryland Rules of Procedure to the effect that a summons must be issued in any action and argues that the action was not properly instituted in Maryland. We believe that on this procedural question, we should be governed by the law of the forum. G.S. 52A-11 does not require the initiating court to issue a summons. We hold that the Maryland Court did not have to issue a summons in order to give jurisdiction to the District Court of Henderson County.

For the reasons stated in this opinion, we hold the District Court of Henderson County committed error by dismissing this action. We reverse and remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges MARTIN (Robert M.) and HILL concur.

DAVID MILTON HOHN v. DR. M.L. SLATE, DR. ROBERT C. JOHNSON AND HIGH POINT MEMORIAL HOSPITAL, INC.

No. 8019SC27

(Filed 2 September 1980)

1. **Limitation of Actions §11; Physicians, Surgeons, and Allied Professions § 13– malpractice – services for minor – statute of limitations**

Plaintiff's claim based on medical malpractice was barred by the three year statute of limitations of G.S. 1-15(c) and provisions of G.S. 1-17(b) requiring an action for malpractice in the performance of professional services for a minor to be brought before the minor attains the full age of nineteen where the last act of negligence by defendants allegedly occurred in 1962 when plaintiff was four years old and plaintiff filed his claim one day before his twentieth birthday, there being no merit to plaintiffs' contention that G.S. 1-17(b) does not apply to an action brought by a plaintiff in his own behalf.

2. **Constitutional Law § 20; Limitation of Actions § 11; Physicians, Surgeons, and Allied Professions § 13– malpractice – services for minor – statute of limitations – equal protection**

The statute requiring an action for malpractice in the performance of professional services for a minor to be brought before the minor attains the age of 19 when the three-year limitation of G.S. 1-15(c) expires before the minor attains the age of 19 does not violate the equal protection clauses of the N.C. or U.S. Constitutions because a person has three years after reaching the age of 18 in which to bring other types of tort actions, since there is a substantial distinction between persons who have malpractice claims and those with other types of tort claims.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 26 September 1979 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 23 May 1980.

This is an action in which the plaintiff's claim for relief is based on alleged medical malpractice. The plaintiff was born on 13 September 1958. He alleged various acts of negligence by all three defendants in regard to medical treatment he received in 1962. The last act of negligence allegedly occurred on 14 October 1962. Plaintiff became 18 years of age on 13 September 1976. Plaintiff filed an action on 12 September 1978. He took a voluntary dismissal and reinstituted the action on 22 May 1979. The action was dismissed as to the defendants Slate and Johnson on the ground it is barred by the statute of limitations.

Plaintiff appealed.

Miller and Miller, by G.E. Miller and Michael C. Miller, for plaintiff appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by G. Marlin Evans and Kenneth K. Kyre, Jr., for defendant appellee Dr. Robert C. Johnson; Perry C. Henson for defendant appellee Dr. M.L. Slate.

WEBB, Judge.

[1] This appeal presents the question of whether the plaintiff's claim is barred by the statute of limitations. G.S. 1-17(b) provides in part:

> [A]n action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c): Provided, that if said time limitations expire before such minor attains the full age of 19 years, the action may be brought before said minor attains the full age of 19 years.

The claim of the plaintiff, having accrued in 1962, is barred by the three year statute of limitations G.S. 1-15(c) and G.S. 1-17(b) requiring the action to be brought within one year after the disability of minority is removed unless, as the plaintiff contends, G.S. 1-17(b) does not apply. Plaintiff urges that since the wording of G.S. 1-17(b) is that "action[s] on behalf" of minors must be brought within one year of attaining majority and the plaintiff brought this action on his own behalf, he is entitled to bring it within three years of attaining 18 years of age. This is the time limit for other tort claims for those reaching majority. We believe the construction for which the plaintiff contends is contrary to the intent of the legislature. We hold that G.S. 1-17(b) applies to this action brought by the plaintiff.

[2] The plaintiff also contends that the statute violates the equal protection clause of Article 1, Section 19 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The General Assembly has declared that a person who has a malpractice claim does not have as long a period after becoming 18 years of age to bring an action as a person who has some other type of tort claim. The plaintiff contends that this creates an arbitrary class and there is no rational basis for this distinction.

The plaintiff challenges this law under the equal protection clauses of both the state and federal constitution. We believe the equal protection test is the same under both constitutions. Persons with malpractice claims are not a suspect class and a classification so as to shorten the statute of limitations as to them does not affect a fundamental interest. This classification is not inherently suspect. *See Williams v. Rhodes*, 393 U.S. 23, 89

S. Ct. 5, 21 L.Ed. 2d 24 (1968). The plaintiff concedes that the General Assembly has the power to adopt different statutes of limitations for different classes of claims. He contends it is arbitrary and capricious to classify those reaching majority with malpractice claims differently than those reaching majority with other tort claims. We believe there is a substantial distinction between persons who have malpractice claims and those with other types of tort claims. Based on this distinction, we presume the General Assembly at the time it enacted understood and correctly appreciated the needs of the people of this state when the legislation was enacted. To strike this statute down, we would have to substitute our judgment for that of the General Assembly. The plaintiff contends that by shortening the period in which persons with malpractice claims may bring actions, the state has penalized those persons for the benefit of insurance companies. If this is true, we feel it is a matter for the General Assembly. We hold G.S. 1-17(b) does not violate the equal protection clause of the constitution of this state or the United States. *See Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed. 2d 1485 (1957) and *In re Walker*, 282 N.C. 28, 191 S.E. 2d 702 (1972).

Affirmed.

Judges MARTIN (Harry C.) and WELLS concur.

JEWEL SMITH OSBORNE v. FRANCES WALKER, KATHRYN WHITNER, VIRGINIA TESH, AND THE NORTH CAROLINA BAPTIST HOSPITALS, INC.

No. 7921DC1074

(Filed 2 September 1980)

Negligence § 1.1– allegation of negligence in filing unfavorable job performance reports – no actionable negligence

Plaintiff's action to recover for the alleged negligence of defendants, her superiors, in filing negative reports on her job performance was properly dismissed.

Osborne v. Walker

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 13 November 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 April 1980.

This is an action in which the plaintiff's claim for relief is based on the alleged negligence of the individual defendants who were plaintiff's supervisors at the Baptist Hospital. Plaintiff, a licensed practical nurse, alleged her employment was terminated because of the negligence of the individual defendants in submitting certain negative reports as to her performance. The superior court allowed a motion to dismiss the action on the ground it did not state a claim for which relief could be granted.

Plaintiff appealed.

Pettyjohn and Molitoris, by Theodore M. Molitoris, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by David A. Irvin and Richard T. Rice, for defendant appellees.

WEBB, Judge.

This is a case of first impression. The gravamen of the plaintiff's claim is that she should be entitled to recover for the negligence of her superiors in giving her negative reports in the course of her employment. She concedes that she was working under a contract for employment at will and could have been discharged by the proper persons whether or not her work was satisfactory. *Tatum v. Brown,* 29 N.C. App. 504, 224 S.E. 2d 698 (1976). The individual defendants did not have the authority to discharge the plaintiff. Each of them had a duty to file reports on the plaintiff's job performance, and she contends they should be held liable to her for their negligence in making these reports upon which other persons acted.

The plaintiff contends the tort of negligence should apply within the corporate relationship. She contends that within a corporation, there may be thousands of employees with no personal relationships. Supervisors make reports which other per-

sons use in deciding the future within the corporation of those in regard to whom the reports are made. She contends a person who makes such a report should be under a duty of due care to the person being evaluated and should be held liable if this standard of due care is violated. Plaintiff argues that employees' rights have been greatly expanded in recent years and they should now be given this additional protection of negligence law.

We decline to extend the law of negligence as the plaintiff contends we should do. Without some personal injury, negligence is usually not actionable. We believe it would put an undue burden on a supervisor who must make reports on employees to know that he or she might be sued for an unfavorable report. We believe the efficiency of business is increased if frankness in work reports is encouraged.

Since the liability of the corporate defendant is predicated on the liability of the individual defendants, we hold the action as to all defendants was properly dismissed.

Affirmed.

Judges MARTIN (Robert M.) and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 29 AUGUST 1980

STATE v. DALE No. 809SC108	Franklin (79CRS2851)	No Error
UTILITIES COMM. v. PUBLIC SERVICE CO. No. 8010UC80	Utilities Comm. (G-5, Sub 136A)	Affirmed

FILED 2 SEPTEMBER 1980

HAMLIN v. HAMLIN No. 7929DC978	Rutherford (74CVD291)	Affirmed
HUNEYCUTT v. PETERS No. 8019SC248	Cabarrus (77CVS933)	Affirmed
PARSONS v. CARDWELL No. 8025SC111	Caldwell (78CVS870)	Affirmed
STATE v. CARRAWAY No. 808SC251	Greene (79CR182) (79CR183)	Affirmed
STATE v. CRAWFORD No. 8026SC380	Mecklenburg (79CRS21181)	No Error
STATE v. DOWELL No. 7927SC1194	Gaston (79CRS11330) (79CRS11331)	No Error
STATE v. HUNTER No. 8023SC249	Yadkin (78CRS895)	No Error
STATE v. KIMES No. 8019SC134	Randolph (79CRS6653)	Reversed
STATE v. McDOWELL No. 7926SC1051	Mecklenburg (78CR114558) (78CR114559) (78CRS114639) (78CRS114641)	No Error
STATE v. MARTIN No. 8020SC283	Union (73CRS3346) (73CRS3347)	No Error

STATE v. PHILBECK No. 8027SC353	Cleveland (79CRS8164)	No Error
STATE v. RUDISILL No. 7927SC1061	Lincoln (79CRS1162)	No Error
STATE v. SMITH No. 8016SC210	Robeson (79CRS3901)	No Error
STATE v. TILLMAN No. 8026SC245	Mecklenburg (79CRS042356)	First Count — Reversed Second Count — Remanded
TIERNEY v. TIERNEY No. 8010DC288	Wake (78CVD3748)	Affirmed

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The first sentence of Rule 13(a) of the Rules of Appellate Procedure, 287 N.C. 671, 710, shall be amended to read as follows (new material appears in italics):

FILING AND SERVICE OF BRIEFS.

Within 20 days after the *clerk of the appellate court has mailed the printed record to the parties*, the appellant shall file his brief in the office of the clerk, and serve copies thereof upon all other parties separately represented.

This amendment to Rule 13(a) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The last sentence of the first paragraph of Rule 14(d)(1) of the Rules of Appellate Procedure, 287 N.C. 671, 712, as amended 31 January 1977, 291 N.C. 721, shall be amended to read as follows (new material appears in italics):

Filing and Service; Copies.

* * *

Within *20* days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The last sentence of Rule 15(g)(2) of the Rules of Appellate Procedure, 287 N.C. 671, 717, shall be amended to read as follows (new material appears in italics):

Cases Certified for Review of Court of Appeals Determinations.

* * *

The appellee shall file a new brief in the Supreme Court and

serve copies upon all other parties within *20* days after a copy of appellant's brief is served upon him.

This amendment to Rules 14(d)(1) and 15(g)(2) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The third and final paragraph of Rule 18(d)(3) of the Rules of Appellate Procedure, 287 N.C. 671, 724, as amended 21 June 1977, 292 N.C. 739, shall be amended to read as follows (new material appears in italics):

Settling the Record on Appeal.

* * *

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar shall by written notice to counsel for all parties set a place and time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order; *provided, however, that when the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar is a party to the appeal as permitted by Rule 19(d), settlement of the record on appeal, absent an agreement of the parties, shall be by a referee appointed pursuant to the procedures contained in the preceding paragraph.*

This amendment to Rule 18(d)(3) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON J.

For the Court

THOMAS EDWARD LANE, A MINOR, BY HIS GUARDIAN AD LITEM, MAXINE SIMS SWAIN v. THE AETNA CASUALTY & SURETY COMPANY

No. 7928DC1146

(Filed 16 September 1980)

Insurance § 87.1; Contracts § 14.2; Parent and Child § 7– automobile liability insurance — medical expenses for child incurred by parent — no cause of action in child — parent's action barred by statute of limitations

In an action to recover under the medical payments coverage of an automobile liability insurance policy, the trial court properly dismissed minor plaintiff's action on the ground that he had no cause of action under the insurance policy, and properly determined that the cause of action of plaintiff's mother for reimbursement of medical expenses incurred by her for the care and treatment of her son was barred by the three year statute of limitations, since the policy in question was issued to plaintiff's mother as named insured, covered relatives of the named insured who were residents of the same household, and provided for payment of "all reasonable expenses incurred within one year from the date of accident"; plaintiff was not a direct beneficiary of the insurance contract, as the intent of the parties was to protect and reimburse the person who actually *incurred* the expenses, in this case plaintiff's mother; plaintiff's mother provided for his support and there was no evidence that she refused or was unable to provide for his necessaries, which would have obligated plaintiff for the expense of his medical treatment; and the mother, who did "incur" expenses within the meaning of the policy, made a claim for expenses on 22 November 1977, while the expenses were incurred between 5 June 1974 and 27 September 1974.

APPEAL by plaintiff from *Roda, Judge.* Judgment entered 19 October 1979 in District Court, BUNCOMBE County. Heard in the Court of Appeals 26 August 1980, at Waynesville, North Carolina.

This is an action in contract on an automobile liability insurance policy. Plaintiff, then a minor, instituted the action through his mother, Maxine Sims Swain, against defendant insurance company. Maxine Sims Swain was appointed plaintiff's guardian ad litem on 10 February 1978.

The policy, effective 5 March 1974 to 5 March 1975, was issued to Maxine Sims Swain as named insured. Persons insured, with respect to a non-owned automobile, include "any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation . . . is with the permission, or reasonably believed to be with the permission, of

the owner and is within the scope of such permission . . . ." The policy defines "relative" as "a relative of the named Insured who is a resident of the same household."

The medical payments coverage, limited to $2,000, provides in pertinent part:

> To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:
>
> Division 1. To or for the named Insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," caused by accident,
>
> . . . .
>
> (b) while occupying a non-owned automobile, but only if such person has, or reasonably believes he has, the permission of the owner to use the automobile and the use is within the scope of such permission, . . .

The medical payments coverage for a non-owned automobile is "excess insurance over any other valid and collectible automobile medical payments insurance." The Proof and Payment of Claim provision reads: "The Company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury."

The parties waived jury trial and submitted a stipulation of the facts to the judge. The relevant facts are:

On 5 June 1974 plaintiff, Thomas Edward Lane, was a thirteen-year-old child residing with and in the custody of his mother, Maxine Sims Swain, who had responsibility for the necessary medical treatment of said child. On that day Thomas was operating a 1962 Renault automobile registered to Roger Dean Waldrop. Thomas had, or reasonably believed he had,

permission of the owner to use the automobile and his use was within the scope of such permission. Plaintiff lost control of the vehicle, ran off the highway, overturned, and sustained injuries. Hospital and medical bills totalling $5,389.44 accrued between 5 June 1974 and 27 September 1974 as a result of the injuries.

Memorial Mission Hospital, Asheville Bone and Joint Clinic (Dr. Wayne Montgomery), Asheville Anesthesia Associates, and Asheville Radiological Group, P.A. billed Thomas's mother for medical services rendered to plaintiff. Asheville Orthopedic and Rehabilitation Center, Inc. billed Robert S. Swain, Thomas's stepfather, the sum of $2,420.59 for plaintiff's treatment. Asheville Radiological Group, P.A. also billed Thomas E. Lane the sum of $14.50 for reading x-rays.

Maxine Sims Swain paid $640.85 to Memorial Mission Hospital. Continental Casualty Company paid $1,393.75 to Memorial Mission Hospital and part of the amount due Asheville Bone and Joint Clinic. The record does not disclose whether the remaining bills were paid. On 12 September 1977 State Farm Mutual Automobile Insurance Company, insurer for Roger Dean Waldrop, made a compromise settlement for $900 on medical payments insurance covering the 1962 Renault.

Plaintiff, by and through his attorney, made a claim for hospital and medical expenses incurred by Thomas Edward Lane to an agent of defendant on 22 November 1977. Defendant refused to pay the claim. Plaintiff commenced this action 10 February 1978.

Defendant moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 28 March 1978, alleging that the medical expenses were incurred by the mother, not the minor plaintiff, and that the plaintiff had no cause of action against the defendant. On 25 July 1979 defendant moved to amend its answer and defense to amplify and detail its plea of the three-year statute of limitations in bar of the claim.

At the October 1979 civil session, Judge Roda concluded that Maxine Sims Swain was liable for the medical expenses

incurred for the treatment of plaintiff, that the right of action to recover such expenses was in the mother, and that the claim was barred by the statute of limitations. Plaintiff appeals from the trial court's dismissal of his claim.

Swain & Stevenson, by Joel B. Stevenson, for plaintiff appellant.

Roberts, Cogburn and Williams, by Landon Roberts and James W. Williams, for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff contends that the trial court erred in determining that the cause of action is barred by the statute of limitations. His assertion would be correct if the action reposed in the plaintiff rather than his mother. The statute of limitations begins to run against an infant, who has no guardian at the time the cause of action accrues, upon appointment of a guardian or the removal of the age disability as provided by N.C.G.S. 1-17, whichever occurs first. *Trust Co. v. Willis*, 257 N.C. 59, 125 S.E. 2d 359 (1962). As Maxine Sims Swain was appointed guardian ad litem on 10 February 1978, the action brought by plaintiff on that same date would not be barred if in fact he were the real party in interest. We agree, however, with the trial judge's conclusion that the exclusive right to recover on the insurance policy is in Maxine Sims Swain and that the three-year statute of limitations is a bar to her claim.

Plaintiff argues that he is a direct beneficiary of the insurance contract and as such the defendant is obligated to pay $2,000 toward plaintiff's medical expenses. We must look to the terms of the insurance policy to determine whether plaintiff has a right against defendant under these circumstances.

> 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.

Electric Co. v. Insurance Co., 229 N.C. 518, 520, 50 S.E. 2d 295, 297 (1948).

Plaintiff would have us apply this principle to the language of the insurance policy providing that the defendant shall pay medical expenses incurred "[t]o or for the named insured and each relative" upon the event of the named contingencies. The issue hinges, however, upon the use of the term "incurred" in determining to whom the company's obligation is owed. If plaintiff himself incurred the medical expenses in question, there would be no doubt that he had a right of recovery from defendant, as he falls within the policy's definition of the term "relative."

While it is true that the original contract of insurance was made between plaintiff's mother and defendant, if the contracting parties intended that the policy benefit plaintiff, he could have an actionable right as a direct third party beneficiary. The North Carolina Supreme Court has stated: " 'The rule is well established in this jurisdiction that a third person may sue to enforce a binding contract or promise made for his benefit even though he is a stranger both to the contract and to the consideration.' " *Trust Co. v. Processing Co.*, 242 N.C. 370, 379, 88 S.E. 2d 233, 239 (1955) (quoting Justice Ervin in *Canestrino v. Powell*, 231 N.C. 190, 56 S.E. 2d 566 (1949)). But "[n]ot every such contract made by one with another, the performance of which would be of benefit to a third person, gives a right of action to such third person. Whether such person can enforce the contract depends on the facts and circumstances of the particular case." 242 N.C. at 379, 88 S.E. 2d at 239. When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement. 17 Am. Jur. 2d Contracts § 302 (1964). The test is whether the parties intended the benefit of the contract to run to the maker of the contract or to the third person. This

intent must be determined by construction of the "terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish." *Id.* § 304. Inasmuch as the insurance policy provision in question promises "[t]o pay all reasonable expenses incurred . . . [t]o or for the named Insured and each relative who sustains bodily injury" it is apparent that the intent of the parties was to protect and reimburse the person who incurred the expenses, who is not necessarily the same party who sustained the injuries. As coverage for relatives is confined to those residing in the same household, we must infer that plaintiff's mother contracted for this protection primarily to assure herself that she would be reimbursed for medical expenses for treatment of her relatives, including her son, for which she otherwise would be liable. The parties stipulated that plaintiff's mother had "the responsibility for the necessary medical treatment of said child." Thus plaintiff would be a direct beneficiary of the policy only if he himself, rather than his mother, incurred such medical expenses.

Although it is undisputed that medical expenses due to plaintiff's injury were incurred within one year of the accident, it appears that the expenses were incurred by the mother, who was legally obligated for plaintiff's support. In interpreting an insurance contract with a similar provision, the North Carolina Supreme Court held in *Czarnecki v. Indemnity Co.*, 259 N.C. 718, 720, 131 S.E. 2d 347, 349 (1963), that:

> The very language which the parties selected to state the facts is the language chosen to measure defendant's obligation. "Incur" is defined by Webster as: "1: to meet or fall in with (as an inconvenience); become liable or subject to: bring down upon oneself *(incurred* large debts to educate his children)." Courts have accepted Webster's definition as the correct meaning of the word.

In construing the term "incur" in a medical payments policy, this Court has held "that expenses are incurred within the medical payments coverage . . . when one has paid, or become legally obligated to pay such expenses within one year of the date of accident." *Atkins v. Insurance Co.*, 15 N.C. App. 79, 83,

189 S.E. 2d 501, 504 (1972). In the instant case there are no allegations or evidence that plaintiff ever had paid or become legally obligated to pay for any of the medical expenses which accrued as a result of his accident. Only one bill for $14.50 was addressed to him. The record indicates that all the other bills were submitted to his mother and stepfather, and that some of these bills were paid by his mother and another insurance company. The record is silent as to whether the remaining expenses were paid.

The parties concur that Maxine Sims Swain was responsible for the necessary medical treatment of her son. Even in the absence of such an admission, the law imposes a duty of support. *See* N.C. Gen. Stat. 50-13.4(b); *Wells v. Wells*, 227 N.C. 614, 44 S.E. 2d 31, 1 A.L.R. 2d 905 (1947). Parental duty includes a liability for medical expenses incurred in treatment of a minor child for injuries sustained in an automobile accident. *Price v. Railroad*, 274 N.C. 32, 162 S.E. 2d 590 (1968). Just as a parent is responsible for his child's support, as a general rule, a child may not incur liability in contract, because his legal incapacity makes his contracts voidable. 7 Strong's N.C. Index 3d Infants § 2 (1977). The doctrine of necessaries is the exception to this general principle.

> An infant may be compelled to pay a reasonable price for the necessaries that have been furnished to him. . . . [T]he obligation in the strict sense of the word is not a contract. It is a quasi-contractual obligation, an obligation imposed upon him by law. . . .
>
> If the law did not impose upon an infant an obligation to pay for necessaries, adults would be reluctant to furnish him with the necessities of life. The policy of the law in giving protection to an infant would be defeated if an infant could not by some kind of binding obligation procure necessities.

3 R. Lee, N.C. Family Law § 272 (3d ed. 1963).

Medical care, as well as food, clothing, lodging, and proper education, has been held to be within the classification of neces-

saries. *Id.* The concept of necessaries for which a minor may become liable has expanded in recent years to include things that are not absolutely vital to the child's survival. *See Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E. 2d 19, 41 A.L.R. 3d 1062 (1970) (liability of an emancipated infant for services rendered by an employment agency).

Whether a particular infant may be liable for those items generally considered necessaries depends on the facts and circumstances of the case. Professor Lee, *supra* § 272, explains:

> If the infant has a parent or guardian who provides him with necessaries, the infant cannot be sued for articles which, under other circumstances, would be classified as necessaries. In the absence of an emergency, the person furnishing the necessaries must prove that the parent or guardian has neglected or refused or is unable to supply the particular necessity. There is a presumption that the parent with whom the minor is living, except in the case where the minor has had an accident and has been taken to a doctor or hospital and quick action must be taken, or other peculiar circumstances, has furnished the child with all proper necessaries.

North Carolina courts have held that in some circumstances a minor who lives with and is supported by a parent may still be required to pay for his necessary medical expenses. In *Cole v. Wagner*, 197 N.C. 692, 150 S.E. 339, 71 A.L.R. 220 (1929), a minor child was seriously injured and received emergency hospital, medical, and surgical treatment from the plaintiffs, owners of a hospital. The child received a judgment in damages, a portion of which was in consideration for his medical expenses. The judgment was paid to the defendant guardian, the child's mother. In an action by plaintiffs to recover the amount of its charges for treatment of the child from the child's estate, the North Carolina Supreme Court held that an infant may become bound to pay for medical expenses, despite the fact that he has a parent or guardian responsible for his support and care, when the parent or guardian does not so provide. The Court believed it would have been inequitable to deny the plaintiffs recovery, because the money that plaintiff recovered in the damage suit

"was for necessary expenses of the defendant. To allow the defendant infant to recover upon this theory and then deny the plaintiff in the present action the right to recover on the same theory of necessary expenses, would be blowing hot and cold in the same breath." *Id.* at 699, 150 S.E. at 341. *Cole* thus stands for the principle that an infant *may* be liable for necessary medical expenses even though he is living with a parent who has a duty to provide the same. *See also In re Peacock*, 261 N.C. 749, 136 S.E. 2d 91 (1964); *Bitting v. Goss*, 203 N.C. 424, 166 S.E. 302 (1932). *Cole* is inapplicable in the present case, however, because the providers of the medical services made no demand for payment upon plaintiff. Unlike the situation in *Cole*, in this case there is no issue of a separate estate or recovery in damages, and the mother assumed her legal responsibility for the child's necessary medical treatment by at least beginning payment of the bills and not objecting to being responsible for plaintiff's treatment.

Plaintiff's mother provided for his support, and there is no evidence that she refused or was unable to provide for his necessaries. Therefore plaintiff did not become obligated for the expense of his medical treatment, did not "incur" any expense under the meaning of the policy, and has no claim against defendant.

Plaintiff, in his brief, concedes that if the exclusive right to recover on the policy is in Maxine Sims Swain, the action is barred by the statute of limitations. *See Wheeless v. Insurance Co.*, 11 N.C. App. 348, 181 S.E. 2d 144 (1971); *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870, *cert. denied*, 277 N.C. 110 (1970). The trial judge properly dismissed plaintiff's action on the grounds that no cause of action exists against defendant under its medical payments coverage of the insurance contract and that the cause of action of Maxine Sims Swain for reimbursement of medical expenses incurred by her for the care and treatment of her son is barred by the three-year statute of limitations.

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA, ON RELATION OF JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, PLAINTIFF v. RESERVE INSURANCE COMPANY, DEFENDANT AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION THIRD-PARTY PLAINTIFF AND PHILIP R. O'CONNOR, AS DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS AND AS DOMICILIARY RECEIVER OF RESERVE INSURANCE COMPANY THIRD-PARTY DEFENDANT AND ROBERT P. BINKLEY, BENJAMIN T. SIMMONS, JR., WALLACE GRAHAM GETCHELL, AND ARNOLD ENGLAND, INDIVIDUALLY AND AS REPRESENTATIVES OF THE POLICYHOLDERS OF RESERVE INSURANCE COMPANY WHO ARE CITIZENS OR RESIDENTS OF NORTH CAROLINA OR WHO HOLD POLICIES ISSUED UPON PROPERTY IN NORTH CAROLINA, AND CAROLINA INSURANCE SERVICE, INC. THIRD-PARTY PLAINTIFFS

No. 7910SC1038
(Filed 16 September 1980)

Insurance § 1– insolvent insurer — deposit — payment to Guaranty Association — retroactivity of statute

The Quick Access Statute, G.S. 58-155.60, which requires that deposits made by an insolvent casualty insurer be paid to the N.C. Insurance Guaranty Association for use in paying claims against the insolvent insurer, is to be applied retroactively to deposits made before the date of its enactment and to the holders of policies issued prior to that date. However, claimants against the deposit of a foreign insurer under G.S. 58-185 will retain their lien rights after payment of the deposit to the Guaranty Association and may proceed against the Guaranty Association to the extent of the deposit for any claims they have under G.S. 58-185 which are not paid by the Guaranty Association pursuant to G.S. Ch. 58, Art. 17B.

APPEAL by third-party plaintiff, North Carolina Insurance Guaranty Association, from *Hobgood, Judge*. Judgment entered 6 July 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 23 April 1980.

This action arose from the insolvency of Reserve Insurance Company, an Illinois Corporation doing business in North Carolina. The North Carolina Commissioner of Insurance was appointed Ancillary Receiver for Reserve on 31 May 1979. North Carolina Insurance Guaranty Association intervened and prayed that the Ancillary Receiver be ordered to deliver to the Guaranty Association a deposit of $185,000.00 which Reserve had delivered to the State Treasurer pursuant to Article 20 of Chapter 58 of the North Carolina General Statutes. Robert P. Binkley and the other individual third-party plaintiffs inter-

vened on their own behalf and on behalf of other individuals as policyholders with Reserve. Carolina Insurance Service, Inc. intervened as general agent in North Carolina for Reserve. The third-party plaintiffs, other than the Guaranty Association, prayed that the court declare that the policyholders of Reserve had a lien on the $185,000.00 deposit superior to the claim of the Guaranty Association and that the deposit not be delivered to the Guaranty Association. On 6 July 1979 the superior court held that the statute under which the Guaranty Association claimed the deposit should not be construed to apply retroactively and the policy holders of Reserve had a lien superior to the claim of the Guaranty Association. The superior court ordered the Guaranty Association's claim to the deposit be denied. The Guaranty Association appealed.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for plaintiff appellee State of North Carolina, on relation of John Randolph Ingram, Commissioner of Insurance of North Carolina.

Allen, Steed and Allen, by Arch T. Allen III and Ann Hogue Pappas, for third-party plaintiff appellant North Carolina Insurance Guaranty Association.

Craige, Brawley, Liipfert and Ross, by Cowles Liipfert, C. Thomas Ross and Terrie A. Davis, for Carolina Insurance Service, Inc., Robert P. Binkley, Benjamin T. Simmons, Jr., Wallace Graham Getchall, Arnold England and the North Carolina policyholders of Reserve Insurance Company.

WEBB, Judge.

This appeal involves the interpretation of several statutes enacted in regard to the insurance industry for the protection of the public in this state. The General Assembly in 1909 enacted Article 20 of Chapter 58 of the General Statutes which required insurance companies chartered in other states or foreign countries to deposit securities with the Commissioner of Insurance for the protection of policyholders. G.S. 58-185 provides:

> Upon the securities deposited with the Commissioner

> of Insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance.

G.S. 58-155.25 provides:

> The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of G.S. 58-155.29 with respect to the rights of claimants holding contingent claims.

In 1971 the General Assembly enacted Article 17B of Chapter 58 of the General Statutes. Pursuant to this Article the North Carolina Insurance Guaranty Association was created. All casualty insurance companies are members of the Guaranty Association. When a member company is determined to be insolvent by a court of competent jurisdiction, the Guaranty Association bears the responsibility for paying claims against the insolvent company. This obligation is limited to the amount of the covered claim in excess of $100.00, but not exceeding $300,000.00. Payments are financed through membership assessments. Covered claims are defined by G.S. 58-155.45 as follows:

(4) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies issued by an insurer, if such insurer becomes insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State. "Covered claim" shall not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

The General Assembly adopted, effective 23 May 1979, what is called the Quick Access Statute. It is codified as G.S. 58-155.60 and provides in part as follows:

> Use of deposits made by insolvent insurer. — Notwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders, the Commissioner shall deliver to the Association, and the Association is hereby authorized to expend, any deposit or deposits previously or hereinafter made, whether or not required by statute, by an insolvent insurer to the extent those deposits are needed by the Association first to pay the covered claims in excess of one hundred dollars ($100.00) as required by this Article and then to the extent those deposits are needed to pay all expenses of the Association relating to the insurer.
>
> * * *
>
> The Association shall account to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder, and shall repay to the Commissioner a portion of the deposits received which shall be equal to an amount computed by adding the lesser of the amount of the covered claim or one hundred dollars ($100.00) for each covered claim. Said repayment shall in no way

> prejudice the rights of the Association with regard to the portion of the deposit repaid to the Commissioner. After all of the deposits of the insolvent insurer have been expended by the Association for the purpose set out in this section, the member insurers shall be assessed as provided by this Article to pay any remaining liabilities of the Association arising under this Article.

From the above statutes, it is seen that persons with claims against insolvent insurance companies have two remedies in this state. They may proceed under G.S. 58-185 to enforce a lien against a deposit required of foreign insurance companies or they may be paid by the Guaranty Association. The General Assembly, by the adoption of G.S. 58-155.60 (Quick Access Statute), provided that the Guaranty Association could have advancements to it from the special deposit to pay claims arising against insolvent insurers. The purpose of the Guaranty Association's claim in this case is to have the deposit of Reserve paid to it. The superior court held that G.S. 58-155.60 was prospective only and that since all claims which would arise against the deposit had vested prior to the adoption of the statute, the deposit should not be delivered to the Guaranty Association.

The appellant Guaranty Association contends that G.S. 58-155.60 is procedural, that it merely provides a way for the Guaranty Association to use the deposit to pay claims which would be paid from the deposit and that it should be construed to be retroactive. The appellees contend the Quick Access Statute makes a substantive change in the law and that claimants against the deposit made by Reserve pursuant to G.S. 58-185 will lose some of their rights if the deposit is delivered to the Guaranty Association. The appellees further contend that if the statute is interpreted to apply retroactively, the claimants against the deposit will lose their liens; that the Guaranty Association is not required to pay the first $100.00 of any claim or any amount of a claim over $300,000.00 which would reduce the claimants' rights under G.S. 58-185; that the Guaranty Association is required to pay claims which arise within 30 days of the insolvency which would allow more claims to be paid by the Association than would be paid pursuant to G.S. 58-185,

thus diluting the rights of claimants under G.S. 58-185; and that, if the deposit is delivered to the Guaranty Association, it will not draw interest which could be used to increase the *pro rata* share of the claimants under G.S. 58-185.

We believe the General Assembly intended for G.S. 58-155.60 to be applied retroactively. The statute provides "deposits previously or hereinafter made" shall be delivered to the Guaranty Association. We believe these plain words of the statute show clearly that the General Assembly intended the deposit made by Reserve prior to the enactment of the Quick Access Statute to be delivered to the Guaranty Association. The appellees contend that a retroactive application of the statute makes it unconstitutional since this deprives claimants under G.S. 58-185 of rights to the deposit which were vested in them at the time the statute was adopted. As we read the statute, the appellees would not be deprived of any rights. When G.S. 58-155.60 was adopted, it did not repeal G.S. 58-185. We do not believe the General Assembly intended claimants against insolvent insurance companies to have less rights after the adoption of G.S. 58-155.60. We believe the statutes can be reconciled. G.S. 58-185 provides for a lien against the deposit of Reserve for certain claims against Reserve. G.S. 58-155.60 does not provide that this lien will be lost when the deposit is paid to the Guaranty Association. We hold that the claimants against the deposit will retain their lien rights after the deposit is paid to the Guaranty Association. If they have rights to be paid under G.S. 58-185 which do not coincide with their rights under Article 17B, the Guaranty Association will be liable to pay such claims to the extent they could have been paid from the deposit which was delivered to the Guaranty Association.

We hold that the superior court committed error when it did not order the deposit of Reserve delivered to the Guaranty Association. The claimants under G.S. 58-185 will retain their lien rights and may proceed against the Guaranty Association to the extent of the deposit for any claims they may have had under G.S. 58-185 which are not satisfied by the Guaranty Association.

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

Reversed and remanded.

Judges MARTIN (Robert M.) and HILL concur.

STATE OF NORTH CAROLINA v. JOHNNIE SUE LIPFIRD DEFENDANT AND STATE OF NORTH CAROLINA v. LARRY CLINTON LIPFIRD DEFENDANT

No. 8025SC107

(Filed 16 September 1980)

1. **Constitutional Law § 50– Speedy Trial Act not violated**

There was no merit to defendants' contention that the Speedy Trial Act was violated because they were not brought to trial within 120 days of their arrest where there was nothing in the record to support their contention that they were arrested for "an offense based on the same acts or transactions" at a time earlier than that indicated in the record, and there was nothing in the record to show that the trial judge, in denying their motions to dismiss, considered anything other than the fact that defendants were brought to trial within 120 days of the "date of indictment (30 April 1979)."

2. **Criminal Law § 92.2– consolidation of offenses — no abuse of discretion**

Defendants were not deprived of a fair trial by the consolidation of their cases for trial, and the trial court did not abuse his discretion in consolidating offenses which were of the same class and were so connected in time and place that evidence at trial upon one indictment was competent and admissible on the other.

3. **Criminal Law § 122.2– failure of jury to reach verdict — instructions — no coercion**

The trial judge did not violate G.S. 15A-1235 and coerce the jury into returning a verdict where the jury returned to the courtroom after an hour's deliberation, requested additional instructions, and indicated that some of the jurors felt they did not have enough evidence to reach a verdict; the trial judge recessed court until the following morning; and on the following morning he answered the jurors' questions and then instructed them that "a mistrial, of course, will mean that more time and another jury will have to be selected to hear the cases and this evidence again," and they should try "to reconcile your differences if such is possible without surrendering your conscientious convictions."

State v. Lipfird

APPEAL by defendants from *Kirby, Judge.* Judgments entered 30 August 1979 in Superior Court, CATAWBA County. Heard in the Court of Appeals on 28 August 1980.

Defendant Johnnie Sue Lipfird was charged under proper indictments dated 30 April 1979 with felonious breaking and entering, felonious larceny, and safecracking. Defendant Larry Clinton Lipfird was charged under proper indictments dated 30 April 1979 with felonious breaking and entering, felonious larceny, and safecracking.

Defendants, on 2 July 1979, moved to dismiss the charges for denial of a speedy trial in violation of the United States and North Carolina Constitutions, and in violation of G.S. § 15A-701 *et seq.* On 13 July 1979, Judge Wood denied the motions. Thereafter, on 23 July 1979, defendants made motions for appropriate relief on the grounds of denial of a speedy trial, and in an order filed 22 August 1979, defendant Johnnie Sue Lipfird's motion was denied. On 28 August 1979, the State's motion to consolidate the trials of the defendants was granted.

At trial, the State's evidence tended to show the following: On 23 December 1978, the Billy R. Wycoff family left their home at Route 11, Hickory, to visit relatives in Chicago, Illinois. The doors and windows in the house were locked, as was a 200 pound safe containing approximately $21,415 located in a closet in the back bedroom of the house. On the evening of 25 December 1978, Orville Dean Moody, Hiram "Sonny" Carroll, and defendants met at defendants' trailer to discuss stealing a safe that defendants claimed contained $22,000 from the Wycoff home, which defendants knew to be unoccupied at the time. At approximately 9:00 p.m. that evening, defendants, Moody, Carroll, and one Mary Beth Martin drove to the Wycoff residence in defendant Larry Lipfird's car. At defendant Larry Lipfird's direction, Moody and Carroll, with socks over their hands, proceeded to the kitchen door. Moody and Carroll then taped up the bottom window in the door with electrician's tape so that breaking the window "would not make noise or shatter." Carroll broke the window with his fist, reached in and unlocked the door. As instructed by defendant Larry Lipfird, Moody went to the closet in the back bedroom and found the safe and they then "picked up the safe and took it outside to the carport." Moody

and Carroll carried the safe across the front yard and the highway, "dropping the safe in a ditch a couple of times because cars were coming up and down the road," and proceeded into some woods where they met the others who had been driving up and down the road in front of the Wycoff residence. The group then returned to defendants' trailer. Carroll and defendant Larry Lipfird carried the safe to the bedroom where they and Moody "started hitting on the safe with crowbars bending the locks off and knocking the dial off trying to get the safe open." The men finally got the safe open, removed the money but left the other contents, and then took the safe to Gunpowder Bridge, where they dumped the safe "into the middle of the water there."

When the Wycoff family returned from Chicago on 27 December 1978, they found the broken window on the kitchen door and the safe missing. Mrs. Elsie Wycoff testified that she never gave defendants permission to take the safe or its contents and that she never received any of the money.

Defendants offered no evidence.

The jury found defendants guilty as charged, and on 30 August 1979, the court entered judgment sentencing defendant Johnnie Sue Lipfird to a prison term of not less than eight nor more than fifteen years, and sentencing defendant Larry Clinton Lipfird to a prison term of not less than eighteen nor more than twenty-five years. Defendants appealed.

Attorney General Edmisten, by Associate Attorney Barry S. McNeill, for the State.

Sigmon, Clark and Mackie, by Barbara H. Kern, for the defendant appellant Johnnie Sue Lipfird.

John D. Ingle, for the defendant appellant Larry Clinton Lipfird.

HEDRICK, Judge.

[1] Defendants first assign error to the denial of their motions to dismiss and for appropriate relief. Defendants argue that the "Speedy Trial Act," G.S. § 15A-701 *et seq.*, was violated since

they were not brought to trial within 120 days "of [their] arrest on an offense based on the same acts or transactions as Appellant[s] [were] tried for in the cases at bar." While we realize that defendants insist they were arrested for "an offense based on the same acts or transactions" at a time earlier than is indicated in the record, there is nothing in the record before us to support this contention, or to show that the trial judge, in denying their motions to dismiss and for appropriate relief, considered anything other than the fact that defendants were brought to trial within 120 days of the "date of indictment (30 April 1979)." The assignments of error addressed to this point are not sustained.

[2] Defendants also contend, by their seventh assignment of error, that they were deprived of a fair trial by the consolidation of their cases for trial, and by the trial court's denial of their motion to sever at the close of the State's evidence. "Ordinarily, motions to consolidate cases for trial are within the sound discretion of the trial judge. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. King*, 287 N.C. 645, 215 S.E. 2d 540 (1975)." *State v. Smith*, 291 N.C. 505, 518, 231 S.E. 2d 663, 672 (1977). *See also State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979). Absent a showing that consolidation for trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). We find no such deprivation of a fair trial here. Consolidation is generally held proper where, as in this case, the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment is competent and admissible on the other. *State v. Smith, supra; State v. Pierce*, 36 N.C. App. 770, 245 S.E. 2d 195 (1978). Defendants have shown no abuse of discretion in the trial judge's allowing the State's motion for consolidation and denying defendants' motion to sever. This assignment of error has no merit.

Defendants' eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth assignments of error, based on 31 exceptions noted in the record, relate to the admission and exclusion of testimony. Suffice it to say we have carefully examined the excep-

tions upon which these assignments of error are based, and we find that defendants were not deprived of a fair trial by any of the rulings challenged by these exceptions.

[3] Next, defendants contend the trial judge erred in "responding with the Allen Charge instructions to the jury following the statement of the jury foreperson that there were some members of the jury that believed that they had insufficient evidence and were unable to make the decision upon the cases." After the jury had deliberated for one hour and ten minutes, it returned to the courtroom at 5:20 p.m. and announced that "some members of the jury ... feel, that believe that we have had insufficient evidence and we're unable to make a decision." The foreperson stated: "We have deliberated. I don't know whether to deliberate further or not. We were hoping you'd come back to the room, that we could ask you questions there. Would that be possible?" At that point, the trial judge decided to recess court until the next day. Upon the convening of court the next morning, the following occurred:

> THE COURT: If the foreperson would stand again, please. Was there any specific instructions that you wanted me to repeat or give to the jury this morning?
>
> FOREPERSON: Okay, sir, if you would redefine for us reasonable doubt and acting in concert.

The trial judge responded to this request, and one further question, and then stated:

> I presume that you members of the jury realize what a disagreement means. It means, of course, that it will be more time of the Court that will have to be consumed in the trial of this action again. I don't want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without the surrender of one's conscientious convictions.
>
> You've heard the evidence in the case. A mistrial, of course, will mean that more time and another jury will have to be selected to hear the cases and this evidence again.

> I realize the fact that there are sometimes reasons why jurors cannot agree. I want to emphasize the fact to you that it is your duty to do whatever you can to reason the matter over together as reasonable men and women and to reconcile your differences if such is possible without surrendering your conscientious convictions and to reach a verdict. I'm going to let you resume your deliberations and see if you can.

The jury retired, and returned twenty-five minutes later with a verdict.

Defendants insist that the trial judge violated G.S. § 15A-1235 and "coerced" the jury to return a verdict by giving the instruction quoted above. Defendants claim that *State v. Lamb*, 44 N.C. App. 251, 261 S.E. 2d 130 (1979), in interpreting G.S. § 15A-1235, condemned an instruction similar to the one challenged here. G.S. § 15A-1235 provides in pertinent part:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely be-

cause of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). . . .

In addressing similar contentions in State v. Hunter, 48 N.C. App. 689, 269 S.E. 2d 736 (filed 16 September 1980), Judge Vaughn, for this Court, wrote:

> We do not concede, however, that the legislature intended to require a trial judge, without regard to the circumstances then existing to either recite G.S. 15A-1235(b) every time a jury returns to the courtroom without a verdict or discharge the jury. We believe, instead, that the section should be regarded as providing the guidelines to which Justice Branch (now Chief Justice) referred in *State v. Alston*, 294 N.C. 577, 596, 243 S.E. 2d 354, 366 (1978), and the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial. He should, of course, avoid any reference to the potential expense and inconvenience in retrying the case should the jury fail to agree. *State v. Easterling* [300 N.C. 594, 268 S.E. 2d 800 (filed 15 July 1980)].

48 NC App. at 692, 269 S.E. 2d at 738.

In the case before us, the jury returned to the courtroom after an hour's deliberation, requested additional instructions, and indicated that some of the jurors felt they did not have enough evidence to reach a verdict. Also, the trial judge recessed court until the following morning, and on the following morning he responded to the juror's request for additional instructions and further gave the instruction quoted above. These facts were some of the "different circumstances" encountered by the trial judge requiring him to "exercise his sound judgment." Under these circumstances, we do not believe Judge Kirby was required to recite G.S. § 15A-1235(b), nor do we believe that the "additional instructions" were erroneous, coerced the verdict, or were in any way prejudicial to these

defendants. Furthermore, the fact that the judge adjourned court and did not respond to the juror's questions until the following morning is of no legal significance whatsoever. Finally, unlike *State v. Lamb, supra*, the judge did not mention "inconvenience and expense" in the instruction challenged by these assignments of error, and thus *State v. Lamb, supra*, is distinguishable.

We have examined defendants' other assignments of error and find them to be without merit.

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

No error.

Chief Judge MORRIS and WEBB concur.

STATE OF NORTH CAROLINA v. JOHN WAYNE HUNTER

No. 804SC256

(Filed 16 September 1980)

1. **Constitutional Law § 34; Criminal Law § 26.5– acquittal of child abuse — conviction of child neglect — no double jeopardy**

Defendant was not denied his right against double jeopardy by his conviction in superior court of child neglect in violation of G.S. 14-316.1 after a judgment of nonsuit was entered in a prosecution of defendant in the district court for child abuse in violation of G.S. 14-318.2.

2. **Constitutional Law § 50– delay because of another charge — speedy trial**

Defendant's trial in superior court on a child neglect charge did not violate the speedy trial provisions of G.S. 15A-701 where defendant gave notice of appeal from the district court to the superior court on 26 April 1979; the end of the first regularly held criminal session of superior court in the county after defendant gave notice of appeal was on 10 May 1979; prosecution of the child neglect charge in the superior court was delayed because of a child abuse charge pending against defendant in the district court; defendant was acquitted on the child abuse charge on 10 September 1979; the 122 days which elapsed between 10 May and his trial on the child abuse charge on 10 September are excluded from the time running against the State pursuant to G.S. 15A-701(b)(1)b; and defendant's trial for child neglect on 19 November occurred 70 days after the child abuse trial.

3. **Criminal Law § 169.3– incompetent evidence admitted over objection — same evidence admitted without objection**

When incompetent evidence is admitted over objection, but the same evidence has theretofore or is thereafter admitted without objection, the benefit of the objection is ordinarily lost.

4. **Parent and Child § 2.2– child neglect — acting in loco parentis**

The State's evidence in a prosecution for child neglect was sufficient to permit a jury finding that defendant was acting in *loco parentis* to the child where it tended to show that defendant, the child's mother and the child were living together; defendant told a witness that the child was his; and defendant told a witness that he had disciplined the child by spanking and that he and the child's mother were the only two people who cared for the child.

5. **Parent and Child § 2.2– child neglect — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for child neglect where it tended to show that the child and his mother lived with defendant; defendant and the child's mother were the only two people who cared for the child; a witness observed various facial injuries to the child between September 1978 and January 1979; defendant stayed home from work on the 23rd, 24th, 25th and 26th of January 1979; the child was taken to a hospital on 27 January; the examining physician found that the child was emaciated, malnourished, dehydrated and did not make any active movement of his extremities; the physician observed swelling of the child's right eye, bruises on his ear, chest, face, back and bottom, and that a tooth was missing; x-rays revealed fractures of the skull, ribs, wrists and legs; the child was six pounds below average weight for a nine month old child and was hospitalized for 29 days; and the physician was of the opinion that the child was not able to move enough to fall and that the injuries did not appear to be caused by accidental means.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 20 November 1979 in Superior Court, ONSLOW County. Heard in the Court of Appeals 26 August 1980.

Defendant was charged in an arrest warrant, proper in form, for the offense of child neglect in violation of G.S. 14-316(a) (Case No. 79-CrS-2032). On the same day, defendant was also charged in another arrest warrant, proper in form, for the offense of child abuse in violation of G.S. 14-318.2 (Case No. 79-Cr-2031). Pursuant to a plea negotiation in District Court, defendant pleaded guilty to the offense of child neglect. The State voluntarily dismissed the child abuse case. Defendant gave notice of appeal to the Superior Court in the child neglect case. The district attorney reopened the child abuse case and sent it to the Superior Court along with the case on appeal.

After remand from the Superior Court, the child abuse case was disposed of favorably to defendant in the District Court when the court entered judgment as of nonsuit in the case on 10 September 1979.

The case *sub judice* was re-calendared for 8 October 1979 in Superior Court. Defendant failed to appear and was arrested thereafter on 18 October 1979. A waiver of arraignment was entered on 5 November 1979, and trial began on 19 November 1979.

Prior to trial, defendant filed a motion to dismiss the charge based upon the State's failure to grant defendant a speedy trial under the Speedy Trial Act. G.S. 15A-701. In opposition to defendant's motion, the district attorney asserted that the State failed to prosecute the child neglect case in Superior Court until the child abuse case had been disposed of in District Court, so as to avoid duplicity of trial. No motions for a speedy trial were filed by defendant prior to his trial date on 19 November. The trial judge denied defendant's motion to dismiss for failure to comply with the Speedy Trial Act. Defendant was convicted on the charge of child neglect and received an active sentence of not less than 18 months nor more than 24 months in prison.

Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Frazier & Moore, by Thomasine E. Moore, for defendant appellant.

ERWIN, Judge.

Defendant brings forward assignments of error in his brief and contends that at least three of them are prejudicial to the extent that defendant is entitled to a new trial and that one of them requires that his conviction be reversed and the case against him be dismissed. We do not agree with defendant in any of his assignments of error and find no prejudicial error in his trial.

[1] Defendant contends that the conviction in his case violates the double jeopardy provisions of the United States and North Carolina Constitutions. The record reveals that defendant did not raise the question of double jeopardy at his trial. On appeal, defendant contends that "Subsection (7)" of G.S. 15A-1446(d) would permit the double jeopardy question to be considered upon appellate review even though no objection, exception, or motion was made at trial. We note that Subdivision (7) of Subsection (d) of the statute in question was repealed a few months before defendant's trial; therefore, defendant cannot rely on a statute that was repealed before the offense complained of was committed. "The general rule is that the defense of double jeopardy is not jurisdictional. . . . It is a defense personal to the defendant." *State v. McKenzie*, 292 N.C. 170, 175, 232 S.E. 2d 424, 428 (1977).

Assuming arguendo that the issue was properly before us, the record does not reveal error. The child abuse statute, G.S. 14-318.2(a), reads as follows:

> "§ 14-318.2. *Child abuse a general misdemeanor.* — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is quilty of the misdemeanor of child abuse."

This statute is to be compared with G.S. 14-316.1(a) which read as follows before its 1979 amendment:

> "§ 14-316.1. *Neglect by parents; encouraging delinquency by others; penalty.* — (a) A parent, guardian, or other person having custody of a child, who omits to exercise reasonable diligence in the care, protection, or control of such child or who knowingly or wilfully permits such child to associate with vicious, immoral or criminal persons, or to beg or solicit alms, or to be an habitual truant from school, or to enter any house of prostitution or assignation, or any place where gambling is carried on, or to enter any place

which may be injurious to the morals, health, or general welfare of such child, and any such person or any other person who knowingly or wilfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or wilfully does any act to produce, promote, or contribute to, any condition of delinquency or neglect of such child shall be guilty of a misdemeanor."

The gravamen of the offense under the neglect statute, G.S. 14-316.1(a) (as existed prior to the 1979 amendment), is the failure to exercise reasonable diligence in the care, protection, or control of the child. The former statute, G.S. 14-318.2(a), contemplates active, purposeful conduct. The latter deals with passive, neglectful conduct. The District Court in nonsuiting the abuse charge shows nothing except that the court found that the evidence was insufficient in some respect to support a conviction for violation of G.S. 14-318.2(a). G.S. 14-316.1(a) describes a separate, additional offense, not precluding other sanctions or remedies. We overrule this assignment of error.

[2] In his second assignment of error, defendant contends that his trial and conviction violate the speedy trial provisions of G.S. 15A-701.

G.S. 15A-701(b) provides in pertinent part:

"(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from

. . . .

b. Trials with respect to other charges against the defendant . . ."

The statutory exclusion of time is unqualified in its terms. There is no dispute that defendant was charged with another

offense. Defendant waived joinder of the two offenses by failing to move for such as required by G.S. 15A-926(c)(1). Notice of appeal to the Superior Court was given on 26 April 1979. The end of the first regularly held criminal session of Superior Court in Onslow County after notice of appeal was given was on 10 May 1979. *See State v. Morehead*, 46 N.C. App. 39, 264 S.E. 2d 400 (1980). The date on which defendant was tried and acquitted on the child abuse charge was 10 September 1979. The result is that the 122 days which elapsed between 10 May and 10 September 1979 are excluded from the time running against the State. Defendant was tried on 19 November 1979, 70 days after the child abuse trial was held. We find no merit in this assignment of error.

[3] In defendant's third assignment of error, he contends that the trial court committed error when it refused to strike an answer given by witness Darryl Ramsey of the Onslow County Sheriff's Department. Defendant contends that the answer was not responsive to the question, was argumentative, and may have been hearsay. The record reveals that Dr. Knox testified without objections to the same injuries and conditions of the child, Michael Darbey, as witness Darryl Ramsey. State's witness, Connie Sayers, had testified before witness Ramsey that, "In January, Mr. Hunter and Mrs. Darbey were living at the Erney Grodsinger's Apartments. Prior to the period of time in September through January of 1979, no one that I know of kept the child other than the defendant and Mrs. Darbey." "The well established rule in this State is that 'when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost . . . .'" *State v. Van Landingham*, 283 N.C. 589, 603, 197 S.E. 2d 539, 548 (1973). We overrule this assignment of error.

Defendant's sixth assignment of error is in effect a motion for judgment of nonsuit, regardless to how he labels it. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Defendant contends that the State's case fails in three respects: (1) defendant "was not in *locus* [sic] *parentis* relationship with the child"; (2) defendant's "connection with the child's physical injuries was not shown in

the evidence"; and (3) defendant's "responsibility for the child's condition was not shown in the evidence." A motion for judgment as in case of nonsuit requires the evidence to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

[4] Some of the evidence with respect to defendant acting *in loco parentis* shows that defendant and Mrs. Darbey, the child's mother, and the victim, Michael, had been living together since September 1978 and that no one kept the child other than defendant and the child's mother. Defendant told the witness, Mrs. Sayers, that the baby was his. Defendant permitted the baby's mother to live with him in his room. Defendant also admitted to witness Merritt that he had disciplined the child by spanking and that he and the child's mother were the only two people who cared for the child. This evidence gave rise to a reasonable inference that defendant supported the child at least to the extent of letting the child live in his room with his mother. To us, the evidence was sufficient to submit the case to the jury on the question of whether defendant was a person acting "*in loco parentis.*"

[5] The evidence tended to show that defendant frequently stayed home from work and was specifically out of work on the 23rd, 24th, 25th, and 26th of January 1979 because of sickness. The child was taken to the hospital on 27 January 1979. Mrs. Sayers testified that she observed various facial injuries to the child between September 1978 and January 1979. Dr. Knox testified that upon examination, she found the child was emaciated, malnourished, dehydrated, and did not make any active movement of his extremities. Swelling of his right eye, bruises of his ear, chest, face, back, and bottom were also observed by Dr. Knox. X-rays revealed fractures of the skull, ribs, both wrists, and legs, Further, a tooth was missing. Dr. Knox was of the opinion that the child was not able to move enough to fall and that the injuries did not appear to be caused by accidental means. The baby was six pounds below average weight and was hospitalized for 19 days.

This evidence was sufficient to take the case to the jury on the question of defendant's neglect of the child by failure to

exercise reasonable diligence in the care, protection, or control of this child. G.S. 14-316.1(a).

We have considered each of defendant's other assignments of error and find them to be totally without merit.

In the trial of defendant, we find

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. DON MARLOWE JEFFERS

No. 8014SC241

(Filed 16 September 1980)

1. **Criminal Law § 34.4; Weapons and Firearms § 2– possession of firearm by felon — stipulation as to prior conviction — admissibility**

In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle, since the State merely introduced defendant's stipulation into evidence so there would be no doubt as to that particular element of the offense being satisfied; the State offered no other evidence in regard to defendant's prior conviction; and the court properly instructed the jury in its charge to consider the conviction only for the purpose of establishing an essential element of the offense and not as evidence of guilt or predisposition. Furthermore, G.S. 15A-928 was not applicable to this case so as to require exclusion since that statute applies solely to cases in which the fact that the accused had a prior conviction raises an offense of lower grade to one of higher grade, but the offense in this case did not have that characteristic.

2. **Criminal Law § 43.5– videotape of crime — admission as substantive evidence — error not prejudicial**

In a prosecution for possession of a firearm by a felon where defendant allegedly sold a firearm to law enforcement officers and a portion of the transaction was recorded by video equipment in an adjacent room, defendant suffered no prejudice due to the erroneous introduction of the videotape as substantive evidence, since sufficient evidence existed in the record in the form of an officer's uncontroverted testimony so that the same result would have ensued even without introduction of the videotape.

State v. Jeffers

APPEAL by defendant from *Farmer, Judge.* Judgment entered 1 November 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 August 1980.

The defendant was charged under an indictment, proper in form, with possession of a firearm by a felon in violation of G.S. 14-415.1. By a motion before trial, defendant stipulated that he had been convicted on 17 August 1976 in the Superior Court of Durham County of the felony of breaking and entering a motor vehicle. At trial, the State offered evidence tending to show the following: On 8 August 1979, Officer David Ramey of the Durham Police Department, Officer Nick Then of the Durham County Sheriff's Department, Agent John Hawthorne of the State Bureau of Investigation (SBI), and Special Agent Bruce Black of the SBI were on duty and present inside a building at 624 East Geer Street in Durham. Officer Ramey and Agent Hawthorne were in the front room, while Officer Then and Special Agent Black were in an adjacent room. Officer Then was operating a video camera with a recording device that recorded sound and picture on tape. This equipment was used to observe and record events in the front room through the use of a two-way mirror. The equipment was in good working order.

Defendant came inside the building into the front room around 10:30 a.m. Defendant pulled a .38 caliber revolver out of his pocket, and offered it for sale. After examining the gun, Agent Hawthorne offered defendant $125, but defendant then stated he wanted $130. Officer Ramey agreed to pay that amount, and placed $130 on the counter. Defendant picked up the money and left the building, leaving the gun with the officers. A portion of the transaction was recorded by the video equipment in the adjacent room.

Defendant offered no evidence.

Defendant was found guilty as charged, and on 1 November 1979, the court entered judgment sentencing defendant to imprisonment for the term of not less than one year nor more than three years. Defendant appealed.

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

Haywood, Denny and Miller, by Charles H. Hobgood, for defendant appellant.

WEBB, Judge.

[1] Defendant first assigns as error the introduction into evidence of defendant's prior conviction for breaking and entering a motor vehicle. Specifically, defendant contends that the trial court erred in allowing the State to introduce the stipulation as to the previous conviction. We disagree. Generally, in a prosecution for a particular crime, the State is not permitted to offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, even though the other offense is of the same nature as the crime charged. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977); *State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976). Evidence of another separate offense is admissible, however, to show matters other than the character or disposition of the accused, such as identity, motive, or common plan. *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977); *State v. Duncan, supra; State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Also, evidence of a prior conviction is admissible for second or subsequent offenses in certain situations, *see State v. St. John*, 17 N.C. App. 587, 194 S.E. 2d 872 (1973), and in situations where the offense charged carries a higher penalty if the accused has a prior conviction. G.S. 15A-928; *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979); *State v. Moore*, 27 N.C. App. 245, 218 S.E. 2d 496 (1975).

G.S. 15A-928(c)(1) provides in pertinent part as follows:

> If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. . . .

Since the trial judge allowed the stipulation as to the previous conviction to be introduced and since he made reference to the stipulation in his charge to the jury, defendant claims that G.S.

15A-928(c)(1) was violated, and that defendant was deprived of his right to a fair trial as a result. G.S. 15A-928, however, is not applicable in this case. The statute applies solely to cases in which the fact that the accused had a prior conviction raises an offense of "lower grade" to one of "higher grade." G.S. 15A-928(a). Thus, the prior conviction serves to increase the punishment available for the offense above what it would ordinarily be. *See State v. Moore, supra.* The offense charged in the instant case, however, does not have this characteristic. A previous conviction for one of a group of enumerated felonies is an essential element of the offense of possession of a firearm by a felon, and thus in the absence of a prior conviction, there is no offense at all. G.S. 14-415.1; *State v. Cobb*, 284 N.C. 573, 201 S.E. 2d 878 (1974). Also, the statute contains nothing as to certain convictions being more intolerable than others, G.S. 14-415.1(a) and (b), and thus no "lower grade" — "higher grade" dichotomy can be ascertained.

Nor do we see anything else improper with the trial court's treatment of the prior conviction. The State merely introduced defendant's stipulation into evidence so that there would be no doubt as to that particular element of the offense being satisfied. The State offered no other evidence in regard to defendant's prior conviction, and the court properly instructed the jury in its charge to consider the conviction only for the purpose of establishing an essential element of the offense and not as evidence of guilt or predisposition. We, therefore, see no error in the introduction of defendant's prior conviction in this case.

[2] Defendant next attacks the introduction of the videotape of the transaction into evidence. The trial judge allowed the State, over objection, to introduce the videotape as substantive evidence and also instructed the jury in the charge that the videotape was to be considered as substantive evidence. Defendant contends that the videotape should have been introduced for illustrative purposes only and that the jury should have been instructed to that effect. Traditionally, the rule in North Carolina has been that photographs, properly authenticated, are admissible only for the limited purpose of explaining or illustrating the testimony of a witness that is relevant and material to the case. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38,

modified, 428 U.S. 903, 96 S.Ct. 3205, 49 L.Ed. 2d 1207 (1974); *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); *State v. Garnett*, 24 N.C. App. 489, 211 S.E. 2d 519, *appeal dismissed*, 287 N.C. 262, 215 S.E. 2d 622 (1975). Motion pictures have been held admissible under the same rule. *State v. Strickland*, 276 N.C. 253, 173 S.E. 2d 129 (1970). In *State v. Johnson*, 18 N.C. App. 606, 197 S.E. 2d 592 (1973) the Court held that videotape recordings of sight and sound taken by a closed circuit television camera were motion pictures, and as long as testimony indicated a videotape to be a fair and accurate record of the actual appearance of the area recorded, the videotape would be admissible for the same purposes as photographs. *See also State v. Grant*, 19 N.C. App. 401, 199 S.E. 2d 14, *appeal dismissed*, 284 N.C. 256, 200 S.E. 2d 656 (1973).

The general rule as to admissibility of photographs has suffered significant erosion in recent years. Beginning with *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973), photographs of fingerprints, when shown by extrinsic evidence to represent accurately the print it purports to show, have been admissible as substantive evidence. *See van Dooren v. van Dooren*, 37 N.C. App. 333, 246 S.E. 2d 20 (1978). In *State v. Hunt*, 297 N.C. 447, 255 S.E. 2d 182 (1979), the Court extended *State v. Foster, supra*, to a photograph of a shoe sole impression, holding that the photograph could be substantive evidence if it accurately portrayed the impression. Neither *State v. Foster, supra*, nor *State v. Hunt, supra*, however, sought to repudiate fully the "illustrative use only" restriction and it is clear from other recent decisions that the restriction is still very much alive. *See State v. Davis*, 297 N.C. 566, 256 S.E. 2d 184 (1979); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). Thus, we are reluctant to extend the rule of *State v. Foster, supra*, and *State v. Hunt, supra*, to this case.

We do not believe, however, that the introduction of the videotape as substantive evidence in the case sub judice was prejudicial enough to justify a new trial for defendant. Technically, incompetent evidence is harmless unless it is made to appear that the defendant was prejudiced thereby and that a different result would have likely occurred if the evidence had been excluded. *State v. Clark*, 298 N.C. 529, 259 S.E. 2d 271

(1979); *State v. Logner*, 297 N.C. 539, 256 S.E. 2d 166 (1979); *see also* G.S. 15A-1443(a). Defendant did not show any prejudice, and sufficient evidence exists in the record, in the form of the officer's uncontroverted testimony, that the same result would have ensued even without introduction of the videotape. We, therefore, hold that defendant suffered no prejudicial error due to the introduction of the videotape as substantive evidence.

Defendant lastly challenges the constitutionality of G.S. 14-415.1 by means of a motion in arrest of judgment made in his brief to this Court. A motion in arrest of judgment is now treated as a motion for appropriate relief, G.S. 15A-1411(c). Defendant's motion apparently falls under G.S. 15A-1415(b)(4), thus allowing determination of the motion at any time following judgment, and since this Court has jurisdiction to pass on motions for appropriate relief, G.S. 15A-1418, we can pass on defendant's motion here. We find no merit to defendant's challenge, however. The constitutionality of G.S. 14-415.1 has previously been upheld in *State v. Tanner*, 39 N.C. App. 668, 251 S.E. 2d 705, *appeal dismissed*, 297 N.C. 303, 254 S.E. 2d 924 (1979), and we find no reason to question that decision.

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

No error.

Chief Judge MORRIS and Judge HEDRICK concur.

JUANITA J. CAMBY, ADMINISTRATRIX OF THE ESTATE OF DONNIE MAX CAMBY v. SOUTHERN RAILWAY COMPANY AND WALTER BYNUM BODENHAMER, JR.

No. 7928SC1100

(Filed 16 September 1980)

1. Evidence § 27– statements made in telephone call — failure to identify person to whom made

In an action to recover for a death in a grade crossing accident, the trial court properly excluded testimony by plaintiff's witness concerning state-

ments he made in a telephone call notifying defendant railroad that a signal light at the crossing was not working where plaintiff failed to offer evidence as to the identity of the person to whom the witness made the statements, the number called, who answered, or whether the answering person was an employee of defendant.

2. **Evidence § 17; Railroads § 6.3– grade crossing accident — failure of engineer to give whistle or bell warning — instruction**

In an action to recover for a death in a grade crossing collision between defendant's train and an automobile occupied by plaintiff's intestate, the trial court erred in failing to give plaintiff's requested instruction that "testimony of a person nearby who could have heard and did not hear the sounding of a whistle or the ringing of a bell is some evidence that such a signal was not given" where three witnesses who were in the area of the collision at the time it occurred testified that they did not hear any train horn, bell or signal before the collision.

APPEAL by plaintiff from *Gaines, Judge.* Judgment entered 16 July 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 26 August 1980, at Waynesville, North Carolina.

This is an action for wrongful death arising out of a collision between defendant's freight train No. 163 and a 1974 Buick automobile occupied by plaintiff's intestate, Donnie Max Camby. The collision happened at the on-grade crossing of defendant's main-line track between Asheville and Black Mountain and RPR 2728, Dennis Street, in Swannanoa, North Carolina, near the Beacon Manufacturing Company plant. At the crossing, Dennis Street runs generally north and south and the railroad track runs east and west. The track was straight and unobstructed to vision to the east for a distance of about 500 feet. Located east of Dennis Street, in the southeast quadrant of the intersection, was a signal-light stand equipped with two flashing red lights on the south side of the stand, one facing south parallel with the margin of Dennis Street and one facing east along a street known as RPR 2856. In the northwest quadrant of the intersection there was a signal-light stand with two flashing red lights on the south side of the stand facing diagonally down Dennis Street to the south. A signal bell was also located on top of the light stand in the southeast quadrant of the crossing. The parties stipulated that "the signal light in the southeast quadrant of the intersection facing Dennis Street

was not operating at the time of the collision." There was evidence that the flashing red signal lights in the northwest quadrant were operating at the time of the collision and were visible to traffic on Dennis Street approaching the crossing from the south. The engineer testified that as the train travelled west he sounded the customary crossing blows with the engine's horn, being two long blasts, one short and one long blast, for the Dennis Street crossing and three other crossings located within 2200 feet east of the Dennis Street crossing. Other testimony indicated the Buick car did not stop at the intersection but drove north onto the track at a speed of about 10 m.p.h. in front of the train.

Upon submission of the case to the jury, verdict was returned finding Donnie Camby's death was not caused by the negligence of defendants. From the judgment entered, plaintiff appeals.

Swain & Stevenson, by Joel B. Stevenson, for plaintiff appellant.

Bennett, Kelly & Cagle, by Harold K. Bennett, for defendant appellees.

MARTIN (Harry C.), Judge.

[1] Plaintiff presents two assignments of error for our consideration. First, plaintiff contends the trial court erred in striking certain testimony concerning a telephone call made by the witness Graham to defendant railway company. The pertinent testimony and the court's ruling follows:

> A. ... I called the Southern Railway and talked with them about it and he said that he appreciated me calling —
>
> MR. BENNETT: Objection, move to strike as to — unless some identification as to who called and who was spoken with.
>
> THE COURT: Sustained.

It was about a week before this wreck that I called the Southern Railway office in Asheville.

Q. Do you recall which office it was you telephoned?

A. No sir, I just looked the number up and called someone under the traffic control and he told me that he appreciated me calling —

MR. BENNETT: Objection.

THE COURT: Sustained.

MR. BENNETT: Motion to strike all of his testimony with reference to a call.

THE COURT: Motion denied.

MR. BENNETT: Exception.

THE COURT: Members of the jury, with regard to any comments or conversation with regards to anyone that he talked to on the telephone, a motion to strike is allowed and you will not consider that as evidence in this case in your deliberations.

Q. Do you know the name of the person in traffic control that you talked to?

A. I'm sorry sir, no I don't, I don't remember his name.

Q. What did you tell the person that you did talk to?

MR. BENNETT: Objection.

THE COURT: Overruled.

Q. What did you tell the person?

A. I told the gentlemen —

MR. BENNETT: Objection.

THE COURT: Overruled.

A. That the light was out at this Dennis intersection; that it had been out for some time and that I was afraid someone would get hurt there.

. . . .

THE COURT: ... I instruct you that the testimony of Mr. Graham this morning with regards to any report which he made to the Southern Railway Company is not to be considered by you as evidence in this case. And the testimony with regards to any telephone call that Mr. Graham made to the Asheville office of Southern Railway is stricken, and you will not consider that testimony or any portion of it as evidence in this case. This ruling relates only to that portion of his testimony concerning the report by him of the light as he observed it there at the scene to the Southern Railway office.

The admissibility of telephone conversations is governed by the same rules of evidence that control the admission of oral statements made in face-to-face conversations, except that the party against whom the conversation is sought to be used must be identified. Identification of the party may be by direct or circumstantial evidence. *Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959). In *Everette*, Justice Moore presents a complete statement of the law in this respect and the reasoning supporting these rules. *See also Mathis v. Siskin*, 268 N.C. 119, 150 S.E. 2d 24 (1966); 1 Stansbury's N.C. Evidence § 96 (Brandis rev. 1973); 79 A.L.R.3d 79 (1977).

Here, plaintiff seeks to use against defendants the statements made by the witness Graham over the telephone. To do so, plaintiff must offer some evidence as to the identity of the person to whom he made the statements. Plaintiff has failed to so do. There is no evidence what number Graham called, who answered, whether the answering person stated who he was, or whether the answering person was an employee of defendant railway. When the court later struck the testimony, plaintiff did

not seek a further voir dire to establish the competency of the testimony. The assignment of error is overruled.

[2] Last, plaintiff assigns as error the failure of the court to give the requested instruction to the jury that "[t]estimony that a person nearby who could have heard and did not hear the sounding of a whistle or the ringing of a bell is some evidence that such signal was not given."

Plaintiff relies upon *Kinlaw v. R.R.*, 269 N.C. 110, 152 S.E. 2d 329 (1967). In *Kinlaw* there was evidence that a witness proceeded across the railroad crossing about seven seconds ahead of plaintiff, and that this witness did not hear any whistle or bell as he approached the crossing, went over it, and proceeded beyond it. Judgment of nonsuit was entered at the close of plaintiff's evidence. The Supreme Court reversed, holding there was evidence from which the jury could infer that defendant railroad did not blow any whistle, ring any bell, or otherwise give any warning of the approach of the train to the crossing. The Court stated in identical language the rule that plaintiff here requested the court to charge. *Kinlaw* in turn relies upon *Johnson & Sons, Inc. v. R.R.*, 214 N.C. 484, 199 S.E. 704 (1938), where Justice Barnhill sets out in detail the rules of law and reasoning concerning negative evidence.

In *Bass v. Hocutt*, 221 N.C. 218, 220, 19 S.E. 2d 871, 872 (1942), we find:

> "... The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error."

In applying *Bass*, *Kinlaw*, and *Johnson* to this case, it is clear that Judge Gaines should have given the requested instruction. Kenneth Thomas, Joe Graham and Monroe Payne all testified that they did not hear any train horn, bell or signal

before the collision of the train with the car. All of these witnesses were at the area of the loading dock, just north of the crossing. There was no evidence that any of the witnesses had impaired hearing or that their attention was diverted in any way. *See Johnson, supra.* Billy Joe Robinson, who was in a car near the crossing, recalled first "hearing the whistle about 50 feet or so before the point of impact." The testimony of these witnesses is sufficient to permit, though not to compel, the inference that defendant failed to blow any horn or whistle or otherwise to give audible warning of the approach of the train to the crossing. *Kinlaw, supra; Johnson, supra.*

We are of the opinion, and so hold, that the charge given by the trial judge does not cure the error of failing to give the requested charge. Nowhere in the charge does the court summarize the testimony of the three witnesses about their not hearing any signal. The judge did instruct the jury that the railway had a duty to give timely warning of the approach of its train by sounding a horn, whistle or bell, and that failure to do so was negligence. He also charged that plaintiff had offered evidence tending to show "[t]hat *at the time of the collision* that there was not a whistle blowing or a bell ringing." (Emphasis added.) The time of the collision is not the relevant time; the railway's duty is to give a timely audible warning *prior* to the collision. Defendants produced evidence that the train horn was continuously blowing as the train travelled a distance of 2200 feet prior to the collision. The jury could have found that the horn was sounded as contended by the railway and that it stopped at the time of the collision.

The requested instruction would have explained to the jury the effect of the testimony of plaintiff's three witnesses. Without this instruction, the jury had no guidance of how to consider this negative evidence in connection with the affirmative testimony of defendants' witnesses that the train horn was sounded.

Plaintiff properly requested a correct instruction supported by the evidence. The trial judge's failure to give the instruction is inexplicable.

Although this is the second time this case has been before this Court *(Camby v. Railway Co.*, 39 N.C. App. 455, 250 S.E. 2d 684 (1978), *disc. rev. denied*, 297 N.C. 298 (1979)), it must be remanded for a new trial because of the trial judge's commission of prejudicial error.

New trial.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. WILLIE C. AVERY

No. 806SC264

(Filed 16 September 1980)

1. **Burglary and Unlawful Breakings § 5.6– breaking or entering with intent to commit larceny — larceny thwarted — sufficiency of evidence of intent**

In a prosecution for felonious breaking or entering with intent to commit larceny, evidence of defendant's intent to steal from a store was sufficient to be submitted to the jury, though defendant's attempt to enter the store was thwarted when the owner shot him, where such evidence tended to show that defendant or someone acting in concert with him had been in the store earlier in the day and secretly turned off the switch which would have allowed the outside light at the front of the store to come on at dark; the store had been open during its regular business hours that day and obviously contained some merchandise; late at night and hours after they knew the store had closed, defendant and his companion kept the store under surveillance for over an hour; after satisfying themselves that their intended intrusion would go unobserved, they approached the store; and defendant obtained a pair of pliers and managed to break open the storm door of the store before he was interrupted.

2. **Burglary and Unlawful Breakings § 6.2– intent — instructions proper**

In a prosecution for felonious breaking or entering with intent to commit larceny, there was no merit to defendant's contention that the trial court's instruction explaining intent was not legally sufficient because from it the jury could have inferred the intent to commit larceny solely from proof of the misdemeanor breaking and entering.

3. **Criminal Law § 118.4– instruction on contentions — necessity for objections**

Defendant failed to show that the trial judge committed prejudicial error in misstating his contentions to the jury, since it appeared from the record that the contentions were stated favorably to defendant, and no objections were made to the contentions at trial.

State v. Avery

APPEAL by defendant from *Small, Judge*. Judgment entered 31 October 1979 in Superior Court, BERTIE County. Heard in the Court of Appeals 27 August 1980.

Defendant was tried upon an indictment for felonious breaking or entering with the intent to commit larceny in violation of G.S. 14-54(a).

The State's evidence tends to show the following. George W. Lee owns and operates a light combination grocery store and service station near Lewiston. The store is located in front of Mr. Lee's home. On Friday, 21 June 1979, Lee, as was his custom, locked up the store between 6:00 and 7:00 p.m. in the evening and returned to his house. About 9:00 that same night, he noticed that the automatic lights over the gas pump were not on. He returned to the store to check the lights and discovered that someone had turned the switch that would have allowed the lights to come on at dark. The switch was hidden behind a board or latch located inside the store, but someone had moved the board aside. He turned the switch, but the lights still did not come on. He went home for awhile and later returned to the store armed with a .22 revolver. He waited there in the dark to see if anything were going to happen. Between 11:00 p.m. and midnight, he watched the same car go back and forth on the road in front of the store. It also went in and out the driveway beside the store which also led to some other houses. Things quieted down, and Lee had started to leave when, about 1:00 a.m., he saw defendant, who was known to him, coming toward the store. He also saw another person but could not recognize him. Defendant shook the aluminum storm door at the front and then went over to the side of the store. He returned with something in his hand and prized the storm door open. He then began shaking the wooden inner door. At that point, before defendant gained entry, Lee stood up from his hiding place in the store and fired his revolver through a glass pane on the wooden door. Defendant immediately fell to the ground, and Lee went home and called the police.

A deputy from the sheriff's department arrived and observed defendant lying on his back with blood and dirt on his forehead. A pair of vise-grip pliers was found in defendant's back pocket.

Defendant was found guilty as charged, and judgment imposing an active sentence was entered.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, for the State.

Gillam, Gillam and Smith, by Lloyd C. Smith, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant first contends that it was error for the trial court to deny the motions for nonsuit or dismissal. We do not agree. There was sufficient evidence to take the case to the jury.

On a motion for nonsuit or dismissal, the court must determine whether there is substantial evidence of all the material elements of the offense charged. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956); *State v. Smith* 40 N.C. App. 72, 252 S.E. 2d 535 (1979). In other words, there must be sufficient evidence to support a finding that the crime charged was committed and that the defendant committed it. *State v. Hill,* 294 N.C. 320, 240 S.E. 2d 794 (1978). Finally, in making this determination, the court considers all the evidence, direct and circumstantial, in the light most favorable to the State and makes every reasonable inference in its favor. *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169 (1965); *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728 (1962).

Defendant admits that he broke open the outer storm door of the store. Yet he strongly contends that nonsuit should have been granted on the felony charge because there was insufficient evidence on the element of intent to steal. It was incumbent upon the State to establish that the defendant intended to steal something upon breaking or entering the store. *State v. Crawford,* 3 N.C. App. 337, 164 S.E. 2d 625, *cert. denied,* 275 N.C. 138 (1969). Defendant argues that since he never entered the store, the breaking only raised a suspicion that he intended to steal merchandise and that the breaking was equally consistent with an intent to commit vandalism, arson, or merely spending the night in the store. The argument is without merit.

The evidence is sufficient to permit the jury to find the following. Defendant or someone acting in concert with him had been in the grocery store earlier in the day and secretly turned off the switch that would have allowed the outside light at the front of the store to come on at dark. The store had been open during its regular business hours that day and obviously contained some merchandise. Late at night and hours after they knew the store had closed, defendant and his companion kept the store under surveillance for over an hour. After satisfying themselves that their intended intrusion would go unobserved, they approached the store. Defendant obtained a pair of pliers and managed to break open the storm door before he was interrupted. That this evidence would permit the jury to infer that his attempted entry was with the intent to steal something from the store is so clear that further discussion hardly seems necessary. It is true that defendant was shot before he gained entry, and as Mr. Lee admitted on cross-examination, "other than the bullet that left my gun that night, no one took anything out of [his] store."

The frustration of defendant's felonious efforts, however, does not reduce the degree of his crime. *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966). The violation of G.S. 14-54(a) was complete when he broke open the door with the obvious intention to enter and take something from the store. *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21 (1966). See also, for example, *State v. Wooten*, 1 N.C. App. 240, 161 S.E. 2d 59 (1968), where a codefendant's efforts to break into a service station were frustrated, the station was not entered, and nothing was taken. Defendant was chased from the scene and found hiding behind a bush 600 yards away from the station. The court held that defendant's motion for nonsuit was properly overruled. See also *State v. Alexander*, 18 N.C. App. 460, 462, 197 S.E. 2d 272, 273-74 (1973), where the Court quoted the familiar principle:

> As stated in *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970): " '. . . Numerous cases, however, hold that an unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other

felony. The fundamental theory, in the absence of evidence of other intent or explanation for breaking and entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft.' "

[2] Defendant next contends that the trial court's instruction explaining intent was not legally sufficient because from it the jury could have inferred the intent to commit larceny solely from proof of the misdemeanor breaking and entering. This contention has no merit. G.S. 15A-1232 requires the judge in his charge to declare and explain the law arising on the evidence. The instructions given conform to the traditional definition of intent given in this State. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Bronson*, 10 N.C. App. 638, 179 S.E. 2d 823 (1971). Specifically, the instruction on intent is essentially the same as the one recently approved in *State v. Simpson*, 299 N.C. 377, 382-83, 261 S.E. 2d 661, 664 (1980).

[3] Finally, defendant argues that the trial judge committed prejudicial error by misstating his contentions to the jury. Appellate counsel did not represent defendant at trial, and we do not know what trial counsel contended in his argument to the jury. Even if we could assume that the judge did misstate defendant's contentions, it appears from the record that they were stated favorably to defendant and should not be cause for complaint. We note further that no exceptions were preserved for appellate review because no objections were made at trial. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). An objection to the contentions should be made at trial to afford the trial court the opportunity to correct any possible errors before the jury retires. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Robinson*, 40 N.C. App. 514, 253 S.E. 2d 311 (1979). This assignment of error, consequently, fails to disclose prejudicial error.

No error.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. CHARLES JAMES MITCHELL

No. 8012SC250

(Filed 16 September 1980)

1. **Criminal Law § 117.3– scrutiny of eyewitness testimony — absence of more elaborate instruction — necessity for request**

The trial court did not err in failing to give the jury a more elaborate instruction concerning the scrutiny to be accorded eyewitness testimony where defendant failed to request special instructions on this point.

2. **Criminal Law § 113.1– instructions — failure to summarize evidence elicited on cross-examination**

The trial court in a robbery prosecution did not err in failing to summarize evidence defendant elicited on cross-examination of the State's witnesses where defendant elicited no favorable evidence raising inferences of any defense or mitigating circumstances but merely attempted and failed to establish discrepancies between the victim's testimony at the preliminary hearing and at trial.

3. **Criminal Law § 115; Robbery § 5.4– armed robbery — submission of common law robbery — no prejudice to defendant**

In a prosecution for armed robbery, defendant was not prejudiced by error, if any, in the trial court's submission to the jury of the lesser included offense of common law robbery.

APPEAL by defendant from *Preston, Judge.* Judgment entered 6 November 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1980.

Defendant was charged with armed robbery 7 May 1979. At trial, the State's evidence tended to show that a man holding a gun and wearing a green mask entered the Quik-Stop where Sopheronia Miller was working, stated that it was a hold-up and demanded that she give him money. Ms. Miller had seen the man in the store before. She went to the cash register, took the drawer out which contained about $60 of Quik-Stop's money, and put it on the counter. She then lay down on the floor as the man instructed her to do. The man left after being in the store between five to eight minutes and then she called the Sheriff's Department. She discovered that money was missing from the cash drawer. When officers arrived, Ms. Miller told them what had happened.

Ms. Miller was later shown photographic line-ups three to four times. She viewed six photographs in State's Exhibit Number 2 and picked out the defendant. At that time she told Detective Maxwell that the picture was not a good picture, that it looked like the man that had robbed her and that she would like to see him in person also.

The defendant presented no evidence but cross-examined the State's witnesses. On cross-examination Ms. Miller testified that she told the police that one other person in the photographic line-up looked similar to the person that robbed her and that she identified the defendant as the robber at the preliminary hearing.

Detective Dunn testified on cross-examination that Ms. Miller was quite upset when she told him what happened immediately following the robbery.

The jury returned a verdict of guilty of common law robbery. From judgment sentencing him to a prison term of five years, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Marvin Schiller, for the State.

Assistant Public Defender Jodie A. English, for defendant-appellant.

MARTIN (Robert M.) Judge.

Defendant's assignments of error concern the trial court's instructions to the jury. We find all assignments of error to be without merit.

[1] First, defendant assigns as error the trial court's instruction to the jury concerning the scrutiny to be accorded eyewitness testimony. Defendant has not assigned as error the use of the in-court show-up procedure at the preliminary hearing. However he contends that due to the importance of the eyewitness testimony, he was irreparably prejudiced by the court's cursory instructions on factors to be assessed in evaluating the

credibility of an eyewitness's identification. Defendant failed to request a special instruction on this particular point.

N.C. Gen. Stat. § 15A-1232 states that the trial court "is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence." This statute has been interpreted by the courts to require the trial court to instruct the jury on every substantive feature of the case regardless of the absence of a request for such an instruction. *State v. Atkinson*, 39 N.C. App. 575, 251 S.E. 2d 677 (1979).

However, it is clear that where, as here, the trial court instructs the jury on a particular point, a party desiring further elaboration on that point must make a timely request for special instructions. *State v. Guffey*, 265 N.C. 331, 144 S.E. 2d 14 (1965); *State v. Walker*, 31 N.C. App. 199, 228 S.E. 2d 772 (1976); *State v. Garrett*, 5 N.C. App. 367, 168 S.E. 2d 479 (1969); *cert. denied*, 276 N.C. 85 (1970).

[2] Defendant also assigns as error the trial court's failure to summarize evidence defendant elicited on cross-examination of the State's witnesses. We cannot agree that such failure constitutes reversible error.

Again, N.C. Gen. Stat. § 15A-1232 controls. The Official Comment to 15A-1232 states that the trial judge has a duty "to 'give equal stress to the State and defendant in a criminal action . . . .' "

It is well settled in North Carolina that the trial court must state the contentions of the defendant if it states the contentions of the State. However, there is a difference in stating contentions of the parties and recapitulating evidence. A trial judge is not required to state the contentions of either side. 15A-1232 merely requires the trial judge to recapitulate that amount of evidence necessary to explain the application of the law to the facts. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978).

In the instant case, defendant offered no evidence. Defendant did cross-examine the State's witnesses. However, defend-

ant at no time elicited any evidence tending to raise the defense that defendant was not the robber. Defendant never elicited any evidence tending to show that the eyewitness misidentified the perpetrator of the crime.

The relevant portion of the trial court's charge reads as follows:

> Now, the Defendant may or may not testify in his own behalf, the law permits him this choice. In the instant case the Defendant has not testified. Again, I say the law of North Carolina gives him this privilege.
>
> This same law also assures him that his decision not to testify will not be used against him and creates no presumption against him and therefore you must be very careful not to allow his silence to influence your decision in any way.
>
> . . .
>
> *Later she was shown a series of photographs which she viewed and she picked out the Defendant's photograph as one who looked very much like the man who robbed her, it was an identification but not a positive identification.*
>
> . . .
>
> *The Defendant did not choose to put on evidence and I have given you an instruction with respect to that and I admonish you to remember that instruction as well as all the other instructions that I gave you.*

Defendant relies heavily on the recent case of *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979). *Sanders* is indeed a case concerning a similar factual situation. In *Sanders*, as in the instant case, the defendant offered no evidence and the trial judge recapitulated the State's evidence without also recapitulating defendant's evidence. However, *Sanders* can be distinguished from the case at bar as the following portion of Chief Justice Branch's opinion shows:

> Although defendant offered no evidence at the conclusion of the State's case, there was certain evidence brought out on cross-examination which tended to exculpate defendant. Furthermore, the evidence of the State itself tended to raise inferences favorable to defendant.

Id. at 517, 259 S.E. 2d at 261.

In *Sanders*, one of the State's witnesses read a statement by defendant tending to show provocation, heat of passion and self-defense. In the instant case, defendant elicited no favorable evidence raising inferences of any defense or mitigating circumstance. He merely attempted and failed to establish any discrepancies in the victim's testimony at the preliminary hearing and at trial. Surely *Sanders* does not mandate that a trial court recapitulate every shred of evidence elicited by defendant on cross-examination of the State's witnesses.

[3] Finally, defendant assigns as error the trial court's submission of the lesser included offense of common law robbery over the defendant's objection. N.C. Gen. Stat. § 15-170 provides that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime ... ." However in order for 15-170 to apply, there must be some evidence tending to establish that defendant may be guilty of the lesser offense. *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). It is not necessary in this case to determine whether the trial court erred in submitting the lesser offense to the jury because such error, if any, is nonprejudicial. Defendant has failed to cite any case holding that submission of the lesser offense of common law robbery where the defendant is charged with armed robbery is harmful error.

Although defendant advances an ingenious argument in contending that submission of the lesser included offense prejudiced him by generating sympathy leading to a compromise verdict, we must agree with the overwhelming body of case law on this issue holding that such error is not harmful to defendant. *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297 (1973), *cert. denied*, 414 U.S. 874 (1973); *State v. Accor*, 281 N.C. 287, 188 S.E.

2d 332 (1972); *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Chase*, 231 N.C. 589, 58 S.E. 2d 364 (1950).

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. ROY BENJAMIN COOK AND FERN WARREN WHITAKER

No. 8026SC254

(Filed 16 September 1980)

1. **Criminal Law § 92.1– two defendants – same offense – consolidation proper**

Consolidation of the trials of defendants was authorized by G.S. 15A-926(b)(2) where the State's case, based on the theory that defendants were acting in concert, charged each defendant with responsibility for the death of a named person; there was no showing that a joint trial denied defendants a fair determination of their guilt or innocence, and the exercise of the trial court's discretion to consolidate will not be disturbed on appeal; and though defendants' defenses were antagonistic, defendants made no showing that they were denied a fair trial because of consolidation.

2. **Constitutional Law § 30– access to incriminating statement – statement timely revealed by prosecutor – failure to object**

The trial court did not err in denying one defendant's motion for mistrial based on the State's failure to disclose an incriminating statement allegedly made by him, since the prosecutor, as soon as he learned it, disclosed to defense counsel the witness's intent to testify about the incriminating statement, and since defendant failed to object to the statement or move to strike at trial.

APPEAL by defendants from *Grist, Judge*. Judgment entered 21 September 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 August 1980.

Defendants were charged in separate bills of indictment with the first degree murder of Clarence William Flowers. Five

days prior to trial the State successfully moved to join the two cases for trial under N.C.G.S. 15A-926. Defendant Whitaker's subsequent motion for a continuance or in the alternative for a severance based on his poor physical condition was denied. The court also denied both defendants' motions to dismiss at the close of the State's case and at the end of all the evidence. The jury found both defendants guilty of second degree murder.

The State presented evidence that Flowers was shot by a .32 caliber revolver found in Cook's apartment; that both defendants, Cook and Whitaker, lived in the same apartment building as the deceased; that in the midafternoon and evening of 1 April 1979 defendant Whitaker, at least once accompanied by defendant Cook, complained several times about the noise coming from Flowers' apartment. Testimony from several witnesses described the abusive nature of these complaints and the angry discussions between defendants and Flowers, including threats and banging on Flowers' apartment door. According to one witness, defendant Whitaker was knocked to the floor by Flowers opening his apartment door and helped off the floor by defendant Cook. The State also presented evidence that defendant Cook shot into Flowers' apartment door while Whitaker stood by watching. Defendants then were seen returning to Whitaker's apartment.

Defendant Whitaker's evidence was consistent with that of the State except as to Whitaker's role in the shooting. He denied any intent to harm Flowers or any complicity with Cook in Flowers' death. Whitaker admitted being in the hallway outside Flowers' apartment at the time of the shooting, but testified that he tried to prevent Cook from shooting into the apartment. Further, Whitaker stated that he failed to report the shooting and denied any knowledge of it when talking with the police because he feared for his own safety as a result of threats from Cook after the shooting.

Defendant Cook's evidence, through the testimony of Cook himself, and Ruby Mae Powers, Flowers' sister who was in the apartment and also wounded during the incident, identified Whitaker as the gunman. Cook denied that he and Whitaker were acting together and testified that he failed to explain the

shooting to the police because he was afraid of Whitaker's retaliation.

Both defendants appeal.

Attorney General Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Lindsey, Schrimsher, Erwin, Bernhardt, Hewitt & Beddow, by Laurence W. Hewitt, for defendant Roy Benjamin Cook.

Assistant Public Defender Theo X. Nixon for defendant Fern Warren Whitaker.

ARNOLD, Judge.

Both defendants assign error to the court's ruling allowing joinder of the cases for trial. Defendant Cook questions the propriety of granting the prosecutor's motion for consolidation, while defendant Whitaker questions the denial of his timely motion to sever. Both contentions are incorrect.

[1] N.C.G.S. 15A-926(b)(2)a authorizes consolidation or joinder of defendants for trial on the written motion of the prosecutor when "each of the defendants is charged with accountability for each offense." The State's case, based on the theory that defendants were "acting in concert," charged each defendant with responsibility for the death of Clarence Flowers. While only one defendant logically could have fired the fatal shots, the indictments charged each defendant with the murder of Clarence Flowers, not necessarily exclusive of each other but by the two defendants acting together. The North Carolina Supreme Court in *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390, 395 (1979), stated: "To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." Therefore, consolidation of the trials of defendants was authorized by statute.

Further, whether defendants should be tried separately or together is in the discretion of a trial judge. Absent a showing that the joint trial denied the defendants of a fair determina-

tion of their guilt or innocence the exercise of the court's discretion will not be disturbed on appeal. *State v. Ervin*, 38 N.C. App. 261, 248 S.E. 2d 91 (1978), citing *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Consolidation of these two cases was proper as neither defendant has indicated an absence of a fair trial as a result of non-severance.

While defendants contend their antagonistic defenses mandate separate trials, they misread *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977). As observed in *State v. Nelson*, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979), *Madden*, "does not mean that antagonistic defenses necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." G.S. 15A-927(c)(2). Though the case *sub judice* certainly involves antagonistic defenses, defendants made no showing that they were denied a fair trial because of the consolidation. Justice Exum further observed in *Nelson* that severance is generally allowed where the case is "an evidentiary contest more between defendants themselves than between the State and the defendants." *Supra* at 587. Such was not the case in this trial. The State presented ample evidence to support a conviction of either or both defendants of Flowers' murder.

We see no merit in Whitaker's assertion that the trial judge was in error in failing to hold a *voir dire* hearing on the competence of Ruby Mae Powers, a witness for defendant Cook who identified Whitaker as the gunman. Determination of the competence of a witness to testify falls within the discretion of the trial judge, and his decision will not be overturned on appeal in the absence of clear abuse of discretion. *State v. Fuller*, 2 N.C. App. 204, 162 S.E. 2d 517 (1968). The record discloses no evidence that the trial judge abused his discretion by allowing Ruby Mae Powers to testify.

[2] Defendant Cook also challenges the denial of his motion for mistrial based on the State's failure to disclose an incriminating statement allegedly made by defendant Cook. As soon as the prosecutor learned it the prosecutor himself, according to the record, disclosed to defense counsel the witness's intent to tes-

tify about the incriminating statement. Moreover, the defendant failed to object to the statement or move to strike at trial. The decision to grant or deny a motion for mistrial is in the discretion of the trial judge and absent abuse will not be disturbed on appeal. *State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446 (1978), *disc. rev. denied*, 296 N.C. 588 (1979). The record indicates no abuse by the trial judge in denying defendants' motion for mistrial.

We find no error in the trial judge's ruling that Officer Overturf could testify concerning statements made by defendant Cook concerning the presence of the gun found in Cook's apartment. Likewise, the judge did not err in his instruction, apparently taken from N.C.P.I. — Crim. 202.10, on the State's theory that the defendants were acting in concert in the death of Clarence Flowers. *See State v. Joyner, supra* at 358.

Finally, the judge's charge, in accordance with N.C.P.I. — Crim. 206.30, on the possible inferences due to the use of a deadly weapon contains no error. *See, State v. Campbell*, 42 N.C. App. 361, 256 S.E. 2d 526 (1979), citing *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979).

No error.

Judges ERWIN and WELLS concur.

STATE OF NORTH CAROLINA v. DESMOND HUNTER

No. 8027SC242

(Filed 16 September 1980)

Criminal Law § 122.2– additional instructions – reference to another trial if jurors failed to agree – harmless error

The trial judge's additional instruction to the jury after it had deliberated for an hour that the case would have to be retried if the jury failed to reach a verdict and that the jurors were as capable of deciding the case as any other group of jurors, if contrary to G.S. 15A-1235, did not constitute prejudicial error where the instruction was not directed to the minority but to all of the jurors; the court's reference to another trial in the event the

jurors failed to agree was followed by an almost verbatim recital of the instructions set forth in G.S. 15A-1235(b); and the charge made it clear that the court was not asking any juror to surrender any conscientious opinion he might have but was only asking the jurors to make every reasonable effort to arrive at a unanimous verdict.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 18 October 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 26 August 1980.

The jury found defendant guilty of taking indecent liberties with a minor in violation of G.S. 14-202.1, and the court imposed an active sentence.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

R. C. Cloninger, Jr., for defendant appellant.

VAUGHN, Judge.

The sole issue in this case is whether the trial court committed prejudicial error in giving supplemental instructions to the jury after it returned to the courtroom without a verdict. The original charge given by the court before the jury retired is not in the record. The defendant stipulates that it was proper in all respects.

Less than one hour after retiring, the jury returned to the courtroom and the following took place:

> COURT: Who is foreman of the Jury? Mr. Foreman, if you'll stand. I understand you have not been able to agree upon a verdict at this point?
>
> FOREMAN: Yes, sir.
>
> COURT: Now, without telling me how you stand, whether for conviction or acquittal, can you tell me what the numerical division is?
>
> FOREMAN: Ten to two.

COURT: Let me give you some additional instructions that may be of some help to you. First of all, let me point out, Members of the Jury, that it's not anticipated that all of you should be of the same opinion as to what your verdict in this case should be when you go into the jury room.

The purpose of a jury, of course, is to provide an opportunity for the people of various walks of life to get together and discuss the matter and to make an effort, a reasonable effort, to arrive at a verdict in the case.

If a verdict is not reached, of course, would mean that the case has to be retried, and I'm sure that coming as you do from various walks of life, and I'm sure of equal or better intelligence than any of your fellow citizens of Gaston County, that you can arrive at a verdict as well as anybody else could be expected to do if given the opportunity to do so.

And this reminder that it's your duty to consult with one another and to deliberate with a view to reaching an agreement as to what your verdict should be if an agreement can be reached without violence to any individual judgment.

It's a juror's duty to decide the case for himself, but only after a fair and impartial consideration of the evidence with his fellow jurors. In the course of your deliberations, a juror should not hesitate to reexamine his or her views concerning what the verdict should be and change his or her opinion if convinced that the opinion is erroneous; however, no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

So, what I'm saying Members of the Jury, I'm not asking you to surrender any conscientious opinion that he or she may have as to what your verdict should be in this case, but, I am asking you to make every reasonable effort to arrive at a unanimous verdict in this case if you can possibly do so.

> You haven't been out long, and there is no reason why you should not, as I see it, continue your deliberations in the case at least for the time being. So I'll give you an opportunity to do so and see if you can arrive at a verdict in the case.

The only exception defendant makes in the record appears at the end of these instructions. This does not comply with the North Carolina Rules of Appellate Procedure which require an exception to jury instructions to identify the disputed portion by the use of brackets or other means of clear reference. App. R. 10(b)(2). Nevertheless, in our discretion, we will consider the merits of defendant's argument on this appeal. App. R. 2. It appears from defendant's brief that he contests only the third paragraph of the instructions.

Defendant contends that these additional instructions improperly coerced the jury into returning a verdict in violation of G.S. 15A-1235. This statute lists some guidelines for jury instructions which we need not repeat here.

The Supreme Court has held that in enacting this section the legislature intended to provide that a North Carolina jury should no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). In the case before us, the court did not refer to any expense or inconvenience but merely reminded the jury that the case would have to be retried, and that they were as capable of deciding the case as any other group of jurors. We concede, nevertheless, that even that reminder is probably contrary to the legislative proscription as interpreted by the Supreme Court in *Easterling*. We do not concede, however, that the legislature intended to require a trial judge, without regard to the circumstances then existing, to either recite G.S. 15A-1235(b) every time a jury returns to the courtroom without a verdict or discharge the jury. We believe, instead, that the section should be regarded as providing the guidelines to which Justice Branch (now Chief Justice) referred in *State v. Alston*, 294 N.C. 577, 596, 243 S.E. 2d 354, 366 (1978), and the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he en-

counters at trial. He should, of course, avoid any reference to the potential expense and inconvenience in retrying the case should the jury fail to agree. *State v. Easterling, supra.*

In any event, the fundamental principle remains that unless there is a reasonable probability that the alleged error in the instruction changed the result at trial, the verdict should not be disturbed on appeal. *State v. Easterling, supra; State v. Alston, supra; State v. Cousin,* 292 N.C. 461, 233 S.E. 2d 554 (1977). When the instructions in the case are evaluated in the light of all the circumstances and are viewed as a whole, there is no way that they can reasonably be said to coerce the mind of a juror of "ordinary firmness and intelligence." *State v. Williams,* 288 N.C. 680, 696, 220 S.E. 2d 558, 570 (1975). The jury had been out less than one hour. The instructions were not just directed to the minority but to all of the jurors. There was no suggestion that a member of the minority should surrender her or his views. Instead, all jurors were instructed to consult with one another. The reference to another trial in the event the jurors did not agree was immediately followed by an almost verbatim recital of the instructions suggested in G.S. 15A-1235(b). The judge then pointed out that they had not been out very long and there seemed to be no reason they should not continue to deliberate "at least for the time being." In words that could not have been plainer, the judge made it absolutely clear that he was "not asking [them] to surrender any conscientious opinion" they might have but was asking them to make every "reasonable effort to arrive at a unanimous verdict" if they could do so. That, indeed, is the duty of every juror. For the reasons stated, defendant's exception fails to disclose prejudicial error.

No error.

Judges MARTIN (Robert M.) and WEBB concur.

Morris v. Asby

NANCY G. MORRIS v. WILLIAM L. ASBY, JR. AND WIFE, EVE ASBY

No. 801DC188

(Filed 16 September 1980)

Jury § 1.3; Rules of Civil Procedure § 38– jury trial – waiver by failure to appear

In addition to the waiver of right to jury trial as established by G.S. 1A-1, Rules 38(d) and 39(a), a party may waive his right to jury trial by failing to appear at trial; therefore, the trial court erred in holding that an earlier judgment was void because plaintiff was allowed to withdraw her request for a jury trial without the consent of defendants who were not present when the case was called for trial.

APPEAL by plaintiff from *Beaman, Judge.* Order entered 6 December 1979, District Court, DARE County. Heard in the Court of Appeals 28 August 1980.

Plaintiff brought this action seeking to impress a constructive trust on a mobile home, title to which she contends she is entitled. In her complaint, she asked for a jury trial. Defendants were served and filed an answer denying the material allegations of the complaint, pleading the statute of frauds and setting up a counterclaim for amounts due as rent and for other transactions between plaintiff and defendants. Plaintiff filed a reply denying that she owed defendants anything for rent but admitting that she owed William L. Asby, Jr., $450.

The matter was set for trial for the 31 October 1977 session of court. At that time counsel for defendants, on motion, was allowed to withdraw, and the court continued the matter to the 12 December 1977 Session of Civil District Court for Dare County. On 13 December 1977, at the request of defendant William L. Asby, Jr., the case was again continued. It was calendared for the 13 February 1978 session of court and notice was sent to defendants at their last known address by the Clerk of Superior Court of Dare County.

At the call of the calendar, plaintiff informed the court that she was ready to proceed. Defendant, William L. Asby, Jr., was present in person but without counsel and stated that he wished to retain as counsel the same counsel who had previously withdrawn and had made no attempt to retain other counsel.

Defendant Eve Asby was not present. The court informed defendant, William L. Asby, Jr., that the case would be tried as soon as it could be reached.

At the time it was called for trial, 14 February 1978, at 10:00 a.m. neither defendant was present, although defendant, William L. Asby, Jr., had been informed by telephone at 7:15 a.m. that the case would be reached that morning.

Prior to presentation of evidence, the court allowed an amendment to the complaint praying for restitution based on *quantum meruit.*

From the evidence the court found facts and made conclusions of law, and entered judgment for plaintiff against the defendants for $5214 and for defendants against the plaintiff for $450.

According to the Record, defendant, William L. Asby, Jr., gave notice of appeal in open court. The appeal was not perfected, but the male defendant filed a petition for certiorari with this Court on 24 August 1978 in which he contended that the Court should issue the writ, because the Court allowed an amendment without notice to him, and because plaintiff was allowed to withdraw the case from the jury without his consent. We denied the petition, and the Supreme Court denied his petition for review of that denial.

Defendants then moved in the District Court for "relief from judgment" under G.S. 1A-1, Rule 60 (b), contending that the judgment entered was void because plaintiff was allowed to withdraw her request for a jury trial and that the defendants had a meritorious defense and their failure to appear to defend the action was the result of excusable neglect.

The court granted the motions, and the basis for the grant was that the judgment was void by reason of this Court's opinion in *Heidler v. Heidler,* 42 N.C. App. 481 (1979), and "defendants are therefore entitled to relief from said judgment pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure." (Conclusion of Law No. 1). The Court further concluded

"the defendants have established no other grounds entitling them to relief from the operation of the judgment in this action." (Conclusion of Law No. 2). Plaintiff excepted to Conclusion No. 1 and appealed.

White, Allen, Hooten, Hodges and Hines, by John M. Martin, for plaintiff appellant.

Carter, Archie and Grimes, by Samuel G. Grimes, for defendant appellee William L. Asby, Jr.

MORRIS, Chief Judge.

It is apparent from the judgment itself that the court based its action in vacating the judgment of 14 February 1978 on *Heidler v. Heidler*, 42 N.C. App. 481, 256 S.E. 2d 833 (1979), the opinion which was filed 31 July 1979, after the motions to set aside were filed by defendants on 8 February 1979. The trial court correctly interpreted *Heidler* as holding that G.S. 1A-1, Rules 38(d) and 39 (a) "do not provide that failure to appear at trial constitutes consent to a withdrawal of a valid jury trial demand." On 3 June 1980, the opinion in *Frissell v. Frissell*, 47 N.C. App. 149, 266 S.E. 2d 866 (1980) was filed. There the judges who sat in *Heidler* joined the judges who sat in *Frissell* in holding that "in addition to the waiver of right to jury trial as established by N.C.G.S. 1A-1, Rules 38(d) and 39(a), as set forth in *Heidler*, a party may waive his right to jury trial by failing to appear at trial," upon the authority of *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439 (1971), and *Ervin Co. v. Hunt*, 26 N.C. App. 755, 217 S.E. 2d 93, *cert. denied*, 288 N.C. 511, 219 S.E. 2d 346 (1975). This, of course, requires that we reverse the trial court's holding that the judgment of 14 February 1978 is void.

Defendants do not contend that the second conclusion of law, to wit: "The defendants have established no other grounds entitling them to relief from the operation of the judgment in this matter" is not supported by the findings of fact. No exception is made to this conclusion, and there is no cross assignment of error. Indeed defendants state in their brief: "Although defendants contend that there was ample other basis for the Court to award a new trial, the only basis given was that stated

in the Court's Conclusion of Law No. 1. Nothing else is before this Court." We, therefore, deem it unnecessary to discuss any other aspect of the case, and the judgment of the trial court is

Reversed.

Judges HEDRICK and WEBB concur.

COOLIDGE STEWART RICE v. ELBERT L. PETERS, JR., COMMISSIONER OF MOTOR VEHICLES

No. 8022SC407

(Filed 16 September 1980)

1. **Automobiles § 2.4– request to take breathalyzer test**

G.S. 20-16.2(c) does not require that an arrestee be requested to submit to a breathalyzer test *after* being informed of his statutory rights; rather, the purpose of the statute is fulfilled when the arrestee is given the option to submit or refuse to submit to a breathalyzer test and his decision is made after having been advised of his rights in a manner provided by the statute.

2. **Automobiles § 2.4– willful refusal to submit to breathalyzer – refusal of petitioner to cooperate**

Petitioner willfully refused to take a breathalyzer test where the arresting officer in the presence of the breathalyzer operator requested defendant to submit to the test; the operator twice read petitioner's statutory rights to him and petitioner stated that he did not understand his rights; the operator's third reading of petitioner's rights to him was drowned out by petitioner's loud and boisterous speech; the operator gave petitioner a signed document setting out his statutory rights; after observing petitioner for 20 minutes, the operator again began to advise petitioner of his statutory rights and petitioner again drowned out the operator's words by talking in a loud and boisterous manner; the operator advised petitioner that he was marking him down as having refused the test; and petitioner made no response and at no time indicated a willingness to submit to the test.

APPEAL by petitioner from *Rousseau, Judge.* Judgment entered 26 February 1980 in Superior Court, IREDELL County. Heard in the Court of Appeals 8 September 1980.

Petitioner was arrested on 17 August 1979 for operating a motor vehicle upon Interstate Highway 77 North in Iredell

County, while under the influence of intoxicating liquor. Petitioner later received an order of revocation of his driver's license for failure to take the breathalyzer test. Upon his requested administrative review, a hearing officer of the Division of Motor Vehicles entered an order affirming the revocation of his driver's license for six months. Upon appeal to superior court, the revocation order was affirmed. Petitioner appealed.

Attorney General Edmisten, by Deputy Attorney General Jean A. Benoy, for the State.

Bondurant & Lassiter, by T. Michael Lassiter, for petitioner appellant.

HILL, Judge.

Petitioner contends the trial court erred in holding that he willfully refused to take the chemical breath test in violation of law.

We note there are no exceptions in the record on appeal. With no exceptions to the findings of fact, they are deemed to be correct and supported by competent, substantial evidence. The findings are thus conclusive on appeal and are not presented for appellate review. *Durland v. Peters, Comr. of Motor Vehicles*, 42 N.C. App. 25, 27, 255 S.E. 2d 650 (1979). The appeal itself, however, raises the question of whether the facts found and the conclusion of law support the judgment. App. R. 10(a).

The trial court made the following findings of fact:

1. On the 17th day of August, 1979, the petitioner was arrested by Statesville Police Officer Page D. Brooks, a law-enforcement officer, upon reasonable grounds, for the offense of operating a motor vehicle upon the public highways or public vehicular area while under the influence of intoxicating liquor.

2. Officer Brooks forthwith took petitioner before Statesville Police Officer Gary P. Henderson, a person authorized to administer a chemical test of breath within the meaning of G.S. 20-16.1.

3. In the presence of Officer Henderson the Petitioner was requested by the arresting officer (Brooks) to submit to a chemical test of breath.

4. Officer Henderson, after reading the rights to Petitioner Rice, asked petitioner if he understood the rights as set forth in G.S. 20-16.2(a), to which the petitioner replied he did not.

5. Officer Henderson again read petitioner's rights to him as set forth in G.S. 20-16.2(a), to which petitioner again replied he did not understand them.

6. Officer Henderson commenced to read the rights again to Petitioner Rice, at which time Mr. Rice commenced saying words in a loud and boisterous manner drowning out Officer Henderson's words.

7. Officer Henderson completed advising petitioner of his rights as required by G.S. 20-16.2(a) (1)(2)(3)(4) and observed petitioner in the breathalyzer room for a period of 20 minutes thereafter.

8. Officer Henderson informed the petitioner twice verbally and in writing furnishing a signed document setting out all of the petitioner's rights under the provisions of G.S. 20-16.2(a)(1)(2)(3)(4).

9. At the expiration of the 20 minutes observation period following petitioner's being advised of his rights as set forth above, Officer Henderson again commenced advising petitioner of his rights preparatory to offering the test to petitioner and petitioner again commenced talking in a loud and boisterous manner drowning out Officer Henderson's words.

10. Officer Henderson at that time advised petitioner he was marking petitioner down as refusing to submit to the breathalyzer test and petitioner made no response to Officer Henderson's advising him of that fact.

11. At no time did petitioner ever indicate to either Officer Brooks or Officer Henderson any willingness to submit to the breathalyzer test.

12. The petitioner, without just cause or excuse, voluntarily, understandingly and intentionally refused to submit to the breathalyzer test as was required of him by G.S. 20-16.2.

From these findings the court concluded that the petitioner willfully refused to take the chemical breath test in violation of law and affirmed the revocation order.

[1] Defendant argues the court's order is in error as there was no finding that he was requested to submit to the breathalyzer test *after* being informed of his statutory rights. He relies on the following provisions of G.S. 20-16.2(c) for his argument.

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

We do not believe the North Carolina General Assembly intended by its enactment of G.S. 20-16.2(c) to prescribe such a rigid sequence of events as contended by defendant. *See State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974). The administrative procedures provided for in G.S. 20-16.2 are designed to promote breathalyzer tests as a valuable tool for law enforcement officers in their enforcing the laws against driving under the influence while also protecting the rights of the State's citizens. *Montgomery v. N.C. Dept of Motor Vehicles*, 455 F. Supp. 338 (W.D.N.C. 1978), *aff'd* 599 F. 2d 1048 (4th Cir. 1979). *We hold the purpose of the statute to be fulfilled when the petitioner is given*

the option to submit or refuse to submit to a breathalyzer test and his decision is made after having been advised of his rights in a manner provided by the statute.

[2] We also do not agree with defendant's argument that his actions, as contained in the court's findings of fact, did not constitute a willful refusal to submit to the breathalyzer test. If defendant's contention were to be held valid, any belligerent or hostile petitioner could evade the results of the test by merely refusing to cooperate. *State v. Carpenter*, 34 N.C. App. 742, 239 S.E. 2d 596 (1977), *disc. rev. denied*, 294 N.C. 183 (1978). One may refuse the test by his deeds as well as his words. *See, Bell v. Powell, Comr. of Motor Vehicles*, 41 N.C. App. 131, 254 S.E. 2d 191 (1979); *Poag v. Powell, Comr. of Motor Vehicles*, 39 N.C. App. 363, 250 S.E. 2d 93, *disc. rev. denied*, 296 N.C. 736 (1979). The officer read petitioner his statutory rights two times and was drowned out on the third reading by petitioner's loud and boisterous speech. Petitioner was informed he was being marked down as a refusal and he thereafter gave no indication that he was willing to cooperate. We hold this sufficient to constitute a willful refusal within the meaning of G.S. 20-16.2

The facts found support the court's conclusion and judgment.

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

KATHLEEN BRADSHAW, INDIVIDUALLY AND KATHLEEN BRADSHAW, GUARDIAN OF CHARLENE SMITH, MINOR v. YVONNE S. SMITH, ADMINISTRATRIX OF THE ESTATE OF CHARLES EMERSON SMITH, DECEASED

No. 804SC192

(Filed 16 September 1980)

Husband and Wife § 11.2; Parent and Child § 7.1– separation agreement – support provisions not affected by death of supporting parent

Absent some indication of a contrary intent, where a valid separation agreement requires the father to make child support payments, states terminating contingencies, and is silent as to the effect of the father's death, his

estate is bound to provide support payments according to the terms of the agreement; therefore, the deed of separation in this case created an obligation to furnish child support which survived decedent's death and became an obligation of his estate where the agreement provided that child support would continue until the child reached eighteen years of age, completed high school, or discontinued her high school education, whichever event happened last; provided that decedent would pay for hospital insurance for the child; and did not make a specific provision for payments in case of decedent's death.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 1 October 1979 in Superior Court, SAMPSON County. Heard in the Court of Appeals 26 August 1980.

On 28 December 1978 plaintiff brought this action against the defendant, the administratrix of decedent's estate, alleging that the estate was liable for child support payments due under the separation agreement. Defendant denied such liability contending that the obligation terminated at decedent's death. Paragraph Three of the separation agreement provided that decedent would pay to plaintiff child support in the sum of $20 per week for the use and benefit of his minor child until such child reached "the age of eighteen (18) years or if still in high school, until said child completes its high school education or discontinues its high school education, whichever of the latter two events happens first . . . ." In Paragraph Four, decedent also agreed to provide hospital insurance for the child for the same period of time. The agreement was silent as to the effect of decedent's death upon his duty to provide child support and hospital insurance. After decedent's death, defendant refused plaintiff's demands for child support.

The parties waived jury trial and stipulated to all facts which were substantially as set out hereinabove.

The court found as facts that:

20. The Court finds that there is no provision in the separation agreement wherein the actual death of Charles Emerson Smith is addressed, that is one that would be set forth in the event of the death of Charles Emerson Smith as to an obligation of his estate to support his children.

21. The separation agreement does set forth a time when the support obligation would terminate, to wit: upon the youngest child obtaining the age of eighteen years of age or completes her high school education or discontinues her high school education, whichever of the latter two events happens first.

22. Upon reading of the separation agreement from start to finish and taking the document from all four corners, the Court finds that the intent of the party was that the obligation of Charles Emerson Smith to support his child would terminate in accordance with the provisions contained in Paragraph No. 3 of said separation agreement.

Upon these findings the trial judge concluded that decedent's estate was obligated to comply with Paragraph Three of the separation agreement. From these findings of fact and conclusions of law, defendant appeals.

Paderick, Warrick, Johnson & Parsons, by Clifton W. Paderick, for plaintiff-appellee.

Holland, Poole & Newman, by B. L. Poole, for defendant-appellant.

MARTIN (Robert M.), Judge.

The sole issue before this Court is whether the deed of separation created an obligation to furnish child support which survived decedent's death and became an obligation of his estate. An examination of prior North Carolina case law answers this issue.

Although the common law duty of a parent to support his child terminates at the parent's death, a parent can bind his estate by contract to support the child after his death. The question of whether a contract operates to so obligate a parent's estate is answered by determining the intent of the parties to the contract. *Mullen v. Sawyer*, 277 N.C. 623, 178 S.E. 2d 425 (1971); *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732 (1965).

In determining the intent of the parties with regard to this issue, three prior North Carolina cases provide guidance.

In *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964), Justice Sharp (later Chief Justice Sharp) stated that where the parties to a separation agreement provide for contingencies which will reduce the amount of support payments, the court will not rewrite the contract for them. In *Church*, the separation agreement provided that the father would pay support for the wife and two minor children. Under the agreement, if the wife remarried or if a child died, payments would be reduced by certain amounts. When one of the minor children married, the father contended that the amount of the support payments should be reduced. The court held that ordinary rules governing the interpretation of contracts applied and that the contractual provisions regarding termination of the duty of support were clear and unambiguous. The marriage of the minor child was not a terminating contingency under the agreement.

Layton v. Layton, supra, involved a consent order providing for support of decedent's two minor children. After determining that the primary purpose of the parties in consenting to the order was to fix the amount of support payments (which had been contested), the court held that the father's intent was merely to meet his common law obligations to his children and nothing more. He did not intend to create a debt which survived his death. Appellant contends that *Layton* supports her position that Smith's estate is not bound by the separation agreement. However, *Layton* is distinguishable from the case at bar on its facts because the consent order in *Layton* did not state when the duty to support would terminate and the agreement in the case *sub judice* did.

The case of *Mullen v. Sawyer, supra*, which was not cited by plaintiff or defendant, concerned a similar factual situation. In *Mullen* the father agreed to make certain support payments for his minor children in a consent order which stated:

> *said payment shall continue monthly until the eldest child reaches the age of 18 years, at which time said payments*

> *shall be cut in half and shall continue until the younger of said children reaches the age of 18 years, at which time all such payments due hereunder shall cease.*

The father also agreed to "*assume the burden of a four year college education for each of said children at the college of his choosing ...*" and upon the occurrence of certain conditions that obligation was to terminate. *Id.* at 626, 178 S.E. 2d at 426-427. As in the case at bar, the consent order was silent regarding the effect of the father's death on his obligation to support. The court held that the father's estate was obligated to make support payments coming due after the father's death to the minor children and to pay their future college expenses. In reaching its decision the court determined that such was the parties' intent in consenting to the order. The court examined *Layton, supra,* and isolated from that opinion four factors to be considered in determining intent from the contract. They are as follows:

> (1) Does the language create a lien upon the father's property? (2) Is there a special consideration in favor of the father? (3) Is there a specific termination time for the payments? (4) Is there an obligation in excess of the common law duty to support? These elements in themselves may not be conclusive, but in the present case they may assist in determining the intent of Dr. Sawyer at the time he signed the consent judgment.

277 N.C at 630, 178 S.E. 2d at 429.

In the case at bar, factors (3) and (4) are met. The agreement states when the payments shall terminate and provides for an obligation in excess of the common law duty to support (to provide hospital insurance for each minor child). Thus it seems clear that when Charles Emerson Smith signed the separation agreement, he intended that his obligation to support his child would continue until she reached eighteen years of age, completed high school, or discontinued her high school education, whichever event happened last. Absent some indication of a contrary intent, where a valid separation agreement requires the father to make child support payments, states terminating

contingencies, and is silent as to the effect of the father's death, his estate is bound to provide support payments according to the terms of the agreement. It appears that the majority of the other jurisdictions that have passed on this issue agree with our holding. *See* Annot., 18 A.L.R. 2d 1126, 1131-1133 (1951).

For the reasons stated above, we affirm the judgment of the superior court.

Affirmed.

Judges VAUGHN and WEBB concur.

THOMAS J. ALLEN, (ALSO KNOWN AS J.T. ALLEN) v. JUSTON MORGAN AND WIFE, BESSIE MORGAN, HAZEL O. BURCH HENRY AND HUSBAND, DONALD HENRY, AND JOSEPH W. MITCHELL AND WIFE, COLLEEN B. MITCHELL

No. 7929DC1137

(Filed 16 September 1980)

Adverse Possession § 25.2– lappage – color of title – fitting deed description to land

The trial court erred in determining that defendants established adverse possession under color of title to the land claimed by them where the disputed area was a lappage; plaintiffs made a *prima facie* showing of senior title; and defendants introduced into evidence the deed they claimed as color of title but failed to offer proof fitting the description in the deed to the land it allegedly covered and establishing the required adverse possession within those lines.

APPEAL by plaintiff from *Guice, Judge*. Judgment entered 4 May 1979, District Court, TRANSYLVANIA County. Heard in the Court of Appeals in Waynesville 26 August 1980.

Plaintiff instituted this action for the purpose of removing cloud on his title caused by defendants' claim to a portion of plaintiff's property. Defendants Morgan answered admitting that they claimed a portion of the property described in the complaint under a deed from J. O. White recorded in Book 96 at page 182, Transylvania County Registry, and on their con-

tinuous open, notorious, and adverse possession of the property described in that deed from and after delivery of the deed in 1948, "under known and visible boundaries conforming with the description in their deed." A copy of the quitclaim deed under which they claim was attached to their answer. By Exhibits 1-6 and 8 and 9, and testimony with respect thereto, plaintiffs established a connected chain of title to a grant from the State to plaintiff's predecessors in title. Defendants stipulated that William Leonard is an expert in the field of land survey.

Mr. Leonard testified that he had surveyed plaintiff's land and that plaintiff's Exhibit 7, admitted without objection, was a plat of that survey. He further testified that when he was surveying the property he found a fence across a portion of the property. The fence was made of three strands of barbed wire with wooden fence posts supporting it. There were two residences to the north of the fence, and there were indications that someone was using the property north of the fence. In his opinion the two residences were on the plaintiff's property. The area claimed by defendant Juston Morgan runs about 600 feet north of the fence, and the bearing along the south line in the deed under which defendants Morgan claim follows the bearing of the fence very well.

Three witnesses testified for defendants. Defendant Bessie Morgan testified that she and defendant Juston Morgan bought the property described in defendant's Exhibit 4 (deed under which they claim) in 1942 but did not get a deed until 1948, when they finished paying for it. They paid taxes back to 1927 and have kept the taxes paid since they received the deed. The fence was not there when they bought the property. They used the east side of the property, using it for crops, pasture, and cutting firewood for their own use. She testified that she could not read a map and could not point out the area they used.

Ernest Morgan, her oldest son, testified that he was familiar with the property described in Exhibit 4, that the fence was there when they bought it, that they raised corn, potatoes, beans, and cabbage on the land on the north side of the creek. He had no knowledge with respect to who occupied the buildings Mr. Leonard observed on the property.

Roy Aiken testified that he lives within 300 yards of the Morgan property and had hunted on the property, never asked permission, and thought he was on the Morgan property. He testified that he knew the lines of the Morgan property but could not relate any of the Juston Morgan corners to the map.

The court found facts and concluded that "because the defendant Morgan possessed the land described in D-4 for more than twenty years, under the circumstances described above, as to them and those holding through them, the plaintiff is barred by G.S. 1-38 and G.S. 1-40 from sustaining this action as to the property described inD-4." The plaintiff's action was, therefore, dismissed with prejudice, and plaintiff appealed.

Ramsey, Smart, Ramsey and Hunt, by John K. Smart, Jr., for plaintiff appellant.

Ramsey, White and Cilley, by Robert S. Cilley, for defendant appellee.

MORRIS, Chief Judge.

As in *Allen v. Petit*, filed this day, the sole question presented is whether the trial court committed error in entering judgment for defendants based on his finding that they had established adverse possession under color of title to the lands claimed by them.

Plaintiff offered a connected chain of title back to a grant from the State. This constituted a *prima facie* showing of senior title and, nothing else appearing, established his right to judgment in his favor. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889).

Defendants presented evidence of a quitclaim deed to property claimed by them. The deed contained a metes and bounds description. The surveyor, by stipulation characterized as a expert in land surveys, testified that the map introduced in evidence accurately represented plaintiff's property.

Here the disputed area is a lappage, and plaintiff has shown senior title. "When a junior grant incorporates a portion of a senior grant it is not necessary for the junior grantee claiming title by seven years adverse possession under color to show that the boundaries of the lappage were visible on the ground. (Citations omitted.) The claimant, however, must establish the required adverse possession within those lines. Here the lines of the lappage must be located from the calls in defendant's deed, the only instrument which defines them." *Price v. Tomrich Corp.*, 275 N.C. 385, 394, 167 S.E. 2d 766, 772 (1969).

Defendants, having introduced into evidence the deed they intended to use as color of title, were required to fit by proof the description contained in that deed to the land it allegedly covered "in accordance with appropriate law relating to course and distance and natural objects called for as the case may be", *Trust Co. v. Miller*, 243 N.C. 1, 7, 89 S.E. 2d 765, 769 (1955), and then establish, if they could, the required adverse possession within those lines. These requirements defendants did not meet, and judgment in their favor was, therefore, erroneously entered.

Reversed.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. SHERRILL WYATT

No. 8028SC231

(Filed 16 September 1980)

1. Arson § 2– apartment building – one dwelling house – sufficiency of indictment

An indictment was sufficient to charge defendant with common law arson of an apartment where it alleged that apartment 9F was burned and apartment 9E was occupied by a named person, since Building 9 of the apartments, comprised of apartments A through F, constituted one dwelling house such that the requirement of a burning could be satisfied by the charring in 9F while the requirement of occupancy could be satisfied by the tenant's presence in 9E.

2. Arson § 5– burning of apartment – one dwelling unit – who occupied which apartment – instructions not prejudicial

In a prosecution of defendant for burning an apartment, it was immaterial which person occupied which apartment in view of the Court's ruling that Building 9 of the apartments, with all its individual apartments, constituted a single dwelling house, and defendant therefore was not prejudiced by the trial court's instructions which placed people in the wrong apartment.

APPEAL by defendant from *Burroughs, Judge.* Judgment entered 24 August 1979 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals in Waynesville on 26 August 1980.

Defendant was charged with arson. He was convicted as charged and appeals from the judgment imposing a prison term of not less than fifteen nor more than fifty years.

The State's evidence tends to show the following: On the evening of 11 March 1979, a fire occurred in Building 9, Pisgah View Apartments in Asheville. The fire was confined to Apartment 9F. There was extensive incidental damage to Apartment 9E which was occupied by Brenda Dockery (or Brockley). Harold Ray, a codefendant, testified that defendant Wyatt set two fires in Apartment 9F. He also testified that no one lived in 9F on the night of the fire. Defendant's stepmother, Vina Mae Wyatt, testified that she moved out of Apartment 9F about a week before the fire; that there were bad feelings between her and the defendant, such that the defendant had threatened to destroy her apartment; and that she now lives in 21A Pisgah View Apartments. Two residents of the Apartments testified that on the night of the fire they saw defendant running out of Apartment 9F, and soon thereafter they observed the fire.

Defendant alleged that his codefendant Ray set the fires. He also introduced evidence of his work as a buyer for the Interagency Narcotics Squad. Other facts will be stated in the opinion.

Attorney General Edmisten by Associate Attorney General Fred R. Gamin for the State.

Gray, Kimel & Connolly by David G. Gray for defendant appellant.

CLARK, Judge.

[1] Defendant's primary assignment of error is that he was not arraigned and tried on a proper bill of indictment. That indictment charges as follows:

> [T]hat on or about the 11th day of March, 1979, in Buncombe County Sherrill Wyatt, aka Sherrill David Wheeler unlawfully and wilfully did feloniously and maliciously burn the dwelling house inhabited by Vina Mae Wyatt and located at 9F Pisgah View Apartments, Asheville, North Carolina. At the time of the burning Brenda Dockery was in the adjoining apartment located at 9E Pisgah View Apartments in violation of the following law: G.S. 14-58.

Defendant suggests that the indictment is fatally defective in that it fails to describe a dwelling house, so inhabited, which would charge the defendant with common law arson.

The purpose of the indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare his defense. *State v. Gates*, 107 N.C. 832, 12 S.E. 319 (1890). To this end, a valid indictment must allege all the essential elements of the offense charged. *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953). Necessary elements of common law arson include that the place burned be "the dwelling house of another" and that the house be occupied at the time of the burning. *State v. Long*, 243 N.C. 393, 90 S.E. 2d 739 (1956). Although we see no problem with the occupancy requirement since Brenda Dockery was alleged to have been "in" 9E at the time of the burning, we believe the requirement of a "dwelling house of another" deserves some discussion.

The defendant argues on the authority of 6A C.J.S., Arson § 32 (1979) and one very old case, *State v. Sandy*, 25 N.C. (3 Ired.) 570 (1843), that each separate apartment within Building 9 constitutes a separate and distinct dwelling house. He notes that since Mrs. Wyatt no longer dwelt in 9F there could be no common law arson of that apartment; and that since Brenda Dockery's apartment was apparently not actually charred, there can be no common law arson of that apartment. The

State's contention is that Building 9 of Pisgah View Apartments (comprised of Apartments A, B, C, D, E & F) constituted one dwelling house such that the requirements of a burning could be satisfied by the charring in 9F while the requirement of occupancy could be satisfied by Dockery's presence in 9E. The State relies upon the recent case of *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978). We agree with the State that the rationale of *State v. Jones, supra*, is controlling in this case. We note that C.J.S. is no more than persuasive authority and that other persuasive authority opposes the view expressed therein. *See, e.g.*, R. Perkins, Criminal Law 183 (1957). *State v. Sandy, supra*, is not controlling because it dealt with the statutory offense of burning a storehouse. As noted by our Supreme Court, per Exum, Justice, "[T]he main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to punishment for arson any person who sets fire to any part of the building." *Jones, supra*, at 77-78, 248 S.E. 2d at 860. We note that unlike *State v. Sandy, supra*, the *Jones* case dealt directly with common law arson. We hold, therefore, that reference in the indictment to Apartments 9F and 9E was sufficient to put the defendant on notice that he was charged with a burning at Building 9 of Pisgah View Apartments and that the recitation of one of the true occupants of the building, Dockery, together with the designation of "dwelling house" in the indictment was sufficient to put the defendant on notice of that element of the crime charged. We note further that the traditional recitation of whose dwelling house was burned is intended simply to put the defendant on notice of the place he is charged with burning so that he can defend his case. We hold that the indictment here sufficiently alleges all of the essential elements of the crime charged.

[2] Defendant also assigns as error that portion of the judge's charge which states:

> "So I charge you if you find from the evidence beyond a reasonable doubt that on or about March 11, 1979, the Defendant, Sherrill Wyatt, maliciously burned Apartment 9F, Pisgah View Apartments, which was inhabited by Miss Vina Mae Wyatt, or Mr. Wethers or Mrs. Parson [sic], by

> setting the living room and bedroom closets on fire it would be your duty to return a verdict of guilty of arson."

We agree with the defendant that there was no evidence to support a finding that either Mr. Wethers or Mrs. Parton were in Apartment 9F. However, the judge followed that instruction with instructions as follows:

> "I further charge if you find from the evidence beyond a reasonable doubt that on or about March 11, 1979, Sherrill Wyatt maliciously burned an apartment in building 9 of the Pisgah View Apartments, which was inhabited by either Mrs. Vina Mae Wyatt or Mr. Wethers or Mrs. Parton, by setting fire to the living room and bedroom closets of Apartment 9F it would be your duty to return a verdict of guilty of arson."

This instruction, combined with his painstaking and accurate review of the evidence would make clear to the jury that Wethers and Parton were not in 9F but 9E and 9A respectively. The evidence reveals that at the time of the fire Wethers was occupying Apartment 9E with Brenda Dockery (Brockley), who in the indictment was allegedly "in the adjoining apartment." In view of our ruling that Building 9 of Pisgah View Apartments constituted a single dwelling house, it is immaterial which person occupied which apartment. And for the same reason there was no material variance between the indictment and the proof. It was material and essential that the State both allege and prove that the defendant did maliciously burn an inhabited dwelling house. The State did both. We find no prejudicial error.

No error.

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

JUDY JENKINS ROBERTS v. EARL DAVID EDWARDS

No. 8019SC202

(Filed 16 September 1980)

Evidence §§ 34.6, 44– nonexpert witness – observation of pain and suffering – complaints by plaintiff

In an action to recover for injuries sustained in an automobile accident, the trial court erred in the exclusion of testimony by plaintiff's mother, plaintiff's husband and another witness concerning their observations with respect to plaintiff's pain and suffering from back and neck injuries. Furthermore, testimony by two of the witnesses as to plaintiff's complaints about her back and neck was not objectionable hearsay.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 1 October 1979 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 27 August 1980.

This action arises out of a claim for injuries sustained by plaintiff when her car was struck by a vehicle operated by defendant on 14 March 1975. The jury answered the issue of defendant's negligence in favor of plaintiff and awarded damages in the amount of $950.00.

Ottway Burton, for plaintiff appellant.

Gavin and Pugh, by W. Ed Gavin, for defendant appellee.

VAUGHN, Judge.

Plaintiff assigns as error the refusal of the trial court to let the jury hear testimony of three witnesses respecting their observations with reference to plaintiff's pain and suffering. We must note at the outset that one of defendant's exceptions to the record on appeal was that plaintiff simply photographed pages 43-57 of the court reporter's transcript without narrating the proceedings which led up to the court's ruling on these witnesses' testimony. The trial judge sustained this exception to the record. Thereafter, plaintiff did not go back and narrate the proceedings for the record but simply drew a line through the pages with the notation "omit." The questions and answers preceding the judge's rulings on the admissibility of the testi-

mony, therefore, are not a part of the record as certified to us. The record on appeal, however, does reveal that as soon as plaintiff rested her case the following took place.

COURT: Just stay there ma'am. Members of the jury, at this time I have three witnesses who will — as the attorney has indicated, he wants the answers that they would have answered put — placed in the record which cannot be in your presence. I'm going to have this done at this time and allow you to take a recess while we are doing that.

. . .

NOTE: The jury leaves the courtroom.

. . .

LINDA SMITH

COURT: Let the record show that the jury is out. Ms. Smith, in answer to the question of Mr. Burton, describe the plaintiff's condition relative to injuries she received in the accident between March the 14th, '75, and July the 2nd, '75.

A. Well, she was in pain with her back and her neck.

MR. BURTON: I didn't hear her.

COURT: She said she was in pain in her back and neck. All right. The same question, but for the period July the 2nd, '75, until October of '75 when you moved away.

A. That was after the accident, right? The other was before. Did I get the dates mixed up?

COURT: The first question was from the date of the accident until July the 2nd, '75.

A. That was after the accident. She complained then and after.

COURT: The second one was from the time the doctor told her she could go back to work, July the 2nd, until you moved away. You moved away in September or October of '75.

A. She still complained with her neck and her back.

COURT: Thank you. You may step down.

- - -

HETTIE YORK JENKINS

COURT: Ms. Jenkins, would you come back to the stand, please, ma'am.

HETTIE YORK JENKINS returned to the witness stand.

COURT: This is for the record. Describe Judy Jenkins Robert's mental and physical condition from the period March the 14th, '75, until July the 2nd, '75.

A. Well, she was real nervous and she did complain with her back and her neck all of the time just about.

COURT: All right. Now, the same question but for the period July the 2nd, '75, until April of '76.

A. She got better, but she still complained.

MR. BURTON: What?

A. She got better but she still complained with it, especially her back.

COURT: You may step down. Thank you, ma'am.

COURT: Mr. Roberts, would you return to the stand.

ALLEN THOMAS ROBERTS returns to the witness stand.

COURT: Mr. Roberts, state the condition of her back and neck from the date of the wreck until the marriage.

A. She appeared to be in pain.

Q. And state the condition of her back and neck after the marriage?

A. She continues to —

COURT: From the time of the marriage until now.

A. She continues to appear to have neck and back pain.

COURT: Thank you. You may step down.

Plaintiff submits it was prejudicial error requiring a new trial for the trial court to exclude the foregoing testimony because it "cut the heart out of the case concerning the pain and suffering." We agree that the jury should have been allowed to hear the testimony of these three witnesses. Their testimony was relevant to the issue of the existence and extent of plaintiff's pain and suffering. Hettie York Jenkins is plaintiff's mother, and Allen Thomas Roberts is plaintiff's husband. Surely, they had the necessary opportunity to form an opinion about the condition of plaintiff's health after the accident. *Kenney v. Kenney*, 15 N.C. App. 665, 190 S.E. 2d 650 (1972).

The state of a person's mental and physical health, as derived from mere observation, is a proper subject for opinion testimony by a nonexpert. *Sherrill v. Telegraph* Co., 117 N.C. 353, 23 S.E. 277 (1895); Stansbury, N.C. Evidence 2d, § 129. Testimony similar to that excluded in this case was allowed in the leading cases of *Pridgen v. Produce Co.*, 199 N.C. 560, 155 S.E. 247 (1930) (husband testified to the fact and extent of his wife's suffering) and *Gasque v. Asheville*, 207 N.C. 821, 178 S.E. 848 (1935) (wife described husband's condition in detail and testified that "[h]e suffered pain and his condition was nervous."). In addition, two recent opinions of this Court provide compelling authority that the testimony of the witnesses de-

scribing plaintiff's physical and mental condition should have been admitted.

In *Rector v. James*, 41 N.C. App. 267, 254 S.E. 2d 633 (1979), plaintiff's son was allowed to testify as to the pain she suffered in the hospital and later at home. The Court overruled an objection that the testimony was hearsay, incompetent and prejudicial because the pain of his mother was not within the son's realm of knowledge. The Court responded:

> The witness testified as to what he observed and heard, and formed the opinion that his mother was in pain. Pain is a mental condition that may be the result of physical injury. It is often manifested in the actions, statements, utterances and behavior of the injured person which may be observed by another. The witness had reasonable opportunities to observe his mother at the hospital and at home, and to form an opinion concerning her pain and suffering. *We hold a non-expert witness may testify as to pain suffered by another, based upon his personal observation.*

41 N.C. App. at 269-270, 254 S.E. 2d at 636 (emphasis added).

In *Hedrick v. Southland Corp.*, plaintiff's children were permitted to testify that she had a back problem (degenerative disc) and that her ankles would swell. 41 N.C. App. 431, 255 S.E. 2d 198, *cert. denied*, 298 N.C. 296, 259 S.E. 2d 912 (1979). In the case at bar, the witnesses were prepared to describe plaintiff's physical condition with regard to her back and neck injuries. Such injuries are not normally visibly susceptible to the eyes of others; however, the type of injury should not preclude testimony on the state of a person's physical condition. *Hedrick, supra.*

The testimony of Hettie York Jenkins and Linda Smith as to what plaintiff said about her physical condition, i.e., complaints about her back and neck, was not objectionable hearsay. Statements as to then existing pain or other physical discomfort, though hearsay, are admissible whenever the physical condition of the declarant is relevant. *Munden v. Insurance Co.*,

213 N.C. 504, 196 S.E. 872 (1938); Stansbury, N.C. Evidence 2d, § 161; 6 Wigmore, Evidence § 1718 (Chadbourn rev. 1976). Anyone who hears a declaration of pain or present physical condition may testify to it. *Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968); *Inman v. Harper*, 2 N.C. App. 103, 162 S.E. 2d 629 (1968).

Plaintiff's assignments of error numbers 1, 5, 6, 7, 10, 11 and 12 are totally lacking in merit and are expressly overruled. In light of our disposition of this case, it is not necessary to consider the remaining assignments of error. Although the error in excluding the witnesses' testimony relates to the damages issue, in our discretion, we order a new trial on all the issues. *Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974); *Lumber Co. v. Branch*, 158 N.C. 251, 73 S.E. 164 (1911).

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

JOHNNY MELVIN CROUSE v. GEORGE WOODRUFF AND CAROL JOHNSON

No. 8023SC189

(Filed 16 September 1980)

Negligence § 35.1– inexperienced tractor driver – plaintiff riding on tractor – contributory negligence as matter of law

Plaintiff's action to recover damages for injuries received while riding on a tractor on defendants' farm was barred by his own contributory negligence where plaintiff alleged that he knew one defendant had no experience driving a tractor and her operation of the tractor might not be prudent; plaintiff nevertheless rode on the back of the tractor with defendant; and defendant's negligence in turning off the tractor before plaintiff dismounted was foreseeable and was included in the risks to which plaintiff voluntarily exposed himself.

APPEAL by plaintiff from *McConnell, Judge*. Judgment entered 19 November 1979 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 26 August 1980.

Plaintiff seeks to recover damages for injuries received while riding on a tractor on defendants' farm. In pertinent part, plaintiff's complaint alleges the following:

> That in the Spring of 1978, Plaintiff was employed as a laborer on a farm in Alleghany County owned jointly by the Defendants; that on May 6, 1978, Plaintiff was cleaning out a barn on said farm when the Defendant, Carol Johnson, indicated to Plaintiff her desire to drive a tractor located on said farm, and which said tractor was used in the farming operation; that Plaintiff admonished Defendant, Carol Johnson, that she had no prior experience driving such equipment and therefore that her operation of said tractor might not be prudent; that notwithstanding the remonstrations of Plaintiff, Defendant Carol Johnson insisted upon operating said tractor and insisted that Plaintiff get on said tractor with her to show her its operation; that so as to prevent Defendant, Carol Johnson, from injuring herself, Plaintiff rode on said tractor with Defendant, Carol Johnson; that when Defendant, Carol Johnson, drove said tractor back to the aforementioned barn, Plaintiff instructed Defendant, Carol Johnson, not to stop the tractor until he had gotten completely off, and that pursuant to said instructions Plaintiff began to get off of the tractor; that notwithstanding Plaintiff's instructions Defendant Carol Johnson cut the motor of said tractor off which dropped the blade of said tractor toward the ground; that as a result Plaintiff was pinned between parts of the blade machinery; that Plaintiff was finally able to re-engage said tractor motor and lift the blade before he could remove his leg from the machinery; that Plaintiff has suffered severe damages and injuries as will be set forth more specifically hereinafter as a result of the aforementioned activities.

Before evidence was presented in the case, defendants moved to dismiss plaintiff's complaint pursuant to Rule 12 (b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted. The trial court granted defendants' motion, and the case was duly dismissed.

Dan R. Murray, for plaintiff appellant.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, Harrell Powell, Jr., and Edward L. Powell, for defendant appellees.

VAUGHN, Judge.

The sole question before us is whether the court erred in allowing defendants' motion to dismiss the complaint. We conclude that the court did not err because an insurmountable bar to recovery, contributory negligence as a matter of law, appears on the face of the complaint.

The general rule is that a complaint should not be dismissed *"unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."* *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970) (citing Moore's Federal Practice § 12.08). For purposes of deciding the motion in this case, the allegations in plaintiff's complaint tending to show the negligence of the defendants are deemed to be admitted. Defendants' answer raised the defense of contributory negligence. Ordinarily, the defendants would have to prove plaintiff's contributory negligence. *Rockett v. City of Asheville*, 6 N.C. App. 529, 170 S.E. 2d 619 (1969). Nevertheless, plaintiff's own pleadings in this case establish the defense of contributory negligence as the sole reasonable conclusion to be drawn under any theory that could have been presented at trial. *See Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305 (1968); *Douglas v. Mallison*, 265 N.C. 362, 144 S.E. 2d 138 (1965).

In this case, plaintiff's conduct, as alleged in his own words, violates the standard of reasonable care and protection required of one for his own safety under similar circumstances. Restatement (Second) of Torts § 463, Comment b, and § 464 (1965). A well accepted definition of contributory negligence in North Carolina appears in *Moore v. Iron Works*, 183 N.C. 438, 439, 111 S.E. 776, 777 (1922): "[c]ontributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and cooperating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred." Assuming

defendant Johnson was negligent in turning off the tractor before the plaintiff was able to get off, it is nonetheless clear that plaintiff's own negligence was a proximate cause of his injury.

First, plaintiff was familiar with the tractor and admits in his complaint that he was aware of the attendant risks of harm involved in the operation of the tractor by an inexperienced driver. In *Bogen v. Bogen*, 220 N.C. 648, 18 S.E. 2d 162 (1942), the Court held that plaintiff wife was contributorily negligent as a matter of law for riding in an automobile driven by defendant husband when she knew that he "habitually" drove recklessly at high speed and ignored any "protest or remonstrance" made. Second, the resulting injury to plaintiff was not only reasonably foreseeable by him, but also one he could have easily avoided. *Burgess v. Mattox*, 260 N.C. 305, 132 S.E. 2d 577 (1963). Other cases finding contributory negligence as a matter of law are: *Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965) (inserting hand into a field chopper); *Kiser v. Snyder*, 21 N.C. App. 708, 205 S.E. 2d 619 (1974) (placing fingers in front of the guardrail on metal shearing machine); *Peeler v. Cruse*, 14 N.C. App. 79, 187 S.E. 2d 396 (1972) (standing on the blade of motor grader). For analogous cases discussing the contributory negligence of passengers in automobiles driven by inexperienced drivers, see Annot. 43 A.L.R. 2d 1155, 1163-65 (1955).

It is deemed to be true that defendant Johnson "insisted" that the plaintiff, an employee, accompany her on this dangerous driving lesson. Yet plaintiff again admits in his complaint that he knew "her operation of said tractor might not be prudent." No reasonable farm laborer familiar with a tractor and its capacity for serious injury would have ridden on the back of the tractor standing near a powerful accessory blade while an inexperienced driver operated it. Because of her known inexperience, defendant Johnson's negligence in turning off the tractor before plaintiff dismounted was foreseeable and was included in the risks to which plaintiff voluntarily exposed himself. It was not one of the general risks of his employment as a laborer to which he was required to expose himself. Plaintiff's position can draw no strength from *Swaney v. Steel Co.*, 259 N.C. 531, 131 S.E. 2d 601 (1963). In that case the risk was unknown to

the plaintiff. Here plaintiff *alleges* that he knew of the danger. His own negligence was a proximate cause of his injury and bars his recovery. The motion to dismiss was properly allowed.

Affirmed.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. TROY LEE ORR

No. 8030SC173

(Filed 16 September 1980)

Criminal Law § 89.1– general reputation in community – insufficient knowledge by witness

A witness did not have sufficient contact with the community in which the prosecutrix lived to permit him to testify as to the general reputation of the prosecutrix in such community.

APPEAL by defendant from *Friday, Judge.* Judgment entered 25 October 1979, Superior Court, CHEROKEE County. Heard in the Court of Appeals in Waynesville 26 August 1980.

Defendant was indicted for armed robbery, convicted, and sentenced to a prison term. He appeals from the judgment entered.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Ronald M. Cowan for defendant appellant.

MORRIS, Chief Judge.

Evidence for the State and for the defendant was sharply in conflict. The prosecuting witness testified that defendant, who "was supposed to be the husband of her niece, came to her house to repair the roof of her mobile home. He offered to drive her in her jeep to Murphy to pick up some tires. She lived in Tallulah

which is about six miles from Robbinsville. Instead of going to Murphy, he turned off on a dirt road, stopped the jeep, and ordered her to get out. He pulled out a gun, pointed it in her face and threatened to kill her. She recognized the gun as one she kept by her bed. He struck at her face with the gun and hit her arm which she had put up to protect her face, knocking her out of the jeep. He ordered her to walk away without looking back and refused to give her her walker, without which she had difficulty in walking. He left in the jeep in which she had left her pocketbook containing $200 in cash. Also taken were two cassette tape players and two watches. She walked back to the road and got a ride to the Andrews police station where she talked with Kenneth Cope. Mr. Cope testified that she was excited and scared and her clothes were in disarray, and there was a bruise on her left arm. He could not tell that she had been drinking.

Defendant testified that he had been to the home of the prosecuting witness one time prior to the date of the alleged robbery; that on the day of the alleged robbery both he and the prosecuting witness were drinking heavily; that he did not rob her but that she made sexual advances to him and he left her in the jeep and caught a ride to his father's house.

Defendant offered one James D. Brown as a witness in his behalf. He testified that he lived in Robbinsville. Counsel for defendant asked Mr. Brown whether he knew Mrs. Starnes, the prosecuting witness. He replied that he did, in fact, know her and that she was a relative of his; that she lived "right above Bear Creek Junction, on the right hand side;" and that the area was referred to as "the upper end of Tallulah, or something." In response to the question whether he knew other persons living in that area, the witness responded: "I know Roy Dale Peterson, I believe it is; he lives right down the road there on the left, and I think Hugh Lane lives up through there somewhere pretty close." Counsel then asked whether the witness knew "Mrs. Starnes's general character and reputation in the community in which she lives." The court sustained the State's objection and denied defense counsel's request that the witness's answer be put in the record. Defendant excepted to both rulings of the court. These two exceptions are assigned as error and constitute defendant's only assignment of error.

Defendant correctly states that one of the more common methods of impeaching a witness is to show his bad character. The State agrees with this statement but contends that the witness had established that he was not qualified to testify with respect to the general character and reputation of Mrs. Starnes in the community in which she lives.

> "In North Carolina the testimony of a character witness is confined by the general reputation of a person whose character is attacked, or supported, *in the community in which he lives. S. v. Parks*, 25 N.C., 296; *S. v. Perkins*, 66 N.C., 126; *S. v. Gee*, 92 N.C., 756; *S. v. Wheeler*, 104 N.C., 893; *S. v. Coley*, 114 N.C., 879, and numerous other cases since. Reputation is the general opinion, good or bad, held of a person by those of *a community in which he resides.* This is eminently a matter of hearsay, based upon what the witness has heard or learned, not as to any particular acts, but as to the *general opinion or standing in the community.*" (Italics ours.) *S. v. Steen*, 185 N.C., 768, 770. The emphasis upon the word "community" is significant. It is not the reputation of a man among a particular group — such as his associates in church, lodge, or business — which is competent in evidence, it is his reputation generally in the community which is admissible. As stated by *Chief Justice Tilghman* in *Wike v. Lightner*, 11 Ser. & Rawle, at p. 199: "The question is, What is said by people in general? This is the true point of inquiry, and everything which stops short of it is incorrect."

State v. Smoak, 213 N.C. 79, 94, 195 S.E. 72, 82 (1938).

In *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973), the Court, through Justice Branch, now Chief Justice, discussed at length the question of the admissibility of evidence of a witness's general character and reputation. There the Court said:

> We are convinced that inquiry into reputation should not be necessarily confined to the residence of the party whose reputation is in question, but should be extended to any community or society in which the person has a well-known

or established reputation. Such reputation must be his *general* reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion. *Of course, the testifying witness must have sufficient contact with that community or society to qualify him as knowing the general reputation of the person sought to be attacked or supported.* (Emphasis supplied.)

Id. at 67.

It appears to us obvious that Mr. Brown had insufficient contact with any community in which Mrs. Starnes might have been known to testify as to what people who had an adequate basis upon which to form their opinion thought about Mrs. Starnes.

The court correctly sustained the State's objection and refused to allow the defendant to have the witness's answer put in the record.

No error.

Judges CLARK and MARTIN (Harry C.) concur.

DONALD W. BROOKS, D/B/A COUNTY SEED AND FEED v. MOUNT AIRY RAINBOW FARMS CENTER, INC.

No. 8015DC185

(Filed 16 September 1980)

Accounts § 1– purchase of seed on account – amount owed in dispute – summary judgment improper

In an action to recover on an account for seed sold to defendant, the trial court erred in entering summary judgment for plaintiff since (1) it could not be said that there were only latent doubts as to plaintiff's credibility in that glaring inconsistencies as to dates of payment, dates of service charge assessments and even the current outstanding balance existed between the exhibit plaintiff attached to his complaint and the exhibit he included with his affidavit supporting summary judgment; (2) defendant did introduce materials in his favor by which he claimed that all debts had been paid and that any balance remaining in the account was due solely to plaintiff's

failure to credit the account properly; and (3) the central theme in plaintiff's allegations was the existence of a debt, and the fact that defendant took numerous opportunities during the proceedings to deny the existence of any debt clearly indicated that a material fact, the debt itself, was indeed in dispute.

APPEAL by defendant from *Allen, Judge*. Judgment entered 29 November 1979 in District Court, ALAMANCE County. Heard in the Court of Appeals on 28 August 1980.

On 1 August 1979 plaintiff filed a verified complaint in Alamance County District Court alleging, *inter alia*, that defendant owed plaintiff the sum of $1,553.28 on an account for seed sold to defendant. Attached to the complaint was an itemized statement of the account that defendant allegedly had with plaintiff. Defendant answered 4 September 1979 denying the material portions of the complaint and filed a motion to dismiss pursuant to G.S. § 1A-1, Rule 12 (b)(6) stating that the sums purportedly owed plaintiff were "nothing more than service charges which have been added on top of service charges resulting from the failure of the plaintiff to credit the defendant's account at the time that the credits should have been made" and further that "[d]efendant owes plaintiff nothing . . . ."

On 3 October 1979, defendant filed a request for admission of facts from plaintiff seeking to establish, *inter alia*, that defendant had sought several times to have plaintiff correct the account; that all charges remaining on the account were service charges; and that "defendant paid all sums due and owing plaintiff for all items other than service charges within thirty days of the date plaintiff made corrections to defendant's account." Plaintiff admitted that the charges remaining were finance and service charges, but denied that defendant had made requests for correction and that defendant had paid all outstanding sums.

Plaintiff moved for summary judgment on 9 October 1979. In a supporting affidavit, plaintiff incorporated the statement of the account attached to the complaint and further set out a second exhibit detailing the particulars of the account. The allegations of the affidavit were essentially those of the com-

plaint, except that the claimed outstanding balance was $1,341.92. Defendant's affidavit in response repeated the allegations defendant had earlier made in his answer, motion to dismiss, and request for admission. From summary judgment for plaintiff in the "sum of One Thousand Three Hundred Forty-One [Dollars] and Ninety-two Cents ($1,341.92), with interest continuing to accrue at the rate of One and One-half percent (1½%) per month upon the unpaid balance until paid in full from September 30, 1979," defendant appealed.

No counsel for plaintiff appellee.

Max D. Ballinger, for the defendant appellant.

HEDRICK, Judge.

The question presented on this appeal is whether the court erred in entering summary judgment for the plaintiff. A summary judgment must be granted, upon motion, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact; his pleadings and papers must be carefully scrutinized and all inferences are to be resolved against him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). *See also Baumann v. Smith*, 298 N.C. 778, 260 S.E. 2d 626 (1979).

Where, as here, the party with the burden of proof moves for summary judgment, a greater burden must be met. Summary judgment may be granted in favor of a party with the burden of proof, on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) where the opposing party has failed to introduce any materials in his favor, failed to point to specific areas of impeachment and contradiction, and failed to use G.S. § 1A-1, Rule 56(f); and (3) when summary judgment is otherwise appropriate. *Kidd v. Early, supra; see also Stroup Sheet Metal v. Heritage, Inc.*, 43 N.C. App. 27, 258 S.E. 2d 77 (1979).

In the present case, plaintiff alleged in his complaint that defendant was indebted to it in the amount of $1,553.29 on an account for seed sold to defendant. Plaintiff attached to his complaint an exhibit of the account, indicating that the defendant owed a balance of $1,553.29. Defendant filed answer, and subsequent papers, denying that it owed plaintiff any amount because its account had been paid in full. Plaintiff supported his motion for summary judgment with an affidavit of Donald Brooks which merely reiterated the allegations of the complaint. He also filed in support of his motion an exhibit indicating that the balance due on the account was $1,341.92. In response to that motion, defendant filed an affidavit reiterating the denials in his answer and other papers and alleging that he "owes plaintiff nothing, that he paid his account in full, and that there are no sums due and owing to the plaintiff by the defendant."

We think that the record here demonstrates that there are genuine issues of material fact, and that plaintiff failed to carry his burden as required by *Kidd v. Early, supra.* First, it cannot be said that there are only latent doubts as to the credibility of the plaintiff, Donald Brooks. Glaring inconsistencies as to dates of payment, dates of service charge assessments, and even the current outstanding balance, exist between the exhibit he attached to his complaint and the exhibit he included with his affidavit supporting summary judgment. This obviously suggests that even plaintiff is uncertain as to the amount of the debt, and thus his statements concerning the debt are less credible. Second, defendant did introduce materials in his favor. His pleadings and papers repeatedly claimed that all debts had been paid, and he stated in his motion to dismiss that any balance remaining in the account was due solely to plaintiff's failure to credit the account properly. Also, in his affidavit against summary judgment, defendant pointed to the previously mentioned inconsistencies between plaintiff's exhibits. Finally, the central theme in plaintiff's allegations is the existence of a debt, and the fact that defendant took numerous opportunities during the proceedings to deny the existence of any debt, clearly indicates to us that a material fact — the debt itself — was indeed in dispute. Since summary judgment must be denied the party with the burden of proof if his opponent

submits affidavits and other supporting materials which cast doubt upon the existence of a material fact, or if such doubts are raised by the movant's own materials, *Kidd v. Early, supra*, we hold summary judgment for plaintiff was inappropriate.

Reversed and remanded.

Chief Judge MORRIS and Judge WEBB concur.

RONALD A. SEVERE AND KAREN A. SEVERE v. BECKY W. PENNY AND KATHERINE WARREN GALLOWAY

No. 8010SC204
(Filed 16 September 1980)

Frauds, Statute of § 7; Vendor and Purchaser § 1.1– contract to convey land – production of written contract

Parol evidence is incompetent to establish an entire contract to convey land, and summary judgment was properly entered for defendants in an action for specific performance of an alleged contract to convey land where plaintiffs were unable to produce a written contract or any written memorandum of a contract to convey signed by the parties to be charged. G.S. 22-2.

APPEAL by plaintiffs from *Canaday, Judge*. Judgment entered 27 November 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 27 August 1980.

Plaintiffs, the Severes, contend that they entered into a valid written contract with defendants, Becky Penny and Katherine Galloway, for the sale of a house and lot devised to defendants by their mother. Defendants deny the existence of any contract and assert the statute of frauds and non-delivery of the contract as defenses to plaintiffs' action for specific performance of the alleged contract.

By sworn deposition, the plaintiff Ronald Severe presented testimony tending to show that he had negotiated the sale with Ms. Penny, a resident of Raleigh, North Carolina. Ms. Galloway, Ms. Penny's sister, is a resident of Atlanta, Georgia. Severe, a licensed real estate broker, made several written offers to buy

the house and lot. Plaintiffs drew the offer in question by using a draft of a previous offer prepared by Ms. Penny's attorney. They made alterations by striking through typewritten provisions and writing in new terms. They reduced the purchase price from $67,500 to $52,500, the amount of the promissory note from $57,500 to $44,500, the amount of monthly payments from $462.67 to $358.07, and the balance due at closing from $9,000 to $7,000. In addition, they deleted the description of an adjacent lot and added a right of first refusal on that lot for $15,000. They changed the date of closing from March 1, 1979 to April 1, 1979. They added plaintiff Karen Severe's name as a grantee to be named in the deed. Then plaintiffs signed and initialed the changes on the altered document.

Ms. Penny sent the altered document to her sister, Ms. Galloway, in Atlanta for Galloway's signature. Ms. Galloway changed the amount of the monthly payment, signed the offer and returned it to Ms. Penny. Ms. Penny signed the offer in the plaintiffs' presence at her home. They then noticed that Ms. Galloway had changed the payment amount and had not initialed any of plaintiffs' prior alterations.

Ms. Galloway telephoned Ms. Penny while plaintiffs were at Ms. Penny's house. Ms. Penny informed her sister that she was returning the payment figure to the correct amount and that plaintiffs would like to send the offer back to Galloway for her to initial the changes. Ms. Penny then told plaintiffs that Ms. Galloway agreed. Plaintiffs mailed the only copy of the altered offer to Ms. Galloway. Apparently contradicting an earlier statement in his deposition, Severe stated that prior to mailing the offer, he, his wife and Ms. Penny initialed all changes. Ms. Galloway never returned the offer and Ms. Penny eventually notified plaintiffs that her sister did not find the price acceptable.

The court granted defendants' motion for summary judgment and motion to cancel notice of lis pendens and denied plaintiffs' motion for summary judgment. Plaintiffs appealed.

Barringer, Allen and Pinnix, by John L. Pinnix, and Noel Lee Allen, for the plaintiffs-appellants.

Poyner, Geraghty, Hartsfield & Townsend, by David W. Long and Elaine R. Pope, for the defendants-appellees.

MARTIN (Robert M.), Judge.

N.C. Gen. Stat. § 22-2 states that "[a]ll contracts to sell or convey any lands ... shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith ... ." 22-2 has been interpreted to prohibit parol evidence to establish such a contract. "A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best* but as the *only admissible evidence of its existence.*" (Emphasis in original.) *Morrison v. Baker*, 81 N.C. 76, 80-81 (1879).

> It is settled by numerous decisions that if the contract be denied ... parol evidence is inadmissible to show the existence or terms of the agreement. (Citations omitted.) "Where the plaintiff sues upon a contract, the performance of which he seeks to enforce specifically in equity, ... he must establish the contract by legal evidence, and if it is required by the statute to be in writing, then by the writing itself, for that is the only admissible proof." (Citations omitted.) *Jamerson v. Logan*, 228 N.C. 540, 543, 46 S.E. 2d 561, 563 (1948).

The court in *Kluttz v. Allison*, 214 N.C. 379, 199 S.E. 395 (1938) held that parol evidence is incompetent to establish an essential element of an otherwise written contract to convey land. Certainly it follows that parol evidence is incompetent to establish the entire contract to convey land. Plaintiffs admit that they are unable to produce a written contract or any written memorandum of a contract to convey the property in question signed by the parties to be charged. To permit a party to establish a contract to convey land solely by parol evidence would defeat the purpose of 22-2 by opening the door to "all the mischiefs which the statute was intended to prevent." *Hall v. Misenheimer*, 137 N.C. 183, 188, 49 S.E. 104, 106 (1904). Therefore the judgment of the court below must be upheld.

Affirmed.

Judges VAUGHN and WEBB concur.

JUDENE S. (ARNETTE) COLEMAN v. FRANCIS D. ARNETTE

No. 8029DC79

(Filed 16 September 1980)

Rules of Civil Procedure § 60– motion to amend not motion for relief from judgment – motion to amend improperly allowed

Defendant's motion to amend the parties' divorce judgment to permit him to claim the two children of the parties as dependents on his state and federal tax returns was not properly made pursuant to G.S. 1A-1, Rule 60(b)(6) since that rule permits motions for relief from judgments, and defendant sought to amend the judgment rather than to be relieved of the judgment.

APPEAL by plaintiff from *Guice, Judge.* Order entered 21 August 1979 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 26 August 1980, at Waynesville, North Carolina.

On 13 June 1974 a judgment was entered granting the parties an absolute divorce. No issues of support payments, custody of children, or visitation were raised on the pleadings as the parties had already entered into a separation agreement concerning these matters. The divorce judgment contained the following:

> It is further ordered that support payments to be made by the defendant, the defendant's visitation privileges and plaintiff's custody of the said minor children be in accordance with the Separation Agreement entered into by the parties hereto.

A separation agreement dated 22 January 1973 and executed by the plaintiff and defendant is included in the record as an exhibit. This agreement does not contain any provision deciding who shall be entitled to claim the two minor children of

plaintiff and defendant as dependents on state and federal income tax returns.

On 6 April 1978, defendant filed a motion in the divorce proceeding requesting that he be permitted to claim the two children of the marriage as dependents on his state and federal income tax returns. Defendant alleges it was agreed by plaintiff and defendant that so long as he paid $190 per month as support for the children he would be entitled to claim the children as dependents, although this was not included in the written agreement.

Plaintiff filed answer to defendant's motion and denied any agreement with respect to who can claim the children as dependents for tax purposes. Plaintiff also moved to dismiss defendant's motion as failing to state a claim upon which relief can be granted.

After hearing, the trial court denied plaintiff's motion to dismiss, and entered an order finding facts and concluding that defendant's motion was made pursuant to N.C.G.S. 1A-1, Rule 60(b)(6), and should be allowed. He ordered the divorce judgment dated 13 June 1974 and the separation agreement dated 22 January 1973 amended to include that defendant be allowed to claim the two children of the parties as dependents upon his state and federal tax returns for 1975 and thereafter. Plaintiff appeals.

Riddle, Shackelford & Hyler, by John E. Shackelford, for plaintiff appellant.

Ramsey, White & Cilley, by William R. White, for defendant appellee.

MARTIN (Harry C.), Judge.

This appeal was filed 153 days after notice of appeal was entered, violating Rule 12(a), North Carolina Rules of Appellate Procedure, and subjecting it to dismissal. In order to prevent manifest injustice, the Court in its discretion treats the appeal as a petition for review by certiorari and allows the petition.

Counsel for defendant and the trial court have misconceived the purposes of Rule 60(b)(6), N.C.R. Civ. Proc. Defendant seeks to *amend* the divorce judgment, *not* to be *relieved* of the judgment. N.C.G.S. 1A-1, Rule 59(e), governs amendments to judgments and requires that motions to alter or amend judgments be made within ten days after entry of the judgment. Defendant's motion to amend was not timely made.

Rule 60(a), N.C.R. Civ. Proc., permits correction of clerical mistakes in judgments. Rule 60(b) permits motions for relief from judgments for five specific reasons and for "[a]ny other reason justifying relief from the operation of the judgment." The judgment defendant seeks to amend does not control which party is entitled to claim the children as dependents for tax purposes. Defendant cannot achieve the result he desires by a motion under Rule 60(b)(6) to be relieved of the effect of the judgment.

We note that the order entered by the district court does not prohibit plaintiff from claiming the children as dependents for tax purposes; it merely allows defendant to do so. In any event, the determination of which parent is entitled to a dependency deduction in a given year is controlled by special rules of the Internal Revenue Code, I.R.C. § 152(e), and the North Carolina income tax law, N.C.G.S. 105-149(a)(5).

Defendant's motion is to amend the judgment. By the very words of the court's order, "be and the same are hereby amended," the district court attempted to amend the divorce judgment. The motion was not properly made pursuant to Rule 60(b)(6) and the court erred in so considering it. As a motion to amend, it comes too late. Plaintiff's motion to dismiss should have been allowed.

The order of 21 August 1979 is reversed, and this cause is remanded to the district court for the entry of an order dismissing defendant's motion of 6 April 1978.

Reversed and remanded.

Chief Judge MORRIS and Judge CLARK concur.

PMB, INCORPORATED, A NORTH CAROLINA CORPORATION v. MICHAEL B. ROSENFELD, J. NAT HAMRICK TRUSTEE, AND J. NAT HAMRICK, INDIVIDUALLY

No. 8029SC187

(Filed 16 September 1980)

Mortgages and Deeds of Trust § 25– foreclosure hearing – notice to debtor

The clerk of court erred in permitting a foreclosure sale of property pursuant to a deed of trust where the debtor was not given notice of the foreclosure hearing in a manner prescribed by G.S. 45-21.16(a), a letter to and telephone conversation with the debtor being insufficient and the debtor's actual knowledge of the hearing being irrelevant.

APPEAL by defendants from *Lewis, Judge.* Judgment filed 2 October 1979 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals at Waynesville on 28 August 1980.

Defendant Rosenfeld, hereinafter mortgagee, filed a Notice of Hearing on Foreclosure on 22 December 1977, properly notifying plaintiff PMB, hereinafter mortgagor, of a hearing on foreclosure of a note and deed of trust mortgagor had executed in favor of mortgagee. The notice stated that "[d]efault ... is based upon the failure of PMB [mortgagor] ... to make the payments as provided in said Note."

A hearing was held in January 1978, but adjourned for the reason that the clerk of court felt the matter would be "amicable [sic] disposed of." The matters were not settled, and on 16 August 1978 another hearing was held at which mortgagor did not appear. On 9 October 1978, the clerk permitted mortgagee to advertise the property for sale based on mortgagor's failure to carry fire insurance on the property as required by the deed of trust.

Notice of the sale was given, and the sale was completed on 13 November 1978. Mortgagor appealed to the superior court, and on 14 September 1979 that court granted partial summary judgment in favor of mortgagor. Delivery of the deed to the trustee was enjoined, and the register of deeds was ordered not to record any deed of conveyance to mortgagee Rosenfeld.

West, Groome & Correll, by Ted G. West, for plaintiff appellee.

Hamrick & Hamrick, by J. Nat Hamrick, for defendant appellant.

HILL, Judge.

The superior court acted correctly in granting partial summary judgment in favor of mortgagor. No proper notice of the 16 August 1978 hearing at which the deed of trust was foreclosed was given to mortgagor. The requirements of G.S. 45-21.16 were not met.

G.S. 45-21.16(a) requires that notice of the hearing "shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested . . . ." Mortgagee asserts that he sent a letter to mortgagor's attorney giving notice of the hearing and that by other means mortgagor had actual knowledge of the sale, but chose not to appear.

Mortgagor's actual knowledge is irrelevant in this case. G.S. 45-21.16 is clear in its requirement that notice shall be served in such a manner that there will be unbiased and reliable extrinsic evidence of the fact notice was served. Mortgagee's purported letter to and telephone conversation with mortgagor fall short of the statutory requirements. The type of "notice" that mortgagee sought to give mortgagor can only give rise to the type of unprofessional haggling between attorneys exemplified by this case, and must have been an evil the General Assembly meant to eliminate by the passage of G.S. 45-21.16.

Mortgagee also argues that the superior court erred when it made findings of fact. Summary judgment is improper if findings of fact are *necessary* to resolve an issue as to a material fact. *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 215 S.E. 2d 162 (1975). "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.) *Mosley v. Finance Co.*, 36 N.C. App. 109, 111,

243 S.E. 2d 145, *disc. rev. denied* 295 N.C. 467 (1978). We find no error in the superior court's summation of the undisputed facts which support its judgment.

For the reasons stated above, the action of the superior court in granting partial summary judgment in favor of mortgagor is

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

ELIZABETH ANN TAYLOR v. JACK HAYES

No. 7921DC421

(Filed 16 September 1980)

Evidence § 40; Landlord and Tenant § 19.1– tenant's action for deceptive trade practices and return of deposit – opinion testimony admissible

In an action to recover for unfair and deceptive trade practices in the lease of an apartment and to obtain a refund of a security deposit, the trial court did not err in overruling defendant's general objection to plaintiff's testimony that on one occasion defendant "ran up his back steps through his back door through his house and got out the front door, and I thought he had gone to get a gun or something so we left," since plaintiff's testimony was admissible to show her reason for abandoning her attempt to regain her security deposit.

APPEAL by defendant from *Keiger, Judge.* Judgment entered 15 November 1978, in District Court, FORSYTH County. Heard in the Court of Appeals 5 December 1979 and reheard 27 August 1980.

Plaintiff was a tenant of the defendant from 11 March 1978 to 18 March 1978 in an apartment located at 15-1/2 Monmouth Street in Winston-Salem, North Carolina. Plaintiff alleged that defendant made untrue and misleading representations which induced her to enter into a rental agreement for the apartment and that the apartment was not habitable. Plaintiff moved out eight days later and brought this action, contending that defendant's misrepresentations and concealments constituted un-

fair and deceptive trade practices under the provisions of G.S. 75-1.1. Plaintiff also sought a refund of her security deposit. Defendant counterclaimed for damages to the apartment, contended that the lease was for one year, and sought to collect eleven months' rent under the terms of the lease. The jury answered issues in favor of the plaintiff, granting her recovery of her security deposit of $175.00 and the sum of $785.00 for damages otherwise sustained. The judge trebled the damages under the provisions of G.S. 75-1.1 and entered judgment accordingly.

Defendant appealed, and this Court granted a new trial, 45 N.C. App. 119, 262 S.E. 2d 383 (1980). Plaintiff then filed a Petition for Rehearing on 22 February 1980 which was allowed. The matter was reheard without additional briefs or additional oral arguments.

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

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

HILL, Judge.

Of the twenty-five arguments originally brought forward by defendant, we found all but one to be without merit. We held in our original opinion that the admission into evidence of a portion of plaintiff's testimony constituted prejudicial error. The plaintiff had stated that,

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

We held that the testimony was nothing more than opinion and incompetent.

After considering the matter again on rehearing, we find that the trial judge did not err when he overruled defendant's objection to the above testimony and motion to strike.

Defendant made only a general objection to the testimony. "A general objection, if overruled, is no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible." 1 Stansbury's N.C. Evidence § 27, p. 72 (Brandis rev. 1973), *citing State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). Plaintiff's testimony was admissible to show plaintiff's reason for abandoning her attempt to regain her security deposit.

We have re-examined defendant's other twenty-four arguments and have come to the same conclusion we did originally. The arguments point out no prejudicial errors. Consequently, we reverse our original position and affirm the trial court.

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

STATE OF NORTH CAROLINA v. LEROY STAFFORD

No. 8030SC319

(Filed 16 September 1980)

Criminal Law § 161– necessity for exceptions and assignments of error

Defendant violated App. R. 10(b) and (c) by failing to set forth any exceptions following the judicial action of which he complains and by failing to base his assignments of error on proper exceptions.

APPEAL by defendant from *Friday, Judge.* Judgment entered 9 November 1979 in Superior Court, HAYWOOD County. Heard in the Court of Appeals at Waynesville on 27 August 1980.

Attorney General Edmisten, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

John I. Jay for defendant appellant.

HILL, Judge.

Defendant has violated App. R. 10(b) and (c) by failing to set forth any exceptions following the judicial action of which he complains and by failing to base his assignments of error on proper exceptions. Exceptions not preserved and set forth as required by the Appellate 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), *disc. rev. denied*, 299 N.C. 123 (1980).

We have carefully examined the record on appeal in light of the provisions of Appellate Rule 2, which permits this Court on its own initiative to vary or waive the rules to prevent manifest injustice. We find the State's evidence of the defendant's guilt to be substantial, and we find waiver of the rules in this case is not warranted.

For the reasons stated above, the appeal is

Dismissed.

Judges CLARK and MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 SEPTEMBER 1980

ALLEN v. PETIT No. 7929DC1138	Transylvania (77CVD243)	New Trial
BELLE REALTY v. LEONARD No. 8019DC199	Rowan (79CVD1188)	Dismissed
DINER'S CLUB v. GREENE No. 8022DC193	Davidson (79CVD863)	Reversed & Remanded
GATES-MILLS v. KIMBROUGH INVESTMENTS No. 8021DC347	Forsyth (79CVD427)	Affirmed
IN RE VICK No. 807SC194	Nash (79CVS426)	Dismissed
MOORMAN v. LITTLE No. 8012SC200	Cumberland (79CVS1165)	Affirmed in part, Modified in part, Reversed in part, and Remanded
STATE v. CORBETT No. 803SC321	Pitt (79CRS9809) (79CRS9810)	No Error
STATE v. GLENN No. 8014SC252	Durham (78CRS31827)	No Error
STATE v. JACKSON No. 8029SC74	Rutherford (78CRS4333)	No Error
STATE v. JACKSON No. 8029SC86	Rutherford (77CRS3710) (77CRS3711)	Appeal Dismissed
STATE v. MANEY No. 8030SC272	Clay (79CRS576)	No Error
STATE v. PIERCE No. 808SC265	Lenoir (79CR7317)	Appeal Dismissed
STATE v. POOLE No. 8028SC271	Buncombe (79CRS5846) (79CRS5902) (79CRS5903)	No Error

STATE v. POSTELL No. 8027SC282	Gaston (79CRS12232)	No Error
STATE v. SMITH No. 8026SC281	Mecklenburg (75CR41350)	Appeal Dismissed
STATE v. YOUNG No. 8026SC370	Mecklenburg (79CRS14250)	Reversed & Remanded
TREXLER v. TREXLER No. 8028DC366	Buncombe (79CVD1399)	Affirmed

APPENDIX

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The first sentence of Rule 13(a) of the Rules of Appellate Procedure, 287 N.C. 671, 710, shall be amended to read as follows (new material appears in italics):

FILING AND SERVICE OF BRIEFS.

Within 20 days after the *clerk of the appellate court has mailed the printed record to the parties*, the appellant shall file his brief in the office of the clerk, and serve copies thereof upon all other parties separately represented.

This amendment to Rule 13(a) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The last sentence of the first paragraph of Rule 14(d)(1) of the Rules of Appellate Procedure, 287 N.C. 671, 712, as amended 31 January 1977, 291 N.C. 721, shall be amended to read as follows (new material appears in italics):

Filing and Service; Copies.

* * *

Within *20* days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The last sentence of Rule 15(g)(2) of the Rules of Appellate Procedure, 287 N.C. 671, 717, shall be amended to read as follows (new material appears in italics):

Cases Certified for Review of Court of Appeals Determinations.

* * *

The appellee shall file a new brief in the Supreme Court and

serve copies upon all other parties within *20* days after a copy of appellant's brief is served upon him.

This amendment to Rules 14(d)(1) and 15(g)(2) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON, J.

For the Court

The third and final paragraph of Rule 18(d)(3) of the Rules of Appellate Procedure, 287 N.C. 671, 724, as amended 21 June 1977, 292 N.C. 739, shall be amended to read as follows (new material appears in italics):

Settling the Record on Appeal.

* * *

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar shall by written notice to counsel for all parties set a place and time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order; *provided, however, that when the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar is a party to the appeal as permitted by Rule 19(d), settlement of the record on appeal, absent an agreement of the parties, shall be by a referee appointed pursuant to the procedures contained in the preceding paragraph.*

This amendment to Rule 18(d)(3) was adopted by the Supreme Court in Conference on 7 October 1980, to become effective January 1, 1981. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

CARLTON 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 3rd.

ACCOUNTS

§ 1. Open and Running Accounts

Summary judgment was inappropriate in an action to recover on an account for seed sold to defendant since a genuine issue of fact existed as to whether a debt was owed. *Brooks v. Farms Center, Inc.*, 726.

ADVERSE POSSESSION

§ 25.2. Insufficiency of Evidence

Trial court properly granted summary judgment for defendants on plaintiff's claim that they had title to a contested strip of land, which was a street the city had closed, by adverse possession for seven years under color of title. *Investment Co. v. Greene*, 29.

Defendants failed to establish adverse possession under color of title to a lappage where they introduced the deed they claimed as color of title but failed to fit the description in the deed to the land. *Allen v. Morgan*, 706.

APPEAL AND ERROR

§ 6.3. Appeals Based on Venue

Defendant's purported appeal from an interlocutory order denying defendant's motion for a change of venue for the convenience of witnesses and ends of justice is dismissed as premature. *Furches v. Moore*, 430.

§ 6.6. Appeals Based on Motions to Dismiss

An immediate appeal lies from the trial court's refusal to dismiss a suit against the State on the grounds of governmental immunity. *Stahl-Rider v. State*, 380.

ARBITRATION AND AWARD

§ 5. Scope of Inquiry by Arbitration

Arbitration of defendant's claim that it was entitled to a bonus was barred where a judgment in an earlier action between the same parties finally determined the issues asserted by defendant in its demand for arbitration. *Development Co. v. Arbitration Assoc.*, 548.

ARREST AND BAIL

§ 6. Resisting Arrest

In a prosecution of defendants for assault on law enforcement officers with a firearm and assault with a deadly weapon with intent to kill, there was no evidence to sustain defendant's plea of self-defense based on the officers' allegedly attempting an illegal arrest or their using excessive force in the execution of that arrest. *S. v. Partin*, 274.

ARSON

§ 2. Indictment

An indictment was sufficient to charge defendant with the burning of an apartment. *State v. Wyatt*, 709.

ASSAULT AND BATTERY

AUTOMOBILES

BURGLARY AND UNLAWFUL BREAKINGS – Continued

instruction explaining intent was not legally sufficient because from it the jury could have inferred the intent to commit larceny solely from proof of the misdemeanor breaking and entering. *State v. Avery*, 675.

CARRIERS

§ 2.7. Granting of Operating Authority; Sufficiency of Findings and Evidence

The Utilities Commission properly granted an applicant a permit to act as a contract motor carrier for Schlitz Brewing Company. *Utilities Comm. v. Delivery Services*, 115.

§ 5.2. Railroad Tariffs

In a complaint proceeding to determine the reasonableness of proposed increased intrastate rates for the shipment of crude earth by rail, respondent railroads were not required to furnish the classes of evidence required by N.C.U.C. Rule R1-17(b), subsections (1)-(11), and were not required to produce evidence of N.C. expenses and revenues separated from regional data. *Utilities Comm. v. Boren Clay Products Co.*, 263.

The differential between joint and single line rates for the shipment of crude earth by rail and the differential between rates for the movement of crude earth and existing rates for sand and gravel were not discriminatory. *Ibid.*

CHARITIES AND FOUNDATIONS

§ 3. Liability for Injury to Patrons

Defendant Duke University was, as a matter of law, a charitable institution in 1961 and is immune from liability for the negligence of its employees in the treatment of patients at Duke Hospital in 1961. *Darsie v. Duke University*, 20.

CONSTITUTIONAL LAW

§ 18. Rights of Free Assembly and Speech; Limitations

Application of the public nuisance statutes to a place of business maintained for prostitution does not violate the right of the owner and his invitees to freedom of association. *Gilchrist, District Attorney v. Hurley*, 433.

Provisions of a county sign ordinance do not infringe upon defendant's right of free speech. *Cumberland County v. Eastern Federal Corp.*, 518.

§ 20. Equal Protection Generally

Statute requiring an action for malpractice in performance of professional services for a minor to be brought before the minor attains the age of nineteen does not violate equal protection. *Hohn v. Slate*, 624.

§ 30. Discovery

Trial court properly denied defendant's motion for mistrial based on the State's failure to disclose an incriminating statement allegedly made by him, since the prosecutor disclosed the statement to defense counsel as soon as he learned of it, and defendant failed to object to the statement or move to strike at trial. *State v. Cook*, 685.

CONSTITUTIONAL LAW – Continued

§ 34. Double Jeopardy

Prosecution of defendants for assault on a law enforcement officer with a firearm and for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, but punishment of defendants for assault on a law officer with a firearm and the lesser offense of assault with a deadly weapon would violate such prohibition. *S. v. Partin*, 274.

Defendant's right against double jeopardy was not violated by his conviction in superior court of child neglect after being acquitted of child abuse in the district court. *State v. Hunter*, 656.

§ 45. Right to Appear Pro Se

Trial court did not err in denying defendant's request to serve as co-counsel. *S. v. Crouch*, 72.

§ 50. Speedy Trial Generally

Defendant's trial in superior court on a child neglect charge did not violate the Speedy Trial Act where the case was delayed because of a child abuse charge pending against defendant in district court and defendant's trial for child neglect occurred 70 days after the child abuse trial. *State v. Hunter*, 656.

There was no merit to defendant's contention that the Speedy Trial Act was violated because they were not brought to trial within 120 days of their arrest. *State v. Lipfird*, 649.

§ 74. Self-Incrimination Generally

An officer's testimony that defendant failed to say anything about deceased having a pistol or about threats by deceased to blow her brains out did not constitute a use of defendant's post-arrest silence in violation of the Due Process Clause and was properly admitted to impeach defendant's testimony at trial by showing inconsistencies between that testimony and her prior statement to the officer. *S. v. Pugh*, 175.

A witness who had entered a guilty plea pursuant to a plea bargain to the same crimes for which defendant was being tried but who had not been sentenced had a right to refuse to answer questions in defendant's trial on the ground that his answers might tend to incriminate him. *S. v. Corbin*, 194.

The prosecutor's impeachment of defendant by cross-examining defendant about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack by deceased when he shot deceased did not violate defendant's constitutional rights. *S. v. Haith*, 319.

§ 75. Self-Incrimination; Testimony by Defendant

Where defendant testified at a hearing on a motion to suppress his confession that he was under the influence of PCP or "bam" when he confessed, defendant's right against self-incrimination was not violated when the State was permitted to ask defendant on cross-examination at the trial whether he used "bam." *State v. Bracey*, 603.

CONTRACTS

§ 2.1. What Constitutes Acceptance

The endorsement by defendant car purchaser and defendant car dealer of a

CONTRACTS – Continued

check from plaintiff lender immediately below a statement on the back of the check that endorsement guarantees legal title to plaintiff of a specifically described automobile created a contractual guaranty that title to the automobile would be placed in plaintiff for which the purchaser and dealer served as equal co-guarantors. *Credit Union v. Stroupe*, 338.

§ 25.1. Sufficiency of Particular Allegations

Plaintiff's complaint failed to state a claim for breach of contract to furnish plans for and to provide a contractor to construct a house. *Hammers v. Lowe's Companies*, 150.

§ 26.1. Evidence of Negotiations; Parol Evidence Rule

In an action to recover damages for breach of a contract for the sale of land and construction of a house thereon, parol evidence was admissible to establish the whole of the contract even though only part of the agreement was reduced to writing. *Smith v. Hudson*, 347.

§ 27.1. Sufficiency of Evidence of Existence of Contract

There was sufficient evidence to take plaintiff's case to the jury on issues of existence and breach of contract in the purchase of commodities futures. *E.F. Hutton and Co. v. Sexton*, 413.

§ 28. Instructions Generally

In an action by a stock brokerage firm and an account executive with the firm to recover for breach of contract to purchase certain commodity futures, trial court's instructions which permitted the jury to find whether there was a contract between the account executive and defendant and breach thereof required a new trial. *E.F. Hutton and Co. v. Sexton*, 413.

CONVICTS AND PRISONERS

§ 2. Discipline and Management

Statute requiring an inmate to exhaust his administrative remedies before he is entitled to judicial review of a complaint within the jurisdiction of the Inmate Grievance Commission does not conflict with constitutional and statutory provisions guaranteeing the privilege of the writ of habeas corpus. *Hoffman v. Edwards*, 559.

CORPORATIONS

§ 28. Dissolution

In an action to recover damages for the wrongful retention of a corporation's property and to obtain an accounting, trial court erred in permitting the individual plaintiff to amend his complaint to conform to the evidence and seek involuntary dissolution of the corporation. *Graphics, Inc. v. Hamby*, 82.

COUNTIES

§ 5.1. Validity of Zoning Ordinances

Provision of a county sign ordinance requiring nonconforming uses to be discontinued within three years from the effective date of the ordinance is

COUNTIES – Continued

reasonable and does not provide for an unconstitutional taking of property. *Cumberland County v. Eastern Federal Corp.*, 518.

Although a county sign ordinance could lawfully be based upon aesthetic considerations, the sign ordinance in question was a legitimate exercise of the county's police power for reasons in addition to aesthetic considerations. *Ibid.*

A county sign ordinance does not violate equal protection because the county will not enforce the ordinance in certain municipalities within the county. *Ibid.*

Provisions of a county sign ordinance do not infringe upon defendants' rights of free speech. *Ibid.*

§ 5.2. Special Exceptions and Variances from Ordinance

A dog breeding and kennel operation does not constitute "farming" so as to exempt the property used therefor from a county's zoning authority under G.S. 153A-340. *Development Associates v. Board of Adjustment*, 541.

CRIMINAL LAW

§ 15. Venue

Proceeding to trial without ruling on defendants' motion for change of venue constituted a denial of that motion, and defendants failed to show prejudice as a result of this procedure. *S. v. Partin*, 274.

There was no merit to defendants' contention that the trial court erred in permitting the jury in Pasquotank County to convict them for the offenses which occurred outside the county, since defendants failed to raise questions of venue at trial. *S. v. Cox*, 470.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Prosecution of defendants for assault on a law enforcement officer with a firearm and for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, but punishment of defendants for assault on a law officer and the lesser offense of assault with a deadly weapon would violate such prohibition. *S. v. Partin*, 274.

Defendant's right against double jeopardy was not violated by his conviction in superior court of child neglect after being acquitted of child abuse in the district court. *State v. Hunter*, 656.

§ 34.4. Admissibility of Evidence of Other Offenses

In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle. *State v. Jeffers*, 663.

§ 42.6. Articles Connected With Crime; Chain of Custody

State did not have to prove chain of custody of a knife where the prosecutrix testified that the knife "looks like" the one used by defendant. *State v. White*, 589.

§ 43.5. Videotapes

The erroneous admission of a videotape of the crime as substantive evidence was not prejudicial to defendant. *State v. Jeffers*, 663.

CRIMINAL LAW – Continued

§ 48. Silence of Defendant as Implied Admission

An officer's testimony that defendant failed to say anything about deceased having a pistol or about threats by deceased to blow her brains out did not constitute a use of defendant's post-arrest silence in violation of the Due Process Clause and was properly admitted to impeach defendant's testimony at trial by showing inconsistencies between that testimony and her prior statement to the officer. *S. v. Pugh*, 175.

The prosecutor's impeachment of defendant by cross-examining him about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack by deceased when he shot deceased did not violate defendant's constitutional rights. *S. v. Haith*, 319.

§ 50.1. Admissibility of Opinion Testimony

Trial court properly permitted a witness who was qualified as an expert in navigation on the high seas to testify as to the significance of certain charts and navigational notations found on a fishing trawler. *S. v. LeDuc*, 227.

§ 58. Evidence in Regard to Handwriting

Trial court erred in permitting the jury, unaided by competent opinion testimony, to compare a signature on a charter boat agreement with samples of defendant's signature for the purpose of determining whether the signature on the agreement was that of defendant. *S. v. LeDuc*, 227.

§ 75.15. Confessions; Defendant's Mental Capacity to Confess; Intoxication

Statements made by defendant to an officer were not inadmissible on the ground that defendant was intoxicated. *S. v. Davis*, 386.

§ 79.1. Acts of Codefendants Subsequent to Commission of Crime

Trial court did not err in advising the jury during trial that defendant's two codefendants had withdrawn their not guilty pleas and entered pleas of guilty. *S. v. Davis*, 386.

§ 86.5. Impeachment of Defendant; Evidence as to Specific Acts

Trial court in a homicide case properly permitted the prosecutor to cross-examine defendant for impeachment purposes concerning a bag of marijuana found on defendant's person. *S. v. Haith*, 319.

§ 86.9. Impeachment of Accomplices

Defendant was not prejudiced when the court sustained the State's objections to questions asked defendant's alleged accomplice as to whether he had been advised of the sentence for armed robbery and whether he considered the fact that he would have a certain length of time to visit with relatives if he did one thing and another length if he did another thing. *S. v. Corbin*, 194.

§ 89.1. Evidence of Character Bearing on Credibility

A witness did not have sufficient contact with the community in which the prosecutrix lived to permit him to testify as to the general reputation of the prosecutrix in the community. *State v. Orr*, 723.

§ 89.10. Credibility of Witnesses; Prior Degrading and Criminal Conduct

Cross-examination of defendant's mother concerning prior shoplifting by

CRIMINAL LAW – Continued

her was improper where there was no showing that the prosecutor had a good faith basis for asking the questions. *S. v. Dawson*, 99.

§ 90. Rule that Party is Bound by and May Not Discredit His Own Witness

Trial court erred in permitting the district attorney to impeach his own witness by reading from and questioning the witness about portions of a pretrial statement made by the witness to an SBI agent after the court had ruled that such portions of the statement were inadmissible. *S. v. Crouch*, 72.

§ 92.1. Consolidation of Charges Against Multiple Defendants Proper; Same Offense

Consolidation of the trials of defendants for murder of the same person was authorized by G.S. 15A-926(b)(2). *State v. Cook*, 685.

§ 92.2. Consolidation of Charges Against Multiple Defendants; Related Offenses

Defendants were not deprived of a fair trial by the consolidation of their cases for trial where the offenses were of the same class and were so connected in time and place that evidence at trial upon one indictment was competent and admissible on the other. *State v. Lipfird*, 649.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

Trial court erred in consolidating for trial three indictments charging defendant with robberies on three different dates. *State v. Bracey*, 603.

§ 98.2. Sequestration of Witnesses

Defendants were not prejudiced when the court sequestered all defendants who intended to testify as well as the State's witnesses at a hearing on a motion to suppress where the court later rescinded its order of sequestration. *State v. Trapper*, 481.

§ 99.9. Examination of Witnesses by Court; Particular Questions

Trial judge did not express an opinion in asking a witness to "describe what this defendant did." *S. v. Fuller*, 418.

§ 101.4. Conduct During Deliberation of Jury

Trial court erred in permitting the jury to take written statements of defendant and two witnesses into the jury room during its deliberations without defendant's consent, but such error was not sufficiently prejudicial to warrant a new trial. *S. v. Bell*, 356.

§ 102.6. Particular Comments in Jury Argument

The prosecutor's jury argument that a juror could not believe a person is guilty without being convinced of his guilt beyond a reasonable doubt was improper. *S. v. Corbin*, 194.

§ 113.6. Charge Where There Are Several Defendants

The trial court's instructions as to each of three defendants was not susceptible to a construction that the jury should convict all defendants if it found one defendant guilty. *S. v. Cox*, 470.

CRIMINAL LAW – Continued

§ 113.7. Charge as to Acting in Concert

In a prosecution of three defendants for kidnapping and first degree rape, the trial court erred in failing to instruct the jury on the issue of acting in concert with respect to the kidnapping charge against two of the defendants. *S. v. Cox*, 470.

§ 117.3. Charge on Credibility of State's Witnesses

Court did not commit reversible error in failing to refer to an officer as an "undercover agent" in its instructions on the officer as an interested witness. *State v. Sowden*, 570.

Court did not err in failing to give a more elaborate instruction on the scrutiny to be given eyewitness testimony. *State v. Mitchell*, 680.

§ 117.4. Charge on Credibility of Accomplices

Where an accomplice was not granted immunity under G.S. 15A-1052, trial court did not err in failing to charge the jury, absent a request by defendant, to scrutinize the testimony of the accomplice. *S. v. Bagby*, 222.

§ 118.3. Erroneous Charge on Contentions

In a prosecution for driving under the influence where defendant offered no evidence, trial court's summarization of defendant's contentions was erroneous where the court assumed defendant admitted certain essential elements of the case and the court's instructions ridiculed defendant before the jury. *S. v. Covington*, 209.

§ 122. Additional Instructions After Jury's Retirement

Failure of the trial court to admonish the jury pursuant to G.S. 15A-1236 prior to an overnight recess was not reversible error. *S. v. Turner*, 606.

§ 122.2. Additional Instructions Upon Jury's Failure to Reach Verdict

Trial court in a rape case did not coerce a verdict when the jury requested additional evidence after deliberating for some two hours and the court instructed the jury on the duty of jurors to attempt to reach a verdict. *S. v. Darden*, 128.

Court's additional instruction that the case would have to be retried if the jury failed to reach a verdict and that the jurors were as capable of deciding the case as any other group of jurors was not prejudicial error. *State v. Hunter*, 689.

The trial court's instructions after the failure of the jury to reach a verdict did not amount to coercion. *State v. Lipfird*, 649.

§ 124. Sufficiency and Effect of Verdict in General

Although every element of the offenses charged was not included in the form verdicts submitted to the jury, the offenses which the jury was to consider were sufficiently identified. *S. v. Partin*, 274.

§ 128.2. Particular Grounds for Mistrial

Trial court did not err in failing to declare a mistrial when the jury foreman stated after the jury had deliberated one hour and 35 minutes that it was doubtful the jury could reach a verdict or when the jury requested additional evidence after deliberating 25 minutes the next day. *S. v. Darden*, 128.

CRIMINAL LAW – Continued

Court did not abuse its discretion in denial of defendant's motion for mistrial because the State presented an oral inculpatory statement of defendant which it had not disclosed pursuant to discovery conducted by defendant. *State v. Sowden*, 570.

§ 134.2. Time and Procedure for Imposition of Sentence

Trial court was authorized to enter judgment and commitment against defendant in Chatham County upon a verdict of guilty returned by a jury after trial in Orange County where the court had ordered a presentence report since defendant had been adjudged guilty in Orange County even though prayer for judgment was continued in that county. *S. v. Fuller*, 418.

§ 161. Necessity for, and Form and Requisites of, Exceptions and Assignments of Error in General

Defendant violated appellate rules by failing to set forth any exceptions and to base his assignments of error on proper exceptions. *State v. Stafford*, 740.

DAMAGES

§ 3.4. Compensatory Damages for Pain

It is proper to argue to a jury to compensate at a certain amount per specific time period when there is evidence of continuous pain. *Thompson v. Kyles*, 422.

§ 16.4. Sufficiency of Evidence of Pain

Testimony by a physician was sufficient evidence from which the jury could conclude that plaintiff was in pain during an entire six month period. *Thompson v. Kyles*, 422.

DEEDS

§ 20. Restrictive Covenants in Subdivisions

Assessment covenants in deeds to owners of lots in a recreational development were not sufficiently definite and certain to be enforceable. *Property Owner's Assoc. v. Seifart*, 286.

DIVORCE AND ALIMONY

§ 5. Recrimination

In plaintiff's action for divorce, trial court erred in striking defendant's recriminatory defenses since the statute eliminating recriminatory defenses raised by defendant did not become effective until after plaintiff's action had been filed. *Gardner v. Gardner*, 38.

§ 16.3. Alimony Without Divorce; Effect of Other Proceedings

The enactment of a statute providing that an action for divorce could be maintained during pendency of an action for alimony did not apply to affect the legal consequences of the Supreme Court decision that defendant wife had the right to have her husband's action for divorce instituted in Johnston County dismissed or have it stayed pending resolution of her action for alimony instituted in another county. *Gardner v. Gardner*, 38.

EJECTMENT

§ 3. Termination and Expiration of Term and Nonpayment of Rent

Plaintiff's action was not one in which summary ejectment could be had before defendants had filed answers and before the time for filing answers had expired. *Couch v. Realty Corp.*, 108.

ELECTRICITY

§ 3. Rates

In a proceeding where defendant sought an increase in its rates based upon the increased cost of fuel used in the generation of electric power, the Utilities Commission went beyond the scope of the procedure authorized by G.S. 62-134(e) when it considered and based its determination upon defendant's heat rate and plant availability. *Utilities Comm. v. Power Co.*, 453.

EMINENT DOMAIN

§ 7.8. Judgments

A judgment giving the Highway Commission a "right of way one hundred feet in width measured 50 feet on either side of the centre line of the concrete pavement laid during the year 1929" contained a sufficient description of the acquired right of way. *Board of Transportation v. Pierce*, 618.

§ 11. Report of Appraisers

Where commissioners of appraisal filed their report and judgment was entered by the clerk before the expiration of the statutory period of 20 days allowed for the filing of exceptions, the judgment was irregular but respondent failed to show it affected his rights injuriously and that he had a meritorious defense. *City of Salisbury v. Realty Co.*, 427.

ESTOPPEL

§ 4.3. Equitable Estoppel; Conduct of Party Sought to Be Estopped

In an action to recover damages from defendant partnership which allegedly consisted of the two individual defendants, trial court erred in granting summary judgment for one defendant where a genuine issue of fact existed as to whether he had spoken or acted in such a way as to be estopped from denying his partnership. *Volkman v. DP Associates*, 155.

Where defendant allegedly constructed a road across plaintiffs' property, the fact that one plaintiff had mistakenly pointed out to defendant's agents where he believed the corners of his property line to be did not entitle defendant to judgment in its favor on the theory of equitable estoppel. *Hill v. Town of Hillsborough*, 553.

EVIDENCE

§ 17. Negative Evidence

Trial court in action arising out of a railroad grade crossing accident erred in failing to give plaintiff's requested instruction that "testimony of a person nearby who could have heard and did not hear the sounding of a whistle or the

EVIDENCE – Continued

ringing of a bell is some evidence that such a signal was not given." *Camby v. Railway Co.*, 668.

§ 27. Telephone Conversations

Court properly excluded testimony concerning notification to defendant by telephone where there was no evidence as to the identity of the person to whom the witness made the statements. *Camby v. Railway Co.*, 668.

§ 34.6. Declarations as to Bodily Feeling

In an action to recover workers' compensation benefits for the death of an employee from an overdose of pain medicine prescribed in the treatment of the employee's injuries in a work-related automobile accident, the hearing commissioner erred in the exclusion of evidence of the physical and mental condition of the deceased employee after the accident. *Thompson v. Transfer Co.*, 47.

§ 40. Nonexpert Opinion Evidence in General

In an action to obtain a refund of a security deposit made on an apartment, the trial court properly allowed testimony by a tenant that defendant ran up his back steps and she thought he had gone to get a gun, since such testimony was admissible to show her reason for abandoning her attempt to regain her security deposit. *Taylor v. Hayes*, 738.

§ 44. Opinion Evidence as to Physical Condition

Witnesses could properly testify concerning their observations with respect to plaintiff's pain and suffering from back and neck injuries and concerning plaintiff's complaints about her back and neck. *Roberts v. Edwards*, 714.

EXECUTORS AND ADMINISTRATORS

§ 3. Appointment of Ancillary Administrators

Propounders of a will who were appointed personal representatives by a Virginia court clerk but neither applied for nor were granted ancillary letters had no authority to administer the property of decedent in N.C. *In re Lamb*, 122.

§ 9. Rights, Duties and Powers of Representative

A person who executes a lease as executor of an estate and represents to the lessee that he has authority to do so is not personally liable for a breach of the lease when an examination of the will on record would have revealed the executor did not have authority to execute the lease. *Trull v. McIntyre*, 599.

FALSE PRETENSE

§ 1. Nature and Elements of Crime

The falsification of expense records cannot in itself constitute the crime of false pretense. *S. v. Davis*, 526.

§ 3.1. Nonsuit

Where defendant wrote checks for the purchase of train tickets but vouchers for those checks stated that the expenditures were for miscellaneous printed information and copies of legal case, defendant's motion for nonsuit should have been granted. *S. v. Davis*, 526.

FRAUD

§ 9. Pleadings

In an action to recover on an installment contract for the purchase of a tractor, the trial court erred in entering judgment on the pleadings for plaintiff where defendants alleged that several items in the "cash price" column of the purported contract were added after they signed it. *Equipment Corp. v. Thompson*, 594.

FRAUDS, STATUTE OF

§ 6.1. Contracts Affecting Realty; Cases Where Statute is Inapplicable

The statute of frauds does not apply to the construction of a house, as compared to a house already built, because a house not built is not an interest in realty. *Smith v. Hudson*, 347.

Though it is the better practice for all contracts for the construction of improvements on realty to include the written specifications of the structure to be built and the contents to be included therein, it is not required in this jurisdiction that such a contract be in writing. *Ibid.*

§ 7. Contracts to Convey

Summary judgment was properly entered for defendants in action for specific performance of alleged contract to convey land where plaintiffs failed to produce a written contract or a written memorandum signed by defendants. *Severe v. Penny*, 730.

FRAUDULENT CONVEYANCES

§ 2. Parties Entitled to Invoke the Remedy

Trial court properly granted summary judgment for defendants on plaintiff subcontractor's claim that the conveyance of land on which he claimed a lien was fraudulent as to plaintiff as a creditor since plaintiff was not entitled to a lien on the property. *Mace v. Construction Corp.*, 297.

GUARANTY

§ 1. Generally

The endorsement by defendant car purchaser and defendant car dealer of a check from plaintiff lender immediately below a statement on the back of the check that endorsement guarantees legal title to plaintiff of a specifically described automobile created a contractual guaranty that title to the automobile would be placed in plaintiff for which the purchaser and dealer served as equal co-guarantors. *Credit Union v. Stroupe*, 338.

HABEAS CORPUS

§ 2.3. Determination of Legality of Restraint; Length of Prison Sentence

Statute requiring an inmate to exhaust his administrative remedies before he is entitled to judicial review of a complaint within the jurisdiction of the Inmate Grievance Commission does not conflict with constitutional and statutory provisions guaranteeing the privilege of the writ of habeas corpus. *Hoffman v. Edwards*, 559.

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions Against Advertisements Along Highways

Petitioner's permit for an outdoor advertising sign was properly revoked because damages exceeded 50% of the initial value of the sign, the sign had been destroyed by a windstorm, and it was a nonconforming sign which could not legally be re-erected. *Advertising Co. v. Bradshaw*, 10.

§ 5. Rights of Way

A judgment giving the Highway Commission a "right of way one hundred feet in width measured 50 feet on either side of the centre line of the concrete pavement laid during the year 1929" contained a sufficient description of the acquired right of way. *Board of Transportation v. Pierce*. 618.

HOMICIDE

§ 30.3. Submission of Guilt of Involuntary Manslaughter

Trial court in a murder prosecution did not err in failing to instruct the jury on involuntary manslaughter. *S. v. Haith*, 319.

HOSPITALS

§ 3.1. Liability of Charitable Hospital for Negligence of Employees; Cases Prior to 1967

Defendant Duke University was, as a matter of law, a charitable institution in 1961 and is immune from liability for the negligence of its employees in the treatment of patients at Duke Hospital in 1961. *Darsie v. Duke University*, 20.

HUSBAND AND WIFE

§ 11.2. Construction of Separation Agreements

Absent some indication of a contrary intent, where a valid separation agreement requires the father to make child support payments, states terminating contingencies, and is silent as to the effect of the father's death, his estate is bound to provide support payments according to the terms of the agreement. *Bradshaw v. Smith*, 701.

§ 14. Creation of Estate by the Entireties

The presumption of a gift which arises when a husband pays for real property and has the deed made to himself and his wife was not applicable in this action where plaintiff neither alleged nor proved any type of trust but instead based his action on a claim for reformation of a deed. *Mims v. Mims*, 216.

INFANTS

§ 2. Liability of Infants on Contracts Generally

Defendant who executed an installment loan contract for the purchase of a car while a minor did not disaffirm his contract within a reasonable time after reaching majority by relinquishing the car to plaintiff dealer ten months after reaching majority. *Toyota, Inc. v. Smith*, 580.

INSURANCE

§ 1. Control and Regulation Generally

Unfair trade practices in the insurance industry are not regulated exclusively by the insurance statutes but may constitute the basis of recovery under G.S. 75-1.1. *Ellis v. Smith-Broadhurst, Inc.*, 180.

Where defendant made a $100,000 deposit in N.C. for the protection of its N.C. policyholders, the title and rights to the deposit were vested in the Com'r. of Insurance, Treasurer and State, and it was not an asset of the company subject to an Indiana rehabilitation proceeding. *Guaranty Assoc. v. Assurance Co.*, 508.

Statute requiring that deposits made by an insolvent insurer be paid to the N.C. Insurance Guaranty Association for use in paying claims against the insolvent insurer is to be applied retroactively to deposits made before the date of its enactment and to the holders of policies issued prior to that date. *Ingram, Comr. of Insurance v. Insurance Co.*, 643.

§ 87. "Omnibus" Clause; Additional Insureds Generally; Children of Insured

Minor plaintiff had no cause of action under policy issued to his mother which covered relatives living in the same household and which provided for payment of all reasonable expenses incurred within one year from the date of accident, since the minor plaintiff was not a direct beneficiary of the insurance contract, as the purpose of the contract was to reimburse the person who actually incurred the expenses, in this case, plaintiff's mother. *Lane v. Surety Co.*, 634.

§ 122. Fire Insurance; Conditions

Plaintiff insured did not have constructive knowledge of a limitation of insurance coverage on homemade tobacco bulk curing barns. *Mitchell v. Insurance Co.*, 189.

JUDGMENTS

§ 19. Attack on Irregular Judgments

Where commissioners of appraisal filed their report and judgment was entered by the clerk before the expiration of the statutory period of 20 days allowed for the filing of exceptions, the judgment was irregular but respondent failed to show it affected his rights injuriously and that he had a meritorious defense. *City of Salisbury v. Realty Co.*, 427.

§ 39. Conclusiveness of Judgments of Courts of Other States

Title to a deposit made by defendant for the benefit of its N.C. policyholders was in the Com'r. of Insurance, Treasurer and the State of N.C. so that it was not an asset of defendant subject to an Indiana rehabilitation proceeding; therefore, the Indiana court's decision was not entitled to full faith and credit in N.C. and was not res judicata. *Guaranty Assoc. v. Assurance Co.*, 508.

JURY

§ 1.3. Waiver and Relinquishment of Right to Jury Trial

Trial court erred in holding that an earlier judgment was void because plaintiff was allowed to withdraw her request for a jury trial without the

JURY – Continued

consent of defendants who were not present when the case was called for trial. *Morris v. Asby*, 694.

§ 6.3. Propriety and Scope of Voir Dire Examination

Trial court did not err in refusing to permit defendant to ask a prospective juror whether she understood "that your personal opinion as to the facts not proven cannot be considered by you as a basis for your verdict." *State v. White*, 589.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for the kidnapping of a college student. *S. v. Cox*, 470.

Jury could find that child was taken from her home without the consent of either parent where evidence showed the child, who was under age 16, was at home without her parents and was taken from the home against her will. *State v. White*, 589.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractor

There was no genuine issue of material fact as to plaintiff subcontractor's claim to a lien on land pursuant to G.S. 44A-23 since long before plaintiff filed any claim of lien the general contractor waived its right to file a materialmen's lien against the property. *Mace v. Construction Corp.*, 297.

There was no material issue of fact as to plaintiff subcontractor's claim to a lien upon funds owed to the general contractor under G.S. 44A-18(1). *Ibid.*

LANDLORD AND TENANT

§ 18. Forfeiture for Nonpayment of Rent

In an action to terminate a lease for alleged breaches by defendant and to have a receiver appointed to take over the management and preserve the property in question, the most the trial court could do under G.S. 1-502(1) was to appoint a receiver pending the outcome of the litigation. *Couch v. Realty Corp.*, 108.

Trial court erred in holding that the lessor had the right to terminate the lease for nonpayment of rent, and the court erred in failing to make a factual determination as to whether the amount of rent tendered by defendants was the proper amount. *Ibid.*

§ 19.1. Recovery of Back Payment or Security Deposit

In an action to obtain a refund of a security deposit made on an apartment, the trial court properly allowed testimony by plaintiff tenant that defendant ran up his back steps and she thought he had gone to get a gun, since such testimony was admissible to show her reason for abandoning her attempt to regain her security deposit. *Taylor v. Hayes*, 738.

LARCENY

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

Evidence was sufficient to support conviction of both defendants of felonious larceny under the doctrine of possession of recently stolen property where stolen property was found in a car driven by one defendant and owned and occupied by the second defendant. *S. v. Maines*, 166.

LIMITATION OF ACTIONS

§ 11. Effect of Personal Disability

Plaintiff's claim based on medical malpractice was barred by the three year statute of limitations of G.S. 1-15(c) and provisions of G.S. 1-17(b) requiring an action for malpractice in performance of professional services for a minor to be brought before the minor attains the full age of nineteen. *Hohn v. Slate*, 624.

§ 18.1. Sufficiency of Evidence

The statute of limitations barred plaintiff's action where the action was not filed within three years after the accident in question and plaintiff failed to reinstitute his action within one year from the date of his voluntary dismissal pursuant to Rule 41(a)(2). *West v. Reddick, Inc.*, 135.

MASTER AND SERVANT

§ 23.3. Negligence by Employer in Injuring Employee

Evidence was insufficient for the jury on the issue of defendant's negligence in an action to recover for damages for injuries suffered by plaintiff when an aerosol paint can exploded while plaintiff was tending a fire on defendant's premises. *Hoggard v. Umphlett*, 397.

§ 54. Application of Workers' Compensation Act; Casual Employees

Plaintiff's accident was covered by a policy of workers' compensation insurance issued to a warehouse business where he was employed by the warehouse owner primarily to do farm work but at the time of injury was moving logs out of the owner's field for use in a fence at the warehouse. *Boyd v. Mitchell*, 219.

§ 55.3. Particular Injuries as Constituting Accident in Workers' Compensation Case

Plaintiff furniture worker was injured by accident when she fainted and fell in the course of her work, but cause is remanded to Industrial Commission for determination as to whether her injury arose out of her employment where the Commission failed to make findings as to whether her fainting was caused solely by an idiopathic condition or by the conditions of her employment. *Hollar v. Furniture Co.*, 489.

§ 64.1. Workers' Compensation for Death by Suicide

In an action to recover workers' compensation benefits for the death of an employee from an overdose of pain medicine prescribed in the treatment of the employee's injuries in a work-related automobile accident, the hearing commissioner erred in the exclusion of evidence of the physical and mental condition of the deceased employee after the accident. *Thompson v. Transfer Co.*, 47.

MASTER AND SERVANT – Continued

The Industrial Commission erred in denying compensation benefits for the death of an employee from suicide by an overdose of pain medicine prescribed in the treatment of injuries received by the employee in a work-related automobile accident on the ground that there was no evidence that his mental condition was affected to such an extent that he was not conscious of his actions. *Ibid.*

§ 68.1. Asbestosis and Silicosis

Plaintiff's disablement from asbestosis resulted more than two years after his last exposure to asbestos dust in his employment by defendant and his claim for workers' compensation was barred by G.S. 97-58. *Eller v. Porter-Hayden Co.*, 610.

§ 370. Compensation for Injuries to Part-Time Workers

Employees in distributive education programs may not be fairly and justly classified as full-time for the purposes of the Workers' Compensation Act. *Mabry v. Implement Co.*, 139.

§ 74. Compensation for Disfigurement

Dependents of an employee who suffers a serious bodily disfigurement due to an accident covered by the Workers' Compensation Act, but who dies due to an unrelated cause, are entitled to a post mortem award for serious bodily disfigurement. *Bridges v. Stone Services, Inc.*, 185.

§ 75. Medical and Hospital Expenses

The full Industrial Commission properly struck a portion of an award requiring defendant employer to pay plaintiff's future medical expenses "so long as it will tend to lessen his period of disability" where the evidence tended to show that future medical treatment was necessary to keep plaintiff's condition from deteriorating and that it will not tend to lessen the period of disability. *Peeler v. Highway Comm.*, 1.

MORTGAGES AND DEEDS OF TRUST

§ 26.1. Personal Notice of Foreclosure Sale

Clerk of court erred in permitting foreclosure sale of property under a deed of trust where the debtor was not given notice of the foreclosure hearing in a manner prescribed by G.S. 45-21.16(a). *PMB, Inc. v. Rosenfeld*, 736.

MUNICIPAL CORPORATIONS

§ 9. Powers and Duties of Officers and Employees

Evidence was sufficient to support a reasonable inference that defendant town manager acted negligently or carelessly in the discharge of her duties where it tended to show that she made expenditures for one item but prepared vouchers for other items. *S. v. Davis*, 526.

The trial court properly submitted the charges of approving an invalid claim and failure to preaudit by defendant town finance officer to the jury. *Ibid.*

§ 21. Injuries in Connection With Sewers

In action against defendant city to recover damages caused by the backflow

MUNICIPAL CORPORATIONS — Continued

of sewage into plaintiffs' home, plaintiffs' evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in failing to maintain, inspect and repair the sewer line serving their home. *Ward v. City of Charlotte*, 463.

§ 30.3. Validity of Zoning Ordinances in General

Defendants could not collaterally attack the validity of a planting strip provision of a zoning ordinance in plaintiff city's action for an injunction requiring them to comply with the ordinance. *City of Elizabeth City v. Enterprises, Inc.*, 408.

§ 30.11. Zoning Provisions as to Specific Businesses or Activities

A dog breeding and kennel operation does not constitute "farming" so as to exempt the property used therefor from a county's zoning authority pursuant to G.S. 153A-340. *Development Associates v. Board of Adjustment*, 541.

§ 30.13. Billboards and Outdoor Advertising Signs

Provision of a county sign ordinance requiring nonconforming uses to be discontinued within three years from the effective date of the ordinance is reasonable and does not provide for an unconstitutional taking of property. *Cumberland County v. Eastern Federal Corp.*, 518

Although a county sign ordinance could lawfully be based upon aesthetic considerations, the sign ordinance in question was a legitimate exercise of the county's police power for reasons in addition to aesthetic considerations. *Ibid.*

A county sign ordinance did not violate equal protection because the county will not enforce it in certain municipalities within the county. *Ibid.*

§ 31. Judicial Review in Zoning Cases

Superior court had discretion to determine whether petition for certiorari to review decision of a county board of adjustment was timely filed. *Development Associates v. Board of Adjustment*, 541.

§ 33. Closing of Public Street

Summary judgment was properly entered for defendants on plaintiff's claim that they possessed certain dedicatory rights which entitled them to have a named street maintained as an open street furnishing them access from their tract to a major thoroughfare in the city. *Investment Co. v. Greene*, 29.

§ 43. Claim Against Municipality for Trespass or Damage to Lands

Evidence was sufficient to support the trial court's finding that defendant's road and utility lines were on plaintiffs' property, and testimony by plaintiffs' expert appraisal witness was sufficient to support trial court's findings with respect to the value of the property. *Hill v. Town of Hillsborough*, 553.

NARCOTICS

§ 3.1. Competency of Evidence

In a prosecution for conspiracy to possess heroin, trial court did not err in permitting a witness to testify concerning events transpiring on a date subsequent to that alleged in the indictment. *S. v. Smith*, 402.

NARCOTICS – Continued

§ 4. Sufficiency of Evidence

State's evidence was sufficient to support defendant's conviction for conspiracy to possess marijuana found on a fishing trawler. *S. v. LeDuc*, 227.

NEGLIGENCE

§ 1.1. Elements of Actionable Negligence

Plaintiff's action to recover for the alleged negligence of defendants, her superiors, in filing negative reports on her job performance was properly dismissed. *Osborne v. Walker*, 627.

§ 22. Sufficiency of Complaint

Plaintiff's complaint failed to state a claim for relief in tort where the facts alleged show no more than that plaintiff continued to be disappointed in negotiations which failed to produce from defendant an offer to build a house in accordance with plans and at a price to which plaintiff would agree. *Hammers v. Lowe's Companies*, 150.

§ 30.3. Insufficient Evidence of Foreseeability

Evidence was insufficient for the jury on the issue of defendant's negligence in an action to recover for damages for injuries suffered by plaintiff when an aerosol paint can exploded while plaintiff was tending a fire on defendant's premises. *Hoggard v. Umphlett*, 397.

§ 35.1. Nonsuit for Contributory Negligence

Plaintiff's action to recover damages for injuries received while he was riding on a tractor on defendants' farm was barred by his own contributory negligence. *Crouse v. Woodruff*, 719.

§ 57.5. Action by Invitee Based on Obstructed Floors

Plaintiff was contributorily negligent when she tripped over a display pallet which protruded into the aisle of defendant's store. *Norwood v. Sherwin-Williams Co.*, 535.

NUISANCE

§ 10. Abatement of Public Nuisances

A complaint was sufficient to state a claim to abate a nuisance where it alleged that defendants maintained a place which is used in the regular course of business as a house of prostitution. *Gilchrist, District Attorney v. Hurley*, 433.

A nuisance action brought by the district attorney does not constitute arbitrary State action or a taking of property without due process because the State is not required to post bond. *Ibid.*

Application of the public nuisance statutes to a place of business maintained for purposes of prostitution does not violate the right of the owner and his invitees to freedom of association. *Ibid.*

State's evidence was sufficient for the jury on the issue of whether a health clinic should be abated as a public nuisance on the ground that it was regularly maintained as a house of prostitution. *Ibid.*

NUISANCE – Continued

§ 11. Forfeiture Upon Abatement of Public Nuisance

Owner of a house of prostitution abated as a public nuisance was properly ordered to forfeit amount found by a referee to be the gross income of the house of prostitution. *Gilchrist, District Attorney v. Hurley*, 433.

PARENT AND CHILD

§ 2.2. Child Neglect and Abuse

State's evidence was sufficient for the jury to find that defendant acted in loco parentis to a child and that he was guilty of neglect of the child. *State v. Hunter*, 656.

§ 7. Parental Duty to Support Child

The claim of a mother who incurred expenses for the medical treatment of her son was barred by the statute of limitations. *Lane v. Surety Co.*, 634.

§ 7.1. Effect of Parent's Death on Support Obligations

Absent some indication of a contrary intent, where a valid separation agreement requires the father to make child support payments, states terminating contingencies, and is silent as to the effect of the father's death, his estate is bound to provide support payments according to the terms of the agreement. *Bradshaw v. Smith*, 701.

§ 10. Uniform Reciprocal Enforcement of Support Act

When an obligee in another state makes an assignment of her rights under the Uniform Reciprocal Enforcement of Support Act to a subdivision of that state, that subdivision is a proper party to bring an action in this state. *Dept. of Social Services v. Skinner*, 621.

PARTNERSHIP

§ 1.2. Existence of Partnership

In an action to recover damages from defendant partnership which allegedly consisted of the two individual defendants, trial court erred in granting summary judgment for one defendant where genuine issues of fact existed as to whether he was in fact a partner. *Volkman v. DP Associates*, 155.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 13. Limitation of Actions for Malpractice

Plaintiff's claim based on medical malpractice was barred by the three year statute of limitations of G.S. 1-15(c) and provisions of G.S. 1-17(b) requiring an action for malpractice in performance of professional services for a minor to be brought before the minor attains the full age of nineteen. *Hohn v. Slate*, 624.

PRINCIPAL AND AGENT

§ 7. Undisclosed Agency

Defendant, who executed a lease of farmland to plaintiff for his mother, could not be held personally liable for a breach of the lease, since there was no

RULES OF CIVIL PROCEDURE – Continued

reinstitute his action within one year from the date of his voluntary dismissal pursuant to Rule 41(a)(2). *West v. Reddick, Inc.*, 135.

§ 55. Default

There was no merit to defendant's contention that entry of default was improperly entered because there was no written motion for entry of default and because his answer, though untimely, constituted a bar to the entry of default. *Peebles v. Moore*, 497.

§ 55.1. Setting Aside Default

In an action to recover damages for personal injuries allegedly due to defendant's negligence, the trial court abused its discretion in failing to set aside an entry of default. *Peebles v. Moore*, 497.

§ 56.1. Timeliness of Summary Judgment Motion

Summary judgment was properly entered for plaintiff although defendants had not yet filed their answer. *City of Elizabeth City v. Enterprises, Inc.*, 408.

§ 60. Relief From Judgment

Defendant's motion to amend the parties' divorce judgment to permit him to claim the two children of the parties as dependents on his state and federal tax returns was not properly made pursuant to G.S. 1A-1, Rule 60(b)(6). *Coleman v. Arnette*, 733.

SALES

§ 8. Parties Liable on Warranties

The absence of a contractual privity does not bar a direct claim by the ultimate purchaser against a manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser. *Williams v. Chrysler-Plymouth, Inc.*, 308.

SEALS

§ 1. Generally

Defendant executed a contract under seal as a matter of law, and the 10 year statute of limitations applied to an action on the contract. *Central Systems v. Heating & Air Conditioning Co.*, 198.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

A deputy sheriff's initial boarding of a fishing trawler moored to a dock in an isolated area of Dare County and his initial search of the vessel were justified by possibly exigent circumstances. *S.v. LeDuc*, 227.

Defendant abandoned a fishing trawler when he left it at a dock in Dare County and thereafter had no legitimate expectation of privacy with reference to it or its contents. *Ibid.*

§ 12. Stop and Frisk Procedures

An officer had articulable reasons for believing that a truck might contain

SEARCHES AND SEIZURES – Continued

marijuana and could properly stop the truck for further investigation, and the investigation of the truck was reasonable in extent and time. *State v. Trapper*, 481.

§ 13. Search and Seizure by Consent

Evidence seized from the house of defendant's parents was properly admitted into evidence where a neighbor who was charged with looking after the house gave officers permission to search. *S. v. Kellam*, 391.

§ 23. Sufficient Showing of Probable Cause for Warrant

A magistrate properly issued a warrant to search a truck on the basis of an officer's affidavit that an odor of marijuana was detected while a driver's license check was being made. *State v. Trapper*, 481.

Officer's affidavit based on a narcotics buy by an informant with money supplied by the officer was sufficient to support a finding of probable cause for issuance of a warrant to search defendant's home for heroin. *State v. Sowden*, 570.

§ 39. Places Which May be Searched Under Warrant

Officers did not exceed the scope of a warrant to search a mobile home when they searched a storage shed within the curtilage of the home. *State v. Trapper*, 481.

STATE

§ 4. Actions Against Officers of the State

In an action by a heating and air conditioning contractor to recover extra expenses and costs in performing its contract with defendants, trial court properly denied defendants' motion to dismiss for lack of subject matter and personal jurisdiction. *Stahl-Rider v. State*, 380.

TAXATION

§ 25.4. Valuation for Ad Valorem Taxation

Evidence was sufficient to support the decision of the Property Tax Commission that petitioner was not a corporation which qualified for present use valuation, though it was a corporation owned by natural persons who were themselves actively engaged in farming. *W.R. Company v. Property Tax Comm.*, 245.

TRESPASS

§ 3. Statute of Limitations

Plaintiff's action seeking a mandatory injunction and damages based on alleged flooding of his property resulting from construction of a dam by defendant was not barred by the three year statute of limitations. *Whitfield v. Winslow*, 206.

§ 13. Prosecutions for Criminal Trespass

In a prosecution of defendants for forcible entry into the premises of a

UNIFORM COMMERCIAL CODE – Continued

§ 36. Collection of Checks and Drafts

Evidence was sufficient to raise a jury question as to whether the 95 year old plaintiff failed to exercise reasonable care and promptness in examining her bank statements to discover her unauthorized signature. *Burnette v. Trust Co.*, 585.

A savings account withdrawal slip is an instrument and an item within the meaning of G.S. 25-4-104(g). *Ibid.*

When there has been a series of unauthorized signatures or alterations to checks by the same person, the depositor cannot recover payments made by the bank during a period of time commencing within 14 days after the customer has first received one such item and ending with the time that the bank receives notice, and this applies only if the customer has been negligent under G.S. 25-4-406(1). *Ibid.*

USURY

§ 1. What Constitutes Usury

Trial court erred in failing to make a finding as to when an alleged usurious loan was made since plaintiff contended the loan was made on 1 July 1969 and the statute governing interest rates on commercial loans was amended 2 July 1969. *Bootery, Inc. v. Shavitz*, 170.

UTILITIES COMMISSION

§ 24. Rate Making in General

In a proceeding where defendant sought an increase in its rates based upon the increased cost of fuel used in the generation of electric power, the Utilities Commission went beyond the scope of the procedure authorized by G.S. 62-134(e) when it considered and based its determination upon defendant's heat rate and plant availability. *Utilities Comm. v. Power Co.*, 453.

VENDOR AND PURCHASER

§ 1. Validity of Contracts to Convey

Evidence was sufficient to show that a contract for the construction of a house was made between the parties and that defendant breached this contract. *Smith v. Hudson*, 347.

§ 1.1. Necessity for Written Contract

Though it is the better practice for all contracts for the construction of improvements on realty to include the written specifications of the structure to be built and the contents to be included therein, it is not required in this jurisdiction that such a contract be in writing. *Smith v. Hudson*, 347.

Summary judgment was properly entered for defendants in action for specific performance of alleged contract to convey land where plaintiffs failed to produce a written contract or a memorandum signed by defendants. *Severe v. Penny*, 730.

VENDOR AND PURCHASER – Continued

§ 2. Time of Performance

Where the parties entered into an agreement for the sale of land with title to vest after certain conditions had been met, the agreement was not violative of the rule against perpetuities. *Rodin v. Merritt*, 64.

WATERS AND WATERCOURSES

§ 1.2. Surface Waters; Remedies and Actions

Trial court erred in instructing the jury that damages for siltation of plaintiff's pond allegedly caused by construction performed on defendants' adjoining land could be "none" or could be "in such amount as you find by the greater weight of the evidence that plaintiff is entitled to receive." *Wilkinson v. Investment Co.*, 213.

§ 1.3. Sufficiency of Evidence

Plaintiff's evidence was sufficient for the jury in an action to recover damages for siltation of plaintiff's pond allegedly caused by construction on defendant's adjoining land. *Wilkinson v. Investment Co.*, 213.

WEAPONS AND FIREARMS

§ 2. Carrying or Possessing Weapons

In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle. *State v. Jeffers*, 663.

WILLS

§ 13. Caveat Proceedings

Where a certified or authenticated copy of a will of a nonresident together with the proceedings had in connection with its probate in another state is allowed, filed and recorded by the clerk of superior court in the same manner as if the original had been produced, proved and allowed before such clerk, a caveat to the will may be properly entered. *In re Lamb*, 122.

§ 57. Description of Amount or Share

Testator did not intend to limit the total amount of his property passing to his wife to one-half the value of his adjusted gross estate as determined for federal estate tax purposes, but intended that his wife was to receive certain items of property as well as specified interests in several tracts of land, and if the value of all those items did not equal one-half of testator's gross estate, then his wife was to receive such additional share as would equal that amount. *Tracy v. Herring*, 372.

WORD AND PHRASE INDEX

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